How well is SA’s Employment Services Act Aligned to Migration Policies with regards to social protection?
Introduction
Introduction

The terms Social Security and Social Protection

Employment Services Act 4 of 2014 (the ESA) recently adopted

2. (1) The purpose of this Act is to—
(d) improve the employment prospects of work seekers, in particular vulnerable work seekers;

How well is the ESA aligned to international norms and South African policy in respect of migrant workers?
Introduction

Structure of the Presentation

Norms regarding migration established by:
- The ILO Constitution and Conventions
- The United Nations
- The African Union and SADC
- Green Paper on Migration 2016
- Guidance from the Constitution and the Courts

The Employment Services Act

Conclusion
ILO Constitution and Conventions
Since 1919, the preamble to the ILO Constitution highlighted the need for the “protection of the interests of workers when employed in countries other than their own”

The ILO has two significant conventions aimed at protecting migrant workers have been adopted

Conventions 97 of 1949 and 143 of 1975

The essence of the Conventions is that signatories should guarantee “equal opportunity and treatment” in respect of employment rights and social security for migrant workers

The Conventions do not go beyond the protection of regular migrants
United Nations
In 1990 the UN adopted the International Convention on the Protection of the Rights of all Migrant Workers

Most significant overarching convention, but 13 years to finalise

The preamble states that the

“problems involved in migration are even more serious in the case of irregular migration”

Four parts: Definitions; non-discrimination; labour security (all migrants); and other human rights regarding “regular migrants”
Part III protects the social and labour security of all migrant workers

- Art 27 – “same treatment granted to nationals” in respect of social security, but subject to “requirements provided for by applicable legislation”
- Weak protection if contributed, but no benefit. State should consider to repay
- At liberty to require citizenship
- Art 25 – all migrant workers have the right to equal treatment regarding employment rights
- Employers not relieved of obligations for any reason, “such as irregularity”
- It is submitted that this also applies regarding the freedom to apply for a job
AU and SADC
Since 2001 the AU has recognized the importance of an integrated strategy regarding the social protection of migrants.

Member countries should develop co-ordinated migration policies, which encourage the free movement of people.

In 2006 the AU adopted a migration policy framework:
- social dialogue and regional agreements;
- transparent policies;
- limit trafficking.

The adoption, implementation and enforcement of instruments which encourage free movement remains problematic.
The SADC treaty 2001 adopts a collaborative approach, which can only be attained through the establishment of social protection measures.

Art 10 of the SADC Charter provides that every worker “shall have a right to adequate social protection”. The charter does not refer to migrant workers.

The SADC Code on Social Security 2008 has the specific goal of encouraging states to work towards the free movement of persons and to progressively reduce migration controls.

The 1995 Draft Protocol on the Freedom of Movement of Persons also has the vision of a region where people, goods and capital could move freely across borders.
The Constitution and SA Courts
S 23 of the Constitution - everyone has the right to fair labour practices

S 9 of the Constitution – no unfair discrimination, but measures may be adopted to advance groups persons disadvantaged by previous discrimination

The Employment Equity Act (EEA) prohibits unfair discrimination

Khoza case

Discovery Health case
Green Paper on Migration
Green Paper on Migration

- The NDP
- Vision
- Skills and risks
- Specific policy options for consideration
Employment Services Act
Definitions

- “employee” bears the same meaning as defined in section 1 of the Basic Conditions of Employment Act;

- “foreign national” means an individual who is not a South African citizen or does not have a permanent residence permit issued in terms of the Immigration Act

- “work seeker” means any person who is looking for work
Purpose of Act

2. (1) The purpose of this Act is to—

(d) improve the employment prospects of work seekers, in particular vulnerable work seekers;

(f) facilitate access to education and training for work seekers, in particular vulnerable work seekers;

(h) facilitate the employment of foreign nationals in the South African economy, where their contribution is needed in a manner— (i) that gives effect to the right to fair labour practices contemplated in section 23 of the Constitution; (ii) that does not impact adversely on existing labour standards or the rights and expectations of South African workers; and (iii) that promotes the training of South African citizens and permanent residents.
Purpose

Purpose of Act

2. (2) The purpose is to be achieved by—

(a) providing comprehensive and integrated free public employment services;

(b) ...

(c) ...

(d) establishing schemes and other measures to promote employment; and

(e) providing a regulatory framework for the operation of private employment agencies
Employment of foreign nationals

8. (1) An employer may not employ a foreign national ... prior to such foreign national producing an applicable and valid work permit

(2) The Minister may, after consulting the Board, make regulations to facilitate the employment of foreign nationals ...

(3) ...

(4) An employee who is employed without a valid work permit is entitled to enforce any claim that the employee may have in terms of any statute or employment relationship against his or her employer or any person who is liable in terms of the law.
Protection Afforded to Migrants

- The Act ensures that SA citizens and permanent residents receive preference with appointments.

- Non-citizens and those who do not have a permanent-residence permit is regarded as a “foreign national”.

- Employers may not employ a foreign national without a valid work permit and employers must also satisfy the requirement that there are no SA citizens or permanent residents to fill a vacancy.

- Employers must prepare skills transfer plans in relation to any position in which a foreign national is employed.
Conclusion
Conclusion

- Questionable whether ESA is aligned to the Constitution and the EEA
- Everyone has the right not to be discriminated against
- Everyone had the right to fair labour practices
- Migrant workers not being treated equally to SA citizens in terms of the ESA
Prof. BPS van Eck
University of Pretoria
Stefan.vaneck@up.ac.za

Miss F Snyman
Akademia
felicia@akademia.ac.za