

Foreigners' Rights to Work and Fair Labour Practices in South Africa: A Review of the South African Labour Legislation and Jurisprudence

André Mbata Mangu

<https://orcid.org/0000-0002-8494-3991>

Research Professor, University of South Africa, South Africa

Manguamb@unisa.ac.za

Abstract

After several decades of apartheid rule, which denied human rights to the majority of the population on the ground of race and came to be regarded as a crime against humanity, South Africa adopted its first democratic Constitution in the early 1990s. The 1996 Constitution, which succeeded the 1993 interim Constitution, is considered one of the most progressive in the world. In its founding provisions, it states that South Africa is a democratic state founded on human dignity, the achievement of equality, the advancement of human rights and freedoms. The Constitution enshrines fundamental human rights in a justiciable Bill of Rights as a cornerstone of democracy. Unfortunately, in the eyes of a number of politicians, officials and lay-persons, the rights in the Bill of Rights accrue to South African citizens only. Xenophobia, which has been rampant since the end of apartheid, seems to support the idea that foreigners should not enjoy these rights. Foreign nationals have often been accused of posing a threat to South African citizens with regard to employment opportunities. In light of the South African legislation and jurisprudence, this article affirms the position of the South African labour law that foreign nationals are indeed protected by the Constitution and entitled to rights in the Bill of Rights, including the rights to work and fair labour practices.

Keywords: Constitution; human rights; fair labour practices; foreigners; foreign workers' rights; labour legislation; South Africa

Introduction

The struggle against apartheid was predominantly a struggle for human rights in South Africa. This struggle received a major boost from the international community when the General Assembly (GA) of the United Nations (UN) adopted the Universal Declaration of Human Rights (UDHR)¹ and several other international instruments, including the International Covenant on Civil and Political Rights (ICCPR),² the International Covenant on Economic, Social and Cultural Rights (ICESCR),³ and most importantly, the International Convention on the Suppression and Punishment of the Crime of Apartheid,⁴ which declared apartheid a ‘crime against humanity’ as it denied human rights to the majority of the population on the ground of race.

As domestic and international pressure intensified in the 1980s, the ruling National Party (NP) announced the unbanning of anti-apartheid organisations and the release of political prisoners. On 11 February 1990, Nelson Mandela was set free after twenty-seven years of imprisonment. Mandela’s release was a turning point in the struggle against apartheid. Under Mandela’s leadership, the African National Congress (ANC) and other anti-apartheid movements embarked on official talks with the NP in order to heal the divisions of the past and lay the foundations for a democratic and open society. The negotiations between the parties resulted in the adoption of an interim Constitution,⁵ which marked the official end of and paved the way for the first multi-racial and democratic elections in April 1994. The ANC won these elections and Nelson Mandela became South Africa’s first black and democratically elected president.

In 1995, the Labour Relations Act (LRA)⁶ was passed to give effect to the rights set out in section 27 of the Interim Constitution and to establish the Labour Court and the Labour Appeal Court with exclusive jurisdiction to decide matters arising from the Act. As a member state of the International Labour Organisation (ILO),⁷ South Africa is

¹ UDHR was proclaimed by the UNGA in Paris on 10 December 1948 (GA Res 217(III) <<http://www.un.org/en/universal-declaration-human-rights/index.html>> accessed 5 August 2016.

² ICCPR was adopted and opened for signature, ratification and accession by GA Res 2200A (XXI) of 16 December 1966. It entered into force on 23 March 1976 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>> accessed 5 August 2016.

³ ICESCR was adopted and opened for signature, ratification and accession by GA Res 2200A (XXI) of 16 December 1966. It entered into force on 3 January 1976 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> accessed 5 August 2016.

⁴ Adopted by the UNGA on 30 November 1973. It came into force on 18 July 1976 <<https://treaties.un.org/doc/Publication/UNTS/Volume%201015/volume-1015-I-14861-English.pdf>> accessed 5 August 2016.

⁵ Constitution of the Republic of South Africa, Act 200 1993 <http://www1.chr.up.ac.za/chr_old/indigenous> accessed 30 June 2016.

⁶ LRA Act 66 1995. At <http://www.acts.co.za/labour-relations-act-1995/index.html> (accessed 15 June 2016). Labour Relations Act as amended by Labour Relations Amendment Act (LRAA) 42 1996, LRAA 66 1996 LRAA 127 1998; LRAA 12 2002.

⁷ <<http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>> accessed 5 August 2016.

bound by a number of ILO instruments,⁸ which inspired its Constitution and labour legislation, including the LRA and the Basic Conditions of Employment Act 75 of 1997 (BCEA).

The 1996 Constitution⁹ superseded the 1993 Constitution and currently governs the country. Cass Sunstein considers it ‘the most admirable constitution in the history of the world’.¹⁰ According to Kende, this Constitution is ‘even better than the United States.’¹¹ It provides that South Africa is a democratic state founded on human dignity, the achievement of equality, the advancement of human rights and freedoms, supremacy of the constitution and the rule of law, universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.¹²

The Constitution provides that the judicial authority of the Republic is vested in the courts, which should be independent and subject to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.¹³

The courts are the Constitutional Court, the Supreme Court of Appeal, the High Court, the Magistrates’ Courts; and any other court established or recognised in terms of an Act of Parliament.¹⁴ Any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates’ Courts, is considered part of the judiciary. These include labour courts and labour appeal courts.

