PROTECTING THE ILLEGAL MIGRANT WORKER IN BOTSWANA: A CONUNDRUM?

SOCIAL PROTECTION FOR MIGRANTS IN THE SADC: PROSPECTS, VULNERABILITY AND BENEFITS ACROSS BOARDERS

SASPEN & FES INTERNATIONAL CONFERENCE

PROTEA PARKTONI AN ALL SUITE
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PRESENTATION OUTLINE

1. Definitions
2. Plight of IMWs
3. ILO on the protection of MWs
4. Other international instruments on MWs
5. Botswana
6. Comparative perspectives
   a. South Africa
   b. European Union
7. Conclusion/ Recommendations
[1] DEFINITIONS

United Nations:

“Migrant worker is a person engaged in a remunerated activity in a country in which he or she is not a national.”

Art.2(1), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

IMW = a non-national who engages in a remunerated activity in a foreign country without following and complying with the prescribed legal procedures governing the employment of non-nationals.
[2] **THE PLIGHT OF IMWs**

The “3 D’s” of illegal migrant work:

**Dirty – Dangerous – Demeaning**

♣ Work in unsafe environment.
♣ Forced to work longer hours.
♣ Paid less than nationals for equal work.
♣ Denied work-related benefits - medical aid, pension etc.
♣ Denied annual leave pay and overtime pay.
♣ Portions of their wages arbitrarily withheld
♣ At times not paid at all.
“I may be an illegal, but they wouldn’t treat a dog this way.”

GIFT NCUBE

(Nov. 2013)
These set forth the general obligations to respect the basic human rights of migrant workers.

- **BOTSWANA HAS NOT RATIFIED ANY OF THESE.**
**ILO, cont.**

**ILO Multilateral Framework on Labour Migration, 2005**

- Not binding, but still represents a rights-based tool for principles and guidelines on good practice on labour migration.
- Seeks, inter alia, to promote decent work for all.

**Chapter V: Protection of Migrant Workers**

**Principle 8**

“The human rights of all migrant workers, regardless of their status, should be promoted and protected. In particular, all migrant workers should benefit from the principles and rights in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, which are reflected in the eight fundamental ILO Conventions and the relevant United Nations human rights conventions.”
[4] OTHER INTERNATIONAL INSTRUMENTS

1. International Convention on the Protection of All Migrant Workers and Members of their Families (ICRMW)
3. African Charter on Human and Peoples’ Rights
4. International Covenant on Civil and Political Civil Rights (ICCPR);
5. The International Covenant on Economic, Social and Cultural Rights (ICESCR)
6. Under Article 1(3) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
8. Universal Declaration of Human Rights (UDHR)

States shall protect the human and socio-economic rights of all individuals regardless of citizenship, including the right to:

(a) work;  (b) good health
(c) just and favourable working conditions;
(d) adequate standard of living;
(e) equal protection before the law
[5] BOTSWANA
GENERAL LAW ON PROTECTION OF WORKERS

- Employment Act
- Public Service Act
- Trade Disputes Act
- Workers Compensation Act
- Factories Act
- Trade Unions and Employers Org’s Act
- Employment of Non-Citizens Act (Immigration Act)
BOTSWANA
ILLEGAL MIGRANT WORK

Sec. 4, ENCA >>> sec 22, Immigration Act
Non-citizen shall not work and
No person shall employ a non-citizen unless-

- work permit; OR
- certificate of exemption

CONTRAVENTION IS AN OFFENCE

<table>
<thead>
<tr>
<th>EMPLOYEE</th>
<th>EMPLOYER</th>
</tr>
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<tbody>
<tr>
<td>Fine -</td>
<td>P1,000.00 &gt;&gt;&gt;&gt; P4,000.00</td>
</tr>
<tr>
<td>Prison - 12 months &gt;&gt;&gt;&gt; 4 years</td>
<td>5 years</td>
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Section 4 ENCA is the embodiment of national policy to protect citizens of Botswana against non-citizens who, in the absence of prohibition would have swamped the local labour market to the prejudice of citizens. (Cahit case, IC. November 1996)

- Non-citizen’s right of entry may be regulated by national considerations, e.g. public safety, health and job preservation. (M. Olivier and A. Govindjee - 2013)

- A Member may-restrict access to limited categories of employment or functions where this is necessary in the interests of the State. (Article 6. (c) ILO Migrant Workers Recommendation, 1975 (No. 151))
EARLIER APPROACH

A. Contract illegal
B. NOT enforceable (*void ab initio*)
C. no employer-employee relationship
D. court will not assist

- 1997 - **Masonza case** (Zimbabwean citizen) - 3 months unpaid salary
- 1998 - **Hattas case** (RSA citizen) - dismissal
- 2002 - **Karoro case** (Zimbabwean) – unpaid wages
MODERN APPROACH

Molefi case (2004)

Yes, the contract is illegal, but ...

“should that hopelessness in stopping or at least deterring the rot be allowed to continue unchecked?” (Legwaila JP)

Equitable considerations – unjust enrichment.
MODERN APPROACH – conti’

However:
- Relief only for work actually done and not paid for.
- No other relief is availed to the IMW, e.g. compensation for unlawful dismissal, etc.
- No obligation to pay severance benefits/pension.
- No obligation to pay for workplace injury (OHS).

Is this sufficient protection??
[6A] SOUTH AFRICA

STATUTE LAW

Section 38 (1) Immigration Act

- offence to employ IMW

ORTHODOX APPROACH

- 2001  *Moses v Safika Holdings*
- 2003  *Vundla and Millies Fashions*
- 2004  *Georgieva-Deyanova/Craighall Spar*

All cases were unfair dismissal cases.
All cases were dismissed by CCMA.
SOUTH AFRICA

NEW APPROACH

Section 23 (1) Constitution of RSA

“Everyone has the right to fair labour practices.”

- Right extends to “everyone” in an employment relationship.
- No need for orthodox “employer-employee” rlt’nshp

- Contract: Discovery Health Ltd v CCMA (2008)

- Performance: Kylie' vs CCMA – sex worker (2010)
THE EUROPEAN UNION

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 June 2009

Member States should:

1. strengthen the fight against illegal migrant employment.

2. Directive sets minimum standards (members at liberty to adopt stricter measures)

3. provide for appropriate sanctions:
   a. financial sanctions
   b. contributions towards repatriation of IMWs
   c. employer to pay IMW any outstanding remuneration for the work rendered
   d. pay outstanding taxes
   e. pay social security contributions.
   f. use criminal sanctions too.
SUGGESTIONS FOR BOTSWANA

Employers to verify and retain proof (RSA & EU)
Disincentivize the employment of IMWs for employers.

1. hold employers liable for all the employee’s benefits.
2. pay social security contributions (EU).
3. Locate labour rights within a human rights discourse.
4. ratify and implement ILO Conventions and other international instruments on migrant work.
5. administrative costs – pay for repatriation (EU)
6. severe criminal fines – (UK, up to £10K per IMW)
7. use of correlating criminal penalties – (Malaysia)
8. Meanwhile, implement the presently available measures.
**END OF PRESENTATION**

THANK YOU