THE EFFECT OF SOUTH AFRICAN LABOUR LEGISLATION ON REFUGEES AND MIGRANTS

by

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SUMMARY

Since South Africa was declared a democratic country, the number of refugees fleeing to South Africa has increased. While it is understandable that refugees would flee to a country with a Constitution that protects the rights of everyone within its territory, this influx of refugees and migrants also puts a strain on the South African economy.

One of the main problems associated with refugees and migrants in this country is their illegal status. Failure to obtain legal status in the country can be attributed to their own negligence to attend to the Refugee Reception Office, upon their arrival in the country. On the other hand, the South African government also fails foreigners in that the service provided at the Refugee Reception Offices is not up to the standard promised in the legislation.

A further problem associated with refugees and migrants in the country is that they are competing with South Africans for jobs that are already scarce in the country. A foreigners need to earn a living is the driving force behind entering the employment market, and often illegally. Where refugees and migrants do not have the required work permits, their employment is prohibited in terms of the Immigration Act 13 of 2002 and they are thus illegal workers.

Until recently, South Africa has followed the same policy as other international countries. Illegal workers did not have access to the protection provided by our labour legislation, by virtue of the illegality of their employment contracts. This position was changed by the *Discovery Health* case where the courts focused more on the existence of an employment relationship as oppose to an employment contract.

CHAPTER 1

INTRODUCTION

The movement of foreigners from one country to another is a practice that has been taking place for decades. Foreigners leave their country of origin, move to a country where the protection of human rights is a priority, where that country then becomes a host country. In the southern hemisphere South Africa is a host to many foreigners.

The main topics to be discussed in this document include the right to equal treatment for refugees and migrants in South Africa, and the exploitation of refugees and migrants in the labour market. A comparative analysis is done on the difference in the treatment of refugees and migrants in South Africa as oppose to their treatment in other countries.

In essence the laws of a host country should protect the rights of foreigners upon arriving in that country. This protection includes[1] the human rights of foreigners and in particular their labour and social security rights. These laws should furthermore set out the guidelines for the application processes to be followed and furthermore the procedure to be followed in the event of an infringement of any right.

An important factor to consider in the modern day society is the issue of morality as it influences what practices' society regards as acceptable or unacceptable. The illegal entry by foreigners into South Africa is an unacceptable practice according to the moral views of society, and it often leads to xenophobic attacks, like the latest incident reported in which 10 Somali businessmen were killed in South Africa.[2] Despite statutory prohibitions preventing xenophobia, in particular chapter 2 of the Constitution of the Republic of South Africa, 1996 (the Constitution) this practice may be acceptable in the eyes of society.

An influx of refugees and migrants on a host country affects the economy of that country, the unemployment rate, as well as the crime rate. It can also indirectly affect the application processes, depending on the number of Refugee Reception centres available within the host country that deals with the application processes. Delays in the application process in turn influence the illegal entry of foreigners into the labour market.

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[1] The Constitution of the Republic of South Africa Act 108 of 1996; The Refugees Act 130 of 1998; The 1951 United Nations Convention relating to the Status of Refugees and The 1969 Protocol relating to the Status of Refugees.

[2] Anonymous "Somalia: 10 Somali Businessmen Killed in South Africa" http://allafrica.com/stories/201206191425.html (accessed 2012-06-26).

The current position on refugees and migrants entering into South Africa has become highly uncontrollable to the South African authorities to such an extent that South African Army Colonel Johan Herbst stated that “This borderline needs a comprehensive border plan," [3] during a visit to Musina.[4] Despite the control measures implemented at the borders, refugees and migrants have found various ways of entering South Africa unnoticed, as well as entering the South African labour market illegally.

South Africa has, taking into account recommendations from the International Labour Organisation, put various laws in place intended at regulating employment within South Africa. However, the question arises whether refugees and migrants currently within South Africa are afforded the same protection as other citizens. When addressing the issue on equal treatment, the following aspects need to be considered:

1. What is a refugee or migrant in terms of the relevant legislation?
2. What rights refugees and migrants have in South Africa?
3. Whether refugees and migrants can claim the same protection as ordinary South African citizens?

Unemployment is a major crisis in many countries and the situation in South Africa is not any different. Kok and Collinson[5] in a discussion on migration argue that the migration of unemployed persons merely displaces unemployment. It is submitted that this argument is acceptable, since an unemployed person remains unemployed irrespective where that person resides.

1 1 Structure of treatise

This treatise has 5 chapters. Chapter 2 discusses the history of refugees and migrants in South Africa, the legislation applicable to refugees and migrants, as well as the application processes within South Africa.

Chapter 3 discuss the principle of equality in relation to the treatment of refugees and migrants and a discussion of case law concerning the effect of the word “citizen” in section 1 of the Social

[3] Anonymous “Illegal border crossing flourish” http://www.news24.co.za (accessed 2011-07-07).
[4] Musina is a border town in the Limpopo Province, South Africa.
[5] “Migration and urbanization in South Africa” 2006 2.

Assistance Act 13 of 2004; the issue relating to access to the application offices is also brought to light through a discussion of case law.

Chapter 4 discusses the treatment of refugees and migrants in various employment positions, and more particularly the vulnerability of foreigners and whether this vulnerability may lead to exploitation.

Chapter 5 deals with a comparative analysis of refugees and migrants in South Africa, as opposed to other countries. The differences in the systems of the countries like the United Kingdom and the United States of America are pointed out. A discussion on whether the systems used by these countries are effective is then undertaken.

The next chapter gives an overview on the history of refugees and migrants in South Africa, as well as the laws that governs the protection of these foreigners.

CHAPTER 2

A HISTORICAL PERSPECTIVE ON REFUGEES AND MIGRANTS IN SOUTH AFRICA

2 1 Introduction

Generally the movement of foreigners from other countries of origin to South Africa has increased over decades. The change from an apartheid regime to a democratic government has influenced the movement of foreigners to South Africa, as a result nationals from neighbouring states fled to South Africa in the hopes of getting a better future.

In *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*[6] Kondile AJ held "In South Africa, the reception afforded to refugees has particularly significance in the light of our history. It is worth mentioning that Hathaway lists apartheid as one of the 'causes of flight', which have resulted in large numbers of refugees in Africa." An interesting fact to note is that most legislation regulating migrants and refugees in South Africa were enacted after the apartheid era, and that was the period when an increase was clearly noticeable in the number of foreigners arriving in South Africa as refugees or on holiday and business trips.

On 7 November 1945, South Africa became a member of the United Nations and thereby committed to protecting human rights, maintaining peace and security and to promote economic growth within South Africa. This commitment was later extended to include the rights and protection afforded to refugees as reflected in the 1951 Refugee Convention, the first convention aimed at defining whom and what a refugee is, as well as providing the legal protection applicable to refugees.

The 1967 Protocol Relating to the Status of Refugees, as well as the 1969 Organisation of African Unity Convention, further extended the protection of refugees and migrants in Africa. South Africa furthermore signed a Memorandum of Understanding with the UNHCR in 1993 to accept refugees.[7] This agreement is binding and it focuses on, among other things, unity and co-operation between African states and the enjoyment of human rights and standards of living of all Africans. This organization was disbanded on 9 July 2011 and replaced with the African Union.

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[6] 2007 (4) BCLR 339 (CC) 348.
[7] CORMSA *Background Paper on Access to Social Assistance for Refugees in South Africa* (2011-02-15) 4.

Various factors have led to an increase in the movement of refugees and migrants to South Africa. Historical events in the 1990s, for example the negotiated transition from apartheid, the collapse of socialism, the end of the war in Mozambique, and wars, disasters and famine in other areas of Africa have been crucial factors in the increase of migrants in South Africa.[8] South Africa became a safe haven for refugees and migrants.

The Southern African Development Community (hereinafter referred to as SADC) of which South Africa is a member was formed around this time and was aimed at peace, security and economic growth between Southern African countries. The SADC also developed a 1995 Draft Protocol on Free Movement, but this protocol was not effective and had to be revised. During its revision it was found that in order for the protocol to be successful, it required that citizens be given access to proper travel documents; that policies and documents of the member states be harmonized; that there be integrated information systems; and that participating states acquire the necessary capacity to facilitate and monitor the movement of persons across borders. It is submitted that these requirements were essential in that it allowed states to monitor movement of persons.

The final Constitution of the Republic of South Africa was signed in 1996, and it included the protection on human rights for all citizens and it was also extended to the human rights of refugees and migrants within the South African border. Since 1996 more laws were enacted to give effect to the rights of refugees and migrants, and these laws are discussed below.

2 2 Legislation applicable to refugees and migrants in South Africa

2 2 1 The Constitution of South Africa

As a point of departure, the constitution of any country will provide fundamental human rights protection for the citizens of that country. In South Africa the Constitution of the Republic of South Africa Act[9] (hereinafter referred to as the Constitution) fulfils this purpose.

Chapter 2 of the Constitution, more particularly section 7(1)[10] provides for the protection of all people within South Africa, and not only for the protection of citizens. The issues relating to

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[8] Trimikliniotis, Gordan & Zondo "Globalisation and Migration Labour in a 'Rainbow Nation: a fortress South Africa?" Vol 29 2008 *Third World Quarterly* 1324.

[9] 108 of 1996.

[10] S 7(1) of the Constitution states as follows:
"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

"citizens" and "permanent residents" were addressed in the Constitutional Court where it was decided that the rights contained in the Bill of Rights extend to all, unless a law of general application limits the reach of the relevant right.[11]

2 2 2 *The Refugees Act*[12]

In addition to the Constitution is the Refugees Act,[13] which was amended by the Refugees Amendment Act.[14] The primary aim of both acts was to ensure that the treatment of refugees in South Africa is in accordance with the standards and principles established in international law. It is for this reason that the definition of a refugee currently used in South Africa, was adopted from the 1951 United Nations Convention (hereinafter referred to as the 1951 Convention). In South Africa a refugee is thus referred to as: any person who was forced to flee his country due to a fear of prosecution or disaster of human origin such as armed conflicts, civil upheavals and generalized violence.[15]

In the case of *Union of Refugee Women* the court correctly stated that the condition of being a refugee has been described as inferring special vulnerability, since refugees are by definition persons in flight from a threat of serious human rights abuse. It is submitted that due to this vulnerable state of refugees, the South African government have granted the following rights to refugees:

1) to apply for a disability and Foster Child grant;[16]

2) to apply for a social relief of distress award;[17]

3) to apply for benefits from the Unemployment Insurance fund;[18]

4) to apply for benefits in terms of the Compensation for Occupational Injury and Disease Act;[19]

5) to claim compensation for work done for an employer;[20]

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[11] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development & others* 2004 (6) BCLR 559 (CC) 590 and 611.
[12] 130 of 1998.
[13] *Ibid*.
[14] 21 of 2008.
[15] The Refugees Act 130 of 1998.
[16] CORMSA *Background Paper on Access to Social Assistance for Refugees supra.*
[17] *Ibid.*
[18] S 12 of Act 63 of 2001.
[19] S 20 of Act 130 of 1993.

6) to demand fair labour treatment practice in the workplace;[21]

7) to claim for payment of compensation in accordance with the Road Accident Fund Act;[22]

8) to access healthcare services;[23]

9) to access education at public schools.[24]

2 2 3 *The Immigration Act*[25]

Distinguishing between refugees and migrants is essential, in order to have a clear understanding of the legal meaning attached to persons regarded as refugees and migrants. Migration involves the movement of individuals over space and the change of an individual's place of residence.[26]

The Aliens Control Act 96 of 1991 initially regulated the application for immigration permits; however, these applications are now done in terms of the Immigration Act 13 of 2002. The latter act also regulates the entry and deportation of foreigners in South Africa as well as to provide the penalty for late applications. Although the Immigration Act 13 of 2002 does not explicitly make provision for the rights listed above, section 2 (1) (l) of the Act[27] is a commitment to refugee protection.

2 2 4 *The Social Assistance Act*[28]

In so far as the right to social security is concerned, section 27(1) (c) of the Constitution[29] is used as a guideline in determining who is entitled to social security. This section includes everyone within the South African borders, irrespective of whether a citizen or not. However, is this what the legislature intended? In response to this question a cross reference should be

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[20] The Basic Conditions of Employment Act 75 of 1997.
[21] The Labour Relations Act 66 of 1995.
[22] S 17 of Act 56 of 1996.
[23] S 27(1) of Act 108 of 1996.
[24] S 29 of Act 108 of 1996.
[25] 13 of 2002.
[26] Casale and Posel *Migration and remittances in South Africa* (2006) 2.
[27] S 2(1)(l) of the Immigration Act states as follows:
"In the administration of this Act, the Department shall pursue the following objectives:
(l) administering refugee protection and related legislation".
[28] 13 of 2004.
[29] S 27(1)(c) of the Constitution states as follows:
"everyone has a right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance".

made to Chapter 2 of the Constitution, which refers to all individuals in South Africa that subsequently includes refugees and migrants in South Africa.

