

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

A MINI-THESIS TO BE SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF M.PHIL: LABOUR LAW IN THE DEPARTMENT OF MERCANTILE AND LABOUR LAW, UNIVERSITY OF THE WESTERN CAPE.



Name of candidate: Nazeema Adams

Student number: 3257250

Degree: LLM

Department: DEPARTMENT OF MERCANTILE & LABOUR LAW

Title of Study: The intersection between labour and immigration law in South Africa.

Supervisors: Mrs Elsabé Huysamen and Mrs Kim-Leigh Loedolf

Date: 12 December 2022

DECLARATION

I, Nazeema Adams, hereby declare that I have read and understood the regulations governing the submission of Master of law in Mercantile and Labour Law dissertations/research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations.



Nazeema Adams

Date: 2022/12/12



ACKNOWLEDGMENTS

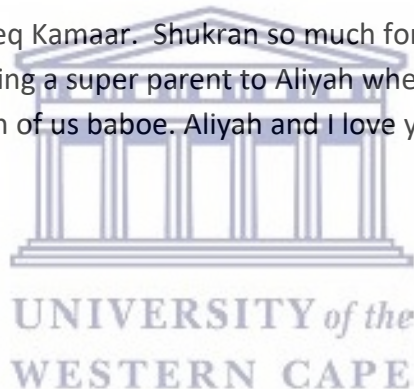
Firstly Alhamdulillah (All praise is due to Allah), for all of my received and continuous blessings and success.

Then, I would like to send a big thank you to my supervisors Mrs Huysamen and Mrs Loedolf. To Mrs Huysamen, thank you for sticking with me throughout the years it took me to complete this degree. You have been a role model to me since my undergrad years and I wish you all of the success and happiness for the future.

To Mrs Loedolf, thank you for being a huge motivation during the last few months of completing my degree. Your invaluable insight, guidance and honesty helped me so much and I am truly so grateful. I know your gifts will take you far in life and I will be silently rooting for you for years to come.

To my parents, Abdus-Samad Adams and Feroza Thomas, there are no amount of words I could say to express my love and appreciation for you guys. I would not be the person I am today if it were not for mummy and daddy. May Allah continue to favour mummy and daddy with good health, happiness and everything your heart's desire.

To my amazing husband Taufeeq Kamaar. Shukran so much for believing in me, the late night coffee and snacks and being a super parent to Aliyah when I needed time to focus. This degree belongs to the both of us baboe. Aliyah and I love you all around the world FOREVER.



ABSTRACT

This thesis is focused on the rights of migrants in South Africa and how those rights are affected and intersect with the rights of migrants in terms of Immigration law or the respective laws which govern migrants. Migrants are often ill-treated in the work place. This treatment can in certain instances lead to a violation of their inherent human rights. The violation of their human rights are often not addressed or dealt with because they are fearful of the consequences.

The different type of migrants is also an issue which employers in the labour market struggle to differentiate between. There are some instances where the labour and immigration law protections afforded to migrants seem to intersect with each other which create difficulties and uncertainties regarding the rights of migrants. This thesis will evaluate the above mentioned instances and shed light on how migrants are affected.

TITLE

The intersection between labour law and Immigration law in South Africa.



KEYWORDS

- ❖ Migrants
- ❖ Refugees
- ❖ Non-standard employment
- ❖ Exploitative labour
- ❖ Asylum Seekers
- ❖ Workers' rights
- ❖ Employers interests
- ❖ Regulation
- ❖ Labour law
- ❖ Immigration Law



UNIVERSITY *of the*
WESTERN CAPE

List of acronyms

Administrative Law Judge (ALJ)
African Charter on Human and People's Rights (Banjul Charter)
African Union (AU)
Basic Conditions of Employment Act (BCEA)
Betriebsrat der Ruhrlandklinik v Ruhrlandklinik (Ruhrlandklinik)
Bill of Rights (BOR)
Cape Town Refugee Reception Office (CTRRO)
Compensation for Occupational Injury and Diseases Act (COIDA)
Constitutional Court (CC)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
Court of Justice of the European Union (CJEU)
Denel (PTY) Ltd v Gerber (Denel)
Department of Home Affairs (DHA)
Department of Health on Recruitment and Employment of Foreign Health Professionals in the Republic of South Africa 2006 (Health Recruitment Policy)
Discovery Health Ltd v CCMA & Others (Discovery)
Draft Social Charter of Fundamental rights (Social Charter)
Draft Protocol on the Facilitation of Movement of Persons in 2005 (Facilitation Protocol)
Employment Equity Act (EEA)
Employers Sanctions Directive (ESD)
Employment authorisation document (EAD)
European Social Charter (ESC)
European Union (EU)
Fair Labour Standards Act of 1938 (FLSA)
Financial Intelligence Centre Act (FICA)
German Federal Employment Agency (GFEA)
Health Professional Council of South Africa (HPCSA)
High Court (HC)
Hoffman Plastic compound v NLRB (Hoffman)
International Covenant on Civil and Political rights (ICCPR)
International Covenant on Economic Social and Cultural rights (ICESCR)
International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (UN Migrant Convention)
International Federation for Human Rights (FIHR)
International Labour Organisation (ILO)
Immigrations Act (IA)
Immigrations Reforms and Controls Act of 1986 (IRCA)
Kylie v Commission of Conciliation Mediation and Arbitration (Kylie)
Kiliko and others v Minister of Home Affairs (Kiliko)
Labour Appeal Court (LAC)
Labour Court (LC)
Labour Relations Act (LRA)

Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another (Larbi-Odam)
 Lawrie-Blum v Land Baden-Württemberg (Lawrie-Blum)
 Migrant Workers (Supplementary Provisions) Convention No. 143 (Convention No. 143)
 Minister of Home Affairs v Watchenuka (Watchenuka)
 Mustafa Aman Arse v Minister of Home Affairs (Mustafa)
 National Labour Relations Act of 1935 (NLRA)
 National Labour Relations Board (NLRB)
 National Minimum Wage Act (NMWA)
 Nbaya and others v Director General of Home Affairs (Nbaya)
 O'Brien v Minister of Justice (O'Brien)
 Occupational Health and Safety Act 85 of 1993 (OHSA)
 Organisation of African Unity (OAU)
 Organisation of African Unity convention governing the specific aspects of refugee problems in Africa (OAU Refugee Convention)
 Prinsloo v Van der Linde and Another (Prinsloo)
 Promotion of Administrative Justice Act (PAJA)
 Preamble of Charter of the Fundamental Rights of the European Union (CFREU)
 Reception Conditions Directive (RCD)
 Refugee Reception Offices (RRO)
 Return Directive 2008/115/EC (RD)
 Refugees Act (RA)
 S v Ntuli (Ntuli)
 South Africa (SA)
 Southern African Development Community (SADC)
 Standing Committee for Refugees Affairs (the SCRA)
 Supreme Court's (SC)
 Supreme Court of Appeal (SCA)
 Sure-Tan v NLRB (Sure-Tan)
 Third country nationals (TCNs)
 Transparent and Predictable Working Conditions in the European Union (TPWCEU)
 Treaty on European Union (TEU)
 Treaty on the functioning of the European Union (TFEU)
 Unemployment Insurance Act 63 of 2001 (UIA)
 United Kingdom (UK)
 United Nation (UN)
 United Nations Convention relating to the status of migrants (Refugees Convention)
 United States of America (USA)
 United States Citizenship and Immigration Services (USCIS)
 Universal Declaration of Human Rights of 1948 (UDHR)
 White v Pan Palladium SA (Pty) Ltd (White)



Table of Contents

Table of contents	8
Chapter 1- Introduction: An overview of the Intersection of labour and Immigration law	11
1.1 BACKGROUND TO RESEARCH.....	11
1.2 PROBLEM STATEMENT.....	12
1.3 SIGNIFICANCE OF THE PROBLEM	14
1.4 RESEARCH QUESTION.....	16
1.5 AIMS OF THE RESEARCH.....	16
1.6 LITERATURE REVIEW	16
1.6.1 Comparative jurisdictions	19
1.7 CHAPTER OUTLINE	20
1.8 RESEARCH METHODOLOGY.....	21
Chapter 2 - Migrant workers: An overview of international, regional and domestic protection.....	22
2.1 INTRODUCTION	22
2.2 CONSTITUTIONAL OBLIGATIONS.....	22
2.3 SOUTH AFRICA'S OBLIGATIONS TOWARDS MIGRANT WORKERS IN TERMS OF INTERNATIONAL LAW	23
2.3.1 United Nations	23
2.3.2 The International Labour Organisation	26
2.3.3 Regional laws relating to the rights of migrants	28
2.4 MIGRANT WORKERS IN SOUTH AFRICA: CATEGORIES AND LEGISLATIVE PROTECTION	30
2.4.1 Relevant Legislation	30
2.4.1.1 Refugees Act 130 of 1998	30
2.4.1.2 Immigration Act 13 of 2002	31
2.4.1.3 Employment legislation	31
2.4.2 Categories of Migrants	32
2.4.2.1 Refugees and Asylum seekers.....	32
2.4.2.1.1 The rights of asylum seekers and refugees in South Africa.....	34
2.4.2.2 Economic migrants.....	39
2.4.2.3 Illegal migrants.....	40
2.5 CONCLUSION.....	41
Chapter 3- Migrants: Labour protection, the overlap between labour and immigration law and the difficulties faced by migrant workers in South Africa.....	43
3.1 INTRODUCTION	43
3.2 SOUTH AFRICA'S LABOUR LEGISLATIVE SCHEME.....	43
3.2.1 The Constitution.....	43

3.2.2 The Labour Relations Act 66 of 1995 (LRA).....	45
3.2.3 The Basic Conditions of Employment Act 75 of 1997 (BCEA)	49
3.2.4 The Employment Equity Act 55 of 1998 (EEA)	52
3.3 OVERLAP BETWEEN LABOUR LEGISLATION AND IMMIGRATION LEGISLATION	54
3.3.1 The requirements of legal status	54
3.3.2 The requirement of legal documentation and its effects	56
3.4 THE DIFFICULTIES FACED BY MIGRANTS: RESTRICTIVE PRACTICES AND LAWS AND THEIR EFFECTS ON MIGRANTS	60
3.4.1 The department of home affairs and the refugee reception offices	62
3.4.2 The ability of migrants workers to open bank accounts and join trade unions	65
3.4.3 Poverty and its effects on migrants and migrant workers.....	67
3.5 CONCLUSION	69
Chapter 4- Comparative Analysis: United States of America and the European Union.....	71
4.1 INTRODUCTION	71
4.2 UNITED STATES OF AMERICA (USA).....	71
4.2.1 Migrants and the right to work.....	71
4.2.1.1 Refugees.....	72
4.2.1.2 Asylum Seekers	73
4.2.1.3 Undocumented migrant workers.....	74
4.2.2 Intersection between labour and immigration law in the United States of America as observed through case law	77
4.2.2.1 <i>Sure-Tan v NLRB (Sure-Tan)</i>	77
4.2.2.2 <i>Hoffman Plastic Compound v NLRB</i>	78
4.2.2.3 The effect of case law on the rights of migrant workers with regarding dismissal.....	79
4.2.2.4 The effect of case law on the rights of migrant workers in the United States of America regarding trade unions	80
4.2.3 Comparison between South Africa and United States of America	81
4.3 EUROPEAN UNION (EU)	81
4.3.1 What is the European Union.....	81
4.3.2 Migrants and the right to work.....	85
4.3.2.1 Refugees.....	85
4.3.2.2 Asylum Seekers	86
4.3.2.3 Illegal migrant workers	87
4.3.3 Case law	88
4.3.3.1 Court of Justice of the European Union.....	89
4.3.3.2 <i>Lawrie-Blum v Land Baden- Württemberg</i>	90
4.3.3.3 <i>O'Brien v Minister of Justice</i>	91

4.3.3.4 <i>Betriebsrat der Ruhrlandklinik v Ruhrlandklinik</i>	92
4.3.3.5 Difficulties faced by migrant workers in the European Union in accessing their rights	94
4.3.4 Comparison and the Intersection between labour and Immigration law in the European Union	95
4.4 CONCLUSION	95
Chapter 5- Conclusion and Recommendations	98
5.1 INTRODUCTION	98
5.2 RECAP OF PAST CHAPTERS	98
5.2.1 Factors affecting the legal status of migrants.....	103
5.3 RECOMMENDATIONS	106
5.3.1 Addressing the difficulties and inequalities faced by migrants and migrant workers.....	106
5.3.1.1 Capacity constraints	106
5.3.1.2 Access to bank accounts and trade unions.....	107
5.3.1.3 Poverty and its effects on the rights of migrants	108
5.4 CONCLUSION	109
Reference	110



Chapter 1

Introduction: An overview of the Intersection of labour and Immigration law

1.1 BACKGROUND TO RESEARCH

Migration is one of the defining issues of the 21st century and consequently unavoidable.¹ Migration can be of economic benefit to both the country of origin (where the worker originates from) and the host country (where the workers lives and works).² The term *migrant* in itself encompasses a range of categories of persons, for example, economic migrants, refugees and asylum seekers.³ As such the term *migrant worker* is a wide concept.⁴ Overall, it is said to refer to persons who are engaged in remunerated activity in a country of which they are not nationals, regardless of whether or not they entered the country with or without the necessary permission.⁵ In essence they are working non-citizens.⁶

The migrant category into which a migrant falls will determine the extent to which that person may work in SA, if at all.⁷ Migrant workers are already granted a number of worker rights under existing labour laws and in accordance with the South African Constitution.⁸ Section 23(1) of the Constitution provides that '[e]veryone has the right to fair labour practices'. Unlike section 23 of the Constitution, labour legislation in itself does not, however, apply to *everyone*. Most pertinently, the LRA only applies to *employees* as defined the Act. Many employers misconceive and do not understand the status of migrant workers

¹ Kulitanyi V and Visser K 'African Immigrants in South Africa: Job Takers or Job creators?' (2010) 13 *SAJEMS* NS 377.

² Korhonen M, Freeman L and Johnson C 'Could opening South Africa's borders lead to job creation?' available at <https://www.dailymaverick.co.za/article/2018-09-03-could-opening-south-africas-borders-lead-to-job-creation/> (accessed 1 May 2019).

³ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 245.

⁴ Van Eck BPS and Snyman F 'Social Protection Afforded to Irregular Migrant Workers: Thoughts on the Southern Africa Development Community (with Emphasis on Botswana and South Africa)' (2015) *Journal for African Law* 293.

⁵ Van Eck BPS and Snyman F 'Social Protection Afforded to Irregular Migrant Workers: Thoughts on the Southern Africa Development Community (with Emphasis on Botswana and South Africa)' (2015) *Journal for African Law* 293.

⁶ Van Eck BPS and Snyman F 'Social Protection Afforded to Irregular Migrant Workers: Thoughts on the Southern Africa Development Community (with Emphasis on Botswana and South Africa)' (2015) *Journal for African Law* 293.

⁷ Kavuro C 'The Disappearance of Refugee rights in South Africa' (2022) *Obiter* 60-61.

⁸ See for example *Discovery Health Ltdv CCMA & Others* (2008) 29 ILJ 1480 (LC) where the court determined that the term employee for the purpose of labour legislations includes even those migrant workers who are not legally in the country.

which could affect their chances of gaining employment.⁹ Furthermore migrants are more likely to be employed in unreliable work than South African (SA) citizens.¹⁰ This is due to the fact that majority of the time migrants are not provided with written contracts of employment.¹¹ The effect of this is that they are highly unlikely to know what their labour rights are, what the actual conditions of their employment are and also leaves the fate of how long they would be employed to the discretion of the employer.¹²

1.2 PROBLEM STATEMENT

Section 23(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides the right to fair labour practices to 'everyone' and all 'workers'. To give effect to the rights granted to *everyone* and all *workers* in terms of section 23, legislation has been enacted. The most pertinent legislation so enacted include the Labour Relations Act 66 of 1995 (LRA), Employment Equity Act 55 of 1998 (EEA), Basic Conditions of Employment Act 75 of 1997 (BCEA), Occupational Health and Safety Act 85 of 1993 (OHSA), Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) and Unemployment Insurance Act 63 of 2001 (UIA).

Section 231 of the Constitution further stipulate(s) that, as a member state of the United Nations (UN) and the International Labour Organisation (ILO), South Africa (SA) is obligated to abide by instruments passed by these international bodies and which the government has ratified. One such instrument, the UN's Universal Declaration of Human Rights of 1948 (UDHR) which is a non-binding instrument, is aimed at guaranteeing and protecting the rights of *all* human beings.¹³ The UDHR further affords basic human rights and fundamental freedoms to everyone, without distinction or discrimination.¹⁴ This includes that no person

⁹ Khan F 'Patterns and policies of Migration in South Africa: Changing patterns and the need for a comprehensive approach' available at http://www.refugeerights.uct.ac.za/downloads/refugeerights.uct.ac.za/patterns_policies_migration_FKhan.doc; Kavuru C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 245.

¹⁰ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *AJHTL* 3.

¹¹ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *AJHTL* 3.

¹² Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *AJHTL* 3.

¹³ Universal Declaration of Human Rights, Preamble.

¹⁴ United Nations *fact sheet* No.2(Rev.1), the International Bill of Rights (1996)

may be discriminated against on the grounds of, amongst others, race, gender, nationality or employment status (protected grounds).¹⁵

Most of the protected grounds listed in the UDRH are echoed in the Constitution in terms of the equality provisions of section 9(3). The Constitution is regarded as the supreme law of the land.¹⁶ In terms of the Constitution the state is obligated to respect, protect, promote and fulfil the rights contained in chapter two of the Constitution, known as the Bill of Rights (BOR).¹⁷

In giving effect to the constitutional rights of migrant workers specifically, the government of SA has passed a number of immigration laws. Immigration laws are laws within the borders of SA, and concerned with issues such as admission of persons into the country, their residency in, ability to work, and departure from the country.¹⁸ The most prominent of these laws in SA are the Immigration Act 13 of 2002 (IA) and the Refugees Act 130 of 1998 (RA).

The migrant category into which a migrant falls will determine the extent to which that person may work in SA, if at all.¹⁹ Many employers misconceive and do not understand the status of migrant workers.²⁰ For example, mistaking refugees and asylum seekers as economic migrants may affect the refugees and asylum seekers chances of gaining employment.²¹ In terms of the RA a migrant will be eligible for refugee status if the individual is a person who has a fear of being persecuted in his/her country of origin due to a number of reasons, such as, race, religion, gender, nationality or tribe to mention a few.²² According to Kavuro, economic migrants are defined as persons who voluntarily leave their country of origin for economic reasons, or to seek material improvements in their

¹⁵United Declaration of Human Rights, article 2.

¹⁶The Constitution of the Republic of South Africa, s2.

¹⁷The Constitution, s7(2)

¹⁸ The Immigration Act 13 of 2002, preamble; Olivier M and Govindjee A 'Labour Law Rights and Social Protection of Migrant Workers: In search of co-ordinated legal response' (2013) *LLRN* 4.

¹⁹ Kavuro C 'The Disappearance of Refugee rights in South Africa' (2022) *Obiter* 60-61.

²⁰ Khan F 'Patterns and policies of Migration in South Africa: Changing patterns and the need for a comprehensive approach' available at

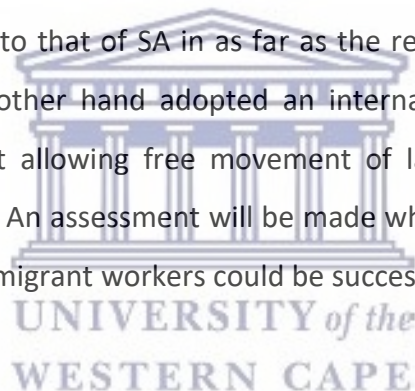
http://www.refugeerights.uct.ac.za/downloads/refugeerights.uct.ac.za/patterns_policies_migration_FKhan.doc (accessed 12 February 2019).

²¹ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 245.

²² Refugee Act, s3(a)-(c).

livelihood.²³ Kavuro however further states that there is an increase in the number of people who escape from environmental degradation, natural disasters and poverty - all reasons which should make them eligible for refugee status, but instead they are labelled as economic migrants.²⁴

This mini-thesis will focus on the rights of migrant workers in the broad sense and as a unique group of workers (that is, illegal migrant workers, refugees, asylum seekers and economic migrants will all be included within the term. Specific reference to legal migrants and permanent residents will occasionally be made for comparative purposes). The mini-thesis will focus on such workers rights in terms of South African labour laws and assess how labour laws intersect with the rights afforded to these workers under relevant immigration laws. The mini-thesis will also include a comparative study with the United States of America (USA) and the European Union (EU) to assess how migrant worker rights are provided for within these jurisdictions. The US as a comparator was chosen since the USA has a very different approach to that of SA in as far as the regulation of illegal migrants is concerned.²⁵ The EU on the other hand adopted an internal free movement project to immigration control, aimed at allowing free movement of labour, service provision and establishment across the EU.²⁶ An assessment will be made whether some of the aspects of USA and EU laws in governing migrant workers could be successfully implemented in SA.



1.3 SIGNIFICANCE OF THE PROBLEM

South Africa's Constitution is regarded as one of the most progressive constitutions in the world.²⁷ The Constitution is unique as it protects the right to fair labour practices for *everyone*.²⁸ The term *everyone* is not defined, and consequently it is argued that the reach

²³Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 245.

²⁴Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 246.

²⁵ Henegham SM 'Employment Discrimination Faced by the Immigrant Worker- A lesson from the United States and South Africa' (2012) 35 *FILJ* 1783.

²⁶ Freeland M and Costello C 'Migrants at work and the division of Labour Law' in Costello, C and Freeland, M (ed) *Migrants at Work: Immigration and Vulnerability in Labour Law* (2014) 6.

²⁷Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *AJHTL* 4.

²⁸The Constitution s 23.

of the definition is not limited by the Constitution.²⁹ The absence of a clear definition of *everyone* in the context of section 23 of the Constitution could be understood to mean that the legislative net providing for fair labour practices should be cast as wide as possible.³⁰ This view was endorsed by the Constitutional Court (CC) in *South African National Defence union v Minister of Defence and Another*³¹ where the CC held that *everyone* in terms of section 23 of the Constitution should be given a broad interpretation which includes workers who do not ordinarily qualify as employees in terms of the law.³² Similarly, the Labour Court (LC) in *Discovery Health Ltd v CCMA & Others (Discovery)*³³ concluded that the *employee* for purposes of labour legislation includes even those migrant workers who are not legally present in the country.³⁴ The ruling in *Discovery* further illustrates that in terms of South African labour laws the definition of employee as per section 213 of the LRA³⁵ is not dependant on the existence of a valid employment contract,³⁶ with the main determining factor whether someone is an employee being based on the existence of an *employment relationship*.³⁷

Despite the protection of migrant workers in respect of the Constitution and labour laws, it is at times questionable whether immigration laws perhaps infringe on the labour protection afforded to migrant workers. This then raises the further issue of whether immigration laws possibly impose on the constitutionally guaranteed right to fair labour practices for *everyone* as provided for in section 23(1) of the Constitution. In those instances where migrant workers are formally afforded protection in labour laws, their protected status as employees may not manifest into substantive protection.³⁸ One such example

²⁹ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *AJHTL* 4.

³⁰ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *AJHTL* 4.

³¹ *South African National Defence Union v Minister of Defence and Another* (1999) (4) SA (CC).

³² *South African National Defence Union v Minister of Defence and Another* (1999) (4) para 4.

³³ *Discovery Health Ltd v CCMA & Others* (2008) 29 ILJ 1480 (LC).

³⁴ Meyer DJ 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 *SA Merc LJ* 834.

³⁵ 'employee' means - (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer.

³⁶ Klaaren J 'Human Rights protections of foreign nationals' (2009) 30 ILJ 89.

³⁷ Meyer DJ 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 *SA Merc LJ* 834.

³⁸ Biney E 'Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers' available at

concerns the protection of occupational insurance.³⁹ Occupational insurance refers to the protection granted to workers under the UIA and COIDA. Very few migrant workers are able to access the complete range of social security benefits as provided for in the aforesaid legislation.⁴⁰

1.4 RESEARCH QUESTION

What impact does the intersection between South African labour and immigration laws have on the rights of migrants as workers, particularly in light of the right to fair labour practices as afforded to *everyone* in section 23(1) of the Constitution?

1.5 AIMS OF THE RESEARCH

The thesis aims to illustrate the difficulties, inequalities and potential exploitation faced by migrant workers in SA despite the formal protection such workers receive in terms of labour laws and under the Constitution. This will include considering to what extent, if any, immigration and labour laws in SA are at odds and, consequently, difficulties faced by migrant workers in seeking and securing employment. The discussion will be centred on the intersection of immigration and labour laws in SA and the potential inconsistencies created. The research will also examine relevant international laws, such as UN and ILO Conventions and Treaties, as guidelines for possible solutions on how migrant workers may be better protected in the South African work environment.

1.6 LITERATURE REVIEW

Even though employment rights of migrant workers in SA is not a new topic, migrant workers still suffer from inequality and remain vulnerable, this is a reality. According to Kavuro, the most apparent problem for migrant workers concerns SA's recruitment and

http://www.saspen.org/conferences/migration2014/Biney_Paper_FES-SASPEN-INT-CONF_Social-Protection-for-Migrants_Oct-29-30-2014.pdf (accessed on 3 November 2017).

³⁹ Biney E 'Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers' available at

http://www.saspen.org/conferences/migration2014/Biney_Paper_FES-SASPEN-INT-CONF_Social-Protection-for-Migrants_Oct-29-30-2014.pdf (accessed on 3 November 2017).

⁴⁰ Biney E 'Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers' available at

http://www.saspen.org/conferences/migration2014/Biney_Paper_FES-SASPEN-INT-CONF_Social-Protection-for-Migrants_Oct-29-30-2014.pdf (accessed on 3 November 2017).

employment policies in respect of asylum seekers and refugees⁴¹ and how these policies are often seemingly at odds with the protection available to workers under labour legislation, such as the LRA.

Fish is of the opinion that given the wording of the definition of employee in terms of the LRA, it appears that migrant workers can be included in the definition.⁴² Meyer however states that the IA requires a migrant to have a legal status in order for such individual to be employed in SA, with only a limited number of exceptions to this general rule.⁴³ Fish states further that even though migrant *workers* as a general group might qualify for protection in terms of labour legislation, the same *workers* are still at risk of deportation in terms of prevailing immigration laws.⁴⁴ It is this seeming conflict which the research seeks to address.⁴⁵

Apart from the apparent aforesaid conflict, migrant workers are also perceived as vulnerable employees despite the protection they receive in terms of labour laws. According to Jinnah and Cazarin, one such vulnerability is that many employers do not contribute to unemployment insurance for migrant workers (even if they are entitled to such unemployment insurance) with the result that such workers will have no access to unemployment benefits in the event of becoming unemployed.⁴⁶ Another vulnerability faced by migrant workers is the lengthy delays and charges attached to acquiring foreign national status. Such delays and charges contribute to the illegal work status of some migrant workers.⁴⁷ In relation to the legal documentation of migrant workers, Khan states that such legal documents are presented differently to those granted to South African

⁴¹ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 260.

⁴² Fish JN 'Rights across borders: Policies, protections and practices for migrant domestic workers in South Africa' in Du Toit D (ed) *Exploited, undervalued – and essential: Domestic workers and the realisation of their rights* (2013) 260.

⁴³ Meyer DJ 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 *SA Merc LJ* 834.

⁴⁴ Immigration Act, s2 (c)

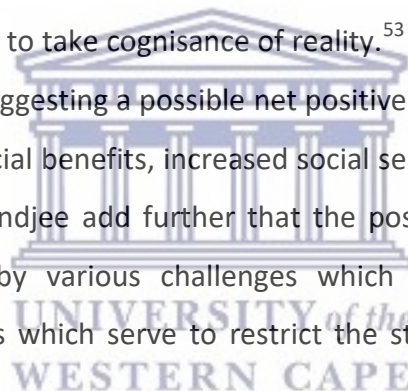
⁴⁵ Fish JN 'Rights across borders: Policies, protections and practices for migrant domestic workers in South Africa' in Du Toit D (ed) *Exploited, undervalued – and essential: Domestic workers and the realisation of their rights* (2013) 260.

⁴⁶ Jinnah Z and Cazarin R 'Making guest feel comfortable' *African Centre for Migration & Society* (2015) 6.

⁴⁷ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 7.

citizens.⁴⁸ Khan further states that the legal status of such legal documents may be largely foreign to employers, especially smaller employers, resulting in such an employer being unwilling to provide employment to a migrant.⁴⁹ Knowing that a migrant worker does not have the proper documentation to work in the country (or even be in the country at all) might lead some employers to exploit such individuals. Vettori is of the opinion that such migrant workers are often also not provided with written contracts of employment.⁵⁰ Vettori further submits that many of these workers thus remain unaware of their labour rights and conditions of employment, rendering their continued employment and the conditions thereof completely within the discretion of the employer.⁵¹

It has been argued by Olivier and Govindjee that in order for migration laws to have their full impact, policies to reduce barriers to migration in a controlled manner, particularly for the poorest, should be considered.⁵² Szablewska and Karim add that strict regulation of entry into, stay and exit from a country of non-citizens through rigid immigration laws is an approach which appears to fail to take cognisance of reality.⁵³ Szablewska and Karim further argue that there is evidence suggesting a possible net positive impact of migration on a host country, such as, increased social benefits, increased social services and a larger tax base to draw from.⁵⁴ Olivier and Govindjee add further that the positive effects of migration are continuously overshadowed by various challenges which cause countries to develop protectionist policies and laws which serve to restrict the status and position of migrant



⁴⁸ Khan F 'Patterns and policies of Migration in South Africa: Changing patterns and the need for a comprehensive approach' available at http://www.refugeerights.uct.ac.za/downloads/refugeerights.uct.ac.za/patterns_policies_migration_FKhan.doc (accessed 12 February 2019).

⁴⁹ Khan F 'Patterns and policies of Migration in South Africa: Changing patterns and the need for a comprehensive approach' available at http://www.refugeerights.uct.ac.za/downloads/refugeerights.uct.ac.za/patterns_policies_migration_FKhan.doc (accessed 12 February 2019).

⁵⁰ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 3.

⁵¹ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 3.

⁵² Olivier M and Govindjee A 'Labour Law Rights and Social Protection of Migrant Workers: In search of co-ordinated legal response' (2013) *LLRN* 8.

⁵³ Szablewska N and Karim S 'Protection and international cooperation in the international refugee regime' in Islam R and Bhuiyan JH (eds) *An introduction to international refugee law* (2013) 193.

⁵⁴ Szablewska N and Karim S 'Protection and international cooperation in the international refugee regime' in Islam R and Bhuiyan JH (eds) *An introduction to international refugee law* (2013) 193.

workers.⁵⁵ These policies impact directly on the ability of migrant workers to access lawful employment in the host country.

1.6.1 Comparative jurisdiction

The EU is a political and economic partnership, built through a series of binding treaties aimed to promote peace and economic recovery in Europe.⁵⁶ The EU is unique because although the member States all remain sovereign and independent states, they have decided to share some of their 'sovereignty' in areas where it makes sense to work together.⁵⁷ Due to the fact that member States remain independent, apparent conflicts, similar to that between immigration laws and the LRA in SA, may be even more apparent in terms of the EU.⁵⁸ According to Kountouris this is due to the fact that the EU labour laws have traditionally reserved the task of determining the personal scope of the application of its provisions to domestic legal systems.⁵⁹ This means that member States are individually responsible for determining the scope of the term *employee*. The result of this is that while a migrant might be regarded as an employee in respect of general EU provisions or laws, depending on the country such individual resides in, the individual might not be regarded as an employee in the host country. The result is that some migrant workers will qualify for employment protection in terms of EU laws in some member States, whereas the same workers will not receive any employment protection in other member States.⁶⁰ The Employers Sanctions Directive⁶¹ (ESD) does however prohibit the employment of illegally

⁵⁵ Olivier M and Govindjee A 'Labour Law Rights and Social Protection of Migrant Workers: In search of co-ordinated legal response' (2013) *LLRN* 8.

⁵⁶ Archick K 'The European Union; Questions and Answers' (2022) *Congressional Research Services* 1.

⁵⁷ European Commission 'The European Union: What it is and what it does' (2020) available at <https://op.europa.eu/en/publication-detail/-/publication/ac0a88a6-4369-11ea-b81b-01aa75ed71a1/language-en> (accessed 2 June 2022).

⁵⁸ See discussion under 4.3.2 – 4.3.2.3.

⁵⁹ Kountouris N 'The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2017) *IJL* 192.

⁶⁰ European Industrial Relations Dictionary available at <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/employee> (accessed on 6 September 2019)

⁶¹ An EU directive is a form of legislation of specific policy directed at the EU member states, when a directive is adopted by the EU, the member States of the EU have to transpose the directive into their national laws; Directive 2009/52/EC available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0052&from=FR>

staying third country nationals (TCNs).⁶² Regardless of this prohibition the ESD also grants rights to illegally employed TCNs.

In terms of immigration law applicable to migrants in the USA, the federal Immigrations Reforms and Controls Act 145 of 1986 (IRCA) prohibits the employment of unauthorised migrants.⁶³ According to Costa in respect of USA labour legislation, specifically the Fair Labour Standards Act of 1938 (FLSA), all *workers* are granted the right to a certain minimum wage and overtime rates regardless of their status.⁶⁴ The term *worker* is not defined in terms of the FLSA though. This means that even unauthorised migrant workers will find protection in terms of the FLSA. There is also case law which has confirmed that undocumented⁶⁵ migrant workers are protected as employees in respect of the National Labour Relations Act of 1935.⁶⁶ This means that in terms of USA labour legislation much like SA's, undocumented migrant workers are recognised as employees and thus enjoy certain protection, yet they are not legally able to work in light of existing USA immigration laws.⁶⁷

1.6 CHAPTER OUTLINE

With chapter one having served as introduction to the study and providing the background for understanding the research aims and main research question, chapter two will consider the different immigration laws currently operating in SA.

Chapter two will highlight the different types of migrant workers in SA and the rights of these workers as provided in the respective immigration laws. International laws of

⁶² Third-country national means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code.

⁶³ The Immigrations Reforms and Controls Act, s274A; Unauthorised is used to refer to work authorisation as defined in 8 U.S.C. § 1324 a (h)(3) (2012).

⁶⁴ Costa D 'California leads the way: A look at California laws that help protect labour standards for unauthorised immigrant workers' available at <https://www.epi.org/publication/california-immigrant-labour-laws/>. (accessed on 30 August 2019).

⁶⁵ Undocumented refers to whether a noncitizen is lawfully present in a jurisdiction, and is generally used in the USA. In SA the term 'illegal foreigner' is used to describe a foreigner who is in the Republic in contravention of the Immigration act, s1. These terms will be used interchangeably depending on the jurisdiction being discussed.

⁶⁶ In *Sure-Tan Inc v NLRB* 467 (1984) U.S. 883 the court held that 'Aliens are considered to be employees under the National Labour Relations Act'. In *Cortez v Medina's Landscaping* (2002) U.S. Dist. 18831 the court held that 'Aliens can recover unpaid wages owed for work actually performed'; Juson JS 'The Intersection of Immigration Law and Labour Law- The Hoffman Plastics case and beyond' 2003 American Bar Association 3.

