

# Providing for the unwanted in a time of crisis: The socio-economic rights of migrant workers in South Africa during the Covid-19 pandemic

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## ABSTRACT

Migrants are amongst the most vulnerable groups in South Africa. They are often subjected to harsh forms of discrimination and excluded from government policy considerations. They have not fared differently under the Covid-19 responses by the government. This is because, while South Africa is a middle-income country, at least half its households struggle to meet their needs, particularly when there are market disruptions. Accordingly, a widely held view is that already sparse government resources cannot be spent on ‘foreigners’ who ‘voluntarily migrated’ to South Africa and ‘take up jobs meant for locals’. Assistance to unemployed migrants is viewed as insensitive to the plight of unemployed citizens who have no access social protection or jobs. Against this backdrop, this chapter assesses the response of the South African government to the socio-economic rights (SERs) of the migrant population. It further interrogates whether the South African government has used best practice labour and humanitarian standards to protect SERs of migrants during the Covid-19 pandemic.

## 1.1 INTRODUCTION

This chapter examines how the South African government has dealt with the socio-economic rights (SERs) of migrants during the pandemic. It argues that migrants, irrespective of their legal status, ought to be catered for in the government’s Covid-19 responses.<sup>1</sup> The exclusion of certain classes of immigrants such as refugees (although this has been partially cured by the courts), undocumented foreign workers (most of whom are involved in the informal sector), and documented foreign workers with a temporary stay has arguably had an adverse effect on the success of the government’s response to Covid-19. This is because there are costs in ignoring what has since become a significant part of the South African population – migrant workers and their families.

Their exclusion in government responses to the Covid-19 pandemic can have unintended consequences in the form of crime, non-compliance with lockdown rules which may lead to infections, and a resultant cost to the health care system. Therefore, an expansive approach in responding to the virus is not only important in reducing the deleterious impact of the virus on migrants as a group of marginalised and vulnerable people, but it is also essential for improving public health management generally. Covid-19 containment strategies cannot be effective if a section of the population is excluded.

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<sup>1</sup> International Red Cross and Crescent Movement ‘Note on the protection of migrants in the face of the Covid-19 pandemic’ [https://www.icrc.org/en/download/file/117261/public\\_note\\_on\\_the\\_protection\\_of\\_migrants\\_in\\_the\\_face\\_of\\_the\\_covid-19\\_pandemic\\_08.04.2020.pdf](https://www.icrc.org/en/download/file/117261/public_note_on_the_protection_of_migrants_in_the_face_of_the_covid-19_pandemic_08.04.2020.pdf) > (viewed 15 September 2020).

Using a socio-legal approach, it is highlighted in the chapter that by and large, the South African government has failed to adequately consider the rights and welfare of migrants in its Covid-19 responses. The chapter then demonstrates that there are a number of complex factors behind this. A significant problem has been the perception of migrant workers as not belonging to the host community. This is sometimes the result of a strong sense of nativism which commodifies migrants as opposed to considering them as part of the community. Migrant workers are often stigmatised and scapegoated for many of the challenges facing South Africa. This is often reflected in the waves of violent xenophobia that sweep through the country frequently.

The failure to provide for the needs of migrant workers in South Africa however, goes against South Africa's constitutional and international legal obligations. The infringed rights in this case, are those relating to access to health care, adequate food, social security and labour rights. The chapter concludes that in addition to improved strategies geared towards catering for the rights of migrants, there needs to be a broader attitude shift, in both the people and the state. This requires significant investment in education and training as well as public sensitisation. Importantly, however, it is vital to note that many of the challenges traversed in this chapter are global problems and must therefore be viewed from that prism.

## 1.2 THE MIGRATION CONTEXT IN SOUTH AFRICA

South Africa has a deep history of migration, dating as far back as the mid-19th century.<sup>2</sup> In earlier times, such migration was often to Johannesburg, the economic hub of South Africa, because of its once rich and abundant mines. This earned it the name Egoli – City of Gold. The profitability of many mines declined over the years, especially in the 1990s when many mines downsized. This coincided with the end of apartheid and apartheid-era African migration. It led to a decline in employment opportunities for African migrants who came from far and wide for opportunities in these mines.<sup>3</sup> Although the sector has since recovered to a limited degree over the years, overall employment numbers remain far below the levels experienced in the 1970s and 1980s.

Post-democratic migration in South Africa has taken on a different form. Migration into South Africa has been driven by several complex economic and

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<sup>2</sup> R Modi 'Migration to democratic South Africa' 2003 (38) *Economic and Political Weekly* 1759.

<sup>3</sup> J Crush 'Complex movements, confused responses: Labour responses in South Africa' 2011 (25) *Southern African Policy Brief* 3.

social factors.<sup>4</sup> One of the biggest drivers for this movement has been the need to attract skills to South Africa. This is because the democratic government has failed to develop critical skills needed to meet the needs of business.<sup>5</sup> This has spurred the demand for African immigrants possessing these skills,<sup>6</sup> particularly from neighbouring countries.<sup>7</sup> As noted above however, there are other factors that have driven migration. For instance, the economic downturn and lack of growth in countries around South Africa has also driven migration to South Africa.

