UNIVERSITEIT VAN PRETORIA
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LLM DISSERTATION

The Labour Rights of Irregular Migrants in South Africa

by

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26015987

submitted in partial fulfilment of the requirements for the degree

MAGISTER LEGUM

in the

FACULTY OF LAW

UNIVERSITY OF PRETORIA

PROMOTER: PROF BPS VAN ECK

Pretoria

October 2016

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DECLARATION

I, Karlien Badenhorst, declare that the work presented in this dissertation is original. It has not been presented to any other University or Institution. Where the work of other people has been used, references are provided. It is in this regard that I declare this work as originally mine, and it is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Labour Law.

Signature: ----------

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Supervisor:

Signature: ----------

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ACKNOWLEDGEMENTS

My utmost appreciation goes out to my dearest husband (Drikus Oberholster) for his support, understanding and love throughout the writing of this study. My eternal gratitude goes out to my parents (Thea and Tokkie Badenhorst) for the financial assistance, allowing me to study the LLM program. To the Department of Mercantile Law, University of Pretoria, I will forever be grateful for your value and effectiveness during the time. Appreciation goes out to my supervisor Prof BPS van Eck who endured, assisted and advised on this study. I thank him for the time an effort he sacrificed for the sake of this study.

Then lastly, but most importantly, I thank God my saviour for his guidance and love during this journey.

SUMMARY

South Africa has long been dealing with the immigration of irregular migrant workers. There are strong indicators that irregular migrant workers are exploited, abused and subjected to working conditions that are less favourable than that of nationals of the country. With the implementation of the Immigration Act 13 of 2002, South Africa criminalised the appointment of an irregular migrant worker.

The Immigration Act came under scrutiny in the *Discovery Health v CCMA* (2008) ILJ 1480 (LC) case and the judgement stated that irregular migrant workers now have rights under the Labour Relations Act, where they are seen as employees with valid employment contracts. The judgement makes it apparent that the Immigration Act's goal is not to deviate from international norms already in place. Internationally, irregular migrant workers have various labour rights. Although these international standards are not ratified by South Africa, they still have a profound effect on our judicial system when determining case law.

A comparative analysis is drawn between the legislative framework of the United States of America, Ireland and South Africa in order to obtain an international perspective. Regarding irregular migrant workers, the United States of America takes a dramatically opposing viewpoint to that of South Africa while Ireland's legislation runs parallel to South Africa's.

In South Africa, contradicting legislative provisions have created misconceptions that employment contracts of irregular migrants are invalid. These workers are afraid and unaware that they have access to dispute resolution mechanisms, while employers are too happy to exploit them to achieve lower labour costs.

Recommendations to remedy the situation include immigration policy reforms, legislative amendments, enforcement of existing legislation, and creating awareness of the status of irregular migrant workers.

Chapter 1

Introduction

> "Humans have always moved, and will always move, to where they are secure and can develop to their potential".[1]

1.1 Introduction

The rights of irregular migrant workers has been a heated topic for years. Illegal labour migration is a source of increasing concern within the South African Development Community[2] (hereinafter "SADC"). People from all over the world have, through the ages, migrated from one country to another. Migration is defined as "the movement of people across country (and state) lines, for the purpose of establishing a new place or seeking peace and stability".[3] The exact number of migrations each year is unknown.[4] This is due to the irregular nature of illegal immigration.[5] Although the numbers are hazy, it is accepted that migration is growing rapidly due to failure of globalisation to provide jobs and economic opportunities.[6] Migration has caused many problems over the course of mankind's existence. Through the years, migration became more and more problematic, especially irregular migration, as migrants move to countries in search of better opportunities.

Labour migration can offer valuable opportunities for migrant workers who cannot secure work in their own countries. Migrant workers flock to bordering countries with

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[1] Green Paper Government Notice dated 24 June 2016 no. 738 at 9.
[2] Campbell (2006) abstract 23.
[3] Kalitanyi and Visser (2010) 377.
[4] Norton (2010) 1522.
[5] Campbell (2006) 27.
[6] Mpedi and Govindjee (2009) Obiter 774.

prospects of wealth and prosperity. These prospects are often abruptly crushed, especially where migrant workers' rights are not protected.[7] As migrants cross borders, it is evident that migration polices are not up to standard to combat this problem. It is further more apparent that South African legislation on how irregular migrants enter South Africa is not being enforced correctly.

The Immigration Act[8] (hereinafter "Immigration Act") requires a person to be in possession of a valid work permit.[9] Furthermore, it prohibits an employer from employing an irregular migrant worker and penalties are imposed for transgressors.[10] However, the landmark case of *Discovery Health v CCMA*[11] (hereinafter "*Discovery*") challenged the Immigration Act, resulting in the position regarding migrant's rights becoming a topic for debate.[12] But are employers aware of this landmark case? Irregular migrants are a vulnerable group of people who are taken advantage of by employers on the foundation that they are illegal.[13] Formally, they are called irregular, but a more common word for them is illegal.

The Immigration Act[14] defines an irregular migrant as an individual who is in the Republic of South Africa in contravention of the Immigration Act and includes prohibited persons. This includes persons who are not residents, nor citizens of the country, and do not comply with the Immigration Act. Non-compliance with the Act may assume many forms. Some of the most prominent forms of non-compliance include failure to enter the country through a port of entry, and not being in possession of a valid passport.

Another definition is provided by the United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they live (hereinafter "UN Declaration").[15] A non-citizen is defined as: "Any individual who is not a national of a

[7] Asia Pacific Forum (2012) 16.
[8] Immigration Act, 13 of 2002.
[9] Section 19 of the Immigration Act.
[10] See also the discussion in chapter 4 para 4.4.
[11] (2008) ILJ 1480 (LC).
[12] See also the discussion in chapter 3 para 3.3.1-3.3.5.
[13] See Norton (2009) where the writer stated that: "Foreigners, especially those whose presence are illegal (or 'irregular', or 'undocumented' or 'unauthorized') are vulnerable not only to a growing culture of xenophobia but also to abuse and exploitation in the workplace".
[14] Section 1(1) (xvii) of the Immigration Act.
[15] Adopted by General Assembly Res No 44 of 144 on 13 December 1985.

State in which he or she is present".[16] The United Nation International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families[17] (hereinafter "ICRMW") defines a migrant worker as: "A person who is to be engaged, is engaged or has been engaged in a remuneration activity in a State of which he or she is not a national".[18]

The newly gazetted Green Paper on the International Migration[19] (hereinafter "Green Paper") defines irregular migrants as: "…people who enter a country, usually in search of income-generating activities, without the necessary documents and permits".[20]

The term "irregular migrant"[21] is suggested as word of choice when referring to these class of migrants. It negates the overly judgmental classification of "illegal".

So, why should these classes of people gain any rights if they entered the country illegally?

Migrants are seen as outsiders, which has led to discrimination, sometimes even escalating into violence and slaughter. Residents justify these xenophobic attacks and blame the foreigners who, in their perception, are stealing their jobs. [22] Migration thus poses a problem when it comes to irregular migrant's labour rights.

South Africa is a constitutional democracy that grants all persons living within South Africa standard human rights.[23] Mokgoro J, in her majority judgment in *Khosa & Others*

[16] Article 1 of the UN Declaration.
[17] The International Convention on the protection of the rights of all migrant workers and members of their families adopted by General Assembly res no 45 of 158 on 18 December 1990.
[18] Article 2(1) of the ICRMW.
[19] Government Notice no. 738 dated 24 June 2016.
[20] Green Paper (2016) 5.
[21] See the definition offered by Bosniak (1991): "As a rule, irregular migrants are people who have arrived in the state of employment or residence without authorization, who are employed there without permission, or who entered with permission and have remained after the expiration of their visas. The term frequently includes de facto refugees (persons who are not recognized as legal refugees but who are unable or unwilling to return to their countries for political, racial, religious or violence-related reasons), as well as those who have migrated specifically for purposes of employment or family reunion".
[22] Norton (2010) 1543 where the writer refers in note 107 to a News 24 report that confirm that: "The local residents claim the Zimbabweans are willing to work for less than the minimum wages, and steal the local community's job opportunities".
[23] In *Khosa & Others v Minister of Social Development & Others* 2004 (6) BCLR 569 (CC) the Constitutional Court referred to Section 27 of the Constitution,1996 which grants everyone the right to have access to social security, including, if they are unable to support themselves and their dependants appropriate social assistance. Further reference was made to Section 10 of the Constitution, 1996 which guarantees everyone the right to equality.

v The Minister of Social Development & Others[24] (hereinafter *"Khosa"*) set out the approach courts should follow when determining whether or not rights should be afforded where there are intersecting rights. She stated that:

> "When the rights to life, dignity and equality are implicated in cases dealing with socioeconomic rights, they have to be taken into account along with the availability of financial and human resources in determining whether the state has complied with the constitutional standard of reasonableness".

Discovery grants irregular migrants labour rights. This is in line with the constitutional regime of affording everyone the right not to be subjected to unfair labour practices.

1.2 Research questions

This study aims to evaluate the current position of irregular migrant workers in South Africa with regards to the labour rights available to them. This study will evaluate the South African system and consider whether or not the regulatory framework is sufficient. The following questions will be answered:

- To what extend do international and national laws protect the fundamental rights of irregular migrants?
- What are the international instruments on irregular migrant rights in the United States of America and Ireland?
- To what extend are applicable laws and legislation enforced in South Africa?
- What reforms are necessary to establish an appropriate balance in the protection of irregular migrants and what are the possible remedies?

When addressing these questions, emphasis is placed on the irregular migrant's labour rights. A very limited perspective of the social security rights of irregular migrant workers is explored. The focus includes the South African legislative instruments and the courts' evaluation of this concept with regards to the labour rights of irregular migrants. Special attention is given to the international norms and position of the International Labour Organisation (hereinafter "ILO"), the United Nations (hereinafter "UN"), the SADC and the African Union (hereafter the "AU"). A contrast is drawn, comparing irregular migrants labour regulations of the United States of America (hereinafter "US") and Ireland with South Africa.

[24] 2004(6) SA 505 (CC).

1.3 Significance of this study

It was reported in the 2013 United Nations population report that at least 3% (232 million) of the human population are international migrants who move across borders in search of better economic opportunities.[25] There are no official figures available of the total amount of foreigners living in South Africa. Figures of the 2011 census suggest a migrant population of about 1.7 million of the country's 51.74 million population.[26] Data collected by the World Bank and the United Nations, suggest a population of about 1.86 million migrants living within South-Africa. The International Organisation for Migration estimates that the total migrant population grew from 2% in 2000 to 5.5% in 2015.[27] It is evident that South Africa continues to attract high volumes of migrant workers, and these are only recorded cases. Irregular migrant workers continue to enter South Africa in the shadows, hidden from the view of formal statistics. The Green Paper acknowledges that no official number is available other than projections:

> "International population movements are complex to measure, as they are influenced by a variety of socioeconomic, political, environmental and other factors. There are, in fact, no official figures available on the total number of foreign residents in SA other than projections based on census data".[28]

Previously, employers were of the opinion that irregular migrants had no rights within South Africa due to the fact that they are illegal.[29] Employers abused their illegal status by underpaying these employees. Employers are prepared to break a national statute which requires all employers to make sure that their employees have a valid work permit. Due to the judgment in *Discovery,* the position has changed and employers must now know what labour rights their foreign workers have, and treat them accordingly in order to avoid costly labour disputes. It seems that employers continue to misuse irregular migrants and pay them less than what is expected by law.