The right to social assistance is further regulated by the Social Assistance Act 13 of 2004, which is primarily aimed at the administration and payment of social grants. Section 2(1)[30] specifically includes everyone that resides in South Africa, and thus includes refugees and migrants. However, it is submitted that this section is too broad as various factors have to be taken into account, before social assistance can be available to all foreigners. A detailed discussion of this aspect follows in the next chapter.

2 2 5 *The Labour Relations Act*[31]

Labour relationships between an employer and an employee in South Africa are primarily governed by the Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA). Incorporated into the LRA is section 23 of the Constitution which entitles everyone to have a right to fair labour practices, and this includes foreigners. Furthermore section 213 of the LRA defines an employee:

a. as any person, excluding an independent contractor who works for another person or for the state and who receives or is entitled to receive any remuneration and

b. any person who in any manner assists in carrying on or conducting the business of an employee."

This definition has brought about different views and the courts have developed various tests to distinguish an employee from an independent contractor. It was also proposed that this definition be amended as follows: employee means any person employed by or working for an employer, who receives or is entitled to receive any remuneration, reward or benefit and works under the direction or supervision of an employer."[32]

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[30] S 2(1) of the Social Assistance Act states as follows:
"This Act applies to a person who is not a South African citizen, if an agreement, contemplated in section 231 (2) of the Constitution, between the Republic and the country of which that person is a citizen makes provision for this Act to apply to a citizen of that country who resides in the Republic."

[31] 66 of 1995.

[32] GN 1112 in *GG* 33873 of 2010-12-17.

It is submitted that this amendment, if it becomes law, will substantially affect the rights of workers in South Africa as it places a limitation on who can qualify as an employee.

2 2 6 *Other relevant labour legislation*

In addition to the LRA and the Constitution, an employment relationship is also governed by other pieces of legislation.[33] It appears that the Department of Labour, with the publication of the new labour bills, intends to amend not only the LRA but also other labour legislation.

The key areas of amendments to the LRA and the BCEA focus on addressing what is now commonly referred to as the phenomenon on the last two sets of labour broking; improve the functioning of the institutions in the labour market such as the Commission for Conciliation Mediation and Arbitration (CCMA), the Labour Courts, regulating contract work; strikes and lock-outs; essential services; organisational rights and collective bargaining; chilled labour and strengthening the inspectorate.[34]

2 3 Application processes

The common, often uninformed, understanding among foreigners is that in order to have rights and benefits in South Africa, a foreigner must have status in South Africa. Refugees apply for an asylum seeker permit in terms of the Refugees Act[35] and migrants apply for permits in terms of the Immigration Act.[36] The application processes of each of these categories will now be discussed.

2 3 1 *Application for asylum seeker permit*

Section 8 of the Refugees Act imposes a duty on the Director-General of the Department to establish many refugee reception offices in the Republic of South Africa as he may deem necessary, and to appoint at least one adequately trained refugee reception officer and at least one similarly trained status determination officer in each such office.[37] Applications for asylum

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[33] The Basic Conditions of Employment Act 75 of 1997; The Occupational Health and Safety Act 85 of 1993; The Employment Equity Act 55 of 1998 and the Skills Development Act 97 of 1998.
[34] Anonymous "Amendments to the LRA and BCEA" http://www.labourguide.co.za/most-recent-publications/amendments-to-the-lra-and-the-bcea (accessed 2012-06-14).
[35] 130 of 1998.
[36] 13 of 2002.
[37] *Kiliko v Minister of Home Affairs* [2007] 1 ALL SA 97 (C).

seeker permits can only be lodged at refugee reception offices within South Africa, however, challenges arise due to the shortage of these offices.

Applications for asylum seeker permits are done in terms of section 21 of the Refugees Act and section 21(1)[38] requires that the application be done in person. The idea with this section was to prevent fraud and to ensure that the applicant can verify the details provided in the application forms. Based on the strength of the reasons provided and the evidence presented, an asylum seeker permit will be granted.

Understanding the significance of an asylum seeker permit is important for foreigners. It does not only grant foreigners a right to remain in the country, but it also entitles foreigners to most of the rights applicable to South African citizens. It is submitted that this important fact should be brought to the attention of all applicants at the Refugee reception offices.

The State, under international law, is obliged to respect the basic human rights of any foreigner who has entered its territory and any such person is in terms of the South African Constitution, entitled to all the fundamental rights entrenched in the Bill of Rights, save to those expressly restricted to South African citizens.[39] This means that the South African government is bound by both its own constitution, as well as international law, to protect the basic human rights of all individuals within its territory.

2 3 2 *Application for immigration permits*

Migration takes various forms. It can either be voluntary or involuntary; internal or external and permanent or temporary. The Immigration Act[40] regulates the application for all these permits.

Whereas refugee permits have to be applied for in the host country[41], applications for immigration permits have to be applied for within the country of origin, at the Embassy offices of

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[38] Section 21(1) of the Refugees Act states as follows:
"An application for asylum must be done in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office".

[39] *Kiliko v Minister of Home Affairs supra.*

[40] 13 of 2002.

[41] Anonymous "A nation in which representatives or organizations of another state are present because of government invitation and/or international agreement." http://www.thefreedictionary.com/host+country (accessed 2012-08-17).

the intended host country. Section 9(4)[42] of the act specifies the grounds on which a foreigner can enter the country.

In South Africa, the movement of people from rural to urban areas in the country was an integral part of labour market participation and of individual and household livelihood strategies.[43] It is submitted that the need for employment played a vital role in the migration of individuals from one area in South Africa to another, as individuals generally moved to the areas where a need for employment arose.

2 4 Conclusion

Although South Africa was once a preferred country for refugees and migrants, the situation has now changed. South African citizens have either ignored or misunderstood the rights provided to foreigners by the Constitution, as well as the Refugees act and the LRA, and often this result in litigation against the government.

In addition to this, the administrative challenges faced by the Refugee Reception offices also contribute to the frustration of all parties involved. It is submitted that the employee shortages and backlogs experienced at these offices, often lead to foreigners staying on illegally in the country or entering the labour market illegally.

In the case of *Somali Association for SA, Eastern Cape v Minister of Home Affairs*[44] the applicants launched an urgent application to have the decision to close the Port Elizabeth Refugee Reception office without opening a suitable alternative office within the area, be declared unlawful, to be reviewed and to be set aside.

The applicants took the matter to the High court. The issue to be decided was whether the closure of the office without prior consultation with the Standing Committee, constituted administrative action. After referring to the provisions of the Refugees Act,[45] the court made a ruling that the closure of the office without having first consulted with the Standing Committee is unlawful and falls to be set aside.

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[42] Section 9(4) of the Immigration Act states as follows:
"A foreigner who is not the holder of a permanent residence permit may only enter the Republic as contemplated in this section if-
(a) his or her passport is valid for not less then 30 days after the expiry of the intended stay; and
(b) issued with a valid temporary residence permit, as set out in this Act".

[43] Casale and Posel *Migration and remittances in South Africa* 2006 2.

[44] [2012] JOL 28458 (ECP)

[45] Section 8, 21(1) and 22 of 1998

The failure by government to provide proper service to foreigners, more particular the service rendered at the Refugee reception offices, gives rise to unequal treatment of foreigners. The next chapters deal with the right to equality of refugees and migrants, particularly in as far as it relates to social assistance and the labour market.

CHAPTER 3

THE PRINCIPLE OF EQUALITY IN RELATION TO REFUGEES AND MIGRANTS

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."[46]

3 1 Introduction

A common understanding of equal treatment relates to everyone having equal rights. In the South African context it includes equal treatment of males and females, pregnant women, disabled persons and equal treatment on other grounds provided in Section 9(3) of the Constitution.[47]

Race, ethnic or social origin is grounds protected by the Constitution, but these are nonetheless the grounds upon which foreigners are discriminated. South African citizens deem it unfair if a foreigner gets employed in the country, but foreigners are also targets if they are self-employed. This relates to the issue of morality, which is discussed hereunder.

Article 3 of the 1951 Refugee Convention[48] states: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." This article imposes a duty on South Africa as the contracting state, to protect refugees against any form of discrimination.

3 2 Relationship between law and morality

Distinguishing between law and morality is important as these two concepts often overlap. The term morality can be used descriptively to refer to a code of conduct put forward by a society or, some other group, such as a religion, or accepted by an individual for her own behaviour or normatively to refer to a code of conduct that, given specified conditions, would be put forward by all rational persons.[49] Laws on the other hand are often evaluated on moral grounds and

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[46] Section 9(1) of the Constitution, 1996

[47] Section 9(3) of the Constitution states as follows:
"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

[48] Anonymous "Refugees and Stateless Persons" http://dpwlexisint01/nxt/gateway.dll/2b/0c/noa/7oa (accessed 2012-07-09).

[49] Salim *The Consequences of Unlawful and Prohibited Contracts of Employment in Labour law* (2009) 21-22.

wrongful conduct is punishable. In the case of morality there is no prescribed sanction for wrongful conduct.

To a large extent, morality plays a role in the treatment of foreigners by South African citizens. Morality dictates that it is unfair of foreigners to get employment in a host country, when there are suitable candidates within the host country. Legally, it is not wrong for a foreigner to be employed in the host country but society regards such conduct as morally unacceptable.

Notwithstanding the views on morality, when a foreigner is legally employed in a host country, that employment relationship becomes the starting point for the application of the LRA and section 23 of the Constitution. Legal foreigners therefore have a right to equal protection and benefits of the labour laws.

3 3 The right to social security

Section 27 (1) (c) of the Constitution provides the right of access to social security and section 5(1) (c) of the Social Assistance Act[50] extends to citizens as well as non-citizens. The question that has to be answered is whether this scope includes both legal and illegal foreigners.

This right of access to social security is granted to ”everyone”, and as such the right to equality entrenched in section 9 of the Constitution is directly engaged. Noting that this right to equality extends to all individuals is important, whether legal or illegal in the country.

The White Paper on International Migration has recognized that there is no constitutional basis for excluding the application of the Bill of Rights, *in toto*, based on the status of a person in South Africa – including illegal immigrants.[51] This document therefore implies that illegal foreigners are equally entitled to social assistance as legal foreigners.

3 3 1 *Key authority on a foreigners right to social assistance*

In *Khosa v Minister of Social Development*[52] the court discussed this argument in detail. The court looked at whether restricting the payment of social assistance benefits to citizens is a

[50] S5(1)(c) of the Social Assistance Act states as follows:
“A person is entitled to the appropriate social assistance if he or she is a South African citizen or is a member of a group or category of persons prescribed by the Minister, with the concurrence of the Minister of Finance, by notice in the Gazette”.
[51] Oliver, Smit and Kalula *Social* Security*: A Legal Analysis* (2003) 99.
[52] 2004 (6) BLCR 569 (CC).

permissible limitation of the constitutional right to equality, of non-citizens resident in South Africa.

The applicant in this case is a Mozambican citizen who has permanent resident status in South Africa. This applicant would have qualified for social assistance in terms of the Social Assistance act, but for the fact that he is not a South African citizen. The constitutionality of section 3 (c)[53] of the act was therefore challenged.

A further case that challenged the inclusion of "citizen" and not "permanent resident" is that of *Mahlaule v Minister of Social Development*[54]*.* This case took the matter further to challenge the constitutionality of both subsection 3(c) as well as section 4(b) (ii)[55] of the Act.

In the latter case the applicant applied for child-support grant for her two minor children, but she was not permitted to apply on the basis that she was not a South African citizen. The diabetic child of the applicant would under normal circumstances have qualified for care-dependency grant, but that child too was excluded because of the child's status.

These cases were consolidated for hearing as both challenged the validity of the exclusion of permanent residents from eligibility for social assistance. The court looked at whether the exclusion of non-citizens was inconsistent with the State's obligation to provide access to social security to everyone, in terms of section 27 (1) (c) of the Constitution.

In assessing whether the limitation was justified, the court considered the reasonableness of the limitation. The argument was that it is a requirement to show self-sufficiency in order to qualify for permanent residence status. It was furthermore argued that the limitation is merely temporary as citizenship can be obtained after five year when they would qualify for this right.

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[53] Section 3(c) of the Social Assistance Act states:
"Subject to the provisions of this Act, any person shall be entitled to the appropriate social grant if he satisfies the Director-General that he-
(c) is a South African citizen; and".

[54] 2004 (6) BLCR 569 (CC).

[55] Section 4 of the Social Assistance Act states:
"Subject to the provisions of this Act, any person shall be entitled to a child-support grant if that person satisfies the Director-General that-
(a) he or she is the primary care-giver of a child; and
(b) he or she and that child –
(i) are resident in the Republic at the time of the application for the grant in question;
(ii) are South African citizens; and
(iii) comply with the prescribed conditions."

In considering whether the exclusion was reasonable, it was relevant to have regard to the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose[56]. In essence, the question that now remains is whether the word "citizen" has so much value attached to it, that a non-citizen should be denied a fundamental right?

The court held the view that a differentiation on the ground of citizenship, although not listed in section 9 (3) of the Constitution, amounted to discrimination. It went further to state the discrimination amounted to unequal treatment as both citizens and permanent residents contributed to the welfare system through the payment of taxes. The High Court concluded that both section 3 (c) and section 4 (b) (ii) were invalid and inconsistent with the Constitution.