Using Zimbabwe as an illustrative example, it can be shown that migration to South Africa has become a pressing issue. There have been three waves of migrants entering South Africa from Zimbabwe since 1990. These are: (1) during the 1990s, (2) from 2000 to 2005, and (3) from 2005 onwards.<sup>8</sup> The skill levels of these migrants has been variable. In earlier times, Zimbabwean migrants were highly skilled, while post 2005, there was an influx of lowly skilled workers. While unofficial claims stipulate that there are 2 million Zimbabweans in

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<sup>4</sup> F Rasool & C Botha 'The nature, extent and effect of skills shortages on skills migration in South Africa' 2011 (9) *SA Journal of Human Resource Management* 2.

<sup>5</sup> A Mateus, C Allen-Ile & C Iwu, 'Skills shortage: Interrogating the repertoire of discussion' 2014 (6) *Mediterranean Journal of Social Sciences* 64.

<sup>6</sup> It is important to note that while the paper focuses on migrants, sometimes, for accuracy, there is reference to 'immigrants'. While there are overlaps between these terms which are sometimes used interchangeably, this is not always accurate as they do not mean the same thing. The term 'migrant' refers to an individual that has willingly left their home or place of birth, in most cases, to search for employment. This generally includes those who move within a country (internal migration) and those that move from their countries of birth (international migration). This can often include refugees while the term 'refugee' does not always include migrants. An immigrant, on the other hand, is a person that willingly leaves their country of origin and legally enters another. They are then granted permission to permanently settle, and therefore have the legal rights to work without restriction. In summary, it can be noted that migration includes both legal and illegal movement into a jurisdiction and can also include intra-country movements. Immigration, on the other hand, involves inter-country and legal movement, often of a permanent nature (as in the case of permanent residents).

<sup>7</sup> Governments, naturally, favour immigration which is usually through accepted channels and often attracts the desired skills.

<sup>8</sup> J Crush, A Chikanda & G Tawodzera 'The third wave: Mixed migration from Zimbabwe to South Africa 2012 (59) *Southern African Migration Program* 1.

South Africa,<sup>9</sup> official estimates show that by 2016, there were an estimated 574 000 migrants from Zimbabwe and an overall total of 1.5 million migrants.<sup>10</sup>

In 2018, the statistician-general of South Africa, Risenga Maluleke, opined that the number of foreign-born people in South Africa had grown to 4 million.<sup>11</sup> Of this number, it is estimated that about 2 million migrants are of working age.<sup>12</sup> Given these numbers, one can appreciate the pressure brought by these migrants on scarce resources such as housing, health services, social protection and jobs. With the onset of the Covid-19 pandemic, these challenges were exacerbated.

Socio-economic support for migrants during a pandemic comes at a great financial cost. This raises questions about whether the government is able to afford making such payments. How can the state with a Constitution that encourages access for all balance its obligations to an expanding population together with the needs of a growing, unverifiable number of migrants? Particularly in the South African context, not only does the government have to deal with documented migrants, it has to also work with the issue of an even larger number of undocumented migrants – many of whom come to South Africa for economic reasons.<sup>13</sup>

Important, however, is the distinction between ‘economic migrants’ and refugees. In recent times, there has been a growing movement to conflate the two. The thinking in this regard is that ‘economic migrants’ can sometimes be viewed as ‘economic refugees’, thus potentially entitling them to benefits accruing to refugees. Despite the best intentions of such thinking, the concept of ‘economic refugees’ has not been solidified in international law. As a

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<sup>9</sup> There is a general lack of accurate data when it comes to the migration of Zimbabweans into South Africa due to the ineffective border control mechanisms. However, statistical evidence by some scholars seems to indicate that there are some 1.5 million Zimbabweans in South Africa. See T Polzer ‘Regularising Zimbabwean migration to South Africa’ 2009 *Migration Issue Brief* 2 – 5.

<sup>10</sup> A Mbiyozo, ‘Aligning South Africa’s Migration Policies with its African Vision’ 2018 *Institute for Security Studies Policy Brief* 117 5.

<sup>11</sup> N Khumalo 2019 ‘Millions of Zimbabweans living in South Africa? Data doesn’t back claim’ <https://africacheck.org/reports/millions-of-zimbabweans-living-in-south-africa-migrant-numbers-hard-to-pin-down-but-data-doesnt-back-claim> viewed 15 September 2020.

<sup>12</sup> F Mukumbang, A Ambe & B Adebisi ‘Unspoken inequality: How Covid-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees and undocumented migrants in South Africa’ 2020 (19) *International Journal for Equity in Health* 1.

