

**Examining the legal protection of
Illegal immigrants under South African
labour law**

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ABSTRACT

Illegal labour migration remains a persistent issue in South Africa, as it has challenged and reshaped the South African labour law from previously what it was. The infamous decision of Discovery Health and Kylie cases have reshaped the interpretation of illegal contract, as it has opened the door for persons employed in such contract the possibility to claim for labour protection. The illegality of their employment result to them being labelled as the vulnerable group. Their vulnerability opens problems that practically these persons they cannot resolve, of which exploitation and unfair dismissal are included. This research analyses the legal position of undocumented migrants after the decision of Discovery Health. This research analyses the legal position of undocumented migrants, with special reference to the after math of the Discovery Health case. This research considers the South African labour law provisions which extend its protection to undocumented migrants, also brief reference is also made to protection of undocumented migrants in other jurisdiction for comparison. The research concludes that, the Discovery Health decision have changed the interpretation of illegal employment by extending legal protection to undocumented migrants, however, practically, they are still exploited and dismissed unfairly among other things. Additionally, it proposes that the current lacuna could be resolved by firstly amending the LRA in a way that it will explicitly include undocumented migrants in the definition of an employee in furthering the purpose and the spirit that is enshrined in the Constitution. Secondly, to establish a legal certainty where legislatures adapt new guidelines and rules for courts, tribunal and forums to deal and adjudicate matters concerning undocumented migrants.

Keywords: Labour Rights, Illegal immigrants, Exploitation, South African Labour Law, Fair Labour Practices, International Labour Framework

Table of Contents

ACKNOWLEDGEMENTS.....	i
ABSTRACT.....	ii
LIST OF ABBREVIATIONS.....	vi
Chapter 1: INTRODUCTION	1
<i>1.1 Introduction</i>	<i>1</i>
<i>1.2 Problem Statement</i>	<i>2</i>
<i>1.3 Background</i>	<i>5</i>
<i>1.4 Aim of the Research</i>	<i>8</i>
CHAPTER TWO: INTERNATIONAL LAW FRAMEWORK	9
<i>2.1 Introduction</i>	<i>9</i>
<i>2.2 The International labour organisation.....</i>	<i>9</i>
2.2.1 Convention 143 and Recommendation 151.....	10
<i>2.2 The United Nations.....</i>	<i>12</i>
2.2.1 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	13
2.3.2 United Nations resolutions on protection of migrant workers	16
<i>2.5 Conclusion</i>	<i>18</i>
CHAPTER THREE: SOUTH AFRICAN LABOUR LAW FRAMEWORK	19
<i>3.1 Introduction</i>	<i>19</i>
<i>3.2 South Africa labour laws</i>	<i>20</i>
3.2.1 Constitutional Protection	20
3.2.2 The interpretation of the term 'everyone'	21
3.2.3 Right to equal treatment.....	22
3.2.4 Right to fair labour practices	22

3.3 Statutory law framework	25
3.3.1 Labour Relations Act 66 of 1995	25
3.3.2 Basic Conditions of Employment Act 75 of 1997	27
3.3.3 Immigration Act 13 of 2002.....	29
3.4 Conclusion	32
CHAPTER FOUR: COMPARATIVE STUDY	34
4.1 Introduction	34
4.2 The United States of America.....	35
4.2.1 Employment of undocumented migrants in the USA	35
4.2.2 Limitations of the undocumented migrant workers rights...	39
4.2.3 Concluding remarks	41
4.3 The Australia	41
4.3.1 Employment of undocumented migrants in Australia	41
4.4 Comparison of the Jurisprudence of the USA and Australia with South Africa.....	46
4.5 Conclusion	48
CHAPTER FIVE: ANALYSIS OF PROTECTION OF UNDOCUMENTED MIGRANTS' EMPLOYEES IN SOUTH AFRICA.....	49
5.1 Introduction	49
5.2 Prior to the Discovery Health Case	49
5.3 Current legal position of undocumented migrants.....	50
5.3.1 Discovery Health Case.....	50
5.3.2 Legal Prohibitions.....	52
5.3.3 Requirements for Dismissal	53
5.3.4 Legal Implications of exploitative labour practices.....	54

5.3.5 Analysis on the incorporation of laws from USA and Australia	55
5.4 Conclusion	57
CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS	58
6.1 Conclusions	58
6.2 Recommendations.....	59
6.2.1 Introduction	59
6.2.2 Recommendations.....	60
BIBLIOGRAPHY	63

LIST OF ABBREVIATIONS

BCEA Basic Conditions of Employment Act

CCMA Commission for Conciliation Mediation and Arbitration

ESA Employment Service Act

ILO International Labour Organisation

FLSA Fair Labour Standard Act

IRCA Immigration Reform and Control Act

LRA Labour Relations Act

NLRA National Labor Relations Act

NLRB National Labor Relations Board

USA United States of America

Chapter 1: INTRODUCTION

1.1 Introduction

South Africa is a culturally diverse country with one of the most liberal Constitution that has a comprehensive Bill of Rights. The provisions of the Bill of Rights have created new possibilities, such as, equal protections of all human rights and freedom of everyone living in South Africa. The Constitution of the Republic of South Africa, 1996¹ (hereafter, the Constitution) is founded on the values of dignity, equality and liberty. It does not choose a colour or origin to afford one with human rights protection.² In the Southern part of the African continent, South Africa is viewed as a developing country because of its promising economy.³ The fundamental rights guaranteed in the Constitution that are similar to human rights protection on an international level coupled with the potential economic growth attracts migrants to come to South Africa for better living conditions and employment.⁴ This phenomenon is the result of poor living conditions, lack of development, lack of resources and high rates of unemployment in their country of origin.⁵

These migrant workers systematically run away from socio-economic problems by moving from their home country to countries such a South Africa in pursuit of work. Upon arrival in South Africa, these migrant workers systematically run away from socio-economic problems by moving from their home country to countries such as South Africa in pursuit of work.⁶ Upon arrival in South Africa, some are without proper documentations but are able to find work, these workers are classed as illegal migrant workers. This situation arises because of the lengthy processes that are involved in acquiring valid working documentation.⁷ The procedure tends to be long,

¹ Constitution of the Republic of South Africa, 1996.

² Viviers and Smit 2014 *International Journal of Business and Social Research* 59.

³ Bloch 2010 *Sociology* 235.

⁴ Bloch 2010 *Sociology* 234.

⁵ Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* 26.

⁶ Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* 26.

⁷ Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* 74.

and one need adequate finances during such a process, of which most foreigners do not have access to.⁸ Due to their illegal status, these undocumented migrants end up finding jobs that are not in line with the standards of the South African labour laws. In other words, they settle for employment that is hazardous to their health, pose a serious threat to their safety and having unusual working hours with less pay which result to exploitation by employers.⁹

This research considers the South African labour protection of undocumented migrants, as well as the international law standards and other jurisdictions of labour laws. The study will further investigate the standing of undocumented migrants since the *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others*¹⁰ (hereafter, *Discovery Health case*) by providing available judicial precedents after the decision, and whether the courts apply the principles from the decision of *Discovery Health case*. This Chapter includes an outline of the problem statement, in which an overview of the South African legal position of undocumented migrant workers will be provided. Such overview is important in order to formulate an argument whether undocumented migrants' workers are protected under the labour after the decision of the Discovery Health case.

1.2 Problem Statement

Section 23 of the Constitution,¹¹ and South African labour laws¹² prohibit unfair labour practices and exploitation of employees.¹³ Employers have not responded to positively amendments to labour laws, regarding undocumented migrant workers as employees for the purpose of the LRA.¹⁴ This research focuses on the latter. In this study undocumented migrants refer to foreign nationals that came to South

⁸ Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* 74.

⁹ Motsamai *Forced Labour- The Protection of Illegal Migrant Workers in South Africa* 5.

¹⁰ *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others* [2008] 7 BLLR 663 (LC).

¹¹ Section 23 of The Constitution of the Republic of South Africa, 1996 (Hereafter, The Constitution)

¹² The Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, and the Employment Equity Act 55 of 1998.

¹³ Nkuna *Undocumented Migrants and the Right to Fair Labour Practices* 22.

¹⁴ Nkuna *Undocumented Migrants and the Right to Fair Labour Practices* 4.

Africa legally and with valid working permits, but their statuses expired during the course of their employment and they have not successfully renewed their status with the immigration officials; and those who came illegally without any legal documents.¹⁵

Undocumented migrants continue to be exploited by their employers, even after the ruling made by the court in *the Discovery Health case*,¹⁶ which affirmed undocumented migrants' protection as employees.¹⁷ In other words, undocumented migrants engaged in an employment relationship are employees and must be afforded the same protection as any other qualified employee in terms of South African labour laws.¹⁸ Nonetheless, the exploitation of these undocumented migrant workers still continues, they are subjected to poor working conditions, low wages and sometimes unpaid labour.¹⁹

In 2017, Human Rights Watch interviewed undocumented migrants; they reported an incident where the employer replaced a group of undocumented migrants on payday without any remuneration for their services.²⁰ There are instances where they have worked under dangerous conditions and they cannot approach their employers for health and safety equipment because they fear being dismissed.²¹ This is the situation that arose in the case of *Sithole v Metal and Engineering Industries Bargaining and others* (hereafter, *Sithole case*),²² wherein, Mr Sithole, a Zambian national, was working in South Africa as an undocumented migrant, he had been employed for about five years by the same employer. One day he decided

¹⁵ Badenhorst *The Labour Rights of Irregular Migrants in South Africa* 2. See also Section 1(1)(xvii) of the Immigration Act 13 of 2002, Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* 6, and Ngomane *the Socio-Economic Impact of Migration in South Africa: A Case Study of Illegal Zimbabweans in Polokwane Municipality in the Limpopo Province* 3.

¹⁶ *Discovery Health v CCMA 2008 7 BLLR 663 (LC)*.

¹⁷ *Discovery Health v CCMA case* para 54.

¹⁸ Banda *Protection of Vulnerable Employees In South African Legislation* 34.

¹⁹ Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* 37.

²⁰ Human Rights Watch Report: Interview of Illegal Immigrants 2017 <https://www.hrw.org>.

²¹ Human Rights Watch Report: Interview of Illegal Immigrants 2017 <https://www.hrw.org>. Ngandwe 2013 PER. See also *Sithole v Metal and Engineering Industries Bargaining and Others 2015 318 (LC)* para 3.

²² *Sithole v Metal and Engineering Industries Bargaining and Others 2015 318 (LC)* para 3.

to approach his employer for protective clothing to avoid injuries at the workplace, his employer thereupon dismissed him.²³ The Labour Court of Appeal ruled that an undocumented migrant working in South Africa without a valid working permit is an employee in terms of s213 of the LRA and the dismissal of the employee was unfair.²⁴

There is seemingly an apparent lack of concern from the employers towards undocumented migrant workers. It appears that because of their illegal status within South Africa that they do not have protection against unfair dismissals, occupational hazard and basic conditions of employment under the various labour laws.²⁵ Section 185 of the Labour Relations Act (hereafter, the LRA),²⁶ prohibits employers from unfairly dismissing employees, and this is the cornerstone of fair labour practices under section 1 of the LRA.²⁷ In the *Discovery Health* case, the court noted a form of exploitation where malicious employers employ undocumented immigrants and then decide not to pay them based on their illegal statuses.²⁸ This is a similar occurrence that was again highlighted by the courts in the case of *Masuta v Lake Smit and Partners*, Lake Smit and Partners dismissed their long term employee, Masuta, on the ground of invalid working permit, while they were aware of his illegal status prior to his employment.²⁹ There is a misconception that labour laws against unfair dismissal and unfair labour practices do not apply to these undocumented migrant workers.³⁰ Section 185 of the LRA provides every person that qualifies as an employee for the purpose of the LRA with a right not to be subjected to unfair labour practices.³¹ Section 185 of the LRA extends its protection to people regarded as employees, it follows on that those undocumented migrants who are engaged in an employment relationship can have recourse and protection under section 185 of

²³ *Sithole v Metal and Engineering Industries Bargaining and Others* 2015 318 (LC) para 3.

²⁴ *Sithole v Metal and Engineering Industries Bargaining and Others* 2015 318 (LC) para 15.

²⁵ Newaj 2020 PER/PELJ 6.

²⁶ Section 185 of the Labour Relations Act 66 of 1995.

²⁷ Section 1 of the Labour Relations Act.

²⁸ *Discovery Health* case para 5.

²⁹ *Masuta v Lake Smith & Partners* (unreported) case number KNDB17003-17 of 18 March 2018 para 10. See also Newaj 2020 PER/PELJ 11.

³⁰ Motsamai *Forced Labour- The Protection of Illegal Migrant Workers in South Africa* 54.

³¹ Newaj 2020 PER/PELJ 8. See also section 185 of the Labour Relations Act.

the LRA.³² The treatment and exploitation of undocumented migrant workers contravenes section 23 Constitution and International Labour Standards on Employment of migrant workers, such as International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 and the United Nations' resolution on Protection of All migrant workers 2017.³³ This proposed study draws attention to the following questions: Whether or not undocumented migrants enjoy legal protection in terms of South African labour law, and which labour rights undocumented migrants are entitled to, in South Africa.

1.3 Background

Since 1994, South Africa saw a beginning of a democratic era which ended the unequal treatment between different racial groups, and the era of a democratic South Africa. The introduction of democracy in South Africa, modified it as a rainbow nation that welcomes people despite their nationality, race, or any other differentiation.³⁴ South Africa is among the countries that have a potential to develop within Africa.³⁵ This in spite of the negative hit of the Covid-19 pandemic in 2020, which resulted in the contraction of 6.4% on the economy. South Africa's economy started to recover in 2021 from the pandemic, with Gross Domestic Price (GDP) growth reaching 4.9%. Most foreign nationals escaped to South Africa to have better employment opportunities and to improve their living standards.³⁶ Some immigrants crossed the border legally to apply for asylum or refugee status, while others did not; the latter prefers an illegal movement because it is easy to cross South African borders without the lengthy process and financial constraints to apply

³² Newaj 2020 PER/PELJ 8.

³³ Banda *Protection of Vulnerable Employees In South African* 50-52.

³⁴ Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* 32. See also Opening Address by President Cyril Ramaphosa at the South Africa Investment Conference, Sandton Convention Centre, Johannesburg, 26 October 2018 (dirco.gov.za) <http://www.thepresidency.gov.za/>.

³⁵ Ngomane the Socio-Economic Impact of Migration in South Africa: A Case Study of Illegal Zimbabweans in Polokwane Municipality in the Limpopo Province 17, and Opening Address by President Cyril Ramaphosa at the South Africa Investment Conference, Sandton Convention Centre, Johannesburg, 26 October 2018 (dirco.gov.za) <http://www.thepresidency.gov.za/>.

³⁶ Ngomane the Socio-Economic Impact of Migration in South Africa: A Case Study of Illegal Zimbabweans in Polokwane Municipality in the Limpopo Province 18.

for legal status.³⁷ When foreigners apply for working permits, or any legal documentation that permits them to work and live in South Africa, they encounter challenges, which leads them to take a shorter illegal route, and risk being undocumented while working in South Africa.³⁸

The South African Labour law framework was implemented to protect employees from being exploited and mistreated by their respective employers.³⁹ The South African law grants protection to people recognised as employees by section 213 of the LRA.⁴⁰ In other words, a person has to fall within the ambit of an employee as defined in section 213 to enjoy the protection offered by South African labour laws.⁴¹ Section 213 states that an employee is;

“(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer, and “employed” and “employment” have meanings corresponding to that of “employee”⁴²

In the *Discovery Health case*, the Court passed a judgement that proclaimed undocumented immigrants as employees as long as they meet the requirements in section 213 of the LRA.⁴³ Furthermore, section 23(1) of the Constitution affords everyone a right to fair labour practices, it is a broad right that benefits both citizens and non-citizen of South Africa, and it does not specify the non-citizens’ immigration status.⁴⁴ In *National Education Health and Allied Workers Union v University of Cape Town and Others*,⁴⁵ the Constitutional Court held that the wording ‘everyone’

³⁷ Ngomane *The Socio-Economic Impact of Migration in South Africa: A Case Study of Illegal Zimbabweans in Polokwane Municipality in the Limpopo Province* 48.

³⁸ Motsamai *Forced Labour- The Protection of Illegal Migrant Workers in South Africa* 52.

³⁹ Ngandwe 2013 PER/PEJL.

⁴⁰ Section 213 of the Labour Relations Act.

⁴¹ Motsamai *Forced Labour- The Protection of Illegal Migrant Workers in South Africa* 24. See also *Discovery Health v CCMA* para 3.

⁴² S 213 of the Labour Relations Act.

⁴³ Motsamai *Forced Labour The Protection of Illegal Migrant Workers in South Africa* 24. See also *Discovery Health v CCMA* para 3.

⁴⁴ Section 23(1) of the Constitution of the Republic of South Africa 1996. See also Badenhorst *The Labour Rights of Irregular Migrants In South Africa* 29.