⁶⁷ See discussion under 4.2.1.3.

relevance to migrant workers, and with which the government of SA has ratified and therefore have to abide, will also be discussed.

Chapter three will introduce the labour legislative scheme in SA and will subsequently focus on how labour and immigration laws in SA intersect with each other and the difficulties created by such intersection for migrant worker.

Chapter four will serve as the comparative part to the study and consider the protection of migrant workers in the chosen jurisdictions of the USA and EU.

Finally, chapter five will serve as conclusion to the study and will include recommendations on how to best provide for the proper protection of migrant workers in South Africa, particularly in light of section 23(1) of the Constitution.

1.7 RESEARCH METHODOLOGY

This research will be conducted by reviewing literature published through both primary and secondary sources on the effect of the intersection between labour law and Immigration law on the rights of migrant workers in SA. Primary sources include policies, laws and international conventions, whilst secondary sources include articles in journals, academic books, newspapers, and web publications. The research will largely follow a conceptual analysis and comparative approach. In addition, the research will include an overview of important court judgments relevant to the intersection between Labour and Immigration law in SA. Lastly, the research will also have an international approach through considering international laws relevant to migrant rights and by undertaking a comparative study between South Africa and the USA and EU in as far as the protection of migrant worker rights is concerned.

Chapter 2

Migrant workers: An overview of international, regional and domestic protection

2.1 INTRODUCTION

According to section 23(1) of the Constitution,⁶⁸ *everyone* has the right to fair labour practices. The term *everyone* is generally accepted to mean all persons in SA, and is not limited to citizens only as is the case with some of the rights in the BOR.⁶⁹ Within such a broad understanding of *everyone*, it seems reasonable to assume that all migrant workers in SA, whether here legally or illegally,⁷⁰ qualify for the protection in terms of section 23(1). Despite such constitutional protection, as highlighted in chapter 1, adding to the difficulty of migrant workers to understand their rights as workers in SA is the existence of a number of overlapping laws in SA which govern the rights of migrant workers.⁷¹ In discussing these difficulties it is therefore important to first understand the different categories of migrant workers in SA and the various laws applicable to them.

It is against the aforesaid background that this chapter will discuss whether international, regional and national laws grant protection to migrant workers as a general group. The chapter will further discuss the different types or categories of migrants, and what protections in terms of immigration and refugee law if any, are specifically available to each category of migrants.

2.2 CONSTITUTIONAL OBLIGATIONS

The Constitution is the highest law in SA.⁷² The preamble to the Constitution confirms that SA belongs to all who live in it, and that democracy is centred around human dignity,

⁶⁸ The Constitution of the Republic of South Africa, 1996.

⁶⁹ Biney E *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* (unpublished LLD thesis, University of Cape Town, 2016); Rights which do not apply to migrants under the BOR are, s19, 20,21 (3)-(4) and 22.

⁷⁰ See the discussion under 2.2 constitutional obligations below.

⁷¹ See discussion under 3.3 and subheadings.

⁷² The Constitution, s2

equality and the advancement of human rights and freedoms.⁷³ The Constitution mandates that legislation must be enacted to give effect to the rights contained therein.⁷⁴

In terms of the BOR the State is obligated to respect, protect, promote and fulfil the rights contained therein.⁷⁵ The BOR also affirms that everyone is equal before the law and has the right to equal protection and benefit of the law.⁷⁶ The protection in terms of section 9(1) of the Constitution is available to *all* people in SA, and thus not limited to citizens only (unless specifically provided otherwise). This essentially means that all migrants, regardless of their legal status in the country, have the right to enjoy basic human rights as set out in the BOR. Important basic rights for migrant workers include: the right to equality; human dignity; life; freedom of security of the person; fair labour practices; access to housing; healthcare, food, water and social security, education and access to courts.⁷⁷

Outside of SAs domestic laws applicable to migrant workers, there are also international and regional laws which apply to them. Section 231 of the Constitution affirms when international laws become binding on SA. Section 233 of the Constitution further provides that, in interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

2.3 SOUTH AFRICA'S RESPONSIBILITY TOWARDS MIGRANT WORKERS IN TERMS OF INTERNATIONAL LAW

2.3.1 The United Nations

The UN is an international organisation which enables its member States to gather together, discuss common problems, and find shared solutions that benefit all of humanity.⁷⁸ The UN Charter is the founding document of the UN which codifies all of the major principles of the UN and which binds all member States.⁷⁹ The preamble to the UN Charter requires member States to reaffirm their faith in fundamental human rights which are to be granted to all

⁷³ The Constitution, s1(a).

⁷⁴ The Constitution, s33(3)

⁷⁵ The Constitution, s7(2).

⁷⁶ The Constitution, s9(1)

⁷⁷ The Constitution s9, s10, s11, s12, s23, s26, s27, s29 and s34.

⁷⁸ United Nations available at <https://www.un.org/en/about-us> (accessed on 16 May 2021).

⁷⁹ United Nations available at <https://www.un.org/en/about-us/un-charter> (accessed on 16 May 2021).

persons.⁸⁰ These fundamental rights are contained in the UDHR which recognises the inherent dignity and equal rights of all member of the human family. The UDHR provides that 'all humans are born free and equal in dignity and rights'.⁸¹ Furthermore it provides that everyone is entitled to all rights and freedoms included in the UDHR without distinction of any kind.⁸² These rights extend to all categories of migrants.

In terms of refugees specifically, the UDHR provides that 'everyone has the right to seek and enjoy asylum from persecution in another country'.⁸³ Even though the UDHR is a non-binding document, it is largely accepted as providing the fundamental principles of human rights internationally.⁸⁴ According to Tshosa, many of the rights and provisions contained in the UDHR have been transferred into international customary law which makes such rights and provisions binding on all member states.⁸⁵ Customary international law is one component of international law.⁸⁶ Customary international law derives from a general practice accepted as law.⁸⁷ In other words, it refers to international obligations arising from established international practice as opposed to obligations arising from formal written conventions.⁸⁸ There are various views on why customary international law is binding. According to Seller it is because states believe themselves to be bound thereby, or even because they choose to be bound thereby since it serves their interest.⁸⁹

The UDHR has two accompanying covenants, namely the International Covenant on Civil and Political rights (ICCPR)⁹⁰ and the International Covenant on Economic Social and Cultural rights (ICESCR)⁹¹. A covenant is an agreement, usually formal, between two or more persons

⁸⁰ Charter of United Nations, Preamble 5.

⁸¹ Universal Declaration of Human Rights, Article 1.

⁸² Universal Declaration of Human Rights, Article 2.

⁸³ Universal Declaration of Human Rights, Article 14(1)

⁸⁴ Brown G 'The Universal Declaration of Human Rights in the 21st Century: A living document in a changing world' (2016) *NYU Global Institute for Advanced Study* 34.

⁸⁵ Tshosa OB 'The protection of the human rights of refugees in International Law' (2018) *SALC* 50.

⁸⁶ Legal Information Institute, Customary International Law available at https://www.law.cornell.edu/wex/customary_internationallaw (accessed on 18 September 2021)

⁸⁷ International Committee of the red cross, Customary Law available at <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law> (accessed 18 September 2021)

⁸⁸ Legal Information Institute, Customary International Law available at https://www.law.cornell.edu/wex/customary_internationallaw (accessed on 18 September 2021)

⁸⁹ Sellers MNS 'Why States Are Bound by Customary International Law' in Sellers MNS *Republican Principles in International Law* (2006) 46-51.

⁹⁰ Available at <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> (accessed 16 May 2021)

⁹¹ Available at <https://www.ohchr.org/documents/professionalinterest/cescr.pdf> (accessed 16 May 2021).

or parties.⁹² Both the ICCPR and the ICESCR have been ratified by SA.⁹³ The ICCPR and ICESCR provide that the rights contained therein are to be enjoyed by everyone, irrespective of status.⁹⁴ Together with the UDHR, the ICCPR and ICESCR form what is known as, the International Bill of Rights.⁹⁵

Outside of the general protection afforded by the above UN instruments to all persons, there are also specialised instruments focussed on the protection of the rights of migrants specifically. Arguably the most important of these is the 1951 UN Convention relating to the status of migrants (Refugees Convention).⁹⁶ The Refugees Convention, ratified by SA in 1996, is one of the first instruments adopted by the UN which focuses on refugees in more detail.⁹⁷ The Refugees Convention defines the grounds for granting and terminating an individual's refugee status. It also places an obligation on states to apply its provisions without discrimination based on race, religion or country of origin.⁹⁸ According to Dalton-Greyling the Refugee Convention prescribes that refugee rights should be equal to the rights and freedoms enjoyed by other foreign nationals and similar to citizens in the particular country.⁹⁹

In 1990 the UN adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (UN Migrant Convention).¹⁰⁰ The UN Migrant Convention provides protection for both migrant workers and their families.¹⁰¹ Similar to the International Bill of Rights, the UN Migrant Convention guarantees basic



⁹² Definition of Covenant Available at <https://www.dictionary.com/browse/covenant> (accessed 16 May 2021).

⁹³ See United Nations Treaty Collection for a list of which countries have signed and ratified instruments, available at <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=en> (accessed 2 December 2022)

⁹⁴ ICCPR Article 2(1) and ICESCR Article 2(2).

⁹⁵ Fact Sheet No.2 (Rev.1), The International Bill of Human Rights

⁹⁶ Available at <https://www.unhcr.org/1951-refugee-convention.html> (accessed 16 May 2021).

⁹⁷ Tshosa OB 'The protection of the human rights of refugees in International Law' (2018) SALC 51.

⁹⁸ Refugee Convention, Article 3.

⁹⁹ Refugee Convention, starting from Article 4; Dalton-Greyling, T 'Urban refugees: definitions, legal position and wellbeing in South Africa' available at http://www.tips.org.za/files/Dalton_Greyling_Refugees_24_Oct_2008_tmp49da794a_0.pdf (accessed on 28 April 2020).

¹⁰⁰ Available at <https://www.ohchr.org/documents/publications/factsheet24rev.1en.pdf> (accessed 28 April 2020).

¹⁰¹ The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 1 and Article 4.

human rights for all migrant workers, together with their families.¹⁰² Such rights include equal pay, fair working conditions and the right to join trade unions.¹⁰³ Even though SA has not ratified the UN Migrant Convention to date, as an active member of the international community, it is important to act in accordance with the UN Migrant Convention and section 231 of the Constitution.¹⁰⁴

2.3.2 The International Labour Organisation

Apart from being a member state of the UN, SA is also a member of the ILO. The ILO is a sub-division of the UN aimed at establishing labour standards, develop policies and devise programmes promoting decent work for all women and men.¹⁰⁵ The ILO has many Conventions and accompanying Recommendations which are aimed at protecting the rights of *all* workers, irrespective of citizenship,¹⁰⁶ and thus including migrant workers.¹⁰⁷ The ILO has eight fundamental, or core, conventions which provide numerous rights to workers.¹⁰⁸ While SA has ratified all of the core conventions, it has failed to ratify any of the conventions and recommendations relating to the rights of migrant workers specifically.¹⁰⁹ Although Conventions not ratified by a country do not bind that country, all member States of the ILO are expected to uphold the principles of the Conventions, which, according to the ILO's preamble, is to 'protect the interest of workers when they are employed in countries other than their own'.¹¹⁰ Furthermore, in *Discovery* the labour court states that in interpreting

¹⁰² The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 7.

¹⁰³ The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 25-27; International Labour Organisation *International Labour Migration: A rights-based approach* (2010) 133.

¹⁰⁴ Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 22.

¹⁰⁵ ILO Homepage available at <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (accessed on 16 May 2021).

¹⁰⁶ Dupper O 'Migrant Workers and the Right to Social Security: An International Perspective' (2007) *SLR* 226.

¹⁰⁷ Van Niekerk *Law@work* (2015) 22.

¹⁰⁸ The eight ILO fundamental conventions are: the *Forced Labour Convention (No. 29)*, the *Freedom of Association and Protection of the Right to Organise Convention (No. 87)*, the *Right to Organise and Collective Bargaining Convention (No. 98)*, the *Equal Remuneration Convention (No. 100)*, the *Abolition of Forced Labour Convention (No. 105)*, the *Discrimination (Employment and Occupation) Convention (No. 111)*, the *Minimum Age Convention (No. 138)*, the *Worst Forms of Child Labour Convention (No. 182)*.

¹⁰⁹ Dupper O 'The Human Rights of (Irregular) Migrants: An International, Regional and South African Perspective (Part 1)' (2010) 2(1) *International Journal of Social Security and Workers Compensation* 61.

¹¹⁰ Page 5 ILO Constitution, available at https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A1 (accessed 16 May 2021).

section 23 of the Constitution, an important source of international law are the conventions and recommendations of the ILO.¹¹¹ The Labour court further pointed out that the protection of the fundamental rights of migrants, even those illegally employed, was a primary purpose of the 1975 Migrant Workers (Supplementary Provisions) Convention No. 143 (Convention No. 143), and the LRA should thus be interpreted in a manner that recognises that purpose.¹¹² In other words the LRA should be interpreted in a manner that does not limit the rights of migrants even if they are illegal foreigners.¹¹³

Conventions and Recommendations which deal with migrant workers *specifically* are: the 1949 Migration for Employment Convention (Revised) No.97; Convention No. 143; and the 1975 Migrant Workers Recommendation No. 151. The ILO adopted Convention No. 143 (also known as Migrations in Abusive Conditions and the Promotion of Equal Opportunity and Treatment of Migrant Workers) and Recommendation No. 151 in an attempt to regulate the increasing use of the services of illegal migrant workers.¹¹⁴ According to Biney, Convention 143 and Recommendation 151 are argued to be broad enough to cover both legal and illegal migrant workers.¹¹⁵ As provided for in Convention 143 illegal migrant workers are entitled to equal treatment pertaining to remuneration, social security and working conditions.¹¹⁶ The equal treatment provided in Convention 143 with regards to illegal migrant workers relates only to past work actually performed, both legal and illegal¹¹⁷ and does not extend to continuous illegal work.¹¹⁸ This is not the case for legal migrants as

¹¹¹ *Discovery Health Ltd v CCMA* 2008 7 BLLR 633 LC 646, para 43.

¹¹² *Discovery Health Ltd v CCMA* 2008 7 BLLR 633 LC 646, para 47.

¹¹³ *Discovery Health Ltd v CCMA* 2008 7 BLLR 633 LC 646, para 47.

¹¹⁴ Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 19; International Labour Organisation *International Labour Migration: A rights-based approach* (2010) 129.

¹¹⁵ Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 19.

¹¹⁶ Convention No. 143, Article 9.

¹¹⁷ Dupper O 'The Human Rights of (Irregular) Migrants: An International, Regional and South African Perspective (Part 1)' (2010) 2(1) *International Journal of Social Security and Workers Compensation* 61.

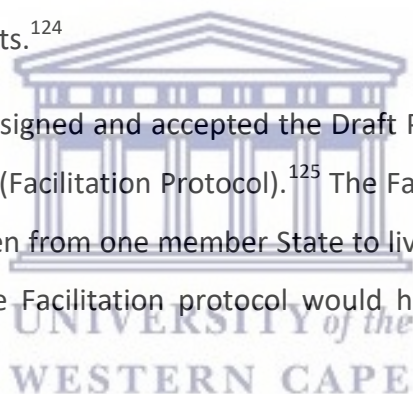
¹¹⁸ Convention No. 143, Article 9; Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 19.

equal treatment is applicable throughout their employment.¹¹⁹ None of the three conventions dealing *specifically* with migrant workers has however been ratified by SA.¹²⁰

2.3.3 Regional laws relating to the rights of migrants

South Africa is a member State of the Southern African Development Community (SADC). The liberalisation of trade and free movement of people within the SADC region are some of the main focuses of the SADC.¹²¹ In 1997 member States of the SADC proposed a Draft Social Charter of Fundamental rights (Social Charter), which only came into effect in 2003. Initially the draft sought to allow for the free movement and equal treatment of workers in the region, as well as the establishment of a minimum floor of rights for workers within the region.¹²² The 2003 Social Charter however goes beyond the initial aim of the draft of the social charter and seeks to promote harmonising legal, economic and social policies for member states.¹²³ To achieve the harmonisation, member States are required to give effect to the core ILO Conventions and create a conducive environment where all workers enjoy adequate social security benefits.¹²⁴

The SADC member States also signed and accepted the Draft Protocol on the Facilitation of Movement of Persons in 2005 (Facilitation Protocol).¹²⁵ The Facilitation Protocol is aimed at establishing the right of a citizen from one member State to live and work in the territory of another member State.¹²⁶ The Facilitation protocol would however only extend to legal



¹¹⁹ Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 19.

¹²⁰ ILO, Up-to-date Conventions and Protocols not ratified by South Africa available at https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:2889535721826:::P11210_INSTRUMENT_SORT:4 (accessed 27 October 2022).

¹²¹ Crush, J et al Migration in Southern Africa: A paper prepared for the policy analysis and research programme of the Global commission on International Migration (2005) *Global Commission on International Migration* available at https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/qcim/rs/RS7.pdf (accessed 19 May 2021).

¹²² Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 23.

¹²³ Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 23.

¹²⁴ Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 23.

¹²⁵ Available at <http://www.sadc.int/index> (accessed 16 May 2021).

¹²⁶ Draft Protocol on the Facilitation of Movement of Persons, Article 3(c).

migrant workers and not to those engaged in economic activity without authorisation.¹²⁷ It has been 17 years since the acceptance of the draft, but the effectiveness of the above mentioned regional agreements are still unseen.¹²⁸ As it currently stands, the draft remains inoperative as it has not yet been ratified.¹²⁹

The Organisation of African Unity (OAU), established in 1963, was the manifestation of the pan-African vision for an Africa that was united, free and in control of its own destiny.¹³⁰ Some of the aims of the OAU were to promote the unity and solidarity of the African states and to coordinate and intensify their various efforts so as to have the people of Africa achieve a better life.¹³¹ The OAU was later replaced by what is currently known as the African Union (AU).¹³² The OUA convention governing the specific aspects of refugee problems in Africa (OAU Refugee Convention),¹³³ established in 1969 in terms of the OUA and ratified by SA, is basically a version of the Refugees Convention, but focused solely on Africa. Similar to the Refugees Convention it grants everyone the right not to be discriminated against on any of the listed grounds of the OAU Refugee Convention, which include race and nationality.¹³⁴ Besides nationality and political opinion, the listed grounds in the OAU Refugee Convention are echoed in SA's Constitution as well.¹³⁵ For refugees and asylum seekers specifically the OUA Refugee Convention grants the right of non-refoulement.¹³⁶ The principle of non-refoulement prohibits the expulsion, return or

UNIVERSITY of the
WESTERN CAPE

¹²⁷ Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 23.

¹²⁸ Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 23.

¹²⁹ Amandi V and Lanaghan P 'Advancing Regional Intergration through the Free Movement of People in the Southern African Development Community (SADC)' (2020) 34 *Speculum Juris* 64.

¹³⁰ African Union 'About the African Union' available at <https://au.int/en/overview> (accessed 2 December 2022).

¹³¹ OUA Charter, Article 2.

¹³² Joshua, S and Olanrewaju, F 'The AU's Progress and Achievements in the realm of peace and security' (2017) 73(4) *ICWA* 4.

¹³³ Available at https://au.int/sites/default/files/treaties/36400-treaty-0005_-_oau_convention_governing_the_specific_aspects_of_refugee_problems_in_africa_e.pdf (accessed 16 May 2021).

¹³⁴ OAU Convention, Article IV.

¹³⁵ OUA Convention, Article IV.

¹³⁶ OAU Convention, Article II(3).

extradition of a person to a state where there are substantial grounds for believing that he would be in danger of being subjected to torture.¹³⁷

2.4 MIGRANT WORKERS IN SOUTH AFRICA: CATEGORIES AND LEGISLATIVE PROTECTION

This section will discuss the different categories of migrants, as well as available legislative protection in SA. The migrant category into which an individual falls will determine the extent to which that person may work in SA, if at all. Many employers misconceive and do not understand the status of migrant workers which then often leads to migrant workers not being afforded the proper legal protection in terms of South African labour law.¹³⁸

Aside from constitutional protection, a number of domestic legislation also becomes applicable to migrant workers and refugees specifically once they enter the country.

2.4.1 Relevant legislation

2.4.1.1 Refugees Act 130 of 1998

The RA is one of the primary legislative instruments addressing refugees in SA. The RA is aimed at ensuring that the treatment of refugees in SA is in accordance with international standards and principles.¹³⁹ Once granted refugee status in SA, an immigrant enjoys full legal protection.¹⁴⁰ For refugees full legal protection includes the ability to relocate within the country and to change employment.¹⁴¹ A refugee also acquires the right of non-refoulement.¹⁴² This right ensures that the refugee is able to stay in SA without the fear of being returned to his/her country of origin.¹⁴³

¹³⁷ Mujuzi JD 'The principle of non-refoulement in South Africa and the exclusion from refugee status of asylum seekers who have committed offences abroad: a comment on *Gavric v Refugee Status Determination Officer, Cape Town and Others*' (2018) 43 *SAYIL* 30.

¹³⁸ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 245.

¹³⁹ Refugees Act, preamble.

¹⁴⁰ Refugees Act, s1(vx) read with s27(b).

¹⁴¹ Landau LB 'Protection and dignity in Johannesburg: shortcomings of South Africa's urban refugee policy' (2006) 19 (3) *Journal of Refugee Studies* 309.

¹⁴² Refugees Act, s2.

¹⁴³ Refugees Act, s2.

2.4.1.2 Immigration Act 13 of 2002

The IA is used to determine the entry, stay and deportation of foreigners in SA.¹⁴⁴ Section 38(1) of the IA prohibits the employment of illegal foreign nationals¹⁴⁵ and establishes a penalty of either a fine or imprisonment for those employers who employ illegal foreigners.¹⁴⁶ Generally speaking, SA's immigration legislation offers a wide range of temporary visas.¹⁴⁷ Some of these visas offer a way to permanent residency and later full citizenship.¹⁴⁸ Biney and Hobden however are of the opinion that SA's immigration policies are not migrant friendly as it characterises foreigners¹⁴⁹ as a threat to citizens.¹⁵⁰ According to Hobden, the government of SA has slowly also been making it more difficult for migrants to gain citizenship.¹⁵¹ Increased measures include the number of years a migrant would have to be resident in SA in order to apply for citizenship.¹⁵² Furthermore placing restrictions on the acquisition of citizenship by birth, for children born in SA to permanent resident parents.¹⁵³ Such children would only be able to acquire citizenship by birth only upon reaching the age of majority and if they have lived in SA from date of birth.¹⁵⁴

2.4.1.3 Employment legislation

The LRA determines who qualifies for protection in terms of SA labour law. The BCEA sets the legal minimum working conditions for all employees in SA.¹⁵⁵ The EEA gives effect to the right to equality as provided for in the Constitution.¹⁵⁶ The EEA protects and promotes the rights of all workers, including foreign workers, to equal treatment by prohibiting discrimination based on any of the grounds listed in the Act in terms of section 6(1) of the

¹⁴⁴ Immigration Act, preamble.

¹⁴⁵ Immigration Act, s1 - 'illegal foreigner' means foreigner who is in the Republic in contravention of the Immigration act.

¹⁴⁶ Immigration Act, s 38(1).

¹⁴⁷ Krensell A 'South Africa' in Magrath C 'The Corporate Immigration Review' (2019) 9th Ed 277.

¹⁴⁸ Krensell A 'South Africa' in Magrath C 'The Corporate Immigration Review' (2019) 9th Ed 277.

¹⁴⁹ Immigration Act, s1 – 'foreigner' means an individual who is not a citizen.

¹⁵⁰ Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 26.

¹⁵¹ Hobden C 'Shrinking South Africa: Hidden Agendas in South African Citizenship Practice' (2020) 47(2) *South African Journal of Political Studies* 159.

¹⁵² Citizenship Amendment Act 17 of 2010, s5(1)(c).

¹⁵³ Citizenship Amendment Act 17 of 2010, s2(3).

¹⁵⁴ Citizenship Amendment Act 17 of 2010, s2(3).

¹⁵⁵ Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 40.

¹⁵⁶ Employment Equity Act, s 6; Biney, E *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* (unpublished LLD thesis, University of Cape Town 2016) 35.

EEA. The COIDA addresses work-related injuries and if and when workers are entitled to compensation.¹⁵⁷ The OHSA is aimed at the establishment and protection of the health and safety of workers in the workplace. The OHSA Act applies to all people in the workplace, regardless of the employer-employee relationships.¹⁵⁸ The UIA is aimed at providing for the payment from the Unemployment Insurance Fund to certain employees who are unemployed for reasons stipulated in the Act.

2.4.2 Categories of migrants

Understanding the migrant status of an individual, that is, the category the individual falls in as a migrant in SA is essential since the relevant category will determine which rights and freedoms, including rights related to work, that individual will enjoy.

2.4.2.1 Refugees and asylum seekers

The difference between refugees and asylum seekers can be difficult to understand since both are governed by the RA. Essentially all refugees were at some point asylum seekers but not all asylum seekers are refugees immediately.

The right to seek asylum is guaranteed in terms of both the UDHR and the African Charter on Human and People's Rights (Banjul Charter).¹⁵⁹ According to Weissbrodt the term *asylum seeker* is not defined in any major treaty, which therefore means its definition varies from one jurisdiction to the next.¹⁶⁰ In simple terms, an asylum seeker is a person whose application for asylum is still pending a final decision by the prospective country of refuge.¹⁶¹ In SA, the term asylum seeker is defined in terms of the RA. The RA defines an asylum seeker as '[a] person who is seeking recognition as a refugee'.¹⁶²

¹⁵⁷ Compensation for Occupational Injuries and Diseases Act, p2.

¹⁵⁸ Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012) 42.

¹⁵⁹ The Universal Declaration of Human Rights, Article 14(1); African Charter on Human and People's Rights (Banjul Charter), Article 12(3)

¹⁶⁰ Weissbrodt D *The Human Rights of Non-Citizens* (2008) 110.

¹⁶¹ Jastram K & Achiron M *Refugee protection: a guide to international refugee law* (2001) (Geneva: Inter-Parliamentary Union 125.

¹⁶² Refugees Act, s1 (v).

For a migrant to be recognised as an asylum seeker in SA they are firstly required to make a claim for asylum¹⁶³ or indicate an intension to apply for asylum.¹⁶⁴ An asylum seeker who declares their intention to seek international protection must be issued with a temporary five day non-renewable visa in terms of section 23 of the IA.

The RA regulations which implement the RA provide that asylum applications will be decided within 180 days of filling a complete application.¹⁶⁵ According to Schockaert, Vanables and Gil-Bazo regardless of this timeline, SA still has one of the highest pending asylum cases with asylum seekers often staying in the asylum process for years.¹⁶⁶ According to Crush, the waiting period has been documented as being up to, and sometimes even in excess of, a decade.¹⁶⁷ As indicated above, a refugee is essentially a migrant whose application for asylum has been successful in respect of the aforementioned process. The term refugee is generally understood to denote a person who has been forced to leave his/her country of origin or habitual residence due to war or armed conflict, and who is further prevented from returning to said country.¹⁶⁸

The definition of a refugee in terms of the RA is derived from the Refugees Convention.¹⁶⁹ A refugee as provided for in SA's RA is any person who has been granted asylum in respect of the act.¹⁷⁰ According to the RA a person is eligible for refugee status if: ‘

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is

¹⁶³ Immigration Act, s15.

¹⁶⁴ Refugees Regulations, s2(2).

¹⁶⁵ Refugee Regulations (Forms and Procedure) 2000, Government Gazette No. 21075, 6 Apr. 2000, s3.

¹⁶⁶ Schockaert L, Vanables E & Gil-Bazo MT 'Behind the scense of South Africa's Asylum Procedure: A qualitative study on long-term Asylum Seekers from the Democratic Republic of Congo' (2020) *Refugee Survey Quarterly* 28.

¹⁶⁷ Refugees Act, s24(3)- In SA only a refugee status determination officer may subsequently determine that an individual does not qualify for refugee status. If an individual does not qualify for refugee status the individual may appeal this decision via an internal review or appeals process and as a last resort via the courts through the Promotion of Administrative Justice Act 3 OF 2000 (PAJA); Amit R & Kriger N 'Making Migrants 'Il-legible': The policies and practices of documentation in post-apartheid South Africa' (2012) *African Centre for Migration and Society* 277. Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 5.

¹⁶⁸ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 238; *Union of Refugee Women and others v Director, Private Security Industry Regulatory Authority and others* 2007 (4) BCLR 339 (CC) para 101.

¹⁶⁹ Convention Relating to the status of Migrants, Article 1(A)(2); Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 238.

¹⁷⁰ Refugees Act, page 5 preamble.

outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it;

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere: or

(c) Is a dependant of a person contemplated in paragraph (a) or (b).¹⁷¹

The definition in the RA firstly emphasises that a refugee is a person who has a fear of being persecuted due to a number of reasons, e.g., race, religion, gender, nationality or tribe, to mention but a few.¹⁷² Secondly, the definition in the RA emphasises that such a person's country of origin cannot or will not avail them protection. These two elements of what constitutes a refugee are essential as they distinguish a refugee from other persons who are either forced or obliged to flee their country of origin for reasons such as poverty, economic crisis or natural disasters.¹⁷³

2.4.2.1.1 The rights of asylum seekers and refugees in South Africa

Once refugee status is granted to a migrant, they are entitled to all of the applicable protections set out in South African law and the international instruments SA has ratified.¹⁷⁴ In terms of international law, according to Weissbrodt, the rights which apply to refugees can be divided into four categories.¹⁷⁵ The first category refers to the rights which guarantee refugees the same privileges as nationals of the host country.¹⁷⁶ Rights included in this

¹⁷¹ Refugee Act, s3(a)-(c) .

¹⁷² Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 238.

¹⁷³ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 239.

¹⁷⁴ Refugee Act, S27(b). S27(b) stipulates that A refugee enjoys full legal protection which includes all the rights set out in the BOR, to the extent that it applies to everyone, and the right to remain in SA in accordance with the provisions of the RA; Refugees Convention, Article 14-26; Dalton-Greyling, T 'Urban refugees: definitions, legal position and wellbeing in South Africa' available at http://www.tips.org.za/files/Dalton_Greyling_Refugees_24_Oct_2008_tmp49da794a_0.pdf (accessed on 28 April 2020).

¹⁷⁵ Weissbrodt D *The Human Rights of Non-Citizens* (2008) 161.

¹⁷⁶ Weissbrodt D *The Human Rights of Non-Citizens* (2008) 161.

category are freedom of religion,¹⁷⁷ access to education,¹⁷⁸ access to public relief and assistance, social security protection,¹⁷⁹ access to courts and legal assistance,¹⁸⁰ equal taxation,¹⁸¹ and protection of intellectual property.¹⁸² The second category places an obligation on the host country to provide all refugees in the same circumstances with the most favourable treatment regardless of which country they are from.¹⁸³ In respect of this category rights such as the right to join a trade union¹⁸⁴ and the right to engage in wage earning jobs are included.¹⁸⁵ The third category requires state parties to accord a refugee no less favourable treatment than that accorded to foreign nationals.¹⁸⁶ No less favourable treatment relates to the right to own property,¹⁸⁷ practice a profession,¹⁸⁸ self-employment¹⁸⁹ and access to housing and education.¹⁹⁰ The fourth and last category of rights places an obligation on state parties to accord refugees with the same treatment as accorded to foreign nationals in general.¹⁹¹ This relates to the right of refugees to choose their place of residency and to move freely within the country.¹⁹²

In terms of SA's domestic law, namely the RA, a decision to grant asylum to an asylum seeker, thus making them a refugee, has the legal impact of entitling that person to what the RA describes as 'full legal protection'.¹⁹³ Full legal protection includes the right to seek employment and enjoy the rights contained in the BOR, only excluding those rights reserved only for citizens.¹⁹⁴ These rights are in essence the same as those rights granted in terms of international law as discussed above.¹⁹⁵ According to Landau, full legal protection does not

¹⁷⁷ Refugees Convention, Article 4.

¹⁷⁸ Refugees Convention, Article 23.

¹⁷⁹ Refugees Convention, Article 22(1).

¹⁸⁰ Refugees Convention, Article 18.

¹⁸¹ Refugees Convention, Article 24.

¹⁸² Refugees Convention, Article 14.

¹⁸³ Weissbrodt D *The Human Rights of Non-Citizens* (2008) 161.

¹⁸⁴ Refugees Convention, Article 15.

¹⁸⁵ Weissbrodt D *The Human Rights of Non-Citizens* (2008) 161.

¹⁸⁶ Refugees Convention, Article 15 and 17.

¹⁸⁷ Refugees Convention, Article 13.

¹⁸⁸ Refugees Convention, Article 19.

¹⁸⁹ Refugees Convention, Article 18.

¹⁹⁰ Refugees Convention, Article 22(2).

¹⁹¹ Weissbrodt D *The Human Rights of Non-Citizens* (2008) 161.

¹⁹² Refugees Convention, Article 26.

¹⁹³ Refugees Act, s1(vx) read together with s27(b).

¹⁹⁴ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 293.

¹⁹⁵ See discussion under 2.3.1.

only constitute meeting the basic needs of refugees, but includes their flexibility to move, invest in a manner which can lead to a dignified life and the ability to gain meaningful employment and change employment.¹⁹⁶ The RA provides that a refugee is entitled to stay within SA without the fear of being returned, expelled or extradited to his or her home country.¹⁹⁷

In the case of asylum seekers, according to Kavuro, the fact that a person has made a request for asylum has the legal implications of legalising their stay as 'lawfully staying in SA and allows them to access certain socio-economic rights'.¹⁹⁸ In SA, the socio-economic rights applicable to asylum seekers allows for the freedom of movement, the ability to work and the ability to study.¹⁹⁹ These socio-economic rights are granted by the RA, as amended, which currently allows asylum seekers to enjoy all of the rights contained in the BOR insofar as those rights apply to everyone.²⁰⁰ These rights are further endorsed by judicial decisions which will be discussed here below. The ability of asylum seekers to seek employment and to seek education has not always been the case though.

Before the 2008 amendments to the RA, asylum seekers was subjected to conditions determined by the Standing Committee for Refugees Affairs (the SCRA).²⁰¹ The most important of these conditions were stipulated on the permit itself, with the remainder of conditions set out in terms of regulation 7 of the Refugees Regulations of 2000. The SCRA adopted conditions prohibiting asylum seekers from enjoying the right to work and the right to education for the first 180 days from the date on which they applied for asylum.²⁰² Asylum seekers were however allowed to apply for special consideration to be permitted to work, but only in circumstances where the 180 days period lapsed and the outcome of the

¹⁹⁶ Landau LB 'Protection and dignity in Johannesburg: shortcomings of South Africa's urban refugee policy' (2006) 19 (3) *Journal of Refugee Studies* 309. Examples of rights in the BOR which exclude refugees are political rights under s19 and the right to freedom of trade, occupation and profession under s22.

¹⁹⁷ Refugees Act, s2.

¹⁹⁸ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 242.

¹⁹⁹ Refugees regulations 2000,s3; Schockaert L, Vanables E & Gil-Bazo MT 'Behind the scene of South Africa's Asylum Procedure: A qualitative study on long-term Asylum Seekers from the Democratic Republic of Congo' (2020) *Refugee Survey Quarterly* 28.

²⁰⁰ Refugees Act, as amended s27A.

