

Forced labour: The protection of illegal migrant workers in South Africa

29774535

LG Motsamai

 **orcid.org/0000-0001-8561-9950**

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Supervisor: Mr MC Stoffels

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Student number: 29774535

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ABSTRACT

Illegal immigrants have been said to be one of the most vulnerable and precarious groups in society. This vulnerable position creates many problems for illegal immigrants, of which forced labour is one. This research aims to investigate the legal position of illegal immigrants in the workplace with special reference to forced labour. Owing to their precarious legal status, immigrants are highly susceptible to forced labour. This research considers legal provisions by the South African law in this regard as well as international law to ascertain protections available to illegal immigrants. Furthermore, the research acknowledges the importance of the *Discovery Health v CCMA* case to this study. This is because this particular case sets the precedent for the protections available to illegal immigrants in the workplace.

Key words: Forced labour, illegal migrant workers, illegal immigrants, fair labour practices, exploitation, vulnerability

OPSOMMING

Onwettige immigrante word beskou as een van die mees weerlose en twyfelagtige groepe in die samelewing. Hierdie weerlose posisie skep baie probleme vir immigrante, en dwangarbeid is een daarvan. Hierdie navorsing ondersoek die regsposisie van onwettige immigrante in die werkplek, met spesiale verwysing na dwangarbeid. Weens hulle twyfelagtige wetlike status, is immigrante vatbaar vir dwangarbeid. Die navorsing oorweeg die wetlike bepalings in die Suid-Afrikaanse in hierdie verband asook die internasionale reg om te bepaal watter beskerm daar is vir onwettige immigrante. Die navorsing erken die belangrikheid van die *Discovery Health v CCMA* saak vir hierdie studie. Dit is omdat hierdie besondere saak die presedent stel vir die beskerming tot die beskikking van onwettige immigrante in die werkplek.

Sleutelwoorde: Dwangarbeid, onwettige trekarbeiders, onwettige arbeiders, regverdige arbeidspraktyke, uitbuiting, weerloosheid

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LIST OF ABBREVIATIONS

| | |
|-------|---|
| BCEA | Basic Conditions of Employment Act |
| CCMA | Commission for Conciliation Mediation and Arbitration |
| CESCR | Covenant on Economic, Social and Cultural Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ILO | International Labour Organisation |
| LRA | Labour Relations Act |

Chapter 1: INTRODUCTION AND PROBLEM STATEMENT

1.1 Introduction

Illegal immigrants are regarded as one of the most vulnerable and precarious groups in society.¹ This vulnerable position creates many problems for illegal immigrants, of which forced labour is one. This research aims to investigate the legal position of illegal immigrants in the workplace with special reference to forced labour. Owing to their precarious legal status, immigrants are highly susceptible to forced labour.² This research considers legal provisions by the South African law in this regard as well as international law to ascertain protections available to illegal immigrants. Furthermore, the research acknowledges the importance of the *Discovery Health v CCMA* 2008 29 ILJ 1480 (LC)³ case to this study. This is because this particular case sets the precedent for the protections available to illegal immigrants in the workplace. Essentially, this research is aimed at investigating the legal position of illegal immigrants in the workplace with special reference to forced labour. This chapter includes an outline of the problem statement, which is the cornerstone of this research. During the stating of the problem an overview of the South African legal position regarding forced labour will be stated. This is essential to provide an understanding of the current framework, which is important in formulating whether illegal immigrants are entitled to labour rights.

1.2 Problem Statement

Section 13 of the *Constitution of the Republic of South Africa* 1996⁴ prohibits forced labour.⁵ The *Basic Conditions of Employment Act* 75 of 1996⁶ also prohibits forced labour. Both the *Constitution* and the *BCEA* make provision for protection against forced labour. The protection afforded by the abovementioned statutes entails the right to protection in cases of forced labour and the right to fair labour practices enshrined in

¹ Kreston 2014 *South African Journal of Criminal Justice* 20-36.

² Masiloane 2010 *South African Journal of Criminal Justice* 23.

³ *Discovery Health v CCMA* 2008 29 ILJ 1480 (LC), (Hereafter referred to as the *Discovery Health* case).

⁴ Constitution of the Republic of South Africa 1996 (Hereinafter referred to as the *Constitution*).

⁵ S 13 of the *Constitution*.

⁶ *Basic Conditions of Employment Act* 75 of 1997 (Hereinafter referred to as the *BCEA*). See section 48 (1) of the *BCEA*.

section 23(1) of the *Constitution*. Section 23(1) of the *Constitution* states that everyone has the right to fair labour practices. However, no definition of forced labour is provided in either the *Constitution* or the *BCEA*.

In this regard, international law must be considered as courts, tribunals or forums are compelled to consider international law when the Bill of rights is interpreted.⁷ The *International Labour Organisation* in the *Forced Labour Convention* defines forced labour as,

All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.¹⁰

The above definition of forced labour simply means that the victims are forced to work regardless of whether they want to work or not or coerced to work without their consent. Threats and promises of punishment are used to make these people do the work their captors enlisted them to do.¹¹ Victims of forced labour work under coercion so that refusal to work might lead to a certain form of punishment. The situations take the form of slavery or practices similar to slavery and servitude, and consequences may include actions as severe as the removal of organs.¹²

In order to keep up with the ever-changing patterns of forced labour, the *ILO* brought into force the *Protocol of 2014*, an addition to *Convention 29* that operates in conjunction with it.¹³ Much has changed since *Convention 29* was adopted.¹⁴ The *Convention 29* was adopted during the era of colonialism, and the era of colonialism has since ended.

⁷ S 39 (1) (b) of the *Constitution* states, "When interpreting the Bill of Rights, a court, tribunal or forum must consider international law."

⁸ Hereafter referred to as *ILO*.

⁹ *Forced Labour Convention 29* of 1930 (Hereafter referred to as *Convention 29*).

¹⁰ Article 2(1) of *Convention 29*.

¹¹ Article 2(1) of *Convention 29*.

¹² Kreston 2014 *South African Journal of Criminal Justice* 27.

¹³ *Protocol to the Forced Labour Convention No 29* of 1930; *Protocol 203* of 2014 (Hereinafter referred to as the *2014 Protocol*). South Africa has ratified this convention and thereby bound by its provisions. Both the *1930 Convention* and *2014 Protocol* are to be referred in unison as the *Forced Labour Conventions*.

¹⁴ International Labour Organisation 2016 <http://www.ilo.org/forcedlabour>.

According to the *ILO*, only colonial administrators and certain states utilised forced labour at the time of the adoption of *Convention 29*.¹⁵

Today, the *ILO* estimates that about 21 million men, women and children around the world are victims of forced labour, are trafficked and held in debt bondage, or working in slave-like conditions.¹⁶ The aim of the *2014 Protocol* is the elimination of forced labour as well as the trafficking of persons.¹⁷ Trafficking of persons includes the recruitment of persons who are at a later stage subjected to forced labour, hence the inclusion of trafficking in the Protocol.¹⁸ It is therefore noted that there seems to be a link between forced labour and trafficking in persons. The *2014 Protocol* provides all actors with a comprehensive strategy and provides tools to address the challenge of forced labour.¹⁹ The *2014 Protocol* further provides that states must not only criminalise and prosecute forced labour, but also set effective measures to prevent forced labour and provide victims with adequate protection and access to justice, including compensation.²⁰ Vulnerable groups, including illegal migrant workers, are most susceptible to forced labour and human trafficking.²¹

An illegal immigrant is a person who enters a country without authorisation to do so. They either have insufficient documentation or overstay the time allowed by their visas.²² This definition gives the idea that an illegal migrant worker is a worker who does not have the requisite documents to be a worker in a certain country or state.

Section 38 of the *Immigration Act* prohibits the employment of illegal immigrants.²³ The question of the employment of illegal immigrants arose in the *Discovery Health case*²⁴. In this case, there was a contract of employment between *Discovery Health* and a

¹⁵ International Labour Organisation 2016 <http://www.ilo.org/forcedlabour> for instance Britain and France were colonial administrators.

¹⁶ International Labour Organisation 2016 <http://www.ilo.org/forcedlabour>.

¹⁷ Preamble of the *2014 Protocol*.

¹⁸ Article 1(3) of the *2014 Protocol*.

¹⁹ Article 1(1) of the Protocol these are member states.

²⁰ Article 1(1) of the Protocol.

²¹ Kreston 2014 *South African Journal of Criminal Justice* 20-36.

²² S 1 of the *Immigration Act* 13 of 2002 (Hereinafter referred to as the *Immigration Act*). See also Masiloane 2010 *South African Journal of Criminal Justice* 23.

²³ S 38 (1) of the *Immigration Act*.

²⁴ *Discovery Health v CCMA*.

certain employee. This employee was an Argentinian national who had a temporary residence permit in South Africa. The employee did not have a work permit that enabled him to work in South Africa. He was aware of his foreign status and the temporary residence permit.²⁵ The validity of the employment contract was brought into question because of the lack of sufficient immigration documentation.²⁶ In this regard, the court considered the provisions of section 23 (1) of the *Constitution*, which states that everyone has the right to fair labour practices. It was held that the right to fair labour practices is a fundamental right and that there was no indication from the terms of section 38(1) of the *Immigration Act* that the statute intends to limit the right.²⁷ The court further held that to sanction the claim of contractual invalidity in these circumstances would defeat the primary purpose of section 23 of the *Constitution*.²⁸ The primary purpose of section 23 of the *Constitution* is to give effect to the right to fair labour practices.²⁹

However, the court stated that

...despite the wording of s 23(1) of the Constitution everyone has the right to fair labour practices' it does not necessarily follow, as Halton Cheadle has argued, that the word 'everyone' should be literally interpreted. Cheadle suggests that the scope of the right is appropriately determined by the inherent qualification in s 23 the right is one that extends to fair labour practices. These are practices that arise from 'the relationship between workers, employers and their respective organisations'.³⁰

In response to the above argument, the court stated that the protection against unfair labour practices established by section 23(1) of the *Constitution* is not dependent on a contract of employment.³¹ Protection extends potentially to other contracts, relationships and arrangements in terms of which a person performs work or provides personal services to another.³² The line between performing work 'akin to employment'

²⁵ *Discovery Health* case para 2.

²⁶ *Discovery Health* case para 12.

²⁷ *Discovery Health* case para 30.

²⁸ *Discovery Health* case para 32.

²⁹ *Discovery Health* case par 32.

³⁰ *Discovery Health* case par 39.

³¹ *Discovery Health* case par 42.

³² *Discovery Health* case par 42.

and the provision of services as part of a business is a matter regulated by the definition of 'employee' in section 213 of the *Labour Relations Act* 66 of 1995.³³

The importance of the *Discovery Health* case is to illustrate the position of illegal migrant workers in South Africa. The position of illegal workers is such that as much as immigration laws prohibit their presence in South Africa, they enjoy the protection of the *Constitution* and the *BCEA* with regard to the right to fair labour practices.

In South Africa, illegal migrant workers face the problem of being vulnerable to victimisation, discrimination and exploitation. The vulnerability of these workers arises from the fact that they are in South Africa illegally.³⁴ They face among other things issues relating to no control or influence over pay and working conditions, and this may include for instance income below the minimum wage.³⁵ Labour exploitation and forced labour are easily perpetrated on illegal workers because they strive to remain invisible in order to escape deportation if they are discovered.³⁶

As stated above, illegal immigrant workers are made vulnerable by immigration laws because they are in danger by simply being in South Africa without the proper documentation.³⁷ Their vulnerability originates from the fact that they have no proper authorisation to be in South Africa and no right to work in the country under the *Immigration Act*.³⁸ They therefore wish to remain invisible to the authorities, which causes the workers to refrain from reporting any abuse to the authorities.³⁹ Employers often also take advantage of employee's illegal status by paying these workers below minimum wage, disregarding health and safety rules. Employers furthermore threaten to expose these workers when they attempt to seek better treatment.⁴⁰

³³ *Discovery Health* case par 42. See section 213 of the *Labour Relations Act* 66 of 1995 (hereinafter referred to as the *LRA*) states that an employee means; "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".

³⁴ Masiloane 2010 *South African Journal of Criminal Justice* 23.

³⁵ Masiloane 2010 *South African Journal of Criminal Justice* 23.

³⁶ Kreston 2014 *South African Journal of Criminal Justice* 20-36.

³⁷ Mantouvalou *The right to work* 50.

³⁸ Section 38(1) of the *Immigration Act*.

³⁹ Mantouvalou *The Right to work* 50.

⁴⁰ Mantouvalou *The right to work* 51.

1.3 Aim of the Research

The aim of this research is to determine the extent to which the South African law protects illegal migrant workers against forced labour. In order to achieve this, the research starts with a discussion of what the law in South Africa provides regarding forced labour. Following this discussion, the South African position on illegal immigrants in the context of labour law will be investigated. This will enable an investigation of the remedies available to illegal immigrants in cases of forced labour in order to curb and avoid the prevalence of this problem. It should further be noted that words 'illegal migrant workers' and 'illegal immigrants' are used interchangeably.

1.4 Framework of the Study

This chapter introduces the problem and gives an outline of the problem that illegal immigrants face in cases of forced labour in order to state the legal position. This is a start to determining how the law provides or fails to provide protection for this group of persons. Chapter 2 focuses on the concept of forced labour and how it manifests, as well as the legal provisions concerning forced labour. Chapter 3 looks into the labour rights of illegal immigrants in the workplace. This chapter elaborates more on the challenges that illegal immigrants face and what the law has to say in this regard. Chapter 4 indicates what remedies are available to illegal immigrants through the assertion of the rights that attach to them. Both labour and human rights are taken into consideration here. Finally, Chapter 5 gives an overview of all the chapters and offers recommendations for the improvement of the existing rights.

Chapter 2: AN IN-DEPTH VIEW OF FORCED LABOUR

2

2.1 Introduction

Forced labour has been an issue in the world of work for many years, and it persists. It presently manifests in many different forms and shapes.⁴¹ The purpose of this chapter is to investigate forced labour. In order to achieve this goal, it is important to indicate how and when forced labour manifests. This will be done by first looking into the definition of forced labour provided by international instruments, its elements and how it occurs. Since there is no definition of forced labour given in any South African legislation, heavy reliance will be on *ILO* instruments for guidance. This is based on section 39 of the *Constitution*, which states that international law must be considered.⁴² This chapter therefore mostly contains the international perspective on forced labour since South African law is lacking in this area.

2.2 International traces of protections against forced labour

In 1944, the *Philadelphia Declaration*⁴³ set out a list of principles that were set to govern and regulate labour conditions. The first principle enunciated was that "labour should not be regarded merely as a commodity." This is one of the underlying principles of international labour law.⁴⁴ According to Smit,⁴⁵ this principle is made up of three interconnected elements. The first is that "the pricing of labour cannot be left solely to the labour market."⁴⁶ This means that the wages paid to a worker should be enough to provide for him as well as his family sufficiently and reasonably.⁴⁷ Secondly, this principle means that, "a worker cannot be transferred from one employer to another without his consent." This means that a worker has a right to be consulted on decisions

⁴¹ This will be indicated and elaborated in Section 2.3 of this chapter.