⁴⁵ *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC).

should be given a broad interpretation even to include people who do not qualify to be employees in terms of the law.⁴⁶

The Immigration Act 13 of 2002, has set out provisions that prohibit employers from employing undocumented migrants.⁴⁷ According to the Immigration Act, employers do not have any authorisation to legally employ undocumented migrants.⁴⁸ Although, the Immigration Act prohibits employers from employing them, employers in non-unionised sectors still employ undocumented migrants in exploitative employment relationships that are not in line with the provisions of the BCEA.⁴⁹ In spite of that, the Immigration Act does not prohibit undocumented migrants from looking for employment in the labour market, which means that their illegal status does not void their employment contract,⁵⁰ thus, they are protected as employees.⁵¹ In addition, section 39 of the Constitution requires international law to be applied when interpreting South African legislation, and must also be taken into account even when interpreting the Bill of Rights.⁵² In addition to section 39, the International Labour Organisation (hereafter, the ILO) Convention 143, Article 2 supports the principle that the status of undocumented migrants does not prohibit them from entering into an employment contract.⁵³ South Africa is bound by the ILO because it is a signatory state to further international instruments such as the ILO Migration for Employment Convention, Forced labour Convention and Discrimination (Employment and Occupation) convention.⁵⁴

⁴⁶ *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) para 39. See also Conradie *a Critical Analysis of the Right to Fair Labour Practices* 44.

⁴⁷ Section 38(1) of the Immigration Act.

⁴⁸ Section 38(1) of the Immigration Act 13 of 2002. See also Badenhorst *The Labour Rights of Irregular Migrants In South Africa* 35.

⁴⁹ Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* 2.

⁵⁰ Banda *Protection of Vulnerable Employees In South African Legislation* 34.

⁵¹ Banda *Protection of Vulnerable Employees In South African Legislation* 34.

⁵² Section 39 of the Constitution. See also Motsamai *Forced Labour The Protection of Illegal Migrant Workers in South Africa* 30.

⁵³ Article 2 of Convention 143 of 1975.

⁵⁴ Norton 2010 ILJ 1527. See also, Migrant Workers Convention (No 143) 1975, Forced Labour Convention (No 182) 1957, and Discrimination (Employment and Occupation) convention (No 111) 1958.

1.4 Aim of the Research

The aim of this research is to determine the legal rights and protection of undocumented migrants' workers under the South African labour law. To achieve this, the study starts with the discussion of laws that provides protection to undocumented migrants workers in South Africa. The analysis will further provide a comparison study of other jurisprudence of the United States of America and Australia and differentiate it to South African labour protection afforded to undocumented migrant worker. The analyses will investigate the remedies available to undocumented migrants' workers that they can use to curb the continuous exploitation of their labour rights.

CHAPTER TWO: INTERNATIONAL LAW FRAMEWORK

2.1 Introduction

South Africa is a member state of the ILO and the United Nations, conventions, resolutions and recommendations passed by these inter-governmental organizations are relevant to South Africa.⁵⁵ International law plays a huge role in South African labour laws because they originated from the minimum standards set by international labour law. There is an obligation for South Africa to adopt its national laws and policies in a manner that conform to international labour law and ILO ratified conventions.⁵⁶

This chapter will analyse the protection of illegal migrants on an international level. It will discuss ILO conventions and recommendations that are relevant to protection of undocumented migrants and the labour standards that are set by these conventions. This chapter will further analyse the resolution on protection of migrant workers tabled by the United Nations and the International Convention on Protection of All migrant Workers and Their Families. The chapter will lastly, discuss the position of South Africa with regards to the international standards of protection of undocumented migrants and reasons why migrant conventions that are not ratified form part of South African labour law.

2.2 The International labour organisation

The ILO was drafted in 1918 by the Versailles peace treaty at the end of the First World War. The purpose was to protect the interest of employees not only domestic employees and diplomats but also migrants that were employed in countries other than their own.⁵⁷ The organisation accumulated a widespread demand for social justice, higher and better living standards for people working in foreign countries.⁵⁸

⁵⁵ Smit and Van Eck *CILJSA* 47.

⁵⁶ Smit and Van Eck *CILJSA* 48.

⁵⁷ Badenhorst *The Rights of Irregular Migrants in South Africa* 8.

⁵⁸ Badenhorst *The Rights of Irregular Migrants in South Africa* 9.

The ILO deals with conventions and recommendations, these conventions need the state to ratify them in order to have any effect on the member states. Once a state ratifies a convention, an obligation arises, which automatically binds and obliges a member state to take necessary steps to give effect to the provision of the said convention. For an example, S1 (b) of the LRA states that one of its purposes is to give effect to the obligations that arose as a result of South Africa being a member state of ILO and ratifying some of the ILO conventions.⁵⁹

The constitution of ILO laid out core labour law standards that were identified as fundamental conventions. In its declaration it stated that all its members, including South Africa and those that have not yet ratified the core conventions, to respect, uphold and realise the principle of the fundamental rights in the conventions. There are other important ILO instruments, such as Migrant Workers Convention, 143 of 1975 (hereafter Convention no 143) and Migrant Workers Recommendation, 151 of 1975 (hereafter, Recommendation 151) which serves as a guideline to member states to reduce and address employment of undocumented migrants in abusive environment, while at the same time protecting the rights of undocumented migrant workers. This study will only focus on Convention, 143 and Recommendation, 151.

2.2.1 Convention 143 and Recommendation 151

Conventions and recommendations are legal documents drafted by ILO to set out basic employment rules and rights of employees at work. Conventions are legally binding to member states and must be ratified into the members' states national law if such convention has been ratified. Recommendations on the other hand, are non-binding instruments that serve as a supplementary guideline to a convention. The purpose of Convention is to provide more detailed information on the best possible application of a convention.⁶⁰ Convention 143 and Recommendation 151 set out minimum standards on the protection of migrants but provides some protection to undocumented migrants that is limited to fewer provisions. Convention

⁵⁹ S1(b) of the LRA.

⁶⁰ International Labour Organisation 2022 <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>.

143 deals with movement of undocumented migrants, it encourages member states to limit employment of undocumented migrants in abusive conditions.⁶¹ These abusive conditions refers to exploitation of undocumented migrant workers, poor working conditions, low wages, physical abuse, substitution after employment, withholding their salary or refusing to remunerate them after rendering services to employer and unfair dismissals without any recourse.⁶² A similar situation was highlighted by the Human Rights watch in their 2017 report on undocumented migrants in South Africa. Undocumented migrant employees were substituted by their employers without recourse and remuneration for their employment.⁶³

Article 1 of the Convention 143 requires co-ordination between member states to respect human rights and fundamental rights of all migrant workers, irrespective of their immigration status.⁶⁴ These fundamental rights include the right to fair labour practice. The aforesaid fundamental right applies in instances where an undocumented migrant has been employed in contravention of national laws such as section 38(1) of the Immigration Act which prohibits employment of undocumented migrant workers.⁶⁵ Article 9(1) of the *Convention* 143 requires member states to remedy the situation by adapting safeguard provisions that guarantees equal treatment to undocumented migrant to receive remuneration and benefits that arose from the previous employment.⁶⁶ In addition, Article 34 of the Recommendation 151 state that employers have to pay undocumented migrants any remuneration for any service that they have rendered.⁶⁷

It does not matter about the legality of a migrant worker, the Recommendation encourages state members to ensure that the provisions of Article 9(1) of the *Convention* are facilitated in manner that caters for every migrant employee.⁶⁸

⁶¹ Article 2 of The Migrant Workers Convention (1975).

⁶² Weidman "The international Labour Law organisation fundamental conventions" 18.

⁶³ Human Rights Watch Report: Interview of Illegal Immigrants 2017 <https://www.hrw.org>.

⁶⁴ Article 1 of The Migrant Workers Convention (1975).

⁶⁵ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 20. See also Section 38(1) of the Immigration Act.

⁶⁶ Article (9)(1) of The Migrant Workers Convention (1975)

⁶⁷ Article 34 of The Migrant Workers Recommendation (1975).

⁶⁸ Article 34 of The Migrant Workers Recommendation (1975).

Article 9(1) of the Convention 143 comprises of two parts, the first part cover most benefits that comes with being an employee regardless of your migrant status, yet South Africa has not ratified this convention.⁶⁹ Failure to ratify Convention 143 can be considered as a conduct that is inconsistent with the Constitution, because the Constitution provide protection to everyone within the republic and Convention 143 is a suitable instrument in relation to employment of undocumented migrants.⁷⁰ It should be noted that the potential growth of South African economy will continue to attract migrations, and without disregarding the high unemployment rate in the country, the law may as well protect undocumented migrants that have already been employed based on these standards.⁷¹ The second part of this article deals with representation in cases of disputes that arose from article 34(1), in which the Constitution has provided everyone with a right to access courts and have legal assistance.⁷²

Lastly, article 9(3) states that the provisions of Convention 143 do not prohibit states from employing undocumented migrants. The provision recognises the inevitable of irregular migration, and it does not forbid their employment as long as it is not in abusive conditions.⁷³ It is evident that article 9(3) does not prohibit employment of irregular migrants, but does this mean that South Africa should start providing these workers with extensive labour protection? *The Discovery Health case* was a cornerstone to answering this question, but is the current protection sufficient for the standards of South African Constitution and international level? The answer to these questions will be determined in the next chapter.⁷⁴

2.2 The United Nations

United Nations is an international organisation that was founded in 1945 after the end of the Second World War. The aim of the United Nations is to achieve

⁶⁹ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 19.

⁷⁰ S1 of the Constitution.

⁷¹ Newaj 2020 *PER/PELJ* 3.

⁷² Article 34(1) of the Migrant workers Recommendation (1975).

⁷³ Article 9(1) of the Migrant Workers Convention (1975).

⁷⁴ Carley 2021 <https://ewn.co.za/2021/03/15/fact-check-does-sa-really-have-15-million-illegal-migrants>.

international co-operation that solves international problems that are economic, social, cultural and humanitarian in nature.⁷⁵ It further aims promoting respect for human rights and freedoms for everyone without discrimination.⁷⁶ The General assembly have adopted two instruments that protects the right of undocumented migrant. The International Convention on the Protection of the rights of All Migrant workers and Members of Their Families and Resolution 70/147 that protects migrants.

2.2.1 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The International Convention on the Protection of the rights of All Migrant workers and Members of Their Families (hereafter, The International Convention on Protection of All Migrant Workers) deals exclusively with rights and protection of migrant workers irrespective their status.⁷⁷ This convention expanded the protection of migrant workers and extended the recognition of undocumented migrant rights by providing that all migrant workers, irrespective of their status must be protected as employees by national laws of member states and provide them with benefits and protection similar to those of the national employees of the state. The International Convention on Protection of All Migrant Workers is the most comprehensive and relevant international instrument with regards to protection of undocumented migrants.⁷⁸ By providing an extensive labour protection to undocumented migrants, these include but not limited to protection against less favourable treatment and exploitation (preamble); unfair dismissal (article 54(a); basic working conditions (article 25 (1) (a)); and right to association (article 26).⁷⁹

⁷⁵ The United Nations 2022 <https://www.un.org/un70/en/content/history/index.html>.

⁷⁶ The United Nations 2022 <https://www.un.org/un70/en/content/history/index.html>.

⁷⁷ The International Convention on the Protection of the rights of All Migrant workers and Members Of Their Families (1990).

⁷⁸ Badenhorst *The Rights of Irregular Migrants in South Africa* 12.

⁷⁹ Badenhorst *The Rights of Irregular Migrants in South Africa* 13.

According to the preamble,⁸⁰ this convention has four purposes but only two are relevant to this study. The convention aims to create a unified body of law that is applicable to all migrant workers and at the same time improve the status of migrants.⁸¹ The possibilities of successfully establishing this unified central law that governs all migrants will reduce exploitation and abuse of the undocumented. It will further make the second purpose possible because it will improve the status of migrants.⁸² The preamble further recognises that undocumented migrants are subjected to less favourable conditions compared to other workers. Their labour rights are disregarded by employers, and they do not have a considerable protection from national laws and this is due to a non-unified body of law that protects migrant workers.⁸³

Article 25 states that:

“(1) Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:

(a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms...”⁸⁴

This provision requires equal treatment of employees on basic conditions. It prohibits member states from having different conditions between undocumented migrants and national employees. This provision further goes on to state that remuneration of employees must be equal based on their employment position.⁸⁵ In other words, employers are not allowed to discriminate against undocumented migrants by paying them less than other employees who are doing the same job.⁸⁶

⁸⁰ Preamble of The International Convention on the Protection of the rights of All Migrant workers and Members of Their Families (1990).

⁸¹ Preamble of The International Convention on the Protection of the rights of All Migrant workers and Members of Their Families (1990).

⁸² Badenhorst *The Rights of Irregular Migrants in South Africa* 12.

⁸³ Badenhorst *The Rights of Irregular Migrants in South Africa* 13.

⁸⁴ Article 25 of The International Convention on the Protection of the rights of All Migrant workers and Members of Their Families (1990).

⁸⁵ Article 25 of The International Convention on the Protection of the rights of All Migrant workers and Members of Their Families (1990).

⁸⁶ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 21.

Article 25(a) of The International Convention on Protection of All Migrant Workers provides other conditions, these conditions are still basic for proper employment of an undocumented migrant. Member states are required to ensure that all migrant employees work in conditions that similar to those of their national employees, with working hours that correspond with their national laws and without undocumented migrant working more than the required hours with little to earn. It is clear that this standards are still not practiced in South Africa.⁸⁷ On paper, similar provisions of Basic Condition Employment Act under the South African law must apply to these undocumented migrant employees because the decision in the *Discovery health case* classified them as employees which must receive the benefits of labour laws in South Africa.⁸⁸ But this is not the case, undocumented migrant workers are still treated less favourably, they work under adverse conditions, in unsafe working environment, with hard labour and low wages, and in the midst of all these they are powerless and unable to voice their grievances.⁸⁹ It is evident from the *Sithole Case* that undocumented migrants are in danger of dismissal whenever they raise their concerns. In this case, an undocumented migrant was dismissed by his employer for requesting protective clothing from his employer to protect himself against injuries at work.⁹⁰

Furthermore, Article 25(3) states that employees may not be deprived of any right in principle due to their illegal status. This provision further provides that employers will not be relieved from their contractual obligation based on the employees' irregular status. In other words, employers cannot fail to fulfil their contractual employment obligation to an undocumented migrant worker because they do not have a working permit. ⁹¹ According to Article 25(a), undocumented migrant workers should not have their labour rights limited regardless of their illegal status

⁸⁷ Article 25(a) of The International Convention on the Protection of the rights of All Migrant Workers and Members of Their Families (1990).

⁸⁸ Nkuna *Undocumented Migrants and the Right to Fair Labour* practices 40.

⁸⁹ Badenhorst *The Rights of Irregular Migrants in South Africa* 11.

⁹⁰ Sithole Case para 10.

⁹¹ Article 25(3) of The International Convention on the Protection of the rights of All Migrant Workers and Members.

in the member state.⁹² In the South African context, there was a *lacuna* in the law and the courts have thus suggested that undocumented migrants must be protected as employees.⁹³ In addition, the executive body have not ratified this convention to form part of South African labour laws. It raises questions on why a constitutional country like South Africa hasn't offer to protect the rights and dignity of undocumented migrants. There are cases that explicit provide protection to undocumented migrants, but employers tend to ignore them because according to them, these cases are not official laws.⁹⁴

Article 54 of The International Convention on Protection of All Migrant Workers provide all migrant workers with a right to enjoy equal treatment in respect of unfair dismissals; any unemployment benefits that came from previous employment; access to programmes that combat unemployment and substitution of employment in cases of termination or loss of employment.⁹⁵ The provisions of Article 54(1) (b); (c); and (d) may not be possible in some countries, South Africa included. These provisions can only be possible in countries that has strong economy such as China, which can facilitate post-employment beneficiary for both citizens and non-citizens employees.⁹⁶

2.3.2 United Nations resolutions on protection of migrant workers

The General Assembly is the central organ of the United Nations that is tasked with making policies and laws for international conventions. The GA provides a platform for multilateral discussion on international issues that covered in the United Nations charter. All member state of the United Nations has an equal vote in all resolutions tabled by the GA.⁹⁷ The GA understands that the irregular status of other migrants make them susceptible to exploitation and forced labour because they believe that

⁹² Article 25(a) of The International Convention on the Protection of the rights of All Migrant Workers and Members.

⁹³ Nkuna *Undocumented Migrants and the Right to Fair Labour* practices 9.

⁹⁴ Nkuna *Undocumented Migrants and the Right to Fair Labour* practices 9.