<sup>13</sup> S Croucher ‘South Africa’s illegal aliens: Constructing national boundaries in a post-apartheid state’ 1998 (21) *Ethnic and Racial Studies* 639–660.

result, at a domestic level, there is no provision for ‘economic refugees’ within the Refugees Act.<sup>14</sup>

Despite the polycentric issues that can be raised, it could still be argued that the government, can, within available resources, meet its obligations to migrants. It is plausible to argue that provision for the socio-economic rights (SERs) of migrants could easily have been made by resources lost through leakages in the system. Primarily, in South Africa, a major challenge has been that of corruption.<sup>15</sup> Consider this, if one takes into account the R 700 million required to pay for the Covid-19 social grant for refugees, it is far outweighed by the amount of money lost through corruption and fraudulent and exorbitant tenders that characterised the disbursement of the R500 billion economic stimulus package.<sup>16</sup> It is estimated that at least R 2.2 billion of these funds have already been looted.<sup>17</sup> Therefore, it could be argued that provision for non-residents could easily have been made by the stimulus package using resources lost in leakages.

Accordingly, one can say that the South African government could have been more pragmatic in its response to the Covid-19 pandemic. While perhaps others could argue that excluding certain classes of persons from the responses was being ‘pragmatic’, this line of thinking is, however, without merit. For example, it can be put forward that the government could have placed more emphasis on protecting the disaster funds from leakages such as corruption, and in turn, have spread the resources to a wider pool, including migrants. As a result, it is plausible to argue that, the government’s response, in as far as it relates to migrant workers, has been fraught with challenges.

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<sup>14</sup> See Refugees Act 130 of 1998.

<sup>15</sup> Corruption Watch 4 September 2020 ‘In South Africa, Covid-19 has exposed greed and spurred long needed action against corruption’ *Transparency International* <https://www.transparency.org/en/blog/in-south-africa-covid-19-has-exposed-greed-and-spurred-long-needed-action-against-corruption> viewed 14 October 2020 & G Oliver ‘South Africa’s Covid relief fund dogged by delays and corruption’ *The New Humanitarian* <https://www.thenewhumanitarian.org/news/2020/08/27/South-Africa-coronavirus-relief-fund-corruption> viewed 14 October 2020.

<sup>16</sup> See section 2 of this chapter for more details on this.

<sup>17</sup> Medical Brief 29 July 2020 ‘Corruption feeding frenzy involving 2.2 billion of pandemic relief funds’ <https://www.medicalbrief.co.za/archives/corruption-feeding-frenzy-involving-r2-2bn-of-pandemic-relief-funds/> viewed 14 October 2020.

### 1.3 THE RESPONSE OF THE SOUTH AFRICAN GOVERNMENT TO THE COVID-19 PANDEMIC

On the 15<sup>th</sup> of March 2020, President Cyril Ramaphosa addressed the nation on a matter he referred to as one ‘of great national importance’.<sup>18</sup> He noted that the world was going through a medical emergency graver than what had been experienced in the last century. Accordingly, there was a need for urgent and drastic measures to manage the disease, protect the people of South Africa and reduce the impact of the virus on the society and economy.

Given this, the President declared a national state of disaster in terms of the Disaster Management Act 57 of 2002, with various pieces of legislation and regulations being published in support of this declaration.<sup>19</sup> Pursuant to these disaster regulations, the government imposed an initial 21-day lockdown. The rationale behind this lockdown was that in order to save millions of South Africans from infection and to save hundreds of thousands of lives, a trade-off had to be made with the negative impact on livelihoods and the economy.<sup>20</sup> To mitigate the impact of the lockdown on the economy, the President crafted a three-phase economic response. In the first phase, the government focused on a range of measures to cushion business communities and individuals. This was done by announcing tax relief measures, releasing disaster relief funds, engaging in emergency procurement, supporting wages through the Unemployment Insurance Fund (UIF) and providing funding to small businesses.

In the second phase, the President announced an expanded Covid-19 economic and social relief package.<sup>21</sup> This was a mega package of R500 billion targeted at ‘(i) redirecting resources to fund the health response to coronavirus; (ii) providing direct support to households and individuals for the relief of hunger and social distress; and (iii) providing assistance to companies in distress and

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<sup>18</sup> President Cyril Ramaphosa 15 March 2020 ‘Measures to combat Coronavirus COVID-19 epidemic’ <https://www.gov.za/speeches/statement-president-cyril-rama-phosa-measures-combat-covid-19-epidemic-15-mar-2020-0000> viewed 14 September 2020.

<sup>19</sup> See for example, GG 43116 of 19 March 2020 Consumer and Customer Protection and National Disaster Management Regulations and Directions.

<sup>20</sup> President Cyril Ramaphosa 23 March 2020 ‘Escalation of measures to combat Coronavirus COVID-19 pandemic’ <https://www.gov.za/speeches/president-cyril-ramaphosa-escalation-measures-combat-coronavirus-covid-19-pandemic-23-mar> viewed 14 September 2020.