⁸ These instruments include the Convention concerning Freedom of Association and Protection of the Right to Organise of 1948 (No 87), the Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively of 1949 (No 98), the Labour Inspection Convention of 1947 (No 81), the Convention concerning Labour Inspection in Industry and Commerce of 1947 (No 81), the Convention concerning decent work for domestic workers of 2011 (No 189), the Migrant Workers (Supplementary Provisions) Convention of 1975 (No 143), the Workers with Family Responsibilities Convention of 1981 (No 156), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

⁹ The Constitution of the Republic of South Africa Act 108 of 1996 <<http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>> accessed 30 June 2016. It was adopted by the Constitutional Assembly on 11 October 1996, assented to by the President on 16 December, and promulgated on 18 December 1996. It entered into force on 4 February 1997. This constitution has been amended seventeen times. The seventeenth amendment took place in 2012.

¹⁰ Cass Sunstein, quoted by M Kende, ‘Why the South African Constitution is BETTER than the United States’ <<http://academic.udayton.edu/Race/06hrights/GeoRegions/Africa/Safrica03.htm>> accessed 10 August 2018.

¹¹ Kende (n 10).

¹² The Constitution (n 9) s 1.

¹³ *ibid* s 165 (1)–(2).

¹⁴ *ibid* s 166.

The 1996 Constitution contains a comprehensive and justiciable Bill of Rights,¹⁵ which is a cornerstone of democracy and enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom.¹⁶ Unfortunately, for many people, including politicians, officials and lay-persons, the rights in the Bill of Rights are seen to accrue to South African citizens only. Foreigners are not regarded as legitimate recipients of these rights and continue to face xenophobia, which has been rampant since the end of apartheid. Very often, foreign nationals are accused of posing a threat to South African citizens with regard to employment opportunities. The overwhelming perception is that foreigners are ‘takers’ and not ‘contributors.’¹⁷

Against this background, this article reflects on the rights of foreigners to work and enjoy fair labour practices in South Africa. On the basis of a review of the South African legislation and jurisprudence, it argues that foreign migrants are entitled to the rights enshrined in the Bill of Rights, including the right to work and the right to fair labour practices. It first defines the concepts of ‘foreigners’ and ‘foreign workers’. It then examines workers’ rights under the South African Constitution, labour legislation and under international conventions binding on South Africa. Furthermore, the focus is on selected South African cases which dealt with foreign workers’ rights. The article concludes that like their South African counterparts, foreign workers are also entitled to the rights enshrined in the Bill of Rights.

Defining ‘foreigners’ and ‘foreign workers’

The South African Immigration Act¹⁸ defines a foreigner as a person who is neither a citizen nor a resident.¹⁹ A foreigner can be ‘legal,’ ‘documented,’ ‘illegal’ or undocumented’. A legal or documented foreigner is a person who entered South Africa in compliance with the Immigration Act.

Under normal circumstances, a foreigner needs to apply and be issued a valid visa to enter the territory of a country other than his country of nationality. An ‘illegal foreigner’ is a person who is in South Africa in contravention of the Immigration Act or a prohibited person.²⁰

Foreigners are divided into several categories. Some are temporary residents or visitors who enter the country for a relatively short period after which they have to leave. Others are rather permanently established in the country. Asylum seekers are those who

¹⁵ The Constitution (n 9) ss 7–39.

¹⁶ *ibid* s 7.

¹⁷ M Neocosmos, *From ‘Foreign Natives’ to ‘Native Foreigners’*. *Explaining Xenophobia on Post-apartheid South Africa* (CODESRIA 2010) 108.

¹⁸ Immigration Act 13 of 2002.

¹⁹ *ibid*.

²⁰ Immigration Act (n 18).

generally left their countries for political reasons and by fear for their lives. The assumption is that they should return to their home countries when the political situation improves. Unlike asylum seekers, refugees are foreigners who have been granted a refugee status. They may later apply for permanent residence and citizenship.²¹

Foreign workers are migrant workers engaged in remunerated activities outside their countries of citizenship, with or without the necessary authorisation of the relevant authorities of the receiving countries.²²

This category excludes citizens. Some visas or permits, like temporary resident permits, visitor or student permits,²³ prevent foreigners from taking up employment in South Africa while permanent residents, asylum seekers and refugees are allowed to work and may qualify as workers or employees despite their status as foreigners or non-nationals. Accordingly, some foreigners are entitled to work and enjoy workers' rights in South Africa.

