

IN TRANSIT: THE POSITION OF ILLEGAL FOREIGN WORKERS AND EMERGING LABOUR LAW JURISPRUDENCE (2009) 30 ILJ 66

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INTRODUCTION

Since 1994 the year in which apartheid was finally dealt a death blow with the popular election of the African National Congress and the new constitutional dispensation which followed, South Africa began to attract an increasing numbers of foreigners. The foreigners come mainly from Africa, and in particular from Zimbabwe, a country in economic and political melt down. The exact number of foreigners (the majority of whom are in the country illegally) is uncertain as no official figures are published by the Department of Home Affairs, whose legislative mandate covers the Refugees Act 1998¹ and the Immigration Act 2002,² presumably because the clandestine movements of people in the country illegally is hard to track. Noting that the number of illegal foreigners³ can only be a 'guesstimate', recent newspaper reports indicate that there are between 1.2 million and 3.5 million Zimbabweans illegally in the country.⁴

Foreigners, especially those whose presence is illegal (or 'irregular', or 'undocumented' or 'unauthorized') are vulnerable not only to a growing culture of xenophobia⁵ but also to abuse and exploitation in the workplace. For example, in February 2008 the Department of Labour reported that 'Dozens of illegal workers have been arrested on farms in Musina' where workers worked seven days a week, nine hours a day for wages ranging from R107 to R1,200 per month.⁶

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The Forced Migration Studies Programme at the University of the Witwatersrand in collaboration with the Musina Legal Advice Office drafted a special report called *Fact or Fiction? Examining Zimbabwean Cross Border Migration into South Africa*⁷ in which the authors draw attention to four particular humanitarian problems currently experienced: the denial of asylum to victims of persecution, violence and conflict; mistreatment of informal migrants by smugglers; poor protection of migrant farm workers; and the exploitation and abuse of female migrants.

Mention too must be made of immigrants in South Africa who are permitted to work but who struggle to find or create employment because of administrative difficulties. The National Consortium for Refugee Affairs⁸ points out, for example, that many asylum seekers and refugees are effectively barred from employment because there are delays in the Department of Home Affairs processing documents such as workpermits; asylum seekers and refugees may not work in certain industries such as the private security industry; they cannot register for street trading on the grounds that their permits do not constitute valid documentation; and for those asylum seekers and refugees who are technically or professionally trained there is the additional (but reasonable) requirement of satisfying the criteria set by the South African Qualifications Authority (SAQA) to authenticate foreign certificates, diplomas and degrees.

Of course there is a material distinction between those legally and those illegally in the country with respect to the rights to which foreigners are entitled. Foreigners legally in the country have secured some important court victories: Asylum seekers successfully contested regulations⁹ published in terms of the Refugees Act automatically prohibiting them from working or studying in the country.¹⁰ Foreigners with permanent resident status have ensured the extension of social grants and child support grants in terms of the Social Assistance Act 59 of 1992 to indigent foreign persons;¹¹ and foreign teachers with permanent residence status have been able to secure permanent teaching posts by challenging the regulations¹² in the Educators Employment Act¹³ which previously reserved permanent teaching posts for South African citizens.¹⁴

There have been defeats, notably in the CCMA denying illegal foreigners access to the protection against unfair dismissal envisaged in the Labour Relations [Act 66 of 1995](#) (LRA), ¹⁵ and in the Constitutional Court (CC) which dismissed an application from the Union of Refugee Women to permit refugees to work in the private security industry in terms of the Private Security Regulation [Act 56 of 2001](#). ¹⁶ The Union of Refugee Women sought an order extending the scope of persons eligible for registration as security service providers to permanent residents (and not exclusively South African citizens). ¹⁷

Very recently the clear delineation in the employment arena which accorded protection to legal workers but not to illegal workers began to erode. A creative way of conceptualizing the situation of illegal workers to provide for redress and restitution within our constitutional framework was voiced by Craig Bosch in an article titled 'Can Unauthorized Workers be regarded as Employees for Purposes of the Labour Relations Act?' ¹⁸ and the decision in the LC in *Discovery Health v CCMA & others*¹⁹ which endorsed (although for different reasons) access of an illegal worker to the dispute-resolution mechanisms of the CCMA.

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. The jurisprudence on the issue is slowly evolving away from a firm denial of any labour rights to a tentative but convoluted set of arguments in the other direction in favour of legal protection.