²⁰¹ Refugees Act, s 11(h).

²⁰² *Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA)* para 23.

asylum application was still pending.²⁰³ Section 27A of the RA, as amended does not however expressly state that asylum seekers are fully protected. In addition, section 22 of the Constitution restricts a refugees (and by extension an asylum seeker) rights in respect of accessing the labour market.²⁰⁴ Some scholars have therefore mentioned that asylum seekers only have the right to stay in SA without being able to work or study, pending the outcome of their application.²⁰⁵

Clarification on this point was provided for in *Minister of Home Affairs v Watchenuka*²⁰⁶ (*Watchenuka*) where the court held that a prohibition against working and studying in terms of asylum seekers is unlawful and fundamentally violated the right to human dignity.²⁰⁷ The SCA reasoned that the denial of the right to seek employment would severely restrict asylum seekers ability to support themselves and their family. Furthermore, denial of the right to seek employment could result in asylum seekers resorting to criminal measures in order to survive. This fact is further emphasised since no state-provided assistance is given to asylum seekers while they are in the asylum process, which forces them to become self-reliant.²⁰⁸ The *Watchenuka* case emphasised the fact that asylum seekers are in a more vulnerable position than refugees. This is because, unlike refugees, their rights are not as clearly stated as those of refugees and their status can be uncertain for a long duration of time.²⁰⁹

The recent amendments to the RA, which came into effect on 1 January 2020, have once again removed the automatic right to seek employment granted to asylum seekers by the *Watchenuka* judgement.²¹⁰ According to the recent amendments to the RA, the right to seek

²⁰³ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 242.

²⁰⁴ Constitution, s 22 states 'Every citizen (emphasis added) has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may *be regulated by law* (emphasis added).

²⁰⁵ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 242 ; Ragananan P & Smit R 'Seeking Refuge in South Africa: Challenges facing a group of Congolese and Burundian Refugees' (2011) 28(5) *Development Southern Africa* 708.

²⁰⁶ *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA)

²⁰⁷ *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) para 32-36.

²⁰⁸ Ragananan P & Smit R 'Seeking Refuge in South Africa: Challenges facing a group of Congolese and Burundian Refugees' (2011) 28(5) *Development Southern Africa* 714.

²⁰⁹ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 241.

²¹⁰ The removal of the automatic right to seek employment for asylum seekers will only be put into practice once the Asylum Seeker Processing Centres have been completed and become operational. This is estimated

employment will have to be endorsed on an asylum seeker visa.²¹¹ Asylum seekers will not qualify to seek employment if they can support themselves for a period of four months and are not being supported by a charitable organisation.²¹² Khan and Rayner are of the view that the *Watchenuka* judgement will be an important tool in challenging the validity of the revocation of the automatic right to work for asylum seekers.²¹³ According to Khan and Rayner based on *Watchenuka* alone, enforcing a ban that requires a person to rely on charitable aid would amount to humiliation and degradation which would violate the right to dignity in terms of the BOR.²¹⁴

From the above discussion we deduce that both asylum seekers and refugees enjoy the rights set out in the BOR to the extent that those rights apply to everyone. Both groups are also protected by the principle of non-refoulement. Furthermore, refugees are granted *full* legal protection whereas this right to full legal protection is not expressly granted to asylum seekers.

An example of the difference between refugees and asylum seekers in terms of full legal protection can be seen from their ability to be registered with some professional council.²¹⁵ One such council is that of the Health Professional Council of South Africa (HPCSA). According to the policy of the Department of Health on Recruitment and Employment of Foreign Health Professionals in the Republic of South Africa 2006 (Health Recruitment Policy), it is clearly stated that asylum seekers are not eligible to be employed on a full time basis or able to enrol for examination by the HPCSA.²¹⁶ Furthermore, no job offers will be endorsed for asylum seekers until they are recognised as a refugee.²¹⁷ Refugees on the other hand can apply to the National Department of Health for support towards enrolment and to be accepted for examination by a statutory HPCSA.²¹⁸ The policy also clearly states that refugees do not need to apply for a work permit in order to seek employment in the

to be in 2030. The *White Paper on International Migration for South Africa*, Department of Home Affairs, July 2017, chapters 6 and 12 specifically.

²¹¹ See Refugees Act, as amended s18.

²¹² See See Refugees Act, as amended s18.

²¹³ Khan F and Rayner N 'Country Fiche South Africa' (2020) *ASILE* 25.

²¹⁴ Khan F and Rayner N 'Country Fiche South Africa' (2020) *ASILE* 25.

²¹⁵ Rule 3.5.2 of Health Professional Council.

²¹⁶ Rule 3.5.2 of Health Professional Council.

²¹⁷ Rule 3.5.2 of Health Professional Council.

²¹⁸ Rule 3.5.3 of Health Professional Council.

health sector.²¹⁹ Refugees are categorised as temporary residents by the Health Professional Council.²²⁰ As temporary residents they are allowed to be employed on a temporary three year non-renewable contract basis.²²¹

2.4.2.2 Economic migrants

According to Jastram and Achiron, economic migrants are classified as people who leave their country of origin purely for economic reasons or in order to seek material improvements in their livelihood.²²²

In SA economic migrants are governed by migration policy by way of the IA, and not the RA.²²³ According to Kavuro, the difference in their migrant status results in economic migrants not being afforded protection in terms of international instruments like refugees and asylum seekers do.²²⁴ Furthermore, unlike refugees and asylum seekers, for economic migrants to perform any work-related activity in SA they are required to have a work visa.²²⁵ Migrants wishing to work in SA need either a short-term work visa in terms of section 11(2) or one of the three different categories of work visa.²²⁶

According to the IA, the three different categories of work visas include a general work visa, intra-company transfers work visa and a critical-skills work visa.²²⁷ The employer of a holder of the above mentioned visa is required to keep records of the employment.²²⁸ Some of the visas have added conditions for economic migrants such as the migrant having the required skills and the unavailability of a suitable South African citizen.²²⁹ According to Kavuro, these conditions are only applicable to economic migrants and not to refugees and asylum

²¹⁹ Rule 14.3 of Health Professional Council.

²²⁰ Rule 3.5 of Health Professional Council.

²²¹ Rule 14.1 of Health Professional Council.

²²² Jastram K & Achiron M *Refugee protection: a guide to international refugee law* (2001) (Geneva: Inter-Parliamentary Union 130.

²²³ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 246.

²²⁴ Odunayo MA, Asuelime LE and Okem AE 'South African Policy on Migration and its alignment with UNO Charter on Refugees and Asylum-seekers' (2017) 6(1) *JoAUS* 86.

²²⁵ Krensel A 'South Africa' in Magrath C (ed) *The Corporate Immigration Review* (2019) 277.

²²⁶ Krensel A 'South Africa' in Magrath C (ed) *The Corporate Immigration Review* (2019) 277.

²²⁷ Immigration Act, s 19 and 21.

²²⁸ Immigration Act, s 38 (4)(a).

²²⁹ See for example the Immigration Regulations of 2014, S18(3).

seekers.²³⁰ This is because of SA's adoption and ratification of the Refugees Convention, which exempts refugees and asylum seekers from any labour restriction, imposed on non-citizens.²³¹

2.4.2.3 Illegal foreigners

In SA the IA defines an illegal foreigner as an individual who is in SA in contravention of the Immigrations Act.²³² Campbell defines an illegal foreigner as any person who enters a country which they are not a citizen of, without legal documents to justify such an entry.²³³

According to the International Federation for Human Rights (FIHR) there are generally three categories of illegal foreigners living in SA. These are: economic migrants who work in SA in an irregular situation; undocumented asylum seekers who have not yet registered with the reception office for a refugee claim,²³⁴ or their application was rejected;²³⁵ and registered refugees whose refugees certificate has been confiscated or has not been renewed. Even though these are distinctly different groups of migrants, and their circumstances are vastly different, they are often grouped together in regards to available protection.

According to Khan and Rayner, since the rights regarding the ability to seek employment are linked to the initiation of the asylum application, illegal foreigners are not afforded this right.²³⁶ Illegal foreign workers do however benefit from the right to fair labour practices.²³⁷ Protection of illegal foreigners in respect of the above mentioned international law is generally provided in terms of the laws and conventions which are applicable to 'everyone' or 'all human beings', regardless of their migrant status.²³⁸ According to Lansink the right to seek employment should not be regarded as an absolute and unconditional right to obtain

²³⁰ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 247.

²³¹ Refugees Convention, Article 17(2).

²³² Immigration Act, s1(xviii).

²³³ Campbell EK 'Reflections on Illegal Immigration in Botswana and South Africa' (2006) 21(2) *African Population Studies* 23-44.

²³⁴ International Federation for Human Rights (FIDH) Report (2008) *Surplus People? Undocumented and other vulnerable migrants in South Africa* available at <http://www.fidh.org/Surplus-People-Undocumentedand> (accessed on 5 May 2020) 10.

²³⁵ Weissbrodt D *The Human Rights of Non-Citizens* (2008) 136.

²³⁶ Khan F and Rayner N 'Country Fiche South Africa' (2020) *ASILE* 25.

²³⁷ Khan F and Rayner N 'Country Fiche South Africa' (2020) *ASILE* 25.

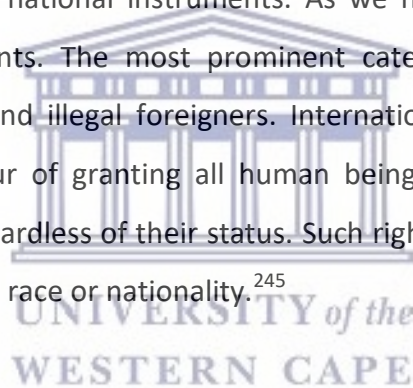
²³⁸ See for example the Universal Declaration of Human Rights, Article 2, ICPPR Article 2(1) and ICESCR Article 2(2).

employment.²³⁹ It is not necessary for a state or its people to hire illegal foreign workers.²⁴⁰ When illegal foreigners are offered work though, these illegal foreign workers gain rights.²⁴¹ Put differently, the offer of work changes their illegal situation, but this only applies to the context of rights at work.²⁴²

In terms of SA specifically, the courts have ruled that the definition of the employment relationship does not include the legality of the work or the illegality of the person and therefore does not affect the application of the right to fair labour practices.²⁴³ The position in SA therefore seems to be that illegal foreign workers are entitled to labour law protections due to the right to fair labour practices in terms of section 23 of the Constitution.²⁴⁴ These entitlements will be discussed in detail in chapter three.

2.5 CONCLUSION

This chapter focused on assessing whether foreign nationals are granted protection in terms of international, regional and national instruments. As we have learned there are many different categories of migrants. The most prominent categories are refugees, asylum seekers, economic migrants and illegal foreigners. International instruments such as the UDHR has provisions in favour of granting all human beings equal access to the rights provided within the UDHR, regardless of their status. Such rights include the right not to be discriminated against based on race or nationality.²⁴⁵



²³⁹ Lansink 'A Migrant Workers and Non-Discrimination in the workplace' in Dupper O and Garbers C (eds) *Equality in the Workplace; Reflections from South Africa and Beyond* (2009) 278.

²⁴⁰ Motsamai LG *Forced Labour: The Protection of Illegal migrant workers in South Africa* (Unpublished LLM thesis, North-West University, 2019) 32; Lansink A 'Migrant Workers and Non-Discrimination in the workplace' in Dupper O and Garbers C (eds) *Equality in the Workplace; Reflections from South Africa and Beyond* (2009) 278.

²⁴¹ Motsamai LG *Forced Labour: The Protection of Illegal migrant workers in South Africa* (Unpublished LLM thesis, North-West University, 2019) 32; Lansink A 'Migrant Workers and Non-Discrimination in the workplace' in Dupper O and Garbers C (eds) *Equality in the Workplace; Reflections from South Africa and Beyond* (2009) 278.

²⁴² Motsamai LG *Forced Labour: The Protection of Illegal migrant workers in South Africa* (Unpublished LLM thesis, North-West University, 2019) 32; Lansink A 'Migrant Workers and Non-Discrimination in the workplace' in Dupper O and Garbers C (eds) *Equality in the Workplace; Reflections from South Africa and Beyond* (2009) 278.

²⁴³ *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 (4) SA 383 (LAC); *Discovery Health Limited v CCMA & Others* [2008] 7 BLLR 633 (LC)

²⁴⁴ Mashele R 'Economics of Illegal Work and Illegal Workers (Immigrants): Are they protected under South African Labour Law and the Constitution, 1996' (2015) 11(3) *AUDJ* 83 and Norton, D 'Workers in the Shadows: An International Comparison on the Law of Dismissal of Illegal Migrant Workers' (2010) *ILJ* 1525.

²⁴⁵ OAU Convention, article IV.

International instruments also provide certain rights specifically for refugees. As the general principle in terms of international law, refugees should be granted rights which are either similar to other refugees in the same circumstances, or those enjoyed by all persons in that country, unless a right is specifically only reserved for citizens. These rights ensure that all foreign nationals, regardless of status, are protected in some manner in whichever country they are. There are also rights which are only granted to specific types of foreigners, but these rights vary from country to country. In terms of South African immigration policy, foreign nationals in the asylum process and those who were successful with the asylum process are afforded protections which include the right to seek employment. According to Khan and Rayner, since the rights regarding the ability to seek employment are linked to the initiation of the asylum application, illegal foreigners are not afforded this right.²⁴⁶

Even though illegal foreigners do not have the same rights as those granted to legal foreigners in terms of South Africa's immigration policy, labour legislation has its own requirements which need to be met in order to qualify for protection. Chapter three will hereafter focus on the existing labour laws in SA and discuss if, and how, these laws protect foreign workers.



²⁴⁶ Khan F and Rayner N 'Country Fiche South Africa' (2020) *ASILE* 25.

Chapter 3

Migrants: Labour protection, the overlap between labour and immigration law and the difficulties faced by migrant workers in South Africa

3.1 INTRODUCTION

This chapter will focus on the legislation in SA applicable to migrant workers against the backdrop of the Constitution. In addition, the chapter will consider the way in which SA's labour and immigration laws intersect and, consequently the difficulties faced by migrant workers as a result of such intersection.

3.2 SOUTH AFRICA'S LABOUR LEGISLATIVE SCHEME

3.2.1 The Constitution

The rights granted to all workers in SA are derived from a number of different sources. The first of these is the Constitution. The Constitution is the supreme law of the land.²⁴⁷ It contains all of the fundamental rights granted to persons in the territory of SA. The Constitution places an obligation on the state to respect, protect, promote and fulfil the rights in the BOR.²⁴⁸ Equality as provided for in terms of South African law is regarded as being both a right as well as one of the foundational values listed in respect of the Constitution.²⁴⁹ Equality being both a right and one of the foundational values of the Constitution emphasises the importance of the equality in the current constitutional dispensation in light of the past inequalities due to apartheid.

Additionally, the Constitution provides a legal framework to address some of the inequalities prevalent in SA.²⁵⁰ Section 9 of the Constitution is known as the equality clause and is focused on the right to equality and non-discrimination.²⁵¹ Section 9(1) of the Constitution states that 'everyone is equal before the law and has the right to equal protection and benefit of the law'. According to Biney 'everyone' in the context of section

²⁴⁷ The Constitution, s2.

²⁴⁸ The Constitution, s7(2).

²⁴⁹ The Constitution, s7(1).

²⁵⁰ Biney E *'Inequality of Opportunity: The Plight of Foreign Workers in South Africa'* (unpublished LLD thesis, University of Cape Town 2016) 32.

²⁵¹ Biney E *'Inequality of Opportunity: The Plight of Foreign Workers in South Africa'* (unpublished LLD thesis, University of Cape Town 2016) 32.

9(1) of the Constitution suggests that all foreigners including illegal foreigners are included in the scope of protection.²⁵² The Constitution in its preamble also states that the country ‘belongs to all who are in it’. The protections in the Constitution are therefore not applicable only to citizens.

According to the South African case of *Kylie v Commission for Conciliation Mediation and Arbitration and Others*²⁵³ (*Kylie*) the term ‘everyone’ in the Constitution is supportive of an extremely broad approach to the scope of the right guaranteed in the Constitution.²⁵⁴ In *Khosa v Minister of Social Development*²⁵⁵ the CC held that:

‘The word ‘everyone’ is a term of general import and unrestricted meaning. It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system.’²⁵⁶

The view of the CC regarding the term everyone, is that it should be understood literally or as broadly as possible. Furthermore the CC in *Prinsloo v Van der Linde and Another*²⁵⁷ and *S v Ntuli*²⁵⁸ has interpreted section 9(1) of the Constitution to mean that *everyone* is entitled ‘to equal treatment by South African courts and nobody should be above or beneath the law and that all people are subject to law impartially applied and administered’.²⁵⁹ Whether this is actually the case is not as clear cut as the Constitution sets it out to be. More often than not, rights on paper are not the same as in reality.²⁶⁰

In terms of section 9(2) of the Constitution equality is described as including the full and equal enjoyment of all rights and freedoms contained in the BOR. A positive duty to create legislation aimed at promoting the achievement of equality designed to protect persons disadvantaged by discrimination is also placed on the state in terms of section 9(2) of the Constitution. Section 9(3) of the Constitution prohibits the state from unfairly discriminating both directly and indirectly on any of the listed grounds including ethnic origin and birth.

²⁵² Biney E ‘*Inequality of Opportunity: The Plight of Foreign Workers in South Africa* (unpublished LLD thesis, University of Cape Town 2016) 191.

²⁵³ *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 (4) SA 383 (LAC)

²⁵⁴ *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 (4) SA 383 (LAC) para 16.

²⁵⁵ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

²⁵⁶ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 111.

²⁵⁷ *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC).

²⁵⁸ *S v Ntuli* 1996 (1) SA 1207 (CC).

²⁵⁹ *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) para 22; *S v Ntuli* 1996 (1) SA 1207 (CC) para 18

²⁶⁰ See 3.2.2 discussion below.

Section 9(4) of the Constitution orders the state to create national legislation to prevent or prohibit unfair discrimination on any of the listed grounds in section 9(3) of the Constitution. Since some of the legislation specifically dealing with migrants has become more restrictive, for example the RA, as will be discussed below,²⁶¹ the question of whether SA's legislation complies with the prohibition of unfair discrimination in terms of section 9(4) of the Constitution is one that might have to be examined in the future but it falls outside of the scope of this paper.

Unlike the constitutions of some other jurisdictions, the Constitution does not specifically grant people the right to work.²⁶² Instead section 23 of the Constitution grants everyone the right to fair labour practices.²⁶³ According to Cheadle, the term 'everyone' in terms of section 23(1) should be interpreted with regards to who the labour practices are aimed at, namely workers, employers, trade unions and employer organisations.²⁶⁴ The majority of the rights of workers are contained in the existing labour law in South Africa.²⁶⁵ The most prominent of these acts will be discussed in detail below, while the rest will be referred to throughout the chapter.

3.2.2 The Labour Relations Act 66 of 1995 (LRA)

Section 1 of the LRA stipulates that the primary objects of the LRA are founded on the needs to advance social justice, labour peace, economic development and democratization of the workplace. The LRA proffers a foundational statutory framework for the regulation of employment relationships between employers and employees.²⁶⁶ For a person to access the protective ambit of labour law in SA, they should first and foremost be either an employer or employee.²⁶⁷

Section 213 of the LRA defines an employee as 'any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to

²⁶¹ See discussion under heading 3.5 below.

²⁶² Tanzer Z and Gwenyaya T 'Shadow Report: South Africa's Compliance with Labour Obligations under the International Covenant on Economic, Social and Cultural Rights' (2018) *Shadow Report* 3.

²⁶³ The Constitution, s23(1).

²⁶⁴ Cheadle H, Davis D and Hysom, N 'South African Constitutional law: The Bill of Rights' (2002) 364-5.

²⁶⁵ See 2.1.4.3 for labour laws in SA.

²⁶⁶ Mashele R 'Economics of Illegal Work and Illegal Workers (Immigrants): Are they protected under South African Labour Law and the Constitution, 1996' (2015) 11(3) *AUDJ* 82.

²⁶⁷ Mashel, R 'Economics of Illegal Work and Illegal Workers (Immigrants): Are they protected under South African Labour Law and the Constitution, 1996' (2015) 11(3) *AUDJ* 82.

receive any remuneration and any other person who in any manner assists in carrying on or conducting the business of the employer.’ According to Mashele it is thus safe to assume that any person who is not covered by section 213’s definition has little or no protection in terms of the LRA.²⁶⁸ The LRA does however extend its protective ambit in section 200A with a list of presumptions on who is an employee. According to Du Toit, the presumption in terms of section 200A of the LRA creates a situation where any worker meeting any of the number of criteria is deemed to be an employee.²⁶⁹ Furthermore the list of presumptions in terms of section 200A of the LRA creates a shift of onus to the party disputing the workers employment to prove the contrary.²⁷⁰ Similarly it is safe to presume that the right of ‘everyone’ to fair labour practices in section 23(1) of the Constitution and the right of ‘every worker’, to form and join a trade union in section 23(2), favours an extensive interpretation of ‘employee’ which has been confirmed by the courts.²⁷¹ In *Chirwa v Transnet*²⁷² the CC held that:

‘... where a provision of the LRA is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA.’²⁷³

The position of the courts regarding an extensive interpretation is due to the fact that the courts seem to focus on the substance of the work relationship rather than its form.²⁷⁴ An example of the court focusing on the substance of the work relationship can be seen in the *Discovery* judgment.²⁷⁵ Prior to 2008 the stance of the CCMA was that an employment

²⁶⁸ Mashele R ‘Economics of Illegal Work and Illegal Workers (Immigrants): Are they protected under South African Labour Law and the Constitution, 1996’ (2015) 11(3) *AUDJ* 83.

²⁶⁹ Du Toit D and Huysamen E ‘Implementing Domestic Workers Labour Rights in a Framework of Constitutionalism’ in Du Toit D *Exploited, Undervalued – And Essential: Domestic Workers and the Realisation of the Rights* (2013) 65-115.

²⁷⁰ Du Toit D and Huysamen E ‘Implementing Domestic Workers Labour Rights in a Framework of Constitutionalism’ in Du Toit D *Exploited, Undervalued – And Essential: Domestic Workers and the Realisation of the Rights* (2013) 80.

²⁷¹ See *Discovery Health Ltd v CCMA & Others* (2008) 29 ILJ 1480 (LC); *Denel (PTY) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC).

²⁷² *Chirwa v Tranet* 2008 (4) SA 367 (CC).

²⁷³ *Chirwa v Tranet* 2008 (4) SA 367 (CC) para 110.

²⁷⁴ See judgment of Cheadle AJ in *Kylie v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 1918 (LC); *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC) para 93; Du Toit D and Huysamen E ‘Implementing Domestic Workers Labour Rights in a Framework of Constitutionalism’ in Du Toit D *Exploited, Undervalued – And Essential: Domestic Workers and the Realisation of the Rights* (2013) 80.

²⁷⁵ *Discovery Health Ltd v CCMA & Others* (2008) 29 ILJ 1480 (LC).

contract concluded in contravention of the IA was null and void.²⁷⁶ Section 38 of the IA prohibits the employment of Illegal foreigners.²⁷⁷ Since the LRA applies to employees, illegal migrant workers in SA were not entitled to the protection of the LRA because they were not considered to be employees.²⁷⁸ The concept of employee was dealt with in *Discovery* which dealt with an unfair dismissal of an illegal migrant.²⁷⁹ The Labour Court (LC) held that the fact that the IA criminalises the conduct of the employer who employs a worker in contravention of the IA did not impact on the validity of the contract of employment.²⁸⁰ The LC went further stating that even if it did affect the validity of the contract of employment, the existence of a valid contract is not a necessary precondition for the acquisition of the status of employee in terms of the LRA.²⁸¹ Since the status of employee is not dependant on a valid contract of employment, in principle it would mean that illegal migrant workers and in some instances workers who do not have valid contracts of employment, are entitled to the protection granted in terms of the LRA. The end result was thus the extension of the interpretation of the term employee to the effect that it could include even those migrant workers who were not legally in the country.²⁸²

In *White v Pan Palladium SA (Pty) Ltd*²⁸³ the LC held that a worker who had not concluded a contract of employment but who nevertheless had an employment relationship with the employer could qualify as an employee for the purposes of the LRA.²⁸⁴ The LC held that:

²⁷⁶ Nkuna PM Undocumented Migrants and the right to fair labour practices (unpublished LLM thesis, University of Pretoria, 2019) 39; Norton D 'In Transit: The position of Illegal foreign workers and emerging Labour law jurisprudence' (2009) 30 *ILJ* 70.

²⁷⁷ Immigration Act, s38(1).

²⁷⁸ Dupper O 'The Human Rights of (Irregular) Migrants: An International Regional and South African Perspective' (Pt 2) (2011) 2 *International Journal of Social Security and Workers Compensation* 66; *Moses v Safika Holdings (pty) Ltd* (2001) 22 *ILJ* 1261 CCMA; Davies B 'The rights of illegal workers and workers engaged in illegal activities' 2018 available at <https://www.golegal.co.za/illegal-workers-south-africa/> (accessed 15 November 2021).

²⁷⁹ Meyer DJ 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 *SA Merc LJ* 837.

²⁸⁰ *Discovery Health Ltd v CCMA & Others* (2008) 29 *ILJ* 1480 (LC) para 49; Dupper, O 'The Human Rights of (Irregular) Migrants: An International Regional and South African Perspective' (Pt 2) (2011) 2 *International Journal of Social Security and Workers Compensation* 66-67.

²⁸¹ *Discovery Health Ltd v CCMA & Others* (2008) 29 *ILJ* 1480 (LC) para 54; Dupper, O 'The Human Rights of (Irregular) Migrants: An International Regional and South African Perspective' (Pt 2) (2011) 2 *International Journal of Social Security and Workers Compensation* 67.

²⁸² *Discovery Health Ltd v CCMA & Others* (2008) 29 *ILJ* 1480 (LC) para 54; Newaj, K 'Defining Fairness in Dismissals of Unauthorised Foreign Nationals' (2020) 23 *PELJ* 2-3; Meyer DJ 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 *SA Merc LJ* 834.

²⁸³ *White v Pan Palladium SA (Pty) Ltd* 2005 (6) SA 384 (LC).

²⁸⁴ *White v Pan Palladium SA (Pty) Ltd* 2005 (6) SA 384 (LC) 391.

‘the existence of an employment relationship is therefore not dependent solely upon the conclusion of a contract recognised at common law as valid and enforceable. Someone who works for another, assists that other in his business and receives remuneration may, in light of the statutory definition, qualify as an employee even if the parties *inter se* have not yet agreed on all the relevant terms of the agreement by which they wish to regulate their contractual relationship.’²⁸⁵

This in short means that a worker could qualify as an employee in terms of the LRA if they are in an employment relationship with the employer, regardless of whether or not there is actually a valid contract of employment.

Furthermore, according to Mashele, the definition in terms of section 213 of the LRA makes no mention of the legal validity or invalidity of an employment relationship or the basis upon which such a relationship was founded.²⁸⁶ The silence of section 231 of the LRA seems to be in line with the aim of section 23 of the Constitution which seeks to provide protection to ‘everyone’ who works for another person.²⁸⁷ Furthermore with regards to the employment relationship, the LAC stated in *Denel (PTY) Ltd v Gerber*²⁸⁸ (*Denel*) that the realities in relationships formed between employers and employees should be used to recognise an employment relationship.²⁸⁹ This basically means that regardless of whether or not the employment commenced through legal means, any worker regardless of their nationality who actually performs work for the employer, is in an employment relationship with such an employer. The worker would therefore fall into the protection of both the Constitution and the LRA.

The rulings in *Discovery* and *Denel* illustrate that in terms of South African labour legislation the main determining factor is the existence of an employment relationship and not the existence of a valid contract.²⁹⁰ Furthermore Immigration law cannot be used to limit a

²⁸⁵ *White v Pan Palladium SA (Pty) Ltd* 2005 (6) SA 384 (LC) 391.

²⁸⁶ Mashele R ‘Economics of Illegal Work and Illegal Workers (Immigrants): Are they protected under South African Labour Law and the Constitution, 1996’ (2015) 11(3) *AUDJ* 83.

²⁸⁷ Mashele R ‘Economics of Illegal Work and Illegal Workers (Immigrants): Are they protected under South African Labour Law and the Constitution, 1996’ (2015) 11(3) *AUDJ* 83.

²⁸⁸ *Denel (PTY) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC).

²⁸⁹ *Denel (PTY) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC) p 1296.

²⁹⁰ *Discovery Health Ltd v CCMA & Others* (2008) 29 ILJ 1480 (LC) para 54 and *Denel (PTY) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC) p 1296; Meyer DJ ‘Migrant Workers and Occupational Health and Safety Protection in South Africa’ (2009) 21 *SA Merc LJ* 834.

constitutionally guaranteed right such as the right to fair labour practices.²⁹¹ Despite the formal recognition of illegal foreign workers as ‘employees’ in labour law, the extension of their status does not translate into substantive protection as far as occupational insurance is concerned.²⁹² Social insurance typically relates to benefits earned by workers (and their families) and often tends to presuppose formal employment.²⁹³ In terms of the Social Assistance Act 13 of 2004, coverage for social assistance in SA is subject to conditions such as nationality, residency, and/or lawful immigration status.²⁹⁴ It can therefore be assumed that illegal foreign workers and foreigners with temporary residence permits simply have little or no recourse to short-term relief (social assistance measures). Most migrant workers are atypically employed or operate on the periphery of the formal economy therefore it can further be assumed that illegal migrant workers are categorically excluded from accessing social security mechanisms.²⁹⁵

3.2.3 The Basic Conditions of Employment Act 75 of 1997 (BCEA)

The BCEA, like the LRA, was enacted to give effect to the right to fair labour practices in terms of section 23(1) of the Constitution.²⁹⁶ The BCEA gives effect to the right to fair labour practices by establishing and making provisions for the regulation of basic conditions of employment while simultaneously complying with SA’s obligations as a member of state of the ILO.²⁹⁷ The BCEA sets the legal minimum working conditions for *all* employees in SA.²⁹⁸

²⁹¹ *Discovery Health Ltd v CCMA & Others* (2008) 29 ILJ 1480 (LC) para 30. This principle was endorsed by the CC in *National Education Health & Allied Workers Union v University of Cape Town* 2003

24 ILJ 95 (CC) para 105. In interpreting s197 of the LRA the CC emphasised that the provisions of the LRA must be construed in a manner that gives effect to s23 of the Constitution. The CC explained that when constitutional rights are given effect to by legislation, such legislation is subject to constitutional scrutiny to ensure that it is consistent with the Constitution.

²⁹² Biney E ‘Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers’ available at http://www.saspen.org/conferences/migration2014/Biney_Paper_FES-SASPEN-INT-CONF_Social-Protection-for-Migrants_Oct-29-30-2014.pdf (accessed on 3 November 2018).

²⁹³ Biney E ‘*Inequality of Opportunity: The Plight of Foreign Workers in South Africa*’ (unpublished LLD thesis, University of Cape Town 2016) 197.

²⁹⁴ Social Assistance Act, s 5(1)(c) and 5(1)(b).

²⁹⁵ Biney E ‘Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers’ available at http://www.saspen.org/conferences/migration2014/Biney_Paper_FES-SASPEN-INT-CONF_Social-Protection-for-Migrants_Oct-29-30-2014.pdf (accessed on 3 November 2018).

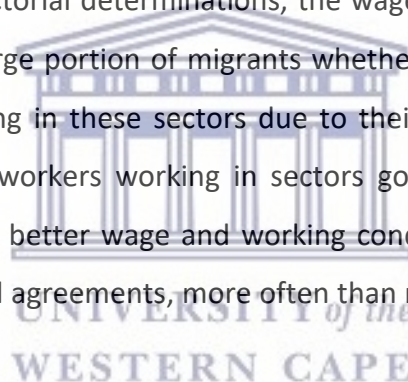
²⁹⁶ Labour Relations Act, s3 and Basic Conditions of Employment Act, s2(a).

²⁹⁷ Vanyoro KP ‘Regularising Labour Migration of Zimbabwean Domestic Workers in South Africa’ (2019) *ACMS Policy Brief* 5.

²⁹⁸ Basic Conditions of Employment Act, s3(1); Vanyoro KP ‘Regularising Labour Migration of Zimbabwean Domestic Workers in South Africa’ (2019) *ACMS Policy Brief* 5.

The minimum working conditions set by the BCEA does not only apply to citizens but also to migrants who are here by legal means or even workers employed in the formal sector.²⁹⁹ These conditions include working hours, overtime, leave and contract terminations.³⁰⁰ Following presumptions in terms of section 200A of the LRA, the working conditions of all workers have to adhere to all guidelines outlined in the BCEA.³⁰¹ If an employment relationship exists where no employment contract has been drawn up, section 4 of the BCEA provides that the BCEA forms part of all employment contracts (written or oral) to the extent that any other laws or conditions of the employment contract between employer and employee are more favourable. Section 4 of the BCEA thus provides relief for all workers, specifically those who are subject to employment relationships without contracts of employment such as certain migrant workers.³⁰²

Prior to 2019 no national minimum wage existed in SA as the BCEA does not provide a general minimum wage applicable to all employees.³⁰³ Most often in sectors where the minimum wage was set by sectorial determinations, the wage is low, for example for farm and domestic workers.³⁰⁴ A large portion of migrants whether refugees, asylum seekers or illegal migrants end up working in these sectors due to their status or inability to access other suitable jobs.³⁰⁵ Those workers working in sectors governed by bargaining council agreements³⁰⁶ generally enjoy better wage and working conditions.³⁰⁷ Even in the sectors governed by bargaining council agreements, more often than not many migrant workers are



²⁹⁹ Basic Conditions of Employment Act, s3(1); Vanyoro KP 'Regularising Labour Migration of Zimbabwean Domestic Workers in South Africa' (2019) *ACMS Policy Brief* 5.

³⁰⁰ Basic Conditions of Employment Act, chapters 2,3 and 5; Vanyoro KP 'Regularising Labour Migration of Zimbabwean Domestic Workers in South Africa' (2019) *ACMS Policy Brief* 5.

³⁰¹ See Generally Chapter 2 of the BCEA; Phiri, TE 'Unfair labour practices, labour legislation and protection of migrant workers in South Africa (unpublished M.com, University of Witwatersrand 2015) 19.

³⁰² Phiri TE 'Unfair labour practices, labour legislation and protection of migrant workers in South Africa (unpublished M.com, University of Witwatersrand) 2015) 19.

³⁰³ Stelzner S, Harrison S and Patterson B et al 'International Labour and Compliance Handbook: South Africa' (2010) *IBA* 36.

³⁰⁴ Bhorat, H, Kanbur R and Mayet N 'The impact of sectoral minimum wage laws on employment, wages and hours of work in South Africa' (2013) *IZA Journal of Labour Development* 2.

³⁰⁵ Malatji TL 'Unemployment and Regional Human Mobility; All Roads Lead To South Africa' 2021 11(3) *AJDS* 175-176.

³⁰⁶ Agreements agreed upon between trade unions and employer organisations.