These workers are most often employed in informal employment relationships. They do not benefit from the protection of the traditional labour laws as employees in formal

[25] Green Paper (2016) 9.
[26] Green Paper (2016) 27.
[27] Green paper (2016) 27.
[28] Green Paper (2016) 41.
[29] See also Chapter 3 para 3.2.

employment do. As a result, they are often deliberately targeted for unfair labour practices by labour brokers, corrupt employers and state agencies.[30]

1.4 Research methodology

This study follows an investigative and comparative approach on the labour rights of irregular migrant workers in South Africa. This study takes the form of a literature review. The information presented was collected from various literature sources including, legislation, national and international Acts, South African and international case law and international Conventions. International legislation and case law is explored with specific reference to the United States of America and Ireland. In addition to reviewing the regulatory framework concerning irregular migrant workers, existing literature from journal articles, books, papers and web articles is reviewed. A specific reference method is used. The full citation is given in the first footnote when citing legislation, international instruments and court cases. Thereafter it is cited as per the abbreviations as per the bibliography. The complete reference to each book, journal article, legislative instrument, case law and international instrument can be found in the bibliography at the end of this dissertation. A shortened version of the source will be used in footnotes and a shortened table can also be found in the bibliography.

1.5 Overview of chapters

In Chapter 1 a general introduction is given, the research questions are specified and the restrictions on this topic are dealt with and explained. The significance of this study is explained and the research methodology and referencing method is explained.

Chapter 2 deals with the international norms applicable to the labour rights of irregular migrants. The chapter deals with the international norms pertaining to irregular migrant rights included into the instruments of the UN, ILO, SADC and AU.

Chapter 3 confirms the position in South Africa and how irregular migrants' rights are protected. This Chapter contains an in depth study of *Discovery*.

Chapter 4 explores the instruments put into place by the Immigration Act. It further looks at the newly enacted Green Paper and its recommendations.

[30] Masabo (2015) 2.

Chapter 5 is a comparative analysis. This chapter compares the rights of irregular migrant workers in the United States of America and Ireland with those in South Africa. Specific reference is made to the legislative instruments and courts' opinions through case law.

Chapter 6, the conclusion, contains concluding remarks on each chapter and the research question. Recommendations on what reforms are necessary to establish an appropriate balance in the protection of irregular migrants are suggested.

Chapter 2

International norms

2.1 Introduction

As previously mentioned, irregular migrants are a worldwide occurrence and not unique to South Africa.[31] A study and assessment of the rights granted by the United Nations is presented in this chapter. Furthermore, the framework of protection afforded to irregular migrants at international level is set forth. The most relevant provisions of the universal human rights instruments of the United Nations, the ICRMW, and of the ILO is presented. This study also considers the AU and the SADC.

2.2 The International Labour Organisation

The ILO was established by the Treaty of Versailles that was signed in 1919.[32] The ILO is comprised out of three bodies: the International Labour Conference, the Governing Body and the International Labour Office. South Africa is a member of the ILO.[33] The ILO operates by way of ILO standards that are included into conventions and recommendations. The most important of which are conventions adopted by the International Labour Conference.

[31] See Campbell (2006) 20 where the writer states: "Since the 1970s illegal immigration has become an increasing source of concern worldwide as poverty forced professionals and non-professionals to take desperate steps to survive and improve their living standards elsewhere".
[32] Van Niekerk Law@work (2015) 21.
[33] Van Niekerk Law@work (2015) 22.

Conventions are not automatically binding and a convention needs to be ratified by a member state in order to be enforceable.[34] Recommendations provide guidelines on how a particular matter should be regulated, or when adopted with a convention, it acts as a supportive mechanism.[35]

The ILO defines a migrant worker as a person who migrates, or has migrated, from one country to another, with a view to being employed by someone other than him/herself, including any person regularly admitted, as a migrant, for employment.[36] Long before the adoption of the International Convention on Migrant workers, the ILO has been concerned with the protection of migrant workers. The Preamble of the ILO Constitution emphasises the urgent improvement in labour conditions:

> "Whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of persons as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of these conditions is urgently required" (….) "protection of the interests of workers when employed in countries other than their own" (…)".[37]

Van Eck and Snyman[38] agree that the ILO recognised the need to protect migrants and their families and adopted conventions dealing with protective measures for migrant workers. It is evident that the ILO specifically refers to labour standards covering migrant workers. The ILO Migration for Employment Convention (hereinafter "Migration for Employment Convention")[39] provides the foundation for the equal treatment between nationals and regular migrant workers. It sets our standards pertaining to living and working conditions.[40] The ILO Convention on Migrant Workers (hereinafter "Migrant Workers Convention")[41] has two main objectives.

The first is to regulate migration flows, to eliminate secret migration and combat trafficking and smuggling activities. The second is to facilitate integration of migrants

[34] See Dupper (2010) Part 1 where writer confirms that South Africa has ratified all 8 fundamental core conventions, but has failed to ratify the Conventions dealing with migrant workers which includes: "the Migration for Employment Convention (Revised) (No 97) and Recommendation (Revised) (No 86), adopted in 1949, and the Migrant Workers (Supplementary Provisions) Convention (No 143) and the Migrant Workers Recommendation (No 151), adopted in 1975 to supplement the 1949 instruments".
[35] Van Niekerk Law@work (2015) 23 – 24.
[36] Article 11(1) ILO Migration for Employment Convention of 1949 (Revised) (No. 97).
[37] Preamble ILO Constitution.
[38] Van Eck and Snyman (2015) 299.
[39] ILO Migration for Employment Convention of 1949 (Revised) (No. 97).
[40] Hemispheric Conference Santiago (2002) 12.
[41] ILO Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143).

in host societies. The ILO thus promotes equal rights for existing irregular migrants through the Migration for Employment Convention, while discouraging further irregular migration through the Migrant Workers Convention.[42]

Article 8 of the Migrant Workers Convention states that an irregular migrant will not be regarded as illegal or in an irregular situation by the mere fact of loss of his/her employment and it will not imply the withdrawal of his/her authorisation of residence or, as the case may be work permit. He/she shall enjoy equality of treatment with nationals in respect of guarantees of security of employment, the provision of alternative employment, relief work and retraining. This is a clear indication that migrant workers in an irregular status do not lose their rights when they are found to be in this situation due to loss of work.

Article 9 of the same Convention stipulates that nothing prevents employers from letting employees in an irregular status stay in employment whilst helping them to establish legal standing within the country. Aside from the Migrant Workers Convention, the other ILO Conventions partially apply to irregular migrants, unless explicitly stated otherwise. This position was affirmed in the 2004 Resolution Concerning a Fair Deal for Migrant Workers in a Global Economy, which stated:

> "It is important to ensure that the human rights of irregular migrant workers are protected. It should be recalled that the ILO instruments apply to all workers, unless otherwise stated. Consideration should be given to the situation of irregular migrant workers, ensuring that their human rights and fundamental labour rights are effectively protected, and that they are not exploited or treated arbitrarily". [43]

There are 8 fundamental ILO Conventions awarding numerous rights to workers.[44] Although not legally binding, all member states of the ILO are obliged to uphold the principles of the 8 core Conventions. These 8 core Conventions apply to nationals and non-nationals, whether they are in a regular or irregular status.

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[42] Hemispheric Conference Santiago (2002)13.
[43] ILO Declaration on Fundamental Principles and Rights at Work, (1998) Geneva. Available at: http://www.ilo.org/declaration/thedeclaration/textdeclaration/index.htm (accessed on 10 March 2016).
[44] Forced Labour Convention, 1930 (No.29); Abolition of Forced Labour Convention, 1957 (No.105); Minimum Age Convention, 1973 (No.138); Worst Forms of Child Labour Convention, 1999 (No.182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No.111); Freedom of Association Convention, 1948 (No.87); and Right to Organize and Collective Bargaining Convention, 1949 (No.98).

2.3 The United Nations

The ICRMW is based on concepts drawn from the Migration for Employment Convention and the Migrant Workers Convention. This is a United Nations Convention that expanded and extended recognition of migrant workers' rights.[45] Dupper writes that this convention breaks new ground in recognising the rights of irregular migrants:

> "…the United Nations Migrant Workers Convention breaks new ground by expressly recognising the plight of irregular migrants".[46]

Dekker[47] points out that this convention is the most comprehensive international instrument on the topic of irregular migrant rights and furthermore confirms that it is also the most controversial. This convention has undergone severe criticism, delaying its adoption by thirteen years.[48] States have still not ratified this convention due to the fact that they fear that irregular migration will increase if migrants are given human rights.

The South African position after *Discovery* grants irregular migrants labour rights. This has been a controversial topic for many years as some agree that rights should be extended and others disagree and say that the immigration laws should be implemented with stricter force. If one looks at the fact that South Africa is a Constitutional democracy which grants "everyone" the right to fair labour practices it is more prone that this study supports the view of applying these rights to migrant workers and then creating awareness about these rights. In that way it will not be at all beneficial to the employer to employ a migrant or irregular migrant if they have the exact same rights as normal national workers. However, this study also agrees with Norton and takes the view that the legislature intended to criminalise both the employer and employee and intended for a contract between an irregular migrant worker and an employer to be null and void. South Africa thus needs clear and consistent Immigration Law pertaining to irregular migrants. Consequently, it will remain a criminal offence to employ an irregular migrant worker, but will also remove the motivating factor for employers to engage irregular migrant workers, by granting

[45] Hemispheric Conference Santiago (2002)13.
[46] Dupper (2010) Part 1, 237.
[47] Dekker (2010) 392.
[48] Bekker and Olivier: "Access to Social Security for Noncitizens and Informal Sector Workers: An International, South African and German Perspective" (2008) at 35-6 writes that the Convention needed 20 ratifications to come into force which was achieved in 2003.

them certain migrant rights. Then perhaps, the newly enacted Employment Services Act, which will be discussed in Chapter 4 hereunder, can be of some help to set straight and further minimise the employment of Migrant workers.

The ICRMW is agreeably the most important tool that regulates migrant workers.[49] Its primary objective is to protect migrant workers and their families, a particularly vulnerable population, from exploitation and the violation of their human rights.[50] The ICRMW has four purposes which is stated in the preamble of this Convention:

- to unify the body of law applicable to all migrant workers and members of their families;
- to improve the status of migrant workers and their families;
- to reduce secret trafficking;
- to compliment other international instruments.