However on appeal the court held that the State was justified in limiting social assistance to citizens, in terms of section 3(c) of the act. The appeal court held that the obligation on the State in terms of section 27(2) of the Constitution is limited to considering reasonable legislative and other measures. Upon an evaluation of the evidence the appeal court found that the limitation was justified, as it was only for a period of five years, which such period can be waived in exceptional circumstances. The court confirmed the order in respect of section 4(b) (ii), and found that section 3 (c) of the Act was not invalid and inconsistent with the Constitution.

3 3 2 *Section 27 of the Constitution*

In so much as section 27 (1) (c) allows for the right of access to social assistance to everyone, it should be read in conjunction with section 27 (2)[57] which places a limitation on that right. Although section 36 of the Constitution[58] is the general limitation clause, an enquiry into the right to social assistance should be done in terms of the internal limitation clause, section 27 (2).

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[56] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development supra.*

[57] Section 27(2) of the Constitution states:
"The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of those rights".

[58] Section 36 of the Constitution states:
"(1) The right in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity , equality and freedom, taking into account all relevant factors, including –
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".

In principle, an enquiry in terms of section 27 (2) should have the same outcome as an enquiry in terms of section 36.

The words "take reasonable legislative and other measures, within its available resources, to achieve progressive realisation" in section 27 (2) places a duty on the State to use alternative measures to meet its obligations in terms of section 27 (1) (c). The State's obligation therefore consists of three elements:

(i) *Take reasonable legislative and other measures*

In the case of *Government of the Republic of South Africa v Grootboom*[59] the court held that in considering reasonableness the court will look at whether the measures adopted were reasonable and also that it is supported by appropriated policies and programs. In laymen's terms, the alternative measures used by the State to realize a right, should coincide to State's policies and programs.

(ii) *Progressive realisation of the right*

Article 2(1) of the International Covenant on Economic Social and Cultural Rights stressed that the requirement of progressive realization "imposes an obligation to move as expeditiously and effectively as possible towards the goal".[60] In the *Grootboom* case it was held that the accessibility to the right must be progressively facilitated and any hurdles should be examined and possibly lowered. It is therefore submitted that speedy and effective steps should be taken by the State to realise the right, in this instance to provide social assistance to applicants.

(iii) *Within its available resources*

In essence this element requires that there be a balance between the goal and the means. The State can only work with the resources available and cannot be expected to do more than what its available resources permit. In the *Khoza* case the court looked at the financial implications an inclusion of permanent residents would have on expenditure. It is submitted that this element is crucial as the resources provided by National Treasury should first be used to look at the need of citizens. If there are no resources available to provide for permanent residents, the State cannot be held accountable.

[59] 2000 (11) BCLR 1169 (CC).
[60] Olivier, Smit and Kalula *Social Security* 74.

In light of the above, it is submitted that section 3 (c) of the Social Assistance Act was not invalid and inconsistent with the constitution. Any state has to first, care for the needs of its citizens, and also has to look at the impact that the payment of social assistance to non-citizens will have on State Finance. A further important factor to note is that once the five years have expired, a permanent resident can apply for citizenship and will then qualify for this right.

The crucial question is whether social security benefits should be made available to every person who is within our borders.[61] It is submitted that the limitation of the right is justified, as the Social Assistance act is primarily aimed at alleviating poverty within the South African society. Permanent residents are regarded as being self-sufficient and as such, they should not become a burden on the state. By limiting this right South Africa can protect itself against foreigners becoming financial burdens to the country.

It is furthermore submitted that the court correctly found that section 4 (b) (ii) is an unjustified limitation on the children's right to social assistance. Children are by definition dependant on parents and as such are not self-sufficient. The limitation is a denial of support to children in need and is an infringement of their rights under section 28 (1) (c) of the Constitution[62]

In the *Lukhoff* case[63] the court unequivocally accepted that the State is the primary duty-bearer of all children who are in its care. The court acknowledged that children have a right to parental care in the first place and only when that is lacking, does the right of alternative care by the state kicks in. This case included both citizen and non-citizen children.

Whereas a right of access is granted to other socio-economic rights, subject to progressive realization by the state within its available resources, the rights pertaining to children do not have any such limitation.[64] Due to their vulnerable state children are always in need of protection. The best interest of the child is of paramount importance, and as such the court's decision in the *Mahlaule* case that a limitation of a child's right to social assistance is a violation of their fundamental human rights, is correct.

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[61] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development supra.*
[62] Section 28(1)(c) of the Constitution states:
"Every child has the right to basic nutrition, shelter, basic health care services and social services".
[63] *Centre for Child Law vs The MEC of The Gauteng Department of Social Development* TPD 2004 Case no 22866/04.
[64] *LAWSA XIII Constitutional imperative* par 242.

3 3 3 *The importance of international law*

International law regulates relationships between states. In terms of the broader definition international law also regulates relationships between international organizations, states and individuals at international level. Non-citizens in South Africa thus qualify as individuals at international level.

The international community has a long-standing tradition of improving standards for non-citizen migrants in national social security law.[65] South Africa has ratified various conventions[66] aimed at protecting non-citizens right of access to social assistance, and is legally bound by the obligations imposed by these conventions.

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[67] This is referred to as an "international law-friendly approach". On matters of non-citizens a court is thus required to consider international law and act consistently to it.

A foreigner's right to social security is further protected by Article 24 (1) (b) of the Convention Relating to the Status of Refugees.[68] This convention however, does not refer to illegal foreigners and it raises the question if such foreigners are entitled to social security. It is submitted that this convention is one-sided in that it deals with and allows for the right to social security only to legal foreigners. It is furthermore argued that it indirectly discriminates against illegal foreigners.

In the *Grootboom* case the court recognized the importance of international law. The court emphasized that international law was significant in the interpretation of sections 26(2) and 27 (2) of the Constitution. Even section 36(1) of the Constitution imports international law. The requirement that a right "may be limited … to the extent that the limitation is reasonable and

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[65] Oliver, Smit and Kalula *Social Security* 624.

[66] The United Nations Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women; the African Charter on Human and People's Rights; and the African Charter on the Rights and Welfare of the Child.

[67] Section 233 of Act 108 of 1996.

[68] Article 24(1) states:
"The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:
(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, Sickness, disability, old age, death, unemployment, family responsibility and any other contingency, which according to national laws or regulations, is covered by a social security scheme).

justifiable in an open and democratic society based on human dignity, equality and freedom", requires a comparative study on how different democratic states treat similar rights.

International co-operation requires international human rights, as well as social and labour policy, to be considered.[69] It is submitted that this statement is correct, in that having international co-operation amongst countries will be difficult, if international human rights and other relevant policies are not considered.

3 4 Access to the Refugee reception centres

Applications for asylum are done in terms of section 21 of the Refugees Act.[70] The asylum applicant can make the application at any one of the five Refugee Reception offices in South Africa, being Pretoria, Braamfontein, Durban, Port Elizabeth and Cape Town.[71]

Although these terms are often confused with one another, it is important that a distinction be drawn between a 'refugee' and an 'asylum seeker'. In principle, an asylum seeker is an application for recognition as a refugee, and a refugee is a person who fled his country for one or other condition or reason and who cannot be protected by his government.

This distinction is important when determining the test applicable. In applying for asylum in many countries, the refugee must pass the 'internal flight alternative' test that asks: 'Could you have hidden anywhere else in your country; did you really have to flee your country?'[72] On the other hand, for a refugee application the 'safe third country' test is applicable which looks at whether the refugee could have applied for asylum in any other country on route to the host country.

In summary, an asylum applicant fills out the prescribed forms to set out his claim. The application is assessed by a Status Determination officer and the applicant may be invited back if further information is needed to clarify the application. In terms of section 22 (1) of the Refugees Act[73] the applicant is given an asylum seeker permit pending the finalization of the application.

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[69] Oliver, Smit and Kalula *Social Security* 622.
[70] 130 of 1998.
[71] Watters *Knocking on South Africa's door* 2002 De Rebus.
[72] Watters 2002 De Rebus.
[73] Section 22(1) of the Refugees Act states:
"The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn

This process sounds simple enough, but problems are encountered even before the application process gets on the way. Firstly, applicants experience difficulty in accessing the Refugee Reception offices, and secondly, the assistance provided at these offices is of poor quality. It is submitted that this statement is true, as is evident from the case studies discussed hereunder.

3 4 1 *The effect of delays at Refugee Reception offices*

In the case of *Zimbabwe Exiles Forum v Minister of Home Affairs*[74] the applicants were arrested and detained for failure to present asylum seeker permits upon request. The applicants contended that they applied for these permits, but due to the long queues and delays at the Refugee Reception offices, have not received same.

The court criticized the failure of the immigration officers to verify the applications by the applicants, and held that it negatively infringed on the freedom and security of the applicants. On the issue of access to the Refugee Reception offices, the court stated: "it is simply untenable in a constitutional democracy that someone should have to give up their liberty on account of administrative difficulties or inefficiencies by an organ of State."[75]

It is agreed with the finding by the court. It is unfair to the applicants that their freedom of movement is infringed upon, as a result of a delay that is out of their control. Subsequent to this, section 38 (1) (e) of the Refugees Act[76] provides for special regulations to be made that allows an asylum seeker to stay in the country while the application is considered. The arrest of the applicants thus constitutes an infringement of their fundamental human rights provided in Chapter 2 of the Constitution.

In the case of *Bula v Minister of Home Affairs*[77] the court held that regulation 2(2) of the Refugees Regulation makes it clear that once there is an indication by an individual that he or she intends to apply for asylum, then that individual is entitled to receive a permit valid for 14 days, within which an application must be lodged at the Refugee Reception office. It is therefore submitted that even in terms of this regulation, the allegation by the applicants in the *Zimbabwe*

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in the Republic temporary, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception officer on the permit".

[74] 27294/2008 2011 ZAGPPHC 29 2011-02-17.

[75] *Zimbabwe Exile Forum v Minister of Home Affairs and others* 2011 par 32.

[76] Section 38(1)(e) of the Refugees Act states:
"The Minister may make regulations relating to the conditions of sojourn in the Republic of an asylum seeker, while his or her application is under consideration."

[77] [2012] 2 All SA 1 (SCA).

Exile Forum case that they applied for asylum seeker permits, should have sufficed as an intention to apply and they should have been granted the 14 days allowed for in the legislation.

3 4 2 *Assistance at Refugee Reception offices*

Section 8 (2) (b) of the Refugees Act[78] provides for qualified refugee reception officers to assist applicants at the Refugee Reception Offices. It is a prerequisite that these officials should have knowledge and experience in refugee matters. This requirement is justified, in that experienced officers can distinguish between relevant and irrelevant information for the application purposes, and they can assist applicants accordingly.

It is worth mentioning that this section is not always complied with. A problem often experienced at these offices is the lack of interpretation services. It is a well-known fact that applicants at Refugee offices come from various countries and as such would speak different languages. It is therefore submitted that an interpreter should be permanently employed at such offices to accommodate all applicants and to comply with section 8 of the Refugees Act.

In the case of *Katsshingu v Chairperson of Standing Committee for refugees Affairs*[79] the applicant argued that no interpretation services were provided at the Refugee Reception Centre and as such he did not understand the questions on the application form. The court confirmed that it was clear from the manner in which the application form was filled out, that the applicant was not assisted.

When considering an application, the Refugee Status Determination officer must have due regard for the rights set out in section 33 of the Constitution and in particular ensure that the applicant fully understands the procedure, his or her rights and responsibilities and the evidence presented.[80] In the case under discussion this section was not complied with.

In addition to this, Refugee Regulation 5 also imposes a duty on the Department of Home affairs to provide competent interpretation for applicants at all stages of the asylum process. This regulation aims to eliminate issues that might be raised with regards to the fairness of the procedures.

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[78] Section 8(2)(b) of the Refugees Act states:
"Each Refugee Reception office must consist of at least one Refugee Reception Officer and one Refugee Status Determination Officer who must have such qualifications, experience and knowledge of refugee matters as makes them capable of performing their functions."

[79] (19726/2010) [2011] ZAWCHC 480 (2011-11-02).

[80] *Katsshingu v Chairperson of Standing Committee for refugees Affairs* 2011

Initially the application was dismissed and the applicant's asylum seeker permit was withdrawn. The applicant was informed in writing that he could make representations before the Standing committee as to why the application should be reviewed, and this writing was once again in English. Furthermore proceedings at the review application were also in English without the assistance of an interpreter and the court held that such action was procedurally and substantively unfair. The applicant's rights in terms of section 33 of the Constitution were thus infringed upon.

Apart from section 33 of the Constitution, it is submitted that section 9(3)[81] of the Constitution is also of importance. Language is specifically listed as one of the grounds in section 9 (3) of the Constitution. In the case under discussion the applicant was discriminated against on the ground of language, as the proceedings were conducted in English without interpreting service. It is therefore submitted that this is a clear violation of the applicant's right to equality.

3 5 Conclusion

As an inherent human right, the right to equality of every individual should be protected. International treatises are ratified to ensure all human rights are protected, irrespective of race, origin or culture.