³⁰⁷ Stelzner S, Harrison S and Patterson B et al 'International Labour and Compliance Handbook: South Africa' (2010) *IBA* 36.

taken advantage of due to their status or not being able to join trade unions, as will be discussed below.³⁰⁸

On 1 January 2019 the National Minimum Wage Act 9 of 2018 (NMWA) came into effect. Some of the purposes of the NMWA as listed in terms of section 2 are to improve the wages of lowest paid workers, protecting workers from unreasonably low wages and preserving the value of the national minimum wage.³⁰⁹ The NMWA applies to all workers and their employers except those specifically mentioned in terms of sections 3(1) and 3(2) of the NMWA. According to the NMWA every worker is entitled to payment of a wage in an amount no less than the national minimum wage³¹⁰ and every employer must pay wages to their worker that is no less than the national minimum wage.³¹¹ The NMWA further instructs that the national minimum wage may not be waived³¹² and must constitute a term of the worker's contract except to the extent that the contract, collective agreement or law provides a wage that is more favourable to the worker.³¹³

Even though the BCEA applies to all workers, for a large portion of migrant workers and other workers in the informal sector, the protections in terms of the BCEA are inadequate in relation to sectors migrant workers are prevalent in, such as domestic labour.³¹⁴ The BCEA is the first Act to formalise domestic labour as a protected sector, and includes a mandatory requirement of work contracts.³¹⁵ The requirement of a work contract could be advantageous to workers since they would have proof of employment and working agreements, however it only covers full-time workers.³¹⁶ This means domestic workers who work part-time on a daily or hourly basis for multiple employers would not be covered by the BCEA regardless of whether they work over 50 hours a week.³¹⁷ The Sectorial Determination 7 in terms of the BCEA applies to domestic workers. It is unclear whether or

³⁰⁸ See discussion under heading 3.5 below.

³⁰⁹ National Minimum Wage Act, S2(a)-(c).

³¹⁰ National Minimum Wage Act, s4(4).

³¹¹ National Minimum Wage Act, s4(5).

³¹² National Minimum Wage Act, s4(6).

³¹³ National Minimum Wage Act, s4(7).

³¹⁴ Tanzer Z and Gwenyaya, T 'Shadow Report: South Africa's Compliance with Labour Obligations under the International Covenant on Economic, Social and Cultural Rights' (2018) *Shadow Report* 13.

³¹⁵ Basic Condition of Employment Act 2013, s8.

³¹⁶ Vanyoro KP 'Regularising Labour Migration of Zimbabwean Domestic Workers in South Africa' (2019) *ACMS Policy Brief* 14.

³¹⁷ Vanyoro KP 'Regularising Labour Migration of Zimbabwean Domestic Workers in South Africa' (2019) *ACMS Policy Brief* 14.

not the Sectorial Determination 7 is applicable to illegal domestic migrant workers since such applicability has never officially been confirmed or commented on.³¹⁸ Due to the fact that it applies to *all* domestic workers except those specifically excluded, it is assumed that migrant domestic workers (unless they fall into one of the excluded categories) are included in the scope of application.

3.2.4 The Employment Equity Act 55 of 1998 (EEA)

South Africa has a history of discrimination based on race and gender (amongst others) which denied certain categories of people access to equal opportunities for employment and fair labour practices.³¹⁹ The EEA is the legislation enacted to give effect to the right to equality in respect of the Constitution. One of the purposes of the EEA is to 'achieve equity in the workplace by promotion of equal opportunity and fair treatment in employment through the elimination of unfair discrimination'.³²⁰ According to Biney, the EEA is aimed at addressing the apartheid colour bar³²¹ which excluded certain groups of people from jobs above a certain level.³²² Furthermore the EEA is also provides for the implementation and enforcement of affirmative action measures to readdress discrimination based on race and gender for designated groups to ensure employee representation in the labour market.³²³ The regulation of equality and anti-discrimination in terms of the EEA is however limited only to the employment context, in contrast to the general application of the constitution.

According to Henegham, the EEA consist of four key components.³²⁴ First, it provides for the prohibition of unfair discrimination since it 'applies to all employees'.³²⁵ Secondly, amongst the listed grounds of protection, ethnic origin and birth are included.³²⁶ Thirdly, if

³¹⁸ Vanyoro KP 'Regularising Labour Migration of Zimbabwean Domestic Workers in South Africa' (2019) *ACMS Policy Brief* 14.

³¹⁹ Phiri TE 'Unfair labour practices, labour legislation and protection of migrant workers in South Africa (unpublished M.com, University of Witwatersrand 2015) 20.

³²⁰ Employment Equity Act s2(a).

³²¹ Dictionary of South Africa- The practice or policy of excluding black people from skilled jobs, first entrenched in the Mines and Works Act No.12 of 1911 available at <https://dsae.co.za/entry/colour-bar/e01739> (accessed 12 November 2021).

³²² Biney E 'Inequality of Opportunity: The Plight of Foreign Workers in South Africa (unpublished LLD thesis, University of Cape Town 2016) 35.

³²³ Employment Equity Act, s2(b).

³²⁴ Henegham SM 'Employment Discrimination Faced by the Immigrant Worker – A lesson from the United States and South Africa' (2012) 35 *Fordham International Law Journal* 1780.

³²⁵ Employment Equity Act, s4.

³²⁶ Employment Equity Act, s6(1).

employment discrimination is alleged, the burden to prove that such discrimination is fair lies with the employer and not the employee, even if it is based on an unlisted ground.³²⁷ Lastly, it places a duty on employers to take steps to eliminate employment discrimination policies or practices.³²⁸ It is submitted that the four components are particularly important to the rights of migrant workers since they may be susceptible to work place discrimination based on their ethnicity or birth.

The EEA protects and promotes the rights of all workers, to equal opportunity by rejecting discrimination based on the grounds listed in the act which include, race, gender, birth and ethnic origin.³²⁹ Although citizenship is not one of the explicitly mentioned grounds in terms of the EEA, the CC has recognised differentiation based on South African citizenship as constituting analogous grounds of discrimination.³³⁰ In *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another*³³¹ (*Larbi-Odam*) the CC established citizenship as an analogous ground of discrimination when it held that Regulation 2(2) of the regulations regarding the terms and conditions of educators³³² differentiated between SA citizens and foreigners, to the detriment of foreigners.³³³ The applicants were foreign nationals with permanent residency who were temporarily employed as teachers in the North-West Province.³³⁴ The Members of the Executive Council for Education in the North-West province issued them with notices stating an intention to terminate their employment and proceeded to advertise their posts.³³⁵ This decision was based on the fact that only South African nationals were allowed to be employed as teacher

³²⁷ Employment Equity Act, s11.

³²⁸ Employment Equity Act, s5.

³²⁹ Employment Equity Act Chpt 3.

³³⁰ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1996 (12) BCLR 1612 (CC) para 19.

³³¹ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1996 (12) BCLR 1612 (CC) para

³³² The Regulations Regarding the Terms and Conditions of Employment of Educators GN R1743 of 13 November 1995, Reg. 2(2) stipulates that 'no person shall be appointed as an educator in a State school in a permanent capacity, unless he or she is a South African citizen'.

³³³ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1996 (12) BCLR 1612 (CC) para 19.

³³⁴ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1996 (12) BCLR 1612 (CC) para 4.

³³⁵ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1996 (12) BCLR 1612 (CC) para 6.

in a permanent basis in state schools.³³⁶ The court found that ‘permanent residency status’ entitled the applicants to compete with locals in the employment market and any limitation or exclusion on the grounds of citizenship was purely discriminatory.³³⁷ Essentially, the CC also acknowledged that foreign nationals are a minority (and thus more susceptible to vulnerability) and that citizenship is a ‘personal attribute which is difficult to change’.³³⁸

With the above mentioned and considering the fact that the LRA, BCEA and EEA are applicable to all employers, workers and job applicant with the exception of those specifically mentioned in the act namely, National Defence Force, National Intelligence Agency and South African Secret Service, it is safe to assume that migrant workers could be entitled to the protections as provided for in the EEA. This assumption would be in line with the constitutional provisions in terms of section 23(1) of the Constitution as well as SA’s international obligation as a member state of the ILO with regards to migrant workers as discussed in chapter two.

3.3 OVERLAP BETWEEN LABOUR LEGISLATION AND IMMIGRATION LEGISLATION

As seen from chapter 2, the right of migrants to be employed in SA varies from migrant category to category. While refugees are naturally better off in terms of their protection in SA laws than their fellow migrants, even they are restricted in some instances or their rights are misunderstood to their detriment. This leaves a lot of room for uncertainty on part of the employer and the migrant worker.

3.3.1 The requirement of legal status

One of the main issues that this thesis aims to evaluate is the fact that labour legislation such as the LRA, BCEA and the EEA all extend their scope of protection to *all* people who are employees, to the exclusion of those specifically mentioned in the respective acts. As we have seen from the above mentioned discussion,³³⁹ a foreign national could be protected in terms of labour laws such as the LRA, BCEA and EEA regardless of whether or not they are

³³⁶ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1996 (12) BCLR 1612 (CC) para 2.

³³⁷ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1996 (12) BCLR 1612 (CC) para 19.

³³⁸ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1996 (12) BCLR 1612 (CC) para 19.

³³⁹ See above discussion under 3.2

documented, if they are able to satisfy any of the criteria of an 'employee' set out in terms of the LRA, BCEA and EEA. Similarly, in terms of the constitution the right to fair labour practices in terms of section 23 is extended to all workers and not only to certain group of workers. On the face of it this fact however seems to clash with one of the main legislations governing foreigners namely, the IA. In comparison to the LRA, BCEA and the EEA, the IA in section 38 stipulates that no person shall employ an illegal foreigner; a foreigner whose status does not authorise him or her to be employed by such person; or a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status. The legal effect of section 38 of the IA is that no employer in the SA may employ any person to work for such employer, unless that person is either a South African citizen (in which case he/she has the right to seek and engage in employment) or that person has a work permit allowing him/her to work in the country.³⁴⁰

From the wording alone, section 38 only criminalises the act of the employer. Section 38 does not prohibit a person from accepting work even if they are deemed an illegal foreigner for the purpose of the IA. In this regard there is no conflict between the provisions of the labour legislation such as the LRA, BCEA or even the Constitution and the IA. The result of the wording of the Immigration law, however is that migrant workers, who would qualify for protection in terms of the labour legislation, based on the fact that they are *workers*, are subject to deportation in terms of Immigration law, if they do not qualify to work in SA.³⁴¹ This is regardless of the circumstances surrounding their lack of legal status. As example, the court in *Bahamboula and Others v Minister of Home Affairs*³⁴² dealt with a 2013 practice of the Department of Home Affairs (DHA) that asylum seeker visas would be extended no more than twelve times.³⁴³ This arbitrary practice left many asylum seekers with expired documents therefore rendering them, by no fault of their own, legally unqualified to work in SA and susceptible to deportation.

³⁴⁰ Davies B 'The rights of illegal workers and workers engaged in illegal activities' 2018 available at <https://www.qolegal.co.za/illegal-workers-south-africa/> (accessed 15 November 2021).

³⁴¹ Tanzer Z and Gwenyaya T 'Shadow Report: South Africa's Compliance with Labour Obligations under the International Covenant on Economic, Social and Cultural Rights' (2018) *Shadow Report 3*; Fish JN 'Rights across borders: Policies, protections and practices for migrant domestic workers in South Africa' in Du Toit D (ed) *Exploited, undervalued – and essential: Domestic workers and the realisation of their rights* (2013) 260.

³⁴² *Bahamboula and Others v Minister of Home Affairs and Others* 2014 (9) BCLR 1021 (WCC).

³⁴³ *Bahamboula and Others v Minister of Home Affairs and Others* 2014 (9) BCLR 1021 (WCC) para 1.1; Khan, F *In Chronic Exile: A critique of South Africa's Legal Regime for refugees in Protracted Refugee Situations* (Unpublished LLD thesis, University of Cape Town 2017) 175.

According to Vettori the difficulties faced by migrant workers are further apparent in the fact that immigration laws are often enforced with much more zeal than labour law.³⁴⁴ Vettori further states that despite the progressive legislation such as the Constitution, the LRA and rulings of the courts, migrant workers generally do not often enjoy what is internationally accepted as fair working or decent working conditions.³⁴⁵ Vettori lists institutional unwillingness and/or inability to implement or rather, properly implement, labour laws as one of the reasons that migrant workers do not enjoy decent working conditions.³⁴⁶ The majority of migrants are often unaware of their labour law rights or the existence of them.³⁴⁷ Furthermore in the event that migrants are knowledgeable of their rights, they are often too afraid to try and enforce their rights.³⁴⁸

According to Fish, the conflict between labour legislation and Immigration legislation may be due to the BOR itself.³⁴⁹ This is due to the fact that the wording of the BOR extends an unqualified right to fair labour practices to *everyone* but at the same time it limits the right to enter, remain and reside anywhere in the republic,³⁵⁰ as well as the freedom of occupation to citizens only.³⁵¹

3.3.2 The requirement of legal documentation and its effects

In the modern bureaucratic state, identity documents are essential to accessing necessities such as education, banking, employment, housing and registration of births.³⁵² Furthermore

³⁴⁴Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 8.

³⁴⁵Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 7.

³⁴⁶Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 7.

³⁴⁷ United Nations 'Combating violence against migrants; Criminal justice measures to prevent, investigate, prosecute and punish violence against migrants, migrant workers and their families and to protect victims' (2015) *UNODC* 2.

³⁴⁸ United Nations 'Combating violence against migrants; Criminal justice measures to prevent, investigate, prosecute and punish violence against migrants, migrant workers and their families and to protect victims' (2015) *UNODC* 2.

³⁴⁹ Fish JN 'Rights across borders: Policies, protections and practices for migrant domestic workers in South Africa' in Du Toit D (ed) *Exploited, undervalued – and essential: Domestic workers and the realisation of their rights* (2013) 260.

³⁵⁰ The Constitution, s21(3).

³⁵¹ The Constitution, s22; Fish JN 'Rights across borders: Policies, protections and practices for migrant domestic workers in South Africa' in Du Toit D (ed) *Exploited, undervalued – and essential: Domestic workers and the realisation of their rights* (2013) 261.

³⁵² Khan F and Kolabhai M 'Bureaucratic Barriers to Social Protection for Refugees and Asylum Seekers' 2021 2 *AHMR* 78.

without an identity document one cannot receive a grant, enter a burial scheme, legally get married or be buried.³⁵³ Put plainly, Identity documents are necessary for every kind of public transaction and facilitate access to rights.³⁵⁴

Asylum seekers have struggled to access asylum documentation in South Africa.³⁵⁵ The struggle by asylum seekers can be seen from the cases brought against the DHA.³⁵⁶ For example, in *Kiliko and others v Minister of Home Affairs (Kiliko)*³⁵⁷ the Western Cape High Court found that limiting the number of applications for asylum seeker permits that can be received per day was unconstitutional.³⁵⁸ Similarly in *Tafira and Others v Ngozwane and Others*³⁵⁹ the DHA had attempted to create a pre-screening system in which refugees were prevented from applying to be asylum seekers.³⁶⁰ The process was dismissed by the court as unconstitutional and unlawful.³⁶¹ These practices in essence affected the ability of refugees and asylum seekers to access documentation.

In *Kiliko*, the court also explained the significance of the right to documentation appropriately thus stating:

‘until an asylum seeker obtains an asylum-seeker permit in terms of section 22 of the Refugees Act, he or she remains an illegal foreigner and, as such, subject to the restrictions, limitations and inroads enumerated in the preceding paragraph, which, self-evidently, impact deleteriously upon or threaten to so impact upon, at least, his or her human dignity and the freedom and security of his or her person.’³⁶²

Naturally attached to the requirement of legal status are the legal documents one would be required to produce in terms of certain labour legislation such as claims in respect of the

³⁵³ Boshoff P ‘Lives ‘on hold’; The Daily Sun and the South African identity document’ (2016) 35(1) *Communicare* 44.

³⁵⁴ Boshoff P ‘Lives ‘on hold’; The Daily Sun and the South African identity document’ (2016) 35(1) *Communicare* 44; Khan F and Kolabhai M ‘Bureaucratic Barriers to Social Protection for Refugees and Asylum Seekers’ 2021 2 *AHMR* 78.

³⁵⁵ Khan F and Kolabhai M ‘Bureaucratic Barriers to Social Protection for Refugees and Asylum Seekers’ 2021 2 *AHMR* 78.

³⁵⁶ Khan F *In Chronic Exile: A critique of South Africa’s Legal Regime for refugees in Protracted Refugee Situations* (Unpublished LLD thesis, University of Cape Town 2017) 171.

³⁵⁷ *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C).

³⁵⁸ *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C) para 35.

³⁵⁹ *Tafira and Others v Ngozwane and Others*, 12 December 2006, unreported, Case No. 12960/06.

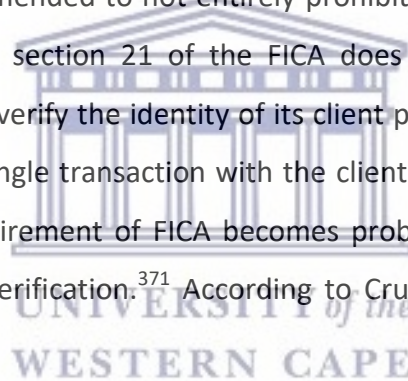
³⁶⁰ *Tafira and Others v Ngozwane and Others*, 12 December 2006, unreported, Case No. 12960/06 page 5-6.

³⁶¹ *Tafira and Others v Ngozwane and Others*, 12 December 2006, unreported, Case No. 12960/06 page 46.

³⁶² *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C) para 7.

COIDA. When reporting an occupational injury, disease or death an employee must provide information and documents which may be prescribed or as the employer or commissioner may direct.³⁶³ This documentation usually includes a valid Identity document or a passport.³⁶⁴ It is submitted that a migrant worker such as an asylum seeker or an illegal migrant worker who cannot present such documents will not be able to claim compensation for work related injuries. Furthermore, claims made in terms of COIDA require pay-outs to be made into a local bank account,³⁶⁵ yet banks often do not allow migrants such as refugees and asylum seekers to open bank accounts.³⁶⁶ Academics have argued that the increased difficulties migrants are experiencing in accessing financial services and opening bank accounts stem from the 2017 Refugees Amendment Act,³⁶⁷ which has resulted in major banks refusing to open accounts for refugees and asylum seekers.³⁶⁸

According to Crush, prior to 2010, the Financial Intelligence Centre Act (FICA) prohibited refugees and asylum-seekers from opening bank accounts in SA.³⁶⁹ Even though the provisions of FICA has been amended to not entirely prohibit refugees and asylum seekers from opening bank accounts, section 21 of the FICA does require that an accountable institution must establish and verify the identity of its client prior to establishing a business relationship or concluding a single transaction with the client or the representatives of the client.³⁷⁰ The verification requirement of FICA becomes problematic due to delays by the DHA in providing requested verification.³⁷¹ According to Crush banks are also given wide



³⁶³ Compensation for Occupational Injury and Disease Act, s41(1).

³⁶⁴ Meyer DJ 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 *SA Merc LJ* 837.

³⁶⁵ Department of Employment and Labour, Notice on Banking Information Requirements for Occupational Injuries and Diseases Related Claims, GN 651 of 19 October 2021.

³⁶⁶ Meyer DJ 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 *SA Merc LJ* 838; Weideman M 'Labour- Related Experience of Migrant and Refugees in SA: ICMC project (the future of work, labour after laudato si)' (2020) *SHIMA* 82.

³⁶⁷ See for example s 5(h), s22 and s 28 of the Refugees Act, as amended.

³⁶⁸ Weideman M 'Labour- Related Experience of Migrant and Refugees in SA: ICMC project (the future of work, labour after laudato si)' (2020) *SHIMA* 82; Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 761.

³⁶⁹ Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 761.

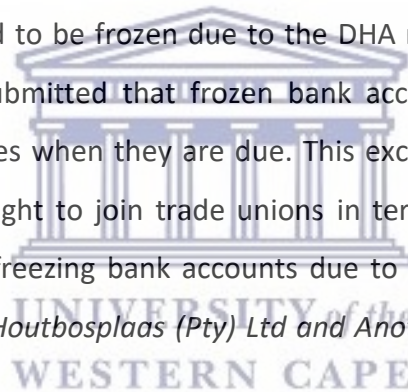
³⁷⁰ Financial Intelligence Centre Act, s 21(1)-(3); Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 761.

³⁷¹ Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 10.

discretion which often leads to the result that many refuse to open accounts for most migrants in general.³⁷²

While some migrants are able to access financial services, the range of services or extent to which they can access financial services is limited by the type of documentation they possess.³⁷³ For example in addition to a valid asylum or refugee permit, banks require proof of residency³⁷⁴ and proof of income.³⁷⁵ Migrants who live in informal settlements and have no recognised address or work as vendors and have no fixed income or proof of income would not be able to open bank accounts.³⁷⁶ There is consensus between FICA and DHA that the DHA would provide banks with the means to verify the authenticity of refugee and asylum-seeker permits.³⁷⁷ In practice however, it is still challenging for migrants to open bank accounts since banks often distrust DHA documentation.³⁷⁸

The requirement of having a bank account also negatively affects a migrant workers ability to join trade unions.³⁷⁹ This is because migrant workers bank accounts (if they were able to open one) have been reported to be frozen due to the DHA not responding to verification requests timeously.³⁸⁰ It is submitted that frozen bank accounts could prevent migrant workers from paying union fees when they are due. This exclusion would affect a migrant workers ability to enjoy the right to join trade unions in terms of section 23(2)(a) of the Constitution. The practice of freezing bank accounts due to a delay of verification by the DHA has been challenged. In *Houtbosplaas (Pty) Ltd and Another v Nedbank Limited*³⁸¹ the



³⁷² Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 761.

³⁷³ Chauke B *Migrants and Access to Financial Services: Exploring alternative financial services available to Zimbabwean migrants who have no access to formal financial services in South Africa* (unpublished MSocSci Development Studies thesis, University of Pretoria 2020) 70.

³⁷⁴ Financial Intelligence Centre Act, S5(1)(f).

³⁷⁵ Chauke B *Migrants and Access to Financial Services: Exploring alternative financial services available to Zimbabwean migrants who have no access to formal financial services in South Africa* (unpublished MSocSci Development Studies thesis, University of Pretoria 2020) 69.

³⁷⁶ Chauke B *Migrants and Access to Financial Services: Exploring alternative financial services available to Zimbabwean migrants who have no access to formal financial services in South Africa* (unpublished MSocSci Development Studies thesis, University of Pretoria 2020) 69.

³⁷⁷ Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 762.

³⁷⁸ Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 762.

³⁷⁹ See discussion below under 3.4.2.

³⁸⁰ Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 10.

³⁸¹ *Houtbosplaas (Pty) Ltd and Another v Nedbank Limited* 2020 (4) SA 560 (GP).

High Court (HC) in Pretoria confirmed that nothing in FICA authorises a bank to freeze any client's accounts.³⁸² The HC held that:

'a business relationship between a financial institution and a customer does not entitle the former to restrict or freeze access to the account of the latter, even in instances where there is a suspicion that the transaction involves unlawful activity.'³⁸³

This means that it is unlawful for banks to freeze a client's account while waiting for verification, even if there is a suspicion of unlawful activity by the client. Although the requirement of being able to provide legal documentation has a purpose in terms of labour laws such as COIDA and even though immigration law sets out time frames for the acquiring of legal documentation,³⁸⁴ in reality migrant workers often suffer due to the inability of the DHA to properly or timeously administer such documents. This leads to numerous negative consequences for migrant workers.³⁸⁵

3.4 DIFFICULTIES FACED BY MIGRANTS: RESTRICTIVE PRACTICES AND LAWS AND THEIR EFFECTS ON MIGRANTS

After the closure of the three refugee reception offices,³⁸⁶ the matter of *Abdulaahi and Others v The Director General of Home Affairs and Others Case*³⁸⁷ addressed the introduction of the practice by the DHA that forces refugees to return to the Refugee Reception Offices (RRO) of their initial application for the renewal of their asylum documentation.³⁸⁸ The court held that:

³⁸² *Houtbosplaas (Pty) Ltd and Another v Nedbank Limited* 2020 (4) SA 560 (GP) para 21; Strategist Migration Services South Africa 'Immigration Update 16 October 2020' available at <https://immigrationspecialists.co.za/immigration-update-16-october-2020/> (accessed 11 May 2022).

³⁸³ *Houtbosplaas (Pty) Ltd and Another v Nedbank Limited* 2020 (4) SA 560 (GP) para 21.

³⁸⁴ See footnote 405 for validity periods of visas.

³⁸⁵ Lawyers for Human Rights 'Costly Protection: Corruption in South Africa's Asylum System' (2020) *Corruption watch and scalabrini centre* 16-17, In 2011, a decision was made to close the Johannesburg RRO and the Port Elizabeth RRO; a further decision was made in 2012 to close the Cape Town RRO; Khan F and Lee M 'Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers' (2018) 4 (2) *African Human Mobility Review* 1212-1213; See Discussion below under 3.4.1

³⁸⁶ See discussion below at 3.4.1

³⁸⁷ *Abdulaahi and Others v The Director General of Home Affairs and Others Case* 7705/2013.

³⁸⁸ *Abdulaahi and Others v The Director General of Home Affairs and Others Case* 7705/2013 para 31.

'the effect of the closure decision of the Cape Town Refugee Reception Office (CTRRO) is that the applicants/asylum seekers will be compelled to leave the Cape Town area where they have established their homes. This result impacts on their rights to dignity and to property and to just administrative action, in terms of the provisions of the Constitution. It is irrational, unjustifiable and inequitable that the Department will grant section 22 permits to Cape Town asylum seekers but not to non-Cape Town asylum seekers. It would be inhumane to force them to leave Cape Town, prior to finality being reached on the closure decision.'³⁸⁹

The court found in favour of the applicants and ordered that the temporary CTRRO renew/extend the asylum permits of the applicants irrespective of where the initial application was made.³⁹⁰ The same position was held by the court in *Nbaya and Others v Director General of Home Affairs (Nbaya)*.³⁹¹ In *Nbaya* the court also dealt with the practice of the DHA forcing asylum seekers to renew or extend their visas at the original RRO which they applied at. The court ordered that the applicants must not be denied extensions or renewals simply because they originally applied at a different RRO.³⁹²

Aside from the practices of the DHA, migrant workers also face difficulties due to the exclusionary and restrictive manner in which SA's IA and RA are drafted.³⁹³ For example in *Mustafa Aman Arse v Minister of Home Affairs (Mustafa)*³⁹⁴ the applicant (Mr Arse) was issued a transit permit in terms of section 23³⁹⁵ of the IA, as amended. At the time, upon reception of the transit permit an applicant for asylum had to report to a RRO within 14 days or they would be deemed an illegal foreigner.³⁹⁶ An illegal foreigner is subject to

³⁸⁹ *Abdulaahi and Others v The Director General of Home Affairs and Others Case 7705/2013* para 63.

³⁹⁰ *Abdulaahi and Others v The Director General of Home Affairs and Others Case 7705/2013* para 23-24.

³⁹¹ *Nbaya and Others v Director General of Home Affairs* 6534 /15 (unreported).

³⁹² *Nbaya and Others v Director General of Home Affairs* 6534 /15 (unreported) para 1.2.

³⁹³ Carciotto S 'The Restrictiveness of Migration Policies in South Africa' (2021) 10 (1) *African Journal of Governance and Development* 132.

³⁹⁴ *Mustafa Aman v Minister of Home Affairs* (2010) 7 BCLR (SCA) 640.

³⁹⁵ Section 23(1) states 'The Director-General may issue an asylum transit permit to a person who at a port of entry claims to be an asylum seeker, which permit shall be valid for a period of 14 days only (2) Despite anything contained in any other law, when the permit contemplated in subsection (1) expires before the holder reports in person to a Refugee Reception Officer at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act. 130 of 1998), the holder of that permit shall become an illegal foreigner and be dealt with in accordance with this Act.'

³⁹⁶ Immigration Act, as amended, s23(2).

detention and deportation in terms of the IA.³⁹⁷ Mr Arse had gone to the RRO within the prescribed period and again for several months after the prescribed period, however due to long queues he was not successful.³⁹⁸ Mr Arse was arrested five months after his entry and remained in detention until the time of the proceedings.³⁹⁹ The time period to report to a RRO has become even more restrictive since the *Mustafa* judgment. Currently migrants in possession of a transit visa have five instead of 14 days to report to a RRO.⁴⁰⁰

From the above mentioned overlaps⁴⁰¹ one can deduce that the problems created by the overlaps go past merely a lack of availability of protection in terms of immigration legislation. Rather the lack of protection leads to a plethora of problems for migrants and migrant workers. These problems will be discussed here.

3.4.1 The department of home affairs and the refugee reception offices

Khan and Rayner suggest that the high rates of undocumented migrants and migrant workers in general can be attributed to the capacity constraints at the DHA.⁴⁰² Capacity constraints often lead to undue delays in the processing of documents for migrant workers.⁴⁰³ As mentioned before, migrant workers require a valid work visa (in terms of the IA), a section 22 asylum seeker visa (in terms of the RA) or section 24 refugee visa in order to work in SA (in terms of the RA). These work visas are issued at the DHA.⁴⁰⁴ When visas are granted they are usually only viable for a short period of time which means that migrant workers would often have to return to the DHA on a regular basis in order to renew their documents.⁴⁰⁵ This has the result of causing further delays as it increases the work load the

³⁹⁷ Immigration Act, s32.

³⁹⁸ *Mustafa Aman v Minister of Home Affairs* (2010) 7 BCLR (SCA) 640 para 2.

³⁹⁹ *Mustafa Aman v Minister of Home Affairs* (2010) 7 BCLR (SCA) 640 para 2.

⁴⁰⁰ Refugees Act, as amended s 21 and Immigration Act, as amended s 23.

⁴⁰¹ See discussions under heading 3.3 above.

⁴⁰² Khan F and Rayner N 'Country Fiche South Africa' (2020) *ASILE* 13 and 16.

⁴⁰³ See Home Affairs 'Issues that affect migrants and citizens: engagement with NGOs & stakeholders' 2019 available at <https://pmg.org.za/committee-meeting/29180/> (accessed 12 November 2021); Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 8.

⁴⁰⁴ South African Government 'How do I obtain a work permit?' available at <https://www.gov.za/faqs/foreigners/how-do-i-acquire-work-permit> (accessed 12 November 2021).

⁴⁰⁵ Immigration Act Regulations, s18 contains the validity period of work visas. For the General and Critical Skills visa the period is 5 years. The Intra-company visa is valid for 4 years. Refugee act regulations s17, contains the validity period of a refugee visa which is valid for four years. A refugee must however apply for a renewal at least 90 days before the visa expires. An asylum seeker visa is generally valid for three to six months

DHA has to deal with.⁴⁰⁶ Furthermore such delays lead to the situation where it is difficult for migrant workers to actually find work or continue working because their documents may expire before they are offered employment.⁴⁰⁷ The SCA in *Minister of Home Affairs & Others v Somali Association of South Africa Eastern Cape & Another*⁴⁰⁸ also confirmed the negative effect delays in granting documentation to migrant workers has by stating that repeated visits to a distant RRO also have the potential to jeopardise the employment and job security of an asylum seeker.⁴⁰⁹

According to Crush those migrants seeking to lawfully enter the country are also subjected to numerous hurdles designed to project SA as being an undesirable destination.⁴¹⁰ Crush identifies these hurdles as being procedural, administrative and logistical with the purpose of complicating access routes and the ability of SA to accommodate any more migrants.⁴¹¹ The most obvious example would be the decision of the DHA to close down half of the RRO in SA.⁴¹² The decision to close down those RRO's has been described as 'not merely a technical or operational decision but one which impacts on the basic principles of the asylum system namely, access (initial applications, renewals and status determination etc) and administrative efficiency and fairness.'⁴¹³

The contradictory outcomes of the courts regarding the decisions to close some of the RRO's lead to the 2017 amendments to the RA which came into effect on 1 January 2020. The 2017 amendments to the RA allow the Director- General of home affairs the powers to

pending a final decision; Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 8.

⁴⁰⁶ Khan F and Rayner N 'Country Fiche South Africa' (2020) *ASILE* 16.

⁴⁰⁷ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 8.

⁴⁰⁸ *Minister of Home Affairs & Others v Somali Association of South Africa Eastern Cape & Another* 2015 (3) SA 545 (SCA).

⁴⁰⁹ *Minister of Home Affairs & Others v Somali Association of South Africa Eastern Cape & Another* 2015 (3) SA 545 (SCA) para 29.

⁴¹⁰ Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 10.

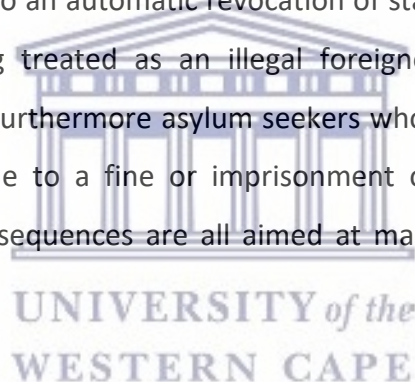
⁴¹¹ Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 9.

⁴¹² Lawyers for Human Rights, Legal Resources Centre and The Scalabrini Centre of Cape Town 'Thematic report on the rights of migrants, asylum seekers and stateless persons in South Africa' 2016 available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23067_E.pdf (accessed 27 November 2021); Ziegler R 'Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?' 2020 10 *Constitutional Court Review* 77.

⁴¹³ Department of Trade and Industry (2013) The draft business licensing bill pretorial: department of trade and industry.

'disestablish' any RRO.⁴¹⁴ The disestablishment of RRO's in itself creates more difficulties for migrant workers as they would most probably have to incur heavy travelling costs to frequently be at the remaining RRO's if they are situated in a city that no longer has a RRO.⁴¹⁵ Furthermore it might lead to an increase in the amount of illegal migrant workers if those with documents decide to not incur the travelling cost because it is either too expensive or they fear losing their jobs.⁴¹⁶ The closure effectively imposed limitations on an asylum seekers and a refugee's choice of place of residence.⁴¹⁷ The closure might in the long run increase tensions between locals and migrant workers as a large number of migrants might flock to the cities with the remaining RRO's to not only insure they are able to keep their lawful status but also engage in work to sustain themselves.⁴¹⁸

For some migrant workers such as asylum seekers who are fully supporting themselves without any assistance from government or the international community the closure of RRO's is even more difficult for them. This is because a failure to renew their visas within one month of expiry will lead to an automatic revocation of status, forfeiture of the right to renewal and ultimately being treated as an illegal foreigner (meaning they would be subjected to deportation).⁴¹⁹ Furthermore asylum seekers whose visas have expired will be guilty of an offence and liable to a fine or imprisonment of up to 5 years or both.⁴²⁰ According to Crush those consequences are all aimed at making SA seem undesirable to



⁴¹⁴ Refugees Act, as amended, s 6(1).

⁴¹⁵ See footnote 402 above for periods of validity of documents; Ziegler R 'Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?' 2020 10 *Constitutional Court Review* 78.

⁴¹⁶ Immigration Act, s 23(2) states that the holder of an asylum transit permit becomes, on expiry of the permit, an 'illegal foreigner' liable to be dealt with under the Immigration Act; Ziegler R 'Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?' 2020 10 7 *Constitutional Court Review* 8.

⁴¹⁷ Ziegler R 'Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?' 2020 10 *Constitutional Court Review* 79.

