

Migrant Labour in Africa (The South African Case Study)

Abstract

This paper is based on the South African case study on Migration Labour. It covers the recruitment framework for migrant labour in South Africa. The paper also covers the applicable regional framework agreement by SADC countries of which South Africa is a member as well as the framework agreements by the African Union and International Labour Organisation. The paper interrogates all related South African Legal Framework applicable for the protection of Migrant Labour rights including the South African Constitution, the Labour Relations Act, Employment Service Act and Immigration Act. The paper also demonstrate flaws in policy framework for the exclusion of some categories of migrant workers in social security benefits. The paper also deal with the recruitment practices of foreign nationals in South Africa as well employment of foreign nationals in the South African Public Service. The paper will also touch on the root causes of emigration as per the South African White Paper on International Migration.

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 neighbouring 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. Regardless of the general surplus of domestic labour, 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.

Since 2000, when Zimbabwe was plunged into an economic crisis, the scale and nature of Zimbabwean migration to South Africa has changed significantly, with increasing numbers crossing the border and staying for longer.

According to a StatsSA report on migration dynamics, the consistently high rate of migration from SADC countries is due to a colonial and apartheid-era regional “history of labour migration, especially from Mozambique, Lesotho, Malawi, Zimbabwe and Swaziland.”

The 2011 census reported that more than 75% of foreign-born (international) 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.

The claim that ‘foreigners’ are taking jobs from South Africans is an argument that is always made and possible the primary cause of the xenophobic attacks that have been experienced in the country from 2008. In a country like South Africa that is characterised by high unemployment means that more people are competing against fewer jobs and the influx of emigrant workers only make issues worse. The employment of foreigners is regulated by The Employment Services Act 4 of 2014 of



which came into effect in August 2015 and was introduced to promote employment while simultaneously decreasing the unemployment rates within the Republic.

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.

Root causes

The 2017 White Paper on International Migration has identified a number of root causes for international migration. The 2017 White Paper highlights significant policy gaps that exist in the management of integration for international migrants, management of emigration and management of asylum seekers and refugees. The following have been identified as some of the root causes for migration:

International migration is regarded as a routine administrative function of the state

The approach to international migration in the 1999 White Paper is largely static and limited to compliance rather than managing international migration strategically. As a result there is a lack of a proactive management of international migration and this does not advance the national security and development agenda of the country. The focus is biased towards formal rights rather than on understanding that international migration must be managed professionally, securely and strategically to achieve national priorities.



The 2017 White Paper proposes that international migration must be managed proactively and strategically in order to contribute to national priorities, such as nation building and social cohesion, inclusive economic growth and national security. South Africa needs to start a conversation on the importance of international migration so that there can be consensus on its contribution to meeting broadly supported national goals. This White paper has also identifies that, South Africa has not put in place adequate policy, strategies, institutions and capacity for attracting, recruiting and retaining international migrants with the necessary skills and resources.

Lack of a risk-based approach to international migration

The current policy relies on the mechanical application of rules to manage risks, rather than the integrated intelligence-based approach that is best practice globally. South Africa has consequently invested little in the effective and secure management of international migration so that risks can be evaluated and mitigated adequately. The capacity to analyse and take strategic decisions is fundamental, together with the availability of the necessary information from other departments, such as State Security, Transport, the South African Police Service (SAPS), South African Revenue Service (SARS), the Department of Trade and Industry and the Health Department. In South Africa, risks have to be managed within the framework of the Constitution and the human rights of both citizens and other nationals must be respected and protected.

Little awareness of historical and geopolitical contexts

The 1999 White Paper was designed in response or to correct the apartheid immigration legislation and it adopted the formal principles of immigration



administration that are promoted by the UN. It opened South African borders to Africa and the world but reserved the right to immigrate largely to those with high level skills or capital. Workers with low to mid-level skills from SADC countries could only be recruited by farmers, the mines and other companies under a temporary Corporate Work Visa that has its roots in the migrant labour system. It was silent on the need to manage historic migration flows from the SADC in a way that will break with the colonial past by promoting regional integration and industrial development.