Foreign workers' rights under South African law

From the outset, it should be stressed that the right to work is a prerequisite for the enjoyment of the right to freedom of association in the workplace and the right to fair labour practices. However, unlike other constitutions such as the 1992 Constitution of Ghana²⁴ and no matter how progressive it may be, the South African Constitution does

²¹ See R Boed, 'The State of the Right of Asylum in International Law' (1994) 5 (1) *Duke Journal of Comparative and International Law* 2–3; See also ss 3–5, 21–23, 27–34 of RSA Refugee Act, 1998 (Act No 130 of 1998) <<http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/51659/86282/F1515632767/ZAF51659.pdf>> accessed on 10 September 2018; Article 1 A (2) of the 1951 Convention Relating to the Status of Refugees and Article I (2) of its 1967 Protocol <<https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+1967%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfce1d47>> accessed 10 September 2018; Articles 1 and 2 of the OUA Convention Governing the Specific Aspects of Refugee Problems in Africa <http://www.achpr.org/files/instruments/refugee-convention/achpr_instr_conv_refug_eng.pdf> accessed 10 September 2018.

²² Article 2 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families <<https://www.ohchr.org/Documents/ProfessionalInterest/cmw.pdf>> accessed 10 September 2018.

²³ Immigration Act (n 18).

²⁴ Article 24(1) of the 1992 Constitution of Ghana provides that 'Every person has the right to work under satisfactory, safe and healthy conditions, and shall receive equal pay for equal work without distinction of any kind'. See Ghana's Constitution of 1992 with Amendments through 1996 <<http://extwprlegs1.fao.org/docs/pdf/gha129754.pdf>> accessed 10 September 2018; section 22(1) of the Constitution of Tanzania also provides: '22.(1) Every person has the right to work' (Constitution of Tanzania <<http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan040857.pdf>> accessed 10 September 2018).

not provide for the right to work, which is entrenched in international instruments binding on South Africa such as the African Charter for Human and Peoples' Rights (ACHPR)²⁵ and ICESCR.²⁶ The latter instrument imposes on State Parties an obligation to take progressive steps to realise socio-economic rights. Each State Party undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively, the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures.²⁷

No reason has been provided to explain why the right to work is not enshrined in the Bill of Rights despite the fact that the overwhelming majority of the Black people were unemployed. Arguably, the 'right to work' is implicitly entrenched in the Bill of Rights, particularly in its provision entrenching the right to fair labour practices.²⁸ However, the importance of this provision requires that it should be expressly protected in the Constitution.

As stressed earlier, the Bill of Rights, which is an integral part of the Constitution, enshrines the *rights of all people*²⁹ in South Africa. It provides that '*everyone*' has the right to fair labour practices,³⁰ and '*every worker*' has the right (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike.³¹ The wording of almost all the provisions of the Bill of Rights, with the use of the expression 'everyone' or 'no one be subject to' and 'no one may be deprived of' makes it clear that these rights accrue to all people in the country regardless of their citizenship or immigration status. This applies to equality, human dignity, life, freedom and security of the person, privacy, freedom of religion, belief and opinion, freedom of expression, assembly, demonstration, picket and petition, freedom of association, freedom of movement and residence, fair labour practices, clean and healthy environment, property, adequate housing, health care, food, water and social security, education, access to information, just administrative action, and access to courts.³² Their formulation in the Constitution makes it clear that no one may be deprived of any of

²⁵ ACHPR <<http://www.achpr.org/instruments/achpr>> accessed 5 August 2016, Article 15.

²⁶ ICESCR (n 3), Articles 6–7.

²⁷ *ibid* Art 2 (1).

²⁸ The Constitution (n 9) s 23(1).

²⁹ *ibid* section 7 (1) [Own emphasis].

³⁰ *ibid* section 23(1) [Own emphasis].

³¹ *ibid* [Own emphasis].

³² *ibid* ss 9(1), 10, 11, 12, 14, 15, 16(1), 17, 18, 21, 23, 24, 25(1), 26(1), 27(1), 29(1), 32(1), 33, 34 and 35(1).

these rights. However, the rights in the Bill of Rights are subject to internal limitations or a general limitation clause.³³ Some rights are not derogable, entirely or partially.³⁴

Although it refers to ‘employees’ instead of ‘workers’, the LRA protects employees and grants them the right to freedom of association. An employee’s right to freedom of association includes

the right

- (a) to participate in forming a trade union or federation of trade unions; and
- (b) to join a trade union, subject to its constitution.³⁵

As a member of a trade union, an employee has the right subject to the constitution of that trade union-

- (a) to participate in its lawful activities;
- (b) to participate in the election of any of its office-bearers, officials or trade union representatives;
- (c) to stand for election and be eligible for appointment as an office bearer or official and, if elected or appointed, to hold office; and
- (d) to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement.³⁶

As member of a trade union that is a member of a federation of trade unions, subject to the constitution of that federation, employees have ‘the right (a) to participate in its lawful activities; (b) to participate in the election of any of its office-bearers or officials; and (c) to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office.’³⁷

The LRA protects employees as well as persons seeking employment without distinguishing between South African nationals and foreigners.³⁸ Accordingly, foreign employees (workers) and foreigners seeking employment enjoy the same rights as South Africans and are equally protected.

³³ ibid s 36.

³⁴ ibid s 37.

³⁵ LRA (n 6) s 4 (1).

³⁶ LRA (n 6) s 4 (2).

³⁷ ibid s 4 (3).

³⁸ ibid ss 5 (2)–(4), 213.