I intend to engage in this debate in three respects. 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.

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.

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) ²⁰ and resonates compatibly with the provisions in the Basic Conditions of Employment Act (BCEA) 1997. ²¹

¹Act 130 of 1998.

²Act 13 of 2002.

³ The term 'illegal foreigner' in this article is not intended to be read pejoratively. The term should be narrowly understood with reference to the Immigration Act 2002 which simply defines an 'illegal foreigner' in s 1 to mean 'a foreigner who is in the Republic in contravention of this Act'.

⁴ Refer to Jayendra Naidoo's article 'SA Picking Up a Crippling Tab for Zimbabwean Crisis' *Sunday Times* 11 May 2008.

⁵ The *Star's* front page article on 13 May 2008 is entitled 'Alex door-to-door purge. Cops step in to protect refugees amid lawlessness.' The *Mail & Guardian's* editorial dated 16 to 22 May 2008 is entitled 'Days of our shame' and the newspaper comments, 'It is clear the African renaissance remains a pipedream when South Africans kill and rape their African brothers and sisters purely for not being South Africans.' The *Sunday Times*, 18 May 2008 at 4 reports on 'Terror on the home front: How residents unleashed a week of murderous mayhem on their foreign neighbours.'

⁶ Refer to www.iol.co.za.

⁷ Refer to www.wits.migration.org.za.

⁸ Refer to the *Summary of Key Findings: Refugee Protection in South Africa 2006*, unpublished at www.ncra.org.za.

⁹ *Government Gazette* 21075 GN R366 of 6 April 2000.

¹⁰ Refer to *Minister of Home Affairs & others v Watchenuka & another* 2004 (2) BCLR 120 (SCA).

¹¹ *Khosa & others v Minister of Social Development & others; Mahlaule & another v Minister of Social Development & others* 2004 (6) BCLR 569 (CC).

¹² *Government Gazette* 16814 GN 1743 of 13 November 1995.

¹³ Proc 138 of 1994.

¹⁴ *Larbi-Odam & others v Member of the Executive Council for Education (North West Province) & another* 1997 (12) BCLR 1655 (CC).

¹⁵ Refer for example to *Moses v Safika* (2001) 22 ILJ 1261 (CCMA); *Vundla and Millies Fashions* (2003) 24 ILJ 462 (CCMA) and *Georgieva-Deyanova/Craighall Spar* [2004] 9 BALR 1143 (CCMA).

¹⁶ *Union of Refugee Women & others v Director: Private Security Industry Regulatory Authority & others* (2007) 28 ILJ 537 (CC).

¹⁷ The CC justified their decision by arguing that there was a legitimate government purpose in distinguishing between citizens on the one hand, and permanent residents on the other hand, and that was that the trustworthiness of citizens could be objectively verified from police criminal records in South Africa, whilst the comparable records from other countries were unreliable or simply unavailable.

¹⁸ (2006) 27 ILJ 1342.

¹⁹ (2008) 29 ILJ 1480 (LC).

²⁰ www.ilo.org/public/english/employment/skills.

²¹ Act 75 of 1997.

THE HISTORICAL POSITION: DENYING ILLEGAL IMMIGRANTS LABOUR PROTECTION

There is only a handful of reported cases (which proceeded no further than the Commission for Conciliation, Mediation & Arbitration (CCMA)) dealing with the unfair dismissal of illegal immigrants. In 2001 the CCMA heard *Moses v Safika Holdings*²² in which a citizen of the United States of America accepted an offer of employment as an adviser in South Africa contingent upon his obtaining a work permit. He did not do so. For reasons not mentioned in the award the contract of employment was terminated and Mr Moses referred an unfair dismissal dispute to the CCMA. The commissioner dismissed the application explaining that the applicant was not an 'employee' in terms of the LRA because the contract was void ab initio due to the applicant's illegal status which directly contravened the Aliens Control Act 1991²³ (the precursor to the Immigration Act).