⁹⁵ Badenhorst *The Rights of Irregular Migrants in South Africa* 11

⁹⁶ Badenhorst *The Rights of Irregular Migrants in South Africa* 11

⁹⁷ United Nations <https://www.un.org/en/ga/>.

they are not protected by the state labour laws.⁹⁸ As a result, the GA tabled a resolution on protection of migrant workers. The resolutions cover wide range of point but the study will only cover those that relates to protection of migrant employees. The resolution calls for states to promote and protect the human rights and fundamental freedoms of every migrant, it does not matter whether they are documented or not.⁹⁹ This resolution is relevant to international labour law because it aims protecting migrants against any form of exploitations.¹⁰⁰

In addition, the United Nations resolutions on protection of migrant workers for states to eliminate any form of misconceptions that migrants are not protected by their state laws, this can only be possible if the states explicitly creates mechanisms allow migrants to report alleged cases of abuse to relevant authorities.¹⁰¹ The said mechanism will eliminate exploitation, abuse, and forced labour.¹⁰² In relation to South Africa, this would be the judiciary, which not only apply and interpret the law but are also the protectors of the Constitution against those holding the majority power that is the state government.¹⁰³ The judiciary tend favour a purposive interpretation of the law, they look at what is the purpose of the law, and what is it trying to remedy. In essence, the purposive interpretation of the Constitution is in line with international law, it ensures the protection of undocumented migrant workers.¹⁰⁴ A reading of section 38 of the Constitution, amongst other provision in the Bill of Rights, clearly states that 'anyone' is entitled to approach a court of law, this falls neatly in line with section 23 of the Constitution which states that 'everyone' has the right fair labour practices.¹⁰⁵ In the *Sithole case*, an employer initiated the issue of working permit after an employee requested protective clothes, he further refused to provide the employee with more information to assist the Department of Home Affairs (hereinafter, the Department) with his application. He later told an

⁹⁸ General Assembly, A/RES/70/147: Protection of migrants

⁹⁹ General Assembly, A/RES/70/147: Protection of migrants.

¹⁰⁰ General Assembly, A/RES/70/147: Protection of migrants.

¹⁰¹ General Assembly, A/RES/70/147: Protection of migrants.

¹⁰² General Assembly, A/RES/70/147: Protection of migrants.

¹⁰³ S165 of the Constitution.

¹⁰⁴ Webb The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law 217.

¹⁰⁵ S38 of the Constitution.

employee not to return at work, the employee reported the abuse to the CCMA by way of unfair dismissal dispute.¹⁰⁶

Furthermore, the United Nations resolutions calls for member state to ratify convention of ILO, including Domestic worker convention. Majority of undocumented migrants are employed in informal sectors such as farms and domestic works.¹⁰⁷

2.5 Conclusion

The ILO as the main international organisation that exclusively deals with international labour standards and labour laws, sets out minimum standards that applies all employees. Although some of their conventions and recommendations are not explicitly on protection of undocumented migrants, their core principles apply to all including undocumented migrants.¹⁰⁸ Undocumented migrants are afforded protection and receive the minimum standards like any other employee. South African labour laws are consistent with the international labour in terms of their minimum international standards.¹⁰⁹ The Constitution and some provisions in the South African labour laws confers undocumented migrants with rights that form part of the core principle of ILO. Unlike ILO, the United Nations are clear and explicit about the protection of undocumented migrants. They undoubtedly protect and respect the labour rights of migrants irrespective of their statuses.¹¹⁰

¹⁰⁶ Sithole Case para 6.

¹⁰⁷ General Assembly, A/RES/70/147: Protection of migrants.

¹⁰⁸ Nkuna *Undocumented Migrants and the Right to Fair Labour practices* 19.

¹⁰⁹ Badenhorst *The Rights of Irregular Migrants in South Africa* 13.

¹¹⁰ Dass and Raymond 2017 ILJ 29.

CHAPTER THREE: SOUTH AFRICAN LABOUR LAW FRAMEWORK

3.1 Introduction

Laws are flexible relationship between people and the government that changes by responding to current social conditions. *The Discovery Health case* is a social condition that brought a different legal perspective to the South African labour law. Our legal system responded by establishing labour rights protection of undocumented migrants.¹¹¹ In *the Discovery Health case*, the court held that irregular status of a person does not exclude them from labour laws protection as an employee.¹¹² After the establishment of the employment relationship, undocumented migrants, are protected by the labour legislations.¹¹³ However, the Immigration Act prohibits employment of undocumented migrants by imposing certain penalties on employers who contravene s38 (1) of the Immigration Act.¹¹⁴

On the contrary, the Constitutional right to fair labour practice is accorded to 'everyone', this includes undocumented migrants.¹¹⁵ The Constitution is the supreme law of the country that invalidates any law or conduct that is inconsistent with it.¹¹⁶ The provisions of the Constitution are utmost important in South Africa because it is the highest form of law that affords protection to everyone within the republic. With, the Constitution takes precedence over the Immigration Act.¹¹⁷

The chapter outlines the Constitutional and legislations protection afforded to undocumented migrants in South Africa, the application of these protection and how undocumented migrant obtain such protection with regard to South African labour laws. This chapter will additionally discuss the provisions of Immigration Act.

¹¹¹ Kasuso, *The definition of an "employee" under labour legislation: an elusive concept* 29.

¹¹² *Discovery Health v CCMA* para 51.

¹¹³ Kasuso, *The definition of an "employee" under labour legislation: an elusive concept* 28.

¹¹⁴ Section 38(1) of the Immigration Act.

¹¹⁵ Vallentgod *Legal Protection of the Rights of Migrant Workers in South Africa* 17. See also S23 (1) of the Constitution.

¹¹⁶ S2 of the Constitution.

¹¹⁷ Vallentgod *Legal Protection of the Rights of Migrant Workers in South Africa* 9.

3.2 South Africa labour laws

3.2.1 Constitutional Protection

People migrate from country of their birth to live in countries that have potential to offer them better living standards and employment opportunities.¹¹⁸ South Africa as a developing country in the southern region of Africa is an ideal destination for other migrants.¹¹⁹ Some migrants cross the border without the intention of obtaining asylum status due to personal and financial reasons, while others are exhausted by the long procedure of the asylum application.¹²⁰ According to 3(1) of the Regulations to the Refugee Act,¹²¹ it takes about 180 days, roughly to six months for the Department of Home Affairs to finalise an application of asylum.¹²² According to Dass and Raymond,¹²³ even though the Refugee Act contemplate 6 months, including all internal processes and finalisation of the asylum application. The reality is that applicants in many instances wait years before their asylum claim can be adjudicated by the Department. Hence, they opt for short and illegal route.¹²⁴

Before the adoption of the Constitution and other policies regulating migration, The *Aliens Control Act 96 of 1991*,¹²⁵ regulated migration, it was founded based on racist policies, exploitation and prohibition of international refugee conventions.¹²⁶ After the end of the apartheid era, the Constitution was adopted. The founding value in section 1 of the Constitution, outlines that the Constitution is based on democratic

¹¹⁸ Ngomane the Socio-Economic Impact of Migration in South Africa: A Case Study of Illegal Zimbabweans in Polokwane Municipality in the Limpopo Province 17.

¹¹⁹ Ngomane the Socio-Economic Impact of Migration in South Africa: A Case Study of Illegal Zimbabweans in Polokwane Municipality in the Limpopo Province 13.

¹²⁰ Ngomane the Socio-Economic Impact of Migration in South Africa: A Case Study of Illegal Zimbabweans in Polokwane Municipality in the Limpopo Province 12.

¹²¹ GN 366 GG 21075 of 6 April 2000.

¹²² Dass and Raymond 2017 ILJ 32.

¹²³ Dass and Raymond 2017 ILJ.

¹²⁴ Dass and Raymond 2017 ILJ 32.

¹²⁵ *Aliens Control Act 96 of 1991*.

¹²⁶ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 58.

values, which are freedom, equality and fundamental rights.¹²⁷ Section 7(2) of the Constitution state that:

“The state has the responsibility to respect, promote, protect and fulfil enjoyment of all fundamental rights.¹²⁸”

There are certain rights that are extended to citizens only, such as right for every citizen to choose trade of their choice, occupation or profession freely and without interference from a third party or the state,¹²⁹ but the right to fair labour practices is afforded to “everyone”.¹³⁰ This means that undocumented migrants as they are included in the definition of ‘everyone’ can also turn to the Constitution for protection against any form unfair labour practices. The term ‘everyone’ of the Constitution will be discussed below.

3.2.2 *The interpretation of the term 'everyone'*

There are certain categories of people who claimed to be legally excluded from the concept of 'everyone'.¹³¹ As a result, it is important to make clarity of which categories of people are included in the interpretation of the term 'everyone'. Therefore, the attempt here is to provide clarity as to whom may claim protection against any unfair labour practices. Section 23 (1) of the Constitution outline that everyone has the right to fair labour practices.¹³² On the face of it, they may stipulate that there are not any restrictions or limitations to the protection. However, the Constitutional Court is in favour of a legal scrutiny to ensure that South African laws continue to give effect to the rights guaranteed in the Constitution.¹³³ In *Kylie v Commissioner for Conciliation Mediation and Arbitration and Others*, it was held that the term “everyone” is wide and has unrestricted meaning to include each and

¹²⁷ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 216. See also section 1 of the Constitution.

¹²⁸ Section 7(2) of the Constitution. See also Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 231.

¹²⁹ Section 22 of the Constitution.

¹³⁰ Badenhorst *The Labour Rights of Irregular Migrants in South Africa* 33.

¹³¹ Phiri *Unfair Labour Practices, Labour Legislation and Protection of Migrant Workers in South Africa* 29. Section 1 of the LRA.

¹³² Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 45.

¹³³ Phiri *Unfair Labour Practices, Labour Legislation and Protection of Migrant Workers in South Africa* 28.

every person within South Africa.¹³⁴ In *NEHAWU v UCT and Others*,¹³⁵ the Constitutional Court held that the term 'everyone' extends to every person including both juristic and natural persons. The Constitutional Court further held that the term 'everyone' should be interpreted in the context of employment, which covers every person in an employment relationship.¹³⁶

3.2.3 *Right to equal treatment*

In South Africa, the society is driven and assembled by democratic values where people are treated equal, have dignity and are free from any oppression.¹³⁷ In terms of the Chapter 2 section 9(1) of the Constitution, "everyone is equal before the law and has the right to equal protection and benefit of the law".¹³⁸ Constitutional labour rights are wide enough to include undocumented migrants, therefore, they too can enjoy and claim the right to equal protection under labour and anti-discrimination laws.¹³⁹ In this respect, in *Larbi-Odam and Others v Member of the Executive Council for Education North West*,¹⁴⁰ it was held that unfair discriminatory treatment towards foreign teachers was a violation to the Constitutional right to fair treatment.¹⁴¹

3.2.4 *Right to fair labour practices*

The right to fair labour practices, is an important right that an individual should be entitled to in the labour market.¹⁴² It is difficult, to identify what really constitutes fair labour practices, there are no clear definitions from our legislations that attentively define fair labour practice.¹⁴³ The principle of fairness with regard to fair labour practice depends on the balance of interest between an employee and the

¹³⁴ *Kylie v Commissioner for Conciliation Mediation and Arbitration and Others* para 17.

¹³⁵ *NEHAWU v UCT and Others* 36.

¹³⁶ *NEHAWU v UCT and Others* 36.

¹³⁷ S1 of The Constitution.

¹³⁸ Section 9(1) of the Constitution.

¹³⁹ Phiri *Unfair Labour Practices, Labour Legislation and Protection of Migrant Workers in South Africa* 28.

¹⁴⁰ *Larbi-Odam and Others v Member of the Executive Council for Education North West* 24.

¹⁴¹ *Larbi-Odam and Others v Member of the Executive Council for Education North West* 24.

¹⁴² Badenhorst *The Labour Rights of Irregular Migrants in South Africa* 29

¹⁴³ Phiri *Unfair Labour Practices, Labour Legislation and Protection of Migrant Workers in South Africa* 28.

employer. What one person deem acceptable may be unacceptable to the other.¹⁴⁴ For example, a commissioner may find it acceptable that an employer dismissed an undocumented migrant on the ground of incapacity because the employee cannot legally perform their duties due to an expired working permit. While the other rejects this reasoning on the basis of unfair dismissal since incapacity does not cater for working permit and other status issues.¹⁴⁵ In the *National Education Health and Allied Workers Union v University of Cape Town and Others*,¹⁴⁶ the Constitutional Court outlined that, what really constitutes fair labour practices in an employment relationship, solely depends on circumstances of every case.¹⁴⁷ Therefore, fair labour practices solely depends on the conditions and treatment within the employment relationship if whether they are in accordance with the Constitution and labour laws.¹⁴⁸

Undocumented workers fall within the provisions of S 23 of the Constitution, but further reading of section 23(2)-(4) limits the scope of the right only to people who are involved in an employment relationship, which are, the employer, employee, unions and employer's organisations.¹⁴⁹ Rochelle le Roux¹⁵⁰ is of the view that the limitation implies that the protection of fair labour practices is afforded to those who are in an employment relationship, based on the terms and conditions that are fair to parties involved.¹⁵¹ Therefore, the important question behind the interpretation, is whether undocumented migrants are ought to be included in the interpretation of the term 'worker' in section 23(2) of the Constitution.¹⁵² Hence, Biney is of the view that section 23 of the Constitution guarantees the protection of the right to

¹⁴⁴ Conradie *a Critical Analysis of the Right to Fair Labour Practices* 51

¹⁴⁵ Newaj 2020 *PER/PELJ* 11.

¹⁴⁶ *National Education Health and Allied Workers Union v University of Cape Town and Others*

¹⁴⁷ *National Education Health and Allied Workers Union v University of Cape Town and Others* 33.

¹⁴⁸ Conradie *a Critical Analysis of the Right to Fair Labour Practices* 55.

¹⁴⁹ S 23(2)-(4) of the Constitution.

¹⁵⁰ Rochelle le Roux 'The new unfair labour practice' in Le Roux & Rycroft (eds) *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges* 2012 *Acta Juridica* 41 at 43.

¹⁵¹ Rochelle le Roux 'The new unfair labour practice' in Le Roux & Rycroft (eds) *Reinventing Labour Law: Reflecting on the first 15 years of the Labour Relations Act and future challenges* 2012 *Acta Juridica* 41 at 43.

¹⁵² Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 57.

fair labour practices to any person involved in an employment relationship.¹⁵³ Theoretically, the protection is afforded to any person involved in an employment relationship because even after the enactment of the Constitution, undocumented migrant workers are continuing to be the vulnerable group of people that mostly experience unfair labour practices. Additionally, the decision in *Larbi-Odam and Others v Member of the Executive Council for Education in North-West Province*,¹⁵⁴ and the decision of *Discovery Health case*, both gave certainty that undocumented migrants are included in the interpretation of the term 'worker' in section 23(2) of the Constitution.¹⁵⁵ The *Discovery Health case* went further to conclude that those workers who are involved in an illegal employment contract are afforded protection of the right to fair labour practices.¹⁵⁶

On the contrary, *Norton*¹⁵⁷ is of the view that the decision in the *Discovery Health* cannot be reasonably sustained.¹⁵⁸ She argues that, recognition of undocumented migrants as employees further encourages illegal employment relationships that are contrary with the objectives of Immigration Act.¹⁵⁹ Furthermore, in her view, the increasing illegal migration is slowly becoming an epidemic in South Africa and that there is a rise in xenophobic attacks as South African citizens are against the employment of undocumented migrants because they are perceived as taking their jobs.¹⁶⁰ According to the United Nations, South Africa recorded the highest xenophobic attack during the 2008 attack on migrants, about 60 people died, while 100 000 more displaced from their migrated resident to squatter camps across the country.¹⁶¹

¹⁵³ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 31.

¹⁵⁴ *Larbi-Odam and Others v Member of the Executive Council for Education in North-West Province*.

¹⁵⁵ *Larbi-Odam and Others v Member of the Executive Council for Education in North-West Province* 24. See also the *Discovery Health case* 51.

¹⁵⁶ The *Discovery Health case*. 'Illegal employment' was described as an employment that is not in accordance with the legislation, in this instance, the undocumented migrants are involved in an illegal employment because their employment is against the Immigration Act.

¹⁵⁷ *Norton* 2010 ILJ 1521.

¹⁵⁸ *Norton* 2010 ILJ 1521. See also Dass and Raymond 2017 ILJ 39.

¹⁵⁹ Dass and Raymond 2017 ILJ 39. See also *Norton* 2010 ILJ 1521.

¹⁶⁰ Dass and Raymond 2017 ILJ 39. See also *Norton* 2010 ILJ 1521.

¹⁶¹ The UN 2022 <https://www.ohchr.org/en/press-releases/2022/07/south-africa-un-experts-condemn-xenophobic-violence>.