South Africa also signed, ratified or acceded to a number of universal and regional instruments that protect workers' rights. These include ILO Conventions on the rights of workers, the ICESCR³⁹ and the ACHPR⁴⁰. All these instruments protect national and foreign workers.

Judicial protection of foreign workers' rights: review of selected South African jurisprudence

South African courts have decided several cases involving foreign nationals. Some cases related to their right to enter and reside in the Republic,⁴¹ and to their right to certain protections and benefits like social security.⁴² This article cannot review all the cases pertaining to foreign nationals but will discuss those related to the rights to work and fair labour practices of refugees, asylum seekers and permanent residents in South Africa. The case of *Khosa*⁴³ will also be discussed as although the court was mainly concerned with the right of access to health care services, food, water and social security, they also made pronouncements on the foreign national's right to work.⁴⁴

The *Watchenuka* cases⁴⁵

The two *Watchenuka* cases related to the asylum seekers right to work. In the first case (*Watchenuka and Another v Minister of Home Affairs*) *Watchenuka*, a pharmacy technician widow from Zimbabwe and her disabled twenty year old son applied for asylum in South Africa in terms of the Refugee Act 130 of 1998 (later replaced with Refugee Act 13 of 2002).

³⁹ ICESCR (n 3) Art 6.

⁴⁰ ACHPR (n 25) Art 15.

⁴¹ See, for instance, *Koyabe & Others v Minister for Home Affairs & Others* (Lawyers for Human Rights as *Amicus Curiae*) 2010(4) SA 327 (CC). This case arose from the withdrawal of residence permits that had been granted to non-South Africans, namely Mr Wycliffe Simiyu Koyabe, a Kenyan businessman, his Kenyan wife Ms Mary Kadenyi Koyabe, and their adult son, Mr Anthony Simiyu Koyabe. The applicants sought leave to appeal against the judgment of the North Gauteng High Court, Pretoria (the High Court) dismissing their request for the review and setting aside of the decision by the Director-General of Home Affairs (the second respondent) to withdraw or terminate their residence permits.

⁴² See *Larbi-Odam & Others v Members of the Executive Council for Education* (North-West Province) & *Another* 1998 (1) SA 745 (CC). In these cases, the Constitutional Court this Court required the state to extend to permanent residents the right of access to social security, previously limited to citizens by section 23(1) (a) of the Security Act.

⁴³ *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* 2004 (6) SA 505 (CC) BCLR 569 (CC).

⁴⁴ The Constitution (n 9) section 27.

⁴⁵ *Watchenuka & Another v Minister of Home Affairs* 2003 (1) SA 619 (C); *Minister of Home Affairs & Others v Watchenuka & Another* (2004) 1 All SA 21 (SCA).

Watchenuka applied to the Cape Town High Court alleging that her savings had been depleted and she needed to secure employment in order to support herself and her son to study at a Cape Town College. However, the regulations of Annexure 3 of the Immigration Act prohibited her and her son from taking employment or from studying pending the application for asylum.

The Cape Town High Court ruled in her favour by declaring these regulations unconstitutional and directing the respondents to permit her to be employed and her son to study pending the finalisation of her application for asylum.

On appeal, the Minister of Home Affairs and Others alleged that pending the application for asylum, section 27 of the Immigration Act did not grant Watchenuka and her son such rights. In a judgment delivered by Acting Justice Nugent, the Supreme Court of Appeal ruled that the matter had to be decided by the Standing Committee for Refugee Affairs and therefore recognised that foreigners (asylum seekers) could enjoy the right to work and study in South Africa.⁴⁶

Khosa & Others v Minister of Social Development & Others, Mahlaule and Another v Minister of Social Development⁴⁷

The applicants, Louis Khosa, Eliasse Mucambo Mulhovo and Sania Ndlovu were foreign nationals, who fled their country due to fear of political persecution. They were granted refugee status and later acquired permanent refugee status in South Africa.

In *Khosa & Others v The Minister of Social Development and Others* (the *Khosa* matter), the applicants challenged the constitutionality of section 3(c) of the Social Assistance Act 59 of 1992 (the Act) which reserved social grants for aged South African citizens. In *Mahlaule & Another v The Minister of Social Development & Others* (the *Mahlaule* matter), the constitutional challenge was to sections 4(b)(ii) (related to child-support grant) and 4B(b)(ii) (related to care-dependency grant), as amended by the Welfare Laws Amendment Act 106 of 1997 (Welfare Laws Amendment Act), which similarly reserved child-support grants and care-dependency grants respectively for South African citizens only. The applicants in both matters were destitute and would have qualified for social assistance, child-support and/or the care-dependency grant under the Act but for the fact that they were not South African citizens.⁴⁸

The respondents in both matters were the Minister of Social Development, the Director-General of Social Development and the Member of the Executive Committee for Health and Welfare in the Northern Province. Because the two matters were related and

⁴⁶ *Minister of Home Affairs and Others v Watchenuka* (n 45) 39.

⁴⁷ *Khosa & Others* (n 43).