In 2003 the CCMA heard the matter *Vundla and Millies Fashions*²⁴ in which a Zimbabwean national found employment as a sales assistant in a dress shop in Johannesburg. Millies Fashions received numerous complaints about employing a foreigner and whilst happy with Ms Vundla's performance, her employer requested that she produce 'documents' to show that she could be legally employed. When she couldn't produce proof of her status her employment was terminated. She referred an unfair dismissal dispute to the CCMA. The commissioner,

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without any legal analysis of the facts, held that there had been no dismissal and dismissed the referral. The commissioner said:

'Although there was no proof submitted to demonstrate that the company received complaints and threats about employment of non-citizens who do not have the necessary documents, it is a known fact that this country is battling to control illegal immigrants. The country's attitude towards illegal immigrants and those who are employing and/or harbouring them is that they should be dealt with severely.'²⁵

In 2004 the CCMA heard the matter *Georgieva-Deyanova/Craighall Spar*²⁶ in which Craighall Spar dismissed a foreigner (nationality unstated) because she did not have a work permit. The CCMA upheld a point in limine that it had no jurisdiction to hear the matter as the contract of employment was void ab initio as the employment violated the Immigration Act.

The general thrust of the legal reasoning applied in these cases is crisply as follows: As the worker has no work permit, any employment contract is void ab initio as the contract directly contravenes the Immigration Act and thus the worker does not fall within the

definition of 'employee' in the LRA and consequently does not enjoy the labour protections envisaged therein. ²⁷

[22\(2001\) 22 ILJ 1261 \(CCMA\)](#).

²³Act 96 of 1991 (repealed by s 54 of the Immigration Act 2002).

[24\(2003\) 24 ILJ 462 \(CCMA\)](#).

²⁵ at 466.

²⁶ [2004] 9 BALR 1143 (CCMA).

²⁷ This article concentrates on the position of illegal foreigners. Note should be made of other cases dealing with South African citizens working in contravention of a particular statute, who are denied legal redress. For example in *Lende v Goldberg* (1983) 4 ILJ 271 (C) the Cape Provincial Division held that a domestic worker employed without a work permit was a contravention of the Black (Urban Areas) Consolidation Act 25 of 1945 and was for that reason not entitled to any relief such as payment in lieu of notice following a summary dismissal. In *'Kylie' and Van Zyl t/a Brigittes* (2007) 28 ILJ 470 (CCMA), the CCMA found that it had no jurisdiction to hear an unfair dismissal dispute brought by a sex worker on the grounds that the contract of employment was for illegal purposes - in contravention of the Sexual Offences Act 23 of 1957. The decisions of the CPD and the CCMA are similar to the reasoning with respect to the cases dealing with illegal immigrants already discussed; ie an employment contract entered into in contravention of legislation is void ab initio and thus the aggrieved worker is not entitled to any legal redress.

OPENING THE DEBATE: EXTENDING LEGAL PROTECTION TO ILLEGAL IMMIGRANTS

The title of Bosch's article 'Can Unauthorized Workers be regarded as Employees for Purposes of the Labour Relations Act?' suggests that the correctness of the orthodox view, described above, was open to doubt. Having analysed the Immigration Act, having considered the constitutional right to fair labour practices ²⁸ and having drawn attention to the acute vulnerability of illegal workers, Bosch concludes that those workers should be regarded as 'employees' and entitled to a

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qualified right not to be unfairly dismissed. (Qualified to apply to illegal workers deserving of protection.) ²⁹

Interestingly Bosch concurs with the traditional interpretation of the Immigration Act and states:

'[M]y 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.' ³⁰

How then does he advance the legal case for the protection of illegal workers in the face of such a view? He does so by arguing that there is no express restriction in the Constitution limiting the right to fair labour practices to workers legally employed; ³¹ an employment contract is not required by workers to access the protection of the constitutional right to fair labour practices as a relationship akin to an employment relationship suffices, ³² and that the right to fair labour practices is closely linked to the constitutional right to dignity which should not be impaired (unless reasonably justified under the limitation clause in s 36 of the Constitution). ³³

He further argues that one of the fundamental social policy considerations underpinning labour legislation is the protection of vulnerable workers. In this respect he draws attention to the rebuttable presumptions in the LRA and the BCEA about who is an employee; ³⁴ the emphasis on dependence when determining whether a worker is an employee or an independent contractor; and the focus on substance over form when analysing the relationship between an employer and a person assisting with the business of the employer. ³⁵

Bosch concedes that there are difficulties with the application of his view that unauthorized workers should be considered to be employees and entitled not to be unfairly dismissed. He identifies two difficulties: the definition of dismissal in s 186 ³⁶ of the LRA which refers to contracts of employment (recall that Bosch held that there were no such contracts as they were null and void as they were in contravention of

the Immigration Act) and the remedies that may be awarded by an arbitrator or the LC on a finding that a dismissal is unfair.