⁴² Section 39 of the *Constitution*.

⁴³ Declaration Concerning the aims and purposes of the ILO 10 May 1944 at para 1 (a).

⁴⁴ Smit 2006 *TSAR* 154.

⁴⁵ Smit 2006 *TSAR* 154.

⁴⁶ Smit 2006 *TSAR* 154.

⁴⁷ Smit 2006 *TSAR* 154.

that include his or her work. Thus, a worker must know his fate in the workplace.⁴⁸ Lastly, this principle means that, "illegal trafficking in migrant labour and fee-charging employment agencies should be outlawed."⁴⁹ The inference can be drawn that the principle that labour is not a commodity also prohibits labour trafficking and basically frowns on the exploitation of workers in the workplace.

For the content of this principle to be accomplished, labour ought to be decided on without restrictions, meaning forced labour is prohibited.⁵⁰ According to Servais⁵¹ "freedom of work is a fundamental aspect of democratic life." This point is clarified by article 8(3)(c) of the *International Covenant on Civil and Political Rights 1966*⁵², which:

...declares that no one shall be held in slavery or servitude, or required to perform forced or compulsory labour.

Furthermore, the *Covenant on Economic, Social and Cultural Rights 1966*⁵³, which recognises the right to work, stipulates that this includes every person's right to an opportunity to gain his living by work that he freely chooses and accepts.⁵⁴ South Africa, having ratified this *Covenant*, is bound by its obligations. Therefore, South Africa needs to recognise and promote the right to work.

2.3 Forced Labour Dissected

Section 13 of the *Constitution*⁵⁵ prohibits forced labour, as does section 48(1) of the *BCEA*.⁵⁶ However, neither the *Constitution* nor the *BCEA* define the concept of forced labour, nor is it defined in any other South African legislation in this regard. The situation can be remedied by drawing reference to international law as provided by

⁴⁸ Smit 2006 *TSAR* 154.

⁴⁹ Smit 2006 *TSAR* 154.

⁵⁰ Servais *International Labour Law* para 329.

⁵¹ Servais *International Labour Law* para 329.

⁵² *International Covenant on Civil and Political Rights 1966*. Hereinafter referred to as the *ICCPR*.

⁵³ *Covenant on Economic, Social and Cultural Rights 1966*. Hereinafter referred to as the *CESCR*.

⁵⁴ Article 6 of the *CESCR*.

⁵⁵ The *Constitution* states that; "No one may be subjected to slavery, servitude or forced labour."

⁵⁶ The *BCEA* states that; "Subject to the *Constitution* all forced labour is prohibited."

section 39 (1) (b) of the *Constitution*.⁵⁷ A clear definition of this concept is provided for in *Convention 29*.⁵⁸ Article 2 (1) of *Convention 29* states that:

Forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.⁵⁹

The above definition of forced labour is better explained by breaking it down into elements. These elements are "work or service," "menace of penalty," and "voluntary."

"All work or service" includes all forms of work or services provided regardless of the kind of employer involved.⁶⁰ It includes work in all sectors, ranging from legal, formal to informal and even illegal employment.⁶¹ This also means that forced labour may happen in any economic sector, either public or private.⁶² It is inclusive of both forced labour and forced prostitution.⁶³

"Menace of any penalty" is inclusive of both real punishment and threats of punishment against a person for not doing work forced on them.⁶⁴ This also includes the following: criminal punishment; threats of physical harm, or for illegal immigrants, denunciation to the authorities; threats of harm, both physical harm and blackmail; retention of identity documents; physical confinement; or withholding wages.⁶⁵ The penalty may also take the form of loss of benefits or privileges.⁶⁶

"Voluntary," means that a person must freely choose to be employed based on valid information regarding the job.⁶⁷ Furthermore, the worker must be able to leave employment at a time he chooses after having given adequate notice to the employer without the fear that the employer will retaliate in some way.⁶⁸

⁵⁷ When interpreting the Bill of Rights, a court, tribunal or forum must consider international law.

⁵⁸ *ILO Forced Labour Convention 29 of 1930*.

⁵⁹ *ILO Forced Labour Convention 29 of 1930*.

⁶⁰ ILO "Forced Labour and human trafficking in the Southern African Development Community" 10.

⁶¹ ILO "Forced Labour and human trafficking in the Southern African Development Community" 10.

⁶² ILO "Forced Labour and human trafficking in the Southern African Development Community" 10.

⁶³ ILO "Forced Labour and human trafficking in the Southern African Development Community" 10.

⁶⁴ ILO "Forced Labour and human trafficking in the Southern African Development Community" 10.

⁶⁵ ILO "Forced Labour and human trafficking in the Southern African Development Community" 10.

⁶⁶ ILO "Forced Labour and human trafficking in the Southern African Development Community" 10.

⁶⁷ ILO "Forced Labour and human trafficking in the Southern African Development Community" 10.

⁶⁸ ILO "Forced Labour and human trafficking in the Southern African Development Community" 10.

The definition is comprised of two key features: the work is done involuntarily, and this occurs because the labourer is under the menace of a penalty.⁶⁹ Clearly, the former element is the consequence of the latter.⁷⁰ Victims of forced labour are in most cases also victims of coercion. They are often given the promise of work and provided with false information regarding the nature of the job they will be performing and the location of that job.⁷¹ Essentially, forced labour is inclusive of obliging people to agree to employment or terms of employment that they would reject otherwise.⁷²

The above definitions give a clear illustration of what a forced labour situation looks like. However, in order to understand the full scope of forced labour, it is important to explain the elements of the definition given above. Coercion and lack of consent are important elements in the above definition. It is inclusive of circumstances where a person is obliged to work without giving permission or is frightened to leave because of threats received from the employer.⁷³ Situations where employees are prevented from leaving the workplace because they have not been remunerated for a long time or where their travel and identity documents are withheld arbitrarily also form part of a forced labour situation.⁷⁴ Involuntariness includes all situations where free consent is not given.⁷⁵ When recruitment takes place, lack of consent arises due to excessive coercion, ranging from abduction to deception.⁷⁶ For instance, the deception often concerns the nature of the work to be done by the person being recruited. As a result the person's consent becomes invalid, consent would not have been given had the person known the nature of the job.⁷⁷ Formal consent is not a guarantee that a person is working voluntarily.⁷⁸ For example, where a worker agrees to work because they are

⁶⁹ Sarrica 2015 *Forum on Crime and Society* 138.

⁷⁰ Sarrica 2015 *Forum on Crime and Society* 138.

⁷¹ ILO "Forced Labour and human trafficking in the Southern African Development Community" 10.

⁷² Sarrica 2015 *Forum on Crime and Society* 138.

⁷³ ILO "Forced Labour and human trafficking in the Southern African Development Community" 9.

⁷⁴ ILO "Forced Labour and human trafficking in the Southern African Development Community" 9.

⁷⁵ ILO "Forced Labour and human trafficking" Para 11.

⁷⁶ ILO "Forced Labour and human trafficking" Para 11.

⁷⁷ ILO "Forced Labour and human trafficking" Para 11.

⁷⁸ ILO "Combatting forced Labour" 17.

being threatened, there is no voluntariness in his work.⁷⁹ In a situation of coercive work, the forceful nature of the work impedes the worker from offering himself freely.⁸⁰

While lack of consent and coercion are important to the definition of forced labour, there are further indicators of forced labour that should be mentioned in order to have a clear understanding of forced labour. These indicators include abuse of vulnerability, restriction of movement, physical and sexual violence, retention of identity documents and debt bondage.

2.4 Indicators of forced labour

Furthermore, labour exploitation occurs in instances where, people are forced to work without their consent.⁸¹ Their identity documents are withheld by their employers to prevent them from leaving, furthermore they are forced to work in conditions that are dangerous to their health.⁸² In addition, they are afraid to leave because the employer is constantly threatening them and is also withholding their wages.⁸³

Several important characteristics of forced labour appear in the above quote.⁸⁴ Vulnerability, coercion and exploitation should be noted as important features in a forced labour situation.⁸⁵ Vulnerability is a pull factor for perpetrators of forced labour because vulnerable people are weak and therefore easy targets. When a perpetrator of forced labour acquires forced labourers, he keeps them on a leash and threatens them if they consider leaving. The following indicators are identified by the *ILO* and are relevant to the South African context.

2.4.1 Abuse of vulnerability

Abuse of vulnerability happens mostly to illegal immigrants.⁸⁶ Abuse of a position of vulnerability happens when a person's individual, situational or circumstantial

⁷⁹ ILO "Combatting forced Labour" 17.

⁸⁰ ILO "Combatting forced Labour" 17.

⁸¹ ILO "Forced Labour and human trafficking in the Southern African Development Community" 7.

⁸² ILO "Forced Labour and human trafficking in the Southern African Development Community" 7.

⁸³ ILO "Forced Labour and human trafficking in the Southern African Development Community" 7.

⁸⁴ See para 2.3 above.

⁸⁵ ILO "Forced Labour and human trafficking in the Southern African Development Community" 7.

⁸⁶ ILO "Human Trafficking and Forced Labour exploitation" 23.

vulnerability is used with the intention to recruit, transport, transfer, harbour or receive that very person in order to exploit him or her.⁸⁷ This happens to the extent that the person ends up believing that submitting to the will of the abuser is the only way to survive.⁸⁸ These people are threatened or blackmailed that the authorities will be alerted should they be reluctant to perform tasks mandated by their employers.⁸⁹ In most cases, their migration status is illegal and this therefore becomes the vulnerability with which the employer blackmails them.⁹⁰

2.4.2 Restriction of movement

Detention is one of the most popular means by which forced labour is exacted.⁹¹ It is a lot easier for the captor to get the detainee to do what he requires when he is being held captive.⁹² The workers are often held captive at their place of work or locked into very confined spaces. These workers are completely prevented from having contact with the outside world or the surrounding communities.⁹³ The ultimate goal is to ensure that the captor gets as much work from the workers as possible.⁹⁴ The possibility exists that these workers are made to work every day, with little or no rest at all.⁹⁵

Restriction of movement corresponds to the common law offence of false imprisonment, which is any restraint of liberty of one person under the custody of another.⁹⁶

The detention of another human being is a gross violation of their human rights, even more so in situations where the detention occurs for the purpose of making that person do work against his will, which may be tantamount to slavery.⁹⁷

⁸⁷ United Nations 2012 <https://www.un.org/> 11 February 2018.
⁸⁸ United Nations 2012 <https://www.un.org/> 11 February 2018.
⁸⁹ ILO "Human Trafficking and Forced Labour exploitation" 23.
⁹⁰ ILO "Human Trafficking and Forced Labour exploitation" 23.
⁹¹ ILO "Human Trafficking and Forced Labour exploitation" 20.
⁹² ILO "Human Trafficking and Forced Labour exploitation" 20.
⁹³ ILO "Human Trafficking and Forced Labour exploitation" 20.
⁹⁴ ILO "Human Trafficking and Forced Labour exploitation" 20.
⁹⁵ ILO "Human Trafficking and Forced Labour exploitation" 20.
⁹⁶ ILO "Human Trafficking and Forced Labour exploitation" 20.
⁹⁷ ILO "Human Trafficking and Forced Labour exploitation" 20.

2.4.3 Physical and sexual violence

Physical and sexual violence are some of the measures the employers use to force workers into submission.⁹⁸ Threats of these types of violence may scare employees into submission, and the actual exaction of these violent acts may force workers to do what is required of them.⁹⁹ These acts constitute assault and are committed in most cases with the intent to frighten the victim.¹⁰⁰ The severity of the assault, be it sexual or physical, depends on how much damage the employer actually wants to cause.¹⁰¹

2.4.4 Retention of identity documents

It is very common in cases of illegal migrant workers for the employer to take the identity documents of the employee under the pretext of helping them sort out their immigration status.¹⁰² In such cases, the employer refuses to return the documents of the employee and does not actually assist in sorting out their immigration problem.¹⁰³ The situation where an employee is without a passport or any other documents to confirm their identity also creates a situation of vulnerability.¹⁰⁴ Once vulnerability is created, the employer is then able to use the workers in any way he/she needs.¹⁰⁵ Vulnerability creates a great position for exploitation on the part of employers. The retention of a worker's identity documents makes it hard to leave the workplace as well.¹⁰⁶

2.4.5 Debt bondage

This happens when a person is used as security for a debt or loan.¹⁰⁷ The *ILO* has stated that this situation is the bridge between forced labour and slavery.¹⁰⁸ The person

⁹⁸ ILO "Human Trafficking and Forced Labour exploitation" 20.

⁹⁹ ILO "Human Trafficking and Forced Labour exploitation" 20.

¹⁰⁰ ILO "Human Trafficking and Forced Labour exploitation" 20.

¹⁰¹ ILO "Human Trafficking and Forced Labour exploitation" 20.

¹⁰² ILO "Human Trafficking and Forced Labour exploitation" 21.

¹⁰³ ILO "Human Trafficking and Forced Labour exploitation" 21.

¹⁰⁴ ILO "Human Trafficking and Forced Labour exploitation" 21.

¹⁰⁵ ILO "Human Trafficking and Forced Labour exploitation" 21.

¹⁰⁶ ILO "Human Trafficking and Forced Labour exploitation" 21.

¹⁰⁷ ILO "Human Trafficking and Forced Labour exploitation" 20.

¹⁰⁸ ILO "Human Trafficking and Forced Labour exploitation" 20.

in this situation has to work towards repayment of this debt or loan.¹⁰⁹ It is very difficult to repay a debt of this kind in full.¹¹⁰ The employer provides food and accommodation in most cases, but this only adds to the debt that has to be repaid.¹¹¹ The worker is paid such a small amount of money that the person barely has anything left for him or herself between paying back the debt and other expenses.¹¹² Debt bondage has also been said to be passed on from generation to generation. It is a form of slavery because the debt can never be fully repaid.¹¹³ The people bound by this kind of debt work tirelessly, but it is never enough, which is one of the reasons why it is regarded as another form of slavery¹¹⁴.

The key to the hold of the employer over the employee is the appearance of lawfulness of the contract. So long as the contract is unlawful, which in many jurisdictions will be the case either as a result of the unlawfulness of the taking of a human being as security for a debt or the unfair contract terms of the agreement regarding food and accommodation, the hold of the employer over the worker is the result of deception as to the rights of the worker. This falls under the offence of obtaining pecuniary advantage or services by deception, which is unlawful in virtually all countries.¹¹⁵

The above quote shows that this type of crime can be prosecuted upon proof of an illegal contract, deception and the idea of taking unjust advantage of another person. Finally, making a person security for a debt is illegal.

Forced labour occurs in more ways than mentioned above that is why it is stated that;¹¹⁶

...in the current globalised economic context, the terms; "forced labour," "human trafficking," "slavery" and "slave-like practices" are often used interchangeably to refer to extreme forms of labour exploitation and abuse that occurs at the nexus of involuntary work and new forms of coercion.

The *ILO* has also stated that forced labour and trafficking of persons are inextricably linked. It is therefore important to look into the link between forced labour and human trafficking in order to better understand how forced labour works. The next section deals with the nexus between forced labour and trafficking in persons.