<sup>21</sup> President Cyril Ramaphosa (21 April 2020) ‘Outlines expanded Covid-19 Coronavirus economic and social relief’ <https://www.gov.za/speeches/president-cyril-ramaphosa-outlines-expanded-covid-19-coronavirus-economic-and-social-relief> viewed 14 September 2020.

seeking to protect jobs by supporting workers' wages'.<sup>22</sup> The third phase is an economic recovery plan aimed at stimulating the economy and putting people back to work.

What is clear thus far, as will be described in later sections in this chapter, is that most of these measures are aimed at improving the conditions for South African citizens to the exclusion of many classes of foreign nationals. Migrants such as refugees, undocumented workers and foreign workers with temporary stays have been directly or indirectly not been accounted for in the various packages put forward by the South African government. This has meant that the welfare of many foreign nationals has been neglected in the fight against Covid-19. Stigmatisation, exclusion and nationalism, however, should be avoided, especially in the context of a global pandemic. Accordingly, the response of the government of South Africa has been flawed.

#### **1.4 CITIZENSHIP, NATIVISM, BELONGING AND UBUNTU: INTERPLAY**

I am a woman. I need sanitary towels, and how am I going to maintain that dignity? So is my dignity sacrificed at this present moment? What exactly is happening to humanity, to Ubuntu? What's happening Africa? <sup>23</sup>

These were the words of Gugu Ncube, spokesperson for Friends of Migrants and Refugees in South Africa. Her plea for help raises very important questions in the context of this conversation. It compels us to consider how the concept of ubuntu is applied in this distinct debate on migrants and government Covid-19 responses, particularly in South Africa. In order to answer this question, it becomes important to consider what is meant by ubuntu. Ubuntu is an African philosophy of life which at its core represents personhood, humanity, humanness and morality.<sup>24</sup> Justice Mokgoro advocates that it is:

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<sup>22</sup> Tralac (3 July 2020) 'South Africa's policy response to the Covid-19 pandemic' <https://www.tralac.org/news/article/14617-south-africa-s-policy-response-to-the-covid-19-pandemic.html> viewed 14 April 2020.

<sup>23</sup> SABC News (23 April 2020) 'Foreign nationals feel excluded by SA government from receiving social relief grant' <https://www.sabcnews.com/sabcnews/foreign-nationals-feel-excluded-by-sa-government-from-receiving-social-relief-grant/> viewed 20 September 2020.

<sup>24</sup> D Lutz 'African ubuntu philosophy and global management' 2009 (84) *Journal of Business Ethics* 315.



[A] metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that *motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu* which, literally translated, means a person can only be a person through others.<sup>25</sup>

The phrase *umuntu ngumuntu ngabantu* is loosely translated as ‘I am because we are’. However, it could also be understood to mean that ‘a person is a person through other persons’.<sup>26</sup> The understanding to be given is therefore that a person’s existence is tied to that of a particular group. While there is no single meaning of the word ubuntu across languages in Africa, there is commonality in that ubuntu signifies humanness and the good treatment of others. Kwamangamalu avers that ubuntu is the collective consciousness of African people representing their desire to be sensitive to the needs of others, caring and patient.<sup>27</sup>

Despite the genuine concern that the interpretation of ubuntu in practice has been flawed, naïve and dangerous in attempting to use it in a mechanical way to solve current problems,<sup>28</sup> it would be an injustice not to consider this concept in the context of the treatment of migrants in the Covid-19 response by the South African government. This is because the Covid-19 crisis is a pandemic of a global scale which knows no race, gender, class, boundary or nationality. Ubuntu speaks to the fact that the injury of one person is the injury of all others. As noted by Ndebele and Sikuza:

The virus reminds us that we are all equally human in our mortality, and that we are interconnected and interdependent. We have to work together to keep each other safe: this is a truth as old as the very first human societies. Responding effectively to the crisis essentially requires that we practise what an ethic of Ubuntu has always invited us to practise, and that we practise it at multiple levels.<sup>29</sup>

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<sup>25</sup> Y Mokgoro ‘Ubuntu and the law in South Africa’ 1998 (1) Potchefstroom Electronic Law Journal 2.

<sup>26</sup> N Ndebele & J Sikuza (19 May 2020) ‘African foreign nationals are being ignored in the fight against Covid-19: Where is our ubuntu?’ Daily Maverick <https://www.dailymaverick.co.za/opinionista/2020-05-19-african-foreign-nationals-are-being-ignored-in-the-fight-against-covid-19-where-is-our-ubuntu/> viewed 20 September 2020.

<sup>27</sup> N Kwamangamalu ‘Ubuntu in South Africa: A sociolinguistic perspective to a pan-African concept’ 1999 (13) *Critical Arts* 26.

<sup>28</sup> E Venter ‘The notion of ubuntu and communalism in African educational discourse’ 2004 (23) *Studies in Philosophy and Education* 150.