With respect to the first difficulty he proposes the technique of reading in so that for example s 186(1)(a) would read:

'Dismissal means that an employer has terminated a contract of employment or employment relationship with or without notice....'

With respect to the second, he acknowledges that reinstatement and re-employment would be inappropriate as it would set in motion a continued contravention of the Immigration Act, and therefore he proposes limiting the remedy to compensation.

The submissions made by Bosch were considered in 2008 by the LC in *Discovery Health Ltd v CCMA & others*.³⁷ The facts very briefly were that Discovery Health terminated the employment relationship with Mr Lanzetta, an Argentinian national, who worked in their call centre as he did not have the requisite work permit in terms of s 19 of the Immigration Act. The CCMA, presumably persuaded by Bosch, found for Mr Lanzetta on the basis of a valid employment relationship despite an invalid employment contract. Discovery took the matter on review to the LC. The LC came to the same result (and found against Discovery) but for different reasons.

The LC considered two legal questions: Firstly, whether or not the contract of employment was invalid by virtue of the contravention of the Immigration Act and secondly, whether or not the statutory definition of 'employee' was predicated on a valid contract of employment.³⁸ 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 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.

The LC found, contrary to Bosch's analysis, that a contract entered into in contravention of the Immigration Act was valid.³⁹ The reasons presented may be summarized as follows: the Immigration Act does not state that an employment contract concluded without the required permit is void;⁴⁰ a statute should be interpreted if its language reasonably permits in a manner which does not limit rights, especially the

constitutional right to fair labour practices;⁴¹ the express prohibition against employing illegal foreigners in s 38(1) of the Immigration Act should be interpreted in a manner which does not limit the right to fair labour practices as exploitative practices may otherwise result; and the legislature was content with penalizing the one party (the employer) without rendering the employment contract void.⁴²

The LC's analysis may well have stopped there, but the court went on to examine whether the statutory definition of 'employee' presupposes a valid contract of employment. The court found that it did not. It stated that the constitutional right to fair labour practices applies more extensively than to parties in an employment contract and potentially 'extends to other contracts, relationships and arrangements in terms of which a person performs work or provides personal services to another'.⁴³ Further, it ruled on the application of relevant International Labour Organization (ILO) conventions to the interpretation of legislation.⁴⁴

I now turn to my first point which is to disagree with the LC's view in *Discovery Health* that a contract of employment is valid despite a contravention of the Immigration Act. My argument rests largely on the 'golden rule' of interpretation which is simply to accord the ordinary grammatical meaning to words unless to do so would lead to absurdity.

²⁸ s 23(1) and (2) of the Constitution.

²⁹ ie not to those illegal foreigners who wilfully flout the provisions of the Immigration Act.

³⁰ Refer too, to his conclusion at 1364.

31 at 1351.

32 at 1351.

33 at 1352.

34 In s 200A of the LRA and s 83A of the BCEA.

35 *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC).

36 "Dismissal" means that -

(a) an employer has terminated a *contract of employment* with or without notice; . . .

(e) an employee terminated a *contract of employment* with or without notice because the employer made continued employment intolerable for the employee;

(f) an employer terminated a *contract of 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.' (Emphasis added.)

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. . .

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(f) an employer terminated a *contract of 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.' (Emphasis added.)

37 (2008) 29 ILJ 1480 (LC).

38 para 19.

39 para 32.

40 para 24.

41 para 28.

42 para 24.

43 para 41.

44 paras 44-47.

DOES THE LANGUAGE OF THE IMMIGRATION ACT REASONABLY LEAD TO THE CONCLUSION THAT A CONTRACT OF EMPLOYMENT IN CONTRAVENTION OF THE ACT IS VALID?

The preamble to the Immigration Act suggests that the Act seeks to encourage the immigration of foreigners who have the skills required by our economy. For example para (d) reads:

'[T]he 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 investment is facilitated, the entry of *exceptionally skilled or qualified people is enabled*, skilled human resources are increased.' (Emphasis added.)

Paragraph (h) reads:

'[T]he South African economy may have access at all times to the full measure of *needed contributions* by foreigners.' (Emphasis added.)

Whilst the preamble promotes the 'highest applicable standards of human rights' and the prevention of xenophobia, the reasonable inference

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to be drawn from the preamble is that not all foreign workers are welcome, only those needed by the economy are.