The ICRMW defines a migrant worker as a person who is engaged or has been engaged in a remuneration activity in a state of which he or she is not a national.[51] The ICRMW further confirms that migrant workers and members of their families are considered as documented if they are authorised to enter, to stay and to engage in a remunerated activity in the state of employment. Migrant workers are considered as non-documented or in an irregular situation if they are not documented as aforementioned.[52] It is therefore clear that this Convention is applicable to migrants in an irregular situation as well.[53]

As emphasised by the ICRMW, irregular migration adversely affects not only the migrants themselves but also society at large. The ICRMW fortunately suggests possible solutions to this problem. It states that appropriate action should be

[49] See Van Eck and Snyman (2015) note 36 at 299 agrees by saying: "This is probably the most significant overarching convention providing protection to migrants and their families…"; Dupper (2010) Part 1 at note 43 at 237 agrees by saying that the ICRMW has been hailed as the "most ambitious statement to date of international concern for the problematic condition of undocumented migrants"; Bosniak (1991) at 740 described this Convention as the "most ambitious statement to date of International concern for the problematic conditions of undocumented migrants".
[50] Preamble of the ICRMW.
[51] Article 2 1(a) of the ICRMW.
[52] Article 5 of the ICRMW.
[53] Articles under Part III of the ICRMW (articles 8-35) apply to "all migrant workers and their families" as the title of that Part indicates.

encouraged, in order to prevent and eliminate secret movements and trafficking of migrant workers, while at the same time ensuring the protection of their essential human rights.

According to the ICRMW, workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than their documented counterparties. Dupper[54] states the following:

> "In the preamble, the Convention recognises that 'workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers', and that 'the human problems involved in migration are even more serious in the case of irregular migration".

Employers find this an encouragement to seek such labour in order to gain the benefits of unfair competition. Employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more broadly recognised. The ICRMW therefore finds the need to bring about the international protection of the rights of all migrant workers and members of their families, confirming and establishing basic norms in a complete convention which could be applied collectively.[55]

Article 25(1) of the ICRMW stipulates that every migrant worker and every member of their family shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration. In South Africa, it is clear that irregular migrant workers are often treated less favourable. They are taken advantage of, abused and exploited.[56] Apart from existing case law, South Africa does not have clear regulations or legislation governing the remuneration structure of irregular migrants. Irregular migrants in South Africa are left to rely on *Discovery*, where it was confirmed that they fall within the definition of an "employee" [57], therefore entitling them to protection under the Labour Relations Act (hereinafter "LRA") and

[54] Dupper (2010) Part 1, 237.
[55] Preamble of the ICRMW.
[56] Global Migration Group (2013) 37. See also Dekker (2010) at 388 where he confirms the "vulnerability of non-citizens and migrant workers".
[57] Section 213 of the Labour Relations Act (hereinafter 'LRA") defines an employee as follows:
"Employee" means –
(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
(b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of "employee".

Basic Conditions of Employment Act, 11 of 2002 (hereinafter the "BCEA").[58] By recognising irregular migrants as employees, basic conditions of employment such as working hours, weekly rest, paid holidays, health and safety, and termination of the employment, and others are extended to irregular migrant workers.[59]

Article 25(2) of the ICRMW illegalises deviation in private contracts of employment from the principle of equality of treatment. Article 25(3) stipulates that State parties should take all appropriate measures to ensure that migrant workers are not deprived of any rights by reason of their irregular status. Particularly, employers are not excused from legal or contractual obligations, nor are their obligations limited, by the mere fact that the employee has irregular status. It is important to note that the ICRMW thus places responsibility on the State to uphold the rights of irregular migrants, while aiming to protect them from exploitation by employers.

Article 26(1)a of the ICRMW grants migrant workers the right to take part in meetings and activities of trade unions, while article 26(1)b grants them the right to freely join any trade union and any such association. Article 26(1)c further grants them the right to seek the aid from these associations. Article 26(2) allows deviation from these rights by outlining two acceptable conditions. The first being restrictions imposed by law, and secondly for maintaining national security and public order or protecting rights and freedom. It seems that these rights are rarely enjoyed by irregular migrants. Irregular migrant workers fail to join associations out of fear of being identified as an irregular migrant and subsequently deported.[60]

In South Africa, trade union participation is a fundamental right and all persons have the right to form and join a trade union and participate in their activities.[61] Until *Discovery,* this was never afforded to irregular migrants. This case makes it clear that irregular migrants can be party to a valid employment relationship. It follows that they are therefore afforded the right to approach the Commission for Conciliation, Mediation and Arbitration (hereinafter "CCMA"). No specific mention is made in *Discovery* to the

[58] Basic Conditions of Employment Act, 11 of 2002.
[59] Article 25(1)a of ICRMW.
[60] Unifem Briefing Paper (2003) 42.
[61] Section 23 of the Constitution, 1996.

right to form, join or participate in trade union activities, however the irregular migrant worker is included into the definition of an employee thus affording them this right. The definition does not specifically include irregular migrants. *Discovery* extended protection to irregular migrants and included them to be employees for purposes of the LRA. The LRA definition has not been amended to incorporate the wording "irregular migrant" into the definition.

Article 54(1)a of the ICRMW grants any migrant worker the right to equality of treatment with nationals of the State of employment in respect of:

> "(a) Protection against dismissal;
> (b) Unemployment benefits;
> (c) Access to public work schemes intended to combat unemployment; and
> (d) Access to alternative employment in the event of loss of work or termination of other remunerated activity…"

From the above, it is important to note that the rights afforded to irregular migrants extends beyond the term of employment and entitles them to benefits after termination of employment. In South Africa, employment relationships with irregular migrant workers are typically of a fixed term nature.[62] The nature of these contracts inherently exclude these workers from the benefits as set out in article 54(1). Article 54(b) goes further to state that if a migrant worker claims that the terms of their work contract have been violated, they will have the right to address their case to the competent authorities of the State of employment.

The ICRMW aims to protect the rights of irregular migrant workers by providing a guideline of rights to be afforded to them.[63] Among these rights are equality of treatment, acceptable working conditions, dispute resolution and trade union participation. In South Africa, the Constitution, 1996 makes it clear that when case law and legislation is evaluated, the international norms must be taken into consideration. Section 39(2)b of the Constitution, 1996 makes it clear that when the Bill of Rights is

[62] See Olivier Part 1 (2011) 142 where the writer confirms that migrant workers are excluded from the unemployment benefits under Section 3(1)(d) of the Unemployment Insurance Act No. 63 of 2001: "…the UIA excludes persons who enter South Africa for the purpose of carrying out a contract of service, apprenticeship or learnership if there is a legal or a contractual requirement or any other agreement or undertaking that such upon termination of the contract".
[63] Dekker (2010) at 392 states that "it aims to extend social protection to migrant workers and their families, irrespective of their status".

interpreted, a court, tribunal or forum must consider international law. Therefore, even if this Convention if not ratified by South Africa, it still has a profound effect when dealing with irregular migrants workers' rights. International norms is therefore a tool that is helpful in the effective development of the South African position for irregular migrant workers.

Despite the fact that ICRMW has not been ratified by many countries, it "remains a significant statement of international norms in relation to the rights of migrant workers".

2.4 The African Union

The African Union (hereinafter "AU") is a continental union consisting out of 54 countries in Africa. Van Eck and Snyman [64] states that:

> "The AU Recognizes the importance of implementing a coherent an integrated strategy regarding the social protection of migrants at continental and regional (such as SADC) levels".

From as far back as 2001, the African Union has made it clear that there is a need for migration policies. The AU stated that member countries must work towards the principle of freedom of movement of people which has also played an extensive role within the European Union. In 2006, the AU expressed the need for a migration policy which incorporated the ILO conventions adopted in 1949 and 1975. It called on member countries to ratify and adopt principles contained in the Migrant Workers Convention, the Migration for Employment Convention and the ICRMW. The African Union therefore aims to protect irregular migrant rights through the implementation of the above Conventions and UN Convention. Despite this no framework has been provided to protect this vulnerable group.[65] Olivier is of the opinion that the AU instruments relating to protection of migrant workers in general is problematic. There is a clear absence of migration policies and it does not operate under the regime of freedom of movement.[66]

[64] Van Eck and Snyman (2015) at 303.
[65] Van Eck and Snyman (2015) 304.
[66] Olivier Part 2 (2011) 138.

2.5 The South African Development Community

South Africa is a member of the Southern African Development Community (hereinafter "SADC"). The SADC was formed on 17 August 1992 when the SADC treaty was signed. The SADC was conceived to be the "front line States" who fought for liberation of southern Africa.[67] The SADC refers to a number of categories of migrants which included irregular migrants/undocumented migrants.[68] It is recorded that South Africa is the largest host country of migrant workers within the SADC.[69] Olivier points out that it appears that migration typically occurs between SADC countries.[70]

The goal of the SADC reads "towards a common future". Article 5 confirms that one of the SADC's main objectives is "to promote sustainable and equitable economic growth and socio-economic development through deeper cooperation and integration". These objectives are to be achieved through increased regional integration, built on democratic principles, and equitable and sustainable development.[71] The SADC makes provision for member states to conclude protocols that will give effect to the aims of the treaty. These protocols do not mention irregular migrants specifically, but try to encourage conclusion of agreements to facilitate movement of persons.[72]

In 1993, the Draft Protocol on the Facilitation of Movement of Persons, 1997 in the SADC (hereinafter "Draft Protocol") was introduced. The main objective of this protocol is to confer, promote and protect:

- the right to enter freely and without a visa the territory of another Member State for a short visit;
- the right to reside in the territory of another Member State;
- the right to establish oneself and work in the territory of another Member State.[73]

[67] Masabo (2015) 1.
[68] "Someone who, owing to illegal entry or the expiry of his or her visa, lacks the legal status in a transit or host country".
[69] Olivier Part 1 (2011) 127.
[70] Olivier Part 1 (2011) 123.
[71] Mpedi and Smit (2001) 36.
[72] Van Eck and Snyman (2015) 13.
[73] Article 2 of the Draft Protocol.

The ultimate objective was to "achieve the progressive abolition of controls on movements of citizens of a Member State at an internal border with another Member State".[74] These objectives were examined in a migration Policy Brief in 2006.[75] This was the start to facilitation of movement between the SADC, but the policy failed to give any indication as to how it should be implemented into the legislative structure. This draft protocol has still not been implemented. In 2016 the SADC adopted a regional Labour Migration Action plan[76], followed by a protocol on Employment and Labour, containing a comprehensive provision on labour migration. This protocol was dedicated particularly to "control and manage the fundamental rights of labour/employment".[77]

2.6 Conclusion

It is evident from the various international conventions that irregular migrants are a worldwide occurrence and an important issue to address in the 21st century.[78] By exploring these conventions, it appears that they have a lot in common. The ILO and ICRMW agree that irregular migrant workers should be protected by affording them the same rights as regular employees, while the AU and the SADC agree that opening borders to promote freedom of movement could be beneficial to member countries, while eliminating the exploitation of migrant workers.