This paper supports and submit the view that the decision of the *Discovery Health* does not encourage the illegal employment, but rather it is against the exploitation of undocumented migrants. For instance if the dismissal is the sole reason for termination of employment, such dismissal should be conducted in terms of section 185 of the LRA in order to promote fair labour practices.¹⁶² The paper further submits that failure to recognise such employment will deprive undocumented migrants' workers constitutional and legislative protections which will make a way for continuous unfair labour practices, on the basis that they would not be able to claim for any labour mechanisms to protect their right to fair labour practices.¹⁶³

3.3 Statutory law framework

Apart from the Constitutional protection, undocumented migrants may also claim for protection from statutory law, precisely those legislation which regulate the employment relationships and conditions of employment.¹⁶⁴ The legislations enacted have different aims and protections, in which some deal with access to equality in the workplace, some give access to fair labour practices and access to social security.¹⁶⁵

Therefore, the purpose here is to discuss the statutory law frameworks which give effect to the Constitutional right to fair labour practices concerning undocumented migrants.

3.3.1 Labour Relations Act 66 of 1995

The aim of the LRA is to give effect and to regulate the Constitutional employment rights in to promote labour peace, social justice, economic development in the workplace.¹⁶⁶ In that regard it entrenches numerous fundamental labour rights

¹⁶² Vallentgod *Legal Protection of the Rights of Migrant Workers in South Africa* 61.

¹⁶³ Vallentgod *Legal Protection of the Rights of Migrant Workers in South Africa* 31.

¹⁶⁴ Mapira, *Trade unions are 'their own obstacles' unions' responses to undocumented migrant labour in post-apartheid South Africa* 27.

¹⁶⁵ Mapira, *Trade unions are 'their own obstacles' unions' responses to undocumented migrant labour in post-apartheid South Africa* 27.

¹⁶⁶ S1 (a) of the LRA.

including the right to fair labour practices.¹⁶⁷ The purpose of the LRA is to protect the rights of every person who qualifies to be an employee, also it protects vulnerable employees by ensuring that they are not divested of their right arbitrarily.¹⁶⁸

Before 2008, South African labour laws excluded undocumented migrants workers from the protection of the LRA.¹⁶⁹ The misinterpretation was influenced by the fact that undocumented migrants could not qualify for employee status as defined by section 213 of the LRA,¹⁷⁰ as their employment contract was in breach with the Immigration Act which subsequently made their employment illegal.¹⁷¹ Moreover, before 2008, the prominent view was that a person working without permit did not qualify to be an employee in terms of labour law because of the invalidity of employment contract.¹⁷² The view was also similar to approach used in the United State supreme Court in *Hoffman Plastic Compounds v National Labour Relations Board*, 535 U.S. 137 (2002)¹⁷³ where the majority of the court held that undocumented migrants are ought to be denied labour law protection as their employment was in contravention of immigration laws.¹⁷⁴ In South Africa, this view changed in 2008, in *the Discovery Health case*, when the court ruled that in interpreting and deciding whether an undocumented migrant falls within the definition and scope of an 'employee' under section 213 of the LRA, that a violation of the Immigration Act does not necessarily invalidate an employment relationship between an employer and undocumented migrant.¹⁷⁵ Therefore, people engaged in an employment relationship without a valid employment contract, including undocumented migrants, now qualify as employees and are eligible for protection under the LRA.¹⁷⁶

¹⁶⁷ S1 (b) of the LRA.

¹⁶⁸ S1 (c) of the LRA.

¹⁶⁹ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 29.

¹⁷⁰ Section 213 of the LRA.

¹⁷¹ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 30.

¹⁷² Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 29.

¹⁷³ *Hoffman Plastic Compounds v National Labour Relations Board* 535 U.S. 137 (2002).

¹⁷⁴ *Hoffman Plastic Compounds v National Labour Relations Board* 535 U.S. 137 (2002).

¹⁷⁵ *Discovery health case* para 31.

¹⁷⁶ *The Discovery Health case* para 31.

The LRA gives effect to section 23 of the Constitution and also give rise to obligations incurred by the country as a member state of the ILO.¹⁷⁷ Hence in 2002, the LRA was amended to introduce the provision of section 200A, that established the rebuttable presumption which qualifies any person as an employee if one of the following factors are met:

- “(a) The way in which the work is done, is controlled and directed by the other person;
- (b) working hours are specified and controlled by another person;
- (c) if the person works for an organisation, they are part of that organisation; working hours worked exceeds or are equal to 40 hours per month for the previous three months;
- (d) the person is economically depended on the other person they work for;
- (e) the person is provided with working apparatus; and
- (f) the person only works for another person.”¹⁷⁸

Now that there is s200A, undocumented migrant workers can also rely on this provision to prove an existence of an employment relationship and protection against any unfair treatment. Effect of the 200A presumption is that, not only contractual employment relationships establish employment relationship.¹⁷⁹ Therefore, from the presumption test in s200A, a person who meets the requirements would qualify to be regarded as employee. For instance, the Labour Appeal Court in *White v Pan Palladium SA (PTY)*¹⁸⁰ held that for the employment relationship to exist, one should not only rely on the availability of employment contract, because a person who also works for another and receives remuneration for work performed, such person qualifies to be an employee even if there is no contract concluded.¹⁸¹

3.3.2 Basic Conditions of Employment Act 75 of 1997

The BCEA was established to protect employment rights of employees, and promote the right to fair labour practices by providing employees with basic employment

¹⁷⁷ *Discovery Health case para 32.*

¹⁷⁸ Section 200A of the LRA.

¹⁷⁹ Rapatsa and Matloga 2014 Journal of Business Management & Social Science Research 106.

¹⁸⁰ *White v Pan Palladium SA (PTY)* 2006 ILJ 2721 (LC).

¹⁸¹ *White v Pan Palladium SA (PTY)* 2006 ILJ 2721 (LC) para 9.

conditions.¹⁸² The BCEA provide guidelines for minimum employment conditions to safeguard against unfair labour conditions, such as unsafe working environment, long working hours and refusing employees to enjoy their annual leave.¹⁸³ These minimum conditions include regulation of working hours, when and how employees must take their leave, remuneration, employment relationship and termination of employment.¹⁸⁴ Employers must comply with all guidelines outlined in the BCEA for basic conditions of employees, including undocumented migrants.¹⁸⁵ In circumstances, where there is an employment relationship without a written employment contract, section 4 of the BCEA provides that, the BCEA protects all employment contracts, except where any other law provides a term that is more favourable to the employee.¹⁸⁶ Section 4 provides relief for all workers, including undocumented migrants who are involved in employment relationships without written contract of employment.¹⁸⁷ Similar to the LRA, the rights under the BCEA are applicable to all employees and workers, with an exception to members of National Defence Force, National Intelligence Agency, South African Secret Service.¹⁸⁸ Additionally, section regulating workers hours is not applicable to unpaid volunteers working for charity, senior managerial employees, employees earning threshold of 205 433 per annum, among others.¹⁸⁹

Undocumented migrants are protected in the scope of the BCEA because in terms of section 1, an employee is any person excluding an independent contractor that renders his services to another in return of remuneration, also is a person who helps another at running their company.¹⁹⁰ When undocumented migrants meet the

¹⁸² Basic Conditions of Employment Act 75 of 1997

¹⁸³ Biney *Safeguarding The Illegal: Rethinking The Interface Between Labour And Immigration Laws* 40.

¹⁸⁴ *Basic Conditions of Employment Act 75 of 1997*

¹⁸⁵ Phiri *Unfair Labour Practices, Labour Legislation and Protection of Migrant Workers in South Africa* 19

¹⁸⁶ Section 4 of the BCEA. See also Phiri *Unfair Labour Practices, Labour Legislation and Protection of Migrant Workers in South Africa* 18.

¹⁸⁷ Section 4 of the BCEA.

¹⁸⁸ Phiri *Unfair Labour Practices, Labour Legislation and Protection of Migrant Workers in South Africa* 20.

¹⁸⁹ Phiri *Unfair Labour Practices, Labour Legislation and Protection of Migrant Workers in South Africa* 20.

¹⁹⁰ Section 1 of the BCEA. Also refer to Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese Small Retailers in Johannesburg* 47.

requirements of being an employee under the BCEA, they may claim for protection against long working hours, unsafe working conditions and being under-paid.¹⁹¹

3.3.3 *Immigration Act 13 of 2002*

From point of departure of the preamble of the Immigration Act, the main aim of the act is to control and reduce the employment of the undocumented migrants in the labour market.¹⁹² The Act specifies that, the employer is placed with the authority over the undocumented migrant, meaning that, the employer has the ultimate power to decide if the undocumented migrant keeps the job or not.¹⁹³ The punishment imposed by the Immigration Act is aimed at the employers for employing undocumented migrants.¹⁹⁴ The Immigration Act is explicitly against the employment of undocumented migrants.¹⁹⁵ Its contribution to this research lies in the contradiction between it and the Constitution, which gives the right to fair labour practices to everyone.¹⁹⁶

Section 10 (A) of the Immigration Act states that

"An employee must have a valid visa, one which may be a work permit. A person who is employed by another, without a valid work permit is guilty of an offence and liable on conviction to a fine or imprisonment and can be arrested or removed from the country."¹⁹⁷

Section 38(1) of the Immigration Act outlines that,

"No person shall employ illegal foreigner or a foreigner whose status does not authorise him or her to be employed by such a person."¹⁹⁸

Section 49(3) provides that:

¹⁹¹ Tshizanga *The Labour Law Protection of Non-Standard Workers in South Africa* 42.

¹⁹² *Immigration Act* Preamble (j) outlines that the act's aim is at setting place 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.

¹⁹³ Bosch 2006 *ILJ* 1350.

¹⁹⁴ Bosch 2006 *ILJ* 1350.

¹⁹⁵ S10 of The Immigration Act

¹⁹⁶ S23 of the Constitution.

¹⁹⁷ S10 (a) of the Immigration Act.

¹⁹⁸ Section 38(1) of the Immigration Act.

"It is an offence to employ an illegal foreigner or a foreigner in violation of the Act and the employer may be liable on conviction to a fine or imprisonment not exceeding one year."¹⁹⁹

Since the Immigration Act prohibit the employment of undocumented migrant, does such prohibition render their employment invalid? Such question was approached in two different ways, because, there are authors who believe that undocumented migrants should not be employed at all, while others are of the view that, undocumented migrants ought to be protected with regard to their labour laws.²⁰⁰ Furthermore, the government experience challenges in balancing the rights and interest of its citizens and giving effect to the international obligations that it should protect human rights of people within the borders of South Africa.²⁰¹

In addition, the traditional way of interpreting legislations, courts or tribunals are obliged to promote the spirit, purport and object of the Bill of Rights. Therefore, it is vital to state whether the protection of section 23 of the Constitution also applies to undocumented migrants, and if it does, what effect it has on the interpretation of Immigration Act. Where there is a category of people who are not protected by the provisions of the Constitution, the Constitution explicitly does so.²⁰² With regard to rights in section 23 of the Constitution, undocumented migrants were not mentioned that they are excluded.

Furthermore, the purposive approach to emphasise that was outlined by Mokgoro J in *Khoza & Others v Minister of Social Development & Others; Mahlaule & another v Minister of Social Development & others*²⁰³ that the Constitution provides that the Bill of Rights enshrines the rights of all people within South Africa, and the absence of any restriction that any particular right is ought to protect citizens only, the word 'everyone' in Bill of Rights refers to any person within the borders of South Africa.²⁰⁴

¹⁹⁹ Section 49(3) of the Immigration Act.

²⁰⁰ Newaj 2020 PER/PELJ 5.

²⁰¹ Vallentgod *Legal Protection of the Rights of Migrant Workers in South Africa* 17

²⁰² Bosch 2006 Industrial Law Journal 1351. See also *Khoza & Others v Minister of Social Development & Others; Mahlaule & another v Minister of Social Development & others* 2004 6 BCLR 569 (CC) para 590.

²⁰³ *Khoza & Others v Minister of Social Development & Others; Mahlaule & another v Minister of Social Development & others* 2004 6 BCLR 569 (CC).

²⁰⁴ Bosch 2006 Industrial Law Journal 1355.

In the minority judgement J Ngcobo highlighted that even if the purposive approach requires that the term 'everyone' refers to each and every person within South Africa, the Constitution provides that the rights in the Bill of Rights are subject to limitations contained in section 36.²⁰⁵ With regard to limitations Norton, outlines that the court in the judgment of Discovery Health case may have erred. Also, that the textual analysis of the Immigration Act explicitly outlines that the employment contract of undocumented migrant is null and void, because firstly, the Act permits employment of legal migrants on the ground that they are employed due to the fact that they have scarce skill that is needed in South Africa. Secondly, making the employment of undocumented migrants valid, it furthers their employment. Lastly, the Immigration Act imposes criminal penalty on both parties. Therefore, such limitations should be adhered to.²⁰⁶

On the other hand, she acknowledges that the current locus standi to approach employment of undocumented migrants is that:

"in circumstances of an alleged unfair dismissal and to pursue the processes and remedies envisaged in the LRA the employee falls within the definition of 'employee' in the LRA. For clarity purposes the contract of employment is not by virtue of a contravention of the Immigration Act void ab initio."²⁰⁷

The paper therefore, submits that it is impossible to prohibit undocumented migrants from being covered by the labour legislations whereas they are protected by the Constitution.²⁰⁸ The effect of Immigration Act is that it prohibits all employment contracts that are contrary to its provision and that such employments should be regarded as null and void.²⁰⁹ However, if such effect is promoted, and that undocumented migrants should have contract of employment before they can claim for protection using the mechanism of the CCMA, the only available way to enforce their Constitutional rights will be firstly through the High Court, because they will have matters that relates to their Constitutional Labour rights in terms of

²⁰⁵ *Khoza & Others v Minister of Social Development & Others; Mahlaule & another v Minister of Social Development & others 2004 6 BCLR 569 (CC)* para 611.

²⁰⁶ Norton 2010 ILJ 1550.

²⁰⁷ Bosch 2006 Industrial Law Journal 1354.

²⁰⁸ Bosch 2006 Industrial Law Journal 1354.

²⁰⁹ Bosch 2006 Industrial Law Journal 1354. Also refer to section 38 of the Immigration Act.

s23 of the Constitution, instead of labour rights from labour legislations, and these matters will be costly for them.²¹⁰ As a result, their exploitation will continue to be detriment. However, in Bosch's view, if the employers are aware that undocumented migrants are able to have access to use the mechanism of the CCMA, regardless of the illegality of their employment, such will result at their employment being less, because employers will be aware that they may get in trouble with the law which will result at them being arrested.²¹¹ Consequently, this interpretation will be giving effect to both the labour laws and the Immigration Act because undocumented migrants would be given a platform where they are able to claim for protection against any exploitation and on the other hand, their employment will be limited due to the fear of employers.²¹²

3.4 Conclusion

The protection of undocumented migrants under the South African law lies in the *Constitution* and legislative provisions.²¹³ The protection is afforded to everyone, including undocumented migrants. However, undocumented migrants are said to be vulnerable, as they are exposed to fear of being deported once discovered. Their fear of being deported have created vulnerability which employers use against them. As *Norton*²¹⁴ said that:

"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."²¹⁵

One has to note that, regardless of the provisions of the *Immigration Act*, undocumented migrants are included in the interpretation of the term 'everyone' in the Constitution and they are also afforded protection under the labour legislation for as long they are participating in an employment relationship. In essence, the

²¹⁰ Bosch 2006 Industrial Law Journal 1354.

²¹¹ Bosch 2006 Industrial Law Journal 1354.

²¹² Bosch 2006 Industrial Law Journal 1354.

²¹³ Section 23 of the Constitution. See also section 123 of the LRA.

²¹⁴ Norton 2010 ILJ 1524.

²¹⁵ Norton 2010 ILJ 1524.

provisions of the Immigration Act should not be interpreted in a manner that limits the Constitutional right to fair labour practices, because any legislation that is in contrary with the provisions of the Constitution is rendered to be invalid. Furthermore, the employment contract that is in contradiction with the Immigration Act, it is valid and enforceable, because the Immigration Act does not state that such contract will be invalid and void. What the legislature intended to do was to penalise the employer without rendering the employment contract void in order to discourage the employment of undocumented migrants.

CHAPTER FOUR: COMPARATIVE STUDY

4.1 Introduction

Undocumented migrant workers have become most vulnerable and exploited group of people in the labour market, as they are subject to all kinds of abuse, arrest and deportation, forced to work for low wages and in miserable working conditions.²¹⁶ Therefore, this Chapter will analyse the protection and the labour rights of undocumented migrants in United States of America (hereafter, the USA) and Australia, thereafter compare it to the South African labour law protection and rights conferred to undocumented migrants. Every country has its own laws regulating employment relationship and the terms and conditions of such employment.²¹⁷ However, there are international standards that the USA and Australia adhered to when implementing their laws.²¹⁸ Employment of undocumented migrants have become an issue on its own globally.²¹⁹ The clandestine nature of undocumented migration makes it difficult to record the exact stats of undocumented migrant workers. But recent international conflicts gave rise to exorbitant number of migrations, which include a great deal of unknown number of undocumented migrant workers.²²⁰ The Syrian civil war forced approximately 7.1 million people to migrate from Syria to neighbouring countries since 2011,²²¹ the war between a USA and Iraq contributed to 9.2 million migrants,²²² while the invasion of Yemen amounted to 4.4 million migrants across Europe.²²³ All these migrant workers moved to neighboring states such as Turkey, UK and other to USA. It is not clear from these statistics whether the exact number of undocumented migrants was correctly recorded but some countries have quotas on how many undocumented migrants

²¹⁶ Cameroon 2009 University of San Francisco Law Review 345.

