Emerging jurisprudence on the labour law protection for undocumented migrant workers in South Africa: Lessons for countries

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ABSTRACT

The theme of migration in the Southern Africa Development Community (SADC) has been a problematic one. Migrants, especially undocumented migrants are vulnerable and are exposed to issues ranging from xenophobia, poverty, access to health care, housing and education. Undocumented migrants are exposed to exploitation at work due to lack of labour law protection. This is despite the protection of undocumented migrants in international human rights law. This is evident as very few SADC member states (as of June 2009, Lesotho, Madagascar, Malawi, Tanzania and Zambia) have signed and ratified the international instruments on migration/migrants rights such as the ILO Migration for Employment Convention No. 97 of 1949, ILO Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975 and the1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Paradoxically, South Africa as an influential member in the region has failed to ratify these conventions and the recent migration trend in this region is unidirectional towards South Africa.

The aim of this paper is to examine current trends in the labour law protection of undocumented migrants in South Africa. This paper has been motivated by the recent judgment of the South African Labour Court in *Discovery Health Ltd v CCMA & others* (2008) 29 ILJ 1480 (LC)) extending labour law protection for the first time in South Africa to undocumented migrant workers. This will be achieved by looking at the impact of the constitutional and statutory framework, earlier court decisions and the international standards.

The rational for this paper will therefore seek to highlight the importance of this judgment and the lessons which other countries, most importantly the SADC member states could learn from it.

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1 INTRODUCTION

There are different categories of migrants in South Africa namely, permanent residents, temporary residents, refugees, asylum seekers and undocumented migrants. Olivier *et al*[1] assert that the position of migrants is a problematic theme in general. As a result, migration control is tightened so as to deter the inflow of migrants, who are often believed to be a liability or social burden of the host country. This focus on migration control tends to criminalise migrants and fuels xenophobia.[2]

The International Organisation for Migration (IOM) stipulates that labour migration has, in the 21st century, moved to the top of the policy agendas of many countries including countries of origin, transit and destination. Most of the world's estimated 150 million migrants are people searching for improved economic opportunities abroad. Three key factors drive migration and will continue to fuel this kind of movement for many years. They include the "pull" of labour market needs in many industrialised countries, the "push" of population, unemployment and crisis pressures in less developed countries and established inter-country networks based on family, culture and history.[3]

A 2007 study by the International Federation for Human Rights (FIDH) defines undocumented migrants to include any person living and working in South Africa who does not have a proper legal status. Undocumented migrants are exposed to exploitation at work. This study confirms that many of them are under paid, work for longer hours than authorised by law, with no access to compensation for occupational injuries and diseases. This strengthens migrant workers' vulnerability because of their precarious legal situation. Undocumented migrants rarely seek redress as this would expose them to the risk of being arrested and deported. Unfortunately, inspections conducted by the Department of Labour only occasionally expose and penalise unscrupulous employers. There are therefore no strong disincentives for employers to continue using and abusing foreign migrant workers, particularly the undocumented.[4]

The courts before now refused to acknowledge the plight of these people by refusing them remedies. An interesting turning point in this area of the law is the recent Labour Court landmark judgment between *Discovery Health Ltd v CCMA & others*.[5] This judgment extends labour law protection and the avenue to seek redress to undocumented migrant workers. Various aspects of this judgment will be examined and the impact on policy development analysed.

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[1] Olivier *et al* (2003) at 624.

[2] International Federation for Human Rights (FIDH) 2008 – No 486/2. In the Immigration Act 13 of 2002 'illegal foreigner' means a foreigner who is in the Republic in contravention of this Act.

[3] http://www.iom.org.za/LabourMigration.html.

[4] n 3 above.

[5] (2008) 29 ILJ 1480 (LC).