<sup>29</sup> N Ndebele & J Sikuza (n26).

This is the sentiment that is shared by many migrants. Their belief is that the fact that they came to seek a better life in South Africa should not mean that they should not receive support from the government simply because they are deemed by the government as not belonging here. This has been an important issue for migrants in post-colonial Africa, and also globally, after World War 2.

“Belonging is about emotional attachment, about feeling ‘at home’.... Belonging tends to be naturalized, and becomes articulated and politicized only when it is threatened in some way.”<sup>30</sup>

This is the politics of belonging. Even within the context of a pandemic, belonging can be politicised. For instance, government aid can be deployed in a manner that benefits citizens and residents, to the exclusion of others. This goes against an interpretation of belonging that argues that it involves diverse forms of mobility, allowing people to be home away from home.<sup>31</sup> Rather, it favours an interpretation of belonging as a concept tied to the nation/state citizenship.<sup>32</sup> A passport is thereby employed as a technology in reinforcing these boundaries of belonging. While the nation/state is often the most perverse signifier of belonging, it is also important to note that it is not the only signifier. Belongingness can also be rooted in ethnic, racial, cultural and religious differences.<sup>33</sup> In many instances, these are often tied to the state, a major boundary signifier of belonging.

With the concept of the nation/state inevitably comes that of nativism. The term ‘nativism’ was coined in 1901, by Louis Dow Scisco, to describe the principles advanced by the anti-foreign American Party in the United States of America (USA).<sup>34</sup> This is representative of the unfavourable attitudes towards foreigners which have persisted in some form or the other in the USA.<sup>35</sup> While nativism is often then understood from this prism of how it evolved in the USA, it is vital to understand that the understanding of nativism in practice is diverse and often inconsistent.<sup>36</sup> A basic understanding of nativism would however be that the ‘native-born’ citizen enjoys preference in a state as compared to the ‘foreign born’.

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<sup>30</sup> N Yuval-Davis ‘Belonging and the politics of belonging’ 2006 (40) *Patterns of Prejudice* 197.

<sup>31</sup> M Savage, G Bagnall & B Longhurst *Globalisation and Belonging* (2004) 1.

<sup>32</sup> N Yuval-Davis *The Politics of Belonging: Intersectional Contestations* (2011) 46.

<sup>33</sup> Yuval-Davis (n30).

<sup>34</sup> A Guia ‘The concept of nativism and anti-immigrant sentiments in Europe’ (2016) European University Institute Working Paper MWP 2016/20 2.

<sup>35</sup> B Knoll ‘Understanding the ‘new nativism’: Causes and consequences for immigration policy attitudes in the United States’ (DPhil thesis, University of Iowa 2010) 1.

<sup>36</sup> H Betz ‘Facets of nativism: A heuristic exploration’ 2019 (53) *Patterns of Prejudice* 111.

This nativism expresses itself in many different forms. The most common and divisive expression of nativism is economic nativism. Here, the assumption is that foreign workers take jobs from locals.<sup>37</sup> As is often said on social media, foreigners literally snatch food from the tables of South Africans.<sup>38</sup> The other reason for economic nativism is that it is often alleged that foreigners depress wage levels within markets.<sup>39</sup> In South Africa, this debate is not new. The Minister of Employment and Labour, Thulani Nxesi, has recently stated that the government is drafting new regulations to limit numbers of foreign workers in South Africa. Potential industries being considered include; the hospitality sector, restaurants, security, farming and agriculture.<sup>40</sup> The Minister argued that the reason for this is that employers target ‘these foreign nationals’ with the intention of paying them starvation wages, making them work long hours and sleep on top of shops. This illustrates that even at government level in South Africa, there is the belief foreigners are driving down wages and taking employment opportunities away from South Africans. This then leads to a formalisation of economic nativism.

## 1.5 THE SOCIO-ECONOMIC RIGHTS OF MIGRANT WORKERS IN SOUTH AFRICA

It is important to state that migrants in South Africa enjoy protection in both domestic law and international law. International human rights law provides an extensive framework for the protection of migrants despite their immigration status, while domestic law stratifies nation/state rights which are dependent on individual citizenship and immigration status, to which undocumented migrant workers have limited rights.<sup>41</sup> Selected SERs as they relate to migrants in South Africa will be outlined below.

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<sup>37</sup> See J Goldstein & M Peters ‘Nativism or economic threat: Attitudes towards foreigners during the great recession’ 2014 (40) *International Interactions* 388.

<sup>38</sup> See generally, R Chaskalson, ‘Do Immigrants “Steal” Jobs in South Africa? What Does the Data Tell Us’ GroundUp <https://www.groundup.org.za/article/do-immigrants-steal-jobs-south-africa-what-data-tell-us/> viewed 2 December 2020.

<sup>39</sup> Betz (n34).