Section 10A sets out the obligation on a foreigner to hold a valid visa, which may be a work permit. ⁴⁵ A person in contravention of this section is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 12 months, and that person may be arrested and removed from the country. ⁴⁶ The holder of a visitor's permit may not work, unless authorized by the Director-General ⁴⁷ of Home Affairs.

Work permits are regulated by s 19 of the Immigration Act. There are four different types of work permits: quota permits,⁴⁸ general work permits,⁴⁹ exceptional skills permits⁵⁰ and intra-company transfer permits.⁵¹

Quota permits may be granted to foreigners who fall within specific professional categories or within specific occupational classes. The Minister of Home Affairs consults the Minister of Labour and the Minister of Trade & Industry and announces the categories by notice in the *Government Gazette*. A recent *Gazette* listed, for example, actuaries (500 sought), astronomers (200 sought), civil engineers (1,000 sought) and veterinarians (250 sought).⁵² General work permits may be granted to foreigners if the prospective employer can show that despite a diligent search, it is unable to find a South African with similar qualifications or skills.⁵³ Exceptional skills permits may be granted to foreigners possessed with exceptional skills or qualifications. The application must be motivated on the basis of scarce skills in South Africa. Intra-company transfer permits may be granted to foreigners, employed outside the country by a business with operations in South Africa, seeking to work in a branch or affiliate here.

The nature and type of work permits reinforce the intention of the Act already intimated in the preamble which is to encourage foreigners with skills and qualifications generally lacking in the country to

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seek employment in the country. The converse may reasonably be inferred - work permits will not be issued by the director-general to foreigners whose skills and qualifications are not needed in the economy, as there are South Africans in the labour pool to do the work.

Section 38 deals with employment. The section falls under the heading 'Duties and Obligations'. Section 38(1) reads:

- 'No person shall employ -
- (a) an illegal foreigner;
 - (b) a foreigner whose status does not authorise him or her to be employed by such person; or
 - (c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.'

Employers are obliged to check the status of employees and not to employ illegal foreigners.⁵⁴ The Act prohibits any person from assisting an illegal foreigner (apart from humanitarian assistance) by for example 'entering into an agreement with him or her for the conduct of any business or the carrying on of any profession or occupation'.⁵⁵ For employers it is an offence to employ an illegal foreigner or a foreigner in violation of the Act and the employer is liable on conviction to a fine or imprisonment not exceeding one year (for a first conviction.)⁵⁶ Foreigners are obliged to abide by the terms and conditions of their status. Section 43(a) reads: 'Obligations of foreigners - A foreigner shall abide by the terms and conditions of his or her status.' A foreigner who works without a permit contravenes s 43. A contravention of this section carries a penalty upon conviction of a fine or imprisonment not exceeding 18 months. Section 49(6) reads:

'Anyone failing to comply with one of the duties or obligations set out under sections 35 to 46 shall be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding 18 months.'

There are three deductions which can be made from the provisions of the Immigration Act set out above. Firstly, based on the preamble and the type of work permits available, the legislature encourages 'needed' foreign skills in the country, not skills already abundant in the county. Secondly, based on the prohibition of employing illegal foreigners coupled with the attendant risk of a fine or one year's imprisonment, the legislature intended criminalizing employers who contravene the relevant provisions. Thirdly, based on the obligation of a foreigner to abide by the terms of his or her status coupled with the attendant risk of a fine or imprisonment and/or deportation for failing to do so, the legislature intended criminalizing foreign workers who work without one of the requisite work permits.

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In the light of the language of the Act, it is more reasonable to argue that a contract of employment entered into in contravention of this Act is invalid, rather than valid. The language of the Act must be given its ordinary meaning - even a purposive approach does not reasonably lead to an interpretation in favour of contractual validity. The interpretation of legislation is limited to the meaning which the language can naturally sustain. Kentridge AJ in *S v Zuma & others* said: ⁵⁷

'Whilst we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconditions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.... If the language used by the lawmaker is ignored in favour of a general resort to 'values' the result is not interpretation but divination.... I would say that a constitution embodying fundamental rights should as far as its language permits be given a broad construction.'