2 CONSTITUTIONAL FRAMEWORK

The debate of extending labour law protection to undocumented migrant workers intensified with time among prominent scholars such as Craig Bosch. In advocating for the extension of labour law protection to undocumented workers in South Africa, Bosch[6] stated that the Constitution guarantees to everyone the right to dignity[7] and fair labour practices.[8] The Constitution does not place any restriction to section 23(1) and therefore unauthorized workers are entitled to fair labour practices in their work relationship. There does not seem to be any compelling reason to limit the application of the right to fair labour practices only to those working legally in South Africa. That fact cannot supply employers with a license to treat workers unfairly. The Constitutional Court has accepted that an employment contract is not required in order to access the protection of section 23.[9] It is also significant that one of the purposes of constitutionally entrenching labour rights is to protect vulnerable workers. Unauthorised workers are amongst the most vulnerable of workers given their tenuous legal position. That status has historically been exploited to their detriment as they are reluctant to use protective mechanisms for fear of secondary victimization at the hands of authorities. The vindication of labour rights is also relevant to ensuring respect for the dignity of illegal foreigners. The infringement of a person's labour rights can therefore also be seen as an infringement of his right to dignity,[10] adding weight to a claim for an interpretation of the Immigration Act that enable access to the statutory protections of that right contained in the LRA.

The supremacy of the Constitution is worth emphasising as the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the State,[11] failure to implement it is often a greater consequence to the political, economic and social structure. The White Paper on International Migration[12] recognises that there is no constitutional basis to exclude, *in toto*, the application of the Bill of Rights owing to the status of a person while in South Africa, including illegal immigrants.[13] In fact, even though the Bill of Rights contains a limitation clause, it has long been established in comparative constitutional jurisprudence to which the limitation clause makes reference that the limitation clause may not be invoked to prevent a class of people, however

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[6] Bosch 2006 at 1350 to 1353.
[7] s 10.
[8] s 23.
[9] *SA National Defence Union v Minister of Defence & another* (1999) 20 ILJ 2265 (CC).
[10] Nugent JA held in *Watchenuka v. Minister of Home Affairs*2003 (1) SA 619 (C) pars 27 and 32 that the freedom to engage in productive work, even where that is not required in order to survive is in deed an important component of human dignity. For mankind is a pre-eminently a social species with an instinct for meaningful association, self-esteem and a sense of self-worth-the fulfilment of what it is to be human is most often bound up with being accepted as socially useful.
[11] s 8(1).
[12] White Paper on International Migration GN 529 in GG 19920 of 1 April 1999.
[13] The Taylor Committee Report into a Social Security system for South Africa. Last update: 2006-03-17 at 60.

identified, from enjoying the total use and benefits of a given constitutional right. The limitation clause may not limit the exercise of a given right by certain people identified on the basis of criteria contemplated by the equality clause, but can only limit it on the basis of the circumstances, time, manner and place in which the right finds itself to be exercised. Therefore, in the absence of a justifying circumstantial and factual reason, one could not limit the constitutional rights of, for instance, Muslims, or homosexuals or people of French origin.[14] On the strength of this argument, one can say that undocumented migrant workers are constitutionally entitled to core basic form of protection.

Van Niekerk AJ in the Discovery Health judgment stipulates that Section 39(2) of the Constitution requires that when a court interprets legislation it must promote the spirit, purport and objects of the Bill of Rights. If a statute is capable of interpretation in a manner that does not limit fundamental rights, that interpretation should be preferred. Therefore, to render invalid a contract of employment with a foreign national who did not possess a work permit, would defeat the primary purpose of s 23(1) of the Constitution which was to give effect, through the medium of labour legislation, to the right to fair labour practices.

3 STATUTES

Section 32 of the Aliens Control Act 96 of 1991 prohibited the employment of an 'illegal alien' unless they had a work permit, but has now been replaced by the Immigration Act 13 of 2002 (as amended by the Immigration Act 19 of 2004). Section 38 of the Act prohibits the employment of 'illegal foreigners' and 'foreigners' contrary to the provisions of the Act. According to section 38(1), no person shall employ:

(a) an illegal foreigner;
(b) a foreigner whose status does not authorise him or her to be employed by such person; or
(c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.

Section 49(6) states that anyone failing to comply with one of the duties or obligations set out under sections 35 to 46 shall be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding 18 months.

As per the LRA 66 of 1995,[15] employee means:

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

[14] White Paper on International Migration 1999.
[15] s 213.

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.

According to Van Niekerk, taking into account the provisions of s 23(1) of the Constitution, the purpose, nature and extent of relevant international standards and the more recent interpretations of the definition of 'employee' by the Labour Court, the court did not consider that the definition of 'employee' in s 213 of the LRA was necessarily rooted in a contract of employment. It followed that a person who rendered work on a basis other than that recognised as employment by the common law might nevertheless be an employee for the purposes of the definition.