¹⁰⁹ ILO "Human Trafficking and Forced Labour exploitation" 20.

¹¹⁰ ILO "Human Trafficking and Forced Labour exploitation" 20.

¹¹¹ ILO "Human Trafficking and Forced Labour exploitation" 20.

¹¹² ILO "Human Trafficking and Forced Labour exploitation" 20.

¹¹³ ILO "Human Trafficking and Forced Labour exploitation" 20.

¹¹⁴ ILO "Human Trafficking and Forced Labour exploitation" 20.

¹¹⁵ ILO "Human Trafficking and Forced Labour exploitation" 20.

¹¹⁶ ILO "Forced Labour and human trafficking in the Southern African Development Community" 7.

2.5 The link between human trafficking and forced labour (vulnerability, coercion and exploitation)

It is important to consider the definition of human trafficking. Trafficking in persons is defined as:¹¹⁷

The recruitment, transportation, transfer, harbouring or receipt of persons by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of the position of vulnerability, or the giving and receiving of payment or benefits to achieve consent of a person having control of another person for the purpose of exploitation. Exploitation shall include at a minimum, exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practice similar to slavery, servitude or removal of organs.

The above definition of trafficking in persons shows a comprehensive chain of causation in relation to persons being trafficked. It starts with recruitment through various means. This leads to exploitation in various forms. Coercion, vulnerability and exploitation form an important part of the above definition. It is therefore important to consider these elements in the context of forced labour and trafficking in persons.

It has been stated that coercion changes during the subsistence of the labour exploitation.¹¹⁸ This form of coercion is called situational coercion.¹¹⁹ It means that trafficked workers become more amenable to abuse because of their situation.¹²⁰ The situation referred to in this instance is usually their illegal immigration status and poverty.¹²¹ The situations referred to above are those that create the kind of vulnerability that attracts perpetrators of forced labour and trafficking in persons. Abuse of vulnerability is one of the most potent tools used by labour traffickers; this is where the victims are made to believe that they have no other option but to submit to the will of their captors.¹²² Some labour traffickers use very complex methods to imprison their

¹¹⁷ *United Nations Protocol to Prevent, suppress and Punish Trafficking in persons especially women and children* Article 3.

¹¹⁸ Kreston 2014 *South African Journal of Criminal Justice* 29.

¹¹⁹ Kreston 2014 *South African Journal of Criminal Justice* 30.

¹²⁰ Kreston 2014 *South African Journal of Criminal Justice* 30.

¹²¹ Kreston 2014 *South African Journal of Criminal Justice* 30.

¹²² Kreston 2014 *South African Journal of Criminal Justice* 30.

victims.¹²³ One such method is psychological control.¹²⁴ This method can be explained as:

...coercive systems utilise high levels of control, exposure to chronic stress and threat, isolation, provocation of fear, and the creation of a sense of helplessness in victims. The methods that enable one human being to enslave another are remarkably consistent, they are based upon the systematic, repetitive infliction of psychological trauma.¹²⁵

The methods mentioned above affect the minds of some victims to such an extent that they go into a state of learned helplessness.¹²⁶ This state prevents victims from trying to escape. They become completely submissive and their wills are broken.¹²⁷ When this happens, they become more or less the property of the people keeping them captive.¹²⁸

The connection between forced labour and trafficking foregrounds the fact that although globalisation brings about new opportunities for people to move around and to attempt to access economic opportunities, it has its disadvantages.¹²⁹ Globalisation has also created the opportunity for coercion, abuse and exploitation.¹³⁰ Some forms of forced labour that have been seen to exist in South Africa include trafficking for sexual exploitation, forced marriage, domestic servitude, and begging.¹³¹

Human trafficking, child labour and forced labour are inextricably linked this is applicable to both Africa and South Africa.¹³² In the end, most victims of human trafficking become forced labourers, either on the African continent or abroad.¹³³ It should be noted that forced labour includes a lot more than what is listed or given in its definition.¹³⁴ The following remark explains this further:

The concept of forced labour is nebulous. For instance, international labour standards include as forced labour, work done in exchange for wages that are below the

¹²³ Kreston 2014, *South African Journal of Criminal Justice* 31.

¹²⁴ Kreston 2014, *South African Journal of Criminal Justice* 31.

¹²⁵ Kreston 2014, *South African Journal of Criminal Justice* 31.

¹²⁶ Kreston 2014, *South African Journal of Criminal Justice* 31.

¹²⁷ Kreston 2014, *South African Journal of Criminal Justice* 31.

¹²⁸ Kreston 2014, *South African Journal of Criminal Justice* 31.

¹²⁹ ILO "Forced Labour and human trafficking in the Southern African Development Community" 3.

¹³⁰ ILO "Forced Labour and human trafficking in the Southern African Development Community" 3.

¹³¹ ILO "Forced Labour and human trafficking in the Southern African Development Community" 92.

¹³² Njoh and Ayuk-Etang 2012 *African Review of Economics and Finance* 31.

¹³³ Njoh and Ayuk-Etang 2012 *African Review of Economics and Finance* 31.

¹³⁴ See 1.2 above.

minimum wage or those established under free market conditions. At a global level forced labour has sometimes been taken to include work with economic value undertaken by minors.¹³⁵

The above quote gives an indication of the broad scope of forced labour. The link between human trafficking and forced labour cannot be overemphasised. Human trafficking has been described as harsh and widespread, and including gross violations of fundamental human rights.¹³⁶ Trafficking is in most cases described as modern slavery. In this context, slavery is often explained as a form of exploitation, and it is for the purpose of exploitation that forced labour is exacted on human beings.¹³⁷

Vulnerability is a core element in the understanding of trafficking in persons.¹³⁸ Vulnerability in this context means integral environmental or other factors that increase the risk individuals or groups of persons have to be trafficked.¹³⁹ Furthermore, factors that increase vulnerability to trafficking seem to disproportionately affect the already downtrodden in society. These include women, children, migrants, refugees and the internally displaced.¹⁴⁰

Although vulnerability is an established factor in the understanding of trafficking, it is not set or fixed within a certain category, or well known. There is a set of factors that mould and define the environment in which trafficking occurs and the ability of an individual to respond.¹⁴¹ In order to be fully understood, vulnerability should be analysed according to specific situations.¹⁴²

Vulnerable people are defined as those who, due to reasons of age, gender, physical or mental state, or due to social, economic, ethnic and/or cultural circumstances, find it especially difficult to fully exercise their rights before the justice system as recognised to them by law. The following may constitute causes of vulnerability: age, disability, belonging to indigenous communities or minorities, victimisation, migration and internal displacement, poverty, gender and deprivation of liberty. The specific

¹³⁵ Njoh and Ayuk-Etang 2012 *African Review of Economics and Finance* 32.

¹³⁶ Jagers and Rijken 2014 *North-western Journal of International Human Rights* 47.

¹³⁷ Jagers and Rijken 2014 *North-western Journal of International Human Rights* 48.

¹³⁸ UN "Abuse of a position of vulnerability in the definition of trafficking in persons" 13.

¹³⁹ UN "Abuse of a position of vulnerability in the definition of trafficking in persons" 13.

¹⁴⁰ UN "Abuse of a position of vulnerability in the definition of trafficking in persons" 14.

¹⁴¹ UN "Abuse of a position of vulnerability in the definition of trafficking in persons" 14.

¹⁴² UN "Abuse of a position of vulnerability in the definition of trafficking in persons" 14.

definition of vulnerable people in each country will depend on their specific characteristics, and even on their level of social or economic development.¹⁴³

The above quote makes it clear that there is no comprehensive definition of vulnerability or a set list of characteristics. How it is understood will depend on the particular case and all the surrounding circumstances.

The next section deals with case studies concerning forced labour. These cases indicate how forced labour has been adjudicated in foreign jurisdictions. Reference is made to foreign case law due to a lack of South African cases dealing with forced labour. The *Constitution* clearly states that where the Bill of Rights needs to be interpreted, international law must be considered.¹⁴⁴

2.6 Cases dealing with forced labour

The two cases referred to below are indicative of how forced labour manifests in different contexts.

In *Prosecutor v Kunarac case No IT-96-23* (22 Feb 2001)¹⁴⁵ in Yugoslavia, the accused was charged with rape as a crime against humanity.¹⁴⁶ The accused was said to have detained two women in an abandoned house. These women were forced to perform house chores and were constantly sexually assaulted.¹⁴⁷ The accused was also charged with enslavement as a crime against humanity.¹⁴⁸ On enslavement, the court held that according to the 1926 Slavery Convention:

Slavery is the status or condition of a person over whom any or all powers attaching to the right of ownership are exercised.¹⁴⁹

Furthermore, the court held that the *1957 Forced Labour Convention* was drafted under the auspices of the ILO and was intended to complement the *Slavery Convention*.¹⁵⁰ The court also gave its own indications of enslavement, which include:

¹⁴³ UN "Abuse of a position of vulnerability in the definition of trafficking in persons" 14.

¹⁴⁴ Section 39 of the *Constitution*.

¹⁴⁵ *Prosecutor v Kunarac case No IT-96-23* (22 Feb 2001).

¹⁴⁶ *Prosecutor v Kunarac* at para 6.

¹⁴⁷ *Prosecutor v Kunarac* at para 6.

¹⁴⁸ *Prosecutor v Kunarac* at para 6.

¹⁴⁹ *Prosecutor v Kunarac* at para 519.

...elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.¹⁵¹

The above quote shows both characteristics of forced labour and human trafficking, which have already been dealt with in this chapter.¹⁵² Additionally, this is another indication that slavery, human trafficking and forced labour are closely linked. Finally, the court held that the accused was guilty of rape and enslavement.¹⁵³

In *Prosecutor v Krnojelac Case No: IT-97-25 T* (15 March 2002)¹⁵⁴ in Yugoslavia, the accused, Krnojelac, was charged with several crimes against humanity. Among his crimes were imprisonment, confinement, torture, beatings, killings, forced labour, inhumane treatment and enslavement.¹⁵⁵ The accused is said to have kept several people detained for the purpose of forced labour.¹⁵⁶ The accused was therefore charged with enslavement contrary to the 1926 Slavery Convention and customary international law.¹⁵⁷ The issue in this case was whether the detainees were forced to work, whether any of the powers attached to the right of ownership over them were used, and finally whether those powers were exercised intentionally.¹⁵⁸

2.7 Conclusion

Convention 29 on forced labour remains the point of reference for the definition of forced labour despite it being outdated. It also criminalises forced labour.¹⁵⁹ The

¹⁵⁰ *Prosecutor v Kunarac* at para 521.

¹⁵¹ *Prosecutor v Kunarac* at para 542.

¹⁵² See section 2.3 of this chapter.

¹⁵³ *Prosecutor v Kunarac* at para 653.

¹⁵⁴ *Prosecutor v Krnojelac Case No: IT-97-25 T* (15 March 2002)

¹⁵⁵ *Prosecutor v Krnojelac* at para 7.

¹⁵⁶ *Prosecutor v Krnojelac* at para 11.

¹⁵⁷ *Prosecutor v Krnojelac* at para 349.

¹⁵⁸ *Prosecutor v Krnojelac* at para 358.

¹⁵⁹ Article 25 states "The illegal exaction of forced or compulsory Labour shall be punishable as a penal offence, and it shall be punishable as a penal offence, and it shall be an obligation on any member

Convention on the Abolition of Forced labour 1957 makes no changes to *Convention 29*. It serves to complement and build on the foundation laid down by the convention. Because of the changing times, the *ILO* adopted a *2014 Protocol to Convention 29* because they realised that the contexts in which forced labour occur and the forms it can take have changed, and that trafficking for the purposes of forced labour is a growing international concern. However, despite this recognition, there is still a shortage of comprehensive national legislation defining forced labour and paving the way for prosecution of offences related thereto. In South Africa, the *Constitution* and the *BCEA* prohibit forced labour, but there is no comprehensive definition for forced labour or guidelines to adjudicate it. This presents a problem when these types of cases arise because courts have to rely heavily on international standards. While they provide a comprehensive framework for forced labour, international standards are broad and they may not address specific trends associated with forced labour that occur only in and around South Africa. Finally, it is common cause that South Africa prohibits forced labour because it includes the gross violation of human rights. However, there is a need for national legislation in this context.

The next chapter focuses on illegal immigrants in the workplace, beginning with how they are treated, their rights and entitlements and the kind of work they do. Furthermore, this chapter focuses on the legal definition of an illegal immigrant as well as their rights and entitlements according to both South African law and international law. Additionally the chapter outlines some decided cases stating the legal position of illegal immigrants.

ratifying this convention to ensure that the penalties imposed by the law are really adequate and strictly enforced".

Chapter 3: ILLEGAL IMMIGRANTS IN THE WORKPLACE: A SOUTH AFRICAN PERSPECTIVE

3

3.1 Introduction

In many cases, immigrants do the hardest, dirtiest, most insecure and poorly paid jobs.¹⁶⁰ These are often referred to as 3D-jobs: dirty, degrading and dangerous jobs.¹⁶¹ The precarious position of immigrants in the labour market is caused by each individual's vulnerability in areas ranging from legal status, political voice and social connections.¹⁶² Furthermore, immigrants become prey to employers' need for cheap labour in certain sectors. These sectors are mainly responsible for immigrant exploitation. They include the commercial agriculture sector, construction and domestic work.¹⁶³ Additionally, employers are encouraged to employ these workers because in most cases they are willing to work for little money and they can easily be disposed of once their usefulness to the employer runs out.¹⁶⁴ The notion of the employment of immigrants is directly tied to a state's labour regime.¹⁶⁵

This chapter focuses on the position of South Africa on illegal immigrants in the workplace. The question is whether there is adequate protection, if any, for illegal immigrants in the work place. The first step is to investigate the existing labour legislation and the international instruments relevant to illegal immigrants in the workplace. This is in order to ascertain the kind of protection these workers are entitled to and the kind of protection they actually get. The most important section to be considered is section 23 of the *Constitution*, which promotes the right to fair labour practices. This chapter further focuses on other factors related to illegal immigrant

¹⁶⁰ Machava & Polzer 2006 *Africanus* 166.

¹⁶¹ Norton 2010 *ILJ* 1523.

¹⁶² Machava & Polzer 2006 *Africanus* 166.

¹⁶³ Machava & Polzer 2006 *Africanus* 167.

¹⁶⁴ Norton 2010 *ILJ* 1524.

¹⁶⁵ Machava & Polzer 2006 *Africanus* 167.

workers, such as discrimination in the workplace and the international right to work. In conclusion, this chapter aims determine whether the existing laws in South Africa are sufficient to provide protection for illegal migrant workers.

It is important to note that constant reference will be made to international instruments in order to emphasise some points being made as per section 39 of the *Constitution*, which allows reference to international law.