Lack of a holistic approach to immigration policy leading to policy gaps

The 1999 White Paper excludes policy on asylum seekers and refugees, which is covered in the Refugees Act. The approach taken in the new White Paper is that, international migration must be dealt with holistically, as many aspects are interconnected and this manifests in concrete processes and the lives of people.

Serious policy gaps regarding asylum seekers and refugees

At the level of policy, legislation, strategy and systems, the asylum seeker and refugee regime that was established through the 1998 Refugees Act has serious gaps that have only been partially addressed through amendments. Besides policy gaps, this points to the need for the state to move more quickly to a more integrated and strategic approach to planning and budgeting.

Capacity constraints to manage international migration

The limited capacity of South Africa to manage international migration is due to a lack of appreciation of its positive role and strategic importance. Contributing to the situation described above has been a tendency to regard the Department of Home Affairs as the sole department responsible for the management of international migration. This has contributed to the lack in South Africa of approaches involving



the whole of the government and civil society, which is contrary to best practice globally. The 2017 White Paper proposes that South Africa should adopt an approach to immigration that is strategically managed and which involves the whole of the government and society approach led by the elected government.

Regulation for employment of foreign workers in South Africa

The employment service act of 2014, was introduced to promote employment while simultaneously decreasing the unemployment rates in South Africa. 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. The Employment Services Act aims to support the employment of foreigners which is consistent with the provisions set out in the Immigration Act.

The Act define any individual who is not a South African citizen or does not have a permanent residence permit in terms of the Immigration Act, is considered a foreign national.

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. If an employer employs someone without a valid work visa, there would be consequences for that employer. Nevertheless, the employee will still be entitled to enforce any claim that he may have in terms of any statute or employment relationship against his employer.

The Act also stipulates that, employers are obliged to ensure that, they have exhausted all recruitment efforts and ensure that there are no South African citizens or permanent residents within South Africa with suitable skills to fill a vacancy before



they recruit a foreign national. Once a foreign national is employed, the employer needs to prepare a skills transfer plan for that person in that specific position and employers may not have a foreign national engage in work that is contrary to the terms of his/her work visa.

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. The Equality Act 2000, prohibits unfair discrimination (on the grounds listed above), as well as hate speech and harassment in accordance with the Constitution.

In addition to these provisions, South Africa is a party to a number of international human rights instruments, which promote the right to equality and non-discrimination.

Recruitment practices of foreign nationals in South Africa

In South Africa, the employment framework for foreign nationals working in South Africa requires employers to confirm with the department of Home Affairs. If South African employers employs a foreign national, the employer and employee have to confirm employment in terms of the Immigration Act. This has to be done within 90 days of arrival and then annually, otherwise the foreign national will face losing his or her work permit and compromising a chance at permanent residence. Recent amendments to the draft immigration regulations mean that if a foreign national overstay their welcome, on a valid visa, they could be banned from the country for up



to 10 years. There's a heavy burden of proof on foreign nationals coming to work in SA. Foreign nationals coming into South Africa on a general work permit must give the director general of home affairs proof that the worker is still gainfully employed, and provide a job description for that employee.

If a foreign national comes in on a specials skills visa or quota work permit, he/she must give the director general of home affairs the proof of specialised qualifications, relevant experience and professional registrations, the latest South African Qualifications Authority (SAQA) evaluation and registration, a copy of their valid passport, and proof that they have secured employment in South Africa.

As part of the compliance process, the migrant worker must provide a letter confirming continued employment, as well as a copy of the contract. If there is a change of employment, a release letter is needed from the previous employer as is a copy of the prior contract.

The result of non-compliance can see the permit voided, the employee excluded from South Africa and cost the employer a great loss in terms of investment and talent. Some employers don't tell the department that they employ foreigners and risk heavy penalties if they are found in contravention with the act. In terms of specialised skills, a quota work permit is the only way for companies to issue contracts to suitable candidates.

A foreign national doesn't need an offer of employment to enter the country and employers are required to verify their international qualifications and confirm membership to professional bodies.

The department of Public Service and Administration also regulates recruitment and employment of foreign nationals in the public service.