The ILO and ICRMW pursue a noble cause. They aim to protect irregular workers and their families from exploitation while reducing secret trafficking. The effectiveness of these conventions set forth by the ILO and UN, however, remains questionable. Member states fail to ratify these conventions, making them mere guidelines, as opposed to binding requirements. In addition, the ILO and ICRMW purport only the protection of irregular migrants as a remedy to the injustice, hardship and privation faced as a result of irregular migration. It is debated however whether protecting these rights is enough to improve labour conditions in South Africa. To combat the existing exploitation of these workers, awareness should be created among employees and

[74] Article 3 of the Draft Protocol.
[75] William and Carr (2006) Migration Policy Brief.
[76] The specific planned activities include, identification and sharing of migration data and statistics; ensuring that migrants have access to social benefits and health services and continuum of care across borders; developing regional labour migration policy; creating synergies between national labour migration policies and the regional labour migration policy; and formulation of labour solid migration management system for purposes of monitoring the implementation of policies and legislation.
[77] Mabaso (2015) 3-4.
[78] See para 2.1 note 28.

employers alike. With an exceptionally high unemployment rate, South Africa is struggling to provide work to its regular workers. Giving rights to irregular workers might seem counter-productive.

However, more awareness could eliminate the primary motivation of employers to engage this group, especially if remuneration is adjusted without discrimination. Awareness should especially be created among employees, as they must take the directive to refer unfair labour practices to authorities. However, irregular migrants are afraid to approach authorities, due to the provisions of the Immigration Act, which may impede the reporting of unfair labour practices. The provisions of the ILO or the UN pertaining to irregular migrant rights are also in contradiction to the Immigration Act. As long as this disparity exists, ratifying these conventions will only bring more confusion to the front. This might be one of the reasons South Africa has not ratified ILO conventions pertaining to irregular migrant workers.

The AU and SADC suggest that border control should be laxed to allow more free movement of people and promote migrant workers. These protocols and instruments have not yet been implemented and it remains a suggestive guideline. This would eliminate the need for work permits and essentially eliminate irregular workers within member states altogether. It is questionable whether this would solve the irregular migrant issue in South Africa, or simply worsen current conditions. In a country with a history of xenophobic attacks, outsiders are not typically welcomed. South Africa already suffers from exceptionally high unemployment rates, partly due to the high number of irregular migrants in the country. It stands to reason that open borders with other developing African countries would simply cripple the South African economy by increasing unemployment and fume social unrest.

Chapter 3

The South African case law

3.1 Introduction

The question of whether labour rights are extended to irregular migrants became more and more important. Norton confirms this statement by asserting that:

> "The question whether, and if so, to what extent, illegal immigrants working in the country are protected by South Africa's labour legislation is an important one in the light of both the number of illegal people in employment and in the light of their vulnerability".[79]

In 2008, a case was heard in the Labour Court of South Africa that significantly changed the legal landscape for irregular migrants. *Discovery* considered two legal and controversial questions: Is a contract of employment valid when it is made between an employer and an irregular migrant in contravention of the Immigration Act and, secondly is the definition of employee grounded on a valid contract of employment?[80] To answer these questions, the Court took a step back to determine

[79] Norton (2009) 68.
[80] Norton (2009) suggests possible answers to this question by stating the following: "The answers to these questions seem to anticipate three possible scenarios. Firstly, if the contract is found to be valid, then the worker falls quite unproblematically into the definition of 'employee' (the enquiry ends neatly then and there). Secondly, if the contract is invalid then there is a possibility that the worker may still be regarded as an 'employee' if the statutory definition does not require a valid contract. Thirdly (and

whether an irregular migrant worker can be seen as an employee, for the purposes of the LRA. Before this case set precedent, a number of cases were considered, two of which are discussed below.

3.2 Previous case law on irregular migrants

Initially the CCMA denied irregular migrants access to the dispute resolution measures due to the perceived illegal nature of employment contracts. This issue started in *Lende v Goldberg*[81] *(*hereinafter *"Lende")* where a domestic worker's employment was terminated due to the fact that she was not in possession of a valid work permit. During that time she did not have a permit required by the Blacks (Urban Areas) Consolidation Act[82] (hereinafter "BCA"). The worker claimed payment of her salary and sued in the Magistrates Court. The Court noted that the employment relationship was null and void due to the fact that she was employed in contradiction of section 10 of the BCA. Bosch[83] confirms that this decision led to several cases, echoing the *Lende* approach in the Industrial Court[84] and the CCMA.[85] A few will be discussed hereunder. Bosch confirmed the version of the court by stating that:

> "The predominant view is that the legislature intended that such contracts would be null and void; in effect the contracts are to be regarded as if they never arose at all".[86]

In *Vulda and Millies Fashions*[87] (hereinafter "*Vulda*") the services of a Zimbabwean sales assistant was terminated, because she failed to produce a valid work permit. She approached the CCMA and the case was dismissed on the grounds that the contract of employment was invalid due to the irregular status of the employee. The Commissioner stated in his award that: "The country's attitude towards illegal

conversely), if the statutory definition requires a valid contract and the contract is invalid, then the worker has no entitlement to the protections envisaged in the LRA".
[81] (1983) 4 ILJ 271 (C).
[82] Act 5 of 1945.
[83] Bosch (2006) 1342.
[84] See *Dube v Classique Panelbeaters* [1997] 7 BLLR 868 (IC) and compare *Norval v Vision Centre Optometrists* (1995) 16 ILJ 481 (IC).
[85] See *Vulda and Millies Fashio*ns (2003) 48 ILJ 24 462 (CCMA); *Mthethwa v Vorna Valley Spar* (1996) 7 (11) SALLR 83 (CCMA); *Moses v Safika Holdings* (Pty) Ltd (2001) 22 ILJ 1261 (CCMA); *Chambers v Process Consulting Logistics* (Pty) Ltd [2003] 4 BALR 405 (CCMA) *and Georgieva-Deyanova v Craighall Spar* [2004] 9 BALR 1143 (CCMA).
[86] Bosch (2006) 1343
[87] (2003) 48 ILJ 24 462 (CCMA).

immigrants and those who are employing and/or harbouring them is that they should be dealt with severely".

It is clear that this statement is in line with the provisions of the Immigration Act. Furthermore, it can be understood in the light of South Africa's unique situation with regards to labour markets and illegal foreigners. The approach, however, is questionable.

In *Moses v Safika Holdings (*hereinafter *"Moses")*[88] an American citizen was offered a position as an advisor, on condition that he obtains a work permit. This case was heard whilst the Alien Control Act[89] was still in force. The Applicant failed to produce a valid work permit after he accepted the offer and his employment was terminated. The Commissioner considered the definition of an employee in terms of the LRA and noted that in his view, "employee" does not cover those employees whose acts are unlawful.

> "Although the definition of 'employee' in s 213 of the Labour Relations Act in its literal interpretation would cover even illegal aliens, I am, however, of the view that the word 'employee' does not cover those 'employees' whose acts are unlawful. In other words, every legislation must be interpreted as meaning only lawful conduct being approved".[90]

The Commissioner further looked at the word "everyone" as contained in section 23 of the Constitution, 1996 and came to the view that the right should be limited as the nature of such a right is that it is impossible to enforce. He speculated that the CCMA and Labour Court would be flooded with irregular migrants challenging the fairness of their dismissals, should they be seen as legal employees.[91]It was further noted that:

> "The commissioner considered but rejected the applicant's argument that s 27(1) of the Constitution 1993, and later s 23(1) of the Constitution 1996, have conferred on 'everyone' an unlimited right to fair labour practices…"[92]

The Applicant could therefore not succeed in his unfair dismissal claim before the CCMA, and was neither accepted as an employee, nor as part of the group "everyone" as in section 23 of the Constitution, 1996.

[88] (2001) 22 ILJ 1261 (CCMA).
[89] Aliens Control Act 96 of 1991.
[90] *Moses* at para 18.
[91] *Moses* at para 24.4.
[92] *Moses* at headnote.

Georgierva-Deyanova v Craighall Spar[93] (hereinafter *"Spar"*) agreed with this view and also dismissed the case due to the fact that it violated section 38(1) of the Immigration Act. The CCMA upheld the point *in limine* that the contract of employment was invalid and therefore the CCMA had no jurisdiction.

It is clear that the provisions of the Immigration Act rings through these cases. The primary argument raised in the above cases was the fact that there is no employment relationship between and employer and an undocumented foreigner. How can someone who has irregular status in a country be afforded any rights? This is unheard of and against the immigration laws. The Immigration Act laid the foundation for previous judgments handed down. The courts cited these provisions as a basis for their judgments that were always against the irregular migrant worker. They were not seen as employees as their employment contracts were null and void, based on their illegal presence in the country. This unfortunately led to the theory that irregular migrant workers were not regarded as employees under the LRA and BCEA definition of an employee and therefore these irregular migrant workers are not afforded any rights in terms of the Act.

Bosch, in his article "Can Unauthorized Workers be regarded as Employees for Purposes of the Labour Relations Act?", considered whether or not a contract of employment concluded with an irregular migrant should be regarded as null and void, and whether a contract of employment is necessary in order for an irregular migrant to be regarded as an employee. Bosch makes mention of the fact that an infringement of a person's labour rights can be seen as an infringement of a person's right to dignity. Whilst it seems that he supports the fact that the Immigration Act limits irregular migrant's rights, he strangely agrees with the traditional interpretation of the Immigration Act and states:

> "My view is that, while there are cogent arguments to the contrary, there are stronger arguments for accepting that the effect of the Immigration Act, properly interpreted, is that contracts of employment concluded contrary to the Act are null and void."[94]

He suggests that they should be regarded as "employees" and entitled to the right to not be unfairly dismissed. It is clear that Bosch acknowledged that the history of

[93] (2004) 9 BALR 1143 (CCMA).
[94] Bosch (2006) 1364.

irregular migrants' rights generally sways towards them not having any rights, but hopes that in the future courts would interpret their rights and expand their rights. He stated that:

> "The fate of unauthorized workers is becoming increasingly important in the labour context. It is to be hoped that the legislature, courts and arbitrators urgently apply their minds to how to give effect to the constitutional rights of those people under the LRA given that the current legal situation seems inadequate".[95]

Bosch agrees that there are two difficulties with the view that irregular migrants are seen as "employees". The first being the definition of dismissal contained in section 186 of the LRA.[96] Bosch suggest that section 186 should rather read:

> "Dismissal means that an employer has terminated a contract of employment or employment relationship with or without notice...."[97]

The Labour Relations Amendment Act[98] made specific changes to section 186(1) of the LRA by replacing any reference to "contract of employment" with 'employment" to be in line with *Discovery.*[99]

The second problem he identified is with respect to granting re-employment or reinstatement as it will be in contravention with the Immigration Act. This article written by Bosch was accepted as a guideline in *Discovery*. *Discovery* changed the legal

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[95] Bosch (2006) 1365.
[96] Dismissal means that -
(a) an employer has terminated employment with or without notice;
(b) an employee employed in terms of a fixed term contract of employment reasonably expected the employer-
(i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
(ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee;
(c) an employer refused to allow an employee to resume work after she -
(i) took maternity leave in terms of any law, collective agreement or her contract of employment or;
(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
(e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee; or
(f) an employee terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.
[97] Bosch (2006) 2361.
[98] 6 of 2014.
[99] Du Toit et al (2015) 425 at note 21.

framework by taking a dramatic turn away from previous judgments and the Immigration Act.

