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POLICY AND REGULATIONS ON EMPLOYMENT OF FOREIGN NATIONALS IN SOUTH AFRICA

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INTRODUCTION

- Migrant Labour is not a new subject in South Africa. South Africa has been a migrant-receiving country for decades and have been going on since the mineral revolution of the late 19th century.
- The majority of those migrants were from neighboring countries within the Southern African region.
- Migrant labour provided abundant cheap African labour for white-owned mines and farms, and it continues to be significant in South Africa to this day.

INTRODUCTION

- South Africa's mining industry employed mostly foreign workers since it was established in the late 19th century until the beginning of the 21st century.
- Employment of unregulated foreign labour enabled mine-owners to exploit the available manpower in pursuit of maximum output.
- Farmers seeking to avoid the South African employment practices increasingly seek to employ migrant workers to whom they extend minimal employment benefits.

INTRODUCTION

- The 2011 census reported that more than 75% of foreign-born migrants living in South Africa came from the African continent.
- African migrants from SADC countries contributed the vast majority of this, making up 68% of total international migrants.
- Immigrants from African countries outside of the SADC region made up just 7.3% of all international migrants

SOUTH AFRICAN CONSTITUTION OF 1996

- Section 1 of the South African Constitution of 1996 identifies the achievement of equality and the creation of a non-racial and non-sexist society as one of the founding values of its constitutional democracy.
- Section 9 also guarantees the right of every person not to be unfairly discriminated against, directly or indirectly, on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origins, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.

EMPLOYMENT SERVICE ACT OF 2014

- The employment of foreigners is regulated by the Employment Services Act 4 of 2014.
- The Act was introduced to promote employment while simultaneously decreasing the unemployment rates within the Republic.
- This act also sets out the rules and regulations for admission of foreigners into South Africa, their residence and their departure as well as the ability for foreigners to work within South Africa.

EMPLOYMENT SERVICE ACT OF 2014

- The Employment Services Act aims to support the employment of foreigners which is consistent with the provisions set out in the Immigration Act.
- According to the Act, foreign nationals employed in South Africa will be protected by fair labour practices and may only perform work as authorised in terms of their work visas.

IMMIGRATION ACT OF 2002

- The Immigration Act 13 of 2002 is also responsible for regulating foreign employment in the Republic of South Africa.
- This act lays out the rules and regulations for admission of foreigners into South Africa, their residence in South Africa and their departure from South Africa as well as the ability for foreigners to work within the Republic.

LABOUR RELATIONS ACT

- The labour relations act gives foreign employees, including those who do not have valid working visas, a legal protection from unfair dismissal.
- Section 213 of the LRA defines an 'employee' as:
 - (a) Any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and
 - (b) Any other person who in any manner assists in carrying on or conducting the business of an employer.

LABOUR RELATIONS ACT

- The law does not declare that a contract of employment concluded without the required permit is void nor does it provide that a foreigner who accepts work without a valid permit is guilty of an offence.
- What is prohibited is the act of employing a foreign national in violation of the law.
- All of the liability is therefore attributed to the employer and the law does not penalize the action of the foreign person who accepts work or performs work without valid authorisation

Case Study: Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others Relations Act

- Following receipt of the termination letter, the complainant, Mr Lanzetta lodged an unfair dismissal dispute at the CCMA.
- The employer contested the CCMA's jurisdiction to hear the matter contending that the applicant was not an employee in terms of the LRA, as the expiration of his work visa invalidated his contract of employment.

Case Study: Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others Relations Act

- It argued that in the absence of a valid contract of employment, the applicant did not qualify as an employee and was therefore not entitled to the protections provided for in the LRA.
- The CCMA found that it had jurisdiction to consider the dispute.
- While the CCMA accepted the respondent's argument that the contract was invalid, it found that there was still an employment relationship between the parties.
- CCMA decided that an employment relationship can exist in the absence of a contract of employment as such a relationship transcends contracts

Case Study: Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others Relations Act

- The CCMA found that it had jurisdiction to consider the dispute.
- On review, the Labour Court focused on two aspects, whether the contract of employment was indeed invalidated by the absence of a valid work permit and whether the applicant could be considered an employee in the event that the contract of employment was invalid.
- the court came to the conclusion that the contract of employment was valid.