Generally speaking a contract in contravention of a statute is null and void. ⁵⁸ Vos J in *De Faria v Sheriff High Court*, ⁵⁹ where there had been a sale in execution in contravention of s 30 of the Administration of Estates Act 1965 ⁶⁰ said:

'[I]t is virtually impossible to escape the conclusion that the Legislature intended the general rule to apply, ie that non-compliance with the prescriptions thereof results in nullity. Firstly, the prohibition contained in s 30 is clearly couched in peremptory language (no person shall). Secondly, it is also couched in negative language. Thirdly, a criminal sanction is imposed in the event of the provisions thereof not being complied with. Fourthly, it is self evident that recognition of a sale in contravention thereof by the Court will bring about, or give legal sanction to, the very situation which the Legislature sought to prevent.' ⁶¹

If we were to consider the four reasons set out by Vos J and apply those reasons to s 38 (1) of the Immigration Act the reasonable conclusion to be drawn would be that the legislature intended the general rule to apply - ie that non-compliance with the Act results in nullity. Firstly, the prohibition is couched in peremptory language ('No person shall'). Secondly, the language of the section is negative, 'illegal', 'status does not authorise him or her to be employed'. Thirdly, a criminal sanction is imposed by virtue of s 49(3) and (6). Fourthly, permitting employment of illegal foreigners or those without work

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permits would foster employment relations which the legislature seeks to prevent.

In my view constructing an interpretation of the Immigration Act which permits an employment relationship to exist in contravention of the Act, despite the peremptory provisions in s 38 and despite the language and intent of the Act as a whole, unreasonably strains the language and permits a scenario which that Act seeks to prevent and punish.

I now turn to my second point which is to disagree with Bosch and the LC in *Discovery* that the legislature sought to criminalize the conduct of the employer and not the employee and was content with the criminal sanction (of a fine or imprisonment) as sufficient punishment for employing a foreigner without a work permit, without rendering the employment contract null and void.

⁴⁵ 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.'

⁴⁶ s 10A(5).

⁴⁷ s 11(2).

⁴⁸ s 19(1).

⁴⁹ s 19(2).

⁵⁰ s 19(4).

⁵¹ s 19(5).

⁵² *Government Gazette* 30975 of 15 April 2008.

⁵³ An application for a general work permit must be accompanied by a contract of employment signed by both parties, SAQA approval with respect to qualifications, and the advertisement indicating the attempt made to employ a South African citizen. (Refer to regulation 16(4) and (5) of the Immigration Regulations GN R616 of 27 June 2005.)

⁵⁴ s 38(2).

55 s 42(1)(a)(iii).

56 s 49(3).

57 1995 (2) SA 642 (CC) at 652I-653B and quoted with approval in *Standard Bank Investment Corporation v The Competition Commission & others* [2000] 2 All SA 245 (A).

58 See *Sutter v Scheepers* 1932 AD 165 ; *Standard Bank Ltd v Van Rhyn* 1925 AD 266; *Schierhout v Minister of Justice* 1926 AD 99; *Pottie v Kotze* 1954 (3) SA 719; and *Pratt v First Rand Bank Ltd & another* [2004] 4 All SA 306 (T).

59 2005 (3) SA 372 (T).

60 Act 66 of 1965.

61 *De Faria* at 397.

WAS THE LEGISLATURE CONTENT WITH CRIMINALIZING THE ONE PARTY (THE EMPLOYER) RATHER THAN RENDERING THE CONTRACT OF EMPLOYMENT INVALID AND NULL AND VOID?

As discussed above, in my view the Immigration Act penalizes both parties (the employer and the employee). ⁶² Thus Bosch states:

'The Act creates a criminal sanction for the employer only. The impression is thus created that it is only the employer that the legislation seeks to penalize.' ⁶³

The LC in *Discovery* concludes that:

'In my judgment therefore, by criminalizing only the conduct of an employer who employs a foreign national without a valid permit and by failing to proscribe explicitly a contract of employment concluded in these circumstances, the legislature did not intend to render invalid the underlying contract. For this reason, the contract concluded between Discovery Health and Lanzetta on 1 May 2005 was valid.' ⁶⁴

Insofar as Bosch and the LC in *Discovery* relies (incorrectly) on their interpretation that it is only the conduct of the employer which is criminalized their approach must fail. The second leg of their argument on this point is less open to attack, however.

It is arguable as Bosch and the LC point out that the legislature may have intended the penalty of criminal prosecution (for one or possibly both parties) to be sufficient without rendering the contract of employment in contravention of the Act void. Our courts have recognized this point. In *Standard Bank v Estate Van Rhyn* ⁶⁵ Solomon JA said:

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'The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and then the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was ... [he continued quoting Voet] ... The reason ... greater inconvenience and impropriety would result from the rescission of what was done.'