The right to social assistance is of fundamental importance, and the Constitution places a duty on the state to take positive measures to give effect to this right. Furthermore, one of the aims of the Constitution is to "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights."[82] It is submitted that a huge part of this healing process is to start by treating all individuals within the country equally.

The limitation in terms of s 27(2) of the Constitution is justified, if one has regard to the limited resources available as opposed to the number of foreigners in the country. In addition to this, the limitation is merely of a temporary nature as a permanent resident will become eligible for the right within five years. As such foreigners are not permanently excluded from this benefit.

As far as access to the refugee reception offices are concerned, various judgments were passed on this matter. In the *Zimbabwe Exiles forum case* the court held that it was

[81] *Ibid.*
[82] Preamble of the Constitution of the Republic of South Africa Act 108 of 1996.

unacceptable that an applicant should be arrested, due to the failure of the Refugee Reception office to timeously issue the permits.

The service provided at these offices also led to litigation. Qualified and experienced refugee reception officers are not always available to assist with application forms and even interpretation services are not available. A failure by the state to provide experienced refugee reception officers as well as interpretation services, often leads to an infringement of section 33, as well as section 9(3) of the Constitution.

On the other hand, discrimination also surfaces in the South African labour market. Foreigners, whether qualified or unqualified, legal or illegal, are often victims of exploitation and this aspect will be discussed in the next chapter.

CHAPTER 4

REFUGEES AND MIGRANTS IN THE SOUTH AFRICAN LABOUR MARKET

"To the extent that the scope of the right to fair labour practices can justifiably exclude those doing illegal work, the equality value has been taken into account. In other words, the dignity and equality values are not values that are assessed independently. They are inextricably part of the analysis of the impact of the rule of law on the scope of the right to fair labour practices."[83]

4 1 Introduction

This chapter focuses on the rights of refugees and migrants in the labour market. In order to understand the link between this topic and the other themes discussed in this document, reiterating that foreigners have a right to work in South Africa is important, and they are equally entitled to fair labour practices in South Africa. The right to dignity and equality are inherently part of the constitutional right to fair labour practices.[84]

There is a material difference between those foreigners that are legally and those that are illegally in the country, specifically in relation to the rights that they are entitled to. While foreigners legally in the country have secured important court victories[85], there have also been defeats suffered by illegal foreigners in as far as their access to the protection against unfair dismissal is concerned.

A major source of South Africa's public international law obligations, in respect of labour law are the conventions and recommendations of the ILO. The ILO has built up a set of principles that regulate labour matters, through the numerous conventions and recommendations.[86] A refugee and migrant's right to work in South Africa are entrenched in article 23 of the International Code of Rights.[87]

Section 23 (1) of the Constitution[88] as well as section 27 (f) of the Refugees Act[89] allows for refugees with a legal status to be employed in South Africa. Furthermore the preamble of the

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[83] *Kylie v CCMA* (2008) JOL 22261 (LC).
[84] Section 23 of Act 108 of 1996.
[85] See for example *Minister of Home Affairs & others v Watchenuka & another* 2004 (2) BLLR 120 (SCA) and *Larbi-Odam v Member of the Executive Council for Education (North West Province)* 1997 (12) BCLR 1655 (CC).
[86] Basson, Christianson, Gabers, le Roux, Mischke and Strydom *Essential Labour Law* (2005) 13.
[87] Article 23(1) of the International Code of Rights states:
"Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment".
[88] Section 23 (1) of the Constitution states:
"Everyone has the right to fair labour practices".
[89] Section 27(f) of the Refugees Act states:

Immigration Act provides that the act aims to put a system on immigration controls in place that will ensure 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.[90] Whether this aim is achieved is not yet clear, especially if one has regard to the various xenophobic attacks in the country. Section 2 (j) and (i) of the Immigration Act[91] furthermore makes provision for the employment of foreigners in the country.

The right to fair labour practice is a fundamental human right and as such should be respected and protected by all parties to an employment relationship. Foreigners, especially those whose presence is illegal are vulnerable not only to a growing culture of xenophobia but also to abuse and exploitation in the workplace.[92]

The exploitations of foreign workers often arise due to the misapprehension of employers that illegal immigrants or employees have no legal rights in South Africa and have no recourse to labour law. It is submitted that this view is flawed for various reasons. A case study follows, which shall illustrate these reasons.

The purpose of this chapter is to determine whether labour rights are applicable to illegal foreigners, and also whether the illegal status automatically excludes a foreigner from the application of labour laws.

4 2 Laws regulating foreigners right to work in South Africa

4 2 1 *Article 23 (3) of the International Code of Rights*

Article 23 (3) of the International Code of Rights states: "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection."[93] This article coincides with section 27 (1) (c) of the Constitution that allows for social security to be applicable to those who cannot support themselves.

"A refugee is entitled to seek employment".

[90] Paragraph (i) Preamble to the Immigration Act 13 of 2002.

[91] Section 2(j)(i) of the Immigration Act states:
"In the administration of this Act, the Department shall pursue the following objectives:
(j) regulating the influx of foreigners and residents in the Republic to-
(i) promote economic growth, *inter alia*, by-
(*aa*) ensuring that businesses in the Republic may employ foreigners who are needed".

[92] Norton "The Position of Illegal Foreign Workers and Emerging Labour Law Jurisprudence" 2009 ILJ 66.

[93] Anonymous "International Code of Rights" http://dpwlexisint01/nxt/gateway.dll/2b/0c/joa/uoa (accessed 2012-08-30).

In the previous chapter it was discussed at length that a foreigner has to show self sufficiency in order to obtain permanent residence. It is therefore submitted that foreigners can prove self sufficiency by means of employment and by earning an income, which will enable them to ensure an existence worthy of human dignity. Allowing asylum seekers to work prevents them from needing government assistance, which they will need if they are unable to support themselves. It is thus submitted that if section 27 (1) (c) is correctly interpreted; it encourages foreigners to work and earn an income, instead of relying of social assistance.

Article 23 (4)[94] takes the matter even further in that it gives foreigners the right to join trade unions, in order to protect their interests. Section 23 (2) of the Constitution also gives effect to this right and it is submitted that the need for foreigners themselves to protect their interest in an employment relationship was recognized even at international level.

4 2 2 *Conventions of the ILO*

Over the years, international labour standards in the form of ILO Conventions have played a formative role in the development of South African labour law.[95] Courts do often, when faced with labour disputes, look at the principles contained in the Conventions and recommendations of the ILO for guidance, in situations where there are no clear principles to guide it.

In the case of *Discovery Health Ltd v CCMA*[96] the court pointed out that the protection of the fundamental rights of migrants, even those illegally employed, is a primary purpose of the International Convention and Convention 143, and the LRA should be interpreted in a manner that recognizes that purpose.

The principles relating to the procedural fairness in the case of a dismissal were derived from Article 7 of the Termination of Employment Convention 158 of 1982[97] and section 188 of the LRA now gives effect to these principles. It is submitted that the application of international law, as stated in section 233 of the Constitution[98], is correctly interpreted and recognized in the LRA.

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[94] Article 23(4) of the International Code of Rights states:
"Everyone has the right to form and to join trade unions for the protection of his interest."
[95] Basson *et al Essential Labour Law* 13.
[96] 2008 7 BLLR 633 LC 646.
[97] Article 7 of the Termination of Employment Convention states:
"The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity".
[98] S 233 of the Constitution states:

4 2 3 *Section 23 (1) of the Constitution*[99]

As a general rule from a human rights perspective, employment in South Africa is primarily governed by section 23 of the Constitution. This right is contained in the Bill of Rights, which applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.[100] To this end one of the purposes of the LRA is: "to give effect and to regulate the fundamental human rights conferred by section 27 of the Constitution.[101]

4 2 3 (i) The meaning of "everyone"

Whereas section 23 (1) extends to workers, employers and their respective associations, the question is whether "everyone" includes only people in a valid employment contract. If the answer to this question is yes, then the next question will be: does section 23 (1) apply to an employment agreement where one of the parties has no legal status in the country?

The constitutional argument is that fair labour practice right in section 23 (1) applies to everyone, which in the context of another right is a term of "general import and unrestricted meaning".[102] Some courts have suggested that "everyone" should be interpreted in light of the sentence in section 23 (1). This means that since labour practices arises through a relationship between workers, employers and their respective associations, that "everyone" should only include those parties.

In the *Discovery Health* case an immigrant joined the applicants' company before his work permit was renewed. His work permit expired and the immigrant claimed that the applicant delayed in giving him the documents required to renew his permit. The applicant terminated his employment on the ground that his continued employment was in contravention of section 38 (1) of the Immigration Act.[103]

"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[99] Section 23(1) of the Constitution states:
"Everyone has the right to fair labour practices."

[100] S 8(1) of Act 108 0f 1996.

[101] The LRA was enacted prior to the final Constitution and therefore refers to s 27 of the Interim Constitution, which was replaced by section 23 of the current Constitution.

[102] *Kylie v CCMA supra.*

[103] Section 38(1) of the Immigration Act states:
"No person shall employ-
(a) an illegal foreigner;
(b) a foreigner whose status does not authorize him or her to be employed by such person; or

The applicant argued that the CCMA did not have jurisdiction to hear the matter on the ground that the employment contract was void due to the illegal status of the immigrant and that he was therefore not an employee. The immigrant argued that the LRA's definition of "employee" is based on an employment relationship that goes beyond the existence of a contract of employment. A further argument by the immigrant was that although the contract of employment may have been invalid as a result of him not being in possession of a valid work permit, that invalidity does not extend to the employment relationship.[104]

The Commissioner in his ruling makes no finding on the validity of the contract concluded between the parties, and while reference is made to case law that suggests that the contract was invalid, he focused his decision on the basis of an employment relationship, rather than an employment contract. As a result the CCMA held that as long as an employment relationship existed, it had jurisdiction to consider the matter. This is contrary to the view in *Moses v Safika Holdings (Pty) Ltd*[105] where the traditional view of Commissioners was adopted that due to the nullity of employment contracts concluded by illegal immigrants, they cannot be employees in terms of the LRA.

The applicant took the matter on review and the Labour court was required to decide whether the decision reached by the Commissioner was one, which a reasonable Commissioner could reach. The court had to decide two issues. Firstly, the issue relating to the validity of the contract of employment concluded between the parties. Secondly, if the contract was invalid, whether the definition of "employee" in section 213 of the LRA is necessarily underpinned by a contract of employment.[106]

The court in its argument referred to sections 38 (1) and 49 (3) of the Act[107] and pointed out that neither of these sections specifically provide that a contract of employment concluded without a necessary permit is void and it furthermore does not make it an offence for a person who accepts or perform work without a valid permit.[108] The court further considered the question as to whether the legislature then merely intended to deter employers from breaching

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(c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status".

104 *Discovery Health Limited v CCMA* (2008) 29 *ILJ* 1480 (LC) 1486.

105 (2001) 22 ILJ 1261 (CCMA).

106 *Discovery Health Limited v CCMA supra* 1487.

107 13 of 2002.

108 *Discovery Health Limited v CCMA supra* 1489.

section 38 of the Act, or whether it was intended that employment contracts concluded where one party commits an offence is void.

The fundamental right relevant in this case is the right to fair labour practices.[109] The court held that there is no indication in the Constitution or the Immigration Act that illegally employed foreigners are excluded from section 23 of the Constitution. The court furthermore held that the prohibition against the employment of illegal foreigners does not void an employment contract of such foreigner.

The court concluded that whether or not the contract between the parties was valid or invalid, the immigrant was nonetheless an "employee" as defined in section 213 of the LRA, since that definition does not require a valid and enforceable contract of employment. As a result the LRA and other labour laws are applicable to that contract.

4 2 3 (ii) The meaning of "fair labour practices"

It is important to determine what is meant by "fair labour practices" in order to determine the extent of this constitutional right. There is however no clear definition of this phrase, as its meaning depends on the circumstances of each employment relationship. The constitutional right to fair labour practice may give employees additional rights or it may even have the effect of changing harsh terms and conditions of employment applicable between the employer and the employee.[110]

It is submitted that this right is applicable to all parties within an employment relationship. Like employees, employers also have a right to fair labour practice, and also a trade union member has the right to be fairly represented by the trade union.

In *NEHAWU v University of Cape Town*[111] the court held that it is neither necessary nor desirable to define this concept. In this judgment, Ngcobo J expressed his view that section 23 (1) focuses on the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both parties.