Policy on the Employment of Foreign Nationals in the Public Service

In recent years, the Public Service has experienced a serious loss or shortage of skilled staff in a number of key occupations. Whilst the mechanisms intended for developing the necessary skills capacity within South Africa but it have not yet been fully implemented, alternative measures need to be taken in the interim to meet the human resource needs in the Public Service. One such alternative is to recruit foreigners from abroad.

Public Service is now faced with the challenge to manage serious staff and skills shortages in a number of occupations in the Public Service.

In order to address these challenges, in 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. This 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.

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. Emphasis is placed on the concepts of “critical occupations”



and “critical skills” as the basis for the application of the policy as well as the need to comply with the Immigration Act, 2002.

The policy also stipulates that, foreign nationals must be employed in critical occupations as determined by departments, South African citizens and permanent residents must receive preference and the recruitment of foreign nationals can only be considered as a last resort. Contracts of employment must provide for the transfer of skills to South African employees and the standard recruitment processes and approaches are to be applied, except that the Department of Foreign Affairs must be approached to facilitate the process if recruitment takes place in terms of treaties and bi-lateral agreements.

Human Trafficking

According to the Southern Cross Weekly forms of human trafficking found in South Africa include sex trafficking, child labour, domestic servitude, organ smuggling, child-brides, illegal child adoptions, debt-bondage, forced surrogacy, and the use of body parts for muti.

NGO and law enforcement officials indicate South Africans constitute the largest number of victims within South Africa. South African children are subjected to trafficking mainly within the country. Girls are subjected to sex trafficking and domestic servitude; boys are forced to work in street vending, food service, begging, criminal activities, and agriculture. Men were also identified as victims of forced labour aboard fishing vessels in South Africa's territorial waters.

According to the report produced by the Office to Monitor and Combat Corruption by the US Department of State, young men and boys from Lesotho, Mozambique, Malawi, Swaziland, and Zimbabwe voluntarily migrate to South Africa for farm work,



including cattle herding; some are subjected to forced labour and subsequently arrested and deported as illegal immigrants. Forced labour is reportedly used in fruit and vegetable farms across South Africa and vineyards in the Western Cape.

The research also stated that, the Government of South Africa does not fully comply with the minimum standards for the elimination of trafficking however, it is making significant efforts to do so. In May 2013, the South African parliament passed the Prevention and Combatting of Trafficking in Persons Act, which was signed by President Zuma in July 2013.

South Africa remains a primary source, destination, and transit country for human trafficking. Human trafficking occurs internally between its provinces, as well as externally across its South African borders. There are reports of criminal syndicates from Russia, Bulgaria and Nigeria operating in this sector.

Internally, victims are targeted from economically poorer provinces such as the Eastern Cape, the Northern Cape, and the Free State and brought to cities such as Durban, Johannesburg and Cape Town.

Externally, across borders, victims are targeted from countries with regions embedded by their own socio-economic and political problems.

The main causes of human trafficking include South Africa's socio-political and economic context with its high levels of poverty, inequality and unemployment, as well as the low levels or lack of education.

Corruption in government departments, within law enforcement units and border-crossing patrols also plays a role in hindering initiatives to prevent trafficking.



The broad definition is that human trafficking is modern-day slavery. Narrowing it down, one finds that human trafficking has many components to it, unremunerated work, kidnapping of people and killing them for body parts, prostitution, and drug peddling, among others.

In June 2017, Mail & Guardian reported that human trafficking was in the rife in South Africa. It became a focus of attention following the introduction of the controversial visa requirements. In addition South Africa has signed a “Preventing and Combating of Trafficking in Persons Act aimed at preventing trafficking. It defines trafficking to include the recruitment, transportation, sale or harbour of people by means of force, deceit, the abuse of vulnerability and the abuse of power for exploitation.