Recruitment of Foreign Nationals in the Public Service

- Public Service is faced with a challenge to manage serious staff and skills shortages in a number of occupations in the Public Service.
- 2002 South Africa adopted a Human Resource Development Strategy for the Public Service that defines a number of strategies to be rolled out until 2006 to address these challenges.
- strategy also included a Scarce Skills Development Strategy that calls for a number of activities to be undertaken in regard to the recruitment and provisioning of scarce skills in the Public Service.

Recruitment of Foreign Nationals in the Public Service

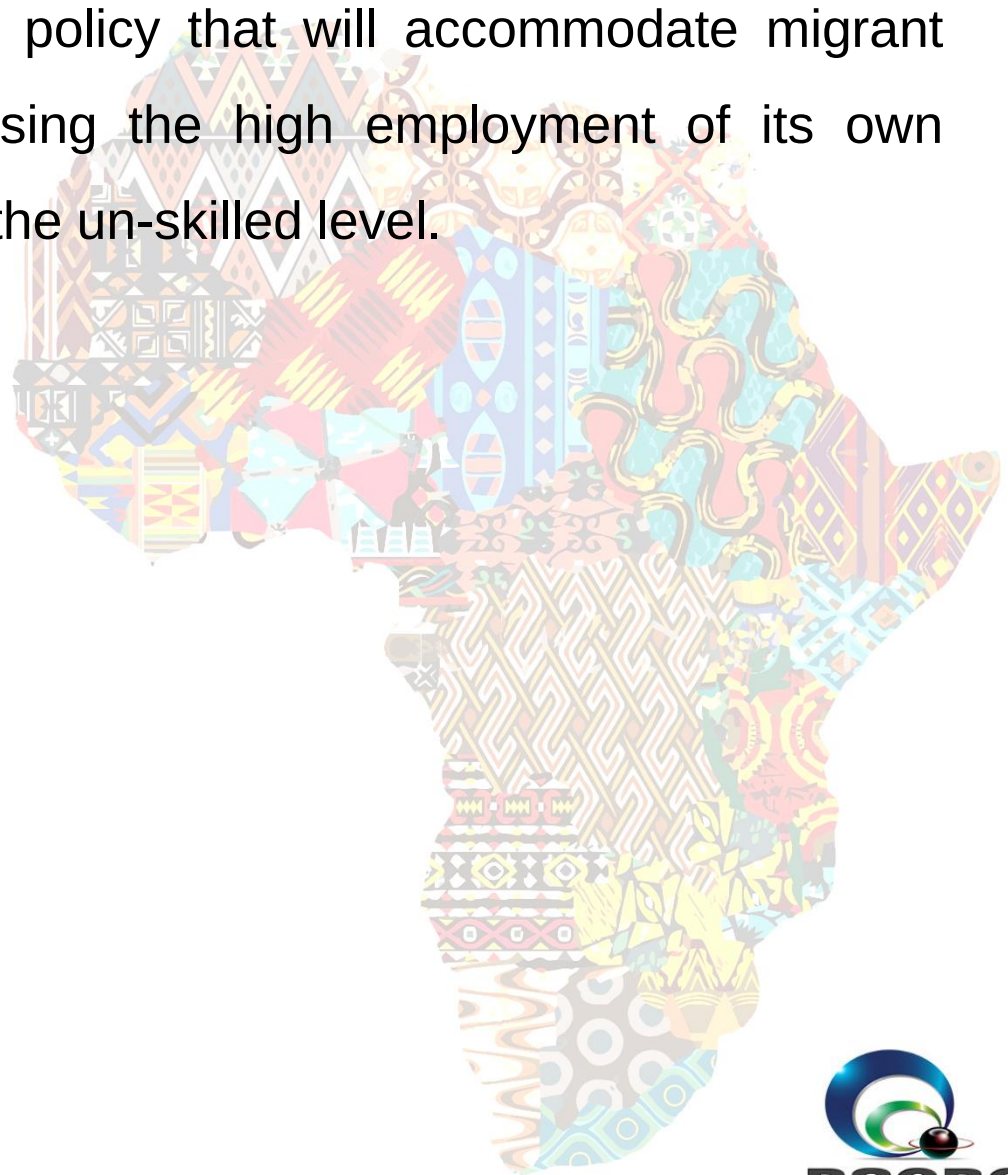
- The Department of Public Service and Administration (DPSA), being a stakeholder in improving human resource management throughout the Public Service, developed a Policy on Employment of Foreign Nationals, to establish a uniform approach and practice.
- The policy is to assist to recruit and utilize foreigners to address staff and skills shortages in their areas of operation.
- The policy is based on the employment framework and provisions provided for in the Immigration Act, 2002, the Public Service Act, 1994, the Public Service Regulations, 2001 and other measures reflected in collective agreements and determinations made by the Minister.