4 EARLIER JUDGMENTS

Klaaren[16] is of the view that documented and undocumented migrants are vulnerable to human rights abuses and occupy an ambiguous space in the law with respect to certain rights guarantees. Their constitutional rights to personal freedom and security, human dignity, and fair labour practices are infringed upon by violations of immigration and employment laws and also deficiencies in these laws. Their inability to access the justice system presents challenging issues of unsettled law, which will require further adjudication.

In *Moses v Safika Holdings (Pty) Ltd*[17] the employee was a citizen of the USA who worked in South Africa but did not have a work permit in contravention of s 26(1)(b), and s 32(1)(a) of the Aliens Control Act 96 of 1991 which states that 'no person shall employ or continue to employ any alien who is in the Republic in contravention of the provisions of this Act'. The arbitrator stated that although the definition of employee in s 213 of the Labour Relations Act in its literal interpretation would cover even illegal aliens, however, the word ‘employee’ does not cover those employees whose acts are unlawful.

In *Vundla and Millies Fashions*,[18] the applicant gain employment as a sales assistant with the respondent. The respondent requested the applicant for a document that permits her to take up employment. She could not produce one and her employment was terminated. She referred an unfair dismissal dispute to the CCMA. The commissioner, without going into the merits of the case, held that there had been no dismissal.

In *Georgieva-Deyanova/Craighall Spar*,[19] the respondent dismissed a foreigner because she did not have a work permit. The CCMA upheld a point *in limine* that it had no jurisdiction to hear the matter as the contract of employment was *void ab* initio because the employment violates the Immigration Act.

[16] Klaaren 2007.
[17] (2001) 22 ILJ 1261 (CCMA).
[18] (2003) 24 ILJ 462 (CCMA).
[19] (2004) 9 BALR 1143 (CCMA).

According to Norton,[20] the clear delineation in the employment arena which accorded protection to legal workers but not to illegal workers began to erode. A creative way of conceptualising the situation of illegal workers to provide for redress and restitution within our constitutional framework was voiced by Craig Bosch in an article titled 'Can Unauthorised Workers be regarded as Employees for Purposes of the Labour Relations Act?'[21] and the decision in the Labour Court in *Discovery Health v CCMA & others*[22] which endorsed (although for different reasons) access of an illegal worker to the dispute-resolution mechanisms of the CCMA.

In 2004, in an important case between *Lawyers for Human Rights v Minister of Home Affairs,*[23] the Constitutional Court rejected the government's argument that persons illegally in the country had no rights and were protected only by international law. It specifically indicated that the right to freedom and personal security (s 12) and the rights of detained persons are integral to the values of the Constitution and cannot be denied to undocumented migrants.

The recent landmark Labour Court judgment by Van Niekerk AJ in *Discovery Health v CCMA* differs with the previous CCMA decisions and extends the access to the justice system to include undocumented migrant workers. He is of the view that if employers were aware that foreign nationals who do not have work permits had rights of recourse to the LRA and the BCEA (and thereby to CCMA and to the Labour Court) they would be less likely to breach s 38(1) of the Immigration Act by entering into contracts in these circumstances. This serves as an eye opener to undocumented migrant workers and a warning to unscrupulous employers.

5 THE DISCOVERY HEALTH CASE

5.1 The Case

The third respondent Lanzetta (an Argentina national) was offered employment by the applicant (Discovery Health) which, he accepted and actually started working with the work permit from his previous job. A certificate of employment dated 4 January 2005, was issued by the respondent to the applicant. The respondent only received documentation from the present employer to assist him process a work permit on the 2nd of December whereas his existing permit expires end of December 2005. On the 4th of January 2006, Lanzetta was served a letter terminating his contract on the basis that he did not have a valid work permit. The applicant referred the matter to the CCMA on the basis that he had

[20] Norton 2009.
[21] n 6 above.
[22] n 5 above.
[23] 2004 (4) SA 125.

been unfairly dismissed. Discovery Health contested in limine that Lanzetta is not an employee as per the definition of the Labour Relations Act so the CCMA do not have jurisdiction to arbitrate Lanzetta's claim. The Commissioner ruled against Discovery Health that Lanzetta was an employee, and that the CCMA had jurisdiction to determine his unfair dismissal dispute. The matter was referred to the Labour Court for review.