A question often asked is whether there is a strict correlation between the constitutional right to fair labour practice and the unfair labour practice provision in the LRA. This question has not yet

[109] Section 23 of Act 108 of 1996.
[110] Basson *et al Essential Labour Law* 12-13.
[111] (2003) 24 ILJ 95 (CC) par [40].

been addressed by the courts. In the case of *Maseko v Entitlement Express*[112] an employer sought an order declaring that the employee's desertion constituted an unfair labour practice. The Commissioner held that he could only arbitrate disputes where the Act required it and, in terms of the Act, the employer had no means of enforcing its constitutional right to fair labour practices.[113]

Subsequent to that, the High Court in *NAPTOSA v Minister of Education, Western Cape*[114] argued that a reliance on the Constitution should be avoided as this would result in the development of two streams of jurisprudence. If the LRA was found not to give adequate protection to the constitutional right, it was ruled, the appropriate course would be to amend the LRA to give effect to the shortcoming rather than permitting a court to fashion a remedy.[115]

Contrary to this, in *Simela v MEC for Education, Province of the Eastern Cape*[116] the Labour Court in its judgment granted employees the possibility to directly rely on the Constitution when enforcing its right to fair labour practices. It is submitted that the conclusion reached in the *NAPTOSA* case should be adopted, as one of the purposes of the LRA is to give effect to the constitutional right to fair labour practices and if that does not happen then the LRA should be amended to give effect to that shortcoming.

4 3 The contract of employment

A contract of employment is the foundation of the relationship between an employee and his or her employer.[117] When a labour dispute is lodged the courts will generally first look at whether the parties are "employees" and "employers" within the definitions provided in the labour statutes. In principle, the application of labour law rules depends on the existence of an employment contract. If there is no employment contract, labour laws are not applicable.

The contract of employment can be defined as a: "voluntary agreement between two parties in terms of which one party (the employee) places his or her personal services or labour potential

[112] 1997 3 BLLR 317 CCMA.
[113] Du Toit, Bosch, Woolfrey, Cooper, Giles, Bosch and Rossouw *Labour Relations Law A Comprehensive Guide* (2006) 484.
[114] (2001) 22 ILJ 889 (C).
[115] Du Toit *et al Labour Relations Law A Comprehensive Guide* 484.
[116] [2001] 9 BLLR 1085 (LC) par 56.
[117] Basson *et al Essential Labour Law* 19.

at the disposal and under the control of the other party (the employer) in exchange for some form of remuneration, which may include money and/or in kind."[118]

This definition does not refer to the status of the parties to the contract; it merely requires the existence of the agreement in order for labour law to be applicable. It is however a requirement that the parties voluntarily enter into the agreement. Where force is used it amounts to forced labour and such a contract is void.

An employment agreement is a contract and, as such, has to comply with the requirements for a valid contract. Generally, employment contracts, which comply with all requirements and that, are not against public policy should be enforced. There are however exceptional cases where the mere existence of an employment contract is sufficient to enforce the right to fair labour practice in section 23 (1) of the Constitution.

In the case of *Georgieva-Deyanova v Craighall Spar*[119] the applicant, a non-South African citizen, worked for the respondent for more than a year without a valid work permit or resident permit. After a year the respondent called on the applicant to provide the required proof of legal documentation, but she failed to comply with the request. The respondent dismissed the applicant based on her failure to provide proof of her legal status.

The applicant took the matter to the CCMA and claimed that she was unfairly dismissed. The issue to be decided was whether there was a valid and binding contract of employment between the parties, irrespective of the fact that the applicant was illegal in the country and did not have status to be employed in the country in terms of section 38 (1) of the Immigration Act.

The CCMA referred to section 38 of the Immigration Act[120] and held that the illegal foreigner could not be regarded as an employee for purposes of the LRA, as the employment relationship was *void ab initio*. This means that the contract was null and void from the onset.

It is submitted that the conclusion reached by the CCMA was incorrect in that it focused on the status of the applicant, as oppose to the fact that an employment relationship existed. The court furthermore disregarded the fact that the applicant was an "employee" in terms of section 213 of the constitution, in that the definition does not require a valid and enforceable employment contract. An employment relationship places duties on both the employee and the employer

[118] *Ibid.*
[119] [2004] 9 BALR 1143 (CCMA).
[120] 13 of 2002.

and it is the responsibility of the employer in terms of section 38 (1) of the Immigration Act, to ensure that it employs foreigners with legal status in the country.

In the *Discovery Health* case the court held that: "The Immigration Act's prohibitions against the employment of so called 'illegal' foreigners do not void the employment contract of such a foreigner."[121] The court furthermore held that it was not the immigrant that contravened the Immigration Act since the wording of the act does not prevent foreigners from accepting employment; it rather prohibits employers from employing certain foreigners. Section 38 (2)[122] of the Immigration Act is placing a duty on an employer to ensure that it does not employ an illegal foreigner.

The court in *Jack v Director-General Department of Environmental Affairs*[123] confirmed the aforementioned view and held that if the parties have reached agreement on all the *essentialia*, a contract of employment will be enforceable on those terms that are agreed. The court furthermore held that a person who has concluded a contract of employment with an employer is protected under labour legislation from the moment the contract is concluded.

There are conflicting views on this aspect. The judgments by the courts in the cases above view the contract concluded between the parties as the primary source to establish the nature of the relationship between the parties. However, there has been a significant change in the emphasis on the employment contract, and the courts now take the view that one must examine factors relevant to identify a relationship, rather than a contract of employment when determining the existence of an employment relationship."[124]

To identify an employment relationship one must first identify the parties to the relationship.

4 3 1 *The definition of an employee*

A seemingly straightforward answer would be that an employee is someone who works for money. This would include any refugee or migrant that renders a service in exchange for

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[121] Isrealstam "Illegal Workers have Labour Law Rights" http://www.polity.org.za/article/illegal-workers-have-labour-law- rights-2012-07-19 (accessed 2012-07-20).

[122] Section 38(2) of the Immigration Act states:
An employer shall make a good faith effort to ascertain that no illegal foreigner is employed by him or her or to ascertain the status or citizenship of those whom he or she employs.

[123] [2003] 1 BLLR 28 (LC) par 22.

[124] Gauss *The Extension of Employment Rights to Employees who work unlawfully* (2011) 13.

remuneration. However, this is a very narrow interpretation of 'an employee', and the courts are inclined to look at a broader approach.

The LRA provides the statutory definition for an employee in section 213 as:

> "(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 person who in any manner assists in carrying on or conducting the business of an employer."[125]

Section 1 of the Employment Equity Act[126] provides an almost identical definition for an employee. Both definitions explicitly exclude independent contractors, yet no reference is made to foreigners as parties to an employment contract. On face value this definition simply means any person who works for another person who is entitled to receive payment for the work done; or any person that helps the employer carry on its business or a person who carries on the business for the employer.

This statutory definition has given rise to much debate. Both the statutory definition and the new "presumption as to who is an employee" are silent on precisely when a job seeker is deemed to fall within the statutory definition.[127]

The statutory definition was examined in *Whitehead v Woolworths (Pty) Ltd*[128] where the respondent offered the applicant permanent employment, but later withdrew the offer and offered a fixed-term contract. The Labour court held that since the statutory definition is cast in the present tense, that applicants for employment only become "employees" once they start working for the employers and are entitled to remuneration, or when they are actually assisting the employer to carry on its business. The court furthermore held that people who conclude employment contracts due to commence at a later date, is not yet entitled to remuneration as they do not assist their future employer.

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[125] S 213 of Act 66 of 1995.

[126] Section 1 of the Employment Equity Act states:
"any person other than an independent contractor who-
(a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
(b) in any manner assists in carrying on or conducting the business of an employer."

[127] Anonymous "The elusive employee New twists in the statutory definition" Employment Law Journal http://dpwlexisint01/nxt/gateway.dll/bc/ke/xp28/89yfa/p94pa?f=document$q=%5Brank%2 (accessed 2012-09-13).

[128] [1999] 8 BLLR 862 (LC).

The matter went on appeal and Zongo J said that an employer is entitled to change his mind between the date of the interview and the date of taking the final decision to appoint a candidate "provided he has not yet made an offer to any of the other candidates."[129] The court thus concluded that the respondent was allowed to change his mind and to make an alternative offer, since the initial offer was not yet accepted by the applicant. In this case the applicant was not yet an employee in terms of the statutory definition in section 213 of the LRA.

The court in the case of *Jack v Director-General Department of Environmental Affairs* confirmed this judgment. The judge held that for purposes of the Basic Conditions of Employment Act[130] (hereinafter referred to as BCEA) an applicant becomes an employee from the moment the contract is concluded, even if the duties and obligations arising from the contract are suspended to a later date.[131]

As pointed out above and in terms of basic contractual law, once an offer is made and the offer is accepted, a contract comes into existence. An applicant for an interview would thus not qualify as an 'employee' in terms of section 213 of the LRA and it is submitted that the view of Zongo J in the *Whitehead v Woolworth's* case is correct.

In so far as paragraph (b) of the statutory definition is concerned, it considers an employee to be any person who assists in carrying on the business of an employer. Sub-paragraph (b) has the consequence that persons who are not engaged in terms of a contract of employment may nevertheless be statutory employees.[132] This second part of the definition recognizes the existence of an employment agreement in the absence of an employment contract.

In the case of *White v Pan Palladium SA (Pty) Ltd*[133] the applicant alleged to have been unfairly dismissed, but the respondent contended that the applicant was an independent contractor. The court looked at the statutory definition of an employee and held that the existence of an employment relationship does not merely depend on the conclusion of a valid and enforceable contract. The court concluded that "someone who works for another, assists that other in his business and receives remuneration may, under the statutory definition, qualify as an employee

[129] *Jack v Director-General Department of Environmental Affairs supra* 31.
[130] 75 of 1997.
[131] Anonymous "The elusive employee New twist in the statutory definition" *supra.*
[132] GN 1774 in *GG* 29445 of 2006-12-01.
[133] (2006) 27 ILJ 2721(LC) 2727J –2728A.

even if the parties inter se have not yet agreed on all the relevant terms of the agreement by which they wish to regulate their contractual relationship."[134]

Contrary to this view the court in *Church of the Province of Southern Africa (Diocese of Cape Town) v CCMA*[135] held that an employment relationship cannot exist unless the parties have entered into a valid contract of service. The court argued that although it is accepted that the protective objective of the Act requires a generous interpretation with regards to the meaning of "employee", it cannot be interpreted to mean that an employment relationship should be forced upon parties who did not intend creating one.[136] This view of the court is accepted as it is trite law that both parties to a contract must have the intention to create the contract. This principle is equally applicable to a contract of employment.

4 3 2 *The presumption as to who is an employee*

In 2002, a new presumption was introduced to the LRA in an attempt to clarify certain issues relating to the statutory definition of an employee. It contains a list of factors, which if it were found present in a particular situation, there would be a statutory presumption of employment.

The effect of this presumption is that if one or more of the list of factors is present, the person is presumed to be an employee – unless, and until, the contrary is proven.[137] This presumption is contained in section 200 A of the LRA[138] and a similar provision appears in section 83 A of the BCEA.[139]

A person who alleges that an employment relationship exists, must prove anyone of the factors listed above and he or she will be presumed an employee. In terms of the principle "he who

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[134] 2728.
[135] [2001] 11 BLLR 1213 (LC) 1225.
[136] *Ibid.*
[137] Basson *et al Essential Labour Law* 29.
[138] Section 200A of the Labour Relations Act states:
"(1) Until the contrary is proved, a person who works for, or renders services to, any person is presumed, regardless of the form of the contract, to be an *employee*, if any one or more of the following factors are present:
(a) the manner in which the person work is subject to the control or direction of another person;
(b) the person's hours of work are subject to the control or direction of another person;
(c) in the case of a person who works for an organization, the person forms part of that organization;
(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
(e) the person is economically dependent on the other person for whom he or she works or renders services;
(f) the person is provided with tools of trade or work equipment by the other person; or
(g) the person only works for or renders services to one person".
[139] 75 of 1997.

alleges must prove", the party who alleges must prove the allegation beyond reasonable doubt. It is for the other party, who denies the existence of an employment relationship, to rebut the presumption.

The application of this presumption is limited in terms of the earning threshold as stipulated in section 6 (3) of the BCEA.[140] In the case of *Van Rooyen v Flintcast Refractories (Pty) Ltd*[141] the court held that since the applicant earned more than the applicable threshold, the presumption of employment in section 200A of the LRA did not apply, though its terms could provide guidance.

Upon a consideration of the facts in both the *Discovery Health* and the *Georgieva – Deyanova* cases, both applicants would fall within the ambit of the presumption of an employee. In both cases factors (a), (b) and (g) of section 200A of the LRA[142] would ordinarily apply, which means that both applicants would be presumed employees and it would have been for the employers to rebut that presumption.

It is thus submitted that even if the court did not find that the applicants were employees in terms of section 213 of the LRA; the applicants would have been presumed to be employees if section 200A was applied, to the extent that the employers were unable to rebut the presumption. What do the facts of each of these cases reveal? It is one thing to be presumed an employee. It is another if that presumption is rebutted, and thus leaving the person without recourse, at least in an employer-employee sense.