<sup>40</sup> Staff Writer (8 July 2020) ‘Government looking at new laws to limit the employment of foreigners in South Africa’ *BusinessTech* <https://businesstech.co.za/news/business/414413/government-looking-at-new-laws-to-limit-the-employment-of-foreigners-in-south-africa> viewed 15 September 2020.

<sup>41</sup> A Bloch ‘The Right to rights? Undocumented migrants from Zimbabwe living in South Africa’ 2010 (44) *Sociology* 234.

## 1.5.1 International standards

### 1.5.1.1 The right to access to health

International human rights law recognises the right of every person, to enjoy the highest attainable state of health. This entails that migrants, regardless of their status, are entitled to the right to the highest attainable standard of health. This agreement is enshrined in a number of international documents. South Africa is a state party<sup>42</sup> to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides in article 12 that the state must recognise ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.<sup>43</sup>

Article 12(2) of the ICESCR further provides that the state must take necessary ‘steps to achieve the full realisation of this right, including the prevention, treatment and control of epidemic, endemic, occupational and other diseases’. This provision applies to all people within a jurisdiction without permitting discrimination on the basis of factors such as ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.<sup>44</sup>

The contents of the ICESCR are also reinforced in the Preamble to the Constitution of the World Health Organisation. It provides that the ‘enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition’. This standard includes access to ‘health-care services, such as testing, diagnostics, care and treatment and referral as well as prevention and health promotion-related activities for Covid-19’<sup>45</sup> for all migrants, documented or undocumented.

### 1.5.1.2 Labour rights

International law further protects the rights of migrant workers through international labour standards. These demand that migrant workers are provided with fair working conditions, including; health care, social insurance programmes, and other basic entitlements. This is often not achieved as most

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<sup>42</sup> South Africa signed the ICESCR on 3 October 1994 and ratified it in January 2015.

<sup>43</sup> See ICESCR art 12.

<sup>44</sup> See ICESCR art 2(2).

<sup>45</sup> World Health Organisation (17 April 2020) ‘Preparedness, prevention, and control of coronavirus disease (covid-19) for refugees and migrants in non-camp settings’ [https://www.who.int/publications/i/item/preparedness-prevention-and-control-of-coronavirus-disease-\(covid-19\)-for-refugees-and-migrants-in-non-camp-settings](https://www.who.int/publications/i/item/preparedness-prevention-and-control-of-coronavirus-disease-(covid-19)-for-refugees-and-migrants-in-non-camp-settings) viewed 16 September 2020.

migrants rarely benefit from equal treatment and often struggle to gain access to social rights in destination countries.<sup>46</sup> One of the primary reasons for this is that many migrants work lowly jobs in industries such as construction, domestic work, agriculture and the hospitality industry.<sup>47</sup> In addition to this, most of their work is seasonal or part-time. This makes them easy targets for exploitation and abuse. Because they are outsiders of the nation/state, lacking the right to vote, they do not have the political capital to put the government under electoral pressure, so as to improve their situations.<sup>48</sup> Furthermore, it is important to note that, even at a more basic level, migrant workers find it difficult to insist on fair wages and working conditions.

The South African government has an obligation to ensure the respect of human rights including rights at work and international labour standards. South Africa has ratified a number of Conventions of the International Labour Organisation (ILO). These include, the Forced Labour Convention 29 of 1930, the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948, the Right to Organise and Collective Bargaining Convention 98 of 1949, Equal Remuneration Convention 100 of 1951, Abolition of Forced Labour Convention 105 of 1957, Employment and Occupation Convention 111 of 1958, Minimum Age Convention 138 of 1973 and the Worst form of Child Labour Convention 182 of 1999.<sup>49</sup> The government must therefore ensure that migrant workers are afforded their labour rights so as to realise these international labour standards.

### 1.5.1.3 The right to social security

The right to social security is established in various international instruments. The non-justiciable International Declaration of Human Rights first provided for this right. Thereafter, it was provided for in the ICESCR. Article 9 of the ICESCR provides that ‘everyone’ has the right to social security including social insurance. This is an essential feature to a decent work approach<sup>50</sup> and

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<sup>46</sup> International Training Centre (16 April 2020) ‘Labour migration at the time of Covid-19’ <https://www.itcilo.org/stories/labour-migration-time-covid-19> viewed 16 September 2020.

<sup>47</sup> See J Cole & S Booth *Dirty Work: Immigrants in Domestic Service, Agriculture, and Prostitution in Sicily* (2007) 1.

<sup>48</sup> C Negi ‘Human rights violations of migrants workers in India during COVID-19 pandemic’ 2017 *Santaniello International* 1.

<sup>49</sup> South Africa has also ratified other Conventions such as the Labour Inspection Convention 81 of 1947, the Maritime Labour Convention 2006, the Work in Fishing Convention 188 of 2007, and the Domestic Workers Convention 189 of 2011.