5.2 The legal issues to be decided

The questions before the Labour Court was whether the contract of employment concluded between Discovery Health and Lanzetta was invalid because of the fact that Lanzetta did not have a permit issued under the Immigration Act that entitled him to work for the Applicant.

Does the definition of 'employee' in s 213 of the LRA depends on a valid underlying contract of employment?

5.3 The findings

The contract of employment concluded by Discovery Health and Lanzetta was not invalid, despite the fact that Lanzetta did not have a valid work permit to work for Discovery Health. For this reason, Lanzetta was an 'employee' as defined in s 213 of the LRA and entitled to refer the dispute concerning his unfair dismissal to the CCMA.

Even if the contract concluded between Discovery Health and Lanzetta was invalid only because Discovery Health was not permitted to employ him under s 38(1) of the Immigration Act, Lanzetta was nonetheless an 'employee' as defined by s 213 of the LRA because that definition is not dependent on a valid and enforceable contract of employment.

The application for a review was set aside and the matter remitted to the CCMA for the dismissal dispute to be arbitrated.

5.4 Reasons for the judgment

Far from defeating the purposes of the Immigration Act, to sanction a claim of contractual invalidity in these circumstances would defeat the primary purpose of s 23 (1) of the Constitution which is to give effect, through the medium of labour legislation, to the right to fair labour practices.

Van Niekerk in this judgment stipulated that by criminalising only the conduct of an employer who employs a foreign national without a valid permit and by failing to proscribe explicitly a contract of employment concluded in these circumstances, the legislature did not intend to render invalid the underlying

contract. For this reason, the contract concluded between Discovery Health and Lanzetta on 1 May 2005 was valid.

As per Van Niekerk, there will no doubt be those who contend that my conclusion necessarily entails both that the CCMA condones illegality when it assumes jurisdiction in a dispute referred to that body by a foreign national not in possession of a valid work permit, and that to assume jurisdiction would give legal sanction to a position that the legislature has specifically sought to prevent. The answer to this proposition, as Bosch and Christie suggest, is that assuming jurisdiction may well expose any illegality that exists and thereby deter it. If employers were aware that foreign nationals who do not have work permits had rights of recourse to the LRA and the BCEA (and thereby to CCMA and to this Court) they would be less likely to breach s 38(1) of the Immigration Act by entering into contracts in these circumstances.

Taking into account the provisions of s 23(1) of the Constitution, the purpose, nature and extent of relevant international standards and the more recent interpretations of the definition of 'employee' by some Courts, the judge do not consider that the definition of 'employee' in s 213 of the LRA is necessarily rooted in a contract of employment.

A contract of employment is not the sole ticket for admission into the golden circle reserved for 'employees'. So the fact that Lanzetta's contract was contractually invalid only because Discovery Health had employed him in breach of s 38(1) of the Immigration Act did not automatically disqualify him from that status.

6 INTERNATIONAL LAW STANDARDS

All persons in South Africa share a certain set of basic human rights under international law, regardless of their immigration status. International and foreign laws play a significant role in the advancement of the jurisprudence in South Africa. This is evident in the Constitutional entrenchment of international law. O'Reagan[24] holds the view that the relationship between international and South African domestic law needs to be understood in the context of South African history, and, in particular the history of the international law stand against apartheid. The international political outcry against apartheid and the government of the apartheid regime, coupled with international law developments to give international law effect to that outcry, had a powerful ideological and material impact on the South African politics. That impact is still to be found in our new constitution, which explicitly recognises that international human rights norm, should inform the development of domestic human rights norms.

[24] O'Reagan K 'International Perspectives on the Interaction of International Law and Domestic Law: A view from South Africa' *at 1-2.*

The Constitution obliges any court, tribunal or forum to consider international law and may consider foreign law when interpreting the Bill of Rights.[25] The courts especially the Constitutional Court have made several comments of international law in their judgments.[26] The courts have held that international law in this context would include international instruments that are binding on South Africa as well as those that are non-binding,[27] and that relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary[28]. The Constitution further provides that 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, when interpreting any legislation.[29]

The Labour Court in making its judgment in *Discovery Health v CCMA* was guided by the above constitutional provisions of international law. According to the court, there are a number of ILO and other instruments that seek to balance what may appear to be competing interests and which apply in the present circumstances. First, the International Convention on the Rights of All Migrant Workers and Members of Their Families, adopted in 1990, extends to migrant workers who enter or reside in the host country illegally (and members of their families) rights previously limited to persons involved in regular migration for employment. The convention aims ultimately to discourage and even eliminate irregular migration, but at the same time, it aims to protect the fundamental rights of migrants, taking into account their vulnerable position. Although the convention has not been ratified by a significant number of countries (South Africa has not ratified it) it remains a significant statement of international norms in relation to the rights of migrant workers. The court is therefore required to consider its terms when interpreting domestic legislation.[30]

The court further held that ILO Convention 143[31] sets out the general obligation of members' states to respect the basic human rights of all migrant workers.[32] At

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[25] South African Constitution 108 of 1996. Section 39(1) (b) (c).