4 4 Employment of illegal foreigners

Section 1 of the Immigration Act[143] defines an illegal foreigner as: "a foreigner who is in the Republic in contravention of this Act and includes a prohibited person." At common law an agreement must be legal to constitute a contract. The conclusion and the objectives of the contract must be lawful.[144] Where an agreement is illegal, it will be invalid and will not give rise

[140] S6(3) if the Basic Conditions of Employment Act states:
"The Minister must, on the advice of the Commission, make a determination that excludes the application of this Chapter or any provision of it to any category of employees earning in excess of an amount stated in that determination." As from 1 July 2012 that amount is R183 008.00 per annum.
[141] [2012] 1 BALR 94 (CCMA).
[142] 66 of 1995.
[143] 13 of 2002.
[144] Basson *et al Essential Labour Law* 36.

to obligations. In some instances an illegal agreement will still constitute a contract, but an unenforceable one.[145]

Lack of the required intent and illegality has emerged as two of the most common reasons for the absence of a valid contract, despite the obvious existence of an arrangement to work.[146] Further grounds nullifying an employment contract exists where the contract is *contra bonus mores* or where the performance in terms of the contract is not possible.

The employment of illegal foreigners initially rendered an employment contract invalid, in that it was found to be in contravention with section 38 of the Immigration Act. The courts have now taken a different approach, in that they focused more on the relationship between the parties, as opposed to the status of the foreigners.

Moving beyond the LRA, the position of illegal foreign workers with respect to basic conditions of employment, unemployment benefits, protection against unfair discrimination and workmen's compensation is equally doubtful.[147] This is perhaps the area in which illegal foreigners need the most legislative protection, but the law is silent on the rights of foreigners.

The question whether and if so, to what extent illegal immigrants working in the country is protected by South Africa's labour legislation is an important one. Especially in so far as it concerns the number of illegal people in employment and in the light of their vulnerability.[148] This question is answered by referring to the provisions of the Immigration Act, as well as its effect on the employment of illegal immigrants.

It would seem that the rights, which reasonably should be extended to illegal workers would be the minimum bed of rights contemplated in the BCEA pertaining to, for example, hours of work, leave, and payment of at least the minimum wage in a particular industry in which the worker is employed and the right to recover those wages if an employer refuses to make payment.[149]

A distinction should be drawn between foreigners working in South Africa without a work permit, and foreigners who perform work that is illegal. In the cases mentioned above the work performed was not the cause of the illegality, but rather the status of the worker.

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[145] Van der Merwe, van Huyssteen, Reinecke & Lubbe *Contract – General Principles* 2nd ed (2003) 175.
[146] Le Roux "The World of Work: Forms of engagement in South Africa" 2009 *Institute of Development and Labour Law* 27.
[147] Le Roux 2009 *Institute of Development and Labour Law* 34.
[148] Norton 2009 ILJ 68.
[149] Norton 2009 ILJ 81.

4 4 1 *Illegal employment contracts due to status of foreigners*

In *Dube v Classique Panelbeaters*[150] the applicant claimed compensation arising out of an alleged unfair labour practice. The applicant was a Mozambican national who used a fictitious alias to disguise his true identity and claimed that he should be compensated for the unfair retrenchment.

The respondent raised a point *in limine* that there was no employment relationship between the parties, based on the argument that section 32 (1) of the Aliens Control Act[151] prohibits the employment or continued employment of illegal aliens.

The court in its judgment referred to the old case of *Schierhout v Minister of Justice*[152] where it was held that it is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The court accordingly held that the contract was null and void and that it had no jurisdiction in respect of a dispute where no legally recognizable employment relationship existed.

In the distinguishable case of *Ndikumdavyi v Valkenberg Hospital*[153] the applicant, a Burundian national, was offered a permanent post, which was later withdrawn because the applicant's refugee status was set to expire. In this case the work to be performed was perfectly legal but for the fact that the applicant was prohibited by statute to perform the work.

The court was required to decide the issues in terms of section 187 (1) (f)[154] of the LRA. The court noted that section 187 (1) (f) of the LRA, which renders discriminatory dismissals automatically unfair, is not prohibitory and does not create positive rights.[155]

The court however looked as section 186 (1) (a) of the LRA[156] and argued that the words "employment contract" in section 186 (1) (a) may be read to mean the wider term "employment

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[150] [1997] 7 BLLR 868 (IC).
[151] 96 of 1991 (predecessor of the Immigration Act 13 of 2002).
[152] 1926 AD 99 at 109.
[153] [2012] 8 BLLR 795 (LC).
[154] Section 187(1)(f) of the LRA states:

(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or if the reason for the dismissal is-

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

[155] *Ndikumdavyi v Valkenberg Hospital supra*.
[156] Section 186(1)(a) of the LRA states:

relationship". This will give effect to the primary objectives of the LRA and provide equal protection for formal refugees and other vulnerable groups of employees.[157] The court thus concluded that the applicant's dismissal was procedurally unfair.

A discussion follows on employment contracts where the work to be performed is illegal.

4 4 2 *Employment contracts where performance is illegal*

4 4 2 (i) Employment of Sex workers

Employment contracts of sex workers generally entail an exchange of sexual acts for money. Such a contract is contrary to public policy in both common law and statutory law, and it is accordingly void and unenforceable.

Due to the vulnerability of illegal foreigners, most women or girls often fall victim to sexual exploitation. Some sell sex in order to survive.[158] For migrants engaging in sex work becomes a viable option for a number of reasons: it pays relatively better than other service work, has flexible working hours, often means that the sex worker is self-employed, and does not require formal qualifications or documentation.[159]

While prostitution might be the only source of income for some illegal female foreigners, they are however not protected by the labour laws of the country.

In the well-known case of *Kylie v CCMA*[160] the applicant, a foreign sex worker, brought an unfair dismissal dispute to the CCMA. The applicant argued that excluding sex workers from the scope of the LRA is not justified on a proper reading of the LRA. The commissioner disagreed with this view and found that the CCMA did not have jurisdiction to arbitrate the dispute.

The matter went on review to the Labour Court. The argument raised was first, that the Constitution protects all workers and as a result they should be protected, irrespective of whether the employment contract is invalid. Secondly, because the LRA defines employees to include anyone "who works for another person", accordingly the Act should apply to all

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"(1) Dismissal means that;
(a) an employer has terminated a contract of employment with or without notice;".

[157] *Ndikumdavyi v Valkenberg* supra 800.

[158] Malapa "Young women immigrants" 2008 *Equal Treatment* 16.

[159] CORMSA "Protecting Refugees, Asylum Seekers and Immigrants in South Africa during 2010" 2011 www.CoRMSA.org.za (accessed on 30 October 2012).

[160] [2008] 9 BLLR 870 (LC); [2010] 31 ILJ 1600 (LAC).

employment relationships irrespective of whether they are underpinned by enforceable contracts or not.[161]

As a matter of interpretation, the scope of the labour rights in section 23 does not include sex workers and brothel keepers as bearers of those rights.[162] The court subsequently found that the Sexual Offences act justifiably limits the scope of section 23 by excluding sex workers and brothel keepers as holders of labour rights. The applicant's claim was dismissed.

Although the court did not find in favor of sex workers, it did acknowledge that sex workers were a vulnerable group and that their exploitation is compared to the exploitation of illegal immigrants and child workers by employers seeking cheap labour.

4 4 2 (ii) Child labour

The ILO's overall goal in child labour issues is a 'world free from child labour'.[163] It is submitted that refugee children too, are subject to exploitation due to their vulnerability. Unaccompanied minor refugees require special protection because of their personal situation and their immediate need for nurturing and care.[164]

Analogous to the position of illegal foreigner workers is the position of child labourers.[165] Article 32 of the UN Convention on the Rights of the Child, defines Child Labour as:

"... work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, moral or social development."[166]

This convention also includes a non-discrimination clause, which ensures that whatever benefits are given to children who are citizens of a state must also be given to children who are refugees in the territory of the state.[167]

In addition to the Convention on the Rights of the Child, the Constitution at section 28 (1) (e)[168] also provides special protection to refugee children. Furthermore section 43 of the BCEA[169]

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[161] Salim 2009 26-27.
[162] *Kylie v CCMA supra* 874.
[163] Musonda "Migration Legislation in East Africa" 2006 *International Labour Office* 24.
[164] Swart "Unaccompanied minor refugees and the protection of their socio-economic rights under human rights law" 2009 *African Human Rights Law Journal* 104.
[165] Le Roux 2009 35.
[166] UN Convention of the Rights of the Child 1989.
[167] Swart 2009 *African Human Rights Journal* 105.
[168] Section 28(1)(e) of the Constitution states:
"Every Child has the right to be protected from exploitative labour practices."
[169] Basic Conditions Of Employment Act 75 of 1997.

prohibits the employment of children and section 43 (3) provides that it is an offence to employ a child under the age of 15 years. In addition hereto the Child Care Act[170] at section 52A also prohibits the employment of children under the age of 15.

During an interview by Equal Treatment with immigrant children, it was found that children are often under the age of legal employment. Boys have been documented working as farm workers, bar or restaurant staff and young girls often work in shops, do housework, sell sex or have sexual relationships with older men for security.[171]

In the case of *Centre for Child Law v Minister of Home Affairs*[172] the applicant brought an urgent application on behalf of a number of unaccompanied minor children who were facing imminent and unlawful deportation. The court held that it has been accepted that persons within our territorial boundaries have the protection of our courts and the constitution. The court therefore found that there is an active duty on the State to provide those children with the rights and protection set out in section 28.[173]

It is submitted that although this case entails the unlawful deportation of refugee children, it emphasizes the protection that foreign children are entitled to in terms of section 28 of the Constitution. Included in this protection is also the right to be protected against exploitative labour practices.

The best interest of a child is of paramount importance, irrespective of race, culture or origin. Everyone, including children, also has rights to equality, human dignity, life and the socio-economic rights to food, water and social security.[174]

4 5 Illegal foreigners in employment sector

Most illegal foreigners are absorbed into informal employment where implementation of labour laws is minimal. Migrant workers, especially those at lower skills levels, who are often employed on a casual or informal basis, have little opportunity to claim work-related benefits and rights.[175]

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[170] 74 of 1983.
[171] Anonymous "Children and Immigration" 2008 *Equal Treatment* 15.
[172] 2005 (6) SA 50 (T).
[173] *Centre for Child Law v Minister of Home Affairs supra* 5.
[174] Mahery and Jamieson "Children's Rights" 2010 *Equal Treatment* 18.
[175]CORMSA 2011 www.CoRMSA.org.za (accessed 2012-10-30).

4 5 1 *Domestic Sector*

One of the sectors mostly infiltrated with illegal foreigners is the domestic sector. Traditionally, domestic work provides an entry point into the South African job market for new arrivals and is a crucial area of employment for both in-country and transnational female migrant workers.[176] It is submitted that this sector is a viable option for foreigners as it does not require formal qualification and documentation.

It however appears that whilst foreign nationals are desperate for money, they get employed for much less then the minimum wage. They are not paid overtime, often do not receive benefits and in some cases are not paid at all.[177] Findings of an ongoing study conducted by Domestic Workers Research Project confirm that migrant domestic workers still suffer arduous working conditions for low wages and are often sequestered behind their employers' high walls, cut off from family and friends for inordinately long periods.[178]

In an effort to fight against exploitation of workers in various sectors, the Minister of Labour has made sectoral determinations to establish basic conditions of employment for employees in a specific sector and area. As such, Sectoral determination no 7 applies to the employment of domestic workers in South Africa and it regulates working hours, wages, leave and other basic conditions of employment.

Since child labour practices and forced labour is common in this sector, a need was felt to regulate this sector. Section 23 thus prohibits child labour and forced labour and section 23 (6)[179] makes it an offence to anyone acting in contravention of this section. A recent study revealed an entrenched practice of employing workers informally and on a temporary basis, without any written contract, with the specific aim of denying them the benefits and rights associated with employment.[180]

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[176] Anonymous "SAs immigrant housemaids – a desperate tribe" *The Zimbabwean* http://www.thezimbabwean.co.uk/human-rights/34112/sas-immigrant-housemaids-a-desp... (accessed 2012-10-31).

[177] Anonymous "Working in South Africa" 2008 *Equal Treatment* 18.

[178] Anonymous "SAs immigrant housemaids – a desperate tribe" *supra*.

[179] Section 23 (6) of Sectoral Determination No 7: Domestic worker sector states: "A person who employs a child in contravention of sub-clause (1) and (2) or engages in any form of forced labour in contravention of sub-clauses (4) and (5) commits an offence in terms of section 46 and 48 of the Basic Conditions of Employment Act respectively, read with section 93 of that Act".

[180] CORMSA 2011 www.CoRMSA.org.za (accessed 2012-10-30).

It is submitted that this is the faith suffered by most illegal foreigners in the domestic sector. It appears that employers hide behind the fact that no formal employment contract exists, and as such no labour laws are applicable. It is however submitted that the outcome of the *Discovery Health* case should be applied in all sectors of employment in South Africa, and that the existence of an employment relationship should warrant illegal foreigners protection in terms of labour legislation.

4 5 2 *Farming Sector*

Labour exploitation is particularly common on farms in South Africa. Farmers are granted 'corporate permits', which allow them to employ Zimbabweans for seasonal jobs."[181] In February 2008 the Department of Labour reported that 'Dozens of illegal workers have been arrested on farms in Musina' where workers worked seven days a week, nine hours a day for wages ranging from R107 to R1,200 per month.[182]

This rife exploitation of farm workers has similarly left government to make a sectoral determination to regulate and establish basic conditions of employment in this sector. Sectoral Determination no 13 came into effect during 2002 and it provides for minimum wage levels, hours of work, overtime, child and forced labour as well as other basic conditions of employment.