⁴¹⁸ *Scalabrini Centre, Cape Town and Others v The Minister of Home Affairs and Others* 2013 (3) SA 531 (WCC) at para 110 where the court stated that 'The resultant decision is also grossly unreasonable in its effect. Thousands of asylum seekers will either have to abandon the idea of residing in the Cape Town area while their asylum applications are assessed, or they will need to spend time and money to travel on a number of occasions to RROs in the north of the country. If they have work in Cape Town, they may lose it because of the need to take off three or four days for each attendance at an RRO. If they have dependants, they would need to leave them in the care of others or travel with them.'

⁴¹⁹ Refugees Act, as amended, s 18 (12)-(13).

⁴²⁰ Refugees Act, as amended, s 18 (14)(2); Crush J, Skinner C & Stulgaitis M, 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 8.

certain migrants such as refugees and asylum seekers and furthermore tend to undermine court judgments which affirm the rights of migrants to be employed.⁴²¹

Undermining court judgments can be seen from the current amendments to the RA which explicitly seeks to overturn judgements that permitted asylum seekers to work in SA while their claims are being adjudicated.⁴²² The Standing-Committee on refugees has also been granted the ability to determine a refugee's field of study and limits to the work refugees may perform.⁴²³ According to Crush, if refugees and asylum seekers are not permitted to perform work in the informal sector it will have a major impact on the sector and the rights of migrant workers.⁴²⁴ The impact would be based on the fact that refugees, asylum seekers and illegal foreigners are a prominent portion in the informal sector for providing labour as well providing employment for SA citizens.⁴²⁵

3.4.2 The ability of migrant workers to open bank accounts and join trade unions

Aside from section 23 of the Constitution granting everyone the right to fair labour practices, section 23(2)(a) grants every worker the right to form a join a trade union. Trade unions are associations of workers formed to protect workers' rights and advance their interest.⁴²⁶ Trade unions negotiate with employers through a process known as collective bargaining.⁴²⁷ According to Norton, the presence of migrant workers, specifically illegal migrant workers creates an uneasy tension between the principle of fairness and human rights and a government's desire for flexible labour for certain sectors of the economy and

⁴²¹ Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 8.

⁴²² Refugees Act, as amended, s 18.

⁴²³ Refugees Act, as amended , s 9C (1)(b); Nyoka N 'Amended Refugees Act restricting fundamental rights' (2020) available at <https://mq.co.za/article/2020-01-20-amended-refugee-act-restricts-fundamental-rights/#:~:text=The%20act%20was%20recently%20amended,missions%20under%20threat%20of%20deportati.on.&text=They%20have%20to%20be%20given,country%2C%20so%20they%20can%20return.> (accessed on 28 June 2020)

⁴²⁴ Crush J, Skinner C & Stulgaitis M 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 11.

⁴²⁵ Malatji TL 'Unemployment and Regional Human Mobility; All Roads Lead To South Africa' 2021 11(3) *AJDS* 172.

⁴²⁶ Sandroff R The history of Unions in the United States: Milestone in the struggle to protect workers rights 2021 available at <https://www.investopedia.com/financial-edge/0113/the-history-of-unions-in-the-united-states.aspx> (accessed 14 November 2021).

⁴²⁷ Sandroff R The history of Unions in the United States: Milestone in the struggle to protect workers rights 2021 available at <https://www.investopedia.com/financial-edge/0113/the-history-of-unions-in-the-united-states.aspx> (accessed 14 November 2021).

political sensitivities of their citizens.⁴²⁸ These tensions become apparent in workplaces in a number of ways. One such way relates to trade unions. Trade unions will most likely be reluctant to organise and represent illegal migrant workers who are often employed in the informal sector.⁴²⁹

The informal sector is characterised by irregular hours, fixed term contracts of short duration, seasonal work or working on a part-time basis when they are needed.⁴³⁰ All of the mentioned characteristics of the informal sector make recruitment by trade unions difficult.⁴³¹ Trade unions are also sceptical to recruit informal workers as a general group because of the difficulties in collecting union fees as informal workers are often paid in cash and are not permanently employed⁴³² meaning they might not have a regular income. In addition the fact that migrants struggle to open bank accounts, as mention above, also plays a role. All of these factors add to the difficulty of trade unions being able to collect fees from migrant worker interested in joining trade unions.

According to Taal, the lack of migrant workers in trade unions can also be attributed to threats from their employers as well.⁴³³ The fact that most migrants work in the informal sector makes it easy for employers to impose strategies to deter migrant workers from joining trade unions.⁴³⁴ Such strategies include employers causing a divide amongst locals and foreigners based on the fact that foreigners are most likely to accept exploitive wages and other conditions that locals will not.⁴³⁵ The willingness of foreigners to work for less

⁴²⁸ Norton D 'Workers in the Shadows: An International Comparison on the Law of Dismissal of Illegal Migrant Workers' (2010) *ILJ* 1525; Traunmuller R and Helbling M 'Backlash to policy decisions: how citizens react to immigrants' rights to demonstrate' (2020) *PSRM* 1.

⁴²⁹ Norton D 'Workers in the Shadows: An International Comparison on the Law of Dismissal of Illegal Migrant Workers' (2010) *ILJ* 1525.

⁴³⁰ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 8.

⁴³¹ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 8.

⁴³² Taal M 'Organising in the Hospitality sector in South Africa: A report on the con text, challenges and strategies of organising hotel workers in South Africa' (2012) *Cape Town Labour Research Service* 21.

⁴³³ Taal M 'Organising in the Hospitality sector in South Africa: A report on the con text, challenges and strategies of organising hotel workers in South Africa' (2012) *Cape Town Labour Research Service* 21.

⁴³⁴ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 8.

⁴³⁵ Malatji TL 'Unemployment and Regional Human Mobility; All Roads Lead To South Africa' 2021 11(3) *AJDS* 179 and Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 8.

automatically puts locals and foreigners in competition.⁴³⁶ The fact that migrant workers are willing to accept lesser conditions of work is also used by employers to negatively cast migrant workers as people who destroy the hard won gains South African workers have fought for.⁴³⁷ This negative view of migrant workers often results in migrant workers being ostracized and discouraged from joining trade unions in solidarity with local workers.⁴³⁸

3.4.3 Poverty and its effects on migrants and migrant workers

Most migrants and migrant workers are susceptible to living in poverty.⁴³⁹ A consequence of the above mentioned difficulties namely delays at DHA, closing of the RRO's, not being able to join trade unions are all factors that cause or contribute to the poverty experienced by migrant workers. Migrants are also regarded as being a group of vulnerable people with restricted access to justice.⁴⁴⁰ In terms of the Constitution, everyone has the right to have any dispute which can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.⁴⁴¹

It is submitted that like many other groups of vulnerable people who suffer from poverty, a migrant's ability or likelihood of being able to access courts and other formal justice institutions is near impossible because the court system is inherently expensive and adversarial, which makes it undesirable for many.⁴⁴² According to Carmona and Donald the poorest and most marginalized segments of society which commonly include women, ethnic minorities and illegal foreigners continue to be excluded from accessing justice on an equal footing with the most privilege groups in a population.⁴⁴³ People living in poverty often do

⁴³⁶ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 8.

⁴³⁷ Taal M 'Organising in the Hospitality sector in South Africa: A report on the con text, challenges and strategies of organising hotel workers in South Africa' (2012) *Cape Town Labour Research Service* 21.

⁴³⁸ Taal M 'Organising in the Hospitality sector in South Africa: A report on the con text, challenges and strategies of organising hotel workers in South Africa' (2012) *Cape Town Labour Research Service* 21.

⁴³⁹ Mukumbang C, Ambe AN and Adebisi BO 'Unspoken inequality: how COVID-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees, and undocumented migrants in South Africa' (2020) *International Journal for Equity in Health* 2.

⁴⁴⁰ Matshakaile TN 'Access to Justice for Non-citizens: A Constitutional Analysis (unpublished LLM thesis, Stellenbosch University 2014) 44.

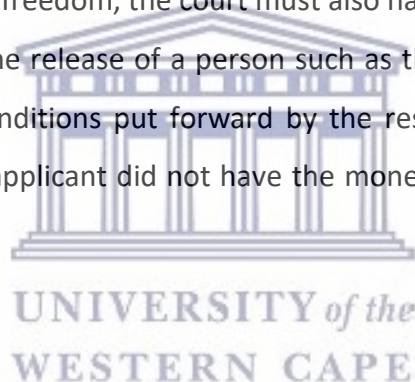
⁴⁴¹ The Constitution, s 34.

⁴⁴² Maziwisa MR 'Access to justice for African Migrants in South Africa' (2019) 20 (4) *ESR Review* 7.

⁴⁴³ Carmona MS and Donald K 'Access to Justice for persons living in poverty: a human rights approach' (2014) *SSRN Electronic Journal* 7.

not have *de facto* or *de jure* access to justice.⁴⁴⁴ This means that people living in poverty are often prevented from claiming, enforcing and contesting violation of their rights.⁴⁴⁵

In fact poverty has previously been used by the courts to deny justice to non-citizens deemed to be indigent.⁴⁴⁶ An indigent person is a person suffering from extreme poverty⁴⁴⁷ or having no money or anything else of value.⁴⁴⁸ In the matter of *Mustafa* the court dismissed the application by Mr Arse to be released from detention because he could not pay the 'reasonable' security cost.⁴⁴⁹ The respondents upon instruction of the presiding judge had suggested conditions for the release of the applicant from detention.⁴⁵⁰ The instruction was given by the presiding judge who showed dissatisfaction at the fact that the applicant had been in detention for longer than the prescribed 120 days.⁴⁵¹ The respondents had suggested amongst other conditions that the applicant pay R2000 to the nearest RRO as security.⁴⁵² The applicant however rejected the conditions as he was unable to pay the R2000.⁴⁵³ The presiding judge dismissed the application by Mr Arse holding that 'despite the importance of a person having freedom, the court must also have regard to the practicalities that would arise in ordering the release of a person such as this, who cannot even comply with eminently reasonable conditions put forward by the respondent'.⁴⁵⁴ The application was thus dismissed since the applicant did not have the money to pay the security cost for his release.⁴⁵⁵



⁴⁴⁴ Carmona, MS and Donald K 'Access to Justice for persons living in poverty: a human rights approach' (2014) *SSRN Electronic Journal* 7.

⁴⁴⁵ Carmona MS and Donald K 'Access to Justice for persons living in poverty: a human rights approach' (2014) *SSRN Electronic Journal* 7.

⁴⁴⁶ Lawson D, Mwambene L and Dublin A 'Gender, poverty and access to justice policy implementation in Sub-Saharan Africa' 2021; Matshakaile TN 'Access to Justice for Non-citizens: A Constitutional Analysis (unpublished LLM thesis, Stellenbosch University 2014) 44.

⁴⁴⁷ Definition of Indigent available at <https://www.merriam-webster.com/dictionary/indigent> (accessed 5 October 2021).

⁴⁴⁸ Definition of Indigent available at <https://dictionary.cambridge.org/dictionary/english/indigent> (accessed 5 October 2021).

⁴⁴⁹ *Mustafa Aman v Minister of Hone Affairs* (2010) 7 BCLR (SCA) 640 para 4.

⁴⁵⁰ *Mustafa Aman v Minister of Hone Affairs* (2010) 7 BCLR (SCA) 640 para 3.

⁴⁵¹ *Mustafa Aman v Minister of Hone Affairs* (2010) 7 BCLR (SCA) 640 para 3.

⁴⁵² *Mustafa Aman v Minister of Hone Affairs* (2010) 7 BCLR (SCA) 640 para 3.

⁴⁵³ *Mustafa Aman v Minister of Hone Affairs* (2010) 7 BCLR (SCA) 640 para 3.

⁴⁵⁴ *Mustafa Aman v Minister of Hone Affairs* (2010) 7 BCLR (SCA) 640 para 4.

⁴⁵⁵ *Mustafa Aman v Minister of Hone Affairs* (2010) 7 BCLR (SCA) 640 para 6.

3.5 CONCLUSION

In conclusion, according to the broad interpretation of the word 'everyone' in the Constitution in relation to the right to equality and the right to fair labour practices, migrant workers across the various categories are include in the protection of the BOR, to the extent that a right is specifically limited to citizens only. Similarly labour legislation such as the LRA, BCEA and the EEA, the definition of the term 'employee' is broad enough to include any worker who qualifies as an 'employee' in respect of that specific legislation regardless of their legal status. The broad interpretation of labour legislation in essence is the root cause of the effect of the intersection between labour and immigration laws. Labour laws tend to acknowledge and grant protection to migrant workers who qualify as employees irrespective of their legal status while immigration policy on the other hand seeks to deport those migrant workers who are here illegally regardless of the circumstances surrounding their illegal status. Furthermore even in instances where migrants workers are given certain rights in terms of SA legislation, like the ability to claim in terms of COIDA, more practical problems such as the correct documents and the ability to have a bank account become obstacle in enjoying their rights.⁴⁵⁶

Even though there has been some progress in case law acknowledging the rights of migrant workers to be treated equally in some instances, more often than not the reality is that migrants either do not know of the extent of the rights or they are afraid of enforcing them. The illegal status of migrant workers does not solely steam from illegal border crossing but can be attributed to the frequent trips migrant workers have to take to renew their work visas, the closing down of some of the RRO's and the expenses they are likely to incur on these trips. Furthermore for those migrant workers who have all of the required legal documentation, this still does not guarantee that their labour rights will be respected and protected in the same manner as citizens. Some migrant workers, usually those employed in the informal sector, are often discriminated against based solely on the fact that they are foreigners. The discrimination is present in a number of ways for example not being able to

⁴⁵⁶ Citizens may face the same or similar issues as their non-national counterparts, however, the discussion of citizens issues falls outside of the scope of this research. See World Economic Forum, 6 Challenges to Financial Inclusion in South Africa available at <https://www.weforum.org/agenda/2017/04/financial-inclusion-south-africa/> (accessed 15 March 2023).

open a bank account or join trade unions. The next chapter will compare the protections illustrated in this chapter in terms of SA law with the jurisdictions of the USA and the EU.



Chapter 4

Comparative Analysis: United States of America and the European Union

4.1 INTRODUCTION

After establishing the position of migrant workers in SA throughout chapters 2-3, chapter 4 will compare the positions of migrant workers in the USA and the EU to SA. This will be done by evaluating the USA's and EU's domestic labour legislation, immigration policies and case law on the status of migrant workers within their borders. Considering the labour rights from the perspective of other jurisdictions and how they deal with different forms of migrant workers could aid SA in its current approach to dealing with the labour rights of migrant workers. The USA was chosen as it has an opposite stance to that of SA in as far as the regulation of irregular migrants is concerned.⁴⁵⁷ The EU again adopted an internal free movement project to immigration control, aimed at allowing free movement of labour, service provision and establishment across the EU.⁴⁵⁸ An assessment of whether some of the aspects of the USA and EU in governing immigration could be beneficial to SA.

4.2 UNITED STATES OF AMERICA (USA)

4.2.1 Migrants and the right to work

The USA, much like SA, is seen as a popular immigrant destination.⁴⁵⁹ In the USA, immigration laws can be found in the Immigration and Nationality Act 1952 (INA).⁴⁶⁰ The INA is a Federal law.⁴⁶¹ The INA brought together all the federal (national) statutes on immigration and naturalisation, and it remains the basic body of immigration law.⁴⁶² Immigration at federal level is further governed by the Immigrations Reforms and Controls Act of 1986 (IRCA).

⁴⁵⁷ Henegham SM 'Employment Discrimination Faced by the Immigrant Worker- A lesson from the United States and South Africa' (2012) 35 *Fordham International Law Journal* 1783.

⁴⁵⁸ Freeland M and Costello C 'Migrants at work and the division of Labour Law' in Costello, C and Freeland, M (ed) *Migrants at Work: Immigration and Vulnerability in Labour Law* (2014) 6.

⁴⁵⁹ Fix M, Hooper K and Zong J 'How are Refugees fairing? Integration at U.S and State Levels' (2017) *MPI* 3.

⁴⁶⁰ Immigration and Nationality Act, Pub.L. No.82-414,66 Stat.162 (1952); Maltby SJO, Pored EL and Guardado MG 'United States' in Magrath C 'The Corporate Immigration Review' (2019) 9th Ed 363.

⁴⁶¹ Immigration Law (U.S) Research Guide, List of current Federal Laws available at <https://guides.ll.georgetown.edu/c.php?g=273371&p=1824780> (accessed 2 June 2022).

⁴⁶² Maltby SJO, Pored EL and Guardado MG 'United States' in Magrath C 'The Corporate Immigration Review' (2019) 9th Ed 363.

With regards to migrant workers such as refugees and asylum seekers in the USA, Zetter and Ruadel are of the opinion that the right to work and the role of employment law for refugees is relatively clear cut.⁴⁶³ Refugees or asylum seekers have permanent permission to live and work in the USA.⁴⁶⁴ Undocumented migrants⁴⁶⁵ on the other hand have less access to labour protections as will be seen in the case law discussion below. Generally speaking, however, the definition of employee in terms of the Fair Labour Standards Act of 1938 (FLSA) includes undocumented migrant workers.⁴⁶⁶

4.2.1.1 Refugees

Several federal laws⁴⁶⁷ protect the right to work of refugees regardless of where in the USA they are situated.⁴⁶⁸ This is because in terms of the INA, the application for employment authorisation is automatically filed for the refugee when their admission is approved.⁴⁶⁹ Furthermore a form 1-94 (arrival-departure record) is usually issued upon arrival or soon thereafter, and stamped to indicate that their employment is authorised.⁴⁷⁰ Thus in respect of USA law, namely the INA, once a refugee status has been approved a refugee can work with immediate effect.⁴⁷¹ If however the employment authorisation document (EAD) has



⁴⁶³ Zetter R and Ruadel H 'Refugees Rights to Work and Access to Labor Markets-An Assessment (2016) *KNOMAD* 205.

⁴⁶⁴ Title 8 - Aliens and Nationality, 8 CFR §274a.12 (available at <https://www.govinfo.gov/content/pkg/CFR-2019-title8-vol1/xml/CFR-2019-title8-vol1-sec274a-12.xml> (accessed 2 June 2022); U.S Department of Justice, Employment Rights and Resources for Refugees and Asylees available at <https://www.justice.gov/crt/case-document/file/1132566/download> (accessed on 6 October 2020).

⁴⁶⁵ The term undocumented migrant is usually used in the USA as opposed to illegal foreigner in SA. These terms will therefore be used interchangeably.

⁴⁶⁶ Griffith KL 'U.S. Migrant worker law: The interstices of Immigration and labour and employment law' (2009) *ILR* 140; Costa D 'California leads the way: A look at California laws that help protect labour standards for unauthorised immigrant workers' available at <https://www.epi.org/publication/california-immigrant-labour-laws/>. (accessed on 30 August 2019).

⁴⁶⁷ Title 8 - Aliens and Nationality, 8 CFR §274a.12; Immigration and Reforms Act. Sec. 274B.8 USC 1324b.

⁴⁶⁸ U.S Department of Justice, Employment Rights and Resources for Refugees and Asylees available at <https://www.justice.gov/crt/case-document/file/1132566/download> (accessed on 6 October 2020).

⁴⁶⁹ US Citizenship and Immigration Services under Refugees 'Working in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees> (accessed 8 October 2020); Zetter, R and Ruadel H 'Refugees Rights to Work and Access to Labor Markets-An Assessment (2016) *KNOMAD* 205.

⁴⁷⁰ US Citizenship and Immigration Services under Refugees 'Working in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees> (accessed 8 October 2020).

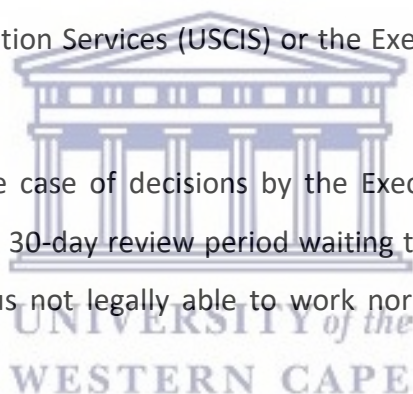
⁴⁷¹ 8 U.S. Code § 1158(c)(1)(B); US Citizenship and Immigration Services under Refugees 'Working in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees> (accessed 8 October 2020).

not been finalised, refugees are still entitled to work for up to 90 days pending the EAD.⁴⁷² In this situation their admission document will serve as proof of permission to work.⁴⁷³

4.2.1.2 Asylum Seekers

In the case of asylum seekers on the other hand, the situation is a bit more complex. Asylum seekers are governed in terms of 8 U.S. Code § 1158,⁴⁷⁴ titled *Asylum*. Asylum seekers have the right to seek employment due to their asylum status, but this right to be employed is subject to conditions.⁴⁷⁵ Similar to refugees, asylum seekers require an EAD after they have been granted asylum in order to be able to work.⁴⁷⁶ Unlike refugees, the EAD is not automatically filed on their behalf once their status has been approved.⁴⁷⁷ The asylum seeker is required to apply for the EAD instead.⁴⁷⁸ The EAD may either be issued by the Asylum office, an Immigration Judge or the Board of Immigration Appeals.⁴⁷⁹ The EAD may however only be applied for 180 days after they have filed for asylum or if an application for asylum has been pending for more than 150 days without a decision by either the United States Citizenship and Immigration Services (USCIS) or the Executive Office for Immigration Review.⁴⁸⁰

It should be noted that in the case of decisions by the Executive Office for Immigration Reviews, there is an additional 30-day review period waiting time.⁴⁸¹ Those asylum seekers awaiting authorisation are thus not legally able to work nor are they eligible for federal



⁴⁷² US Citizenship and Immigration Services under Refugees 'Working in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees> (accessed 8 October 2020).

⁴⁷³ US Citizenship and Immigration Services under Refugees 'Working in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees> (accessed 8 October 2020).

⁴⁷⁴ 8 U.S. Code § 1158 available at <https://www.law.cornell.edu/uscode/text/8/1158>

⁴⁷⁵ Zetter R and Raudel H 'Refugees Rights to Work and Access to Labor Markets-An Assessment (2016) *KNOMAD* 205.

⁴⁷⁶ 8 U.S. Code § 1158(d)(2); US Citizenship and Immigration Services under 'Permission to work in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> (accessed 8 October 2020).

⁴⁷⁷ US Citizenship and Immigration Services under Asylum 'Permission to work in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> (accessed 8 October 2020).

⁴⁷⁸ 8 U.S. Code § 1158(d)(2); US Citizenship and Immigration Services under 'Permission to work in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> (accessed 8 October 2020).

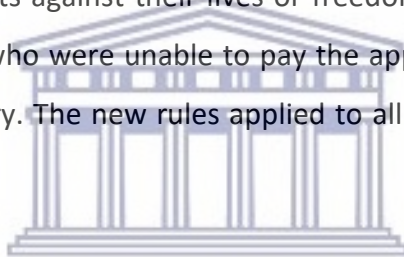
⁴⁷⁹ US Citizenship and Immigration Services under 'Permission to work in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> (accessed 8 October 2020).

⁴⁸⁰ 8 U.S. Code § 1158(d)(2); US Citizenship and Immigration Services under 'Permission to work in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> (accessed 8 October 2020).

⁴⁸¹ 8 U.S. Code § 1158(d)(4)(iii).

benefits.⁴⁸² They are thus often left in vulnerable positions, and more often than not their waiting period for permission to work extends to years.⁴⁸³ To add on to this, in 2020, the Donald Trump administration created rules and regulations relating to the waiting period of asylum seekers to apply for EAD's.⁴⁸⁴ These new rules which was issued on 26th June 2020, extended the waiting period from 150 days to 365 days.⁴⁸⁵

In addition to the extended waiting period, the new rules imposed a fee of \$50 for an application for asylum and a \$460 fee for the accompanying application for work authorisation.⁴⁸⁶ According to Frelick, these new rules marked the first time in American history that the USA required people seeking asylum to pay to have their claims considered.⁴⁸⁷ The imposed fee in essence went against the foundation of international law, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁴⁸⁸ and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)⁴⁸⁹ which prohibits sending refugees back to a place where they have to face threats against their lives or freedom.⁴⁹⁰ The end result for those refugees and asylum seekers who were unable to pay the application fees meant they had to return to their home country. The new rules applied to all people who voluntarily apply



⁴⁸² Zetter R and Ruadel H 'Refugees Rights to Work and Access to Labor Markets-An Assessment (2016) KNOMAD 205.

⁴⁸³ Zetter R and Ruadel H 'Refugees Rights to Work and Access to Labor Markets-An Assessment (2016) KNOMAD 205.

⁴⁸⁴ These rules are contained in the Asylum Application, Interview, and Employment Authorization for Applicants, 84 FR 62374 available at https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-13544.pdf?utm_medium=email&utm_campaign=pi+subscription+mailing+list&utm_source=federalregister.gov (accessed 7 October 2020).

⁴⁸⁵ Asylum Application, Interview, and Employment Authorization for Applicants, 84 FR 62374 page 5 available at https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-13544.pdf?utm_medium=email&utm_campaign=pi+subscription+mailing+list&utm_source=federalregister.gov and Human Rights First <https://www.humanrightsfirst.org/press-release/human-rights-first-condemns-rule-keeping-asylum-seekers-work-authorization> (accessed on 7th October 2020).

⁴⁸⁶ Frelick B 'US to Refugees: Poor Asylum Seekers Need not Apply <https://www.hrw.org/news/2019/11/16/us-refugees-poor-asylum-seekers-need-not-apply> (accessed on 8th October 2020).

⁴⁸⁷ Frelick B 'US to Refugees: Poor Asylum Seekers Need not Apply <https://www.hrw.org/news/2019/11/16/us-refugees-poor-asylum-seekers-need-not-apply> (accessed on 8th October 2020).

⁴⁸⁸ International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) United Nations General Assembly, UN Treaty Series, vol 1465 available at <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

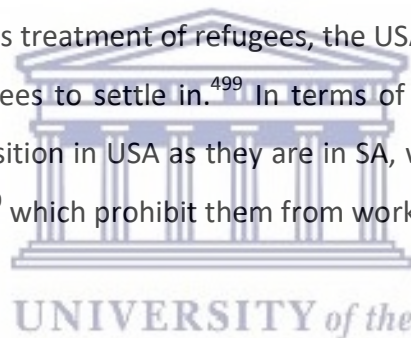
⁴⁸⁹ International Convention for the Protection of All Persons from Enforced Disappearance(2006) United Nations General Assembly resolutions 61/177 (2007) available at <https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx>

⁴⁹⁰ CAT, Article 3(1) and ICPPED, Article 16(1).

for asylum.⁴⁹¹ According to Frelick it was the only USA immigration service which did not include a waiver fee provision for those refugees and asylum seekers who were too poor to pay.⁴⁹² Following the decision in *Asylumworks v. Mayorkas*⁴⁹³ in February 2022, the USCIS has stopped applying the new rules.⁴⁹⁴ A notice on the official USCIS website instructs that the provisions governing asylum applications, interviews, and employment authorization eligibility that were in place before the new rules took effect will be applied once again.⁴⁹⁵

Those refugees and asylum seekers who manage to satisfy the regulations for employment, fall within the full protection of all USA employment and labour laws.⁴⁹⁶ They are therefore able to enjoy the same rights and protections as citizens with regards to employment contracts, health and safety, wage regulation, pensions and trade union membership to mention a few.⁴⁹⁷

While migrant workers are entitled to the same rights as citizen, it is often not the reality for some migrants. Much like SA, the USA's refugee admissions programme faces significant challenges.⁴⁹⁸ Compared to SA's treatment of refugees, the USA at the very least allows for a cash allowance to allow refugees to settle in.⁴⁹⁹ In terms of asylum seekers on the other hand, they are in the same position in USA as they are in SA, with limited benefits from the government and recent laws⁵⁰⁰ which prohibit them from working for long periods of time.



⁴⁹¹ Frelick B 'US to Refugees: Poor Asylum Seekers Need not Apply' <https://www.hrw.org/news/2019/11/16/us-refugees-poor-asylum-seekers-need-not-apply> (accessed on 8th October 2020).

⁴⁹² Frelick B 'US to Refugees: Poor Asylum Seekers Need not Apply' <https://www.hrw.org/news/2019/11/16/us-refugees-poor-asylum-seekers-need-not-apply> (accessed on 8th October 2020).

⁴⁹³ *Asylumworks v. Mayorkas* Civil Action 20-cv-3815 (BAH) DDC (2022).

⁴⁹⁴ USCIS notice available at <https://www.uscis.gov/laws-and-policy/other-resources/class-action-settlement-notices-and-agreements/uscis-stops-applying-certain-ead-provisions-for-asylum-applicants#:~:text=You%20may%20apply%20for%20employment,you%20file%20your%20asylum%20applicatio> (accessed 21 July 2022).

⁴⁹⁵ USCIS notice available at <https://www.uscis.gov/laws-and-policy/other-resources/class-action-settlement-notices-and-agreements/uscis-stops-applying-certain-ead-provisions-for-asylum-applicants#:~:text=You%20may%20apply%20for%20employment,you%20file%20your%20asylum%20applicatio> (accessed 21 July 2022).

⁴⁹⁶ Zetter R and Ruadel H 'Refugees Rights to Work and Access to Labor Markets-An Assessment (2016) KNOMAD 206.

⁴⁹⁷ Zetter R and Ruadel H 'Refugees Rights to Work and Access to Labor Markets-An Assessment (2016) KNOMAD 206.

⁴⁹⁸ Kerwin D 'The faltering US Refugee Protection System: Legal and Policy Responses to Refugees, Asylum Seekers and Others in need' (2012) *Refugee Survey Quarterly* 2.

⁴⁹⁹ Fix M, Hooper K and Zong J 'How are Refugees fairing? Integration at U.S and State Levels' (2017) *MPI* 7-8

⁵⁰⁰ Asylum Application, Interview, and Employment Authorization for Applicants, 84 FR 62374 available at <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020->

4.2.1.3 Undocumented/Illegal migrant workers

Like the IA 13 of 2002 in SA, the IRCA prohibits employers from hiring illegal migrants.⁵⁰¹ The IRAC also imposes sanctions against employers who knowingly employ or continue to employ illegal migrants.⁵⁰² The IRAC further instituted the I-9 (employment eligibility) form which requires employers to verify the employment eligibility of their employees. The IRAC contains both civil and criminal sanctions for employers who knowingly hire illegal migrants.⁵⁰³ When viewed comprehensively, the IRCA mainly focuses on employer restrictions, however it does to some degree target the actions of illegal migrant workers as well.⁵⁰⁴ As an example §§ 1324 c(a)(1)-(3) of IRAC imposes a fine or criminal prosecution for foreign nationals who violate the IRAC by using forged, counterfeit, altered or falsely made documents in order to obtain work. In this regard IRAC goes beyond section 38 of IA. Regardless of the IRCA prohibiting illegal migrants from working, according to Griffith, it is widely accepted that illegal migrant workers share the same labour and employment law rights as their documented counterparts.⁵⁰⁵ In terms of the USA labour and employment statutes, workplace rights are provided for all employees.⁵⁰⁶ These laws, unlike immigration law apply equally to documented and undocumented migrant workers.⁵⁰⁷

Even though the IRAC prohibits the employment of illegal migrants, in terms of the FLSA, all workers are granted the right to a certain minimum wage and overtime rates regardless of



[13544.pdf?utm_medium=email&utm_campaign=pi+subscription+mailing+list&utm_source=federalregister.gov](https://www.federalregister.gov/documents/2014/07/11/13544.pdf?utm_medium=email&utm_campaign=pi+subscription+mailing+list&utm_source=federalregister.gov) (accessed 7 October 2020).

⁵⁰¹ Title I of the IRAC prohibits persons or other entities from (1) Hiring, recruiting or refer for a fee for U.S employment any alien knowing that such a person is unauthorised to work, or any person without verifying his or her work status: or (2) continue to employ an alien knowing of such person's unauthorised work status; Norton D 'Workers in the Shadows: An International Comparison on the Law of Dismissal of Illegal Migrant Workers' (2010) 31 *ILJ* 1521.

⁵⁰² Immigrations Reforms and Controls Act 1986, § 1324 a(e)(4)A and § 1324 a(f)(1) for civil and criminal sanctions imposed on employers who violate the IRAC.

⁵⁰³ See § 1324 a(e)(4)A of IRAC which punishes employers who violate the IRAC with a civil fine and § 1324 a(f)(1) of IRAC which states employers who violate the IRAC may be subject to criminal prosecution; Griffith, KL 'U.S. Migrant worker law: The interstices of Immigration and labour and employment law' (2009) *ILR* 125.

⁵⁰⁴ Griffith KL 'U.S. Migrant worker law: The interstices of Immigration and labour and employment law' (2009) *ILR* 140.

⁵⁰⁵ Griffith KL 'U.S. Migrant worker law: The interstices of Immigration and labour and employment law' (2009) *ILR* 140; Costa D 'California leads the way: A look at California laws that help protect labour standards for unauthorised immigrant workers' available at <https://www.epi.org/publication/california-immigrant-labour-laws/>. (accessed on 30 August 2019).

⁵⁰⁶ See definition of employee in 29 U.S. Code§ 203.

⁵⁰⁷ *Sure-Tan Inc v NLRB* 467 U.S 883 (1984) p892, the court stated that undocumented aliens come within the broad statutory definition of employee.

their status.⁵⁰⁸ A worker is not defined in the FLSA. The FLSA does however define the term *employee*.⁵⁰⁹ According to scholars such as Griffith and Costa, the definition of employee as provided in the FLSA includes illegal migrants.⁵¹⁰ According to Brigg, although it is seldom acknowledged, immigration legislation is the most basic labour legislation, in so far as it lays out who is legally eligible to be a member of the labour force.⁵¹¹

The Supreme Court's (SC) interpretation of the IRCA has created ambiguity about which labour and employment law remedies are available to illegal migrant workers.⁵¹² The different views of the SC will be discussed in terms of the case law discussion below.

4.2.2 Intersection between labour and immigration law in the USA as observed through case law

4.2.2.1 *Sure-Tan v NLRB* (*Sure-Tan*)

*Sure-Tan Inc v NLRB*⁵¹³ set the existing precedent in the USA that the legal status of an employee is not affected by the workers' immigration status.⁵¹⁴ The dispute in *Sure-Tan* arose due to employees wanting to unionise. *Sure-Tan* permitted the awarding of back pay to employees who were unlawfully dismissed regardless of whether or not they are illegal foreigners in terms of USA law.⁵¹⁵ Thus, much like SA, migrant workers regardless of their immigration status, could still be classified as an employee in terms of labour law if they meet the requirements of an 'employee'. *Sure-Tan* was however decided before the IRCA came into force. The National Labour Relations Board (NLRB) still applied the precedent of *Sure-Tan* that all migrant workers were employees for the purpose of the National Labour

⁵⁰⁸ See definition of employee in 29 U.S. Code § 203; Costa D 'California leads the way: A look at California laws that help protect labour standards for unauthorised immigrant workers' available at <https://www.epi.org/publication/california-immigrant-labour-laws/>. (accessed on 30 August 2019).

⁵⁰⁹ Fair Labour Standards Act 1983, § 203.

⁵¹⁰ Griffith KL 'U.S. Migrant worker law: The interstices of Immigration and labour and employment law' (2009) *ILR* 140; Costa, D 'California leads the way: A look at California laws that help protect labour standards for unauthorised immigrant workers' available at <https://www.epi.org/publication/california-immigrant-labour-laws/>. (accessed on 30 August 2019).