<sup>50</sup> W van Ginneken ‘Extending social security: Policies for developing countries’ 2003 (142) *International Labour Review* 279.

a vital vehicle for attaining social and economic development. If an effective social security system is pursued, it may have the effect of reducing poverty and inequality, and promoting social inclusion.<sup>51</sup> Accordingly, this right is vital to migrant workers who are often not protected. It is also important for securing equality of treatment in social security for migrant workers.

#### 1.5.1.4 The right to food

The right to food is a human right recognised under international human rights law. It protects the right of all human beings to live in dignity, free from hunger, food insecurity and malnutrition.<sup>52</sup> Accordingly, article 11 of the ICESCR provides for this right. It is one of four rights that is deemed to be at the core of the ICESCR – the right to housing, primary health care, basic education, and food.<sup>53</sup> The UDHR further recognises this right in article 25. This notwithstanding, the right to food is one of the most violated international rights. This is because the realisation of this right is dependant on the economic circumstances of a country and the political will to ensure the enforceability of internationally recognised human rights.

### 1.5.2 Domestic law

#### 1.5.2.1 The rights to health care, food and social security

The Constitution of the Republic of South Africa, 1996 (Constitution of South Africa) provides in section 27 that:

- (1) Everyone has the right to have access to—
  - (a) health care services, including reproductive health care;
  - (b) sufficient food and water; and
  - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

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<sup>51</sup> K Hirose, M Nikac & E Tamagno *Social Security for Migrant Workers: A Rights-based Approach* (2011) 1.

<sup>52</sup> C Frison & P Claeys 'The right to food in international law' in P Thompson et al (eds) *Encyclopedia of Food and Agricultural Ethics* (2014) 1.

<sup>53</sup> P van Esterik 'The right to food; right to feed; right to be fed. The intersection of women's rights and the right to food 1999 (16) *Agriculture and Human Values* 226.

As a result of South Africa's complicated past, the provisioning of these rights has been skewed in terms of factors such as health, gender and socio-economic status.<sup>54</sup> The realisation of these rights must be made more equitable. The government is directed to take all available 'reasonable legislative measures or other measures, within its available resources', to ensure that each of these rights is progressively realised. The content of and parameters in which this must take place are not easily ascertainable.<sup>55</sup> If there are concerns around<sup>56</sup> the failure of the state to realise the right, section 8 of the Constitution empowers the courts to make decisions on matters of policy, including budgetary appropriations.

### 1.5.2.2 Labour rights

It is important to note that the Preamble to the Constitution of South Africa provides that South Africa belongs to all who live in it. This is inclusive of documented and undocumented migrant workers. The government must respect and promote the rights of all workers.<sup>57</sup> The Constitution of South Africa entrenches certain core labour rights. These are enshrined in section 23 of the Constitution of South Africa. In particular, it provides that 'everyone has a right to fair labour practices' and that 'every worker has the right to form and join a trade union', participate in activities of a trade union and strike.<sup>58</sup>

In addition to the rights provided for in the Constitution, a number of pieces of legislation give effect to the rights of workers. Benjamin sets out the principle statutes in the table below:<sup>59</sup>

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<sup>54</sup> K Pillay 'Tracking South Africa's progress on health care rights: Are we any closer to achieving the goal? 2003 (7) *Law, Democracy and Development* 56.

<sup>55</sup> C Ngwenya 'Access to health care services as a justiciable socio-economic right under the South African Constitution' 2003 (6) *Medical Law International* 16.

<sup>56</sup> C Ngwenya 'The recognition of access to health care as human right in South Africa: Is it enough?' 2000 (5) *Health and Human Rights* 28.

<sup>57</sup> Section 7(2) of the Constitution provides that 'the state must respect, promote and fulfil the rights in the Bill of Rights'.

<sup>58</sup> See section 23(1)-(2) Constitution of South Africa, 1996.

<sup>59</sup> P Benjamin 'Informal work and labour rights in South Africa' 2008 (29) *Industrial Law Journal* 1580.

<b>Statute</b>	<b>Labour Protection</b>
Labour Relations Act 66 of 1995	Freedom of association, organisational rights, collective bargaining, right to strike, and protection against unfair dismissal
Basic Conditions of Employment Act 75 of 1997	Hours of work, annual leave, sick leave, maternity leave, severance pay, notice pay, sectoral determinations
Employment Equity Act 55 of 1998	Anti-discrimination and affirmative action
Skills Development Act 97 of 1998	Skills development and training
Unemployment Insurance Act 63 of 2001	Unemployment and maternity benefits
Compensation for Occupational Injuries and Diseases Act 130 of 1993	Compensation for work-related injuries and diseases
Occupational Health and Health and safety in the workplace Safety Act 85 of 1993, Mine Health and Safety Act 29 of 1996	Health and safety in the workplace

The protection afforded within these instruments is however not available to all workers. Only workers qualifying with the definitions of the legislation are entitled to protection. The Basic Conditions of Employment Act (BCEA) defines the employees capable of protection 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.<sup>60</sup>

A similar definition of any employee is provided in section 213 of the Labour Relations Act (LRA).