Christie, however, in *The Law of Contract in SA* cautions that '[t]he principle ... cannot be applied if the object of the statutory requirement is not simply fiscal but is, even if only partly, the protection of the public'. ⁶⁶

The 'protection of the public'/the 'public interest' principle was certainly a consideration in the case *Norval v Vision Centre Optometrists* ⁶⁷ in which the Industrial Court found that an employment contract entered into between an unqualified and unregistered person purporting to be an optometrist and Vision Centre was null and void and in violation of the Medical, Dental and Supplementary Health Service Professions Act 1974 ⁶⁸ which imposed a criminal sanction for such an arrangement. ⁶⁹ Waglay J held as a further consequence that no employer-employee relationship existed and that the court therefore had no jurisdiction to entertain the dispute. ⁷⁰

The 'public protection' argument which could be advanced (against the view that the criminal sanction suffices and rendering the employment contract invalid would amount to overbreath) is a compelling one: preference for employment should be given to South Africans

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not foreigners - the legislature's intent in the Immigration Act is abundantly clear in that regard.⁷¹

Noting the vulnerability of illegal workers and noting the broad application of the right to fair labour practices in the Constitution supported by, for example, the decision in *SA National Defence Union v Minister of Defence*⁷² I now turn to my third point which is to propose for consideration a minimum bed of rights for illegal workers arising from ILO conventions.

⁶² Refer to s 43(a) read with s 49(6) of the Immigration Act.

⁶³ Bosch at 1348.

⁶⁴ *Discovery* at para 32.

⁶⁵ 1925 AD 266.

⁶⁶ See too *Van der Spuy & another v Malpage* [2005] 2 All SA 635 (N) in which the Natal Provincial Division held that the requirement that a manufacturer of a trailer as well as the trailer must be registered in terms of the National Road Traffic Act 93 of 1996 and a contract which breached these requirements was void and of no effect. Alkema AJ explained at 644: 'It serves no purpose, and the entire object of the Act will be defeated, if unregistered manufacturers are allowed to sell unregistered trailers to the general public. The object and purpose of the registration, as I said, is to ensure that only vehicles and trailers which comply with the safety regulations are allowed to be sold to the general public.'

⁶⁷ (1995) 16 ILJ 481 (IC).

⁶⁸ Act 56 of 1974.

⁶⁹ Section 39(1) of the Medical, Dental and Supplementary Health Service Professions Act states: 'No person shall perform for gain any act deemed under section 33 to be an act pertaining to any supplementary health service profession unless he is registered under section 32 in respect of such profession.' Section 39(2) reads: 'Any person contravening the provision of subsection (1) shall be guilty of an offence and on conviction liable to a fine not exceeding R500,00 or to imprisonment for a period not exceeding 12 months, or to both such fine and such imprisonment.'

⁷⁰ *Norval* at 489.

⁷¹ Jayendra Naidoo writes in the *Sunday Times* (11 May 2008) that 'An estimated 3.5 million Zimbabweans are in South Africa, mostly working illegally in SA homes, restaurants and the construction sectors. At the same time, there are about 4 million unemployed South Africans who are actively looking for jobs. . . . Assuming that only a third of the jobs currently held by Zimbabweans are taken by South Africans, unemployment in South Africa would drop from the current rate of 23% to around 16%.'

⁷² 1999 (4) SA 469 (CC); (1999) 20 ILJ 2265 (CC).

SOME DIRECTION FROM THE ILO

If one is persuaded that the Immigration Act properly interpreted more reasonably supports the view that a contract of employment concluded between an illegal immigrant and employer is null and void and of no effect, and Bosch and the LC in *Discovery* are correct in their view that the constitutional right to fair labour practices extends to everyone in an employment relationship, then how should legislation and the courts deal with this incongruous situation? If illegal workers are to be accorded labour rights, then which ones? Perhaps the International Labour Organization (ILO) could be of some guidance in this regard.

When interpreting international law within the employment law domain, our courts are encouraged to seek guidance from the conventions and recommendations emanating from the ILO.⁷³ There are three conventions applicable to the employment conditions of migrant workers; those are the Migration for Employment Convention 1949 (the 1949 convention); Migrant Workers (Supplementary Provisions) Convention 1975 (the 1975 convention); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (the 1990 convention).