3.3 *Discovery Health v CCMA*

3.3.1 Background

Lanzetta, an employee of Discovery Health who is an Argentine National approached the CCMA regarding an unfair dismissal case. The Applicant was offered employment with effect from 1 May 2005. Lanzetta accepted the offer and he claimed that he asked his manager to provide him with the necessary documentation to enable him to renew his work permit as it was about to expire on 31 December 2005. His permit could not be renewed on a timely basis and Discovery Health dismissed him on the basis that he was not legally permitted to work for the company. Lazetta claimed that Discovery Health delayed this on their side and this was the reason why his permit expired and his dismissal took place. He consequently referred an unfair dismissal case to the CCMA.

3.3.2 The finding at the CCMA

A preliminary point was raised at the arbitration that the Commissioner should start by determining whether or not the CCMA has jurisdiction to hear the matter. Discovery Health argued that the CCMA has no jurisdiction due to the fact that Lanzetta was not regarded as an employee in terms of section 213 of the LRA. Therefore there was no protection afforded to him. Discovery Health contended that the statutory definition contemplates that an employee is a party to a valid contract of employment. Since the contract of employment concluded with Lanzetta was tainted with illegality, Lanzetta's contract was not valid and he was therefore not an employee as defined in the LRA. Based on this, Discovery Health surmised that Lanzetta was not an employee, and could not claim the right not to be unfairly dismissed and the CCMA had no jurisdiction to arbitrate his dispute with Discovery Health.[100]

Lanzetta submitted that despite the fact that the contract of employment between the parties was tainted with illegality, this invalidity does not extend to the employment relationship itself, which goes above and beyond the contract of employment.[101]

[100] Discovery at para 12.
[101] Discovery at para 13.

The Commissioner concluded:

> "While it seems to me to be obvious that an employer cannot be required to continue the employment of an illegal foreigner or a foreigner whose specific work permit does not permit the employer to employ him that does not mean that the protections afforded to employees by the Act cannot apply to such foreigners prior to decisions being made in this regard".

The commissioner agreed with Bosch's argument that the concept of an employment relationship was an appropriate vehicle to extend the protections of the LRA to what Bosch terms "unauthorized workers".

The Commissioner accordingly ruled that the CCMA had jurisdiction to hear Lanzetta's case and found that Lanzetta had been, in effect, dismissed. This is clearly in contradiction to the aforementioned case law.[102]

3.3.3 The Labour Court

Discovery Health filed a review application in the Labour Court as they felt the Commissioner reached a decision that a reasonable decision maker would not reach. The Labour Court applied the test set out in the *Sidumo* case.[103] Judge van Niekerk AJ had to firstly deal with the issue on the validity of the contract of employment. If the contract is found to be valid, it would automatically include Lazetta into the definition of an employee as contemplated in section 213 of the LRA.

3.3.4 Validity of the employment contract

In order to determine the validity of an employment contract with an irregular migrant, the Labour Court held that it is necessary to explore the background of this debate. It started in *Standard Bank v Estate Van Rhyn*[104] where the Court stated: "When the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law." According to this case, the penalties handed down in the Immigration Act thus implies that employing irregular migrants is illegal. This case was decided many years before South Africa adopted the Constitution, 1996.

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[102] *Vulda and Millies Fashions* (2003) 48 ILJ 24 (CCMA) 462; *Moses v Safika Holdings* (2001) 22 ILJ 1261 (CCMA); *Georgierva-Deyanova/Craighall Spar* (2004) 9 BALR 1143 (CCMA).
[103] *Sidumo v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC).
[104] 1925 AD 266.

Section 39(2) of the Constitution, 1996 sheds some light on the tools to be applied when any interpretation of cases are in dispute. It requires that when a court interprets legislation, it must "promote the spirit, purport and objects of the Bill of Rights." In *NUMSA & others v Bader Bop (Pty) Ltd & another,*[105] the Constitutional Court highlighted that if a statute is capable of interpretation in a manner that does not limit fundamental rights, then that interpretation should be preferred. The Court qualified this rule by stating:

> "This is not to say that where the legislature intends legislation to limit rights, and where that legislation does so clearly but justifiably, such an interpretation may not be preferred in order to give effect to the clear intention of the democratic will of parliament. If that were to be done, however, we would need to be persuaded by careful and thorough argument that such an interpretation was indeed the proper interpretation and that any limitation caused was justifiable as contemplated by s 36 of the Constitution."

Discovery followed the *Bader Bop* decision in so far as the case highlights the fact that the right to fair labour practice is a fundamental right and when interpreting legislation, the interpretation that excludes anyone from the benefits of this right, is the incorrect one. This case makes mention of the fact that employers would take advantage of the irregular migrant worker based on assumption that the employment relationship is void. This is a sound argument because it is clear that employers exploit and abuse irregular migrants because they think they do not have any rights. The conclusion the Court came to is the fact that the contract of employment was never void.

3.3.5 Definition of an employee

Discovery also paid careful attention to the Labour Relations Act's definition of an employee in section 213 of the LRA. It provides that an employee is:

> "(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and;
>
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of " employee".

[105] (2003) 24 ILJ 305 (CC).

Section 23(1) of the Constitution,1995 provides that: “everyone has the right to fair labour practices”.

Lanzetta wanted to enforce his right relating to fair labour practice. It should be noted, however that Cheadle suggests that the word “everyone” should not be taken literally. The scope of the right is appropriately determined by the inherent qualification in section 23 of the Constitution, 1996 – the right is one that extends to fair labour practices. These are practices that arise from “the relationship between workers, employers and their respective organisations.”[106] Du Toit agrees that the employment relationship should be considered over a contract of employment and that the substance of the relationship takes precedence over its legal form.[107]

In the case of *South African National Defence Union v Minister of Defence,*[108] the Court defined the more narrow term “worker” to extend beyond a contract of employment. In this case, members of the Defence Force were prohibited from forming and joining trade unions. The Defence Force argued that members enlist in the armed forces and there was no employment contract between them. Therefore they were not workers as contemplated in section 23 of the Constitution, 1996. In a positive development, the Labour Appeal Court concluded:

> “In many respects, therefore, the relationship between members of the permanent force and the defence force is akin to an employment relationship. It would seem to follow that when s 23(2) speaks of 'worker', it should be interpreted to include members of the armed forces, even though the relationship they have with the defence force is unusual and not identical to an ordinary employment relationship”.

In another development, the court had to evaluate whether labour law extended beyond the existence of a valid contract of employment. In the case *of Kylie v CCMA*[109] the Court had to decide on whether or not the CCMA had jurisdiction to resolve an unfair dismissal case of a sex worker. Does this sex worker who participates in an illegal act have any labour rights? The Court decided that the CCMA has jurisdiction to resolve this dispute. For this decision, the Court relied on section 23(1) of the Constitution, which provides that everyone has the right to fair labour practices.

[106] Cheadle (2002) 365.
[107] Du Toit et al (2015) 89.
[108] *South African National Defence Union v Minister of Defence*1999 (4) SA 469 (CC).
[109] *Kylie v CCMA* (2010) 7 BLLR 705 (AAH).

According to the Labour Appeal Court the crucial question for determination by the court was if a person in the position of a sex worker enjoyed the full range of constitutional rights, including the right to fair labour practices. In the court's reasoning, the word 'everyone' in section 23(1) of the Constitution is a term of general import and conveys precisely what it means. In other words, everyone, including those engaged in illegal activities, has the right to fair labour practices as guaranteed in the Constitution. This paper does not discuss employment relationships where the nature of the work performed is that of illegal activities. Perhaps this can be explored in future studies.

The article by Bosch was taken into consideration when *Discovery* was handed down. *Discovery* took the view that it was not the intention of the legislature to criminalise the action of the employer and employee and contended that the contract of employment is not invalid. *Discovery* further suggests that the irregular migrant is included into the definition of "employee". This view was criticised by other writers such as Norton in her article "In Transit: The Position of Illegal Foreign Workers and Emerging Labour Law Jurisprudence" [110] *Discovery* made it clear that section 23(1) is not dependant on an employment contract. Protection extends potentially to other contracts, relationships and arrangements in terms of which a person performs work or provides personal services to another. The line between performing work 'akin to employment' and the provision of services as part of a business is a matter regulated by the definition of 'employee' in s 213 of the LRA.

The court Concluded with the following:

[110] Norton (2009) 68 writes that she disagrees with the Labour Court and *Discovery* decision and states that: "Firstly I disagree with the LC in the Discovery decision which accorded validity to a contract of employment which contravened the Immigration Act. My view is that a contract of employment concluded contrary to the Act's provisions is null and void". She furthermore disagrees with Bosch (2006) and gives her reason as: "Secondly I disagree with Bosch and the LC in Discovery that the legislature in the Immigration Act sought to criminalize the conduct of the employer and not the employee and thus that that sanction was sufficient without rendering the employment contract null and void. My view is that the Act criminalizes both the employer and employee and that the legislature intended such contracts to be null and void particularly to further the underlying policy consideration in the Immigration Act which is to prevent the employment of illegal foreigners over South Africans". Norton (2009) 69 agrees with Bosch and Discovery by stating that: "Thirdly, I agree with Bosch and the LC in Discovery that it is arguable that the constitutional right to fair labour practices protects workers, even illegal ones. I propose - for purposes of developing a sense of what the content of that right for illegal workers might entail - a minimum bed of labour rights which arises from the recommendations in the International Labour Organization's International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (the 1990 convention) and resonates compatibly with the provisions in the Basic Conditions of Employment Act (BCEA) 1997".

> "a) 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.
>
> b) 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."

3.4 Conclusion

Discovery is a controversial judgment and a topic for debate. It is clear from the recent case law as well as the Constitution, 1996 of South Africa that irregular migrants have access to a country's labour dispute resolution mechanism. Furthermore, irregular migrant workers fall within the definition of an employee and is therefore awarded all rights to approach the CCMA to pursue unfair dismissal. Remedies are available to them under the LRA and they should not be treated less favourably than South African citizens. When determining the validity of the employment relationship, the substance should be regarded over the legal form. Thus an employment relationship formed on the basis of a contract that is null and void, is still valid under the LRA and BCEA. Despite this, employers still exploit irregular migrants by subjecting them to less favourable working conditions due to lack of awareness. Perhaps another reason for this continued exploitation is the existing disparity between case law, particularly *Discovery* and legislation, specifically the Immigration Act.

Chapter 4
The South African legislative structure

4.1 Introduction

As discussed in Chapter 2, *Discovery* established that the irregular status of a worker, does not exclude them from the definition of an employee. However, under the Immigration Act, foreigners need to be in possession of a valid a work permit in order for them to seen as employees.[111] Furthermore, the Immigration Act explicitly states that "no person shall employ an illegal foreigner"[112], while imposing penalties for non-compliance. From this view, how can an irregular migrant then be party to a valid employment relationship?

The Constitution, 1996 awards the right to fair labour practices to "everyone".[113] This could presumably include irregular migrants.[114] Thus *Discovery*, aligns with the Constitution, 1996. When interpreting the provisions of the Immigration Act, all Courts must ensure that it is in line with all constitutional rights. Following that basis, the Constitution, 1996 reigns supreme over other legislation, thus abandoning that section 23(1) of the Constitution must be considered over section 38(1) of the Immigration Act.