3.2 Brief historical background on illegal immigrants in South Africa

Before 1994, the South African economy was founded on the exploitation of all blacks, including citizens and foreign workers.¹⁶⁶ Labour exploitation was perpetuated by the government controlling movement and settlement, as well as limiting the provision of identity documents, education and skills development opportunities.¹⁶⁷

The position has changed in South Africa since 1994. The laws and policies that had the disempowering effect have since been abolished and have been replaced with a progressive constitutional and labour rights protective regime.¹⁶⁸ However, practically speaking, arguments have been advanced stating that the same disempowering factors continue to exist in the employment realm of immigrants.¹⁶⁹

3.3 South Africa's legal position pertaining to illegal immigrant workers

The *Constitution* in section 23 provides that "everyone has the right to fair labour practices." The *Immigration Act* 13 of 2002 in section 38 on the other hand states as follows:

No person shall employ an illegal foreigner;¹⁷⁰ a foreigner whose status does not authorise him or her to be employed by such person;¹⁷¹ or a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.¹⁷²

¹⁶⁶ Machava & Polzer 2006 *Africanus* 167.

¹⁶⁷ Machava & Polzer 2006 *Africanus* 167.

¹⁶⁸ Machava & Polzer 2006 *Africanus* 167.

¹⁶⁹ Machava & Polzer 2006 *Africanus* 167.

¹⁷⁰ Section 38 1(a) of the *Immigration Act* 1.

¹⁷¹ Section 38 1(b) *Immigration Act*.

¹⁷² Section 38 1(c) *Immigration Act*.

The conjunction between these two provisions illustrates the legal position of illegal immigrants in the South African labour context.

The prohibition in the *Immigration Act* that prevents foreign nationals from working without permits has the consequence of preventing illegal immigrants from the ability to sustain themselves by finding lawful employment.¹⁷³ In essence, the *Immigration Act* is particular with regard to the kind of foreigners it permits into the country and continues to criminalise unauthorised workers and those who employ them.¹⁷⁴ Furthermore, the existing legislative framework, namely the *Immigration Act*, does not provide sufficient support or security for these types of persons.¹⁷⁵ Rather, the main focus of the framework is security, control and exclusion instead of management and development of policies for the security of migrants.¹⁷⁶ The framework disregards the illegal immigrant's constitutional right to dignity and makes it impossible to have access to labour rights.¹⁷⁷ The denial of access to available opportunities negates the provision of meaningful protection to these workers.¹⁷⁸

It is important to note that labour legislation's main function is to maintain the balance in the relationship between an employee and an employer.¹⁷⁹ This balance is more important in a relationship between an employer and an illegal immigrant worker because their legal status makes it easy for an employer to exploit such a worker.¹⁸⁰ Despite their need for protection, illegal immigrants often find themselves locked out of legal protection.¹⁸¹ This occurs without any regard to the fact that these workers are more willing and able to work.¹⁸²

¹⁷³ Dass and Raymond 2017 *ILJ* 26.

¹⁷⁴ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 116.

¹⁷⁵ Dass and Raymond 2017 *ILJ* 27.

¹⁷⁶ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 116.

¹⁷⁷ Dass and Raymond 2017 *ILJ* 27.

¹⁷⁸ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 116.

¹⁷⁹ Dass and Raymond 2017 *ILJ* 28.

¹⁸⁰ Dass and Raymond 2017 *ILJ*.

¹⁸¹ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 5.

¹⁸² Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 5.

The above illustration is better explained by the Labour Court in the *Discovery Health v CCMA and others* [2008] 7 BLLR 663 (LC).¹⁸³

3.4 *Discovery Health v CCMA and others* [2008] 7 BLLR 633 (LC)

In *Discovery Health v CCMA*, the main question was whether a foreign national working for another without a work permit is an employee in terms of the *Labour Relations Act*.¹⁸⁴ The worker in question was Lanzetta from Argentina. He was employed by Discovery Health and it was found that his work permit had expired, therefore Discovery Health terminated his employment.¹⁸⁵ Lanzetta then referred a claim of unfair dismissal to the Commission for Conciliation Mediation and Arbitration.¹⁸⁶ Discovery Health contended that only an employee who falls under the definition in the *LRA* could claim its protection.¹⁸⁷ It further contended that the contract entered into with Lanzetta was tainted with illegality and therefore he could not claim to have been unfairly dismissed.¹⁸⁸ The argument was that the definition of employee in terms of the *LRA* contemplates an underlying contract of employment and that the contract in the present instance was void *ab initio* because it was in conflict with the *Immigration Act*.¹⁸⁹ This view was contrasted with the argument that the definition of employee in the *LRA* contemplates an employment relationship that transcends a contract. Although there was an invalid contract entered into with an illegal immigrant, the employment relationship cannot be said to be invalid.¹⁹⁰ The court also stated that the right to fair labour practices is a fundamental right and as such there is no evidence to the effect that the *Immigration Act* intends to limit this right.¹⁹¹ Furthermore, the court recognised

¹⁸³ *Discovery Health v CCMA and others* [2008] 7 BLLR 663 (LC).

¹⁸⁴ *Discovery health v CCMA* at par 1. Section 213 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 receive, any remuneration. And any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee."

¹⁸⁵ *Discovery Health v CCMA* at para 2.

¹⁸⁶ *Discovery Health v CCMA* at para 2. Commission for Conciliation Mediation and Arbitration (hereinafter the *CCMA*).

¹⁸⁷ *Discovery Health v CCMA* at para 3.

¹⁸⁸ *Discovery Health v CCMA* at para 3.

¹⁸⁹ *Discovery Health v CCMA* at para 12. See also section 38 of the *Immigration Act*.

¹⁹⁰ *Discovery Health v CCMA* at para 13.

¹⁹¹ *Discovery Health v CCMA* at para 29.

the dire consequences that may arise from the conclusion of a void contract of employment with an illegal migrant.¹⁹²

The court noted that malicious employers would employ foreigners and then decide not to pay them on the basis of the invalidity of their contracts.¹⁹³ In the given situation, an employee would have no remedy in the law of contract or in labour law.¹⁹⁴ The court held that to authorise a claim for contractual invalidity in these circumstances would defeat the purposes of section 23 of the *Constitution*, which seeks to give effect to the right to fair labour practices through medium legislation.¹⁹⁵ The right to fair labour practices extends only to fair labour practices, which includes practices that come out of the relationship between workers, employers and their organisations.¹⁹⁶ Furthermore, the protection against unfair labour practices is not dependant on a contract of employment, but also extends to other contracts, relationships and arrangements in terms of which a person performs work and provides services to another.¹⁹⁷ Finally, the court concluded that the employment contract between Lanzetta and Discovery Health was valid, regardless of the fact that Lanzetta did not have a valid work permit.¹⁹⁸ Also, he was an employee in terms of the *LRA*.¹⁹⁹

The *Discovery Health* case has been criticised on the basis that it expands the interpretation of the right to fair labour practices to illegal foreign workers in cases of dismissal.²⁰⁰ A further criticism was advanced stating that:

...recognising an illegal worker as an employee would perpetuate an illegal employment relationship contrary to the intention of the *Immigration Act*.²⁰¹

However, Dass and Raymond²⁰² respond to this criticism by stating that the *Discovery Health* case does not at all "perpetuate an illegal employment relationship," rather they state as follows:

¹⁹² *Discovery Health v CCMA* at para 30.

¹⁹³ *Discovery Health v CCMA* at para 30.

¹⁹⁴ *Discovery Health v CCMA* at para 30.

¹⁹⁵ *Discovery Health v CCMA* at para 31.

¹⁹⁶ *Discovery Health v CCMA* at para 39.

¹⁹⁷ *Discovery Health v CCMA* at para 41.

¹⁹⁸ *Discovery Health v CCMA* at para 54.

¹⁹⁹ *Discovery Health v CCMA* at para 54.

²⁰⁰ Dass and Raymond 2017 *ILJ* 38.

²⁰¹ Dass and Raymond 2017 *ILJ* 38.

If the illegality of the foreign migrant is the reason for the dismissal, then such a dismissal should be effected in terms of labour law.²⁰³

Moreover, they contend that in a case where the relationship is not recognised, this leads to a situation where the illegal foreign worker is denied constitutional and legislative protections.²⁰⁴ Essentially, the more vulnerable the worker is in terms of an illegal immigration status, the more prone to exploitation such a person is.²⁰⁵ It would also give malicious employers the opportunity to exploit and discriminate against these workers based on the idea that these workers would not be able to rely on any of the protective labour statutes, for instance the protection against unfair dismissal and the right to fair labour practices.²⁰⁶

The next section focuses on the need for protection for illegal migrants by considering the importance of labour law, which aims to maintain a balance in the relationship between employers and employees. This balance is maintained to ensure equality between employers and employees. Furthermore, the need for the protection of illegal immigrants due to their precarious position is emphasised.

3.5 The protection of illegal migrant workers

Since illegality exists in an illegal immigrant's work relationship, they become precarious workers whose rights as people get minimal or no protection at all.²⁰⁷ It is therefore at this juncture that the transformative goal of the *Constitution* should be reactive.²⁰⁸ Evidence shows that desperate workers are very susceptible to exploitation because they fear deportation if they report any abusive conditions they may be working in.²⁰⁹ These workers basically fall victim to various forms of marginalisation in foreign states, especially at work.²¹⁰ Labour relationships remain characterised by the interplay of

²⁰² Dass and Raymond 2017 *ILJ* 38.

²⁰³ Dass and Raymond 2017 *ILJ* 38.

²⁰⁴ Dass and Raymond 2017 *ILJ* 42.

²⁰⁵ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 5.

²⁰⁶ Dass and Raymond 2017 *ILJ* 42.

²⁰⁷ Rapatsa 2015 *Acta U, Danubius Juris* 76.

²⁰⁸ Rapatsa 2015 *Acta U, Danubius Juris* 76. The preamble of the *Constitution* provides for Transformative constitutionalism means using the law to effect comprehensive social change through a non-violent political means.

²⁰⁹ Rapatsa 2015 *Acta U, Danubius Juris* 76.

²¹⁰ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 4.

power between the employers and the employees.²¹¹ Employers continue to hold immense power in the working relationship, employees on the other hand legitimately expect to be treated respectfully and to be protected against unfair labour practices.²¹² In essence, because employers are in a higher position of power at work, workers need more protection because employers are more likely to abuse such power.²¹³

The world of work is changing, both adversely and with some advantages.²¹⁴ There are differing options for workers now. These options are related to different forms of employment, for instance fixed-term employment and other forms of atypical employment. These have had the effect of moving workers into more vulnerable, unprotected and less rewarding jobs.²¹⁵ This is evident in the trouble faced by numerous workers who are trapped in slave-like conditions, such as illegal immigrants.²¹⁶ Illegal immigrants tend to suffer double what regular migrants suffer because migration is a challenge as it is, and the burden is increased on illegal immigrants.²¹⁷ These changes in the employment realm have resulted in instances where workers are open to exploitation in "many grey areas of employment."²¹⁸ The conditions workers find themselves in prompt the need to recall the importance of labour law:

Labour law is aimed at establishing a countervailing power in the labour market which assumes equality of position between employers and the collective organisation of workers, while leaving room for the continuing effects of the market forces.²¹⁹

Work is important to meet societies' most paramount needs, but is also the centre of personal identity and social status.²²⁰ In addition, work is important to enable a person to gain the fulfilment of their desires.²²¹ Such fulfilment can only be attained if a person

²¹¹ Rapatsa 2015 *Acta U, Danubius Juris* 77.

²¹² Rapatsa 2015 *Acta U, Danubius Juris* 77.

²¹³ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 5.

²¹⁴ Rapatsa 2015 *Acta U, Danubius Juris* 77.

²¹⁵ Rapatsa 2015 *Acta U, Danubius Juris* 77.

²¹⁶ Rapatsa 2015 *Acta U, Danubius Juris* 77.

²¹⁷ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 4.

²¹⁸ Rapatsa 2015 *Acta U, Danubius Juris* 77.

²¹⁹ Rapatsa 2015 *Acta U, Danubius Juris* 78.

²²⁰ Rapatsa 2015 *Acta U, Danubius Juris* 78.

²²¹ Rodgers *E-Journal of International & Comparative Labour Studies* 2012 87.

is doing quality or decent work.²²² In this instance, access to the right to work is mostly related to the ability to do decent work.²²³

Workers ought to be protected because work functions as a solution to social problems that threaten stability.²²⁴ Therefore, in this regard social protection should be invoked in the sense of giving workers access to "the dignity of being productive" given their willingness to perform work.²²⁵

Currently the world of work is better defined as a battle between the weak and the strong where the weakest are constantly struggling to make a better living.²²⁶ The weak are in most cases subjected to harsh conditions, while the strongest are mostly interested in generating profit.²²⁷ This stems from the inherent inequality in bargaining power between employers and employees. In the end the employees succumb to the condition set by employers, harsh as they may be, due to weak bargaining power.²²⁸

Section 23 of the *Constitution* should therefore be interpreted to state that workers should be protected against unfair dismissal and other forms of problems that employees may face in the workplace.²²⁹ Protection should not be qualified in terms of the nature of the employment relationship, protection should extend to everyone who is in an employment relationship regardless of whether there is a contract or not.²³⁰ The argument that illegal workers wilfully contract themselves out of legislative protection should not stand.²³¹ Labour legislation was intended to prioritise worker protection. Therefore, attempts aimed at arbitrarily denying workers protection based on the nature of work performed without any regard to the realities of such work will defeat the purpose of the existence of labour law.²³² On account of the fact that the definition of an employee does not explicitly exclude workers whose contracts are

²²² Rodgers *E-Journal of International & Comparative Labour Studies* 2012 87.

²²³ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 121.

²²⁴ Rapatsa 2015 *Acta U, Danubius Juris* 78.

²²⁵ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 4.

²²⁶ Rapatsa 2015 *Acta U, Danubius Juris* 79.

²²⁷ Rapatsa 2015 *Acta U, Danubius Juris* 79.

²²⁸ Rapatsa 2015 *Acta U, Danubius Juris* 79.

²²⁹ Rapatsa 2015 *Acta U, Danubius Juris* 80.

²³⁰ Rapatsa 2015 *Acta U, Danubius Juris* 80.

²³¹ Rapatsa 2015 *Acta U, Danubius Juris* 83.

²³² Rapatsa 2015 *Acta U, Danubius Juris* 84.

tainted by illegality, it would be unjust to exclude the said workers from the protective intentions of labour law, especially where it is patently clear from the characteristics of their work that they fall within the confines of an employment relationship.²³³ In essence, labour law should seek the advancement of worker protection and increase socio-economic development regardless of the legal status of the employee.²³⁴

In the following section, the interplay between discrimination and illegal immigrants will be discussed. It is important to discuss discrimination because it is one of the many challenges that illegal immigrants face in the workplace despite their human right not to be discriminated against.²³⁵

3.6 *Illegal migrant workers and discrimination in the workplace*

Migrants are often confronted with discrimination when they arrive in a new country.²³⁶ Rijken²³⁷ supports this view by stating that:

Victimisation through migration can occur because the movement was flawed from the beginning, for instance when people are fleeing war or are being recruited by smugglers or traffickers.²³⁸

The discrimination and victimisation referred to above occurs because of the illegal status of the migrants in question.²³⁹ Furthermore, migrants are seen and treated as items of merchandise.²⁴⁰ The discrimination against these workers happens because they fear that they will get little or no protection from law enforcement authorities, therefore they do not report the abuse.²⁴¹ Undocumented migrant workers are in an even more precarious position than regular migrants because they fear deportation. Therefore, they try as much as possible to remain under the radar.²⁴² Moreover,

²³³ Rapatsa 2015 *Acta U, Danubius Juris* 84.