²¹⁷ Norton 2010 ILJ 1549.

²¹⁸ Vallentgoed *Legal Protection of The Rights of Migrant Workers In South Africa* 15.

²¹⁹ Vallentgoed *Legal Protection of The Rights of Migrant Workers In South Africa* 15.

²²⁰ McGee, "From Syria to Europe: Experiences of Stateless Kurds and Palestinian Refugees from Syria Seeking Protection in Europe. Institute on Statelessness and Inclusion (ISI) & European Statelessness Network (ENS) & ASKV Refugee Support" 8.

²²¹ STANICEK "EU-Turkey relations in light of the Syrian conflict and refugee crisis" 2.

²²² Vine *et al* "Creating refugees: Displacement caused by the United States' Post-9/11 wars. *Costs of War Project*." 23.

²²³ Vine *et al* "Creating refugees: Displacement caused by the United States' Post-9/11 wars. *Costs of War Project*." 10.

should be employed in order to meet their labour market needs.²²⁴ The countries chosen are among countries that have a developed economy, and they attract more irregular migrants as they see an opportunity to develop their lives through employment in those countries. It is true that the legal system of RSA and USA are different, the purpose to compare them was to evaluate how are irregular migrants are protected in terms of the legal system of the USA and Australia, since they are more developed than RSA.

4.2 The United States of America

4.2.1 Employment of undocumented migrants in the USA

In the year 2018, there were approximately eight million undocumented migrants in the USA labour market.²²⁵ Most of these undocumented migrants were employed in low wage jobs such as in agriculture, construction, food-service, and domestic work.²²⁶ The Immigration Reform and Control Act of 1986 (hereafter, the IRCA)²²⁷ limits the rights and protections of such workers.²²⁸ Employers use such limitations to create an unhealthy working environment and exploit these undocumented migrant workers who are reluctant to report such abusive employers.²²⁹ In general, undocumented migrants are more likely to experience dangerous working conditions than legal migrants.²³⁰

While the IRCA prohibits employers from hiring undocumented migrants, it does however require employers to collect information on all employees beforehand.²³¹ The IRCA does not itself ban undocumented workers from serving as independent contractors.²³² However, there is a loophole between the guideline of hiring undocumented migrants and independent contractors, because undocumented

²²⁴ Norton 2010 ILJ 1548.

²²⁵ Norton 2010 ILJ 1548.

²²⁶ Norton 2010 ILJ 1534.

²²⁷ Immigration Reform and Control Act of 1986.

²²⁸ Cameroon 2009 University of San Francisco Law Review 432. See also Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 42.

²²⁹ Norton 2010 ILJ. See also Cameroon 2009 University of San Francisco Law Review 433.

²³⁰ Lee 2018 California Law Review 1618.

²³¹ Cameroon 2009 University of San Francisco Law Review 433.

²³² Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 42.

migrants are often clouded as independent contractors.²³³ Employers find it easy to exploit undocumented migrants as they mostly opt for low paying, and unsafe jobs, as a result, employers avoid any legal responsibility that comes with the employment relationship.²³⁴ Consequently, in practice the rights of undocumented migrants are not protected as enshrined in the legislation.²³⁵

In 2014 Green²³⁶ held that some of undocumented women migrants workers, were not given the basic right to breaks and they earned less than the prescribed minimum wage, they endure such unfair labour because they are afraid of being deported back to their country of origin.²³⁷ Approximately 22% of undocumented migrant women workers, are employed as domestic workers, in which their remunerations are unregulated, they work for 12 hours per day with little to no breaks and no overtime pay.²³⁸ In a similar vein, undocumented migrant male workers, find themselves looking for labour positions on a daily basis. They seek out employment with independent employers in a competitive environment, that has no job security as they are let go when the job is done. This leads them to be in desperate situation which result them to work for long and unregulated working hours.²³⁹

Regardless of the limitations imposed by the IRCA, undocumented migrants are protected and have rights under the USA labour law.²⁴⁰ There are federal and state laws such as The Fair Labour Standards Act,²⁴¹ and National Labor Relations Act,²⁴² among others prevent discrimination in the workplace and also offer remedies for violations of an employer.²⁴³ The enforcement of workplace protection regardless of

²³³ Lee 2018 California Law Review 1627.

²³⁴ Norton 2010 ILJ 1534.

²³⁵ Norton 2010 ILJ 1535.

²³⁶ Green <https://www.kqed.org/news/140984/undocumented-immigrants-still-mistreated-by-employers-deposit-new-laws>

²³⁷ Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 42.

²³⁸ Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 42.

²³⁹ Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 42.

²⁴⁰ Norton 2010 ILJ 1535.

²⁴¹ The Fair Labor Standards Act Of 1938

²⁴² The National Labor Relations Act of 1935

²⁴³ Cameroon 2009 University of San Francisco Law Review 433.

immigration status is one through the National Labor Relations Board,²⁴⁴ the Department of Labor, the Equal Employment Opportunity Commission²⁴⁵ and the Occupational Safety and Health Administration.²⁴⁶ As a result, an undocumented migrant worker, in the USA, is entitled to the right to minimum wage,²⁴⁷ overtime pay,²⁴⁸ union organisation and collective bargaining,²⁴⁹ freedom from unfair labor practices and discrimination,²⁵⁰ the ability to sue and recover damages for both tort and contract liability, bonuses and commissions, among others.²⁵¹

Therefore, this part of the Chapter, will examine the rights and protection of undocumented migrants, by outlining the laws that specifically offer protection and rights to such group of people in the USA. It will further examine the effects of immigration laws on undocumented migrants those migrated to the USA.

4.2.1.1 Undocumented migrant workers' right under USA labour laws

In terms of the USA labour law, theoretically, undocumented migrant workers are entitled to same basic employment rights as other workers. However, there are exceptions to their employment. Below, several different laws which provide for those rights and protections will be discussed and examined.

4.2.1.1.1. Fair Labor Standards Act of 1938

The Fair Labor Standards Act 1938²⁵² (hereafter, the FSLA) was introduced to provide workers with employment rights and protection.²⁵³ Undocumented migrant are included in the definition of an employee under the FSLA, because, federal court

²⁴⁴ Cameroon 2009 University of San Francisco Law Review 433

²⁴⁵ Cameroon 2009 University of San Francisco Law Review 434.

²⁴⁶ Norton 2010 ILJ 1535.

²⁴⁷ Norton 2010 ILJ 1535.

²⁴⁸ Norton 2010 ILJ 1535. See also Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 43.

²⁴⁹ Norton 2010 ILJ 1535. See also Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 43.

²⁵⁰ Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 44.

²⁵¹ Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 44.

²⁵² The Fair Labor Standards Act 1938

²⁵³ Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 44.

in the case of *Solis v Cindy's Total Care Inc*,²⁵⁴ held that the provisions enshrined in the FSLA protects any individual who is employed by the employer.²⁵⁵ The issue in this case was the payment of the back pay.²⁵⁶ The secretary and other workers claimed that they have rendered their services on overtime, but were not paid for such overtime.²⁵⁷ The FSLA does not explicitly excludes people who are not legal citizens of the USA.²⁵⁸ For that reason, the courts have held that, considering the claim of undocumented migrants workers, there has to be an employer and employee relationship, and the remuneration claimed for, has to be for the work that is actually performed.²⁵⁹

Undocumented migrant workers in the FSLA are provided with the basic employment rights such as the minimum wage,²⁶⁰ and for not working more than forty hours, unless it is an overtime,²⁶¹.

4.2.1.1.2 National Labor Relations Act 66 of 1395

The National Labor Relations Act 66 of 1395 (hereafter, the NLRA)²⁶² is yet another federal law which provides undocumented migrants with rights and protection.²⁶³ Under the NLRA, employees are provided with basic right to organise and negotiate

²⁵⁴ *Solis v Cindy's Total Care Inc 10 Civ. 7242 (PAE).*

²⁵⁵ *Solis v Cindy's Total Care Inc 10 Civ. 7242 (PAE).* Also see Wishine 2003 University of Pennsylvania Journal of Labor and Employment Law 497.

²⁵⁶ *Solis v Cindy's Total Care Inc 10 Civ. 7242 (PAE).* Wishine 2003 University of Pennsylvania Journal of Labor and Employment Law 497 and Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 44.

²⁵⁷ *Solis v Cindy's Total Care Inc 10 Civ. 7242 (PAE).* Wishine 2003 University of Pennsylvania Journal of Labor and Employment Law 497 and Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 44.

²⁵⁸ *Solis v Cindy's Total Care Inc 10 Civ. 7242 (PAE).* Wishine 2003 University of Pennsylvania Journal of Labor and Employment Law 497 and Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 44.

²⁵⁹ *Solis v Cindy's Total Care Inc 10 Civ. 7242 (PAE).* Wishine 2003 University of Pennsylvania Journal of Labor and Employment Law 497 and Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 44.

²⁶⁰ *Solis v Cindy's Total Care Inc 10 Civ. 7242 (PAE).* Wishine 2003 University of Pennsylvania Journal of Labor and Employment Law 497 and Badenhorst "The Labour Rights of Irregular Migrants in South Africa" 2016 44.

²⁶¹ *Solis v Cindy's Total Care Inc 10 Civ. 7242 (PAE).*

²⁶² National Labor Relations Act 66 of 1395.

²⁶³ National Labor Relations Act 66 of 1395.

with their employers. The NLRA does not exclude undocumented migrant workers from the definition of an employee.²⁶⁴

In terms of section 2(3) of the NLRA an employee:

“ shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.”²⁶⁵

As a result, the NLRA provides undocumented migrant workers with rights including but not limited to labour organisation, that regulate the relationship between the employer; employee; employers’ organisation; and employee’s agencies, to set agreements on the terms and conditions of the employment including but not limited to, wages, working hours, labour disputes and working environment. With that being said, illegal migrant workers are entitled to take part in labour organisations or refrain from doing so.²⁶⁶ Furthermore, they are protected from unfair labour practices.²⁶⁷

4.2.2 Limitations of the undocumented migrant workers’ rights

Often every right goes along with its limitations. In the USA, undocumented migrant workers are given the basic employment rights, but there are also limitations to such rights as they are not allowed to perform some actions. The discussion of those limitations follows.

²⁶⁴ Cameroon 2009 University of San Francisco Law Review 454.

²⁶⁵ Section 2(3) of the National Labor Relations Act.

²⁶⁶ Cameroon 2009 University of San Francisco Law Review 454. Unfair labour practices include the interference of the employer with labour organisation, when employer refuse to bargain collectively and discriminating against an employee.

²⁶⁷ Cameroon 2009 University of San Francisco Law Review 455.

4.2.2.1 Immigration Reform and Control Act of 1986

The Immigration Reform and Control Act, (hereafter, the IRCA), was implemented to prevent employers from employing undocumented immigrants.²⁶⁸ The limitations were evoked in the case of *Hoffman Plastic Compounds Inc v National Labor Relations Board*²⁶⁹, (hereafter, *Hoffman Plastic*) where Mr. Jose Castro was an undocumented migrant who was fired by his employer for distributing union authorisation cards.²⁷⁰ What Mr. Castro did, was referred to as the act of retaliation, regarded as a violation of section 3(a)(3) of the NLRA.²⁷¹ According to the court, Mr. Castro was not entitled to back pay.²⁷² The majority of the court supported the perspective that giving back pay to undocumented migrant workers violates federal immigration policy, codified by the IRCA.²⁷³ As a result, the case of *Hoffman Plastics* excluded undocumented migrant workers from the scope of an employee under the NLRA.²⁷⁴ Consequently, they cannot claim for back pay, because if their pay backs are awarded, provisions of IRCA would be violated,²⁷⁵ also it would encourage employers to continue violating the immigration laws.²⁷⁶ Additionally, illegal migrant workers are not entitled to reinstatement,²⁷⁷ undocumented migrant workers are not entitled to reinstatement because the IRCA does not allow the employer to knowingly give undocumented migrant worker the job back knowing that such person is an undocumented migrant.²⁷⁸ In contrast, the South African labour affords

²⁶⁸ Cameroon 2009 University of San Francisco Law Review 456

²⁶⁹ *Hoffman Plastic Compounds Inc v National Labor Relations Board* [2002] 535 U.S 137. See also Cameroon 2009 University of San Francisco Law Review.

²⁷⁰ *Hoffman Plastic Compounds Inc v National Labor Relations Board* [2002] 535 U.S 137. See also Cameroon 2009 University of San Francisco Law Review.

²⁷¹ *Hoffman Plastic Compounds Inc v National Labor Relations Board* [2002] 535 U.S 137. See also section 3(a)(3) of the NLRA.

²⁷² *Hoffman Plastic Compounds Inc v National Labor Relations Board* [2002] 535 U.S 137. See also Cameroon 2009 University of San Francisco Law Review.

²⁷³ *Hoffman Plastic Compounds Inc v National Labor Relations Board* [2002] 535 U.S 137. See also Cameroon 2009 University of San Francisco Law Review.

²⁷⁴ *Hoffman Plastic Compounds Inc v National Labor Relations Board* [2002] 535 U.S 137. See also Cameroon 2009 University of San Francisco Law Review.

²⁷⁵ Cameroon 2009 University of San Francisco Law Review.

²⁷⁶ *Hoffman Plastic Compounds Inc v National Labor Relations Board* [2002] 535 U.S 137. See also Cameroon 2009 University of San Francisco Law Review.

²⁷⁷ *Hoffman Plastic Compounds Inc v National Labor Relations Board* [2002] 535 U.S 137. See also Cameroon 2009 University of San Francisco Law Review.

²⁷⁸ *Hoffman Plastic Compounds Inc v National Labor Relations Board* [2002] 535 U.S 137. See also Cameroon 2009 University of San Francisco Law Review.

illegal workers with reinstatement or compensation with regards to unfair dismissal. For instance, in the case of *Kylie v Commission for Conciliation Mediation and Arbitration and Others*, the court held that the illegality of the work performed does not prohibit the employee from being reinstated for unfair dismissal.²⁷⁹

4.2.3 Concluding remarks

The Hoffman Plastic case had effects on the protection of undocumented migrant workers, the effects are that undocumented migrant workers should not enjoy any legal protection under the American labor laws.²⁸⁰ The courts follow the interpretation that employment which is contradicting Immigration laws should not be covered and protected in terms of American labour laws. The court's reasoning behind this judgement is when they undocumented migrants are protected, and entitled to remedies after dismissal, such protection will result to future employments of undocumented migrants which will violate Immigration laws.²⁸¹

4.3 The Australia

4.3.1 Employment of undocumented migrants in Australia

This part examines the labour rights and protection of undocumented migrants in terms of the Australian law. Australia as a developed country is the host to a large number of illegal migrants,²⁸² and it has a steady economic growth that is able to deliver higher employment opportunities, higher earnings and skills amongst migrants.²⁸³ Employers exploit these undocumented migrant workers by not remunerating them for rendering their services; working in unsafe conditions and also sexually harassing them.²⁸⁴ However, under Australian law, undocumented migrant workers are not entitled to any protection from their national labour laws.²⁸⁵

²⁷⁹ *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (2010) 7 BLLR 705 (LAC) para 52.

²⁸⁰ Badenhorst *The Labour Rights of Irregular Migrants in South Africa* 44

²⁸¹ Nkuna *Undocumented Migrants and the Right to Fair Labour Practices* 54

²⁸² Clibborn, S. (2015). Why undocumented immigrant workers should have workplace rights 465.

²⁸³ Wright *et al migration and Australia in the 21st century* 10.

²⁸⁴ Norton 2010 ILJ 1541.

²⁸⁵ Norton 2010 ILJ 1541.

The current system reimburse employers who breaches the immigration laws by employing undocumented migrants, which indirectly encourages the race discrimination and employment of undocumented migrants.²⁸⁶ The Australian labour does not make any provision that extends its protection to undocumented migrants, in terms its labour laws, they are not entitled to any protection, and such perception encourages exploitation of undocumented migrants.