⁴⁸ *ibid* 2 and 3.

involved similar considerations and arguments of law, they were heard together in the High Court which ruled that the impugned sections 3(c) and sections 4(b)(ii) and 4B(b)(ii) of the Act, as amended by the Welfare Laws Amendment Act 106 of 1997 were inconsistent with the Constitution; especially the provisions which state that ‘everyone’ has the right to have access to health care services, sufficient food and water and social security.⁴⁹ The Transvaal Provincial Division found that non-citizens were also entitled to these rights and their exclusion violated section 27(1) of the Constitution. Accordingly, these sections were declared invalid and struck down. As required by section 172(1)(b)⁵⁰ of the Constitution, the orders were referred to the Constitutional Court for confirmation of constitutional invalidity before they could have any force or effect.⁵¹ The Constitutional Court set aside the orders of the High Court and ruled that the omission of ‘permanent residents’ after citizens in the Social Assistance Act 59 of 1992 was inconsistent with the Constitution⁵² and permanent residents were therefore entitled to social grants.⁵³

With regard to the right to work, the Constitutional Court referred to the *Larbi-Odam* case and held that permanent residents have the right to work in South Africa and are entitled to compete with South Africans in the employment market. The Court stated that it would make little sense to permit people to stay permanently in a country, but then exclude them from a job they are qualified to perform.⁵⁴

Union of Refugee Women & Others v Director: Private Security Industry Regulatory Authority & Others⁵⁵

This case concerned the right of refugees to work in the private security industry in South Africa, which was regulated by the Private Security Industry Regulation Act 56 of 2001.

The case started as an application made by thirteen refugees. They were supported by their union in requesting the Pretoria High Court to declare that section 23(1)(a) of the Private Security Industry Regulation Act which excluded them from the private security

⁴⁹ The Constitution (n 9) of s 27(1).

⁵⁰ *ibid* s 172(1)(b) provides that when deciding a constitutional matter within its power, a court ‘may make any order that is just and equitable, including —

(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.’

⁵¹ *Khosa & Others* (n 43) 98.

⁵² *ibid*.

⁵³ *ibid* 12 and 98.

⁵⁴ See *Larbi-Odam & Others* (n 42) 609; *Khosa & Others* (n 43) 71.

⁵⁵ *Union of Refugee Women & Others v Director: Private Security Industry Regulatory Authority & Others* 2007 (4) BCLR 339 (CC).

industry violated their right to equality, was discriminatory (sections 9(3) – (4) of the Constitution) and therefore unconstitutional and invalid.

In a judgement delivered by Bosielo J, the High Court dismissed the application stating that a high level of trust was required from private security officers, and undesirable persons had to be excluded. The applicants sought leave to appeal to the Constitutional Court against the judgement of the High Court.

In its majority judgement delivered by Justice Kondile, the Constitutional Court granted leave to appeal but dismissed the challenge to the constitutionality of section 23(1)(a) of the Private Security Industry Regulation Act 56 of 2001. However, the applicants were given the opportunity to apply for exemption in terms of section 23(6) of the Private Security Industry Regulation Act 56 of 2001.

Arguably, like the High Court, the Constitutional Court erred in its judgement. Mokgoro J and O'Regan J disagreed with the majority judgment that seemed to endorse the view that permanent residents were not fit and proper persons to be registered as security providers and therefore could not render a security service. Langa CJ and Van der Westhuizen J concurred in the minority judgment. This author endorses the minority judgement that the section in question is inconsistent with section 9(3) of the Constitution.

The *Discovery* case⁵⁶

Mr Lanzetta, an Argentinian national, entered South Africa with a study visa on 21 January 2001. He applied for and obtained a work permit on 8 May 2003. This work permit was extended to enable him to work for Multi-Path Customer Solutions until 31 December 2005. On 18 April 2005, Discovery Health offered Lanzetta employment as a call centre agent, with effect from 1 May 2005.

In September 2005, Lanzetta requested his manager to provide him with the necessary documentation to enable him to renew his work permit. He only received the documents on 2 December 2005 and their tardiness resulted in his work permit expiring at the end of December 2005. On 4 January 2006, Discovery Health terminated Lanzetta's employment on the grounds that his continued employment violated section 38(1) of the Immigration Act that prohibited the employment of foreigners without the required permit.

Lanzetta referred a dispute for unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). Discovery contested the CCMA's jurisdiction to consider the dispute on the ground that Lanzetta was no longer an employee in terms of section 213 of the LRA since he was not allowed to contract without a valid (work)

⁵⁶ *Discovery Health Ltd v CCMA & Others* (2008) 29 ILJ 1480 (LC).

permit. The CCMA decided that it did have jurisdiction to deal with the matter as long as an employment relationship existed.

This was a landmark decision since the CCMA had so far denied access and dismissed applications made by irregular migrant workers on the grounds that their employment relationships were void *ab initio*, having been concluded in contravention of the Immigration Act.⁵⁷ Discovery Health was dissatisfied with the CCMA's finding and approached the Labour Court for review.