²³⁴ Rapatsa 2015 *Acta U, Danubius Juris* p 84. See also Section 1 of the LRA.

²³⁵ Section 9 of the *Constitution* states that everyone is equal before the law and is entitled to equal protection before the law; Article 26 of the *ICCPR*.

²³⁶ Lansink "Migrant workers and non-discrimination in the workplace" 263.

²³⁷ Rijken *Victimisation through Migration* 2016 5.

²³⁸ Rijken *Victimisation through Migration* 2016 5.

²³⁹ Rijken *Victimisation through Migration* 2016 5.

²⁴⁰ Lansink "Migrant workers and non-discrimination in the workplace" 263.

²⁴¹ Lansink "Migrant workers and non-discrimination in the workplace" 263.

²⁴² Lansink "Migrant workers and non-discrimination in the workplace" 263.

Lansink²⁴³ concludes that the legal status of a migrant should not be a precondition for the state to ensure that equality and non-discrimination are observed.²⁴⁴ Similarly, there is no need to deny human rights, including labour rights, because of the migratory status of a person.²⁴⁵ Therefore, the same labour rights that apply to regular workers should also apply to undocumented migrant workers.²⁴⁶ This protection stems from their human right not to be discriminated against based on their migratory status.

Equality, non-discrimination and the duty to honour human rights go hand-in-hand.²⁴⁷ However, although undocumented migrants deserve protection, states are empowered not to admit these migrants into their territory. Furthermore, they are also not bound to offer them work.²⁴⁸ Additionally, states are free to deny migrants certain political rights. However, they are prevented from sanctioning exploitation of undocumented workers.²⁴⁹

The *Constitution* in section 9(1) clearly states that;

Everyone is equal before the law and has the right to equal protection and benefit of the law.

The abovementioned section by promoting equality also leaves no room for discrimination and clearly indicates the South African position regarding discrimination. This should include immigrants as well.

3.7 Illegal immigrants and the right to work

When dealing with the right to work, it is very important to use international law in order to trace its origins. According to section 39 of the *Constitution*, the use of international law is allowed in order to interpret national legislation. However, the function of international law is not limited to interpretation; other functions include governing relations between states.

²⁴³ Lansink "Migrant workers and non-discrimination in the workplace" 263

²⁴⁴ Lansink "Migrant workers and non-discrimination in the workplace" 275.

²⁴⁵ Lansink "Migrant workers and non-discrimination in the workplace" 275.

²⁴⁶ Lansink "Migrant workers and non-discrimination in the workplace" 276.

²⁴⁷ Lansink "Migrant workers and non-discrimination in the workplace" 276. See also Section 7 (2) of the *Constitution* which states that, "The state must respect, protect, promote and fulfil the rights in the Bill of Rights".

²⁴⁸ Lansink "Migrant workers and non-discrimination in the workplace" 276.

²⁴⁹ Lansink "Migrant workers and non-discrimination in the workplace" 276.

The right to work is provided for by article 6 of the *International Covenant on Economic, Social and Cultural Rights* . It states as follows:

The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.²⁵⁰

The above quote states that key to the right to work is the fact that each person must freely decide on his employment. Furthermore, there must be a way to protect this right. Additionally, the right to work is important to ensure realisation of other human rights. It also forms an intrinsic part of human dignity.²⁵¹ Every person has the right to be able to perform work.²⁵² The right to work adds to the survival of the individual the person's family, as long as the work is decided on freely.²⁵³ The definition of the right to work highlights the idea that being able to choose one's own work is a way of maintaining dignity and respect.²⁵⁴ Furthermore, work is important for personal development and social and economic inclusion.²⁵⁵ The right to work is simultaneously an individual and a collective right.²⁵⁶ It is inclusive of all forms of work, regardless of whether it is independent or wage-dependent work.²⁵⁷

Being a worker gives rise to labour rights generally.²⁵⁸ When someone is part of an activity that is reimbursed, that person instantly becomes a worker and as a result gains rights intrinsic to being a worker.²⁵⁹ The right to work deals with rights and obligations of both the employer and the worker. It is a protective system for workers.²⁶⁰ When a person goes into a state and enters into a work relationship, that person gains labour

²⁵⁰ Article 6 of the *CESCR*.

²⁵¹ UN Economic and Social Council "The Right to Work" General Comment No 18 2005 para 1.

²⁵² UN Economic and Social Council "The Right to Work" General Comment No 18 2005 para 1.

²⁵³ UN Economic and Social Council "The Right to Work" General Comment No 18 2005 para 1.

²⁵⁴ UN Economic and Social Council "The Right to Work" General Comment No 18 2005 para 4.

²⁵⁵ UN Economic and Social Council "The Right to Work" General Comment No 18 2005 para 4.

²⁵⁶ UN Economic and Social Council "The Right to Work" General Comment No 18 2005 para 6.

²⁵⁷ UN Economic and Social Council "The Right to Work" General Comment No 18 2005 para 6.

²⁵⁸ Inter- American Court of Human Rights "Legal status and rights of undocumented migrants" Advisory Opinion OC 18/13 para 133.

²⁵⁹ Inter- American Court of Human Rights "Legal status and rights of undocumented migrants" Advisory Opinion OC 18/13 para 133.

²⁶⁰ Inter- American Court of Human Rights "Legal status and rights of undocumented migrants" Advisory Opinion OC 18/13 para 133.

rights at the place of work.²⁶¹ This is without regard to his migratory status, because respect for his rights must be observed without any discrimination.²⁶² Furthermore, the right to work deals collectively with intrinsic human needs for survival, which are inclusive of food and shelter. Moreover, the right to work links to dignity, freedom and self-esteem.²⁶³

However, the right to work should not be regarded as an absolute and unconditional right to obtain employment.²⁶⁴ This means that it is not necessary for a state or its inhabitants to hire undocumented workers, but when they offer them work, these workers gain rights.²⁶⁵ In other words, the offer of work changes their irregular situation, but this only applies to the context of rights at work.²⁶⁶ They more or less become employees.²⁶⁷

Theoretically, under international human rights law the right to work applies universally.²⁶⁸ This means that everyone should be able to enjoy this right, but in fact not everyone does.²⁶⁹ However, for *ILO* member states, the right to work does apply to everyone.²⁷⁰ In most cases, this right is based on citizenship and possession of work permits instead of dignity. Only the citizens of a given country have the legal right to work.²⁷¹ "Immigration law sets restrictions to the universality of the international human right."²⁷² This means that if for instance a person is an illegal immigrant, they are automatically disqualified from enjoying the right to work. Contrary to this, it has been stated that:

²⁶¹ Inter- American Court of Human Rights "Legal status and rights of undocumented migrants" Advisory Opinion OC 18/13 para 133.

²⁶² Inter- American Court of Human Rights "Legal status and rights of undocumented migrants" Advisory Opinion OC 18/13 para 133.

²⁶³ Collins H *Is there a human right to work?* 17.

²⁶⁴ UN Economic and Social Council "The Right to Work" General Comment No 18 2005 para 6.

²⁶⁵ Lansink "Migrant workers and non-discrimination in the workplace" 278.(see above comment)

²⁶⁶ Lansink "Migrant workers and non-discrimination in the workplace" 278.

²⁶⁷ Lansink "Migrant workers and non-discrimination in the workplace" 278.

²⁶⁸ Virginia Mantouvalou " The right to work: Legal and philosophical perspectives" 2015 Oxford 42

²⁶⁹ Virginia Mantouvalou " The right to work: Legal and philosophical perspectives" 2015 Oxford 42.

²⁷⁰ Virginia Mantouvalou " The right to work: Legal and philosophical perspectives" 2015 Oxford 42.

²⁷¹ Virginia Mantouvalou " The right to work: Legal and philosophical perspectives" 2015 Oxford 42.

²⁷² Virginia Mantouvalou " The right to work: Legal and philosophical perspectives" 2015 Oxford 42.

The migratory status of a person cannot be used to deprive a migrant of his human rights including those of a labour related nature; as an employee acquires these rights irrespective of his regular or irregular status in the state where he/she is employed.²⁷³

The above quote explains that a person's human rights should be protected regardless of his or her migratory status in a given state. Therefore, South Africa needs to protect the rights of illegal immigrants in the workplace.

3.8 Exploitation of illegal immigrants in the context of work

As discussed in Chapter 1 and 2, migrants are normally vulnerable for a number of reasons, making them susceptible to exploitation.²⁷⁴ This vulnerability originates from poverty, language barriers and social isolation in a foreign country.²⁷⁵ This factor is emphasised in the Preamble of the *United Nations International Convention on the Rights of all Migrant Workers and Members of their Families* 1990 which states,

Considering the situation of vulnerability in which migrant workers and members of their families frequently-find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment. ²⁷⁶

The above quote emphasises that migrants face problems in the countries they migrate to, especially in the work environment. The abovementioned convention realises the vulnerability of migrant workers and works towards ensuring their protection at work.²⁷⁷ Furthermore, this convention recognises that illegal migrants face even more problems at work, like low pay, because employers in this instance actually seek these kinds of workers in order to generate more profit through low wages.²⁷⁸

Workers may are often vulnerable to their employers because of the inherent imbalance in their relationship.²⁷⁹ In contrast, migrant workers are exposed to vulnerability by the

²⁷³ Lansink "Migrant workers and non-discrimination in the workplace" 278.(see above comment)

²⁷⁴ Virginia Mantouvalou " The right to work: Legal and philosophical perspectives" 2015 Oxford 49.(see previous comments)

²⁷⁵ Virginia Mantouvalou " The right to work: Legal and philosophical perspectives" 2015 Oxford 49.

²⁷⁶ *United Nations International Convention on the Rights of all Migrant Workers and Members of their Families* 1990 Preamble.

²⁷⁷ *United Nations International Convention on the Rights of all Migrant Workers and Members of their Families* 1990 Preamble.

²⁷⁸ *United Nations International Convention on the Rights of all Migrant Workers and Members of their Families* 1990 Preamble.

²⁷⁹ Virginia Mantouvalou " The right to work: Legal and philosophical perspectives" 2015 Oxford 50.

law, more especially through immigration laws.²⁸⁰ Documented migrants are in a better position than undocumented migrants are because they are authorised to be in the country.²⁸¹ The vulnerability of undocumented migrants is so advanced that employers violate several rights, including labour rights, like protection from inhumane and degrading treatment.²⁸² As mentioned before, some employers actually prefer these workers instead of documented workers because they are able to treat them below the basic acceptable threshold of the suitable conditions of employment and they will never be held accountable for this kind of treatment. They are also able to pay them low wages without consequence.²⁸³ Employers feel like they are not obliged to protect their human or labour rights, and this is a colossal difficulty for illegal immigrants.²⁸⁴

3.9 Case law dealing with illegal immigrants in the workplace

This section presents a discussion of some cases dealing with illegal immigrants in the workplace. These are South African cases with the exception of a UK case where after the relevance thereof will be discussed.²⁸⁵ The abovementioned will be done in order to ascertain the legal position of illegal immigrants in the workplace. Furthermore, the question of whether the illegality of the work contract invalidates the existence of the employment relationship is answered by these cases. This is important to indicate that although it can be concluded that the work contract is void, the existence of the work relationship is not rendered non-existent. Furthermore, this means that labour rights ought to be protected based on the fact that a work relationship exists between an employee and an employer, not because they entered into a contractual relationship.

3.9.1 Moses v Safika Holdings (2001) 22 ILJ 1261²⁸⁶

In this case the applicant was a United States citizen. He was offered a position as advisor to the respondent company contingent upon receiving a work permit to work in South Africa from the Department of Home Affairs. The applicant was laid off work and

²⁸⁰ Virginia Mantouvalou "The right to work: Legal and philosophical perspectives" 2015 Oxford 50.

²⁸¹ Virginia Mantouvalou "The right to work: Legal and philosophical perspectives" 2015 Oxford 50.

²⁸² Virginia Mantouvalou "The right to work: Legal and philosophical perspectives" 2015 Oxford 51.

²⁸³ Virginia Mantouvalou "The right to work: Legal and philosophical perspectives" 2015 Oxford 52.

²⁸⁴ Virginia Mantouvalou "The right to work: Legal and philosophical perspectives" 2015 Oxford 52.

²⁸⁵ Paragraph 3.9.3.1 below.

²⁸⁶ *Moses v Safika Holdings* (2001) 22 ILJ 1261

took the matter to the *CCMA* for resolution. It was discovered that during his employment the applicant did not have a work permit and was in contravention of the *Aliens Control Act 96 of 1991*.²⁸⁷ The issue in this case was whether the applicant was debarred from pursuing the dispute under the *LRA*.

It was argued that although the *LRA* gives a narrow definition of the word "employee," the legislature did not intend to condone unlawful acts.²⁸⁸ Furthermore, it was argued that the *ACA* invalidates the contract and that his continuous employment would have been illegal.²⁸⁹ The illegality of the contract resulted in the impossibility of performance.²⁹⁰

Further arguments were advanced to the effect that section 27 (1) of the *Constitution* states that "everyone has the right to fair labour practices." Therefore, the right does not apply only to citizens or nationals who have work permits.²⁹¹ Moreover, it was said that the *ACA* should be interpreted in a manner consistent with the *Constitution*.²⁹² It was also argued that even if one were to regard the ordinary statutory interpretation principles without the need to invoke the *Constitution*, there is nothing in both the *LRA* or the *ACA* prohibiting the applicant from pursuing the relief sought in this matter.²⁹³ In particular, strikingly absent from the definition of an employee is the requirement that an employee must prove the existence of a valid common law contract.²⁹⁴ Given a proper interpretation, the *ACA* in any event does not render formation of the contract invalid, but merely prohibits its performance.²⁹⁵ For example, aliens, including illegal immigrants, are not precluded from making a remuneration claim for work done in terms of the *ACA*.²⁹⁶

²⁸⁷ The Aliens Control Act 96 of 1991 (hereinafter referred to as *ACA*)the *Aliens Control Act*.

²⁸⁸ *Moses v Safika Holdings* para 7.

²⁸⁹ *Moses v Safika Holdings* para 7.

²⁹⁰ *Moses v Safika Holdings* para 7.

²⁹¹ *Moses v Safika Holdings* para 9.

²⁹² *Moses v Safika Holdings* para 9.

²⁹³ *Moses v Safika Holdings* para 9.

²⁹⁴ *Moses v Safika Holdings* para 9.

²⁹⁵ *Moses v Safika Holdings* para 9.

²⁹⁶ *Moses v Safika Holdings* para 9.