There have been an increasing number of illegal migrant workers in Australia; hence, the Migration Act of 1958²⁸⁷ was amended in order to impose penalties on employers who employ such workers without any verification on their migration status.²⁸⁸

4.3.1.1 Rights and protection of undocumented migrants in Australia

4.3.1.1.1 Immigration Act of 1958

According to section 235 of Immigration Act of 1958,²⁸⁹ employers in Australia are not permitted to employ undocumented migrants, as it sets strict penalties for those who are employed and those who employ undocumented migrants,²⁹⁰ with that said, under the Immigration Act, it is an offense to perform employment duties that are not permitted by any visa, if the person is found doing so, such person may be fined, detained and deported.²⁹¹ Furthermore, section 245 AB outlines that any employer who allows undocumented migrants to work for them may receive penalties such as fines and criminal sanction.²⁹²

According to previously decided cases, the employment laws in Australia do not afford undocumented migrants' workers with rights and protection.²⁹³ In the case of *Smallwood v Ergo Asia Pty Ltd*,²⁹⁴ the application of an unfair dismissal was set

²⁸⁶ Norton 2010 ILJ 1542.

²⁸⁷ Migration Act of 1958.

²⁸⁸ Norton 2010 ILJ 1543.

²⁸⁹ Section 235 of Immigration Act 1958.

²⁹⁰ Section 235 of Immigration Act 1958.

²⁹¹ Section 235 of Immigration Act 1958. See also Norton 2010 ILJ.

²⁹² 245 AB of Immigration Act 1958.

²⁹³ Norton 2010 ILJ 1544.

²⁹⁴ *Smallwood v Ergo Asia Pty Ltd* U2013/14383 [2014] FWC 964.

aside by the Fair Work Commission on the grounds that an employment contract is contrary with the Migration Act is invalid and unenforceable in terms of Australian labour laws.²⁹⁵ The effect of such decision, concludes that the employment contract never existed between the employer and the undocumented migrant worker.²⁹⁶ Therefore, undocumented migrants cannot benefit from the minimum labour rights and protection offered by the Fair Work Act of 2009, which include but not limited to minimum wage,²⁹⁷ and minimum working hours.²⁹⁸ However, the principle of unjust enrichment may allow undocumented migrants to claim for underpaid wages in order to restrict an employer from benefiting, this is a difficult task for undocumented migrant worker.²⁹⁹

4.3.1.1.2 Migration Amendment Act of 2007

The Migration Amendment Act of 2007³⁰⁰ was introduced after the Australian government realised that the number of undocumented migrants' workers was increasing.³⁰¹ The introduction of the amendment was to set limitations, by imposing penalties to people who employ undocumented migrant workers contrary to immigration laws.³⁰² The Explanatory Memorandum to the Migration Amendment Bill 2006 motivates for stricter enforcement of immigration laws by stating that:

"The incidence of illegal work in Australia is a significant problem that denies Australians the opportunity to gain employment and can result in the exploitation of noncitizens. It is also a concern to the Government because of its close association with cash economy industries, which are characterized by abuses of Australia's tax, employment and welfare laws."³⁰³

Furthermore, the Memorandum outlines that:

"Unrestricted access to the labour market is a privilege limited to citizens and permanent residents of a country. In Australia, permanent residents, Australian citizens and New Zealand citizens who enter Australia on a valid New Zealand

²⁹⁵ Smallwood v Ergo Asia Pty Ltd U2013/14383 [2014] FWC 964.

²⁹⁶ Smallwood v Ergo Asia Pty Ltd U2013/14383 [2014] FWC 964. See also Norton 2010 ILJ

²⁹⁷ Division 4 of Fair Work Act of 2009.

²⁹⁸ Division 3 of Fair Work Act of 2009.

²⁹⁹ Norton 2010 ILJ 1543.

³⁰⁰ Migration Amendment Act of 2007

³⁰¹ Norton 2010 ILJ 1543.

³⁰² Norton 2010 ILJ 1543.

³⁰³ Migration Amendment Bill 2006. See also Norton 2010 ILJ 1543.

passport, have an unrestricted right to work. Other people wishing to enter the country face the precondition that they have either no access or restricted access to the labour market".³⁰⁴

The Bill then came into effect as the *Migration Amendment (Employer Sanction) Act of 2007*.³⁰⁵ In terms of the Act, the employer is faced with imprisonment of about two years when they employ undocumented migrant workers, and also five years of imprisonment when they have exploited their worker.³⁰⁶

The justification of dismissing undocumented migrants due to their migration status, find its way back from the 1997, in the case of *Wei Xin Chen v Allied Packaging Co Pty Ltd*,³⁰⁷ where Mr. Chen was employed by Allied Packaging as a guillotine operator. In 1996, he injured his back, which resulted at him taking time off to attend to his injury. On his return to work, he was informed by his employer that the Department of Immigration & Ethnic Affairs had written to them that Mr. Chen was not allowed to work in Australia.³⁰⁸ Consequently, Mr Chen took the matter to Industrial Relations Court, where the Chief Justice Wilcox found that he was an undocumented migrant not entitled to work in Australia. Therefore, he should not be re-employed by Mr Doherty unless he provides evidence that he has a right to be employed and render his employment duties to his employer.³⁰⁹ Chief Justice Wilcox held that:

"Once Mr Doherty became aware of Mr Chen's status, any action by him that facilitated Mr Chen's illegal employment would itself be unlawful; Mr Doherty would be an accomplice and would himself be exposed to prosecution. Whatever Mr Doherty's motive in contacting the Department, and however harsh the result may be as far as Mr Chen is concerned, there was a valid reason for his termination."³¹⁰

Another case where dismissal based on immigration status was justified, was the case of *Antony Emurugat v Utilities Management (Pty) Ltd*,³¹¹ whereby in 2005 Mr

³⁰⁴ Migration Amendment Bill 2006.

³⁰⁵ Migration Amendment (Employer Sanctions) Act of 2007. See also Norton 2010 ILJ 1543.

³⁰⁶ Migration Amendment (Employer Sanctions) Act of 2007

³⁰⁷ *Wei Xin Chen v Allied Packaging Co Pty Ltd* Industrial Relations Court of Australia [1997] IRCA 120.

³⁰⁸ *Wei Xin Chen v Allied Packaging Co Pty Ltd* Industrial Relations Court of Australia [1997] IRCA 120.

³⁰⁹ *Wei Xin Chen v Allied Packaging Co Pty Ltd Industrial Relations Court of Australia [1997] IRCA 120.*

³¹⁰ *Wei Xin Chen v Allied Packaging Co Pty Ltd* Industrial Relations Court of Australia [1997] IRCA 120.

³¹¹ *Antony Emurugat v Utilities Management (Pty) Ltd* Industrial Relations Court of Australia [1997] IRCA 120.

Emurugat was recruited from Kenya to work as a power liner in Australia.³¹² The visa that he used explicitly specified the work he was hired to perform. The company realised his potential but lacked the skill it was outsourcing, it then attempted to improve his skills by training him for the vacant position. The training ended in vain results; hence he was positioned as a general worker.³¹³ Consequently, the Business Monitoring Unit of the Department of Immigration & Citizen evaluated his employment and the concluded that he was working in contravention of his visa because he was not in an employment position specified in his visa.³¹⁴ The Department advised the company to continue with the training, so that he could be in accordance with required standards, however, the company argued that his knowledge was low and the continuation of training would be unnecessary. Therefore, he was dismissed to avoid a contravention of immigration law.³¹⁵

Mr Emurugat took the matter to the Australian Industrial Relations Commissions to claim for an unfair dismissal in terms of *Workplace Relations Act 1996*.³¹⁶ His argument was that, the training should have continued and that failure to conduct such training amounted to an invalid reason to dismiss him.³¹⁷ The Australian Industrial Relations Commission concluded that the dismissal was in accordance with the law and that the continuation of employment would contravene the Migration Amendment Act 2001.³¹⁸

The position of the Australian labour law is that, the worker that is an undocumented migrant who works in contravention of the Australian migrant laws

³¹² *Antony Emurugat v Utilities Management (Pty) Ltd* Industrial Relations Court of Australia [1997] IRCA 120.

³¹³ *Antony Emurugat v Utilities Management (Pty) Ltd* Australian [2008] Unreported (case no U2008/2326) Industrial Relations Commission.

³¹⁴ *Antony Emurugat v Utilities Management (Pty) Ltd* [2008] Unreported (case no U2008/2326) Industrial Relations Commission.

³¹⁵ *Antony Emurugat v Utilities Management (Pty) Ltd* [2008] Unreported (case no U2008/2326) Industrial Relations Commission.

³¹⁶ Workplace Relations Act 1996

³¹⁷ *Antony Emurugat v Utilities Management (Pty) Ltd* [2008] Unreported (case no U2008/2326) Industrial Relations Commission.

³¹⁸ *Antony Emurugat v Utilities Management (Pty) Ltd* [2008] Unreported (case no U2008/2326) Industrial Relations Commission.

can be dismissed on the ground of invalid working permit, their contract of employment is void ab initio and a dismissal for that reason is justified.³¹⁹

4.4 Comparison of the Jurisprudence of the USA and Australia with South Africa

The protection and rights afforded to undocumented migrant workers differs in each and every state. In the USA, there are conflicting views about the rights and protection of undocumented migrant workers, because in the case of *Hoffman Plastics*, the NLRB had two different conclusions, it passed a decision firstly not aware that Mr Castro's immigration status was illegal, stating that he was unfairly dismissed as he was protected by the provisions of NRLA, after they discovered that he was an undocumented migrant, the NLRB reached a conclusion that Mr Castro was not unfairly dismissed.³²⁰ However, the NRLA does not explicitly restrict undocumented migrants from being protected and given employment rights under the NRLA, because the definition of an employee in terms of section 2(3) of the NRLA have other categories of people who are excluded from the protection but undocumented migrants were not mentioned.³²¹ Consequently, the broad language for such interpretation would be that the Congress knew which people to include and to exclude and they never intended to exclude undocumented migrant workers.³²² Consequently, Cameroon³²³ is of the view that in theory undocumented migrant worker enjoy the same rights in the workplace that other workers are entitled to.³²⁴ On the contrary, the lower state and federal courts in the USA do not follow the international standards when deciding on matters including undocumented migrant workers.³²⁵ Because, the American government declined the recommendation from ILO that they ought to respect and protect the rights of undocumented migrants by making rectification on the legislation to prohibit unfair

³¹⁹ Clibborn, S. (2015). Why undocumented immigrant workers should have workplace rights 465.

³²⁰ Norton 2010 ILJ 1544

³²¹ Norton 2010 ILJ. See also section 2(3) of the NRLA.

³²² Norton 2010 ILJ 1544.

³²³ Cameroon 2009 University of San Francisco Law Review 1557.

³²⁴ Cameroon 2009 University of San Francisco Law Review 1557.

³²⁵ Norton 2010 ILJ 1552.

treatment towards undocumented migrant workers. However, the USA government chose to ignore the recommendations and held that it alone may decide on its immigration labour policies.³²⁶

In Australia, undocumented migrant workers are not afforded any labour rights and protection, they are explicitly excluded from the protection afforded to employees who are legally employed.³²⁷ The Industrial Relation Court and the Industrial Relations Commission in the above-mentioned cases, concluded that the dismissal of those undocumented migrant workers was justified, because the continued employment of them would be in contrary and in violation of the immigration laws which does not permit the employment of undocumented migrants.³²⁸

The South African position regarding the rights and protection of undocumented migrant workers differs from that of the USA and Australia. In South Africa, undocumented migrants are entitled to the fundamental right to fair labour practices, in which it gives effect to the protection afforded by the labour laws such as the LRA and BCEA among others.³²⁹ The term employee in LRA include undocumented migrant workers without having to put out any test.³³⁰ The contract of employment between the undocumented migrant and the employer in South Africa is not seen as invalid contract even such contract is violating the Immigration Act.³³¹ With that said, in South Africa the Constitutional right to fair labour practices must overweight the Immigration Act limitations.³³² The notion was supported by the Constitutional Court decision in *NUMSA v Bader BOP*³³³ where it was held that if a statute is capable of interpretation in a manner that does not limit fundamental rights, then such interpretation should be preferred above other interpretations.³³⁴

³²⁶ Norton 2010 ILJ 1539.

³²⁷ Norton 2010 ILJ 1552.

³²⁸ Norton 2010 ILJ 1553.

³²⁹ Norton 2010 ILJ 1553.

³³⁰ Norton 2010 ILJ 1662. See section 233 of the LRA.

³³¹ Norton 2010 ILJ 1553.

³³² Norton 2010 ILJ 1554.

³³³ *NUMSA v Bader BOP* 2002 ZACC 30.

³³⁴ *NUMSA v Bader BOP* 2002 ZACC 30 para 37.

4.5 Conclusion

There are millions of undocumented migrant workers who are employed in each and every state above. Such people are employed contrary to immigration laws of the host state, as a result to their immigration status, they often find them being exploited, with the fear of being deported if they report any mistreatment by their employers. Some employers take advantage of such fear.³³⁵

In the USA, undocumented migrants might find protection against the employer mistreatment, as they were not explicitly excluded from the definition of an employee in the NRLA. However, regarding the decision of *Hoffmans Plastic*, undocumented migrants have no remedies against the unfair dismissals they encounter themselves in.³³⁶ Whereas, the Australian labour laws does not offer any minimum protection and rights to undocumented migrants.³³⁷ In contrast, the South African labour law protects the rights of undocumented migrant in support that it is their fundamental right to be protected.³³⁸

³³⁵ Norton 2010 ILJ 1554.

³³⁶ Norton 2010 ILJ 1554.

³³⁷ Norton 2010 ILJ 1554.

³³⁸ Norton 2010 ILJ 1554.

CHAPTER FIVE: ANALYSIS OF PROTECTION OF UNDOCUMENTED MIGRANTS' EMPLOYEES IN SOUTH AFRICA

5.1 Introduction

This chapter analysis the current legal position of undocumented migrants after the decision of *Discovery Health case*. This chapter will further outline different legal positions of employee in relation to undocumented migrants. The current legal position and the previous legal perspective that excluded people from the scope of employee due to the legality of their contact.³³⁹ This chapter will further determine whether undocumented migrants are protected by our labour laws, it will also outline rights that given to these employees and their limitations. The Constitutional perspective of employees protects every employee against unfair labour practice. This chapter will be able to discuss how this constitutional protection brought changes and the benefits thereof.³⁴⁰

5.2 Prior to the Discovery Health Case

Prior to the *Discovery Health case*, undocumented migrants did not enjoy any legal protection in terms of South African labour laws, these include protection against unfair dismissals and labour practices. The scope of protection was limited to the definition of an employee, which was systemically limited to the validity of an employment contract.³⁴¹ In the case of *Moses v Safika Holdings* (Hereafter, *the Safika Holdings case*)³⁴² a United States of America's citizen accepted employment in South Africa as an advisor of Safika Holdings.³⁴³ However, he failed to obtain a working permit on a given time which resulted to his dismissal from the aforesaid employment contract.³⁴⁴ The reasons for his dismissal was that he was unable to obtain a working permit, thus he was incapable of rendering any legal service to the

³³⁹ Masabo *The Protection of the Rights of Migrant Workers in Tanzania* 8.

³⁴⁰ Tapiwa *The Definition of an "Employee" Under Labour Legislation: An Elusive* 25.

³⁴¹ Badenhorst *The Labour Rights of Irregular Migrants in South Africa* 21. See also *Lende v Goldberg* 1983 4 ILJ 271 (C).

³⁴² *Moses v Safika Holdings* (2001) 22 ILJ 1261 CCMA.

³⁴³ *Moses v Safika Holdings* (2001) 22 ILJ 1261 CCMA para 1.