[26] In *SANDU v Minister of Defence* (1999) 20 ILJ 2265 (CC) the Constitutional Court stated that s 39 of the Constitution provides that, when a court is interpreting Chapter 2 of the Constitution, it must consider international law. In my view, the conventions and recommendations of the International Labour Organization (the ILO), one of the oldest existing international organizations, are important resources for considering the meaning and scope of "worker" a s used in s 23 of the Constitution.' In *NUMSA & others v Bader Bop (Pty) Ltd & another* (2003) 24 *ILJ* 305 (CC) the Constitutional Court had to consider the right of a minority trade union to strike in support of a demand that the employer recognize the union's shop stewards. The court referred to s 39(1) of the Constitution and noted: 'As has already been acknowledged by the court, in interpreting s 23 of the Constitution an important source of international law will be the conventions and recommendations of the ILO.'

[27] *S v Makwanyane and another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at par 35.

[28] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) par 26.

[29] s 233.

[30] par 48.

[31] Migrant Workers (Supplementary Provisions) Convention 1975.

[32] art 1.

the same time, the convention addresses problems associated with clandestine immigration, and calls, amongst other things, for the adoption and application of sanctions against persons who assist in the illegal movements of migrants, or illegally employ them. In short, the protection of the fundamental rights of migrants, even those who are employed illegally, is a primary purpose of the International Convention and Convention 143, and the LRA should be interpreted in a manner that recognises that purpose.[33]

Although South Africa has not yet signed these conventions, it is however, attracting and hosting the different categories of migrants from the Southern African Development Community (SADC) region, continent and the world at large, whose rights human rights are continuously violated. These conventions provide a set of binding international standards to address the treatment, welfare and human rights of both documented and undocumented migrants, as well as the obligations and responsibilities on the part of sending and receiving states.[34] However, in reality, migrant workers are frequently subjected to unequal treatment and unequal opportunities, as well as discriminatory behaviour.[35]

Undocumented migrants, though in theory protected by the human rights framework are in fact falling outside of any protection disempowering them and leaving them vulnerable. By virtue of being undocumented, migrants are particularly powerless, being subject to removal and possible persecution for immigration violations. As a result, they usually lack access to many, if not most, civil and labour rights and social benefits, and they are afraid to avail themselves of the rights they may enjoy for fear of exposure to immigration authorities'. Discrimination can take a number of forms and the extent to which a migrant is discriminated against might also be related to their immigration status with undocumented migrants most vulnerable to potential abuses.[36]

7 CONCLUSIONS

While all migrants need to have their human rights protected, it is imperative to stress that undocumented migrants are more vulnerable and deserves even more protection. This is eminent considering reality of people's lives, the human rights abuses that force people to flee from their country of origin and the violations that can take place in receiving countries. Certainly a wider and more inclusive approach to rights needs to be explored to ensure that undocumented migrants are not exploited and can access protection.[37] Efforts both in the domestic and international arena in this regard has not gone unnoticed as several international instruments, South African Constitution, statutes and court

[33] par 49.
[34] South African Human Rights Commission (SAHRC) (2008).
[35] n 27 above
[36] *Ibid*.
[37] Bloch (2008).

decisions illustrated above uphold and promotes an inclusive human rights for everyone irrespective of their status.

There is no denying that undocumented migrant workers lack adequate domestic protection with respect to labour rights and human rights. This situation does require urgent attention on a policy level. According to Lawyers for Human Rights, until such time as government signs the International Convention on the Protection of the Rights of all Migrant Workers and Members of their families and develops policy around the employment of undocumented migrants, both human rights and labour standards will be severely undermined.[38]

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[38] Lawyers for Human Rights Press Statement on World Refugee Day (2008).