The court held that the applicant was not an employee in terms of the *LRA* as he was an illegal alien and as such the employment relationship was *void ab initio*.²⁹⁷ Furthermore, it was held that it is a principle in South African law that "a thing done contrary to the direct provision of the law is *void ab initio* and of no effect."²⁹⁸ The fact that the act is prohibited nullifies it.²⁹⁹ Moreover, although the definition of employee in terms of section 213 of the *LRA* in its literal interpretation would cover even illegal aliens, the word employee does not cover those whose acts are unlawful.³⁰⁰ Additionally, the section states that everyone has the right to fair labour practices should be limited.³⁰¹ This is because if it is not limited, the resources of the *CCMA* and the Labour Court would be stretched to the limit as it would open the floodgates for all illegal immigrants to challenge the fairness of their dismissal.³⁰²

In this case it is important to indicate the attitude of the law towards illegal immigrants in the workplace. The court held that the fact that the employee was an illegal immigrant disqualified him from the protection of the right to fair labour practices.

*3.9.2 Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA 326 (SCA)*³⁰³

In this case, the respondent applied for asylum after entering the country from Zimbabwe with her 22-year-old disabled son.³⁰⁴ She was a pharmacy technician and also a widow. She alleged that she left Zimbabwe because she was afraid that her son would be coerced into joining militant groups that supported the ruling party by intimidating and threatening the opposition.³⁰⁵ After applying for asylum, the respondent found a school for her son in Cape Town.³⁰⁶ She stated that she had no money and

²⁹⁷ *Moses v Safika Holdings* para 11.

²⁹⁸ *Moses v Safika Holdings* para 15.

²⁹⁹ *Moses v Safika Holdings* para 15.

³⁰⁰ *Moses v Safika Holdings* para 18.

³⁰¹ *Moses v Safika Holdings* at para 24.

³⁰² *Moses v Safika Holdings* at para 24.

³⁰³ *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) (hereinafter referred to as the *Watchenuka* case).

³⁰⁴ *Minister of Home Affairs and others v Watchenuka and Another* para 11.

³⁰⁵ *Minister of Home Affairs and others v Watchenuka and Another* para 11.

³⁰⁶ *Minister of Home Affairs and others v Watchenuka and Another* para 11.

needed to find a job in order to support herself and her son.³⁰⁷ She was given a permit, but the conditions of the permit stated that she was not allowed to work and that her son was not allowed to study.³⁰⁸ As such, the respondent applied to court for an order declaring that the prohibition is contrary to the *Constitution* and that she and her son should be allowed to work and study pending the finalisation of the asylum application.³⁰⁹ The court granted the relief sought by the respondent.³¹⁰ The court held that the prohibition from employment and study is in conflict with the Bill of Rights.³¹¹

The Court further stated as follows:

Human dignity has no nationality. It is inherent in all people –citizens and non-citizens alike simply because they are human. Furthermore, while that person happens to be in this country-for whatever reason, it must be respected, and is protected by s 10 of the Bill of Rights.³¹²

Furthermore, the court stated that human dignity is inherent to all human beings, the same with human life.³¹³ It is one of the fundamental values in the Bill of Rights.³¹⁴ It is the basis for all other protections given by the Bill of Rights.³¹⁵ Freedom to engage in productive work is important to human dignity.³¹⁶ The freedom to study is also inherent in human dignity, because without education a person is deprived of his potential for human fulfilment.³¹⁷

The above case hints on the importance of human dignity in a person regardless of their migratory status. Furthermore, human dignity is regarded as the basis of other rights which includes the right to fair labour practices. When a person has a right to engage in productive work, their human dignity is protected.³¹⁸

³⁰⁷ *Minister of Home affairs and others v Watchenuka and Another* para 11.

³⁰⁸ *Minister of Home affairs and others v Watchenuka and Another* para 12.

³⁰⁹ *Minister of Home affairs and others v Watchenuka and Another* para 13.

³¹⁰ *Minister of Home affairs and others v Watchenuka and Another* para 14.

³¹¹ *Minister of Home affairs and others v Watchenuka and Another* para 24.

³¹² *Minister of Home affairs and others v Watchenuka and Another* para 25.

³¹³ *Minister of Home affairs and others v Watchenuka and Another* para 26.

³¹⁴ *Minister of Home affairs and others v Watchenuka and Another* para 26.

³¹⁵ *Minister of Home affairs and others v Watchenuka and Another* para 26.

³¹⁶ *Minister of Home affairs and others v Watchenuka and Another* para 27.

³¹⁷ *Minister of Home affairs and others v Watchenuka and Another* para 36.

³¹⁸ *Minister of Home affairs and others v Watchenuka and Another* para 26.

Although this chapter is focused on South African law, it is important to refer to a case decided in another jurisdiction, as it is relevant to the current research. Furthermore, section 39 of the *Constitution* remains the authority for using international cases and instruments.

3.9.3 *Hounga v Allen & Another* [2014] UKSC 4³¹⁹

The appellant Hounga is a 21-year-old Nigerian national now residing in England. She went to England from her home country when she was 14 under arrangements made by the respondent Mrs Allen.³²⁰ The appellant knowingly entered the country illegally and lived with the respondent for eighteen months to take care of the respondent's family.³²¹ The respondent then later evicted appellant from her home and dismissed her from employment, and the appellant contended that her dismissal was discriminatory and based on her nationality.³²² The court in this case held that the fact that it was unlawful for the appellant to enter into a contract of employment with the respondent, the defence of illegality precludes her from enforcing it.³²³ Therefore a claim of unfair dismissal might need a different approach than a claim of wrongful dismissal.³²⁴ If a claimant of unfair dismissal is seeking to enforce the contract, often seeking reinstatement, the defence of illegality defeats a claim of unfair dismissal.³²⁵

The court further held that this was a classic case of human trafficking of a vulnerable child who lacked the family support of people known to her. They abused her natural trust in them with promises that were not kept and subjected her to forced labour.³²⁶ Furthermore, the court held as follows:

Where issues of illegality are raised, the courts have to steer the middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should on the first indication of unlawfulness, draw up its skirts and refuse all

³¹⁹ *Hounga v Allen & Another* [2014] UKSC 4 (United Kingdom)

³²⁰ *Hounga v Allen* para 2.

³²¹ *Hounga v Allen* para 2.

³²² *Hounga v Allen* para 3.

³²³ *Hounga v Allen* para 24.

³²⁴ *Hounga v Allen* para 24.

³²⁵ *Hounga v Allen* para 24.

³²⁶ *Hounga v Allen* para 48.

assistance to the plaintiff no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct. On the whole courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn. Where plaintiff's action in truth arises directly *ex turpi causa*, he is likely to fail where the plaintiff has suffered a genuine wrong to which allegedly unlawful conduct is incidental, he is likely to succeed.³²⁷

The above quote simply illustrates the criteria used by the court in deciding cases of illegality, there has to be a balance between protection of the law and that of the plaintiff. The court will always ensure that justice is served and that wrongs are righted as far as reasonably possible.

Finally, the court held that the defence of illegality defeated the complaint by the appellant that the employer discriminated against her by dismissing her in contravention of the law.

3.9.3.1 Relevance of *Hounga v Allen & Another* [2014] UKSC 4 for South Africa

The facts of this case are indicative of a classic illegal immigration case. The applicant in this case would be an illegal immigrant in terms of the *Immigration Act*. This case is important to indicate how courts should handle cases where the defence of illegality of a contract defeats a claim of unfair dismissal. This indicates a conjunction between the right to fair labour practices provided by section 23 of the *Constitution* versus section 13 of the *Immigration Act* which prohibits illegal immigrants from performing work. The court had to find middle ground between two difficult positions. In this instance, finding a solution for a person whose contract is unlawful and trying not to be too hasty where issues of illegality are raised. In other words, when dealing with illegal immigrants courts must seek to enforce their labour rights instead of making the decision based on their illegal status. It is submitted that that despite their illegal status, illegal immigrants should still be entitled to labour law protection.

³²⁷ *Hounga v Allen* para 58.

3.10 Conclusion

The main aim of this chapter has been to ascertain whether illegal migrant workers have any rights in the South African context. The main indication of the existence of these rights is the *Discovery Health* case,³²⁸ which has been dealt with at great length in this chapter. The definition of employee goes beyond a contractual relationship. Even if a contract entered into with an illegal immigrant is invalid, this does not invalidate the work relationship.³²⁹ Furthermore, using contractual invalidity as a reason for dismissing an illegal immigrant worker defeats the purpose of the right to fair labour practices that attaches to everyone according to the *Constitution*.³³⁰ Moreover, although the *Constitution* provides protection for illegal migrant workers as indicated above, this is what some would refer to as piecemeal protection. This is because the legislative framework does not provide sufficient support or security to these workers.³³¹ Protection of workers' rights does not have to be qualified on a contractual basis only, it should extend to everyone, even those who don't have work contracts.³³² Furthermore, workers are entitled to claim compensation for work already done even if their work is terminated because of their illegal status.

Furthermore, their constitutional right to dignity is disregarded where persons are precluded from claiming compensation for work already done.³³³ The right to dignity was emphasised in the *Watchenuka* case:

The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right is therefore a foundation of many other rights that are specifically entrenched.³³⁴

This emphasises the importance of dignity, more especially in the workplace. Work that is full of vulnerability and exploitation is not dignified, and such are the conditions of work for illegal immigrants.

³²⁸ *Discovery Health v CCMA & others*.

³²⁹ *Discovery Health v CCMA & others* para 13.

³³⁰ *Discovery Health v CCMA & others* para 31.

³³¹ Dass and Raymond 2017 *ILJ* 42.

³³² Dass and Raymond 2017 *ILJ* 42.

³³³ Dass and Raymond 2017 *ILJ* 42.

³³⁴ *Minister of Home affairs and others v Watchenuka and Another* para 26.

The jurisprudence is slow in evolving since the *Discovery Health* case is the only decision that guarantees clear labour rights to illegal migrant workers. Illegal migrant workers have rights in South Africa. These rights need to be protected in the workplace. Although there is some protection as per the *Discovery Health case*, there seems to be room for improvement given the provisions of the *United Nations International Convention on the Rights of all Migrant Workers and Members of their Families (1990)*. It encourages the recognition of the problems migrant workers face in the destination states. These problems call for protection because these workers are more vulnerable than regular workers.

4 Chapter 4: REMEDIES AVAILABLE TO ILLEGAL IMMIGRANTS IN CASES OF FORCED LABOUR

4.1 Introduction

According to Meyer,³³⁵ migration is a global reality that cannot be avoided and therefore should be addressed. People generally migrate to escape unemployment and poverty in their home countries, therefore seeking a better existence in a different country.³³⁶ South Africa is confronted with the challenge of high levels of irregular migration or illegal immigration. The majority of illegal immigrants come from neighbouring countries.³³⁷ *The White Paper on International Migration for South Africa*³³⁸ contends that it is neither desirable nor possible to stop or slow down international migration.³³⁹ It points out that international migration in general is beneficial if it is managed in a way that is efficient, secure and respectful of human rights.³⁴⁰ South Africa is not only constitutionally bound to protect the rights of migrant workers, but also obliged by regional and international instruments in this regard.³⁴¹

However, as a sovereign state South Africa reserves the right to determine who is allowed entry into the country.³⁴² Migrants are often faced with the least desirable job options, those that are despised by the locals.³⁴³ Illegal immigrants are over-represented in 3D-jobs. These are said to be dirty, degrading and dangerous jobs.³⁴⁴ This precarious position of illegal immigrants increases their chances of being exploited and being subjected to forced labour. This is because they have few job options and their

³³⁵ Meyer 2009 *SA Merc LJ* 831.

³³⁶ Norton 2010 *ILJ* 1522.

³³⁷ White Paper On International Migration for South Africa July 2017 29. These countries are Lesotho and Zimbabwe for instance.

³³⁸ White Paper On International Migration for South Africa July 2017 29. These countries are Lesotho and Zimbabwe for instance.

³³⁹ White Paper On International Migration for South Africa July 2017 v.

³⁴⁰ White Paper On International Migration for South Africa July 2017 v.

³⁴¹ Dekker 2010 *SA Merc LJ* 389. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families for instance and the Draft Protocol on the Facilitation of Movement of Persons in SADC

³⁴² White Paper On International Migration for South Africa July 2017 v.

³⁴³ Norton 2010 *ILJ* 1523.

³⁴⁴ Norton 2010 *ILJ* 1523.

desperation leads them to accept whatever they are offered. This vulnerable position leaves them without any bargaining power. They are at the mercy of the employer.

This chapter focuses on the remedies and recourse available to illegal immigrants in cases of forced labour. The provisions of the law concerning forced labour and illegal immigrants in South Africa have already been addressed in Chapters 2 and 3 respectively.³⁴⁵ However, in order to determine the available remedies, some of the provisions have to be revisited to create a clear path to the remedies that are available to these workers. The first step is to look at the *Protocol of 2014 to the Forced Labour Convention 1930*, then to revisit some of the provisions of the *Constitution*, the *LRA*, the *BCEA*, and the *Immigration Act*. Furthermore, the chapter focuses on the *Discovery Health* case because the findings of the court are in direct support of the point that this research aims to make, in essence that illegal immigrants are entitled to labour rights. Fundamental rights like the right to equality and the right to fair labour practices are also considered in this chapter.

4.2 Protocol of 2014 to the Forced Labour Convention, 1930³⁴⁶

The preamble to the *2014 Protocol* states that forced labour is a violation of human rights and dignity of persons. Furthermore, forced labour contributes in the increase of poverty and is an obstacle to the goal of achieving decent work for all. Additionally, the preamble obliges members who have ratified the *2014 Protocol* to make forced labour a punishable offence. Moreover, the preamble states that forms of forced labour keep changing and that human trafficking is a growing concern which needs to be eliminated urgently. The preamble also notes that the number of people in forced labour situations has increased and it is highly present in certain sectors of the economy and that certain groups of workers are more susceptible to forced labour especially migrants.³⁴⁷

As stated above, the preamble singles out important issues for this study. For instance, it comments on punishing and penalizing forced labour, but also mentions that forced labour hinders people from benefiting from decent work. Furthermore, trafficking may

³⁴⁵ See sections 2.2 and 3.2.

³⁴⁶ *Protocol of 2014 to the Forced Labour Convention, 1930*.

³⁴⁷ Preamble of the *2014 Protocol*.

occur for the purposes of forced labour. Finally, migrants form part of a vulnerable group and are highly susceptible to forced labour situations. This is indicative of the severe nature of forced labour.

In order to meet the obligations set by the *2014 Protocol*, which includes suppressing forced or compulsory labour, member states are obliged to take effective measures to prevent and eliminate its use, to provide protection to victims and access to appropriate and effective remedies such as compensation, and to sanction the perpetrators of forced or compulsory labour.³⁴⁸ Furthermore, member states are urged to create a national policy and plan of action for the effective and sustained suppression of forced or compulsory labour in consultation with employers and workers' organisations.³⁴⁹ This plan ought to involve systematic action by the competent authorities to ensure elimination of forced labour.³⁵⁰ Measures to be taken by members against forced labour should be inclusive of targeted action against trafficking in persons for the purposes of forced or compulsory labour.³⁵¹ In addition, the *2014 Protocol* gives a list of measures to be taken by member states for the elimination of forced labour. These measures include the following:

- (a) Educating and informing people, especially those considered to be particularly vulnerable, in order to prevent their becoming victims of forced or compulsory labour;
- (b) Educating and informing employers, in order to prevent their becoming involved in forced or compulsory labour practices;
- (c) Undertaking efforts to ensure that:
 - (i) the coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour, including labour law as appropriate, apply to all workers and all sectors of the economy; and
 - (ii) labour inspection services and other services responsible for the implementation of this legislation are strengthened;
- (d) Protecting persons, particularly migrant workers, from possible abusive migrant and fraudulent practices during the recruitment and placement process;

³⁴⁸ Article 1(1) of the *2014 Protocol*.