³⁴⁴ *Moses v Safika Holdings* (2001) 22 ILJ 1261 CCMA para 4.

holding company.³⁴⁵ Aggrieved by his dismissal, he then took the matter to the CCMA for unfair dismissal dispute. The Commissioner dismissed his dispute on the basis that the applicant was not an employee for the purpose of the LRA.³⁴⁶ The employment contract was declared void because of his illegal status.³⁴⁷ A similar decision was taken in the case of *Vundla v Millies Fashions*.³⁴⁸ A female employee from Zimbabwe was dismissed because she was unable to produce any proof of her immigration status. She took the matter to the CCMA for unfair dismissal, like in the *Safika Holding case*, her dispute was dismissed by the commissioner of CCMA.³⁴⁹ During that time, status of the parties played a crucial role in determining whether a person is an employee for the purpose of the LRA.³⁵⁰ However, this position was changed in 2008 in the *Discovery Health Case*.³⁵¹

5.3 Current legal position of undocumented migrants

5.3.1 Discovery Health Case.

An Argentina National, Mr. Lanzette was a temporary resident in South Africa. He was employed by Discovery Health from the 1st of May 2005 until his dismissal.³⁵² He told the employer that he was legally allowed to be employed in South Africa, However, his work permit expired in the preceding year before his employment.³⁵³ Discovery Health later discovered that Mr. Lanzette did not have a working permit anymore, which resulted in termination of his employment contract.³⁵⁴ The termination came as a result of Mr. Lanzette's illegal status, according the Discovery Health, Mr. Lanzette was unable to render any legal service to the employer. Mr. Lanzetta referred the matter to CCMA for the dispute of unfair dismissal, Discovery

³⁴⁵ *Moses v Safika Holdings (2001) 22 ILJ 1261 CCMA para 7.*

³⁴⁶ *Moses v Safika Holdings (2001) 22 ILJ 1261 para 11.*

³⁴⁷ *Moses v Safika Holdings (2001) 22 ILJ 1261 CCMA para 16.*

³⁴⁸ *Vundla v Millies Fashions 2003 24 ILJ 462.*

³⁴⁹ *Vundla v Millies Fashions 2003 24 ILJ 462 para 466. See also Norton 2009 ILJ 70.*

³⁵⁰ *The Discovery Health v CCMA para 54.*

³⁵¹ *The Discovery Health v CCMA para 2.*

³⁵² *The Discovery Health v CCMA para 8.*

³⁵³ *The Discovery Health v CCMA para 9.*

³⁵⁴ *The Discovery Health v CCMA para 9.*

Health argued that Lanzette was not an employee for the purpose of the LRA since his contract of employment was invalid.³⁵⁵ The commissioner held that:

“The concept of an employment relationship was sufficiently wide to extend the protections of the LRA to workers such as Lanzetta and held that, although an employer could not be required to continue the employment of an illegal foreigner or a foreigner whose specific work permit does not permit the employer to employ him, that does not mean that the protections afforded by the LRA cannot apply to such foreigners who were illegally employed.”³⁵⁶

Dissatisfied with the ruling of the CCMA, Discovery Health took the matter to the labour court. The court was tasked with two issues, the first one was to determine the legality of the contract of employment between Mr. Lanzette and Discovery Health. The second issue was to determine whether or not, Mr Lanzetta was an employee in terms of section 213 of the LRA.³⁵⁷

When interpreting the provisions of section 213 of the LRA, the court departed from the previous method that relied mostly on the legality of the contract. Influenced by the international law standards and the Constitution,³⁵⁸ the court interpreted the term employee in terms of section 23 of the Constitution in the wider sense to include everyone in fair labour practices.³⁵⁹ Furthermore the court stated that the statutory definition of employee is wide enough to cover undocumented migrant employees.³⁶⁰ In the end, the court concluded as follows in this regard:

“A person who renders work on a basis other than that recognised as employment by the common law may be an ‘employee’ for the purposes of the definition. Because a contract of employment is not a sole ticket for admission into the golden circle reserved for ‘employees’, the fact that

³⁵⁵ *The Discovery Health case* para 3.

³⁵⁶ *The Discovery Health v CCMA* para 54.

³⁵⁷ *The Discovery Health v CCMA* para 11.

³⁵⁸ Motsamai *Forced Labour- The Protection of Illegal Migrant Workers in South Africa* 48

³⁵⁹ Motsamai *Forced Labour- The Protection of Illegal Migrant Workers in South Africa* 48

³⁶⁰ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 39.

Lanzetta's contract was contractually invalid only because Discovery Health had employed him in breach of section 38(1) of the Immigration Act did not automatically disqualify him from that status." ³⁶¹

5.3.2 Legal Prohibitions

After the decision of *Discovery Health Case*, the interpretation of the term employee in section 213 of the LRA, changed its lens from a law of contract point of view to a Constitutional perspective. The definition was systemically centred on law of contract that determined the legality of the employment contract before they could determine whether a person is an employee.³⁶² South Africa has then departed from this legal era. Consequently, there are limitations and prohibitions towards employment of undocumented migrants. S38 of the Immigration Acts prohibits employment of migrants whose immigration status does not authorise them to be employed.³⁶³ This provision prohibits employers from having undocumented migrants as employees. It places an obligation on the employer to verify statuses of their prospective employees and monitors dates of expiry of existing employees.³⁶⁴ It is not a gateway for employers to exploit undocumented migrants, and get rid of them when they deem fit.³⁶⁵ In the *Sithole Case*, the court ruled in favour of a Zambian national that was dismissed after the employee refused to assist him in obtaining the information that the Home Affairs department required in order to process his application.³⁶⁶ Furthermore, the Constitution is the supreme law of the country, and it surpasses any law that exist within South Africa and according to the provision of section 23, undocumented migrants are employees and their irregular status does not prevent them from enjoying legal protection in South Africa.³⁶⁷

³⁶¹ *The Discover Health v CCMA* para 53.

³⁶² Nkuna *Undocumented Migrants and the Right to Fair Labour Practices* 39.

³⁶³ Section 38 of the Immigration Act.

³⁶⁴ Badenhorst *The Labour Rights of Irregular Migrants in South Africa* 35.

³⁶⁵ Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* 36.

³⁶⁶ *Sithole v Metal and Engineering Industries Bargaining and Others* para 18.

³⁶⁷ Vallentgod *Legal Protection of the Rights of Migrant Workers in South Africa* 9.

5.3.3 Requirements for Dismissal

As stated above, the immigration Act prohibits employers having undocumented migrant as their employees. In cases where they are already employed, employers are required to follow a proper legal procedure in dismissing them.³⁶⁸

Section 185 of the LRA states that,³⁶⁹

“Every employee has the right not to be

(a) Unfairly dismissed; and

(b) Subjected to unfair labour practice”³⁷⁰

This serve as a safeguard against unfair dismissal and migrants are protected by this provision. The employer’s conduct in dismissing undocumented migrant workers must meet the requirements of the LRA, mainly substantive and procedural fairness.³⁷¹

5.3.3.1 Substantive Fairness

Substantive fairness means that the employer dismissed an employee on a ground that fair and adequate. This means that undocumented migrant can be dismissed for any other accepted ground as long it does not relate to their migrant statuses.³⁷² For instance, an employee can be dismissed if they have breached a workplace rule that is legitimate like prohibition of sexual harassment in the workplace, which applies to every employee, including management and a dismissal is the only appropriate sanction.³⁷³

Since the LRA limits substantive fairness to either misconduct, operational requirements or incapacity, a dismissal is likely unfair if the termination is motivated

³⁶⁸ Nkuna *Undocumented Migrants and the Right to Fair Labour practices*

³⁶⁹ Section 185 of the LRA.

³⁷⁰ Section 185 of the LRA.

³⁷¹ Newaj 2020 PER/PELJ 9.

³⁷² Newaj 2020 PER/PELJ 10.

³⁷³ Newaj 2020 PER/PELJ 10.

by illegal status of an employee.³⁷⁴ In other words, dismissal of an undocumented migrant is unfair if the employer did not use any of the three reasons to terminate the employment contract of an undocumented migrant employee.³⁷⁵ For instance, in the case of *Amankwah v Menzies Aviation*,³⁷⁶ a Ghanaian national was dismissed because he was unable to obtain a working permit for his employment with Menzies Aviation.³⁷⁷ The employer dismissed the employee on the basis that he was incapable of performing his duties without a working permit. This reasoning of the employer is not different from dismissal of employee due to their illegal status.³⁷⁸

3.3.3.2 Procedural Fairness

Procedural fairness refers to the procedure and protocols that the employer takes before dismissing any employee.³⁷⁹ An employee must be given reasonable opportunity to present his case, have disciplinary and little effort from the employer to enquire or investigate the problem. Irrational dismissal with effective immediate conditions renders the dismissal unfair.³⁸⁰ In the Discovery Health case, the employer did not take any necessary steps to follow proper procedure, they instantly dismissed Mr. Lanzetta from the spot.³⁸¹

5.3.4 Legal Implications of exploitative labour practices

Based on the information above, undocumented migrants are protected by our labour laws, but this protection is limited to more refined industries, such as telecommunication, food industries and those that can access courts.³⁸² Still leaving a void to informal sectors such as farmers and domestic workers. According to the

³⁷⁴ Newaj 2020 PER/PELJ 9.

³⁷⁵ Newaj 2020 PER/PELJ 10.

³⁷⁶ *Amankwah v Menzies Aviation (SA) (Pty) Ltd* (CCMA) (unreported) case number GAJB13296-17 of 30 October 2017 paras 5-6. See also Newaj 2020 PER/PELJ 10.

³⁷⁷ *Amankwah v Menzies Aviation (SA) (Pty) Ltd* (CCMA) (unreported) case number GAJB13296-17 of 30 October 2017 para 5. See also Newaj 2020 PER/PELJ 10.

³⁷⁸ *Amankwah v Menzies Aviation (SA) (Pty) Ltd* (CCMA) (unreported) case number GAJB13296-17 of 30 October 2017 para 2. See also Newaj 2020 PER/PELJ 10.

³⁷⁹ Newaj 2020 PER/PELJ 12.

³⁸⁰ Newaj 2020 PER/PELJ 12.

³⁸¹ *The Discover Health v CCMA* case para 2.

³⁸² Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese*

Human Rights watch report, in 2017,³⁸³ there were reported cases of exploitation and unfair labour practice towards undocumented migrants. Gatekeepers were employed in a farm near Pretoria, these gatekeepers were let go by their employer without receiving any payment for the service that they previously rendered.³⁸⁴ It gets worse because they were not even notified in any way about termination of their employment, they were instantly replaced without any prior communication.³⁸⁵

In *the Sithole case*,³⁸⁶ a Zambian national, Mr Sithole was employed by Spray System Specialist as a general worker.³⁸⁷ The applicant had issues with obtaining his application for work permit. His employer unreasonably given him three days to resolve this debacle.³⁸⁸ However, Mr Sithole had problems with the Department of Home Affairs as they needed more information in order to assist Mr. Sithole with his application. The employer refused to assist the applicant and instructed him not to return to work anymore.³⁸⁹

The matter was taken to the Labour Court, the court relied heavily on the decision of Discovery Health Case. The court held that an employment contract that contravene s38(1) of the Immigration Act does not render such contract void, a person can still be an employee even when their employment contract is invalid, it was concluded that a contract between an employer and undocumented employee is still valid and they enjoy similar protection in terms of the LRA and the BCEA.³⁹⁰

5.3.5 Analysis on the incorporation of laws from USA and Australia

The USA and Australia are countries with strong and steady economy. They have strict laws towards employment of undocumented migrants and the protection they offer.³⁹¹ The USA labour laws recognises undocumented migrant as employees but

³⁸³ Human Rights Watch Report: Interview of Illegal Immigrants 2017 <https://www.hrw.org>.

³⁸⁴ Human Rights Watch Report: Interview of Illegal Immigrants 2017 <https://www.hrw.org>.

³⁸⁵ Human Rights Watch Report: Interview of Illegal Immigrants 2017 <https://www.hrw.org>.

³⁸⁶ *Sithole v Metal and Engineering Industries Bargaining 2018 39 ILJ 472 (LC)*.

³⁸⁷ *Sithole v Metal and Engineering Industries Bargaining 2018 39 ILJ 472 (LC)* para 2.

³⁸⁸ *Sithole v Metal and Engineering Industries Bargaining 2018 39 ILJ 472 (LC)* para 11.

³⁸⁹ *Sithole v Metal and Engineering Industries Bargaining 2018 39 ILJ 472 (LC)* para 5.

³⁹⁰ *Sithole v Metal and Engineering Industries Bargaining 2018 39 ILJ 472 (LC)* paras 10, 13 and 14.

³⁹¹ Roh, *The Aftermath of September Eleventh: Increased Exploitation of Undocumented Workers in the Workplace* 238.

does not offer them anything after that. Although undocumented migrants are employees for the purpose of the NLRA, they cannot have a claim against employers for unfair dismissal and other unfair labour practices except for mistreatment.³⁹² Australia on the other hand, does not recognise them as employees and they have no claim against any unfair labour disputes.³⁹³ Unlike USA and Australia, South Africa is still a developing country with unstable economy and high unemployment rate.³⁹⁴ But, Should South Africa follow the approach of these country by incorporating their strict laws on their national laws?

Firstly, undocumented migrant workers are inevitable reality to South Africa and other developing and developed countries. No matter how strict a country's laws are, undocumented migrant will continue to move to those aforesaid countries and employers will continue to exploit them, as long there are no protection from the state laws.³⁹⁵ The laws of USA and Australia enables abuse and exploitation of undocumented migrants, it further allows gross violation of the Human Rights of undocumented migrant and their right to fair labour practice.³⁹⁶ South Africa on the other hand, is a constitutional state that respects and promote the Human Rights of everyone within the republic.³⁹⁷ These laws from USA and Australia do not align with the Constitution, it must be noted that one of this country still has death penalty incorporated in their national laws. Laws that deliberately violate the Human Rights of other people cannot serve any purpose in the South African constitutional perspective.³⁹⁸ In addition, with acknowledgement and reality of undocumented migrants, by adapting the American and Australian approach, South Africa will disregard the constitutional values of the Constitution and contribute to the Violation of the Human Rights of undocumented migrant.³⁹⁹ Instead, a valuable addition to

³⁹² Roh, *The Aftermath of September Eleventh: Increased Exploitation of Undocumented Workers in the Workplace* 242.

³⁹³ Clibborn, S. (2015). *Why undocumented immigrant workers should have workplace rights* 467.

³⁹⁴ Clibborn, S. (2015). *Why undocumented immigrant workers should have workplace rights* 468.

³⁹⁵ Lee 2018 CLR 1620.

³⁹⁶ Lee 2018 CLR 1619.

³⁹⁷ S1 of the Constitution.

³⁹⁸ Webb *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law* 250.

³⁹⁹ Nkuna *Undocumented Migrants and the Right to Fair Labour practices* 20.

the South African labour laws is the International Convention on Protection of All Migrant Workers. As stated above in chapter 2, this convention protects and respects the rights of all migrant workers. The values of the convention align and are also in complimentary with the Constitution.⁴⁰⁰

5.4 Conclusion

It can be concluded from this chapter that there is progressive development in offering undocumented migrants workers protection. The courts are able to interpret the statutory meaning of employee through the lens of the Constitution, which is not restrictive as the previous method.⁴⁰¹ There are still other sectors, particularly informal sector that needs to be refined and reshaped in accordance with the Constitution. It must be noted that the main part of labour practice has been covered by this new development, even though the benefits are limited. Undocumented migrants are unlikely to be granted reinstatement in cases of unfair dismissal but with the current legal perspective, and its progress, it will be possible.⁴⁰²

⁴⁰⁰ Preamble of the International Convention on the Protection of the rights of All Migrant workers and Members of Their Families (1990)

⁴⁰¹ Nkuna *Undocumented Migrants and the Right to Fair Labour* practices 45.

⁴⁰² Nkuna *Undocumented Migrants and the Right to Fair Labour* practices 41.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

6.1 Conclusions

Immigration is an inevitable reality that cannot be ignored in South Africa or any other part of the world. Factors such as socio-economic rights, international conflicts, civil wars and poor economy of other countries contribute to immigration and they are incapable of stopping.⁴⁰³ South African, mainly from the southern region of Africa, receives a great deal of migrants compared to other countries in that region. Some cross the border legally to seek Asylum status, other with working and study permits. Some migrate to South Africa without legal documentations, while others have expired permits and were unable to successfully renew them with the immigration office.⁴⁰⁴

As stated above, migrants come to South Africa for better living standards and employment opportunities. It must be noted that South Africa has issues of unemployment rate, however, undocumented migrants have infiltrated the informal sectors in the country.⁴⁰⁵ These sectors include construction, farming and domestic work. They are given employment under the pretext of cheap labour. Their irregular status makes them susceptible to exploitation and subject to unfair labour practices, such as unfair dismissals, low wages, work without remuneration and abuse by their employers.⁴⁰⁶

South Africa as a constitutional country with a virtuous Constitution protects the rights of everyone in the country.⁴⁰⁷ The right to fair labour practice under s23 extends to undocumented migrant workers.⁴⁰⁸ The study analysed and determined that undocumented migrants are also protected by our labour laws. The LRA, BCEA and EEA also applies them but it is mainly known in more refined industries such as

⁴⁰³ Phiri *Unfair Labour Practices, Labour Legislation and Protection of Migrant Workers in South Africa* 67.

⁴⁰⁴ Dass and Raymond 2017 ILJ 34.

⁴⁰⁵ Nkuna *Undocumented Migrants and the Right to Fair Labour practices* 59.

⁴⁰⁶ Badenhorst *The Labour Rights of Irregular Migrants in South Africa* 49.

⁴⁰⁷ S8 of The Constitution.

⁴⁰⁸ Nkuna *Undocumented Migrants and the Right to Fair Labour practices* 39.

sales and marketing and hospitality.⁴⁰⁹ Badenhorst,⁴¹⁰ correctly stated that undocumented migrant workers do not know their labour law rights because they are not aware that they are entitled to any.⁴¹¹ None of the South African labour law Acts unambiguously state their protection to the undocumented migrants. This leads to a misconception that undocumented migrants do not enjoy any legal protection, thus they continue to be subjected to exploitation and unfair labour practices.⁴¹²

The international labour law does not prohibit countries from employing undocumented migrant workers, but employment of these workers must be in compliant with the basic international standards such as basic employment conditions under article 25 of the Protection of All Migrant Workers Convention,⁴¹³ and the right not to be fairly dismissed under article 54.⁴¹⁴ The protection that the United Nations and the Protection of all migrant workers convention offers to undocumented migrant worker is equivalent to the standards that the South African Constitution offers, it remains unclear on why South Africa has not ratified this convention and adapt to laws that undoubtedly protects undocumented migrants.