⁵¹¹ Briggs VM 'Illegal Immigration and Immigration Reform: Protecting the Employment Rights of the American Labor Force (the Native Born and Foreign Born) who are Eligible to be Employed' (2010) *Public Interest Law Journal* 1-9.

⁵¹² Griffith KL 'U.S. Migrant worker law: The interstices of Immigration and labour and employment law' (2009) *ILR* 141.

⁵¹³ *Sure-Tan Inc v NLRB* 467 U.S. 883 (1984).

⁵¹⁴ *Sure-Tan Inc v NLRB* 467 U.S. 883 (1984) p887.

⁵¹⁵ *Sure-Tan Inc v NLRB* 467 U.S. 883 (1984) p900-901.

Relations Act of 1935 (NLRA).⁵¹⁶ The NLRA was created to mainly protect the rights of both employers and employees.⁵¹⁷ Much like SA's LRA, the NLRA aims to do this by allowing for and encouraging collective bargaining.⁵¹⁸ The NLRA was created by the NLRB, which since the enactment of the NLRA has been party to a number of labour disputes between employers and employees. The NLRB applied the precedent of *Sure-Tan* that all migrant workers were employees for the purpose of the NLRA until 2002, when the courts heard the matter of *Hoffman Plastic compound v NLRB (Hoffman)*.⁵¹⁹

4.2.2.2 Hoffman Plastic Compound v NLRB

Mr Jose Castro was hired by Hoffman Plastic Compound Inc in 1988, with the use of false documents, which at the time of hiring was not known to be false by the company.⁵²⁰ Similarly to *Sure-Tan* the dispute of the matter arose after employees of the company wanted to unionise. In 1989 the company decided to dismiss union workers in its workforce, of whom Mr Castro was one.⁵²¹ The NLRB found that the layoff of the employees violated §8(a)(3)⁵²² of the NLRA and ordered that those employees that were dismissed should be reinstated and awarded back pay.⁵²³ During the compliance hearing in 1993 however, the false documentation of Mr Castro came to light.⁵²⁴ The presiding Administrative Law Judge (ALJ) determined that Mr Castro's illegal status prohibited him from being able to be awarded back pay of reinstatement.⁵²⁵ The ALJ's reasoning was that such remedies in the case of Mr Castro would conflict with the IRCA which prohibited employers from knowingly hiring illegal foreign nationals.⁵²⁶

The NLRB overturned the ALJ's finding and decided that even though reinstatement would be impossible for Mr Castro, back pay would be the most effective way to further the

⁵¹⁶ National Labour Relations act of 1935; *Sure-Tan Inc v NLRB* 467 U.S 883 (1984) 887.

⁵¹⁷ See United States of America available at https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=105993 (accessed 30 October 2021)

⁵¹⁸ National Labour Relations act of 1935.,Sec. 7. [§ 157.]

⁵¹⁹ *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002).

⁵²⁰ *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002) 140-141.

⁵²¹ *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002) 140.

⁵²² Section 8(a)(3) of the NLRA prohibits discrimination 'in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labour organisation.'

⁵²³ *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002) 140-141.

⁵²⁴ *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002) 141.

⁵²⁵ *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002) 141.

⁵²⁶ *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002) 141.

immigration policy within the IRCA, by insuring that the protections and remedies in respect of the NLRA are extended to undocumented workers in the same manner as to other employees.⁵²⁷

The court then considered *Sure-Tan*, which was factually similar to the matter of *Hoffman*.⁵²⁸ *Sure-tan* as mentioned before permits the awarding of back pay to illegal foreigners but on condition that they were lawfully entitled to be present and employed in the US, in order to collect such back pay. Instead of clarifying the scope of *Sure-Tan* however, the SC in *Hoffman* focused on the fact that the Immigration law had significantly changed since the enactment of the IRCA.⁵²⁹ In light of IRCA, the SC stated that a back pay award for a job obtained in the first instance by criminal fraud, not only trivializes the Immigration laws, it condones and encourages future violations.⁵³⁰ The court thus reversed the back pay award granted in favour of Mr Castro.⁵³¹

4.2.2.3 The effect of case law on the rights of migrant workers regarding dismissal

The SC's decision in *Hoffman* to not allow back pay to those workers who are unauthorised to work in USA limits the protection available to such workers. Not only are workers not allowed to be reinstated due to the IRACs prohibition on the hiring of illegal migrant workers but such workers are not entitled to back pay in the event that they are dismissed even if the dismissal is unfair.⁵³² While the reasoning behind prohibiting back pay for employment obtained through the use of false documents is sound, it is submitted that matters regarding the dismissal of undocumented migrants should be handled on a case by case bases, taking into account the actions of the employer and fairness of the dismissal.

The *Hoffman* judgment has a negative spill-over effect into other areas of labour and employment laws which apply to undocumented migrant workers.⁵³³ Generally speaking

⁵²⁷ *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002) 141.

⁵²⁸ *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002) 144.

⁵²⁹ *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002) 147-149.

⁵³⁰ *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002) 149-150.

⁵³¹ *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002) 160-161.

⁵³² *Hoffman Plastic compound v NLRB* 535 U.S 137 (2002); Newton L 'Who Governs Immigrant Labor? Status, Residency, and Rights in Federal and State Law' (2020) 50(3) *The Journal of Federalism* 484.

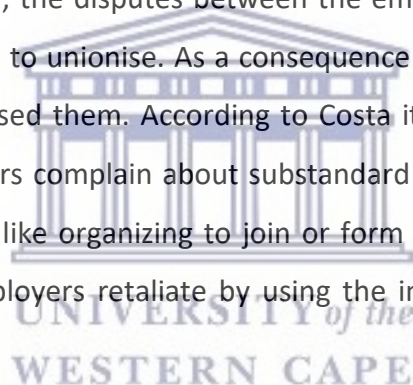
⁵³³ United Workers Congress 'United States Compliance with the International Covenant on Civil and Political Rights, Freedom of Association and Right to Equality and Non-Discrimination at Work' 2013 available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_14575_E.pdf (accessed 14 November 2021).

Federal worker protection does not distinguish between immigrant and citizen workers nor does it describe protection according to legal status.⁵³⁴ The protection of safety regulations and wage floors, to mention a few, are therefore equally applicable to all employees.⁵³⁵ Based on the reasoning by the SC for the refusal of back pay to undocumented migrant workers, a number of states in the USA have used the ruling of the SC to disallow payments to undocumented migrant workers for work related injuries since they are technically not allowed to work in terms of the IRAC.⁵³⁶

4.2.2.4 The effect of case law on the rights of migrant workers in the USA regarding trade unions

As previously mentioned the NLRA allows for and encourages collective bargaining.⁵³⁷ Through the process of collective bargaining, trade unions are able to contract for better pay, hours, benefits and job health and safety benefits for their members.⁵³⁸

In both *Sure-Tan* and *Hoffman*, the disputes between the employers and employees arose due to the employees wanting to unionise. As a consequence of the employees wanting to unionise, the employer dismissed them. According to Costa it is a common practice when undocumented migrant workers complain about substandard conditions, unpaid wages, or engage in protected activities like organizing to join or form a union, their employers can and often do retaliate.⁵³⁹ Employers retaliate by using the immigration status of migrant



⁵³⁴ Newton L 'Who Governs Immigrant Labor? Status, Residency, and Rights in Federal and State Law' (2020) 50(3) *The Journal of Federalism* 483.

⁵³⁵ Newton L 'Who Governs Immigrant Labor? Status, Residency, and Rights in Federal and State Law' (2020) 50(3) *The Journal of Federalism* 483.

⁵³⁶ United Workers Congress 'United States Compliance with the International Covenant on Civil and Political Rights, Freedom of Association and Right to Equality and Non-Discrimination at Work' 2013 available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_14575_E.pdf (accessed 14 November 2021). Newton L 'Who Governs Immigrant Labor? Status, Residency, and Rights in Federal and State Law' (2020) 50(3) *The Journal of Federalism*.

⁵³⁷ National Labour Relations Act of 1935, sec. 7. [§ 157].

⁵³⁸ Sandroff R The history of Unions in the United States: Milestone in the struggle to protect workers rights 2021 available at <https://www.investopedia.com/financial-edge/0113/the-history-of-unions-in-the-united-states.aspx> (accessed 14 November 2021).

⁵³⁹ Costa D 'California leads the way: A look at California laws that help protect labour standards for unauthorised immigrant workers' available at <https://www.epi.org/publication/california-immigrant-labour-laws/>. (accessed on 30 August 2019).

workers as an excuse to fire them, by threatening to call federal immigration authorities, or by actually calling immigration authorities.⁵⁴⁰

It is submitted that the ruling in *Hoffman* will discourage undocumented migrant workers from joining trade unions for fear that by joining they would risk being dismissed and have no real remedies after such a dismissal.

4.2.3 Comparison between South Africa and United States of America

In comparison to SA's *Discovery* it is submitted that the USA takes an opposite stance in *Hoffman* with regards to the labour rights of migrant workers. The SC in *Hoffman*, unlike the court in *Discovery*, failed to evaluate or even mention anything about whether or not Mr Castro was or should be viewed as an employee. Mr Castro was at the time of his dismissal an 'employee' in terms of USA labour law, thus the focus should have been whether or not as an 'employee' was he entitled to back pay. Nevertheless, despite the SC's ruling in *Hoffman*, the NLRB has continued to recognise the *Sure-Tan* ruling that even illegal migrant workers can be regarded as employees for the purpose of labour law and therefore have the right to the protection listed in terms of USA labour law.⁵⁴¹ This position is in line with the stance of SA, where regardless of the fact that immigration law prohibits the employment of migrant workers in some instances, if a worker is able to satisfy the requirement of 'employee' as provided for in labour law they are entitled to protection.⁵⁴²

4.3 EUROPEAN UNION (EU)

4.3.1 What is the European Union

The EU is a political and economic partnership, currently consisting of 27 member states.⁵⁴³ The EU has been built through a series of binding treaties aimed to promote peace and economic recovery in Europe after World War II.⁵⁴⁴ The unique feature of the EU is that,

⁵⁴⁰ Costa D 'California leads the way: A look at California laws that help protect labour standards for unauthorised immigrant workers' available at <https://www.epi.org/publication/california-immigrant-labour-laws/>. (accessed on 30 August 2019).

⁵⁴¹ *Sure-Tan Inc v NLRB* 467 U.S 883 (1984) p892.

⁵⁴² Masehele R 'Economics of Illegal Work and Illegal Workers (Immigrants): Are they protected under South African Labour Law and the Constitution, 1996' (2015) 11(3) *AUDJ* 83.

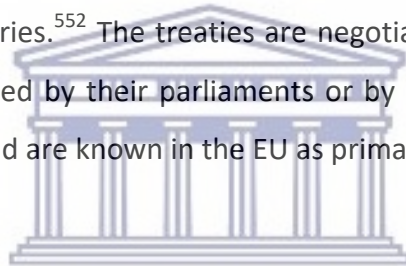
⁵⁴³ Archick K 'The European Union; Questions and Answers' (2022) *Congressional Research Services* 1.

⁵⁴⁴ Archick K 'The European Union; Questions and Answers' (2022) *Congressional Research Services* 1, According to Archick, the founders of the EU hoped that by creating specific areas in which member States

although the member States all remain sovereign and independent states, they have decided to share some of their 'sovereignty' in areas where it makes sense to work together.⁵⁴⁵ The sharing of some of their sovereignty means that the member States delegate some of their decision-making powers to the shared institutions they have created.⁵⁴⁶ This ensures so that decisions on specific matters of common interest can be made democratically.⁵⁴⁷

The role of the EU institutions differs depending on the subject to be considered.⁵⁴⁸ On a multitude of economic, social, and internal security policies, member States have pooled their sovereignty to varying degrees and EU institutions hold decision making authority.⁵⁴⁹ EU legislation in such areas is subject to a complex majority voting system among member States as well as European Parliament approval and is legally binding on member governments.⁵⁵⁰ There are two main types of EU law namely primary and secondary.⁵⁵¹

Every action taken by the EU is founded on treaties that have been approved voluntarily and democratically by all EU countries.⁵⁵² The treaties are negotiated and agreed by all the EU member States and then ratified by their parliaments or by a referendum.⁵⁵³ Treaties are the starting point for EU law and are known in the EU as primary law.⁵⁵⁴



agreed to share sovereignty, the sharing of sovereignty would promote interdependence and make another war in Europe unthinkable.

⁵⁴⁵ European Commission 'The European Union: What it is and what it does' (2020) available at <https://op.europa.eu/en/publication-detail/-/publication/ac0a88a6-4369-11ea-b81b-01aa75ed71a1/language-en> (accessed 2 June 2022).

⁵⁴⁶ The main institutions involved in decision making at an EU level are, the European Parliament, the European Council, European Commission and the Council of the European Union.

⁵⁴⁷ European Commission 'The European Union: What it is and what it does' (2020) available at <https://op.europa.eu/en/publication-detail/-/publication/ac0a88a6-4369-11ea-b81b-01aa75ed71a1/language-en> (accessed 2 June 2022).

⁵⁴⁸ Archick K 'The European Union; Questions and Answers' (2022) *Congressional Research Services* 1.

⁵⁴⁹ Archick K 'The European Union; Questions and Answers' (2022) *Congressional Research Services* 3.

⁵⁵⁰ Archick K 'The European Union; Questions and Answers' (2022) *Congressional Research Services* 3.

⁵⁵¹ European Commission 'Types of EU law' available at https://ec.europa.eu/info/law/law-making-process/types-eu-law_en (accessed 2 June 2022).

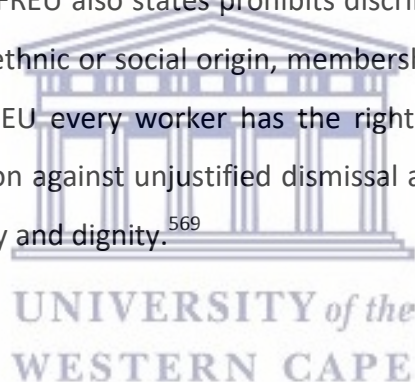
⁵⁵² European Commission 'The European Union: What it is and what it does' (2020) available at <https://op.europa.eu/en/publication-detail/-/publication/ac0a88a6-4369-11ea-b81b-01aa75ed71a1/language-en> (accessed 2 June 2022).

⁵⁵³ European Commission 'The European Union: What it is and what it does' (2020) available at <https://op.europa.eu/en/publication-detail/-/publication/ac0a88a6-4369-11ea-b81b-01aa75ed71a1/language-en> (accessed 2 June 2022).

⁵⁵⁴ European Commission 'Types of EU law' available at https://ec.europa.eu/info/law/law-making-process/types-eu-law_en (accessed 2 June 2022).

The Treaty on the functioning of the European Union (TFEU)⁵⁵⁵ is one of two primary treaties of the EU, alongside the Treaty on European Union (TEU).⁵⁵⁶ The TFEU forms the detailed basis of EU law by defining the principles and objective of the EU.⁵⁵⁷ In terms of EU labour law, the TFEU has only laid down substantive rights in the field of equal pay⁵⁵⁸ and the free movement of workers.⁵⁵⁹ According to the TFEU, access to the labour market is within the member States competence.⁵⁶⁰ In terms of EU Immigration law the TFEU mandates member States to adopt measures to “prevent and combat illegal migration”, including measures to tackle illegal employment.⁵⁶¹

Important to all people living in the EU is the Preamble of Charter of the Fundamental Rights of the European Union (CFREU).⁵⁶² The CFRU states that the CFREU applies to the peoples of Europe.⁵⁶³ The CFREU enshrines into primary EU law a wide array of fundamental rights enjoyed by EU citizens and residents.⁵⁶⁴ It became legally binding with the coming into force of the Treaty of Lisbon on 1 December 2009.⁵⁶⁵ The CFREU guarantees that everyone is equal before the law.⁵⁶⁶ The CFREU also states prohibits discrimination based on any of the listed grounds including race, ethnic or social origin, membership of a national minority and birth.⁵⁶⁷ According to the CFREU every worker has the right of collective bargaining and action,⁵⁶⁸ the right to protection against unjustified dismissal and working conditions which respect his or her health, safety and dignity.⁵⁶⁹



⁵⁵⁵ Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

⁵⁵⁶ Treaty on the Functioning of The European union available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A4301854> (accessed 1 November 2021).

⁵⁵⁷ See Generally the TFEU Articles 7-17.

⁵⁵⁸ The TFEU, Article 157.

⁵⁵⁹ The TFEU, Article 45; Risak M and Dullinger T ‘The concept of ‘worker’ in EU law Status quo and Potential for change’ (2018) *ETUI* 17.

⁵⁶⁰ The TFEU, Article 79(5).

⁵⁶¹ The TFEU, Article 79.

⁵⁶² Available at https://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁵⁶³ Charter of the Fundamental Rights of the European Union, preamble p8.

⁵⁶⁴ European Union Agency for Fundamental Rights available at <https://fra.europa.eu/en/eu-charter> (accessed 3 November 2021).

⁵⁶⁵ European Union Agency for Fundamental Rights available at <https://fra.europa.eu/en/eu-charter> (accessed 3 November 2021).

⁵⁶⁶ Charter of the Fundamental Rights of the European Union, Article 20.

⁵⁶⁷ Charter of the Fundamental Rights of the European Union, Article 21.

⁵⁶⁸ Charter of the Fundamental Rights of the European Union, Article 28.

⁵⁶⁹ Charter of the Fundamental Rights of the European Union, Article 30 and Article 31.

The main body of law that comes from the principles and objectives of the treaties is known as secondary law.⁵⁷⁰ The Secondary law includes regulations,⁵⁷¹ decisions,⁵⁷² recommendations,⁵⁷³ opinions⁵⁷⁴ and directives.⁵⁷⁵

European Union labour and Immigration laws have traditionally reserved the task of determining the scope of the application of its provisions to each member States domestic legal systems.⁵⁷⁶ In terms of EU labour law, with regards to determining the scope of application, this means that member States are individually responsible for determining the scope of the terms such as *worker* or *employee*.⁵⁷⁷ According to Risak, the discretion granted to member States can lead to certain provisions of directives being applied in the member States in a different way to the same categories of workers.⁵⁷⁸ The result is that some migrant workers will qualify for labour market access and employment protection in terms of EU laws in some member States, whereas the same workers will not receive any access to the labour markets or employment protection in other member States.⁵⁷⁹

4.3.2 Migrants and the right to seek employment

Migrant workers across the EU face different levels of labour market access, depending on the extent to which Directive 2013/33/EU, the Reception Conditions Directive (RCD) has

⁵⁷⁰ European Commission 'Types of EU law' available at https://ec.europa.eu/info/law/law-making-process/types-eu-law_en (accessed 2 June 2022).

⁵⁷¹ Regulations are legal acts that apply automatically and uniformly to all EU countries as soon as they enter into force, without needing to be transposed into national law. They are binding in their entirety on all EU countries.

⁵⁷² A decision is binding in its entirety. A decision which specifies those to whom it is addressed is binding only on them.

⁵⁷³ Recommendations allow the EU institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed. They have no binding force.

⁵⁷⁴ An opinion is an instrument that allows the EU institutions to make a statement, without imposing any legal obligation on the subject of the opinion. An opinion has no binding force.

⁵⁷⁵ An EU directive is a form of legislation of specific policy directed at the EU member states, when a directive is adopted by the EU, the member States of the EU have to transpose the directive into their national laws; European Commission 'Types of EU law' available at https://ec.europa.eu/info/law/law-making-process/types-eu-law_en (accessed 2 June 2022); Risak M and Dullinger T 'The concept of 'worker' in EU law Status quo and Potential for change' (2018) *ETUI* 17.

⁵⁷⁶ Reception Conditions Directive, Article 15(3); Kountouris N 'The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) *ILJ* 192.

⁵⁷⁷ Risak M and Dullinger T 'The concept of 'worker' in EU law Status quo and Potential for change' (2018) *ETUI* 8.

⁵⁷⁸ Risak M and Dullinger T 'The concept of 'worker' in EU law Status quo and Potential for change' (2018) *ETUI* 8.

⁵⁷⁹ European Industrial Relations Dictionary available at <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/employee> (accessed on 6 September 2019).

been assimilated into each Member State's legal framework.⁵⁸⁰ The RCD is an EU asylum legislation which establishes common standards for the reception of applicants for international protection in member States.⁵⁸¹ The sections under the headings below will focus on the labour market access of different migrants in the EU.

4.3.2.1 Refugees

Across the EU refugees and beneficiaries of subsidiary protection⁵⁸² are usually grouped together because they are treated the same.⁵⁸³ According to Weber, these two categories of migrants have a stronger right to seek employment in the EU context.⁵⁸⁴ Access to the labour market is immediately possible upon gaining refugee and beneficiaries of subsidiary protection status and applies without restrictions.⁵⁸⁵ According to Article 26 of the RCD, these beneficiaries of subsidiary protection categories of migrants may therefore immediately engage in employment activities once protection has been granted. Germany is an example of one of the member States which conforms to the RCD in this regard. It abolished the labour market test for refugees and removed the requirement of permission from the German Federal Employment Agency (GFEA).⁵⁸⁶ Once refugees are recognized and issued a residence permit, there are no limitations on their access to the labour market, self-employment, training, and education.⁵⁸⁷ The residence permit includes a work permit for an unrestricted and indefinite period.⁵⁸⁸ Thus from a legal point of view for refugees in Germany there are no legal limits in accessing the labour market.

⁵⁸⁰ Schenner JK and Neergaard A 'Asylum-Seekers and refugees within Europe labour market integration' (2019) 25(1) *ETUI* 13-24.

⁵⁸¹ Receptions Conditions Directive, Article 1.

⁵⁸² Under European legislation (Directive 2004/83/EC and Directive 2011/95/EU) defines subsidiary protection status as a third-country national or stateless person who would face a real risk of suffering serious harm if they were to return to their country of origin. Beneficiaries of subsidiary protection tend to hold this renewable status for a year.

⁵⁸³ Schenner JK and Neergaard A 'Asylum-Seekers and refugees within Europe labour market integration' (2019) 25(1) *ETUI* 15.

⁵⁸⁴ Weber F 'Labour Market Access for Asylum Seekers and Refugees under the common European Asylum system' (2016) *EJML* 18(1) 54.

⁵⁸⁵ Weber F 'Labour Market Access for Asylum Seekers and Refugees under the common European Asylum system' (2016) *EJML* 18(1) 54.

⁵⁸⁶ Weber F 'Labour Market Access for Asylum Seekers and Refugees under the common European Asylum system' (2016) *EJML* 18(1) 54.

⁵⁸⁷ Zetter R and Ruaudel H 'Refugees Rights to Work and Access to Labor Markets-An Assessment (2016) *KNOMAD* 43.

⁵⁸⁸ Residence Act of 2005, Article 25(1) & (2).

The European Social Charter (ESC)⁵⁸⁹, forms part of EU law and specifies that refugees are akin to nationals in terms of labour market access, and thus theoretically cannot be discriminated against when it comes to employment.⁵⁹⁰ Both research findings and official statistics demonstrate that, in terms of being employed, refugees lag behind when compared to nationals.⁵⁹¹ While there are some refugees who succeed in finding highly skilled employment, this is not the case for the majority of refugees and asylum seekers.⁵⁹² The majority of refugees and asylum seekers tend to find employment in what is considered the informal labour market.⁵⁹³ Employment in the informal labour market is generally characterised by low wages, long working hours and little to no job security and protection against precarious work employment which nationals tend to avoid.⁵⁹⁴ This is similar to the situation of most migrant workers in SA, regardless of their legal status.⁵⁹⁵

4.3.2.2 Asylum Seekers

Once an asylum seeker has lodged an application for asylum or recognition as a refugee, article 15(1) of the RCD⁵⁹⁶ stipulates that generally access to the labour market has to be granted within no less than nine months.⁵⁹⁷ The length of time which asylum seekers are obliged to wait before being allowed to work in the EU labour markets varies from one member State to the next.⁵⁹⁸ These waiting periods range from one month, such as in the case of Greece and Sweden, to over a year or longer, in Bulgaria, Croatia and Malta.⁵⁹⁹ In

⁵⁸⁹ The European Social Charter of 1961, European Treaty Series no.035.

⁵⁹⁰ The European Social Charter, article 19; Sarvimaki M 'Labour Market Integration of Refugee in Finland' (2017) *VATT Institute for Economic Research* 13.

⁵⁹¹ Sarvimaki M 'Labour Market Integration of Refugee in Finland' (2017) *VATT Institute for Economic Research* 13; Schenner JK and Neergaard A 'Asylum-Seekers and refugees within Europe labour market integration' (2019) 25(1) *ETUI* 15.

⁵⁹² Schenner JK and Neergaard A 'Asylum-Seekers and refugees within Europe labour market integration' (2019) 25(1) *ETUI* 15).

⁵⁹³ Schenner JK and Neergaard A 'Asylum-Seekers and refugees within Europe labour market integration' (2019) 25(1) *ETUI* 15.

⁵⁹⁴ Schenner JK and Neergaard A 'Asylum-Seekers and refugees within Europe labour market integration' (2019) 25(1) *ETUI* 15-16.).

⁵⁹⁵ Mertens J and Spareboom T 'How Immigrants Contribute to South Africa's Economy' (2018) *OCED/ILO* 76.

⁵⁹⁶ The Directive is applicable to all EU member States besides Denmark, Ireland and the United Kingdom which have all chosen to opt out of the Directive and now have their own asylum procedures.

⁵⁹⁷ Reception Conditions Directive, Article 15(1) states that 'Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.'

⁵⁹⁸ Costello C and O' Cinneide C 'The Right to Work of Asylum Seekers and Refugees' (2021) *ASILE28*.

⁵⁹⁹ Schenner JK and Neergaard A 'Asylum-Seekers and refugees within Europe labour market integration' (2019) 25(1) *ETUI* 17.

Lithuania on the other hand, asylum seekers are prohibited from entering the labour market until their asylum claim has been approved.⁶⁰⁰

Article 15(2) of the RCD provides that member States may stipulate further conditions for granting access to the labour market. It was not set out specifically however, how the member States were to grant access to the labour market.⁶⁰¹ In Germany, asylum seekers may not work in the first three months after arrival.⁶⁰² Furthermore it is a requirement that the GFEA must give permission for the asylum seeker to seek employment.⁶⁰³ Alternatively, for certain jobs it may be stipulated via regulations that the GFEA's permission is not necessary.⁶⁰⁴ Furthermore, after 15 months asylum seekers are granted the right to work without any restrictions.⁶⁰⁵ The RCD also allows continued access to the labour market in situations where an asylum seeker is appealing a negative decision regarding their claim for asylum.⁶⁰⁶

4.3.2.3 Illegal Migrant Workers

In terms of illegal migrant workers the Employers Sanctions Directive⁶⁰⁷ (ESD) prohibits the employment of illegally staying third country nationals (TCNs)⁶⁰⁸ in order to fight illegal immigration.⁶⁰⁹ To this end, the ESD lays down minimum common standards on sanctions and measures to be applied in the member States against employers who infringe the prohibition of employment of TCNs.⁶¹⁰ Regardless of this prohibition the ESD also grants rights to illegally employed TCNs. The rights granted to TCNs include the right to back

⁶⁰⁰ Schenner JK and Neergaard A 'Asylum-Seekers and refugees within Europe labour market integration' (2019) 25(1) *ETUI* 17.

⁶⁰¹ Weber F 'Labour Market Access for Asylum Seekers and Refugees under the common European Asylum system' (2016) *EJML* 18(1) 53.

⁶⁰² Asylum Act, (AsylG) §61(2); Bruker, H, Jaschke, P and Kosyakavo, Y 'Integrating Refugees and Asylum Seekers into German Economy and Society' (2019) *MPI* 21.

⁶⁰³ Weber F 'Labour Market Access for Asylum Seekers and Refugees under the common European Asylum system' (2016) *EJML* 18(1) 53.

⁶⁰⁴ Weber F 'Labour Market Access for Asylum Seekers and Refugees under the common European Asylum system' (2016) *EJML* 18(1) 53.

⁶⁰⁵ Zetter R and Ruadel H 'Refugees Rights to Work and Access to Labor Markets-An Assessment (2016) *KNOMAD* 44.

⁶⁰⁶ Receptions Conditions Directive, Article 15(3).

⁶⁰⁷ Directive 2009/52/EC available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0052&from=FR>

⁶⁰⁸ Third-country national means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code.

⁶⁰⁹ Employers Sanction Directive, Article 1.

⁶¹⁰ Employers Sanction Directive, Article 1.

payments to be made by employers.⁶¹¹ Furthermore TCN's enjoy the right to the facilitation of complaints.⁶¹²

The Return Directive 2008/115/EC (RD) apply to TCNs staying illegally in the territory of a member State.⁶¹³ In respect of the RD 'illegal stay' means the presence on the territory of a member State, of a TCN who does not fulfil, or no longer fulfils the conditions of entry, stay or residence in that member State.⁶¹⁴ The RD sets out common standards and procedures to be applied in member States for returning illegally staying TCNs.⁶¹⁵ The RCD grants member States the authority to decide on the conditions for granting access to the labour market once an application for asylum has been lodged.⁶¹⁶ If an asylum seeker acts in contravention of the conditions allowing them to stay or work in the territory of a member state, they may be subject to the penalties in terms of the RD. Penalties for illegal employment include fines, detention, a loss of their residence and/or work permit, entry ban to the country, or a return decision.⁶¹⁷

4.3.3 Case Law

In terms of case law applicable to migrant workers, it is difficult to formulate a precedent regarding the labour rights of migrant workers which applies to all migrant workers within the EU. This is primarily due to the fact that member States are given the power to regulate their own immigration and labour law therefore there is no universally accepted ruling on the rights of migrant workers in the EU.⁶¹⁸

Regardless of the general practice of member States regulating their own immigration and labour laws, there has been movement in the direction of a community based or common EU approach to defining EU labour law in recent years.⁶¹⁹ The motive for this is all workers

⁶¹¹ Employers Sanction Directive, Article 6.

⁶¹² Employers Sanction Directive, Article 13.

⁶¹³ The Return Directive, Article 2.

⁶¹⁴ The Return Directive, Article 3(2).

⁶¹⁵ The Return Directive, Article 1.

⁶¹⁶ Receptions Conditions Directive, Article 15(2).

⁶¹⁷ The Return Directive, Article 6; Van Nierop P, Schonenberg L and Terziev P 'Counteracting undeclared work and labour exploitation of third-country national workers' (2021) *European Platform Tackling Undeclared Work* 62.

⁶¹⁸ Receptions Conditions Directive, Article 15(2).

⁶¹⁹ Risak, M and Dullinger, T 'The concept of 'worker' in EU law Status quo and Potential for change' (2018) *ETUI* 7.

will at the very least have a standard floor of employment rights, regardless of which county they reside in.⁶²⁰ The movement of a common EU approach has taken the form of directives which do not grant member States the scope to define certain terms or protection, but rather have a common based definition.⁶²¹ It is submitted that a common definition approach would be beneficial as the directives which reserve defining terms and protection to member States creates a fragmented understanding of rights which often ends up being detrimental to migrants. In addition to the common based approach, there have been some judgments by the Court of Justice of the European Union (CJEU), regarding the definition of the term 'worker' which is applicable to all member States.

4.3.3.1 Court of Justice of the European Union

According to Kountouris, the CJEU has taken a leading role in construing the scope of application of EU labour law directives.⁶²² For a number of directives that do not expressly reserve the scoping exercise to implementing member States, the CJEU has progressively implemented and consolidated the 'worker' concept initially developed by its jurisprudence in the area of free movement of workers.⁶²³ In respect of other directives that explicitly limit their scope of application to whatever notion of worker or employment contract prevails at a national level however, the CJEU has taken a more cautious approach.⁶²⁴ Even in the case of the latter situation, the CJEU is increasingly steering their scoping provisions in ways that are pushing towards a convergence with the 'worker' concept mentioned above and usually does so whenever member States 'apply rules which are liable to jeopardise the

⁶²⁰ Kountouris N 'The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) *ILJ* 193.

⁶²¹ Menegatti E 'The Evolving Concept of "worker" in EU law' (2019) 12 *Italian Law Journal e-journal* 75; Kountouris N 'The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) *ILJ* 193.

⁶²² Kountouris N 'The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) *ILJ* 196.

⁶²³ Menegatti E 'The Evolving Concept of "worker" in EU law' (2019) 12 *Italian Law Journal e-journal* 75; Luderar-Ruszel A 'The Concept of "worker" under the principle of free movement of workers and its implications for the protection of workers in the European Union' (2020) *Studies on Labour Law and Social Policy* 168 ;Kountouris N 'The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) *ILJ* 197.

⁶²⁴ Kountouris N 'The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) *ILJ* 197.

achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness'.⁶²⁵

The CJEU's move in terms of case law began with the *Hoekstra v Administration of the Industrial Board for Retail Trades and Businesses* case.⁶²⁶ In this matter the CJEU attributed a community definition for the term 'worker' in respect of the EU provisions aimed at shaping the law on free movement of workers.⁶²⁷ The power of the court as mentioned above however, has mostly only been used in cases based on EU Directives that do not grant member States the explicit ability to define the scope or meaning of the term worker.⁶²⁸ Examples of both instances will be discussed below.

4.3.3.2 Lawrie-Blum v Land Baden-Württemberg

According to Risak and Dullinger the point of departure for a European concept of 'worker' is the 1986 landmark decision *Lawrie-Blum v Land Baden-Württemberg*⁶²⁹ (*Lawrie-Blum*) in which the ECJ interpreted the term 'worker' within the meaning of Article 45 of the TFEU for the first time.⁶³⁰ A British national Deborah Lawrie-Blum was refused admission to the *Vorbereitungsdienst*, a period of preparatory service leading to the Second State Examination, which qualifies successful candidates for appointment as teachers in a German *Gymnasium*.⁶³¹ The admission was refused on the ground of her nationality.⁶³² The CJEU repeated its finding from the case *Levin v Staatssecretaris van Justitie*⁶³³ that the term 'worker' has a community meaning and must be interpreted broadly.⁶³⁴ The CJEU stated that:

'the concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons

⁶²⁵ *O'Brien v Minister of Justice* (2012) UKSC 46/C-393/10.

⁶²⁶ *Hoekstra v Administration of the Industrial Board for Retail Trades and Businesses* (1964) ECR 177.

⁶²⁷ Menegatti E 'The Evolving Concept of "worker" in EU law' (2019) 12 *Italian Law Journal e-journal* 72.

⁶²⁸ Kountouris N 'The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) *ILJ* 201.

⁶²⁹ *Lawrie-Blum v Land Baden-Württemberg* 66/85 EU C (1986) 284.

⁶³⁰ Risak M and Dullinger T 'The concept of 'worker' in EU law Status quo and Potential for change' (2018) *ETUI* 28.

⁶³¹ *Lawrie-Blum v Land Baden-Württemberg* 66/85 EU C (1986) 284 para 2.

⁶³² *Lawrie-Blum v Land Baden-Württemberg* 66/85 EU C (1986) 284 para 2.

⁶³³ *Levin v Staatssecretaris van Justitie*, 53/81 EU C (1982) 105.