The Labour Court ruled that the CCMA had jurisdiction to deal with the matter. It found that section 23 of the Constitution provides that 'everyone' has the right to fair labour practices and therefore both legally and illegally employed foreigners like Lanzetta were entitled to this right. This was a ground-breaking judgment as the Court held that the existence of an employment contract was not dependent on the employee's residence status or immigration laws. The contract of employment between the respondent and Lanzetta remained valid despite the fact that Lanzetta did not have a work permit. Lanzetta remained an 'employee' in terms of section 213 of the LRA and therefore entitled to refer the dispute concerning his unfair dismissal to the CCMA.

The ruling of the Labour Court was in line with the Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants of the Inter-American Court of Human Rights issued in 2003 at the request of the Government of Mexico.⁵⁸ The Inter-American Court of Human Rights held that irregular migrants could not be deprived of their rights because of the irregularity of their immigration status.

Therefore, whenever a migrant (regular or irregular) was employed, he or she acquired employment rights that had to be recognized and protected.⁵⁹

The Inter-American Court stated:

⁵⁷ See, for instance, *Moses v Safika Holdings* (2001) 22 ILJ 1261 (CCMA); *Vulda & Millies Fashions* (2003) 24 ILJ 462 (CCMA). In *Moses v Safika Holdings*, an American citizen employed as an advisor in the company was dismissed while in *Vulda & Millies Fashions* the services of a Zimbabwean sales assistant were terminated due to her failure to produce a work permit.

⁵⁸ See Advisory Opinion OC-18/03 (17 September 2003) of the Inter-American Court of Human Rights requested by the United Mexican States <https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf> accessed 18 June 2018 at 133; S-H Cleveland, 'Legal Status and Rights of Undocumented Workers: Advisory Opinion OC-18/03' (2005) 99(2) American J of Intl L 460–465 at 460. Mexico complained about the denial of fundamental workplace rights to irregular migrant workers in the United States of America without naming them following US Supreme Court judgment in *Hoffman Plastic Compounds v National Labor Relations Board*, 535 US 137 (2002), which held that irregular migrants who were wrongfully dismissed for taking part in trade union activities were not entitled to back pay.

⁵⁹ Advisory Opinion (n 58) 133.

The migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship.⁶⁰

The ILO's Committee on Freedom of Association (CFA) have also, on several occasions, upheld this position when dealing with complaints concerning irregular migrant workers' right to join and participate in trade union activities.⁶¹

Southern Sun Hotel Interests, Southern Sun Waterfront Hotel v CCMA⁶²

Ms Lynne Ernesta, a foreign national from the Seychelles, was employed by the applicant (Southern Sun Hotel) as a receptionist at its Waterfront Hotel in Cape Town. At the time, she had a study permit, which expired on 30 May 2008.⁶³ When the permit expired, Southern Sun told Ernesta that she could no longer lawfully render her services in terms of the Immigration Act 13 of 2002. She was told to obtain a valid employment permit. Southern Sun argued that she was not entitled to any payment. Accordingly, it stopped paying her from 11 August 2008.⁶⁴

By 18 September 2008, Ernesta had not succeeded in obtaining a valid permit. Southern Sun instructed her to attend a disciplinary enquiry on 25 September 2008. Pursuant to that enquiry, Southern Sun dismissed Ernesta on 7 October 2008 on the basis that she was unable to lawfully tender her services.⁶⁵

On 16 October 2008, Ernesta referred the dispute to the CCMA as an unfair labour practice in terms of section 186(2)(b) of the LRA. She claimed that she had been unfairly suspended and, in terms of the relief sought, asked that Southern Sun be ordered to pay the salary due to her for the period from 11 August to 7 October 2008.⁶⁶ The dispute was conciliated only in November 2008. The applicant objected to the CCMA's

⁶⁰ Ibid 134.

⁶¹ See Case No 2227, Complaint presented by the American Federation of Labour and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM); ILO Committee on Freedom of Association, Report No 332 (18 October 2002); Case No 2121 (Spain), Complaint presented by the General Union of Workers of Spain (UGT) against the Government of Spain; ILO Committee on Freedom of Association, Report No 327 (23 March 2001); and Case No 2620, Complaint against the Government of the Republic of Korea presented by the Korean Confederation of Trade Unions (KCTU) and the International Trade Union Confederation (ITUC); ILO Committee on Freedom of Association, Report No 362 (November 2011).

⁶² *Southern Sun Waterfront Hotel v CCMA* (2011) ZALCCT 14; (2011) 32 ILJ 2756 (LC) (21 June 2011) <<http://www.saflii.org/za/cases/ZALCCT/2011/14.html>> accessed 5 August 2016.

⁶³ *ibid* 3.

⁶⁴ *ibid* 4.

⁶⁵ *Southern Sun Hotel Interests* (n 62) *ibid* 5.

⁶⁶ *ibid* 6.

jurisdiction to hear the dispute and the Commissioner issued a certificate on 14 November 2008 that the dispute remained unresolved.⁶⁷

Ernesta's trade union, SACCAWU, referred the dispute to arbitration on 20 November 2008. After an initial postponement, the matter was set down for arbitration on 3 February 2009. At the arbitration hearing, the applicant again objected to the CCMA's jurisdiction but Commissioner Coenie de Kock ruled that the CCMA had jurisdiction to hear the dispute.⁶⁸ The arbitrator issued his award on 6 February 2009 (although it appears that it was only sent to the parties on 4 March 2009).