A concern among illegal foreigners is the fear for arrest or deportation. Despite a recent court ruling which states that migrants with or without a permit, have the same labour rights as those afforded to South Africans under the Labour Relations Act many fear arrest or deportation if they try to report the crimes of their employers.[183]

Of greater concern however, is the fact that foreign farm workers are often unaware of labour laws. There is a lack of awareness with regard to labour laws, and institutions such as the Commission for Conciliation, Mediation and Arbitration (CCMA) and the labour court, among migrant workers.[184] It is thus submitted that employers abuse this lack of awareness and continuously fail to comply with the labour laws.

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[181] "Working in South Africa" 2008 *Equal Treatment* 18.
[182] Norton 2009 ILJ 66.
[183] *Ibid*.
[184] CORMSA 2011 www.CoRMSA.org.za (accessed 2012-10-30).

Although for different reasons, the decision in the *Discovery Health* case endorsed access of an illegal worker to the dispute resolution mechanisms of the CCMA.[185] This case furthermore confirms that the constitutional rights to fair labour practices protect workers, even illegal ones.

4 6 Conclusion

South African citizens are generally not very receptive of refugees and migrants, whether legal or illegally in the country. There have been much debate and disagreement on the question as to whether the rights in terms of labour legislation should be afforded to illegal immigrants and the common reaction is that South Africa has enough jobless citizens that can perform the jobs that illegal foreigners take up.

The courts do not share the above view. In the *Discovery* and *Georgieva* cases the court argued in favour of granting labour rights to illegal foreigners, and it is submitted that these judgments are correct for the following reasons:

1. Firstly, what is inherently part of every human being is the need to support oneself and the family. Apart from being illegal in the country, refugees and migrants are, first and foremost, human beings and also have this inherent need to support themselves and their families. The status of foreigners should not prevent them from an entitlement to labour rights;

2. Secondly, if labour rights are not extended to illegal foreigners, employers will prefer to employ illegal foreigners on conditions contrary to the basic conditions of employment. Exploitation in the form of lower wages, longer working hours, and even unfair dismissals will be at the order of the day, especially in the informal employment sector; and

3. Finally, section 23 (1) of the Constitution is the basis for every employment relationship and the word “everyone” should be defined somewhere to include every employee within the country. Since the LRA aims the give effect to section 23 of the Constitution, the suggested amendment will also be effect to by the LRA.

South Africa is not the only country faced with the challenge of foreigners in the labour market. A comparative analysis to the position of foreigners in other countries will now be discussed.

[185] Norton 2009 ILJ 66.

CHAPTER 5

A COMPARATIVE ANALYSIS BETWEEN SOUTH AFRICA, THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA

"Research by the International Labour Organization (ILO) on migrations shows that there are approximately 191 million migrants around the world, made up of workers, their dependants, refugees and asylum seekers."[186]

5 1 Introduction

All refugees and migrants, regardless of their status, have a right to basic human rights. As early as the 20th century the need arose for conventions and guidelines to be put into place in order to afford protection to refugees and migrants.

The 1951 Refugee Convention is the cornerstone for the protection of refugees. All countries that have ratified this convention have binding obligations in public international law. Furthermore those countries had to ensure that when they formulate internal policies and regulations that they consider the policies and guidelines issued by the United Nations High Commission for Refugees.

The International Convention on the Protection of the Rights of All Migrant Workers and their Family Members breaks new ground by extending the protection for migrant workers and members of their families' worldwide.[187] This Convention focuses on the prevention and elimination of exploitation of migrant workers and their families through the migration process.

In so far as the international labour rights of refugees and migrants are concerned, the International Labour Organisation has played a significant role in promoting policies to minimize the risk of work-based migration. The ILO provides a set of principles aimed at regulating labour matters through numerous Conventions and Recommendations. It furthermore also encourages closer cooperation among states, to contribute to more effective labour migration processes.

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[186] Norton "Workers in the Shadows: An International Comparison on the Law of Dismissal of Illegal Migrant Workers" 2010 31 ILJ 1521.

[187] Oswald & Schmelz "Migrants, Refugees and Human Rights Resource-Book" 2006 *Netzwerk Migration in Europa* 12.

Despite the protection measures in place, this constituency remains a vulnerable one, subject to exploitation and abuse.[188] Very few workers report cases to challenge their situations, for the obvious reason that they do not want to expose themselves to authorities for fear of deportation.

A discussion will now follow on the labour rights of refugees and migrants in the United Kingdom and the United States of America.

5 2 Labour rights for refugees and migrants in other countries

All human rights treaties adopted by the United Nations, the European Convention on Human Rights adopted by the Council of Europe, as well as the Universal Declaration of Human Rights, contains provisions that protect the human rights of all human beings, irrespective of citizenship. It should also be borne in mind that all countries have an obligation to protect the rights of foreign workers that have a legal status in the respective country.

5 2 1 *Refugees and Migrants illegally employed in the United Kingdom*

The United Kingdom is one of the most cosmopolitan countries in the world, as approximately 36% of its population consists of foreign nationals. This figure includes refugees and migrants from various countries and it is this diverse population that is an added incentive for potential asylum seekers.

What South Africa and the United Kingdom have in common is the fact that both countries are the most economically stable within their respective continents. This is a major pulling factor for refugees and migrants when deciding on a host country.

In the United Kingdom the Human Rights Act 1998, as well as the Equality Act 2010 addresses the needs and protection of refugees and migrants. The Equality Act 2010 explains how refugees and migrants are protected against discrimination under the Act and the extent of the relevant exceptions.[189] The protection applies to discrimination against age, disability, gender, reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.[190] It is submitted that the grounds listed above, are similar to the grounds listed in section 9 (3) of the Constitution.

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[188] Norton 2010 ILJ 1550.
[189] Anonymous "Refugees, migrants and the Equality Act 2010"2011 *Equality and Diversity Forum* 1.
[190] *Ibid.*

Although refugees have full employment rights, they face major barriers in the labour market.[191] This includes high numbers of unemployment or underemployment of refugees and migrants. Contrary to the position of South Africa where migrants have the same rights irrespective of their country of origin, in the United Kingdom the right of a migrant to remain in the UK, the length of their permitted stay and the right to work in the UK, to have access the public services, to receive housing support, to receive state benefits and to enjoy other rights or benefits will depend on their country of nationality and their immigration status.[192]

Whereas in South Africa the Immigration Act of 2003 and the Refugees Act 1998 regulates the employment of refugees and migrants, in the United Kingdom the employment of foreign workers is currently regulated by the Immigration Act 1971 and the Immigration, Asylum and Nationality Act 2006.[193] This act allows immigration officers to serve 'penalty notices' on employers of unauthorized workers.

The United Kingdom also faces the problem of illegal workers in employment and the Border Agency has warned that tough action will be taken against these employers. In a recent article on the London 2012 Olympic torches, the Border Agency reported: "We are cracking down on companies that employ illegal workers and fail to carry out proper checks on passports and other identity documents."[194] This statement places to onus on the employers to ensure that the employees have the legal status to be employable. It is submitted that this is a correct approach as it is in accordance with the decision of the Labour Court in the *Discovery Health* case, in that there is a duty on the employer to ensure that the employee is authorized to be employed.

In the case of *Houga v Allen*[195] the applicant, a Nigerian national, was employed by the respondents without a work permit. There was an arrangement between the parties that the applicant would enter the country and work for the respondents illegally. Although the applicant knew she needed a work permit, the respondent was also aware that she did not have a work permit. The applicant was thus working illegally and was later dismissed.

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[191] Hurstfield, Pearson, Hooker, Ritchie & Sinclair "Employing Refugees: Some Organisations Experiences" 2004 *Institute for Employment Studies* 1.
[192] Anonymous "Refugees, migrants and the Equality Act 2010" 2011 *Equality and Diversity Forum* 2.
[193] Norton 2010 ILJ 1536.
[194] Furness "London 2012: Olympic torches 'made by illegal immigrants'" (2012-09-21)*The Telegraph* http://www.telegraph.co.uk/sport/olympics/news/9369389/London-2012-Olympic-torches- (accessed 2012-09-21).
[195] [2012] England and Wales Court of Appeal (Civil Division) 609 (15 May 2012).

Upon her dismissal, the applicant took the matter to the London Central Employment Tribunal. The applicant claimed for (1) unfair dismissal; (2) breach of contract; (3) unlawful deductions from her wages and holiday pay; (4) racial discrimination; and (5) racial discriminatory treatment during her employment. The tribunal held that the applicant's employment contract was "tainted with illegality" as she knew she was not allowed to work without a work permit. The tribunal dismissed the claims for unfair dismissal, breach of contract, unpaid wages and holiday pay.

As for her racial discrimination claims, the tribunal nevertheless held that Ms Houga was in employment with the Allens for the purposes of the Race Relations Act 1976 and that her dismissal was an act of unlawful race discrimination for which she was entitled to be compensated.[196] Both parties referred the matter to the Employment Appeal Tribunal (hereinafter referred to as the EAT) to review the findings respectively applicable to them.

The EAT upheld the tribunal's decision on the applicant's non-dismissal discrimination claim. The EAT concluded that by allowing the applicant to recover compensation for this claim, would not be "*appearing to condone*" the illegal conduct of the applicant.[197] The respondents criticized this reasoning and argued that a relevant question requires a focus on the claimant's conduct, and in particular requires an examination of whether the claim is so inextricably linked with her illegality in obtaining and continuing in the employment that the court would be seen to be condoning the illegality by acceding to it.[198]

On appeal to the Court of Appeal, it was concluded that the EAT's decision was flawed and wrong. The court held that it was an error to fail to recognize the factual basis of the applicant's dismissal discrimination claim and the tribunal's finding to it. The court furthermore held that it was also a mistake to consider that in assessing the applicant's dismissal discrimination claim, would be to condone the applicant's illegal conduct.

The court submitted that whilst a discrimination claim focuses on the conduct of the alleged discriminator, the applicant's dismissal discrimination case positively linked the discriminator's conduct with her own illegal conduct. Furthermore the court held that although unfair advantage was probably taken of the applicant, she was well aware that her actions were wrong and illegal. In conclusion the court held that once those matters were brought into account, the

[196] *Houga v Allen* par 4.
[197] *Houga v Allen* par 53.
[198] *Houga v Allen* par 56.

only possible answer is that to allow the Ms Houga's dismissal claim would be to condone her illegal conduct.[199]

During argument the court referred to the case of *Hall v Woolston Hall Leisure*[200] which related to a successful sex discrimination claim by a pregnant employee. The court held that the *Hall's* case shows that the fact that an employee may be barred by illegality from enforcing her contract of employment will not automatically lead to the conclusion that she will be barred from claiming compensation from a discriminatory dismissal from her employment.[201] The court was therefore correct in dealing with the employment issues and the discrimination issue, separately.

When considering the outcome of the case discussed above, there is a vast difference between South Africa and the United Kingdom. The court in the *Houga* case focused on the illegal status of the applicant, as opposed to the existence of an employment relationship. Although the United Kingdom Court of Appeal found that there is no contract of employment, the issue relating to the dismissal discrimination claim was separately decided by the court.

Where the violation of this right arises from the existence of the employment relationship, it is not a requirement to be an employee before a discrimination claim can be brought. It is therefore submitted that the decision reached by the court, especially in so far as it relates to the racial discrimination claim, was correct. As a fundamental human right, the right not to be discriminated against, does not depend on the existence of an employment contract. The court therefore correctly held that the applicant was entitled to compensation for the dismissal discrimination claim.

South Africa shares the view of the United Kingdom court, in so far as it relates to the discrimination claim. It is submitted that the protection against discrimination is a fundamental human right. Section 187 (1) of the LRA provides protection to foreign national against any form of discrimination listed in that section.

5 2 2 *Refugees and Migrants illegally employed in the United States of America*

The United States of America (hereinafter referred to as the USA) is also a favorable country for refugees and migrants and the number of refugees and migrants in the USA have increased

[199] *Houga v Allen* par 63.
[200] [2000] England and Wales Court of Appeal Civil division 170 (23 May 2000).
[201] *Houga v Allen* par 48.

over the past decades. This is primarily due to the fact that the USA, in that part of the continent, is an economically sound country with various employment opportunities.

In so far as the United States claims to be a "nation of immigrants", it also boasts that it is a "nation of laws", which presumably includes the realm of immigration policy.[202] Immigration is governed by the Immigration Reform and Control Act 1986 (hereinafter referred to as IRCA). This Act prohibits employers from hiring unauthorized aliens and it is also an offence to continue employing an unauthorized alien, knowing that the employee is not permitted to be employed.[203]

In principle all employment in the USA is regulated by the National Labor Relations Act 1998 (hereinafter referred to as the NLRA). Furthermore, the immigration policy serves as the nation's most basic labor law in that it establishes who is legally eligible to be a member of America's labor force.[204]

Generally, all non-citizens who have been granted permanent resident status; those with refugee or asylum status; those who have been given temporary protected status for limited periods of time due to unsettled conditions in their homelands; as well as those who have been granted non-immigrant status that permits work for limited and temporary periods in specified circumstances are eligible to be employed in the USA.[205]

The USA has the highest number of illegal immigrants in the world. In a recent article on illegal immigrants in the USA, it was estimated that about 11.5 million illegal immigrants were living in the United States in January 2011.[206] They contribute about 12% a share of the workforce.[207] These workers are often vulnerable to abuse such as wages below minimum rate, long working hours and unhealthy working conditions.