6.2 Recommendations

6.2.1 Introduction

The vulnerability of undocumented migrants is an encouraging factor for their illegal, cheap and exploitive employment that lacks legal regulation. Hence it is important to create and set basic rights and protection for these workers which will ensure that their employment is not taken for granted or is exploitive. Regulation of their rights and protection will require a well-established process for reporting any abuse they encounter to relevant tribunals without any fear that they might face deportation to their respective countries. The paper submits that, the right to fair labour practices and the inclusion of undocumented migrants in the term 'employee'

⁴⁰⁹ Badenhorst *The Labour Rights of Irregular Migrants in South*.

⁴¹⁰ Badenhorst *The Labour Rights of Irregular Migrants in South* 48.

⁴¹¹ Badenhorst *The Labour Rights of Irregular Migrants in South* 48.

⁴¹² Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 68

⁴¹³ A 25 of the protection of all migrant workers convention.

⁴¹⁴ A 54 of the protection of all migrant workers convention.

triggers the supervision of employment of undocumented migrants. Because the supervision will reduce their employment, protect their labour rights and promote the migration law. Therefore, this part of the chapter proposes recommendations for regulating the labour rights of undocumented migrants.

6.2.2 Recommendations

6.2.2.1 Separating migration status from labour rights

The migration status often is the important key which determines if one qualifies for labour rights protection. Potential employers are driven by the migration status on how they treat undocumented migrants, because they have a perspective that they are not protected by labour law whereas they are. Legal interpretation is needed to determine if they are qualified to be employees and be protected, because on the face of the legislation they are not mentioned whereas, when tribunals interpret such legislation, they are found to qualify for protection as employees.

The paper proposes that, the separation of migration status and labour rights will ensure that undocumented migrants are protected, because the migration status will no longer be the determining factor to qualify for protection. In that way undocumented migrants will be able to report any unfair labour practices towards them without any fear of being deported to their respective countries, knowing that they are protected regardless of their migration status. Furthermore, undocumented migrants will be entitled to basic labour rights such as fair remuneration, protection against unfair dismissal and regulation of their working hours. Additionally, such separation will also halve the employment of undocumented migrants and give effect to Immigration Act.

6.2.2.2 Strengthening border policies

The South African border security is an opening gate for undocumented migrants. Foreigners who are not able to obtain legal status and legal documents to enter South Africa due to long procedure and financial strains, use corruption to enter

into the country.⁴¹⁵ Foreigners pay securities at the border to enter the country and other uses unfamiliar routes to enter.⁴¹⁶

Strengthening border policies will also guarantee that people who are allowed to cross to South Africa are documented. Their legality will determine the reason why they are in South Africa, and how long they will stay. Such formality will ensure that those who cross in South Africa are employed legally and afforded labour protection without any precautions.

It is submitted that strengthening border securities will indirectly protect the rights of undocumented migrant. Since the corruption at the borders will not be an easy passage for undocumented migrants to enter the country, they cannot be employed in the country. Their vulnerability will not be used against them and they will not suffer any unfair labour practices.

6.2.2.3 Amendment of the term employee

The definition of an employee does not explicitly mention undocumented migrants within its ambit. Lay persons such as some employers cannot tell if whether they are included or not, one must make thoroughly research in order to know that they are included. The employers are still on the perspective that the term employee is ought to be elucidated through law of contract.⁴¹⁷ Meaning that, if the contract of employment is illegal, then their contract will be null and void.

The continuation of excluding undocumented migrants in the definition of an employee, serve as a limitation for them from enjoying the constitutional and legislative protection.⁴¹⁸ In most cases, employers disguise the employment relationship by labelling it as another relationship, whereas the relationship qualifies

⁴¹⁵ Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* 14.

⁴¹⁶ Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* 14 and 15.

⁴¹⁷ Biney *Inequality of Opportunity: The Plight of Foreign Workers in South Africa* 122.

⁴¹⁸ Biney *Safeguarding The Illegal: Rethinking The Interface Between Labour And Immigration Laws* 68.

to be an employment relationship. They disguise the relationship, in order to exclude undocumented migrants from the definition.

With the amendment of the term employee, labour rights of undocumented will be protected and adhered to. The paper submits that, the inclusion that undocumented migrants are ought to be regarded as employees when they are in relationship that is categorised as employment relationship is vital. Because their exploitation will lessen, as they will be able to claim for protection when their rights are violated

BIBLIOGRAPHY

Literature

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

Biney E *Inequality of Opportunity: The Plight of Foreign Workers In South Africa*
(PHD-dissertation University of Cape Town 2016)

Bosch 2006 Industrial Law Journal

Bosch C "Can Unauthorized Workers be Regarded as Employees for the Purpose
of the Labour Relations Act" 2006 Industrial Law Journal

Conradie *A Critical Analysis of the Right to Fair Labour Practices*

Conradie M *A Critical Analysis of the Right to Fair Labour Practices* (LLM-
dissertation University of Free State 2013)

Crush *et al*/2017 SAMP

Crush J, Skinner C, and Stulgaitis M "Rendering South Africa Undesirable: A
Critique of Refugee and Informal Sector Policy" 2017 SAMP

Dass and Raymond 2017 ILJ 39

Dass AL and Raymond D "A Consideration of the Employment Rights of Asylum
Seekers and Refugees within South Africa as Contextualised by the Watchenuka
and Discovery Health Judgments "2017 ILJ

Kasuso *The Definition of an "Employee" Under Labour Legislation: An Elusive* 14

Kasuso TP *Definition of an "Employee" Under Labour Legislation: An Elusive*
(LLM-dissertation at University of South Africa 2015)

Lilian *et al*/2010 CIHR

Lillian *et al* "Undocumented Migrants in Canada: A Scope Literature Review on Health, access to Services, and working Conditions" 2011 CIHR 2-30

Makosi *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* 23

Makosi E *Working Conditions of Undocumented Zimbabwean Migrant Workers Employed by Chinese* (Masters of Arts-dissertation University of Johannesburg 2012)

Masabo *The Protection of the Rights of Migrant Workers in Tanzania*

Masabo J *The Protection of the Rights of Migrant workers in Tanzania* (PHD-dissertation University of Cape Town 2012)

Mokofe *Regulation of Non-Standard Employment in Southern Africa*

Mokofe WM *Regulation of Non-Standard Employment in Southern Africa* (LLD-dissertation University of South Africa 2018)

Motsamai *Forced Labour- The Protection of Illegal Migrant Workers in South Africa*

Motsamai LG *Forced Labour- The Protection of Illegal Migrant Workers in south Africa* (LLM-diseertation North West University 2019)

Mpira *Trade Unions Policies and Practices in Response to Undocumented Migrant Labour In Post Apartheid South Africa*

Mpira L *Trade Union Polices and Practices in Response to Undocumented Migrant Labour in Post Apartheid South Africa* (Masters in Social Industrial Sociology-dissertation University of Cape Town 2013)

Muwanya-Banda *Protection of Vulnerable Employees In South African Legislation*

Muwanya-Banda PH *Protection of Vulnerable Employees in South African Legislation* (LLM-dissertation University of South Africa 2019)

Newaj 2020 PER/PEJL

Newaj K "Defining Fairness in Dismissals of Unauthorised Foreign Nationals"
2020 PER/PEJL

Ngandwe PER / PELJ 2013

Ngandwe PJ "The Paradox of Migration and the Interest of the Atomistic
Nation-States: The Southern African Perspective" 2013 PER / PELJ

Nkuna *Undocumented Migrants and the Right to Fair Labour Practices*

Nkuna PM *Undocumented Migrants and the Right to Fair Labour Practices* (LLM-
dissertation University of Johannesburg)

Norton 2010 ILJ

Norton D "Workers in the Shadows: An International Comparison of the Law of
Dismissal of Illegal Migrant Workers" 2010 ILJ

Ntshalintshali Phindile – The rights of illegal works not be unfairly dismissed

Ntshalitshali *The Rights of Illegal Works Not to be Unfairly Dismissed with
Emphasis on Illegal Immigrants and Sex Workers* (LLM-dissertation University
of Kwa-Zulu Natal 2019)

Phiri *Unfair Labour Practices, Labour Legislation and Protection of Migrant Workers
in South Africa*

Phiri TD *Unfair Labour Practices, Labour Legislation and Protection of Migrant
Workers in South Africa* (M. Com-dissertation at University of the Witwatersrand
2015)

Rapatsa *JURIDICA* AUDJ 2015

Rapatsa M "Economics of Illegal Work and Illegal Workers (Immigrants): Are They Protected under South African Labour Law and the Constitution, 1996?" 2015 JURIDICA

Tshizanga *The Labour Law Protection of Non-Standard Workers in South Africa* 34

Tshizanga GK *The Labour Law Protection of Non-Standard Workers in South Africa* (LLM dissertation University of South Africa 2020)

Pheta *Decent Work for All: Its Meaning and Content, Social Dimensions and SADC Social Policy Perspectives*

Pheta J *Decent Work for All: Its Meaning and Content, Social Dimensions and SADC Social Policy Perspectives* (LLM-dissertation University of Cape Town)

Smit and van Eck 2010 CILSA

Smit P and van Eck PBS "International Perspectives on South Africa's Unfair Dismissal Law" 2010 CILSA

Swartz *The Effect of South African Labour Legislation on Refugees and Migrants*

Swartz NS *The Effect of South African Labour Legislation on Refugees and Migrants* (LLM-dissertation Nelson Mandela Metropolitan University 2012)

Vallentgod *Legal Protection of the Rights of Migrant Workers in South Africa*

Vallentgoed N *Legal Protection of the Rights of Migrants Workers in South Africa* (LLM-dissertation North-West University 2008)

Viviers and Smit *International Journal of Business and Social Research* 2014

Viviers D and Smit D "A Labor Law perspective on the Protection of Persons in Vulnerable Employment Relationship in South Africa" 2013 *International Journal of Business and Social Research*

Case law

Amankwah v Menzies Aviation (SA) (Pty) Ltd case number GAJB13296-17

Anthony Emurugat and Utilities Management Pty Ltd [2008] AIRC 247

Discovery Health Limited v Commission For Conciliation, Mediation and Arbitration and Others (JR 2877/06) [2008] ZALC 24; [2008] 7 BLLR 633 (LC) ; (2008) 29 ILJ 1480 (LC)

Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC)

Kylie v Commission for Conciliation Mediation and Arbitration and Others (CA10/08) [2010] ZALAC 8; 2010 (4) SA 383 (LAC) ; 2010 (10) BCLR 1029 (LAC) ; (2010) 31 ILJ 1600 (LAC) ; [2010] 7 BLLR 705 (LAC)

Larbi-Odam and Others v Member of the Eexecutive Council for Education (North-West Province) and Another (CCT2/97) [1997] ZACC 16; 1997 (12) BCLR 1655; 1998 (1) SA 745

Lawyers for Human Rights v Minister of Home Affairs and Others (CCT38/16) [2017] ZACC 22; 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC)

Mahlaule and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC)

Masuta v Lake Smith & Partners (unreported) case number KNDB17003-17 of 18 March 2018

National Education Health and Allied Workers Union v University of Cape Town and Others CCT2/02 [2002] ZACC 27 2003 (2) BCLR 154 (CC)

Moses v Safika Holdings (2001) 22 ILJ 1261

National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another (CCT14/02) [2002] ZACC 30; 2003 (2) BCLR 182 ; 2003 (3) SA 513 (CC) ; [2003] 2 BLLR 103 (CC)

Sithole v Metal and Engineering Industries Bargaining and Others 2015 318 (LC)

Solis v Cindy's Total Care Inc 10 Civ. 7242 (PAE)

Vundla v Millies Fashions (2003 24 ILJ 462)

Legislation

Aliens Control Act 40 of 1973

Basic Conditions of Employment Act 75 of 1997

Constitution of the Republic of South Africa, 1996

Employment Equity Act 55 of 1998

Employment Services Act 4 of 2014

Fair Labor Standards Act of 1938

Immigration Act 13 of 2002

Immigration Act of 1958

Immigration Reform and Control Act of 1986

Labour Relations Act 66 of 1995

National Labor Relations Act of 1935

Migration Amendment Act of 2007

International instruments

Discrimination (Employment and Occupation) Convention, (No 111) 1958

Equal Remuneration Convention, (No 100) 1951

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (No 13) 1990

Forced Labour Convention, (No 182) 1957

Freedom of association and protection of the right to organisation convention, (No 87) 1948

Migration for Employment Convention (Revised), (No 97) 1949

Migrant Workers (Supplementary Provisions) Convention, (143) 197

Minimum Age Convention, (No 138) 1973

Right organisation and collective bargaining convention, (No 98) 1949

Worst Forms of Child Labour Convention, (No 182)1999

Internet Sources

Carley 2021 <https://ewn.co.za/2021/03/15/fact-check-does-sa-really-have-15-million-illegal-Migrants> accessed 14 September 2022

Green<https://www.kqed.org/news/140984/undocumented-immigrants-still-mistreated-by-employers-deposit-new-laws> accessed 27 October 2022

The UN 2022 [https://www.ohchr.org/en/press-releases/2022/07/south-africa-un-experts-](https://www.ohchr.org/en/press-releases/2022/07/south-africa-un-experts-condemn-xenophobic-violence) condemn-xenophobic-violence accessed 12 October 2022

United Nations <https://www.un.org/en/ga/> accessed 28 September 2022



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LLM Dissertation: ☐

NAME	TWALA ERNESTINA NTSWAKI	STUDENT NR	29190606
SUPERVISOR	Mrs Lebo M-Smith		
CO-SUPERVISOR			
RESEARCH TITLE	Examining the legal protection illegal immigrants under South African labour law		

<u>Examiner 1:</u> Please type the comments of the examiner in this column.	Response / amendments of student and supervisor/promoter.
1. On page 1. the sentence which starts with 'The Constitution of the Republic ...' should end at liberty and a new sentence must start with 'It does not choose ...'; 2. On page 1. the word 'a' before South Africa in the sentence which starts with 'Upon arrival in South Africa ...' should be 'as'; 3. On page 1. In the sentence which follows the above sentence, 'Migrant works' cannot be a sentence;it must instead be joined to the next sentence; 4. On page 1, a source should be provided for the sentence which starts with 'This situation arises ...' unless it is the student's own submission; 5. On page 2, the word 'of' should be inserted between 'jurisdictions' and 'labour' in the sentence which starts with 'This research considers ...'; 6. Under par 1.2, the word 'The' should use a small 't'; 7.On page 3, the word 'wherein' should be inserted just before 'Mr Sithole' in the sentence which starts with 'This is the situation ...'; 8.The opening sentence on page 4 should be divided into two sentences. The first must end with 'migrant workers' and the next must start with 'It appears ...'; 9.On page 4, the word 'is' must be inserted between 'this' and 'the' in the sentence which starts with 'Section 185...'; 10.On page 4, only the name of the case should be in the	1. Corrected as suggested. 2. inserted the correct word. 3. Corrected the two sentences by joining them together. 4. Authority included on footnote 7. 5. Corrected as suggested. 6. Corrected the word to a small 't' 7 Corrected as suggested. 8. Divided the sentence into two as suggested. 9. inserted the word 'is' between 'this' and 'the' 10. Corrected as suggested.

<u>Examiner 2</u> Please type the comments of the examiner in this column.	Response / amendments of student and supervisor/promoter.
1. On page 2: What does this mean? 2. On page 2: It would be better to divide this into different paragraphs. 3. On page 3: What was the decision in this case? 4. On page 3: it would be better to divide this into different paragraphs. 5. On page 7: Has it ratified these conventions? 6. On page 10: Which conventions? There are only two conventions that you mentioned, and the study is based on both of them. 7. On page 10: Convention are legally binding in South Africa it has ratified such convention. 8. On page 11: Consistency. This is Convention 143. 9. On page 11: which provision? Art 9(1)? 10. On page 12: What is the effect of failure to ratify. 11. On page 12: Elaborate on this point. What authority supports this assertion? 12. On page 12: Are we still talking about article 9(1)? 13. On page 12: You tend to discuss a number of ideas in one paragraph. This really undermines the flow of your discussion and can be confusing to the reader. 14. On page 15: Which Act is this? 15. On page 16: What is the gap in the SA labour laws? 16. On page 16: What about the cases that says they are protected as employees. Is that not sufficient?	. . 1. Provided clarity on the subject matter. 2. Provided clarity about the amendments to labour law. 3. Included the decision of the case at the end of the paragraph. 4. Divided this paragraph into different paragraphs as suggested. 5. Correct this by including ratified conventions. 6. Corrected this error and provided clarity thereof. 7. This was explaining the universal position of Conventions and Recommendations.

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Qualification: Master of Laws in Labour Law

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