⁶³⁴ *Lawrie-Blum v Land Baden-Württemberg* 66/85 EU C (1986) 284 para 10; *Levin v Staatssecretaris van Justitie* 53/81 EU C (1982) 105 para 11.

concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.⁶³⁵

The ruling of the court means that Article 45 applies to all individuals of member States regardless of nationality. An individual who works in a different member State other than their state of origin would therefore still be deemed a worker if they performed services for and under direction of another person in return for remuneration. Since the school determined the services to be performed by Deborah, her working hours and it is the school's instructions that she must carry out and the school's rules that she must observe, it is clear that during the entire period of preparatory service Deborah was under the direction and supervision of the school to which she was assigned.⁶³⁶ The CJEU therefore set a criterion that an employment relationship is not dependant on the nationality of the worker but is dependent on if for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.

4.3.3.3 O'Brien v Minister of Justice

An example of the cautious approach of the CJEU in developing the concept of a 'worker', where the Directive concerned grants member States the discretion to define concepts is *O'Brien v Minister of Justice (O'Brien)*.⁶³⁷ In *O'Brien* a United Kingdom (UK) part-time judge paid on a fee basis was effectively being excluded from an occupational retirement scheme because in terms of UK law he was not an employee but rather a 'judicial office holder'.⁶³⁸ The CJEU noted that the discretion granted to the member States, in order to define the concepts used in the Directive 97/81/EC (the Framework Agreement on part-time work) is not unlimited.⁶³⁹ Furthermore member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.⁶⁴⁰ The CJEU therefore acknowledges a member States power to define

⁶³⁵ *Lawrie-Blum v Land Baden-Württemberg* 66/85 EU C (1986) 284 para 17.

⁶³⁶ Risak M and Dullinger T 'The concept of 'worker' in EU law Status quo and Potential for change' (2018) *ETUI* 29.

⁶³⁷ *O'Brien v Minister of Justice* (2012) UKSC 46/C-393/10.

⁶³⁸ Kountouris N 'The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) *IJL* 197.

⁶³⁹ *O'Brien v Minister of Justice* (2012) UKSC 46/C-393/10 para 35.

⁶⁴⁰ *O'Brien v Minister of Justice* (2012) UKSC 46/C-393/10 para 35.

concepts such as ‘worker’ for certain directives which explicitly grants member States the discretion to do so. The CJEU however also demands that member States should define concepts in a manner that does not lead to the arbitrary exclusion of a category of persons from the protection offered by a Directive.⁶⁴¹ The exclusions should be permitted only if the relationship between part-time worker and employer is, by its nature, substantially different from that between employers and their employees falling, according to national law, within the category of workers.⁶⁴²

4.3.3.4 Betriebsrat der Ruhrlandklinik v Ruhrlandklinik

A more recent case adopting the cautionary approach is that of *Betriebsrat der Ruhrlandklinik v Ruhrlandklinik (Ruhrlandklinik)*.⁶⁴³ In *Ruhrlandklinik*, the employer was arguing that nurses supplied by the German Red Cross to its clinic did not have the status of employees of a temporary-work agency in respect of German law, namely the *Arbeitnehmerüberlassungsgesetz* (Law on the supply of temporary staff).⁶⁴⁴ In its decision that these nurses were ‘workers’ for the purposes of Directive 2008/104 (Directive on temporary agency work), the CJEU acknowledged that the concept of workers is broad enough to cover any person who, in the member State concerned, is protected as a worker in terms of national employment law.⁶⁴⁵

Following the goal of the CJEU to find a definition of ‘worker’ applicable to all member states, the European Commission proposed a new directive, Directive 2019/1152/EU called the Directive on Transparent and Predictable Working Conditions in the European Union (TPWCEU). In terms of the proposed TPWCEU Article 2(1)(a) describes a worker follows:

‘a worker means a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration.’

Article 2(1)(a) of the TPWCEU provides criteria for establishing worker status for the purpose of the TPWCEU. These criteria are based on the case law of the CJEU as developed

⁶⁴¹ *O’Brien v Minister of Justice* (2012) UKSC 46/C-393/10 para 51

⁶⁴² *O’Brien v Minister of Justice* (2012) UKSC 46/C-393/10 para 51

⁶⁴³ *Betriebsrat der Ruhrlandklinik v Ruhrlandklinik* (2016) C-216/15.

⁶⁴⁴ *Betriebsrat der Ruhrlandklinik v Ruhrlandklinik* (2016) C-216/15. Para 18-19.

⁶⁴⁵ *Betriebsrat der Ruhrlandklinik v Ruhrlandklinik* (2016) C-216/15. Para 25-26.

since case *Lawrie-Blum* and *Ruhrlandklinik*.⁶⁴⁶ According to the European Commission it was necessary to specify such criteria in view of the findings of the Regulatory Fitness and Performance Programme evaluation that the scope of application of Directive 91/533/EEC (Written Statement Directive) varies among member States.⁶⁴⁷ The variation amongst member States is dependent on their concepts of 'employee', 'employment relationship', 'employment contract' and risks of excluding growing numbers of workers in non-standard forms of employment.⁶⁴⁸ Non-standard form of employment includes domestic workers, on-demand workers, intermittent workers, voucher-based workers and platform workers.⁶⁴⁹ The TPWCEU would apply to workers, as long as they fulfil the criteria set out above in terms of Article 2(1)(a) of the TPWCEU.⁶⁵⁰

The TPWCEU was entered into force on 31 July 2019. The proposed definition for the term 'worker' was however excluded from the final draft of the TPWCEU, therefore up to date there is still no uniform definition of the term worker within the EU. The criteria set out in *Lawrie-Blum*⁶⁵¹ and *O'Brien*⁶⁵² is therefore still the leading notions of 'worker' in terms of EU labour law.

4.3.3.5 Difficulties faced by migrant workers in the EU in accessing their rights

According to Tsirli and O'Flaherty for most migrants accessing employment, education, housing, healthcare and social security can be a challenging exercise.⁶⁵³ An acknowledged right to remain in the member State is normally necessary to access the full range of social rights.⁶⁵⁴ Member States are generally permitted to differentiate between nationalities

⁶⁴⁶ COM/2017/0797 final - 2017/0355 (COD) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0797> (accessed 4 November 2021).

⁶⁴⁷ COM/2017/0797 final - 2017/0355 (COD) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0797> (accessed 4 November 2021).

⁶⁴⁸ COM/2017/0797 final - 2017/0355 (COD) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0797> (accessed 4 November 2021).

⁶⁴⁹ COM/2017/0797 final - 2017/0355 (COD) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0797> (accessed 4 November 2021).

⁶⁵⁰ COM/2017/0797 final - 2017/0355 (COD) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0797> (accessed 4 November 2021).

⁶⁵¹ See discussion under 4.3.3.2

⁶⁵² See discussion under 4.3.3.3

⁶⁵³ Tsirli M and O'Flaherty M 'Handbook on European law relating to asylum, borders and immigration' (2020) FRA 245.

⁶⁵⁴ Tsirli M and O'Flaherty M 'Handbook on European law relating to asylum, borders and immigration' (2020) FRA 245.

when they are exercising their sovereign right to permit or deny access to their territory.⁶⁵⁵ In principle, it is not unlawful to enter agreements or pass national legislation permitting certain nationalities privileged rights to enter or remain in the member State's territory. States are normally also permitted to stipulate different conditions to such entry or residence, such as stipulating that there should be no access to employment or no entitlement to public funds.⁶⁵⁶

As previously mentioned, the ESD prohibits hiring illegal TCN's. The ESD however, also states that employers who hire illegal TCN's are obligated to pay any outstanding remuneration owed to such illegal TCN's upon termination of the employment.⁶⁵⁷ An illegal TCN may in certain instances receive a temporary residence visa to facilitate lodging complaints against their employer.⁶⁵⁸ The conditions of such temporary visas are however left to the discretion of each member State.⁶⁵⁹ A member State can therefore decide that illegal TCN's are not allowed to work for the duration of the proceedings (lodging a complaint) or only allowed to perform certain types of work.

One of the reasons illegal TCN's choose not to enforce their labour rights even if a violation of their rights falls within Articles 9(c) and (e) of the ESD (and thus they may obtain a temporary resident visa) is the financial burden attached to the proceedings of lodging a complaint. Costs related to court cases include costs for lawyers, translation, travel costs and trade union support. Costs are therefore a major barrier to participating in court proceedings for illegal TCNs.⁶⁶⁰ According to O'Flaherty, some migrants who have engaged in court proceedings had to leave the country in which the proceedings took place as they could not afford accommodation.⁶⁶¹ The inability of migrant workers to stay in the country where their court proceedings are taking place leads to more difficulties in trying to access

⁶⁵⁵ Tsirli M and O'Flaherty M 'Handbook on European law relating to asylum, borders and immigration' (2020) *FRA* 246.

⁶⁵⁶ Tsirli M and O'Flaherty M 'Handbook on European law relating to asylum, borders and immigration' (2020) *FRA* 246.

⁶⁵⁷ Employer Sanctions Directive, Article 6.

⁶⁵⁸ Employer Sanctions Directive, Article 9(c) and (e).

⁶⁵⁹ Employer Sanctions Directive, Article 13(4).

⁶⁶⁰ O'Flaherty M 'Protecting migrant workers from exploitation in the EU: Workers Perspective' (2019) *FRA* 85.

⁶⁶¹ O'Flaherty M 'Protecting migrant workers from exploitation in the EU: Workers Perspective' (2019) *FRA* 85.

their rights. Such difficulties include providing courts with the necessary evidence or staying in contact with the support organisation or lawyers assisting them.⁶⁶²

4.3.4 Comparison and the Intersection between labour and Immigration law in the EU

It is submitted that in comparison with SA, the EU has a much more fragmented approach to governing Immigration and Labour law. It is particularly difficult as there is no universal concept of employee or worker within the EU.⁶⁶³ Even though the common EU laws recognise and grant rights to refugees and asylum seekers, and taking into account the CJEU's recent rulings on the concept of 'worker', it is safe to assume that even undocumented migrants should be granted protection in terms of a Directive. Undocumented migrants should be granted protection if according to the CJEU ruling in *O'Brien*, depriving them of protection would affect the effectiveness of such a directive.⁶⁶⁴ The recent move on behalf of the CJEU regarding the concept of worker is more in line with SA's approach to migrant workers.⁶⁶⁵ It is still difficult to draw a holistic conclusion on EU as a whole, but considering Germany as an example, the access to the labour market for migrants is steadily being advanced by those countries that extensively include the RCD in their jurisdiction.

4.4 CONCLUSION

In conclusion, migrant workers in terms of SA, USA and EU have different levels of access to the labour market. Generally, refugees are better off as on paper they are legally allowed to work in the respective countries and in principle refugees should be able to receive the full protection of labour law as citizens do.⁶⁶⁶ In practice however, in SA, USA and EU refugees are mainly employed in areas of the law where exploitation is common and protection or enforceability of their rights are rarely sought because refugees are either too afraid or unaware of their rights. For asylum seekers, their plight to accessing the labour markets is

⁶⁶² O'Flaherty M 'Protecting migrant workers from exploitation in the EU: Workers Perspective' (2019) *FRA* 86.

⁶⁶³ Risak M and Dullinger T 'The concept of 'worker' in EU law Status quo and Potential for change' (2018) *ETUI* 8

⁶⁶⁴ *O'Brien v Minister of Justice* (2012) UKSC 46/C-393/10.

⁶⁶⁵ See discussion in chapter 3 at 3.2.

⁶⁶⁶ Weber F 'Labour Market Access for Asylum Seekers and Refugees under the common European Asylum system' (2016) *EJML* 18(1) 54; US Citizenship and Immigration Services under Refugees 'Working in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees> (accessed 8 October 2020).

more difficult than that of refugees. Much like SA, USA has recently enacted legislation⁶⁶⁷ aimed at preventing asylum seekers from working for a prescribed period after they have entered the country. In the EU however, the RCD does not prohibit access to labour markets for asylum seekers, however their level of access is dependent on which member State they are in.

The immigration legislation of SA, USA and the EU all prohibit the employment of undocumented migrants. Sanctions are also imposed on employers who act in contravention of the immigration legislation. In the USA and EU certain sanctions are also imposed on migrant workers who gain employment through fraudulent methods or in contravention of immigration legislation.⁶⁶⁸ Section 38 of the IA does not have any sanctions for employees who act in contravention of the IA though so in this regard USA and EU go beyond the scope of section 38 of the IA. Regardless of the fact that all three jurisdictions prohibit the employment of illegal migrant workers, the labour laws of all three jurisdictions create mechanisms which allow migrant workers some form of protection. It is however the case law in each respective jurisdiction that illustrates the different approaches taken to granting access to the labour law protection for illegal migrant workers.

The government of SA, recognises all categories of migrant workers as employees if they meet any of the definitions of what constitutes an employee in terms of the labour legislation, and therefore migrants are entitled to the protection provided in labour legislation. It is submitted that in USA on the other hand, the different existing precedents in case law creates an ambiguous view on the labour rights of undocumented migrant workers. Migrant workers are technically still viewed as employees in terms of *Sure-Tan*, however, they do not have all of the labour protections available to them due to the decision in *Hoffman*. Lastly, the EU has a fragmented approach to dealing with migrant workers.⁶⁶⁹ For those not legally employed, the CJEU has slowly been moving in the direction of creating a common definition of the term 'worker' to extend the protection of

⁶⁶⁷ 8 U.S. Code § 1158(d)(2); Asylum Application, Interview, and Employment Authorization for Applicants, 84 FR 62374 available at https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-13544.pdf?utm_medium=email&utm_campaign=pi+subscription+mailing+list&utm_source=federalregister.gov (accessed 7 October 2020).

⁶⁶⁸ See discussions under 4.2.1.3 and 4.3.2.3.

⁶⁶⁹ Risak M and Dullinger T 'The concept of 'worker' in EU law Status quo and Potential for change' (2018) *ETUI* 17.

EU labour law to migrants. The creation of a common definition of ‘worker’ will however be difficult as each member State generally has the power to determine the extent of protection they provided to undocumented workers.⁶⁷⁰

Migrant workers are therefore granted labour law protections despite the fact that immigration policy may stipulate restrictions or prohibitions on their employment. The enforceability of the rights and protection granted to migrant workers however, is also affected by a number of factors. These factors will be discussed in chapter five along with possible recommendations on how to address the effects the factors might have on the ability of migrant workers to properly access their labour law rights and protection.



⁶⁷⁰ Receptions Conditions Directive, Article 15(3); Kountouris N ‘The concept of ‘Worker’ in European Labour Law: Fragmentation, Autonomy and Scope’ (2018) *ILJ* 192.

Chapter 5

Conclusion and recommendations

5.1 INTRODUCTION

This chapter will serve as the conclusion for the research. Summary points of each chapter will be reiterated. Furthermore, recommendations aimed at addressing the effect of the intersection between labour and immigration law will be discussed.

5.2 RECAPITULATION OF CHAPTERS

As previously mentioned,⁶⁷¹ section 23(1) of the Constitution states that *everyone* has the right to fair labour practices. The term *everyone* is generally accepted to mean *all* persons in SA, and is supportive of an extremely broad approach to the scope of the right guaranteed in the Constitution.⁶⁷² The term *everyone* is therefore not limited to citizens only as is the case with some of the rights in the BOR.⁶⁷³ The BOR is regarded as the cornerstone of democracy in SA. It enshrines the rights of *all* people in the country and affirms the values of human dignity, equality and freedom.⁶⁷⁴ Since the BOR applies to *all* people in SA, migrant workers should thus be able to enjoy the basic human rights stipulated in the BOR. These rights include the right to equality, human dignity, fair labour practices, education and social security to mention a few.

Aside from the Constitution, regional and international laws are also applicable to migrants in SA. This is due to the fact that section 231(5) of the Constitution stipulates that SA is bound by all applicable international laws. Under international law the most well-known form of protection is the UDHR. The UDHR, together with the ICCPR and the ICESCR, form what is known as the International Bill of Rights.⁶⁷⁵ Although the UDHR is a non-binding document, it has universally been accepted as laying down the general principles of human

⁶⁷¹ See chapter 2 introduction.

⁶⁷² *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 (4) SA 383 (LAC) para 16.

⁶⁷³ Biney E *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* (unpublished LLD thesis, University of Cape Town, 2016)

⁶⁷⁴ The Constitution, s7(1).

⁶⁷⁵ Fact Sheet No.2 (Rev.1), The International Bill of Human Rights

rights.⁶⁷⁶ Most of the rights contained in the UDHR have been transferred to the Constitution. To add to this, most of the rights contained in the UDHR have also been transferred to customary law.⁶⁷⁷ The same applies to rights granted in terms of the ICCPR and the ICESCR. This would make such rights binding on member States of the UN to which the government of SA is party to.⁶⁷⁸

The rights provided under the International Bill of Rights apply to all people regardless of citizenship.⁶⁷⁹ The UN does however also have specialised instruments for the specific protection of migrants and migrant workers, such as, the Refugees Convention.⁶⁸⁰ The Refugees Convention, ratified by SA in 1996, is one of the first instruments adopted by the UN which focuses on refugees in more detail.⁶⁸¹ The Refugees Convention places an obligation on states to apply its provisions without discrimination based on race, religion or country of origin.⁶⁸² According to Dalton-Greyling the Refugee Convention prescribes that refugee rights should be equal to the rights and freedoms enjoyed by other foreign nationals and similar to citizens in the particular country.⁶⁸³

In addition to being a member of the UN, SA is also a member of the ILO. The ILO also has its own Conventions and Recommendations regarding the protection of the rights of migrants and migrant workers.⁶⁸⁴ To date South Africa has however not ratified any of the Conventions and Recommendations specifically relating to the rights of migrants.⁶⁸⁵ Regardless of this, as a member state of the UN SA is still under the obligation to uphold the principles of the ILO Conventions, which are to protect the interest of migrant workers employed in foreign countries.⁶⁸⁶

⁶⁷⁶ Brown G 'The Universal Declaration of Human Rights in the 21st Century: A living document in a changing world' (2016) *NYU Global Institute for Advanced Study* 34.

⁶⁷⁷ Tshosa OB 'The protection of the human rights of refugees in International Law' (2018) *SALC* 50.

⁶⁷⁸ Tshosa OB 'The protection of the human rights of refugees in International Law' (2018) *SALC* 50.

⁶⁷⁹ Universal Declaration of Human Rights, Article 2.

⁶⁸⁰ Available at <https://www.unhcr.org/1951-refugee-convention.html> (accessed 16 May 2021).

⁶⁸¹ Tshosa OB 'The protection of the human rights of refugees in International Law' (2018) *SALC* 51.

⁶⁸² Refugee Convention, Article 3.

⁶⁸³ See Refugee Convention, starting from Article 4 and Dalton-Greyling, T 'Urban refugees: definitions, legal position and wellbeing in South Africa' available at http://www.tips.org.za/files/Dalton_Greyling_Refugees_24_Oct_2008_tmp49da794a_0.pdf (accessed on 28 April 2020).

⁶⁸⁴ Dupper O 'Migrant Workers and the Right to Social Security: An International Perspective' (2007) *SLR* 226.

⁶⁸⁵ See 2.3.2 above.

⁶⁸⁶ Page 5 ILO Constitution, available at

South Africa is also a member of SADC. The aim of SADC in relation to migrants is the free movement of people within the SADC region.⁶⁸⁷ The achievement of such an aim is possible through the acceptance of ILO Conventions specifically aimed at the protection of migrants,⁶⁸⁸ which, however, SA has yet to ratify.⁶⁸⁹ Within the SADC region, African countries have formed the AU. Similar to the UN, the AU has its own instruments aimed at the protection of people within the region of Africa, such as, OAU Refugee Convention.⁶⁹⁰ Similar to the Refugees Convention, the OUA grants everyone the right not to be discriminated against on any of the listed grounds of the OAU Refugee Convention, which include race and nationality.⁶⁹¹

In SA the RA is one of the primary legislative provisions addressing the rights of refugees. The RA is aimed at ensuring that the treatment of refugees in SA is in accordance with international standards and principles.⁶⁹² Once granted refugee status in SA, a refugee enjoys full legal protection.⁶⁹³ The IA is used to determine the entry, stay and deportation of migrants in SA.⁶⁹⁴ Section 38(1) of the IA prohibits the employment of illegal foreigners and establishes a penalty of either a fine or imprisonment for those employers who employ illegal foreigners.

As previously stated, the category a migrant falls under also plays a role in determining the extent of protection afforded to them.⁶⁹⁵ The different types of migrants are refugees, asylum seekers, economic migrants and illegal foreigners.⁶⁹⁶ The incorrect categorisation of a migrant may also affect the level of protection they receive. The result of incorrect

https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A1

⁶⁸⁷ Crush J et al Migration in Southern Africa: A paper prepared for the policy analysis and research programme of the Global commission on International Migration (2005) 24.

⁶⁸⁸ Biney E Safeguarding the Illegal: Rethinking the Interface Between Labour and Immigration laws (unpublished Mphil thesis, University of Cape Town, 2012) 23.

⁶⁸⁹ The ILO conventions and recommendations dealing specifically with migrants are, the 1949 Migration for Employment Convention (Revised) No.97; Convention No. 143; and the 1975 Migrant Workers Recommendation No. 15; Amandi, V and Lanaghan, P 'Advancing Regional Intergration through the Free Movement of People in the Southern African Development Community (SADC)' (2020) 34 *Speculum Juris* 64.

⁶⁹⁰ Available at https://au.int/sites/default/files/treaties/36400-treaty-0005_-_oau_convention_governing_the_specific_aspects_of_refugee_problems_in_africa_e.pdf (accessed 16 May 2021).

⁶⁹¹ OAU Convention, Article IV.

⁶⁹² Refugees Act, preamble.

⁶⁹³ Refugees Act, s1(vx) read with s27(b).

⁶⁹⁴ The Immigration Act 13 of 2002, preamble.

⁶⁹⁵ Kavuro C 'The Disappearance of Refugee rights in South Africa' (2022) *Obiter* 60-61.

⁶⁹⁶ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 245.

migrant status classification is that instead of receiving protection in terms of the RA, such migrant workers are (mistakenly) governed in respect of the IA, which provides different legal protection. An example of the difference in protection provided can be seen when comparing the ability of migrants to access the labour market in terms of these two Acts respectively. As example, certain migrant workers governed by the IA require work permits which are subject to statutory employability conditions such as being highly skilled and in some cases the unavailability of a suitable citizen to do the work.⁶⁹⁷ These conditions are however not applicable to refugees and asylum seekers.⁶⁹⁸

Regardless of their status according to the broad interpretation of the word 'everyone' in the Constitution in relation to the right to equality and the right to fair labour practices, migrant workers across the various categories are included in the protection of the BOR, to the extent that a right is specifically limited to citizens only.⁶⁹⁹ Similarly under labour legislation, such as, the LRA, BCEA and the EEA, the definition of the term 'employee' is broad enough to include *all workers* who qualify as an 'employee' under that specific legislation.⁷⁰⁰ The rulings in *Discovery Health* and *Denel* illustrate that under South African labour legislation the main determining factor is the existence of an employment relationship and not the existence of a valid contract.⁷⁰¹ Immigration law cannot be used to limit a constitutionally guaranteed right such as the right to fair labour practices.⁷⁰² Despite the formal recognition of illegal foreign workers as 'employees' in labour law, the extension of their status does not translate into substantive protection in some instances.⁷⁰³

⁶⁹⁷ Immigration Act, s19(2)(a)

⁶⁹⁸ Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 247.

⁶⁹⁹ Biney E 'Inequality of Opportunity: The Plight of Foreign Workers in South Africa (unpublished LLD thesis, University of Cape Town 2016) 32.

⁷⁰⁰ Dupper O 'The Human Rights of (Irregular) Migrants: An International Regional and South African Perspective' (Pt 2) (2011) 2 *International Journal of Social Security and Workers Compensation* 67.

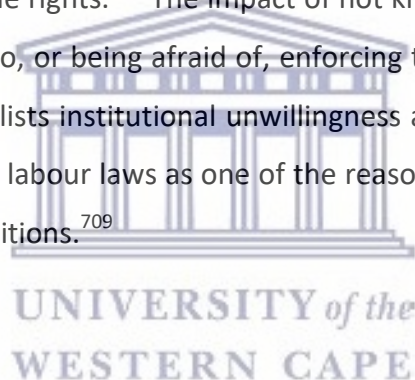
⁷⁰¹ *Discovery Health Ltd v CCMA & Others* (2008) 29 ILJ 1480 (LC) para 54 and *Denel (PTY) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC) p 1296; Meyer DJ 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 *SA Merc LJ* 834.

⁷⁰² *Discovery Health Ltd v CCMA & Others* (2008) 29 ILJ 1480 (LC) para 30. This principle was endorsed by the CC in *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 ILJ 95 (CC) para 105. In interpreting s197 of the LRA the CC emphasised that the provisions of the LRA must be construed in a manner that gives effect to s23 of the Constitution. The CC explained that when constitutional rights are given effect to by legislation, such legislation is subject to constitutional scrutiny to ensure that it is consistent with the Constitution.

⁷⁰³ Biney E 'Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers' available at

This in essence is the root cause of what on the surface appears to be a conflict between labour and immigration laws. Labour laws tend to acknowledge and grant protection to migrant workers who qualify as employees irrespective of their legal status. On the other hand, the result of the wording of immigration laws is that migrant workers, who would qualify for protection under the labour legislation, based on the fact that they are *workers* under the relevant labour legislation, are subject to deportation in terms of immigration law, if they do not qualify to work in SA.⁷⁰⁴ This is regardless of the circumstances surrounding their lack of legal status. As an example, the court in *Bahamboula*⁷⁰⁵ dealt with a 2013 practice of the DHA that asylum seeker visas would be extended no more than twelve times.⁷⁰⁶ This arbitrary practice left many asylum seekers with expired documents and therefore rendered them legally unqualified to work in SA and subject to deportation.

Even though there has been some progress in case law acknowledging the rights of migrant workers to be treated equally, more often than not the reality is that migrants do not know of the existence or extent of the rights.⁷⁰⁷ The impact of not knowing about their rights may result in them not being able to, or being afraid of, enforcing their rights where their rights have been violated.⁷⁰⁸ Vettori lists institutional unwillingness and/or inability to implement or rather, properly implement, labour laws as one of the reasons that migrant workers does not enjoy decent working conditions.⁷⁰⁹



http://www.saspen.org/conferences/migration2014/Biney_Paper_FES-SASPEN-INT-CONF_Social-Protection-for-Migrants_Oct-29-30-2014.pdf (accessed on 3 November 2018).

⁷⁰⁴ Tanzer Z and Gwenyaya T 'Shadow Report: South Africa's Compliance with Labour Obligations under the International Covenant on Economic, Social and Cultural Rights' (2018) *Shadow Report 3*; Fish JN 'Rights across borders: Policies, protections and practices for migrant domestic workers in South Africa' in Du Toit D (ed) *Exploited, undervalued – and essential: Domestic workers and the realisation of their rights* (2013) 260.

⁷⁰⁵ *Bahamboula and Others v Minister of Home Affairs and Others* 2014 (9) BCLR 1021 (WCC).

⁷⁰⁶ *Bahamboula and Others v Minister of Home Affairs and Others* 2014 (9) BCLR 1021 (WCC) para 1.1; Khan, F *In Chronic Exile: A critique of South Africa's Legal Regime for refugees in Protracted Refugee Situations* (Unpublished LLD thesis, University of Cape Town 2017) 175.

⁷⁰⁷ Khan F *In Chronic Exile: A critique of South Africa's Legal Regime for refugees in Protracted Refugee Situations* (Unpublished LLD thesis, University of Cape Town 2017) 175.

⁷⁰⁸ United Nations 'Combating violence against migrants; Criminal justice measures to prevent, investigate, prosecute and punish violence against migrants, migrant workers and their families and to protect victims' (2015) *UNODC 2*.

⁷⁰⁹ Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure 7*.

5.2.1 Factors affecting the legal status of migrants

The illegal status of migrant workers does not solely stem from illegal border crossing, but can also be attributed to the frequent trips migrant workers have to take to renew their work visas, the closing down of some of the RRO and the expenses they are likely to incur on these trips.⁷¹⁰ Identity documents are essential to accessing necessities such as education, banking, employment, housing and registration of births.⁷¹¹ According to Khan and Kolabhai, asylum seekers struggle to access asylum documentation in SA.⁷¹² Some migrant workers, usually those employed in the informal sector, are often discriminated against based solely on the fact that they are foreign nationals. The discrimination is present in a number of ways, for example, struggling to open a bank account or join trade unions.⁷¹³

Migrant workers also face difficulties due to the restrictive practices by the DHA. An example of such a restrictive practice was the introduction of the practice by the DHA that forces refugees to return to the refugee reception office of initial application for the renewal of their asylum documentation.⁷¹⁴ The difficulties faced by migrant workers can also be attributed to the exclusionary and restrictive manner in which SA's IA and RA are drafted.⁷¹⁵ Currently migrants in possession of a transit visa have only five, instead of 14, days to report to a RRO.⁷¹⁶ Furthermore the 2017 amendments to the RA grant the Director-General of home affairs the powers to 'disestablish' any RRO.⁷¹⁷ The closure effectively imposed restrictions on asylum-seekers and refugees choice of place of residence.⁷¹⁸

⁷¹⁰ Crush J, Skinner C & Stulgaitis M, 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 9.

⁷¹¹ Khan F and Kolabhai M 'Bureaucratic Barriers to Social Protection for Refugees and Asylum Seekers' 2021 2 *AHMR* 78.

⁷¹² Khan F and Kolabhai M 'Bureaucratic Barriers to Social Protection for Refugees and Asylum Seekers' 2021 2 *AHMR* 78.

⁷¹³ Crush J, Skinner C & Stulgaitis M, 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' (2017) *SAMP* 10.

⁷¹⁴ *Abdulaahi and Others v The Director General of Home Affairs and Others Case 7705/2013* para 31.

⁷¹⁵ Carciotto S 'The Restrictiveness of Migration Policies in South Africa' (2021) 10 (1) *African Journal of Governance and Development* 132.

⁷¹⁶ See s21 of the Refugees act, as amended and 23 of Immigration Act, as amended.

⁷¹⁷ Refugees Act, as amended, s 6(1).

⁷¹⁸ Ziegler R 'Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?' 2020 10 *Constitutional Court Review* 79.

Capacity constraints at the DHA often lead to undue delays in the processing of documents for migrant workers.⁷¹⁹ Work visas for migrant workers are issued at the DHA.⁷²⁰ When visas are granted they are usually only viable for a short period of time which means that migrant workers would often have to return to the DHA on a regular basis in order to renew their documents.⁷²¹ This has the result of causing further delays as it increases the work load the DHA has to deal with.⁷²²

Most migrants and migrant workers are susceptible to living in poverty.⁷²³ Migrants are also regarded as being part of a group of vulnerable people with restricted access to justice.⁷²⁴ A consequence of the above mentioned difficulties, namely delays at DHA, closing of the RRO's, and not being able to join trade unions, are all factors that cause or contribute to the poverty experienced by migrant workers. A migrants' ability or likelihood of being able to access courts and other formal justice institutions is near impossible because the court system is inherently expensive and adversarial, which makes it inaccessible to many.⁷²⁵ People living in poverty often do not have *de facto* or *de jure* access to justice.⁷²⁶ This means that people living in poverty are often prevented from claiming, enforcing and contesting violation of their rights.⁷²⁷



⁷¹⁹ See Home Affairs 'Issues that affect migrants and citizens: engagement with NGOs & stakeholders' 2019 available at <https://pmg.org.za/committee-meeting/29180/> (accessed 12 November 2021); Vettori, S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 8.

⁷²⁰ South African Government 'How do I obtain a work permit?' available at <https://www.gov.za/faq/foreigners/how-do-i-acquire-work-permit> (accessed 12 November 2021).

⁷²¹ Immigration Act Regulations, s18 contains the validity period of work visas. For the General and Critical Skills visa the period is 5 years. The Intra-company visa is valid for 4 years. Refugee act regulations s17, contains the validity period of a refugee visa which is valid for four years. A refugee must however apply for a renewal at least 90 days before the visa expires. An asylum seeker visa is generally valid for three to six months pending a final decision; Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 8.

⁷²² Khan F and Rayner N 'Country Fiche South Africa' (2020) *ASILE* 16.

⁷²³ Mukumbang C, Ambe AN and Adebisi BO 'Unspoken inequality: how COVID-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees, and undocumented migrants in South Africa' (2020) *International Journal for Equity in Health* 2.

⁷²⁴ Matshakaile TN 'Access to Justice for Non-citizens: A Constitutional Analysis (unpublished LLM thesis, Stellenbosch University 2014) 44.

⁷²⁵ Maziwisa MR 'Access to justice for African Migrants in South Africa' (2019) 20 (4) *ESR Review* 7.

⁷²⁶ Carmona MS and Donald K 'Access to Justice for persons living in poverty: a human rights approach' (2014) *SSRN Electronic Journal* 7.

⁷²⁷ Carmona MS and Donald K 'Access to Justice for persons living in poverty: a human rights approach' (2014) *SSRN Electronic Journal* 7.

From a comparative point of view, migrant workers in SA, the USA and the EU have different levels of access to the labour market. Generally, refugees are better off since, on paper, they are legally allowed to seek employment in the respective jurisdictions and in principle should be able to receive the full protection of national labour laws. In practice however in SA, USA and EU refugees are mainly employed in areas where exploitation is common and protection is rarely sought because refugees are either too afraid to exercise, or unaware of, their rights. For asylum seekers, their plight to accessing the labour markets is more difficult than that of refugees. Similar to SA, the USA has recently enacted legislation aimed at preventing asylum seekers from working for a prescribed period after they have entered the country. Neither of these countries provides asylum seekers with any form of assistance once they are in the country, regardless of the fact that they are unable to work. In the EU however, the RCD does not prohibit access to labour markets for asylum seekers, their level of access is however dependant on which member state they are in.⁷²⁸

Immigration legislation of SA, the USA and the EU all prohibit the employment of undocumented migrants. However, even with this prohibition, the labour laws of all three jurisdictions create mechanisms which allow migrant workers some form of protection. It is however case law in each respective jurisdiction that determines the extent of protection for undocumented migrant workers. South African case law recognises all migrant workers as employees in terms of the LRA, and therefore they are entitled to the protection provided for in terms of the LRA.⁷²⁹ In the USA on the other hand, the different existing precedents in case law creates an ambiguous view on the labour rights of undocumented migrant workers. Whereas they are technically still viewed as employees in terms of *Sure-Tan*, they do not have all of the labour protections available to them, due to *Hoffman*. The EU lastly has a fragmented approach to dealing with migrant workers. For those not legally employed, the CJEU has slowly been moving in the direction of creating a common definition of the term 'worker' to extend the protection of EU labour law to those who most

⁷²⁸ See 4.2 and 4.3 above.

⁷²⁹ Meyer DJ 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 SA Merc LJ 834.

likely need it the most.⁷³⁰ This will however be difficult as each member state generally has the power to determine the extent of protection they provided to undocumented workers.

Much like SA, even though there are protections in places and in the case of labour market access, migrant workers are allowed to work, they are often too scared or unaware of their protections and therefore end up being exploited.