The arbitrator had regard to the judgement in *Koka v Director-General: Provincial Administration North West Government*⁶⁹ where the court considered suspension to be an unfair labour practice as well as remarks by Grogan⁷⁰ that the unilateral suspension of the contract of employment by the employer did not relieve the employer of its duty to pay the employee. The arbitrator came to the conclusion that the suspension of the employee due to her status as an illegal foreigner could be brought within the confines of s 186(2)(b) of the LRA and that the CCMA had jurisdiction to deal with the dispute.⁷¹

Commissioner de Kock also referred to the judgment of the Labour Court in *Discovery Health Limited v CCMA*⁷² and found that an 'illegal foreigner' (or undocumented immigrant) was an employee for the purposes of the LRA. Therefore Ernesta was still entitled to the protection offered to employees in terms of the LRA, even though she did not have a valid work permit.⁷³ He held further that Southern Sun's failure to assist Ernesta in getting a work permit could amount to an unfair labour practice. Southern Sun took the decision of the CCMA on review to the Labour Court. In a separate application, Southern Sun asked for costs against the CCMA. In a judgment delivered on 21 June 2011,⁷⁴ both applications were dismissed. Steenkamp J upheld the findings of Commissioner de Kock and held that Ernesta was protected (as an employee) by the LRA despite the fact that she did not have a work permit as required by the Immigration Act. The court stated that the suspension of Ernesta's contract of employment as provided in section 186(2)(b) of the LRA fell within the jurisdiction of the CCMA and therefore the CCMA had jurisdiction to deal with the dispute for unfair labour practice.

⁶⁷ *ibid* 7.

⁶⁸ *ibid*.

⁶⁹ *Koka v Director-General: Provincial Administration North West Government* 1997 7 BLLR 874 (LC).

⁷⁰ J Grogan, *Workplace Law* (Juta 1996) 86–87.

⁷¹ *Southern Sun Hotel* (n 62) 7, 18–19.

⁷² *Discovery* (n 56).

⁷³ *ibid* 16–19.

⁷⁴ *ibid* 30, 47–49.

The *Ndikumdayi* case⁷⁵

Alain Godefroid Ndikumdayi, the applicant, was a Burundian citizen who was granted refugee status in South Africa in terms of the Refugee Act 130 of 1998. He obtained a nursing degree from the University of Cape Town. On 1 July 2010 the applicant was offered a permanent nursing position by Valkenberg Hospital despite the fact that the formal recognition of his refugee status was going to expire on 24 December 2010, just six months later.

On 20 July 2010, the offer of permanent employment was withdrawn and he was effectively suspended pending acquisition of the necessary paperwork after the Hospital discovered that it had erroneously offered the Applicant a permanent job. He approached the Cape Town Labour Court alleging unfair dismissal in violation of the LRA. The Court had to address three questions: Was the Applicant an “employee” as defined in the LRA? Was there an unfair dismissal? Was the Applicant entitled to compensation?

The respondent opposed the application, alleging that the contract was void *ab initio* since a person with whose refugee status was only valid for six months could not have been offered a permanent employment.

In a judgment delivered by Justice Rabkin-Naicker, the Court ruled in favour of the applicant and ordered the respondent to pay an amount equivalent to 12 months of his remuneration at the time of his dismissal. The judgment was in line with the precedent that emerged from both the *Discovery* and *Kylie* cases where the Courts ruled respectively that the immigration status (an employee without work permit in *Discovery*)⁷⁶ or the illegality of a contract (a sex worker in *Kylie*)⁷⁷ could not deprive anyone of her rights and the person still qualified as an ‘employee’ under the LRA⁷⁸.

Conclusion

Although the Constitution of the Republic of South Africa does not provide for the right to work, it enshrines the rights of all people in the country, including everyone’s right to fair labour practices. The LRA was enacted to give effect to the rights in the Bill of Rights and to establish special courts to deal with labour law disputes. In deciding cases involving the rights in the Bill of Rights, labour courts are required to enforce the Constitution and the law. They should also consider international law and apply international agreements that are binding on South Africa. On this basis the relevant

⁷⁵ *Ndikumdayi v Valkenberg Hospital & Others* (2012) 33 *ILJ* 2648 (LC), (2012) 8 *BCLLR* 795 (LC).

⁷⁶ *Discovery* (n 56) 54.

⁷⁷ *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] ZALAC 8; 2010 (4) SA 383 (LAC); 2010 (10) *BCLR* 1029 (LAC); (2010) 31 *ILJ* 1600 (LAC); [2010] 7 *BLLR* 705 (LAC) (26 May 2010) 61.

⁷⁸ The LRA (n 6) s 213.

case law, as discussed above,⁷⁹ tends to support the view that foreign workers can and should be considered as workers or ‘employees’ under the LRA and are therefore entitled to the right to fair labour practices. The judgements in these cases were in line with international jurisprudence from the ILO Committee on Freedom of Association⁸⁰ and the Inter-American Court of Human Rights.⁸¹

⁷⁹ See *Watchenuka* (n 45); *Union of Refugee Women* (n 55); *Discovery* (n 56); *Southern Sun* (n 62); *Ndikumdavyi* (n 75).