[111] Section 19 of the Immigration Act.
[112] Section 38(1)a of the Immigration Act.
[113] Section 23(1) of the Constitution of the Republic of South Africa, 108 of 1996.
[114] See chapter 3 para 3.3.5.

In 2016, the Minister of Home Affairs for South Africa published the Green Paper, recognising that the Immigration Act causes policy gaps within the legislative framework. The Minister criticises the current Act as creating a problematic way of thinking regarding immigration. It seems that there are clear contradictions within the legislative framework governing South Africa, with regards to the legality of irregular migrant workers. The history of, contradictions in, and recommendations to improve the legislative framework are discussed in this Chapter.

4.2 Historical and pre- constitutional legislation and policy

South Africa's history with immigration dates back to colonialisation and the arrival of the Dutch and the British immigrants. South Africa has attracted large numbers of immigrants seeking work with hope of a better life.[115] These migrations took place throughout the apartheid regime in an effort to increase the white community and to acquire skilled people. South Africa thus also opened its doors to European immigrants. Black migrant workers were refused permanent residency during that time.[116]

The Aliens Control Act[117] was a piece of legislation that regulated migrants during the apartheid era. The name of the Act speaks for itself and this was the purpose of the Act. The legislation rested on 4 main pillars: racist policy and legislation, the exploitation of migrant labour from neighbouring countries, tough enforcement legislation, and the repudiation of international refugee conventions.[118] There was no protection or labour rights for irregular migrants contained in the Act and it lead to abuse and exploitation.[119] It is clear that South Africa needed strong migrant polices which incorporated the rights of migrant workers, including irregular migrant workers. The Aliens Controls Act was declared unconstitutional and inconsistent with international standards. As a replacement, the Immigration Act[120] was introduced in 1991.

[115] Norton (2010) 36.
[116] Lubbe (2010) available at http://www.desmondtutudiversitytrust.org.za/xenophobia.pdf (accessed on 19 October 2016).
[117] Aliens Control Act 96 of 1991
[118] Crush and Mcdonald (2001) 4.
[119] Peberdy & Crush (1998) 18.
[120] Immigration Act, 13 of 2002.

4.3 The Constitution 1996 and migrants

In *Khosa,*[121] the Constitutional Court found that foreigners with permanent resident status were entitled to the same socio-economic rights as nationals of the country. The Applicants in both cases were Mozambican citizens who challenged certain provisions of the South African legislation that did not apply to them based on their foreign status.

The Court provided that the Bill of Rights enshrined the rights of "all people in our country" and in the absence that Section 27(1) was restricted to citizens only, the word everyone could not be construed as referring to citizens only.[122] Permanent residents are therefore entitled to the full spectrum of social insurance benefits. Some sections of the Bill of Rights only apply to citizens and permanent residents and this is made clear by the wording. Temporary residents qualify for some benefits that include employment injuries and disease protection, occupational health benefits and motor vehicle accident insurance. Temporary residents are not covered by our health care system.[123] Olivier confirms that migrant workers are excluded from unemployment insurance on termination of employment, illness, maternity or adoption.[124]

In the case of *Union of Refugee Women & Others v Private Security Industry Regulatory Authority & Others*[125] (hereinafter "*Refugee Women*"), the Constitutional Court considered the position of refugee workers and asylum seekers in South Africa. The Court confirmed that refugees held the same status as permanent residents and therefore have the same access to rights and privileges. They were, however, restricted to certain industries and professions, while certain rights were excluded.[126]

In *Larbi-Odam and others v MEC for Education (North-West Province) and another*[127] (hereinafter "*Larbi-Odam*") the Court had to decide whether only South African teachers may be appointed in permanent teaching positions. The Court decided that this restriction amounted to unfair discrimination inconsistent with the interim Constitution. The Court only pointed to permanent residents and noted that temporary

[121] See also *Mahlaule & another v Minister of Social Development &* others 2004(6) BCLR 569 (CC) where similar considerations and arguments of law were led as these cases were heard collectively.
[122] *Khosa* at para 47.
[123] Olivier Part 1 (2011) 147.
[124] Olivier Part 1 (2011) 147.
[125] (2007) 28 ILJ 537 (CC).
[126] See *Refugee Women* at para 99. They were excluded from the private security industry due to high unemployment rate.
[127] (1998) 1 SA 745 (CC).

residents' contracts are of a fixed term nature due to the period they are allowed to stay. The Court decided to invalidate the regulation in its entirety as temporary residents may not gain appropriate work security as in the case of permanent residents.

It is clear that migrants' rights have been explored and they have been afforded certain socio-economic rights which was influenced by the wording of the interim Constitution and Constitution, 1996.

4.4 The Immigration Act

The Preamble of the Immigration Act seeks to encourage immigration of migrants who have the required skills for South Africa's economy to flourish.[128] Paragraph d reads:

> "…the Immigration Act aims at setting in place a new system of immigration control which ensures that – economic growth is promoted through the employment of needed foreign labour, foreign investments is facilitated, the entry of exceptionally skilled or qualified people is enabled, skilled human resources are increased…"

The original purpose of this Act can thus be seen as promoting economic growth, through the employment of necessary and skilled foreign labour. However, it is usually the case that this class of worker is documented and enters the country legally. Section 49(1)a and section 49(1)b of the Immigration Act agrees and requires a foreigner to hold a visa.[129] If a person is in contravention of this section, they face the applicable consequences. Transgressors may be liable to a fine or imprisonment of up to 3 years.[130] Furthermore, irregular migrant workers can be subject to a fine or imprisonment of to 9 months.[131] Whether these consequences are enforced, is another debate.

Section 38(1) of the Immigration Act reads:

> "(1) No person shall employ -
> a) an illegal foreigner…"

[128] Norton (2010) 37.
[129] Section 10A (1) reads "Any foreigner who enters the Republic shall subject to subsections (2) and (4) on demand produce a valid visa…to an immigration officer. Section 10A(2) reads "Any person who holds a valid permit issued in terms of sections 13 to 22 shall upon his or her entry into the Republic and having been issued with that permit, be deemed to be in possession of a valid visa for the purposes of this section".
[130] Section 49 (3) of the Immigration Act.
[131] Section 49(1)a and section 49(1)b of the Immigration Act.

The Act thus explicitly illegalises the employment relationship, where one party to such relationship is an irregular migrant. Section 49(3) imposes penalties for the knowledgeable contravention of section 38(1). Section 49(3) states:

> "Anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year, provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding three years without the option of a fine."

It is clear that the intention of the Act is to minimise the presence of irregular migrant workers. Furthermore, their presence should not impact on the employment and training of South African citizens.[132] The Act aims to ensure that employers are aware of the fact that they may not employ irregular migrants and by doing so, they are delivered to the consequences.[133]

Bosch states that the Act does not expressly nullify the contract of employment concluded between the employer and an irregular migrant worker.[134] He noted that the language used in section 38 of the Immigration Act contains the wording "shall". According to Bosch, this may be interpreted in many ways. Some argue that the criminal penalty is so minimal that the Act merely wanted employers to be discouraged from employing irregular migrants and the purpose was not aimed at the validity of the contract of employment.[135] Others are of the opinion that the Immigration Act imposes criminal sanctions on both the employer and the employee, and therefore intended to discourage contractual agreements with irregular migrants.[136] Regardless of the intention of this Act, it is clear that it created a divide in the legislative framework of South Africa, one which the Employment Services Act aims to rectify.

4.5 The Employment Services Act

The Employment Services Act[137] came into effect on 9 August 2015. One goal of this Act is to regulate employment of foreign nationals. It stipulates that employers may not employ foreign nationals within the Republic of South Africa prior to such foreign

[132] Bosch (2006) 1345.
[133] Section 43(a) of the Immigration Act.
[134] Bosch (2006) 1345.
[135] Bosch (2006) 1359.
[136] See Chapter 3 para 2.3.
[137] The Employment Services Act, 4 of 2014.

national producing an applicable and valid work permit, issued in terms of the Immigration Act.[138] Furthermore, employers must satisfy themselves that there was no other person within the Republic that has the necessary skills before recruiting a foreign national.[139] It is clear that this piece of legislation tries to limit employment of irregular migrants and makes it apparent that all necessary resources should be exhausted before a foreign national is employed. The lengths to which employers must go to establish that no citizen can perform the required work is not stipulated in the Act. The only action suggested by the Act is the use of employment agencies. As this is a relatively new piece of legislation, there is also a void of case law on this topic. This poses the question: how does an employer satisfy themselves in this regard?

Section 8(4) of the Employment Services Act is also of importance to this study as is confirms that employees, including irregular migrant workers, may enforce terms of the contract of employment. The section reads:

> "An employee who is employed without a valid work permit is entitled to enforce any claim that the employee may have in terms of statute or contract of employment against his or her employer or any person who is liable in terms of the law".

It appears that the Employment Services Act, in a sense, bridges the gap between *Discovery* and the Immigration Act. The Employment Services Act agrees with the Immigration Act in the sense that it promotes the acquirement of scarce skills while discouraging the immigration of unskilled workers. To this purpose, it declared that only when there is an absence of a particular skill, may a foreign national occupy an employment position where such skill is required. In this case, a skills transfer plan needs to be implemented by the employer, to ensure that the scarce skill enters the national workforce.

The Employment Services Act went further to state that when an irregular migrant occupies an employment position, regardless to how this occupation came into effect, they will be awarded contractual rights and remedies. Thus agreeing with *Discovery* that this employment relationship is legal and binding. The Employment Services Act

[138] Section 8(1) of the Employment Services Act. See also Law@Work where van Niekerk et al confirm that a person who is not a South African citizen or does not have permanent –residence permit is regarded as a foreign national and may not be employed before a valid work permit is produces. Furthermore employer must satisfy themselves that there was no national to fill the vacancy.
[139] Section 8(2)a of the Employment Services Act.

is not the only gazetted paper recognising the limitations of the Immigration Act. The recently published government notice, the Green Paper, also attempts to remedy the shortcomings of the Immigration Act.

4.6 The Green Paper

Currently, the international migration policies are set out in the 1991 White Paper on International Migration (herein after "the White Paper"). The purpose of the White Paper was to set forth a new immigration policy for South Africa. However, it was recognised that the White Paper is not sufficient to govern immigration laws and is currently creating problems in the paradigm on these laws. The Green Paper aims to rectify this problematic approach to immigration. The problems identified include:

- the approach followed in the white paper is limited to compliance rather than managing immigration strategically;
- lack of a risk-based approach to international migration;
- lack of a holistic approach to immigration policy leading to policy gaps;
- serious policy gaps regarding asylum seekers and refugees;
- capacity constraints to manage international migration; and
- criminalisation of irregular migrant workers.