5.3 RECOMMENDATIONS

As previously mentioned in chapter one, the research aims to illustrate what impact does the intersection between South African labour and immigration laws have on the rights of migrants as workers, particularly in light of the right to fair labour practices as afforded to *everyone* in section 23(1) of the Constitution. The impact of the intersection between labour and immigration laws manifest in the difficulties, inequalities and potential exploitation faced by migrant workers in South Africa. These difficulties and inequalities exist because it is challenging for migrant workers to enforce their labour rights despite the numerous formal protection migrant workers receive in terms of labour laws.

5.3.1 Addressing the difficulties and inequalities faced by migrants and migrant workers

5.3.1.1 Capacity constraints

The difficulty faced by migrant workers during the application for asylum can largely be attributed to capacity constraints at the DHA. The capacity constraints often result in undue delays in the processing of documents for migrant workers.⁷³¹ There have been numerous instances where migrants have had to wait much longer than the prescribed waiting period for the outcome of their application. This results in a majority of migrants resorting to illegal employment in an effort to sustain them. This is often their only option as the government of SA requires all migrants entering the country to be self-sufficient. Being self-sufficient may more often than not be difficult for migrants intending to seek asylum who have fled their home country in a rush with nothing but their names and the clothes on their backs.

⁷³⁰ Kountouris N 'The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) *IJL* 193.

⁷³¹ See Home Affairs 'Issues that affect migrants and citizens: engagement with NGOs & stakeholders' 2019 available at <https://pmg.org.za/committee-meeting/29180/> (accessed 12 November 2021); Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure* 8.

In response to the capacity constraints it would be better to focus internally on capacity development and efficiency as a means to prevent abuse of the system.⁷³² At present, research shows that the level of decision-making lacks quality and does not meet the basic standards of administrative justice.⁷³³ This creates backlogs in the review and appeals processes which, in the end, results in extended sojourns of applicants with asylum seeker permits. Officials of the DHA should also receive proper training to deal with asylum applications and frequent refresher seminars or assessments in order to ensure that officials are adequately capable to handle asylum claims. An investigation into why the DHA has wilfully ignored court orders should also be undertaken. This may reveal if there might be an element of intention or motive behind why asylum claims are being frustrated.

Adherence to the time period of granting documents or decisions on asylum applications for migrants should also be met and monitored with sanctions for undue delays. The appointment of proper interpreters to cater to the language barrier that may exist should also be adhered to in order to ensure that asylum seekers are able to properly explain their circumstance and it would speed up the application process.

5.3.1.2 Access to bank accounts and trade unions

Addressing the capacity constraints at the DHA will also benefit migrants who have or want to open bank accounts. This is because it would allow banks to receive verification timeously and facilitate trust between banks and the DHA and ultimately benefit migrants to properly enjoy bank services.

Trade unions find it extremely difficult to access and organise atypical workers, many of whom are migrants.⁷³⁴ Trade union structure has remained profoundly national. They are embedded in specific national contexts and thus primarily represent the interests of their

⁷³² Lawyers for Human Rights, Legal Resources Centre and The Scalabrini Centre of Cape Town 'Thematic report on the rights of migrants, asylum seekers and stateless persons in south africa' (2016) available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23067_E.pdf (accessed 27 November 2021).

⁷³³ *Director-General Department of Home Affairs v De Saude Attorneys* (2019) 46 ZA SCA paras 13-16; *Eisenberg & Associates & others v Director-General, Department of Home Affairs & others* (2012) 3 SA 508 (WCC) paras 73 and 86; Amit R 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' 2012 *African Centre for Migration and Society* 14.

⁷³⁴ Lorgat A 'Not, We Are Not Fighting Against Foreign Workers And We Will Never Fight Against Foreign Workers: Trade Unions and Migrant Rights' in Rugananan P and Xulu-Gama N (ed) *Migration in South Africa* (2022) 251.

existing national membership.⁷³⁵ Due to trade unions structure remaining mostly national, it is submitted that this indirectly affect migrant workers ability to access trade unions and therefore enforce their rights in terms of section 23(2) of the Constitution. Trade unions should be better equipped to cater to the circumstances of migrant workers and facilitate in the acceptance and harmonisation of citizen and migrant workers in the same industry. This would enable better working conditions for all employees in the same industry.

5.3.1.3 Poverty and its effects on the rights of migrants

Most migrants and migrant workers are susceptible to living in poverty.⁷³⁶ The 2017 amendments to the RA, prohibits asylum seekers from working during the application process and will be more detrimental to their human rights granted by SA's Constitution. The specific prohibition on asylum seekers seeking employment during the application process will only implemented once Asylum Seeker Processing Centres have been completed and become operational.⁷³⁷ This is estimated to be in 2030.⁷³⁸ South African courts have commented on the importance on the ability to seek employment on the human dignity of a person. The prohibition from seeking employment therefore goes against both the Constitution and case law and should be removed.

Access to courts should be made more accessible to migrants, considering their lack of understanding of SA's court systems, their economic status, language barriers and their susceptibility of exploitation due to their migrant status. Migrants should also be educated on their rights once they enter the country and what to do or where to go in the event that their rights are violated.

⁷³⁵ Lorgat A 'Not, We Are Not Fighting Against Foreign Workers And We Will Never Fight Against Foreign Workers: Trade Unions and Migrant Rights' in Rukananan P and Xulu-Gama N (ed) *Migration in South Africa* (2022) 251.

⁷³⁶ Mukumbang C, Ambe AN and Adebisi BO 'Unspoken inequality: how COVID-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees, and undocumented migrants in South Africa' (2020) *International Journal for Equity in Health* 2.

⁷³⁷ The *White Paper on International Migration for South Africa*, Department of Home Affairs, July 2017, chapter 12.

⁷³⁸ The *White Paper on International Migration for South Africa*, Department of Home Affairs, July 2017, chapter 6.

5.4 CONCLUSION

The research sought to evaluate the impact of the intersection between labour laws and immigration laws on the rights of migrant workers in SA. When evaluating the wording of the definition of an employee under the LRA, BCEA and EEA, migrant workers, even those who are undocumented, qualify for protection. Yet, some of these same workers, particularly those who are undocumented, are not allowed to be employed in SA under the IA and will be subject to deportation under immigration provisions regardless of the circumstances surrounding their lack of legal status. Even though the wording of labour legislation and immigration legislation are not directly in conflict (the IA only prohibits employers from hiring unqualified persons and not workers from accepting employment) the effects of these two distinctive outcomes are detrimental for migrant workers as shown in the research. Employers with knowledge of the difference in provisions regarding labour and immigration legislation may use this knowledge to abuse migrant workers by exposing them to exploitative conditions.

With deportation as a consequence of being undocumented, most migrant workers who find themselves in this situation will be less likely to report violations on their labour rights or those rights granted in terms of the BOR. It is no secret that more often than not rights on paper do not manifest in practice and the reasons for this are numerous. The lack of proper enforceability of immigration and refugee legislation is one such reason affecting the ability of migrant workers to assert their rights. Regardless of this, the fact remains that the Constitution is aimed at promoting equal rights and freedoms to all those within its borders. It is submitted that this aim of the Constitution is and should be the foundation of addressing inequalities in SA. Intentionally treating people differently for whatever reason, be it their language, skin colour or place of origin goes against what an apartheid free, democratic SA is supposed to stand for. The inequalities, exploitation and disregard for the inherent human dignity of migrants in SA are in fact still apartheid. Only now it is not aimed at SA's 'citizens'.

THESIS REFERENCES

BOOKS

Cheadle H, Davis D, & Hysom N *South African Constitutional law: The Bill of Rights* (2002) LexisNexis, South Africa.

Crush J, Skinner C & Stulgaitis M, *Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy* (2017) Southern African Migration Programme, Canada.

International Labour Organization *International labour migration: A rights-based approach* (2010) International Labour Office, Geneva.

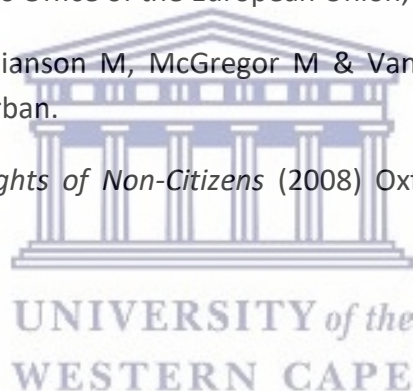
Jastram K & Achiron M *Refugee protection: a guide to international refugee law* (2001) Inter-Parliamentary Union, Geneva.

Lawson D, Mwambene L & Dublin A *Gender, poverty and access to justice policy implementation in Sub-Saharan Africa* (2021) Routledge, New York.

Tsirli M & O'Flaherty M *Handbook on European law relating to asylum, borders and immigration* (2020) Publications Office of the European Union, Luxembourg.

Van Niekerk A, Smit N, Christianson M, McGregor M & Van Eck S (eds) *Law@work3* ed (2015) LexisNexis (Pty) Ltd, Durban.

Weissbrodt D, *The Human Rights of Non-Citizens* (2008) Oxford University Press, United Kingdom.



CASES

America

Supreme Court

Hoffman Plastic compound v NLRB (2002) 535 U.S 137.

Sure-Tan Inc v NLRB (1984) 467 U.S 883.

District Court

Asylumworks v. Mayorkas, Civil Action (2002) 20-cv-3815 (BAH) D.D.C.

Cortez v Medina's Landscaping (2002) U.S Dist.18831.

Europe

European Court of Justice

Betriebsrat der Ruhrlandklinik v Ruhrlandklinik (2016) C-216/15.

Hoekstra v Administration of the Industrial Board for Retail Trades and Businesses (1964) ECR

Lawrie-Blum v Land Baden-Württemberg, 66/85, EU:C:1986:284.

Levin v Staatssecretaris van Justitie, 53/81, EU:C:1982:105.

O'Brien v Minister of Justice (2012) UKSC 46/C-393/10.

South Africa

Constitutional Court

Chirwa v Tranet 2008 (4) SA 367 (CC).

Khosa v Minister of Social Development 2004 (6) SA 505 (CC).

Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another 1998 (1) SA 745 (CC).

National Education Health & Allied Workers Union v University of Cape Town 2003 (24) ILJ 95 (CC).

Prinsloo v Van der Linde and Another 1997 (6) BCLR 759 (CC).

S v Ntuli 1996 (1) SA 1207 (CC).

South African National Defence Union v Minister of Defence and Another (1999) (4) SA 469 (CC).

Union of Refugee Women and others v Director, Private Security Industry Regulatory Authority and others 2007 (4) BCLR 339 (CC).

Supreme Court of Appeal

Director-General Department of Home Affairs v De Saude Attorneys 2019 46 ZA (SCA)

Minister of Home Affairs & Others v Somali Association of South Africa Eastern Cape & Another 2015 (3) SA 545 (SCA).

Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA).

Mustafa Aman v Minister of Home Affairs 2010 (7) BCLR 640 (SCA).

High Court

Gauteng Division

Houtbosplaas (Pty) Ltd and Another v Nedbank Limited 2020 (4) SA 560 (GP).

Western Cape Division

Abdulaahi and Others v The Director General of Home Affairs and Others Case 7705/2013 (unreported).

Bahamboula and Others v Minister of Home Affairs and Others 2014 (9) BCLR 1021 (WCC).

Eisenberg & Associates & others v Director-General, Department of Home Affairs & others 2012 (3) SA 508 (WCC).

Kiliko and Others v Minister of Home Affairs and Others 2006 (4) SA 114 (C).

Nbaya and Others v Director General of Home Affairs 6534 /15 (unreported).

Tafira and Others v Ngozwane and Others, 12960/06 (unreported).

Labour Appeal Court

Denel (PTY) Ltd v Gerber (2005) 26 ILJ 1256 (LAC).

Kylie v Commission of Conciliation Mediation and Arbitration (2010) 4 SA 383 (LAC).

Labour Court

Discovery Health Ltdv CCMA & Others (2008) 29 ILJ 1480 (LC).

Kylie v Commission for Conciliation, Mediation & Arbitration & Others (2008) 29 ILJ 1918 (LC).

White v Pan Palladium SA (Pty) Ltd 2005 (6) SA 384 (LC).

Commission for Conciliation, Mediation and Arbitration

Moses v Safika Holdings (pty) Ltd (2001) 22 ILJ 1261 (CCMA).

Scalabrini Centre, Cape Town and Others v The Minister of Home Affairs and Others 2013 (3) SA 531 (WCC).

CHAPTERS IN BOOKS

Du Toit D and Huysamen E 'Implementing Domestic Workers Labour Rights in a Framework of Constitutionalism' in Du Toit *D Exploited, undervalued- And*

Essential: Domestic Workers and the Realisation of their Rights (2013) Pretoria University Press, South Africa.

Fish JN 'Rights across borders: Policies, protections and practices for migrant workers domestic workers in South Africa' in Du Toit D (ed) *Exploited, undervalued – and essential: Domestic workers and the realisation of their rights* (2013) Pretoria University Press, South Africa.

Freeland M and Costello C 'Migrants at work and the division of Labour Law' in Costello C and Freeland M (ed) *Migrants at Work: Immigration and Vulnerability in Labour Law* (2014) Oxford University Press, United Kingdom.

Krensell A 'South Africa' in Magrath C *The Corporate Immigration Review* 9 ed (2019) Law Business Research Ltd, London.

Lorgat, A 'Not, We Are Not Fighting Against Foreign Workers And We Will Never Fight Against Foreign Workers: Trade Unions and Migrant Rights' in Rugananan, P and Xulu-Gama, N (ed) *Migration in South Africa* (2022) Springer Nature Switzerland AG, Switzerland.

Lansink 'A Migrant Workers and Non-Discrimination in the workplace' in Dupper O and Garbers C (eds) *Equality in the Workplace; Reflections from South Africa and Beyond* (2009) Juta, Cape Town.

Mertens, J and Spareboom, T 'The immigration landscape in South Africa: Patterns, drivers and policies' in OCED/ILO *How Immigrants Contribute to South Africa's Economy* (2018) OECD Publishing, Paris.

Maltby SJO, Pored EL and Guardado, MG 'United States' in Magrath C *The Corporate Immigration Review* 9 ed (2019) Business Research Ltd, London.

Sellers MNS 'Why States Are Bound by Customary International Law' in Sellers MNS *Republican Principles in International Law* (2006) Palgrave MacMillian, London.

Szablewska N and Karim S 'Protection and international cooperation in the international refugee regime' in R Islam and JH Bhuiyan (ed) *An introduction to international refugee law* (2013) Martinus Nijhoff Publishers, Netherlands.

INTERNET SOURCES

African Union 'About the African Union' available at <https://au.int/en/overview> (accessed 2 December 2022).

Biney E 'Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers' (2014) available at

http://www.saspen.org/conferences/migration2014/Biney_Paper_FES-SASPEN-INT-CONF_Social-Protection-for-Migrants_Oct-29-30-2014.pdf (accessed on 3 November 2018).

Budlender SC '20 Years of Democracy: The State of Human Rights in South Africa' *The Annual Human Rights Lecture, Faculty of Law, University of Stellenbosch* (2014) available at <http://blogs.sun.ac.za/law/advocate-geoff-budlender-sc-deliversannual-human-rights-lecture/> (accessed 9 October 2021).

Costa D 'California leads the way: A look at California laws that help protect labour standards for unauthorised immigrant workers' (2018) available at <https://www.epi.org/publication/california-immigrant-labour-laws/>. (accessed on 30 August 2019).

Crush, J et al Migration in Southern Africa: A paper prepared for the policy analysis and research programme of the Global commission on International Migration (2005) Global Commission on International Migration available at https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/qcim/rs/RS7.pdf (accessed 19 May 2021)

Dalton-Greyling, T 'Urban refugees: definitions, legal position and wellbeing in South Africa' (2008) available at http://www.tips.org.za/files/Dalton_Greyling_Refugees_24_Oct_2008_tmp49da794a_0.pdf (accessed on 28 April 2020).

Davies, B 'The rights of illegal workers and workers engaged in illegal activities' 2018 available at <https://www.golegal.co.za/illegal-workers-south-africa/> (accessed 15 November 2021).

European Commission 'The European Union; What it is and what it does' (2020) available at <https://op.europa.eu/en/publication-detail/-/publication/ac0a88a6-4369-11ea-b81b-01aa75ed71a1/language-en> (accessed 2 June 2022)

European Commission 'Types of EU law' available at https://ec.europa.eu/info/law/law-making-process/types-eu-law_en (accessed 2 June 2022)

European Union Agency for Fundamental Rights available at <https://fra.europa.eu/en/eu-charter> (accessed 3 November 2021).

European Industrial Relations Dictionary available at <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/employee> (accessed on 6 September 2019)

Frelick B 'US to Refugees: Poor Asylum Seekers Need not Apply' (2019) available at <https://www.hrw.org/news/2019/11/16/us-refugees-poor-asylum-seekers-need-not-apply> (accessed on 8th October 2020).

Home Affairs 'Issues that affect migrants and citizens: engagement with NGOs & stakeholders' (2019) available at <https://pmg.org.za/committee-meeting/29180/> (accessed 12 November 2021).

Human Rights First <https://www.humanrightsfirst.org/press-release/human-rights-first-condemns-rule-keeping-asylum-seekers-work-authorization> (accessed on 7th October 2020).

Immigration Services under 'Permission to work in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> (accessed 8 October 2020).

'International Federation for Human Rights (FIDH) Report (2008) *Surplus People? Undocumented and other vulnerable migrants in South Africa* available at <http://www.fidh.org/Surplus-People-Undocumentedand> (accessed on 5 May 2020).

International Labour Organisation, Up-to-date Conventions and Protocols not ratified by South Africa available at https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:2889535721826:::P11210_INSTRUMENT_SORT:4 (accessed 27 October 2022).

Lawyers for Human Rights, Legal Resources Centre and The Scalabrini Centre of Cape Town 'Thematic report on the rights of migrants, asylum seekers and stateless persons in South Africa' available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23067_E.pdf (accessed 27 November 2021)

Nyoka, N 'Amended Refugees Act restricting fundamental rights' (2020) available at <https://mq.co.za/article/2020-01-20-amended-refugee-act-restricts-fundamental-rights/#:~:text=The%20act%20was%20recently%20amended,missions%20under%20threat%20of%20deportation.&text=They%20have%20to%20be%20given,country%2C%20so%20they%20can%20return.> (accessed on 28 June 2020)

Sandroff, R The history of Unions in the United States: Milestone in the struggle to protect workers rights (2021) available at <https://www.investopedia.com/financial-edge/0113/the-history-of-unions-in-the-united-states.aspx> (accessed 14 November 2021).

South Africa's obligations under international and domestic law' available at <https://www.hrw.org/legacy/reports98/sareport/App1a.htm> (accessed on 19 May 2019).

South African Government 'How do I obtain a work permit?' available at <https://www.gov.za/faq/foreigners/how-do-i-acquire-work-permit> (accessed 12 November 2021).

Strategist Migration Services South Africa 'Immigration Update 16 October 2020' available at <https://immigrationspecialists.co.za/immigration-update-16-october-2020/> (accessed 11

May 2022) United States of America available at https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=105993 (accessed 30 October 2021).

United Nations Treaty Collection available at <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&clang=en> (accessed 2 December 2022).

U.S Department of Justice, Employment Rights and Resources for Refugees and Asylees available at <https://www.justice.gov/crt/case-document/file/1132566/download> (accessed on 6 October 2020).

US Citizenship and Immigration Services under Refugees 'Working in the US' available at <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees> (accessed 8 October 2020).

United Workers Congress 'United States Compliance with the International Covenant on Civil and Political Rights, Freedom of Association and Right to Equality and Non-Discrimination at Work' (2013) available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_14575_E.pdf (accessed 14 November 2021).

World Economic Forum, 6 Challenges to Financial Inclusion in South Africa available at <https://www.weforum.org/agenda/2017/04/financial-inclusion-south-africa/> (accessed 15 March 2023).



JOURNAL ARTICLES

Amit R & Kriger N, 'Making Migrants 'il-legible': The policies and practices of documentation in post-apartheid South Africa' (2012) *African Centre for Migration and Society* 269-290.

Amandi V and Lanaghan P 'Advancing Regional Intergration through the Free Movement of People in the Southern African Development Community (SADC)' (2020) 34 *Speculum Juris* 51-67.

Bhorat H, Kanbur R and Mayet N 'The impact of sectoral minimum wage laws on employment, wages and hours of work in South Africa' (2013) *IZA Journal of Labour Development* 1-27.

Briggs VM 'Illegal Immigration and Immigration Reform: Protecting the Employment Rights of the American Labor Force (the Native Born and Foreign Born) who are Eligible to be Employed' (2010) *Public Interest Law Journal* 1-9.

Bruker H, Jaschke P and Kosyakavo Y 'Integrating Refugees and Asylum Seekers into German Economy and Society' (2019) *MPI* 1-31.

Campbell EK 'Reflections on Illegal Immigration in Botswana and South Africa' (2006) 21(2) *African Population Studies* 23-44.

Carciotto S 'The Restrictiveness of Migration Policies in South Africa' (2021) 10 (1) *African Journal of Governance and Development* 118-163.

Carmona MS and Donald K 'Access to Justice for persons living in poverty: a human rights approach' (2014) *SSRN Electronic Journal* 1-42.

Department of Trade and Industry, 'The draft business licensing bill pretorial: department of trade and industry' (2013).

Dupper O, 'Migrant Workers and the Right to Social Security: An International Perspective' (2007) *SLR* 219-254.

Dupper O, 'The Human Rights of (Irregular) Migrants: An International, Regional and South African Perspective (Part 1)' (2010) 2(1) *International Journal of Social Security and Workers Compensation* 61-81

Dupper O 'The Human Rights of (Irregular) Migrants: An International Regional and South African Perspective' (Part 2)' (2011) 2 *International Journal of Social Security and workers compensation* 55-75.

Ekambaram S 'The current asylum protection system in South Africa is in crisis and is effectively dysfunctional' (2018) *SALC* 7-12.

Fix M, Hooper K and Zong J 'How are Refugees fairing? Integration at U.S and State Levels' (2017) *MPI* 1-33.

Griffith KL 'U.S. Migrant worker law: The interstices of Immigration and labour and employment law' (2009) *ILR* 125-162.

Henegham SM 'Employment discrimination faced by the Immigrant Worker- A lesson from the United States and South Africa' (2012) 35 *Fordham International Law Journal* 1780-1823.

Hobden C 'Shrinking South Africa: Hidden Agendas in South African Citizenship Practice' (2020) 47(2) *South African Journal of Political Studies* 159-175.

Jinnah Z and Cazarin R 'Making guest feel comfortable' *African Centre for Migration & Society* (2015) 6 *ACMS* 1-8.

Juson JS 'The Intersection of Immigration Law and Labour Law- The Hoffman Plastics case and beyond' (2003) *American Bar Association (ABA)* 1-7.

Joshua S and Olanrewaju F 'The AU's Progress and Achievements in the realm of peace and security' (2017) 73(4) *ICWA* 1-17.

Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy and Development* 232-260.

Kavuro C 'The Disappearance of Refugee rights in South Africa' (2022) *Obiter* 49-78.

Keith L, & LeVoy M 'A worker is a worker: How to ensure that undocumented Migrant Workers can access justice' (2020) *PICUM* 1-56.

Kerwin D 'The faltering US refugee protection system: legal and policy responses to refugees, asylum-seekers, and others in need of protection' (2012) *Refugee Survey Quarterly* 1-33.

Khan F and Kolabhai M 'Bureaucratic Barriers to Social Protection for Refugees and Asylum Seekers' 2021 2 *African Human Mobility Review* 74-95.

Khan F and Lee M 'Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers' (2018) 4 (2) *African Human Mobility Review* 1205-1225.

Klaaren J 'Human Rights protections of foreign nationals' (2009) 30 *ILJ* 82-91.

Kountouris N 'The concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope' (2018) 47 (2) *ILJ* 192-225.

Kulitanyi V and Visser K 'African Immigrant workers in South Africa: Job Takers or Job creators?' (2010) 13 (4) *SAJEMS NS* 367-694.

Landau LB 'Protection and dignity in Johannesburg: shortcomings of South Africa's urban refugee policy' (2006) 19 (3) *Journal of Refugee Studies* 308-327.

Ludera-Ruszel A 'The Concept of "worker" under the principle of free movement of workers and its implications for the protection of workers in the European Union' (2020) *Studies on Labour Law and Social Policy* 167-174.

Mukumbang C, Ambe AN and Adebisi BO 'Unspoken inequality: how COVID-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees, and undocumented migrants in South Africa' (2020) *International Journal for Equity in Health* 1—7.

Malatji TL 'Unemployment and Regional Human Mobility; All Roads Lead To South Africa' 2021 11(3) *AIDS* 169-186

Mashele R 'Economics of Illegal Work and Illegal Workers (Immigrants): Are they protected under South African Labour Law and the Constitution, 1996' (2015) 11(3) *AUDJ* 77-88.

Maziwisa MR 'Access to justice for African Migrants in South Africa' (2019) 20 (4) *ESR Review* 4-8.

Meyer DJ 'Migrant Workers and Occupational Health and Safety Protection in South Africa' (2009) 21 *SA Merc LJ* 837-849.

Menegatti E 'The Evolving Concept of "worker" in EU law' (2019) 12 *Italian Law Journal e-journal* 71-83.

Mujuzi JD 'The principle of non-refoulement in South Africa and the exclusion from refugee status of asylum seekers who have committed offences abroad: a comment on Gavric v Refugee Status Determination Officer, Cape Town and Others' (2018) 43 *SAYIL* 20-46.

Newaj K 'Defining Fairness in Dismissals of Unauthorised Foreign Nationals' (2020) 23 *PELJ* 1-25.

Newton L 'Who Governs Immigrant Labor? Status, Residency, and Rights in Federal and State Law' (2020) 50(3) *The Journal of Federalism* 473-493.

Norton D 'In Transit: The position of Illegal foreign workers and emerging Labour law jurisprudence' (2009) 30 *ILJ* 66-81.

Norton D 'Workers in the Shadows: An International Comparison on the Law of Dismissal of Illegal Migrant Workers' (2010) *ILJ* 1521-1556.

Olivier M and Govindjee A 'Labour Law Rights and Social Protection of Migrant workers: In search of co-ordinated legal response' (2013) *LLRN* 1-41.

Ragunanan P & Smit R, 'Seeking Refuge in South Africa: Challenges facing a group of Congolese and Burundian Refugees' (2011) 28(5) *Development Southern Africa* 714-716.

Risak M and Dullinger T 'The concept of 'worker' in EU law Status quo and Potential for change' (2018) *European Trade Union Institute* 1-68.

Schenner JK and Neergaard A 'Asylum-Seekers and refugees within Europe labour market integration' (2019) 25(1) *European Trade Union Institute* 13-24.

Schockaert L, Vanables E & Gil-Bazo MT, 'Behind the scene of South Africa's Asylum Procedure: A qualitative study on long-term Asylum Seekers from the Democratic Republic of Congo' (2020) *Refugee Survey Quarterly* 26-55.

Tshosa OB, 'The protection of the human rights of refugees in International Law' (2018) *SALC* 49-56.

Van Eck BPS & Snyman F 'Social Protection Afforded to Irregular Migrant workers: Thoughts on the Southern Africa Development Community (with Emphasis on Botswana and South Africa)' (2015) *Journal for African Law* 294-316.

Vosko LF 'Decent Work The shifting Role of the ILO and the Struggle for Global Social Justice' (2002) 2 *Global Social Policy* 19-46.

Weber F 'Labour Market Access for Asylum Seekers and Refugees under the common European Asylum system' (2016) *EJML* 18(1) 34-64.

Weideman M 'Labour- Related Expeience of Migrant and Refugees in SA: ICMC project (the future of work, labour after laudatosi)' (2020) *SHIMA* 10-134.

Ziegler R 'Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?' (2020) 10 *Constitutional Court Review* 65-160.

LEGISLATION

America

Aliens and Nationality, Code of Federal Regulation 1987, 52 FR 16221

Fair Labour Standards Act of 1938 as amended.

Immigrations Reforms and Controls Act 145 of 1986.

Immigration and Nationality Act, Pub.L. No.82-414,66 Stat.162 (1952)

National Labour Relations act of 1935; 29 U.S.C. §§ 151-169.

Asylum Application, Interview, and Employment Authorization for Applicants, 84 FR 62374

European Union

Asylgesetz (Asylum) Act of 1992 (AsylG)

Charter of the Fundamental Rights of the European Union (2007/C 303/01)

Directive on Transparent and Predictable Working Conditions in the European Union (2019/1152/EU)

Employers Sanction Directive (2009/52/EC)

Receptions Conditions Directive (2013/33/EU)

Residence Act of 2005

Return Directive (2008/115/EC)

Schengen Borders Code Regulation (EC) No 562/2006

Written Statement Directive (91/533/EEC).

South Africa

Constitution of the Republic of South Africa, 1996.

Basic Conditions of Employment Act 75 of 1997.

Basic Conditions of Employment Act No 20 of 2013.

Citizenship Amendment Act 17 of 2010

Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Employment Equity Act 55 of 1998.

Employment Services Act 4 of 2014.

Financial Intelligence Centre Act 38 of 2001

Labour Relations Act 66 of 1995.

Immigration Act 13 of 2002.

Immigration Amendment Act 19 of 2004

National Minimum Wage Act 9 of 2018

Occupational Health and Safety Act 85 of 1993.

Promotion of Administrative Justice Act 3 OF 2000.

Refugees Act 13 of 2011.

Refugees Amendment Act 33 of 2008.

Refugees Amendment Act of 2017.

Social Assistance Act 13 of 2004

Unemployment Insurance Act 63 of 2001.

Delegated Legislation

Regulations Regarding the Terms and Conditions of Employment of Educators GN R1743 in GG 16814 of 13 November 1995.

Refugee Regulations (Forms and Procedure) GN R 366 in GG 21075 of 6 April 2000.

Department of Health on Recruitment and Employment of Foreign Health Professionals in the Republic of South Africa 2006

Department of Employment and Labour, Notice on Banking Information Requirements for Occupational Injuries and Diseases Related Claims, GN 651 of 19 October 2021.

REPORTS AND STUDIES

Archick K 'The European Union; Questions and Answers' (2022) *Congressional Research Services*.

Brown G 'The Universal Declaration of Human Rights in the 21st Century: A living document in a changing world' (2016) *NYU Global Institute for Advanced Study*.

Costello C and O'Conneide C 'The Right to Work of Asylum Seekers and Refugees' (2021) *ASILE*.

Khan F and Rayner N 'Country Fiche South Africa' (2020) *ASILE*.

Lawyers for Human Rights 'Costly Protection: Corruption in South Africa's Asylum System' (2020) *Corruption watch and Scalabrini Centre*.

O'Flaherty M 'Protecting migrant workers from exploitation in the EU: Workers Perspective' (2019) *EU Agency for Fundamental Rights (FRA)*.

Sarvimaki M 'Labour Market Integration of Refugee in Finland' (2017) *VATT Institute for Economic Research*.

Stelzner S, Harrison S and Patterson B et al 'International Labour and Compliance Handbook: South Africa' (2010) *IBA*.

Taal M 'Organising in the Hospitality sector in South Africa: A report on the context, challenges and strategies of organising hotel workers in South Africa' (2012) *Cape Town Labour Research Service*.

Tanzer Z and Gwenyaya T 'Shadow Report: South Africa's Compliance with Labour Obligations under the International Covenant on Economic, Social and Cultural Rights' (2018) *Shadow Report*.

Traunmuller R and Helbling M 'Backlash to policy decisions: how citizens react to immigrants rights to demonstrate' (2020) *PSRM*.

United Nations 'Combating violence against migrants; Criminal justice measures to prevent, investigate, prosecute and punish violence against migrants, migrant workers and their families and to protect victims' (2015) *United Nations Office On Drugs And Crime*.

Van Nierop P, Schonenberg L and Terziev P 'Counteracting undeclared work and labour exploitation of third-country national workers' (2021) *European Platform Tacking Undeclared Work*.

Vettori S 'The exploitation of Migrant workers Labour in the Hospitality Industry in South Africa' (2017) 6 *African Journal of Hospitality, Tourism and Leisure*.

Vanyoro KP 'Regularising Labour Migration of Zimbabwean Domestic Workers in South Africa' (2019) *African Centre for Migration and Society Policy Brief*.

Zetter R and Ruaudel H 'Refugees Rights to Work and Access to Labor Markets- An Assessment (2016) *Global Knowledge Partnership on Migration and Development (KNOMAD)*.

THESIS

Biney, E *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* (unpublished LLD thesis, University of Cape Town, 2016).

Biney E *Safeguarding the Illegal: Rethinking the Interface between Labour and Immigration laws* (unpublished Mphil thesis, University of Cape Town, 2012).

Chauke B *Migrants and Access to Financial Services: Exploring alternative financial services available to Zimbabwean migrants who have no access to formal financial services in South Africa* (unpublished MSocSci Development Studies thesis, University of Pretoria 2020)

Khan F *In Chronic Exile: A critique of South Africa's Legal Regime for refugees in Protracted Refugee Situations* (Unpublished LLD thesis, University of Cape Town 2017)

Matshakaile TN *Access to Justice for Non-citizens: A Constitutional Analysis* (unpublished LLM thesis, Stellenbosch University 2014).

Motsamai LG *Forced Labour: The Protection of Illegal migrant workers in South Africa* (Unpublished LLM thesis, North-West University, 2019).

Nkuna PM *Undocumented Migrants and the right to fair labour practices* (unpublished LLM thesis, University of Pretoria, 2019).

Taha S *Protection of Labour Rights of Undocumented Migrant Workers against severe Labour exploitation in the EU: A case for supporting clandestine workers in Belgium* (Organization for undocumented Migrant Workers OR.C.A, 2015).

Phiri TE *Unfair labour practices, labour legislation and protection of migrant workers in South Africa* (unpublished M.com, University of Witwatersrand 2015).

TREATIES AND CONVENTIONS

European Union (EU)

Treaty on the Functioning of the European Union 1957 European Union OJL, 326/47 (2012).

The European Social Charter of 1961, European Treaty Series no.035.

International Labour Organisation (ILO)

Migrant Workers (Supplementary Provisions) Convention, 1975 International Labour Organisation C143.

Migrant Workers Recommendation 1975 International Labour Organisation R151.

Organisation of African Unity (OAU)

African Charter on Human and People's Rights (Banjul Charter) 1981 (1982) 215 ILM 58.

Constitution of the International Labour Organisation of 1 April 1919 International Labour Organisation

Draft Protocol on the Facilitation of Movement of Persons 2005

Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 1001 UNTS 45.

Organisation of African Unity Charter City of Addis Ababa, Ethiopia, 25th day of May, 1963

United Nations (UN)

International Covenant on Civil and Political Rights (1966) United Nations General Assembly, UN Doc A/6316.

International Covenant on Economic, Social and Cultural Rights (1996) United Nations General Assembly, G.A./res/2200A (XXI).

International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) United Nations General Assembly, UN Treaty Series, vol 1465.

International Convention for the Protection of All Persons from Enforced Disappearance (2006) United Nations General Assembly resolutions 61/177 (2007).

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1966) United Nations General Assembly, A/6316 (1966) 3 UNTS 993.

Charter of the United Nations (1945) United Nations, 1 UNTS XVI.

International Bill of Human rights (1996) United Nations Fact sheet No.2 (Rev.1)

Universal Declaration of Human Rights (1948) United Nations General Assembly 271 A (III).

WHITE PAPERS

The *White Paper on International Migration for South Africa*, Department of Home Affairs, July 2017.