Recent Development in Migrant Employment Policy

- The department of Employment and Labour is in a process of developing a National Labour Migration Policy expected to be finalised this year for public comments, which is in response to the African Union (AU) and Southern African Development Community (SADC) protocols and other international agreements that relate to migrant labour.

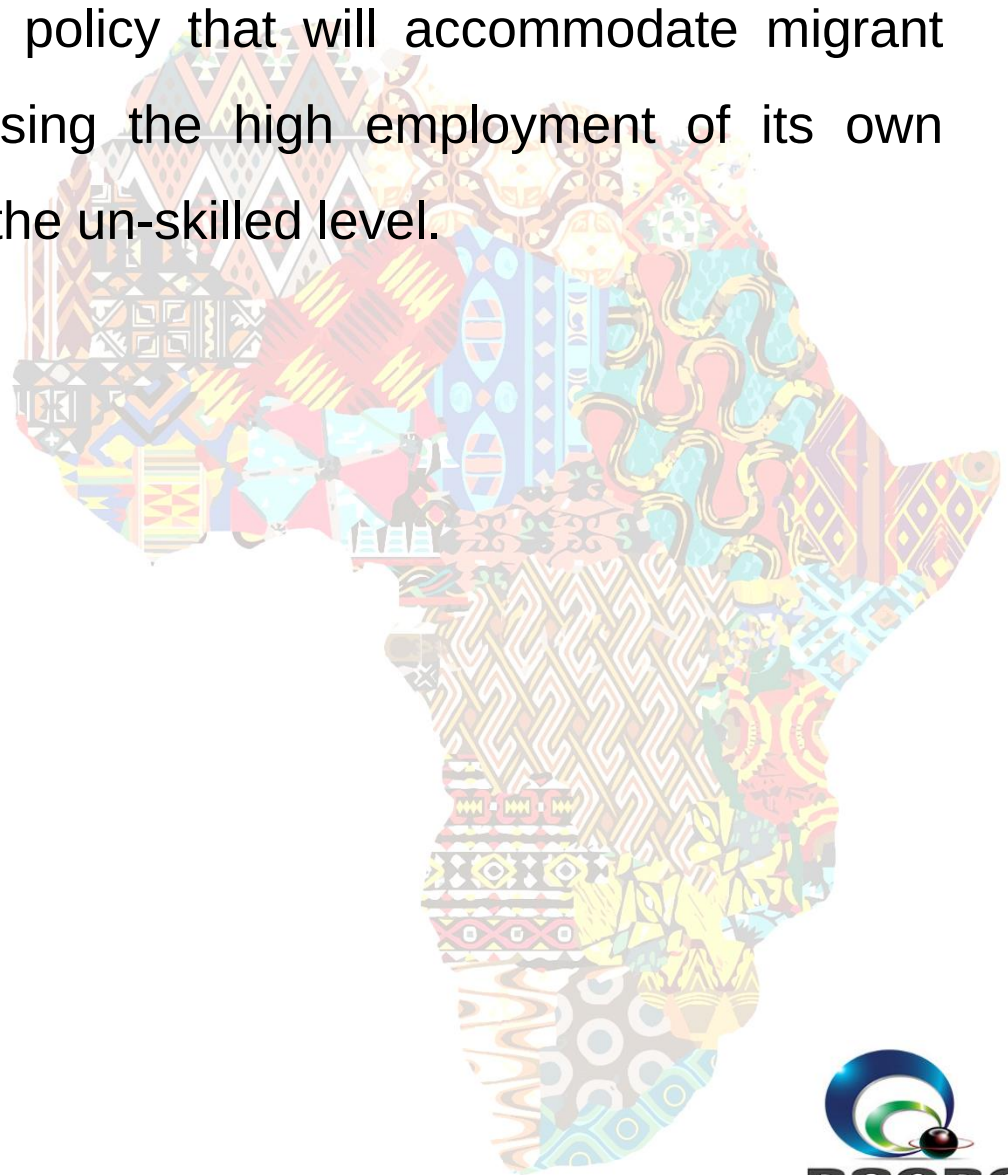
CONCLUSION

- South Africa needs a policy that will accommodate migrant workers while addressing the high employment of its own citizens particularly in the un-skilled level.



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Thank you!!!