Firstly, the South African immigration policies are largely based on control and expulsion of irregular migrant workers. The Green Paper suggests that international migration must be seen as an important subject for conversation so that agreement may be reached on the national goals. It suggests that international migration must be managed proactively and strategically in order to contribute to national priorities. The entire environment in which migration administration occurs is unproductive and inefficient. These functions have poor resources, technology and limited funds.[140]

Secondly, South Africa does not assume a risk-based approach. South Africa has invested very little in the effective management of international migration so that risks may be evaluated. South Africa is a country with a high risk of migrant flooding in search of wealth and prosperity. Background checks, including investigation of the migrant's relationship to the country, should be performed. Current legislation does not explore the root causes of the problems faced and aims to treat symptoms of a

[140] Green Paper (2016) 10.

deeper problem. A risk-based approach could identify, evaluate, and manage these root causes effectively.[141]

Together with assuming a risk-based approach, South Africa should take a holistic approach to managing policies. The White Paper excludes policy on asylum seekers and refugees, which is covered in the Refugees Act. The approach taken in the 2016 Green Paper is that international migration must be dealt with as a whole, as many aspects are interconnected and this manifests in concrete processes and the lives of people. A holistic view would also eliminate policy gaps and minimise contradictions within the legislative framework.[142]

Thirdly, capacity constraints limit the degree to which international migration can be managed. Currently, the Department of Home Affairs is seen to have sole responsibility for this issue. Government and civil society often decide on matters in court, consequently driving the development of future policies. Due to limited national agreement around the importance and goals of international migration, policy development is not as driven as would optimally be required. The Green Paper suggests that South Africa should adopt an approach to immigration that is strategically managed and which involves the whole of the State and civil society led by the elected government.[143]

Lastly, due to the Immigration Act's criminalisation of the irregular migrant worker, irregular migrant workers are hesitant to report abuse and lower wages in fear of deportation. This fear to approach authorities to report exploitation, enables the problem to persist. Recommendations by the Green Paper, in the form of key principles, attempt to remedy this issue already discussed.

4.7 Key principles of the Green Paper

Suggestions made by the Green Paper include:[144]

- South Africa needs to manage international migration in its national interest.
- the immigration policies should be orientated towards Africa.

[141] Green Paper (2016) 11.
[142] Green Paper (2016) 11.
[143] Green Paper (2016) 13.
[144] Green Paper (2016) 16.

- the international migration policy must determine who can become part of the South African community, while contributing to national building and social cohesion.
- the migration policy must enable South Africans living abroad to contribute to national development priorities.

Each individual country needs to take responsibility for the management of international migration. On the national level, the policy should explicitly clarify the rights and responsibilities of the state, individual citizens, civil society and foreign nationals. Furthermore, all these stakeholders should be informed and made aware of these rights and responsibilities.

On the international level, the policy should therefore provide a framework of principles for encouraging shared responsibility for managing international migration. In this regard South Africa must implement measures to promote the principles of shared and collective responsibility and cooperation. Relationships should be established with other states with the goal to form long lasting partnerships. Finally, the policy framework should be aligned with South Africa's foreign policy.

The Green Paper suggests that migration be handled on a national and international level. To enable effective management, all stakeholders, including international partners, should be aware of their explicit rights and responsibilities.

4.8 Conclusion

The history of the legislative framework regarding irregular migrant workers is hazy and ripe with confusion. This is mainly due to contradictory provisions. It appears that the Immigration Act is the source of the bulk of the debates. The current regime is outdated and inconsistent with the needs of the country. A holistic and risk-based approach should be adopted to align the provisions of the legislative framework with the actual needs of South Africa. This will ensure that the framework is free from contradictions and tailored to the needs of this unique country. Agreement should be reached on what these needs are. Furthermore, responsibilities should be made clear.

Together with responsibilities, the rights of migrant workers should be communicated to create awareness at a national and international level. Special emphasis should be

placed on the fact that irregular migrants are seen as employees with valid employment contracts. Amongst other rights, they have the right to fair remuneration. By enforcing this right, employers are deprived of their primary reason for taking these irregular migrants into their employ - cheap labour. Awareness is critical to achieve this as the workers should also be informed that they have access to dispute resolution mechanisms, which ensures that they are treated fairly in all circumstances to their employment.

Chapter 5
Comparative Analysis

5.1 Introduction

With the South African position firmly established in Chapters 2-4, this Chapter aims to draw a distinction between irregular migrant rights in the United States of America (hereinafter "US") Ireland and South Africa. National legislation, case law and international conventions all play a role in where South Africa stands on the topic of irregular migrant workers. Perhaps by viewing the problem from another frame of reference and determining how model countries propose to deal with irregular migrant workers, can a comparison be drawn between those countries and South Africa. From this analysis, possible universal solutions may come to light. A critical analysis and comparison evaluates the position of the US and Ireland as they seem to be on opposing fronts when it comes to the treatment of irregular migrant workers.

5.2 Legislation in the United States relevant to irregular migrant labour rights.

5.2.1 Immigration Reforms and Control Act

The Immigration Reforms and Control Act (hereinafter "IRC")145 also named the Simpson Mazzoli Act, requires employers to attest to their employees' immigration status. This Act makes it clear that hiring or recruiting any illegal foreigner is an illegal act. The purpose of the IRC is to reduce incentives for hiring illegal workers by imposing penalties on employers engaging the services of these illegal workers. Section 274A prohibits employing unauthorised aliens. Employers who contravene these sections will be subjected to a fine.[146] The provisions of this Act seems to fall in line with those of the Immigration Act in South Africa. Criminalising the irregular migrant worker and employers of such workers are a key comparison between these two Acts.

5.2.2 National Labor Relations Act

The National Labor Relations Board (hereinafter "NLRB") oversees the National Labor Relations Act, 1998.[147] Congress enacted the National Labor Relations Act (hereinafter "NLRA") in 1935 to protect the rights of employees and employers, by encouraging collective bargaining and limiting certain private sector labour and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.

5.3 United States Case law

5.3.1 Background

In the case of *Sure-Tan, Inc. v. NLRB* (hereinafter "*Sure-tan"*)[148] the Court held that the legal status of an employee was not affected by the workers' immigration status. Two years after the *Sure-tan* decision, Congress passed the IRC.[149] For the first time it was illegal to hire workers that were in the United States illegally. The NLRB continued to find that undocumented workers were seen as employees entitled to protection under the NLRA. Despite the IRC, the Court continued to follow the *Sure-*

[145] Immigration Reform and Control Act of 1986.
[146] Norton (2010) 20.
[147] National Labor Relations Act, 1998.
[148] *Sure-Tan, Inc. v. NLRB* 467 U.S. 883 (1984).
[149] Immigration Reform and Control Act of 1986.

Tan decision.[150] This was until *Hoffman Plastic Compounds v National Labour Relations Board* (hereinafter *"Hoffman"*)[151] set a new precedent.

5.3.2 Hoffman Plastic Compounds v National Labour Relations Board

Mr Jose Castro was a Mexican worker who entered the Unites Stated illegally. He found employment at Hoffmann Plastic Compounds Inc. He was subsequently dismissed due to the fact that he became involved in a trade union within the workplace. The NLRB found Mr Castro's termination to be unfair and unlawful and awarded him reinstatement and back pay. The NLRB was unaware at the time it made its ruling that he was working illegally. The employer appealed and the matter proceeded to the Supreme Court of Appeal. The decision was overturned due to the fact that the employment relationship violated the immigration laws. Particular reference was made to the IRC. The Court referred to the prohibition of the employment of "illegal aliens".[152] The Act requires that employers should subject employees to an extensive employment verification system to establish their status. The Court commented:

> "Under the IRC regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRC's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRC obligations".[153]

Therefore, illegal workers would not have any protection from unfair dismissal due to the fact that US immigration laws were violated. This case has a profound effect on irregular migrants in the US. This decision violated international human rights and norms. The UN Declaration[154] entitled everyone the right to work and everyone the right to form and join trade unions. The ILO furthermore refers to the Declaration of Fundamental Rights and Principles at Work where it sets out four core workers' rights: freedom of association, the right to organize and join trade unions, the effective recognition of the right to collective bargaining and the right of workers to seek improvements in their working conditions as a group rather than individually. Borak[155]

[150] Garcia and Ruben (2012) 9.
[151] Hoffman Plastic Compounds v National Labour Relations Board 535 U.S.137 (2002)
[152] Term used by the Court. Hoffman (note 61) 9.
[153] *Hoffman case* (note 61) 10.
[154] Article 23(1) and (4).
[155] Borak (2003) 1.

is of the opinion that by denying employment protection to undocumented workers, it discriminates against them based on their immigration status. This agrees with Bosch's standing, confirming their constitutional rights. *Hoffman* clearly departed from international norms human rights doctrine.

5.3.3 The effect of the Hoffmann case on irregular migrant workers

The case makes it clear that undocumented workers do not have any labour rights and therefore they become a vulnerable group. Employers can hire and dismiss irregular migrant workers as the please, while these workers have no protection under the Law. Mexico was particularly concerned with the outcome of the *Hofmann case* and approached the Inter-American Court of Human Rights for relief. The Court concluded:

> "The State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationship…"[156]

The Confederation of Mexican Workers[157], the American Federation of Labor and the Congress of Industrial Organizations[158] also instituted a complaint to the ILO's Committee on Freedom of Association about the Supreme Court's decision. The ILO Committee commented that the US government should explore possible solutions, including amending the legislation to ensure effective protection for all workers including irregular migrants.[159] Despite the recommendations by the ILO and Inter-American Court of Human Rights, the precedent laid down in *Hoffman* stands.

As seen earlier, the provisions of the South African Immigration Act is in line with the IRC and *Hoffman*, the two main spheres of the legislative framework governing irregular migrant workers in the US. The US position criminalises the employment of irregular migrant workers and criminalises the irregular migrant workers themselves. Fines are imposed on transgressors and the irregular migrant is deported. The primitive Immigration Act in South Africa agrees with this stance.

[156] Advisory Opinion (note 65), para 134 and 135.
[157] A union representing 5.5 million Mexican workers.
[158] A federation of 66 national and international unions in the US, representing 13 million workers.
[159] Case No. 2227 (note 44) paras 610 – 614.

5.4 Legislation in Ireland relevant to irregular migrant labour rights.

Section 2 of the Employment Permit Act of 2003 (hereinafter "Employment Permit Act")[160] states that a non-national shall not enter the service of an employer in the state, or be employed in the state except in accordance with the employment permit granted by the Minister. Section 3(a) and 9(b) makes further mention that anyone who contravenes this Act will be liable to imprisonment or a monetary fine. The sections read as follows:

> "2(1) A non-national shall not—
> (a) enter the service of an employer in the State, or
> (b) be in employment in the State, except in accordance with an employment permit granted by the Minister (an "employment permit").
> (2) A person shall not employ a non-national in the State except in accordance with an employment permit.
> (3) A person who contravenes subsection (1) or (2) shall be guilty of an offence and shall be liable—
> (a) on summary conviction, to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or
> (b) if the offence is an offence consisting of a contravention of subsection (2), on conviction on indictment, to a fine not exceeding €250,000 or imprisonment for a term not exceeding 10 years or both."

Ireland's legislation thus illegalises the act of employing irregular migrants and imposes fines on employers who contravene this provision. This piece of legislation seems to agree with the US view, and also the South African Immigration Act. The provisions of Employment Permit Act continued to reign in the judicial system of Ireland, until case law expanded on the issue.