Legal Framework for Social Protection Rights regarding Migrants in South Africa

There are numerous frameworks and tools that are dedicated for the extension of social protection as well as the protection of migrant workers globally, fostered by the United Nations, African Union, the ILO and the SADC. The Constitution of the Republic of South Africa, also recognises that international law must be considered when interpreting the Bill of Rights. Each element of social protection, as well as migration, is regulated by different legislative instruments. South Africa has legislative instruments dedicated to the regulation of social assistance, social insurance and labour security. In South Africa, irregular migrants receive limited social protection. The South African courts have played a positive role in the development and broadening of the social protection afforded to migrant workers, especially in the form of labour security. The limitations in the legislative instruments



that regulate labour security are being extended to give effect to the courts' decisions.

The Social Assistance Act provides for basic grants and only apply to South African citizens. Although the provision of social protection in South Africa is relatively comprehensive and embedded in legal frameworks and instruments, particular categories of migrants are excluded and discriminated from accessing these benefits. Non-nationals are generally excluded from social security protection, in particular social assistance.

The AU recognizes the importance of implementing a coherent and integrated strategy regarding the social protection of migrants at continental and regional levels.

In 2006, the African Union adopted its migration policy framework for Africa which expresses the need for a comprehensive migration policy in Africa. It calls on member countries to adopt principles from the ILO's Conventions and the UN International Convention on Migrant Workers. The AU migration policy framework contains a number of guidelines relating to how policies can be developed to promote the free movement of people and to strengthen regional co-operation in matters concerning migration. It also recommends that member countries should seek collective solutions through dialogue and regional agreements, establish transparent labour migration policies, strengthen measures to prevent trafficking, and resolve conflicts relating to migration by balancing national security and migrants' rights.

In a South African context, it is recognised that South Africa has a progressive and modern constitution which protects most if not all categories of human rights that are ordinarily included in international human rights instruments and these rights are



enforceable through the judiciary. These rights are applicable to everyone and are not discriminative according to any person based on their citizenship, migration status or legality of work. This then mean that, even irregular migrants would also be entitled to some social security protection under the Constitution of South.

Also included in the South African Constitution is a provision which states that, everyone has the right to fair labour relations. The International Convention on Migrant Workers provides labour protection to irregular migrants in so far as they may not be exposed to exploitation in the workplace, and that the Constitution of South Africa protects everyone's right to fair labour practices.

It should be remembered that this initiative promotes opportunities for everyone to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.

South Africa has a reasonably well developed social security framework and it accommodates the ILO's classical contingencies. Public insurance schemes extend to workers in the formal sector. Irregular migrant workers who work in the informal job market are automatically excluded due to the fact that they do not contribute to any of the public social insurance schemes.

As a direct consequence of South Africa's legal regulations governing access to social protection benefits, temporary residents are excluded from accessing social assistance but qualify for specific forms of social insurance. The constitutional and legal frameworks explicitly exclude categories of irregular migrants such as undocumented migrants from accessing social security however, the Social Assistance Act makes provision for the Minister of Social Development, with the agreement of the Minister of Finance, to provide social relief to distressed individuals



who qualify. Thus, the South African government was able to assist victims of the 2008 xenophobic violence. However, this assistance is at the discretion of the relevant Minister and does not translate into a claimable right for migrants. While constitutional and legal provisions mostly exclude migrants from forms of protection, migrants are also excluded from accessing particular entitlements due to administrative and institutional frameworks governing individuals' access.

Conclusive Remarks

South Africa have a burden of being on the receiving end of international migration and has been evidently struggling to manage migration into the country. There is a lack of research to determine the impact of illegal immigrants on the resources of the country. Acceptance of bribes by border officials is the contributing factor to the high undocumented migrants in the country. Although it's only a drop in the sea, The Directorate for Priority Crime Investigation (Hawks) have made numerous arrests of police and border officials for extortion of money from foreign nationals attempting to enter South African borders.

In terms of protection of migrant labour and social rights, South Africa have an adequate legal framework that and there are consequences for non-compliance, however there are cases of forced labour and human trafficking. South Africa is struggling in curbing human trafficking, although there have been a number of efforts and arrests in this regard, it is far from enough to eliminate the problem.

In spite of the high employment rate especially with the unskilled workers, there is an addition of migrants who are also unskilled, fighting for the same few opportunities. Some of the debates regarding the xenophobic attacks that have been evident in the



country argue that, labour competition in the unskilled labour market might have aggravated the attacks.

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