In comparison to the position in South Africa, illegal workers in USA are mostly employed in jobs that require little formal education like construction, agriculture, hospitality, meat packing and poultry industries. On average these workers earn much less than the average native

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[202] Briggs "Illegal Immigration and Immigration reform: Protecting the Employment Rights of the American Labor Force (Native-Born and Foreign-Born) Who are Eligible to be Employed" 2010 *Centre for Immigration Studies* 1.
[203] Norton 2010 ILJ 1533.
[204] Briggs 2010 *Centre for Immigration Studies* 1.
[205] *Ibid.*
[206] Preston "Illegal Immigrants Number 11.5" (2012-03-24) *The New York Times* http://www.nytimes.com/2012/03/24/us/illegal-immigrants-number-11-5-million.html (accessed 2012-11-15).
[207] Wikipedia "Economic impact of illegal immigrants in the United States" http://en.wikipedia.org/wiki/Economic_impact_of_illegal_immigrants_in_the_United_St... (accessed 2012-11-15).

worker.[208] Their presence in the USA labour market has an adverse effect on the economy of the country.

In the case of *Plyler v Doe*[209] the court of appeals held that whatever the applicant's status under the immigration laws, an alien is a "person" in any ordinary sense of that term. The court furthermore concluded that the use of the phase "within its jurisdiction" confirms the understanding that the protection under the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of the State, and it also reaches into every corner of the State's territory.

In the case of *Hoffman Plastic Compound v National Labor Relations Board*[210] an illegal Mexican worker found employment with the applicant company, but was later dismissed for his involvement in a trade union. The National Labor Relations Board, whilst unaware that he was working illegally, found that the worker's termination was unfair and unlawful and awarded the worker reinstatement and back pay.

Under the NLRA, back pay is paid to an ex-employee for an illegal anti-union termination to compensate for wages that would have been earned but for the termination.[211] This protection is however afforded to employees and not illegal workers. The employer appealed the matter and the Supreme Court overturned the board's decision.

The Supreme Court found that awarding back pay would trivialize the US's immigration laws and encourages future violations and on that basis set aside the NLRB's decision.[212] In its judgment the court emphasized that the board overlooked the fact that under the Immigration Reform and Control Act, it is not possible for an undocumented alien to obtain employment in the USA without some party directly contravening explicit congressional policies. In arriving at its decision the US did not consider any international law expressed in the UN or the ILO conventions.[213]

The National Labor Relations Board's argument was that although the IRCA criminalizes the use of false documents, it did not exclude undocumented workers from receiving back pay and

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[208] Wikipedia "Economic impact of illegal immigrants in the United States" http://en.wikipedia.org/wiki/Economic_impact_of_illegal_immigrants_in_the_United_St.. (accessed 2012-11-11).
[209] United States Court of Appeals for the Fifth Circuit 457 US 202 (1982).
[210] United States Court of Appeals for the District of Columbia Circuit 535 US 137 (2002).
[211] Norton 2010 ILJ 1533.
[212] *Ibid.*
[213] Norton 2010 ILJ 1551.

other remedies. In response to this argument the court held that the fact that it is a crime for an individual to use false documents to get a job is an indication that the Congress would not allow that worker to be awarded back pay. Moreover, the court's argument was that back pay under the NLRA was to compensate a worker who was discriminated against and who suffered harm, but an undocumented worker who illegally obtained work could technically not be "harmed".

In essence, the position relating to the employment of illegal workers in the USA differs to that in South Africa. Although the Fourteenth Amendment afforded protection to everyone within the territory of the USA, this view was not shared by all courts. The Supreme Court in the *Hoffman* case makes no reference to the employment relationship that existed between the parties, or the unfair dismissal of the illegal worker. Its entire judgment is based on the fact that the worker was illegal and as such was not entitled to back pay. This is contrary to the South African position as reflected in the *Discovery* case.

Despite the Court's decision in *Hoffman* with respect to an undocumented worker's right to back pay under the NLRA, this decision does not affect the many other basic employment rights undocumented workers have, such as protection from national origin or racial discrimination and sexual harassment, and the right to workers' compensation benefits and safe work environments.[214] As a result illegal workers are not wholly excluded from employment right and this is similar to the position in South Africa.

The Supreme Court in the USA was recently also called upon to decide on a matter relating to an illegal immigrant who qualified as a law graduate and passed the Bar association test within the country. Garcia's father had applied for a U.S immigrant visa for his son in 1994, which was approved a year after.[215] It was reported that Garcia still awaits his visa, which will enable him to procure employment in the USA.

The outcome of this case will be very interesting. The applicant is prohibited from practicing law, although the delay in obtaining his visa was not caused by him. Anti-immigrant activists have said that allowing illegal immigrants' employment in the U.S is an attack on the justice and

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[214] Anonymous "Supreme Court Bars Undocumented Worker from Receiving Back Pay Remedy for Unlawful Firing" *Immigrants' Rights Update Vol 16* http://www.nilc.org/hoffman02.html (accessed 2012-10-02).

[215] Andrew "Will US Courts Allow Illegal Immigrants to Practice Law?" (2012-08-02) http://news.vista.com/united-states/will-us-courts-allow-illegal-immigrants-to-practice-la.. (accessed 2012-10-05).

immigration system of the country.[216] A further criticism is also that Garcia cannot practice law as he himself was in violation of the law, being an illegal immigrant.

It is submitted that the court will have to consider all the circumstances of the case, before it makes an informed ruling. On the one hand, the applicant was allowed to follow all the processes in order to become a member of the Bar association, without reference to his illegal status. On the other hand, the court will have to establish whether there was any fault on the part of Garcia in obtaining his visa. The court will therefore have to enquire from the visa offices if there was a delay on the part of Garcia, in applying for his visa.

It is furthermore submitted that the court has to be mindful of Garcia's right not to be discriminated against. Should the court conclude that Garcia will not be entitled to become a member of the Bar association based on his illegal status, it might just give rise to a discrimination claim against the Board. The protection against discrimination is an international human right and it applies to all individuals irrespective of their status.

5 3 Conclusion

The argument of the illegal immigration status of the employee disentitling the employee to the protections of the host nation's labour laws was successfully argued in the US, the UK and Australia, but not in South Africa.[217] Whereas South Africa uses the employment relationship as a basis for the application of labour laws, the USA and the United Kingdom does not.

Despite the conflicting views in relation to the application of labour laws, these countries have in common the protection against discrimination. It was successfully argued that the existence of an employment contract should not be the basis for a discrimination claim and the countries discussed in this chapter follows this approach.

While the ILO conventions and the UN convention encourage equality of treatment of illegal migrants' vis-E-vis legal migrants and nationals, this equality pertains to work already performed.[218] These conventions are silent on the protection against dismissal for illegal workers and this duty rest with each nation to determine their own immigration laws.

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[216] *Ibid.*
[217] Norton 2010 ILJ 1551.
[218] Norton 2010 ILJ 1555.

Although these countries are all signatories to the 1951 Refugee Convention, the protections afforded to refugees are more confined to fundamental human rights and not labour rights. The South African Constitution however, considers the right to fair labour practice as a fundamental human right and it is afforded to all people within the South African territory.

South Africa furthermore places more emphasis on the existence of an employment relationship, as oppose to the status of the parties. The primary remedy for a finding of an unfair dismissal is reinstatement and clearly such a remedy in favour of an illegal worker would result in the perpetuation of an illegal employment relationship which host nations have sought to avoid.[219]

It is submitted that the right to equality, which is an international fundamental human right, should get preference in all countries. As pointed out in the previous chapter, Article 23 of the International Code of Rights provides that everyone has a right to work, and this international right should be protected by all signatory countries to the 1951 Refugee Convention.

[219] *Ibid.*

CHAPTER 6

CONCLUSION

6 1 Recommendations

The closure of Refugee Reception offices (RRO's) in South Africa is a great concern. The cumulative effect of measures such as the RRO closures and 'reviewing the minimum rights of immigrants' is eroding the rights of refugees and asylum seekers and, by so doing, eroding the internationally applauded human rights record of the country.[220] It is submitted that by closing these offices it will be more difficult for refugees to access this office in order to apply for status in the country. A decision to close a Refugee Reception office should therefore be properly communicated to all parties concerned and furthermore alternative measure should be put in place to allow refugees the right to update their status in the country. It is submitted that this will eliminate any infringement on a foreigner's right to equal treatment.

Subsequent to this, the delays and backlogs experienced at RRO's also has a direct influence of the number of foreigners who becomes illegal employees. Research has shown that foreigners are reluctant to go RRO's because of the poor service, long queues and delays with their applications. All these factors have an influence on a foreigner's status in the country. To keep in line with its applauded human rights record, and when taking into account to large numbers of foreigners entering into the country, South Africa should ensure that the service provided at the Refugee Reception offices is in line with its duties as stipulated in the Refugees Act[221].

The employment of illegal foreigners remains a problem in South Africa. Previously the courts have deemed an employment contract with an illegal foreigner to be void, however, the *Discovery Health* case has brought about a breakthrough for illegal foreigners. This judgment provides some protection to vulnerable foreigners; however a lot can still be done by the South African government. Ideally, where illegal foreigners are employed in the country, they should be afforded the same protection as any other party in a normal employment contract.

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[220] Blanc "Right to work for asylum seekers and refugees" http://asylumwork.blogspot.com/2012/01/threats-concerning-right-to-work-of.html (accessed 2012-10-09).

[221] 130 of 1998.

Contrary to this, where an employer employs a foreigner knowing about his / her illegal status, stricter action should be taken against such employer. In the *Discovery Health* case the foreigners status became illegal during his employment and the court emphasized that the onus was on the employer to ensure that the foreigner was authorized to work in the country. It is submitted that the South Africa government will benefit by, in addition to giving the employer a fine, to order that the employer also forfeit any benefit from an illegal employment relationship.

6 2 Conclusion

In as much as the ILO provides policies and conventions to regulate labour matters worldwide, these conventions merely serve as a guideline to countries. Research has shown that countries still follow their own internal laws when challenged with the issue of illegal foreigners.

The South African government has an international commitment to protect the right to equality and human dignity of refugees and migrants. It is in line with public international law in that it gives full effect to the White Paper on Immigration Migration by granting foreigners who are dependent on social assistance, access to it.

Similarly, the right to fair labour practice is in accordance with international law. Our courts now view the existence of an employment relationship as a determining factor for the application of labour rights. This is in line with the ILO's Recommendation 198 of 2006 which suggests that, reference should be made to the performance of the work and remuneration of the worker, irrespective of contractual and other arrangements that indicate otherwise, when determining whether a worker is an employee.

It can accordingly be said that the provisions of the LRA applies to illegal immigrants, if one has regards to the judgment in the *Discovery Health* and the *Jack v Director-General* case, where the courts placed emphasis on the employment relationship as oppose to the employment contract. Furthermore the judgment in the *Kylie* case confirmed the position that illegal immigrants who are employed contrary to the Immigration Act are viewed as employees notwithstanding the fact that their contract of employment is illegal.

In order to adjudicate a dispute by an illegal foreigner, it must first be established if an employment relationship existed. Once an employment relationship is established, an unfair dismissal dispute is considered by the CCMA and the courts. In the *Discovery Health* case the

court held that the illegal immigrant was an employee and as such the LRA and other labour remedies were available to him.

There are however, different views to that reached in the *Discovery Health* and *Kylie* cases. Some courts still holds that a contract of employment is the primary source from which to establish the nature of the employment relationship. These courts solely rely on section 38 of the Immigration Act and view the illegal status of a foreigner as a ground to nullify the contract of employment.

Most international communities share this view. The United Kingdom and the USA also prohibit the employment of illegal foreigners. These countries furthermore deny illegal workers access to labour rights, and as such abuse and exploitation of illegal workers are rife in these countries.

This study has shown that South Africa is a forerunner in so far as the employment rights of illegal immigrants are concerned. Unlike other countries South Africa acknowledges illegal workers as employees, and extends our labour laws protection to illegal refugees and migrants.

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Road Accident Fund Act 56 of 1996

Sectoral Determination No 7: Domestic Worker Sector

Skills Development Act 97 of 1998

Social Assistance Act 13 of 2004

Unemployment Insurance Act 63 of 2001

INTERNATIONAL CONVENTIONS

African Charter on Human and People's Rights (1981/86)

African Charter on the Rights and Welfare of the Child (1990/99)

International Code of Human Rights 1948

Termination of Employment Convention 158 of 1982

United Nations Convention on Rights of the Child of 1989

Convention on the Elimination on All Forms of Discrimination against Women of 1979

1951 United Nations Convention relating to the Status of Refugees

1969 Protocol relating to the Status of Refugees