5.5 Case law in Ireland

In the case of Hussein v The Labour Court & Anor[161] the employee (hereinafter "Younis") arrived in Ireland to work at a restaurant as a tandoori chef for his second cousin (hereinafter "Hussein"). Whilst in employment, he was exposed to working conditions that are less favourable than that of normal national employees. His working permit expired in 2006 and was never renewed.

At the heart of this case was the Employment Permit Act. The court found that the employment contract was substantively illegal and therefore, the Rights Commissioner and the Labour Court could not lawfully provide any assistance. The judge noted that

[160] Employment Permit Act No 11 of 2003.
[161] [2012] IEHC 364.

the notice party had been subject to extreme exploitation against which he had no effective recourse. Hogan J acknowledged that the legislature might not have intended to exclude undocumented migrant workers from the protection of all employment legislation as a result of their illegal status, even though they might not be responsible nor realise the nature of the illegality.

In *Martin v. Galbraith*[162] (Hereinafter "*Martin*") the plaintiff sued to recover overtime payments which had been earned in circumstances where he had worked in excess of a statutory work week.[163] Murnaghan J rejected the claim, saying:

> "Parties to a contract which produces illegality under a statute passed for the benefit of the public cannot sue upon a contract unless the Legislature has clearly given a right to sue."[164]

The High Court judgment was overturned by the Supreme Court of Appeal on 25 June 2016. Murray J did not go into detail when analysing the High Court Decision. He indicated that with so many regulatory measures in the modern economy concerning employment relationships, contractual relationships which give rise to some form of illegality might be considered a ground for not enforcing it. He acknowledged that older case law should be reviewed in light of modern times.

Since this decision, the Employment Permits (Amendment) Bill of 2014 was passed on 16 July 2016. The legislation affords irregular migrant workers the right to civil recourse against employers, in addition to a defence to the charge of being employed without a valid work permit, given that they took all reasonable steps to ensure that they are in possession of a valid work permit. This turned the Ireland position on its head by providing recourse to irregular migrant workers and allowing cases to be fairly heard, even if a valid contract of employment is absent.

5.6 Conclusion

The legislative framework in the US makes no provision of the protection of irregular migrant workers in any form. The *Hoffman case* agreed with previously laid down legislation in the US and emphasised the position that employment by means of illegal

[162] [1942] I.R. 37.
[163] Section 20 of the Shops (Conditions of Employment) Act 1938.
[164] Martin at para 54.

acts will not be tolerated. Despite appeals from the ILO and Inter-American Court of Human Rights, the legislative framework in the US retains its *status quo.*

In comparison to the US, where no rights are given to irregular migrant workers, Ireland allows some rights, given certain conditions are met. Although legislation of the US, Ireland and South Africa agree, case law drives the positions of these three countries in different directions. The US stands by its legislation and holds the position that employing illegal migrants is illegal and affords them no rights. Ireland held the same position until the Employment Permits (Amendment) Bill of 2014 was passed, giving irregular migrant workers a defence against exploitation and the right to civil recourse. In South Africa, *Discovery* paved the way to recognising irregular migrants as employees and affording them every right that regular employees enjoy. In contradiction to Ireland, South Africa does not rely on conditions that should be met before these rights are afforded.

Chapter 6
Conclusion

6.1 Introduction

This study has examined the situation of irregular migrants in South Africa and the protection of their fundamental labour rights. It is clear that irregular migrant's rights are disregarded and they are certainly a vulnerable group of people in South Africa.[165] The Immigration Act has not improved the situation of irregular migrants, nor regular workers in South Africa. It can be argued that the Immigration Act has created not only confusion, but also a misconception among society at large that a legal employment relationship does not exist between employers and irregular migrants. Despite this misconception that irregular migrant workers have no labour rights, *Discovery* blew the legislative framework wide open. The Constitution, 1996, however gives all persons the rights to fair labour practices. Irregular migrants are seen as employees for purposes of the LRA and can enjoy all protection under the LRA and BCEA. Constitutional cases expanded, rather than restricted, migrant workers' rights.

6.2 International Organisations

The ILO and UN are important international organisations that regulate irregular migrant rights. These organisations have put forth various conventions and principles to guide member states when dealing with irregular migrant rights. Under these conventions and principles, irregular migrant workers enjoy numerous labour rights often in line with rights enjoyed by regular workers. Furthermore, these organisations have noble causes, impaired by unenforceability. Most Member States including South

[165] See Chapter 1.3.

Africa have not ratified these conventions. Nonetheless, the principles and guidelines still offer a framework by which newly established legislation and regulation can be guided.

The SADC and AU seem to agree as to the solution to irregular migration on many fronts. These organisations collectively place emphasis on the discussion point that countries within the SADC should work together to enable movement of people between countries. They argue that clear immigration policies should be enacted to reach this end. Statistics suggest that people from neighbouring countries flock to South Africa to gain employment. However, South Africa already suffers from an extremely high unemployment rate. Opening borders to allow more workers to flock in will simply exasperate the problem. It is, however, agreed that Immigration policy reforms are required.

6.3 The South African position

The current state of affairs in South Africa awards protection to irregular migrant workers under the LRA and BCEA. This precedent was laid down in *Discovery*, where it was established that irregular migrant workers are in fact employees and party to legal and binding employment contracts. The right to fair labour practices is also awarded to irregular migrant workers, together with the right to approach the CCMA, should they feel that they have been treated unfairly by employers.

The principles laid down by *Discovery* may potentially have enormous effects on the South African labour market. The exploitation of irregular migrant workers would cease. More importantly, they would be remunerated in line with their regular counterparts. This would remove the primary incentive for employers to engage these irregular migrants in employment. Logically, employers would approach the local labour market for recruitment purposes instead.

The overarching concern in South Africa is the lack of awareness. This is arguably due to legacy legislation that illegalises the act of engaging irregular migrants in employment. Consequently, it is a common misconception that employment contracts with irregular migrants are null and void. Employers still engage these workers in an attempt to secure cheap labour.

Irregular migrants are not aware that they are entitled to the same benefits as regular workers and accept their fate. This brings us to the current state of affairs, where a large portion of the labour market is occupied by irregular migrants, earning sub-par wages, while the regular workers cannot compete and are left unemployed.

6.4 The US and Ireland

The legislative framework in the US makes no provision of the protection of irregular migrant workers in any form. In the US, irregular migrant rights are of no concern and these groups of people are open to abuse and exploitation. In comparison to the US, where no rights are given to irregular migrant workers, Ireland allows some rights, given certain conditions are met. Although legislation of the US, Ireland and South Africa agree, case law drives the positions of these three countries in different directions.

6.5 Recommendations and strategies

It is the view of this study that the foundation of the legislative framework regarding irregular migrant workers should ideally be upheld. The Immigration Act laid this foundation by illegalising the employment of irregular migrant workers. The Immigration Act should be enforced by periodic and surprise audits on employers by the Department of Home Affairs, testing compliance with this Act. Non-compliance should be coupled with the specified penalties as provided for in the Act. This position is much the same as the current condition in the US, where employers are prohibited from employing irregular migrants and subject to fines and imprisonment should the not comply.

However, as seen in South Africa and the US the provisions of these acts are not effective in reducing the number of irregular migrants or irregular migrant workers. In South Africa, the efficacy of the Immigration Act is reduced due to various factors. Firstly, many governmental departments are under resourced, under skilled and underfunded. Furthermore, they occupy an administrative approach to immigration instead of holding a strategic view. Secondly, for the Immigration Act to be effectively enforced it is an absolute necessity that immigration controls be reformed accordingly. Lastly, a clear consensus should be reached on the approach South Africa should take on immigration and this should be implemented and enforced right through the legislative framework including acts, case laws and government gazettes.

Unfortunately, as is the case in South Africa currently, implementation of the above conditions is not practical. This is mainly due to the inherent limitation of limited resources. Due to this effective implementation and enforcement of the Immigration Act seems unlikely.

With the enforcement of the Immigration Act being a distant ideology, the alternative is to align with the conventions of the ILO and UN and also *Discovery*. In this, irregular migrant workers should be granted any and all rights of regular employees with regards to their employment relationships included into the LRA and BCEA. Allowing these rights in contrast to the depravation thereof also aligns with modern human rights doctrine. The most important of these rights is arguably the right to fair remuneration. By ensuring that irregular migrant workers are paid fairly and not any less than their regular counterparts, it is also ensured that employers are relieved of their primary motivation for employing irregular migrants. Furthermore, by granting these rights irregular migrants will no longer be a vulnerable group of people, open for exploitation.

The second most important right is the right to approach the dispute resolutions councils. It is difficult to imagine that the enforcement of these rights will be driven from the employer's side. Consequently the main directive would fall on the shoulders of the employee or as the case may be irregular migrant worker. The only recourse that these workers have is to approach the CCMA should they be treated unfairly. For this to effectively reform the immigration status, it is imperative that they enjoy full and free access to these authorities. As seen in the past irregular migrants are wary to approach authorities due to their illegal status. To increase their confidence in dispute resolution mechanisms more awareness should be created among this group. In particular they should be informed of their labour rights and assured that they will not be deported if they approach the CCMA. At this point a major contradiction comes into play. The Immigration Act criminalised the irregular migrant worker for engaging in employment. This criminal status surely does not speak open and free access to authorities. Perhaps the Immigration Act should be amended to decriminalise the act of seeking employment even if irregular.

While decriminalising the employee in an irregular employment contract, the criminalisation of employing irregular migrants should remain. However, for the Act to

achieve its intended purpose, the penalties against employer need to be consistent and enforced. Employers should be held accountable for engaging irregular migrants in employment relationships. Whilst seeking employment is a basic human right, employing others is not. Currently employers give little attention to the illegality of recruiting from this group. They favour greed above adhering to the law. It should be made clear that they are responsible and will be held accountable should they contravene the Immigration Act. Perhaps it could be required that public and private companies report on their labour practices, including the impact on the local communities, in their annual integrated report as part of their social responsibility. This could be an area for further study.

The Employment Services Act provides that when considering the employment of a foreign national every avenue should be exhausted to ensure that there is no South African national with the required skill set. This study supports this approach. However, the exact extent to which employers must resort to fulfil this requirement is open for interpretation. In modern times, with rapidly evolving telecommunication technology, expanding internet reach and social media it becomes easier for employers to abide by this requirement effectively. The Employment Services Act suggests merely a single method to increase compliance with this regulation, namely the use of private and public employment agencies. Whether this method satisfies the condition is debatable.

By implementing the above recommendations the criminalisation of employing irregular migrants will shift from the employee to the employer, insuring greater accountability for those who allow the problem to persist while reaping the benefits thereof. Furthermore, by granting rights to regular migrant workers the sole and primary incentive of employers to employ these irregular migrants is removed. Coupled with the illegalisation, employers will be forced to draw from the national labour pool. South African nationals will receive the benefits of preference over irregular migrants while enjoying the right to fair labour practices. As for the irregular migrants, they will not be employed as extensively as is currently the case. Admittedly, this could have unintended consequences like forcing these irregular migrants to resort to criminal activities to survive. This is partly due to them not having access to social security like unemployment benefits. Perhaps these rights could be explored in further study.

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