The 1949 convention does not deal specifically with the question of what employment rights illegal workers should enjoy.

The 1975 convention promotes the protection of illegal workers in circumstances of past employment with respect to remuneration, social security and other benefits if the worker's 'position cannot be

regularized'.⁷⁴ It would seem that this convention supports claims for remuneration for work already performed (retrospective rights) but does not extend to continued employment in which the irregular/illegal situation continues. Lawful foreign employees are privileged vis-à-vis their illegal counterparts as member states are encouraged to -

'promote and to guarantee, by methods appropriate to the national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security⁷⁵ and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory'.⁷⁶

The 1990 convention deals comprehensively with the rights of migrants in both regular and irregular circumstances.⁷⁷ (Interestingly the descriptors of workers have changed from 'illegal' and 'illicit' in the 1975 convention to 'irregular' and 'undocumented' in the 1990 convention.) The 1990 convention is divided into nine parts. Parts III and IV distinguish a distinction between migrant workers in regular and irregular working situations respectively. Part III is entitled 'Human Rights of All Migrant Workers and Members of their Families'; whilst part IV is entitled 'Other Rights of Migrant Workers and Members of their Families *Who Are Documented or in a Regular Situation* (emphasis added).'

The 1990 convention seeks to extend the rights of migrant workers in irregular working circumstances, whilst according additional rights to migrant workers in regular circumstances. The preamble to the convention motivates this position as follows:

'Considering 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 certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition;

Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a

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regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned.'

All migrants regardless of their status have the right to basic human rights such as freedom of religion and freedom of expression and with respect to employment to treatment no less favourable than treatment applying to nationals in relation to remuneration, overtime, hours of work, health and safety, minimum age of employment and termination of the employment relationship.⁷⁸ If a migrant is expelled from the state of employment the migrant is still entitled to receive the wages acquired during the period of employment.⁷⁹ (Interestingly the right to enjoy equality of treatment with nationals of the state of employment in respect of protection against dismissal seems to apply to regular migrants and not to irregular migrants.)⁸⁰

It would seem that the rights which reasonably should be extended to illegal workers would be the minimum bed of rights contemplated in the BCEA pertaining to, for example, hours of work,⁸¹ leave,⁸² and payment of at least the minimum wage in a particular industry in which the worker is employed,⁸³ and the right to recover those wages if an employer refuses to make payment.⁸⁴

⁷³NUMSA & others v Bader Bop (Pty) Ltd & another 2003 (3) SA 513 (CC); (2003) 24 ILJ 305 (CC).

⁷⁴ Article 91 reads: 'Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits. (Emphasis added.)

⁷⁵ The right to social grants and child care grants extends to foreigners with permanent resident status and not to illegal foreigners. Refer to *Khosa & others v Minister of Social Development & others; Mahlaule & another v Minister of Social Development & others* 2004 (5) BCLR 569 (CC).

⁷⁶ article 10.

⁷⁷ Migrant workers in this convention are considered as documented or in a regular situation 'if they are authorized to enter, to stay and to engage in remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party'. Migrant workers are considered to be non-documented or in an irregular situation if they do not comply with these conditions. Refer to part I article 5.

⁷⁸ Refer to part III, article 25.

[79](#) part III article 22, 9.

[80](#) part IV article 54 1.a.

[81](#) chapter 2 of the BCEA (ordinary hours, overtime hours, meal breaks, etc).

[82](#) chapter 3 of the BCEA (annual leave, sick leave, maternity leave, family responsibility leave, etc.

[83](#) Sectoral determinations in chapter 8 of the BCEA.

[84](#) Enforcement measures in chapter 10 of the BCEA.

WAY FORWARD

The limits of the right to fair labour practices with respect to illegal employment relationships may develop on a case-by-case basis over time - certainly the LC's decision in *Discovery Health* will open the debate further. Parliament may wish to step in and create greater certainty by making legislative amendments or new legislation which expressly addresses the situation. The issue would likely be a contentious one as the range of opinion would include views reflecting xenophobia, the need to give preference to employment to South Africans and not foreigners (in line with the intention of the Immigration Act), the need to show support for human rights principles and the guidelines of the ILO, and the desirability of extending labour protection to vulnerable workers. The time surely calls for clarity on the matter.

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