³⁴⁹ Article 1(2) of the *2014 Protocol*.

³⁵⁰ Article 1(2) of the *2014 Protocol*.

³⁵¹ Article 1(3) of the *2014 Protocol*.

(e) Supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour; and

(f) Addressing the root causes and factors that heighten the risks of forced or compulsory labour.³⁵²

4.2.1 How far has SA come in this regard?

South Africa's *Prevention and Combatting of Trafficking in Person's Act* of 2013 mandates relevant authorities to develop training courses on social contexts, norms, standards and procedures to ensure appropriate efficient and sensitive responses to matters in relation to human trafficking.³⁵³ Furthermore, the *BCEA* empowers labour inspectors to promote, monitor and enforce compliance with the law.³⁵⁴

The list above is quite comprehensive and offers recommendations to suppress forced labour. Among the most important recommendations are information and education. Other important recommendations listed are labour inspections and increasing legislative coverage in order to extend protection to everyone. Moreover, members are obliged to take effective measures for the identification, release, protection, recovery and rehabilitation of all victims of forced or compulsory labour, as well as the provision of other forms of assistance and support.³⁵⁵

Furthermore, members ought to ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies such as compensation.³⁵⁶ Furthermore, members should take the necessary measures to ensure that the competent authorities have the discretion not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities if they have been compelled to

³⁵² Article 2 of the *2014 Protocol*.

³⁵³ *South Africa Prevention and Combatting of Trafficking in Persons Act* 7 of 2013 article 44.

³⁵⁴ Section 64 of the *BCEA*.

³⁵⁵ Article 3 of the *2014 Protocol*.

³⁵⁶ Article 4 of the *2014 Protocol*.

commit the acts as a direct consequence of being subjected to forced or compulsory labour.³⁵⁷

The importance of this instrument is to emphasise that forced labour hinders people from benefiting from decent work in the sense that people who are subjected to forced labour live and work in abhorrent conditions. Worse still, illegal immigrants easily become subjected to forced labour because they live in the shadows due to their illegal status. The severity of forced labour cannot be emphasised enough, especially when it comes to illegal immigrants.

4.3 Protection afforded in South Africa: Illegal migrant workers and forced labour

4.3.1 The Constitution

The *Constitution* as the supreme law of South Africa is the foundation of democracy.³⁵⁸ It contains the fundamental rights of everyone in the country and is based on the democratic values of human dignity, equality and freedom.³⁵⁹ However, for the purposes of this chapter, only the right to equality and the right to fair labour practices as provided for by the *Constitution* are investigated. Additionally, the prohibition of forced labour as provided for in section 13 of the *Constitution* is also considered.

4.3.1.1 Fundamental rights enshrined in the Constitution

4.3.1.1.1 The right to equality

Section 9(1) of the *Constitution* states as follows:

Everyone is equal before the law and has the right to equal protection and benefit of the law.³⁶⁰

According to this section, migrants and illegal immigrants are included within the purview of the protection provided.³⁶¹ However, given the history of South Africa

³⁵⁷ Article 4 of the 2014 Protocol.

³⁵⁸ Meyer 2009 SA Merc LJ 843.

³⁵⁹ Meyer 2009 SA Merc LJ 843.

³⁶⁰ Section 9 (1) of the *Constitution*.

concerning discrimination, there was the need for remedies to uplift groups of people who were disadvantaged in the past.³⁶² There are two types to equality: formal equality and substantive equality.³⁶³ The formal approach makes the suggestion that by treating everyone in an equal manner, past inequalities will be removed.³⁶⁴ Substantive equality proposes that past discrimination should be removed by providing unequal resources to previously disadvantaged groups in order to equalise everything.³⁶⁵

Illegal immigrants as a vulnerable group should therefore be given equal treatment to other workers, regardless of their illegal status. Therefore the formal approach will suffice in order to promote equal treatment for all.

4.3.1.1.2 The right to fair labour practices

According to Meyer,³⁶⁶ the constitutional right to fair labour practices is available to everyone³⁶⁷. The decision in *Discovery Health Ltd v CCMA* also indicates a judicial willingness to extend fundamental rights to migrants:³⁶⁸

Despite the blanket protection seemingly envisaged herein, though, which could be wide enough to provide protection against occupational-related injuries and diseases, there is no certainty as to the precise parameters of the scope of an unfair labour practice in terms of this provision.³⁶⁹

The Constitutional Court examined the right to fair labour practices as envisaged in section 23(1) of the Constitution in *National Education Health and Allied Workers Union v University of Cape Town & Others*.³⁷⁰

In this case, *NEHAWU* contended that the interpretation of section 197 of the *LRA* as adopted by the majority of the Labour Appeal Court infringes on the rights of the

³⁶¹ Meyer 2009 *SA Merc LJ* 843.

³⁶² Meyer 2009 *SA Merc LJ* 843.

³⁶³ Meyer 2009 *SA Merc LJ* 843.

³⁶⁴ Meyer 2009 *SA Merc LJ* 843.

³⁶⁵ Meyer 2009 *SA Merc LJ* 843.

³⁶⁶ Meyer 2009 *SA Merc LJ* 846.

³⁶⁷ Meyer 2009 *SA Merc LJ* 846.

³⁶⁸ Meyer 2009 *SA Merc LJ* 846.

³⁶⁹ Meyer 2009 *SA Merc LJ* 846.

³⁷⁰ *National Education Health and Allied Workers Union v University of Cape Town & Others*[2002] ZACC para 27.

workers to fair labour practices conferred by section 23(1) of the *Constitution*.³⁷¹ The court held that the *LRA* was enacted "to give effect to and regulate the fundamental rights conferred by section 27 of the *Constitution*." In doing so, the *LRA* gives content to section 23 of the *Constitution* and must therefore be understood and applied consistently with that purpose.³⁷² Furthermore, the court held that where legislation is enacted in an effort to meet constitutional obligations and does so within constitutional limits, the courts are obliged to give full effect to that legislative purpose.³⁷³ Moreover, when interpreted properly, such legislation should provide protection, promotion and fulfilment of the constitutional rights and as such becomes a constitutional matter.³⁷⁴ In this manner, the courts and the legislature act in partnership to give life to constitutional rights.³⁷⁵

The South African constitutional democracy envisages the development of a coherent system of law that is shaped by the *Constitution*.³⁷⁶ Therefore, the court in *NEHAWU* had the following to say concerning the right to fair labour practices:

Our *Constitution* is unique in constitutionalising the right to fair labour practice. But the concept is not defined in the *Constitution*. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment.³⁷⁷

It is therefore neither necessary nor desirable to define this concept.³⁷⁸ The court stated that the word "everyone" in section 23(1) of the *Constitution* refers to human beings and not to juristic persons.³⁷⁹ However, the court stated that there is nothing, either in the language of section 23(1) of the *Constitution* or the context in which that section occurs, which supports the narrow construction contended for that the concept of unfair labour practices applies to workers only.³⁸⁰ In contrast, the context suggests that the

³⁷¹ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 13.

³⁷² *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 14.

³⁷³ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 14.

³⁷⁴ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 14.

³⁷⁵ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 14.

³⁷⁶ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 16.

³⁷⁷ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 16.

³⁷⁸ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 33.

³⁷⁹ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 33.

³⁸⁰ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 33.

word refers to every person and it includes both natural and juristic persons. Where the rights in the section are guaranteed to workers or employers or trade unions or employers' organisations as the case may be, the *Constitution* says so explicitly.³⁸¹ If the rights in section 23(1) were to be guaranteed only to workers, the *Constitution* would have provided to that extent.³⁸²

Therefore, Section 23(1) of the *Constitution* is focused on the relationship between the worker and the employer as well as the continuation of that relationship on fair terms for both parties. In giving effect to this right, it is essential to bear in mind the contrast between the interests of the workers and the interests of the employers, which is inherent in labour relations.³⁸³ Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices.³⁸⁴

The declared purpose of the *LRA* "is to advance economic development, social justice, labour peace and the democratisation of the workplace."³⁸⁵ This should be achieved by fulfilling its primary objects, which includes giving effect to section 23 of the *Constitution*. It lays down the parameters of its interpretation by enjoining those responsible for its application to interpret it in compliance with the *Constitution* and South Africa's international obligations. The *LRA* must therefore be purposively construed in order to give effect to the *Constitution*. This is the approach that has been adopted by the Labour Appeal Court and the Labour Court in construing the *LRA*.³⁸⁶

The *NEHAWU* case is important to elaborate on the meaning of "everyone" in the right to fair labour practices as provided for by the *Constitution*. The court stated that this includes human beings and juristic persons in an employment relationship. This therefore means that illegal immigrants in an employment relationship should be covered by this provision. They can seek recourse from this provision in cases of employment troubles. Furthermore, the *Discovery Health* case has already indicated the

³⁸¹ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 33.

³⁸² *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 39.

³⁸³ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 40.

³⁸⁴ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 40.

³⁸⁵ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 41.

³⁸⁶ *National Education Health and Allied Workers Union (NEHAWU) v University of Cape Town* para 41.

willingness of the judiciary to extend human rights to migrants, and this is inclusive of illegal immigrants.

4.3.2 The Labour Relations Act

It has already been stated in the *NEHAWU* case that the *LRA* seeks to:

...advance economic development social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are to give effect to and regulate the fundamental rights conferred by section 27 of the *Constitution*; to give effect to obligations incurred by the Republic as a member state of the *International Labour Organisation*; to provide a framework within which employees and their trade unions, employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and formulate industrial policy; and to promote orderly collective bargaining; collective bargaining at sectoral level; employee participation in decision-making in the workplace; and the effective resolution of labour disputes.³⁸⁷

This is in line with the primary object of the *LRA* to give effect to the right to fair labour practices as enshrined in the *Constitution*.

This simply means that the *LRA* is the embodiment of the right to fair labour practices as provided for in section 23(1) of the *Constitution*. This means that even illegal immigrants in an employment relationship can seek protection from the *LRA* concerning fair treatment in the workplace.

4.3.3 Basic Conditions of Employment Act

Concerning forced labour, section 48 of the *BCEA* states that subject to the *Constitution*, all forced labour is prohibited. Although this provision does not go into detail, it clearly provides that all forced labour is prohibited.

It is important to note that all illegal immigrants who are subjected to forced labour can seek recourse from the *BCEA* because it prohibits forced labour.

4.3.4 Immigration Act

According to section 38 (1) of the *Immigration Act*,

³⁸⁷ Preamble of the *LRA*.

no person shall employ an illegal foreigner or a foreigner whose status does not authorise him or her to be employed by such a person.

It can be understood from the preamble of the *Immigration Act* that the main concern of the act is to reduce the incidence of illegal immigrants in employment situations and to control the involvement of immigrants in employment and the job market.³⁸⁸ In a work relationship, the employer is the one who holds authority over an illegal immigrant. This means that the employer will ultimately decide whether the immigrant keeps their job or not.³⁸⁹ The *Immigration Act* is intent on punishing employers for employing illegal immigrants. The aim is to place a sanction where it matters the most.³⁹⁰

The *Immigration Act* is explicitly against the employment of illegal immigrants. Its importance for this research lies in the contradiction between this act and the *Constitution*, which gives the right to fair labour practices to everyone.

4.3.4.1 The impact of the Bill of Rights on the interpretation of the *Immigration Act*

There is no restriction in section 23 of the *Constitution* in relation to the right to fair labour practices. Illegal immigrant workers are also entitled to the protection of the right to fair labour practices in their work relationships.³⁹¹ Furthermore, it is important to note that:

...it is also significant that one of the purposes of constitutionally entrenching labour rights is to protect vulnerable workers. Unauthorized workers are amongst the most vulnerable workers given their tenuous legal position. That status has historically been exploited to their detriment as they are reluctant to use proactive mechanisms for fear of secondary victimization at the hands of authorities.³⁹²

The abovementioned indicates that constitutionalising labour rights helps to protect illegal immigrants because they form part of the group of vulnerable workers who are

³⁸⁸ *Immigration Act* Preamble (j) states that the *Immigration Act* aims at setting in place a new system of immigration control which ensures that the contribution of foreigners in the South African labour market does not adversely impact on existing labour standards and the rights and expectations of South African workers.

³⁸⁹ Bosch 2006 *ILJ* 1350.

³⁹⁰ Bosch 2006 *ILJ* 1350.

³⁹¹ Bosch 2006 *ILJ* 1351.

³⁹² Bosch 2006 *ILJ* 352.

often afraid to report abuse because they may receive further abuse from the authorities.

Additionally, the protection of labour rights is important to ensure the dignity of illegal immigrants. The certainty of this protection is ensured by the *Constitution*.³⁹³ It is submitted by Bosch³⁹⁴ that a contract of employment is important to be able to access the protections provided for in the *LR* properly. He also submits that illegal immigrants are unable to access the *CCMA* for protection of their labour rights.³⁹⁵ Their only hope in this instance is to invoke the protection of the *Constitution*.³⁹⁶ Furthermore, it seems to be absurd to exclude or deprive people who have the right to fair labour practices from protection of legislation that was enacted specifically to protect the given right.³⁹⁷

Bosch³⁹⁸ further states that:

...allowing unauthorised workers remedies under labour legislation empowers them in the sense that they do not have to put up with oppressive employer conduct, thus bolstering their sense of dignity. In addition, it is unlikely that permitting unauthorised workers to rely on our labour legislation will discourage them from applying for permission to work via the proper channels. By approaching the *CCMA* to enforce labour rights an unauthorised worker brings himself or herself to the attention of authorities who may take steps to declare him or her an undesirable person and deport him or her.³⁹⁹

The above is indicative of the fact that giving workers remedies under labour legislation incentivises them not to put up with employer oppression. Rather it empowers them and it gives them a sense of dignity. However, reporting abuse still remains a problem for illegal immigrants because they live in the shadows for fear of the authorities.

4.4 The right to fair labour practices as discussed in Discovery Health v CCMA

In *Discovery Health*, the court stated that the right to fair labour practices is a fundamental right and that there is no indication in the *Immigration Act* that the statute

³⁹³ Bosch 2006 *ILJ* 1352.

³⁹⁴ Bosch 2006 *ILJ* 1352.

³⁹⁵ Bosch 2006 *ILJ* 1353.

³⁹⁶ Bosch 2006 *ILJ* 1353.

³⁹⁷ Bosch 2006 *ILJ* 1353.

³⁹⁸ Bosch 2006 *ILJ* 1353.