⁸⁰ See (n 61).

⁸¹ Advisory Opinion (n 58).

References

Advisory Opinion OC-18/03 (17 September 2003) of the Inter-American Court of Human Rights requested by the United Mexican States (Juridical Condition and Rights of Undocumented Workers)

<https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf>

accessed 18 June 2018.

Boed R, 'The State of the Right of Asylum in International Law' (1994) 5(1) Duke Journal of Comparative and International Law.

Cleveland SH, 'Legal Status and Rights of Undocumented Workers: Advisory Opinion OC -18/03' (2005) 99(2) American Journal of International Law.

<<https://doi.org/10.2307/1562510>>

Grogan J, *Workplace Law* (Juta 1996).

Kende M, 'Why the South African Constitution is BETTER than the United States' (University of Dayton Race, Racism and the Law, 31 December 2010)

<<http://academic.udayton.edu/Race/06hrights/GeoRegions/Africa/Safrica03.htm>>

accessed 10 August 2016.

Neocosmos M, *From 'Foreign Natives' to 'Native Foreigners'. Explaining Xenophobia on Post-apartheid South Africa* (CODESRIA 2010).

Cases

Discovery Health Ltd v CCMA & Others (2008) 29 ILJ 1480 (LC).

Hoffman Plastic Compounds v National Labor Relations Board 535 US 137 (2002).

Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development 2004 (6) SA 505 (CC).

Koka v Director-General: Provincial Administration North West Government 1997 (7) BLLR 874 (LC).

Koyabe & Others v Minister for Home Affairs & Others (Lawyers for Human Rights as Amicus Curiae) 2010(4) SA 327 (CC).

Kylie v CCMA 2010 (7) BLLR 705 (LAC).

Larbi-Odam & Others v Members of the Executive Council for Education (North-West Province) & Another 1998 (1) SA 745 (CC).

Minister of Home Affairs & Others v Watchenuka & Another 2004 (1) All SA 21 (SCA).

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

Ndikumdavyi v Valkenberg Hospital & Others 2012 (33) ILJ 2648 (LC), 2012 (8) BCLLR 795 (LC).

Southern Sun Waterfront Hotel v CCMA (2011) ZALCCT 14; 2011 (32) ILJ 2756 (LC) (21 June 2011).

Union of Refugee Women & Others v Director: Private Security Industry Regulatory Authority & Others 2007 (4) BCLR 339 (CC).

Vulda & Millies Fashions 2003 (24) ILJ 462 (CCMA).

Watchenuka & Another v Minister of Home Affairs 2003 (1) SA 619 (C).

Legislation

Constitution of the Republic of South Africa, Act 200 of 1993.

Constitution of the Republic of South Africa Act 108 of 1996.

Constitution of Ghana of 1992 with Amendments through 1996.

Constitution of Tanzania of 1977 as amended in 2005.

Immigration Act 13 of 2002.

LRA Act 66 of 1995 as amended by Labour Relations Amendment Act (LRAA) 42 of 1996, LRAA 66 of 1996, LRAA 127 of 1998; LRAA 12 of 2002.

Private Security Industry Regulation Act 56 of 2001.

Refugee Act 130 of 1998.

Resolutions and Conventions

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), OAU Doc CAB/LEG/67 /3/Rev 5.

International Labour Organization Convention concerning Freedom of Association and Protection of the Right to Organise of 1948 (No 87).

International Labour Organization Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively of 1949 (No 98).

International Labour Organization Labour Inspection Convention of 1947 (No 81).

International Labour Organization Convention concerning Labour Inspection in Industry and Commerce of 1947 (No 81).

International Labour Organization Convention concerning decent work for domestic workers of 2011 (No 189).

International Labour Organization, The Migrant Workers (Supplementary Provisions) Convention of 1975 (No 143).

International Labour Organization, The Workers with Family Responsibilities Convention of 1981 (No 156).

International Labour Organization International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

International Labour Organization Committee on Freedom of Association, Case No 2227, Complaint presented by the American Federation of Labour and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM).

International Labour Organization Committee on Freedom of Association, Report No 332 (18 October 2002), Case No 2121 (Spain), Complaint presented by the General Union of Workers of Spain (UGT) against the Government of Spain.

International Labour Organization Committee on Freedom of Association, Report No 327 (23 March 2001), Case No 2620, Complaint against the Government of the Republic of Korea presented by the Korean Confederation of Trade Unions (KCTU) and the International Trade Union Confederation (ITUC).

International Labour Organization Committee on Freedom of Association, Report No 362 (November 2011).

International Convention on the Suppression and Punishment of the Crime of Apartheid.

OUA Convention Governing the Specific Aspects of Refugee Problems in Africa
Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

UNGA Res 2200A (XXI) of 16 December 1966 (entered into force on 23 March 1976) (ICCPR).

UNGA Res 2200A (XXI) of 16 December 1966 (entered into force on 3 January 1976) (ICESCR).