³⁹⁹ Bosch 2006 *ILJ* 1353.

intends to limit that right.⁴⁰⁰ Furthermore, sanctioning a claim of contractual invalidity would defeat the primary purposes of section 23(1) of the *Constitution*, which gives effect to the right to fair labour practices.⁴⁰¹ The court also noted that the right to fair labour practices extends only to the work relationship between workers and employers.⁴⁰² The court also held that the protection against unfair labour practices given by section 23 the *Constitution* does not depend on a contract of employment. Such protection also extends potentially to other contracts, relationships and other arrangements in terms of which a person performs work or renders other services for another.⁴⁰³

The court also held that the definition of an employee is not rooted in a contract of employment. Furthermore, a person who renders work on a basis other than that recognised as an employment by the common law, may be an employee for the purposes of the definition. This is because a contract of employment is not the sole ticket for admission to the golden circle reserved for the employed.⁴⁰⁴ To conclude, the court held that the contract of employment between Lanzenta and Discovery Health was valid regardless of the fact that Lanzenta did not have a valid work permit. Furthermore, Lanzenta was nonetheless an employee because the definition of an employee is not dependant on a valid and enforceable contract.⁴⁰⁵

4.5 Conclusion

The remedies available to illegal immigrants in situations of forced labour often lie in legislative protections. The right to fair labour practices is at the top of this list. It provides protection for everyone and according to the *Discovery Health* case, this is inclusive of illegal immigrants. These workers have been said to be vulnerable and precarious workers and they also get protection under international law. The *Forced Labour Conventions* provide comprehensive protection for illegal immigrants in the workplace. However, these workers live and work in precarious positions because they

⁴⁰⁰ *Discovery Health v CCMA* para 29.

⁴⁰¹ *Discovery Health v CCMA* para 31.

⁴⁰² *Discovery Health v CCMA* para 39.

⁴⁰³ *Discovery Health v CCMA* para 41.

⁴⁰⁴ *Discovery Health v CCMA* para 49.

⁴⁰⁵ *Discovery Health v CCMA* para 54.

try to exist outside the law for fear of being deported once discovered. This created vulnerability that employers often use against them. This point is reemphasised by Norton when stating as follows:⁴⁰⁶

Employers are incentivised to employ unauthorised workers because they are prepared to work for lower salaries than their national counterparts. Employers are also attracted to the flexibility of such labour which may be employed in times of need and simply be dispensed with in times of low demand. They are thus a source of labour exploitation and abuse.⁴⁰⁷

Although there is legislative protection for illegal immigrants in work, these workers often have a problem accessing these protections in real-life situations.⁴⁰⁸ Therefore, the remaining problem is access and reporting of abuses in the workplace.

⁴⁰⁶ Norton 2010 *ILJ* 1524.

⁴⁰⁷ Norton 2010 *ILJ* 1524

⁴⁰⁸ Bosch 2006 *ILJ* 1353.

Chapter 5: CONCLUSIONS AND RECOMMENDATIONS

5

5.1 Introduction

Although the number of illegal immigrants entering, living and working in South Africa cannot be accurately determined, we can agree that unauthorised migration into the country will continue.⁴⁰⁹ This is because migration is a global reality that cannot be avoided and must therefore be dealt with head-on.⁴¹⁰ People generally migrate to escape unemployment and poverty in their home countries, therefore they to seek a better existence in a different country.⁴¹¹

It is important to note that the purpose of this research has been to explore whether illegal immigrants have any labour rights, more especially protection against forced labour. Forced labour has been an issue in the world of work for many years, and it still persists. Presently it manifests in many forms and shapes. This is despite the fact that forced labour is prohibited by both the *Constitution* and the *BCEA*. Forced labour is one of the many forms of worker exploitation, and illegal immigrants are especially susceptible to this form of exploitation. This is because migration is a challenge for many people who migrate to seek better life opportunities in a different country. They engage in the kind of migration that is prompted by the need for better economic opportunities, regardless of the danger this might pose to their personal safety.⁴¹²

5.2 Conclusions

The right to protection against forced labour as provided for by section 13 of the *Constitution* and section 48 of the *BCEA* runs parallel with the right to fair labour practices provided for by section 23 of the *Constitution*. This therefore means that

⁴⁰⁹ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 3.

⁴¹⁰ Meyer 2009 *SA Merc LJ* 831.

⁴¹¹ Norton 2010 *ILJ* 1522.

⁴¹² Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 1.

where forced labour persists, the right to fair labour practices is being disregarded. Forced labour has been an issue in the world of work for many years, and it persists. *ILO Forced Labour Convention 29 of 1930*⁴¹³ has defined forced labour as occurring in instances where a person is forced to work or provide a service without their consent, and threats are used in order to get that person to do these tasks. Some indicators of forced labour include, "abuse of vulnerability," "restriction of movement," "physical and sexual violence," "retention of identity documents" and "debt bondage." Furthermore, it has been discovered that human trafficking, child labour and forced labour are inextricably linked⁴¹⁴ In the end, most victims of human trafficking become forced labourers, either on the African continent or abroad.⁴¹⁵ Vulnerability is a core element in the understanding of trafficking in persons.⁴¹⁶ Factors that increase vulnerability to trafficking seem to disproportionately affect the already downtrodden in society. These include women, children, migrants, refugees and the internally displaced.⁴¹⁷ This is where illegal immigrants come in, in many cases, immigrants do the hardest, dirtiest, most insecure and poorly paid jobs.⁴¹⁸ These are often referred to as 3D-jobs: dirty, degrading and dangerous jobs.⁴¹⁹ According to the *Immigration Act*, illegal immigrants are not allowed to work in South Africa,⁴²⁰ on the other hand section 13 of the *Constitution* states that everyone has the right to fair labour practices. This conjunction between the provisions of the *Constitution* and the *Immigration Act* is better illustrated by the *Discovery Health Case*. In this case the court held that the right to fair labour practices extends only to fair labour practices, which includes practices that come out of the relationship between workers, employers and their organisations.⁴²¹

Furthermore, the protection against unfair labour practices is not dependant on a contract of employment, but also extends to other contracts, relationships and

⁴¹³ Article 2(1) of *Convention 29*.

⁴¹⁴ Njoh and Ayuk-Etang 2012 *African Review of Economics and Finance* 31.

⁴¹⁵ Njoh and Ayuk-Etang 2012 *African Review of Economics and Finance* 31.

⁴¹⁶ UN "Abuse of a position of vulnerability in the definition of trafficking in persons" 13.

⁴¹⁷ UN "Abuse of a position of vulnerability in the definition of trafficking in persons" 14.

⁴¹⁸ Machava & Polzer 2006 *Africanus* 166.

⁴¹⁹ Norton 2010 *ILJ* 1523.

⁴²⁰ Section 38 of the *Immigration Act*.

⁴²¹ *Discovery Health v CCMA* para 39.

arrangements in terms of which a person performs work and provides services to another.⁴²² The *Constitution* also states that everyone is equal before the law.⁴²³ everyone should include migrants as well as illegal immigrants.

The *NEHAWU* case is important to elaborate on the meaning of "everyone" in the right to fair labour practices as provided for by the *Constitution*. The court stated that this includes human beings and juristic persons in an employment relationship. This therefore means that illegal immigrants in an employment relationship should be covered by this provision. They can seek recourse from this provision in cases of employment troubles. Furthermore, the *Discovery Health* case has already indicated the willingness of the judiciary to extend human rights to migrants, and this is inclusive of illegal immigrants.

The problems illegal immigrants face in the countries they migrate to are mostly based on the illegality of their entry in the first place.⁴²⁴ Their illegal status does not allow them to be integrated into the labour market.⁴²⁵ As a consequence, they stand the risk of doing exploitative and dangerous work.⁴²⁶ This leads to the possibility of them receiving little or no wages at all compared to other workers.⁴²⁷ Furthermore, because of their illegal status, they are unable to assert their rights even if they are aware of them.⁴²⁸ Standing⁴²⁹ states that illegal immigrants deliver low-priced labour and can be fired and deported if and when necessary or even when they prove unruly. They do not appear on any official employee documentation. They disappear into the nooks and crannies of society when work becomes scarce.⁴³⁰ They are indeed workers in the shadows, which makes them incredibly easy to exploit and mistreat.⁴³¹

Numerous illegal immigrants have no right to work for pay, but are hired anyway. However, they live under constant threats of being deported and without any rights to

⁴²² *Discovery Health v CCMA* para 41.

⁴²³ Section 9(1) of the *Constitution*.

⁴²⁴ *Biney Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 129.

⁴²⁵ *Biney Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 129.

⁴²⁶ *Biney Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 130.

⁴²⁷ *Biney Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 130.

⁴²⁸ *Biney Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 130.

⁴²⁹ Standing "Migrants: Victims, Villains or Heroes?" 91.

⁴³⁰ Standing "Migrants: Victims, Villains or Heroes?" 91.

⁴³¹ Standing "Migrants: Victims, Villains or Heroes?" 91.

social protection.⁴³² Additionally, it is important to note that irregular migration brings about a difficult conjunction between immigration law and labour law.⁴³³ This is because the purpose of immigration law is to regulate movement in and out of a country, while labour law is meant to protect the employment relationship between an employer and an employee. Therefore, a case becomes difficult where a choice has to be made between honouring the provisions of the *Immigration Act* versus the provisions of the *Labour Relations Act*.

Regardless of the fact that illegal immigrants are regarded as one of the most vulnerable groups in any given society, they have little to no legal protection.⁴³⁴ This is ironic because social protection measures are intended to protect the most vulnerable groups in society.⁴³⁵ This is a clear indication of the contradiction between immigration laws and labour laws in South Africa.⁴³⁶ Furthermore, immigration law is seemingly in direct contradiction with the concept of equality provided for by the *Constitution*, which is the foundation of all laws.⁴³⁷ Illegal immigrant workers in South Africa, despite the notion of equal labour rights, engage in mundane, dirty, degrading, and dangerous work.⁴³⁸ These jobs normally include appalling conditions that hinge on the verge on slavery because of the long hours, poor wages, and discrimination.⁴³⁹

Despite the fact that it may be considered a struggle to extend substantial rights to illegal immigrants, granting them rights is in fact possible.⁴⁴⁰ There have been arguments for extending these rights and protections that deserve some attention. These should be advanced from perspectives ranging from migration labour and human rights perspectives.⁴⁴¹

⁴³² Standing "Migrants: Victims, Villains or Heroes?" 91.

⁴³³ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 2.

⁴³⁴ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 6.

⁴³⁵ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 6.

⁴³⁶ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 6.

⁴³⁷ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 6.

⁴³⁸ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 127.

⁴³⁹ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 127.

⁴⁴⁰ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 96.

⁴⁴¹ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 96.

5.3 Recommendations

5.3.1 Removing overly restrictive immigration policy

Regardless of the appeal accompanying "overly restrictive and control-centred" immigration policy, it is not ideal.⁴⁴² This is because it has the potential to worsen an already precarious situation.⁴⁴³ Restrictive immigration policies seem to facilitate the exploitation of illegal immigrants instead of constraining the inflow of immigrants.⁴⁴⁴ Essentially, criminalising illegal immigrants begets "a marginalised underclass" who is very susceptible to exploitation.⁴⁴⁵ Without legal protection and rights, illegal immigrants seek jobs for survival and because of their illegal status they have no option but to agree to work regardless of pay, risk, physical demand or working hours.⁴⁴⁶ Furthermore, restrictive immigration policies increase the possibility of migrants falling prey to trafficking.⁴⁴⁷

Therefore, removing overly strict immigration policies will create an opportunity for migrants to enter states legally and this will help them live within the radar of the authorities from which they can seek help in cases of trouble. Furthermore, when migrants are within the country legally, this decreases the chances of them falling prey to human trafficking for the purposes of forced labour. In this way the law would not exacerbate illegal migration and further the exploitation of migrants who enter states illegally and seek work.

It is submitted that once immigration policies relax, this will allow for immigrants to enter a state and remain legally in such a state. There will then be no need for them to live illegally or hide from the law. This will make it easy for the state to track their movements. Furthermore, when they are not in a state illegally this decreases vulnerability to forced labour and exploitation because at the first sign of these instances they can report without fearing imprisonment themselves.

⁴⁴² Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 127.

⁴⁴³ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 127.

⁴⁴⁴ Ollus 2015 *Crime Law Soc Change* 224.

⁴⁴⁵ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 127.

⁴⁴⁶ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 127.

⁴⁴⁷ Ollus 2015 *Crime Law Soc Change* 225.

5.3.2 Enhancing the right to work to protect the livelihoods of immigrants

The right to work envisages a situation where everyone has an opportunity to gain a living through work freely chosen and accepted. Furthermore, once a person has the right to work, they can further take steps to safeguard that right. This means that there will be little chance of exploitation in work and a worker cannot be subjected to forced labour easily. The right to work brings about more security in work and more security in the knowledge of existence of rights and recourse that comes out of the knowledge of the entitlements that come with these rights.

It is recommended that legislation should be enacted stating that everyone has the right to work regardless of their status in the country, more especially their migratory status. The effect of such legislation will grant and protect this right. Also, workers will be protected against exploitative work as part of the comprehensive right to work. Additionally, once the right as well as the protection thereof exist it will enhance the ending of exploitation.

5.3.3 Removing the reliance to the term "employee" in granting work-related protection to migrants

The fact that the definition of employee is interpreted through "the lens of contract law," means that the South African employment law prevents illegal immigrant workers from having access to protection via employment law.⁴⁴⁸ Section 23 of the *Constitution* should therefore be interpreted to state that workers should be protected against unfair dismissal and other forms of difficulties that employees may face in the workplace.⁴⁴⁹ Protection should not be qualified in terms of the nature of the employment relationship, and should be extended to everyone who is in an employment relationship regardless of whether there is a contract or not.⁴⁵⁰ The argument that illegal workers

⁴⁴⁸ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 123.

⁴⁴⁹ Rapatsa 2015 *Acta U, Danubius Juris* 80.

⁴⁵⁰ Rapatsa 2015 *Acta U, Danubius Juris* 80.

wilfully contract themselves out of legislative protection should not stand.⁴⁵¹ Labour legislation was intended to prioritise worker protection. Therefore, attempts aimed at arbitrarily denying workers protection based on the nature of work performed without any regard to the realities of such work will defeat the purpose of the existence of labour law.⁴⁵²

Labour rights ought to be protected based on the fact that a work relationship exists between an employee and an employer, not because they entered into a contractual relationship. To this effect, it is important to recall the court's judgment in the *Discovery Health* case. The court held that the definition of employee is not necessarily rooted in a contract of employment. Furthermore, a person who renders work for another on a basis other than that recognised as employment by the common law may be an employee for the purposes of the definition. The argument is that a contract of employment is not the sole ticket for admission into the golden circle reserved for the employed.⁴⁵³ In conclusion, it is recommended that legislation should be amended to provide protection for all employment relationships regardless of whether a contract exists or not. Employees should be protected from exploitative employers, and this protection should cover all employment relationships regardless of the nature of the work. This legislation should be created in such a way that fairness prevails above all given the particular case being dealt with. It is the responsibility of lawmakers as well as executors to ensure that justice should prevail and that protection against forced labour be guaranteed to everyone. More especially illegal migrant workers because they have been said to be most susceptible to forced labour.

⁴⁵¹ Rapatsa 2015 *Acta U, Danubius Juris* 83.

⁴⁵² Rapatsa 2015 *Acta U, Danubius Juris* 84.

⁴⁵³ *Discovery Health v CCMA* para 49.

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