This definition excludes self-employed workers, as many migrants are. As noted earlier, the scope of the labour rights of migrants under domestic law is much narrower than that under international law. Undocumented migrant workers are at a distinct disadvantage in terms of these laws. This is because the

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<sup>60</sup> Section 1 BCEA.



Immigration Act 13 of 2002 disallows the employment of migrant workers who are not in the possession of a valid work visa. Section 2(2) of the Act provides that the Department of Home Affairs shall ensure that no foreign national is employed and that foreigners employed, are employed in positions that meet the conditions set out in their temporary residence visas (TRVs). However, the court in *Discovery Health Limited v CCMA & Others*<sup>61</sup> provided that it was possible that illegal migrant workers can be recognised as employees in terms of the LRA.<sup>62</sup> It was said that:

Taking into account the provisions of s 23(1) of the Constitution, the purpose, nature and extent of relevant international standards and the more recent interpretations of the definition of ‘employee’ by this Court, I do not consider that the definition of ‘employee’ in s 213 of the LRA is necessarily rooted in a contract of employment. It follows that a person who renders work on a basis other than that recognised as employment by the common law may be an ‘employee’ for the purposes of the definition. Because a contract of employment is not the sole ticket for admission into the golden circle reserved for ‘employees’, the fact that Lanzetta’s contract was contractually invalid only because Discovery Health had employed him in breach of s 38(1) of the Immigration Act did not automatically disqualify him from that status.<sup>63</sup>

This is an important judgment in protecting the rights of undocumented migrant workers in South Africa. It interprets the Constitution in a manner that accords with international standards and protections. It also ensures that undocumented migrant workers are afforded the requisite substantial and procedural fairness. Documented migrant workers, however, should in theory, receive the same employment law protection as citizens. By and large, this is the case. However, there are certain instances where injustices occur.

## 1.6 THE (NON)REALISATION OF THE SOCIO-ECONOMIC RIGHTS OF MIGRANT WORKERS UNDER COVID-19

The South African government has failed to adequately protect the SERs of migrant workers during the Covid-19 pandemic for a number of reasons. Firstly, a significant number of undocumented migrants work in the informal sector. This is because they are yet to regularise their stay and are unable to find work in the formal economy. It is estimated that the informal economy (shadow economy)

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<sup>61</sup> (2008) *ILJ* 1480 (LC).

<sup>62</sup> (n61) at para 49.

<sup>63</sup> *Ibid.*

employs about 2 million people, just under 20% of the total employment.<sup>64</sup> Those in this sector did not qualify for pay-outs from the UIF because they were not formally employed.

Payments for UIF were made through the Covid-19 Temporary Employer Relief Scheme (C-19 TERS) administered through the Department of Labour Notice 215 of 2020 (C-19 TERS Notice).<sup>65</sup> Section 3.6 of the Notice provides that ‘qualifying employees will receive a benefit calculated in terms of sections 12 and 13 of the [Unemployment Insurance Act] UI Act...’.<sup>66</sup> These benefits, however, as provided in section 2.1.1(a) of the C-19 TERS Notice, were only paid to contributors who lost their income during the Covid-19 pandemic. This is in line with section 2 of the UI Act in which it stipulates that UIF benefits only accrue to contributors.

The above notwithstanding, South Africans who were in the informal sector and did not qualify for UIF however qualified for an unemployment grant (Covid-19 grant). This grant was paid out to individuals who were unemployed and not receiving any other form of social grant or UIF payment. The aim of this grant was to address the deepening poverty, increase in hunger and devastating human and social effects of the pandemic for citizens in the informal sector.

It is unsurprising that the decision to exclude non-citizens from the Covid-19 grant was challenged in the case of *Scalabrini Centre of Cape Town and Another v Minister of Social Development and Others*.<sup>67</sup> In this case, the Scalabrini Centre brought an application on an urgent basis for the court to determine whether asylum seekers and social permit holders had been lawfully excluded from receiving social assistance in terms of the distress grant for those affected by Covid-19.<sup>68</sup> It was argued that the exclusion was arbitrary, irrational and unreasonable and violated the constitutional rights to equality, dignity and social protection of lawful asylum seekers and special permit holders. The Minister of Social Development had announced that the grant would only be available to South African citizens, permanent residents and refugees who were affected by the Covid-19 disaster.

In analysing the matter, the court looked at various rights which were potentially affected by the decision of the state. These included, the right of

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<sup>64</sup> M Rogan & C Skinner (12 September 2019) ‘South Africa’s informal sector creates jobs but should not be romanticised’ *The Conversation* <https://theconversation.com/south-africas-informal-sector-creates-jobs-but-shouldnt-be-romanticised-122745> viewed 17 September 2020.

<sup>65</sup> It is important to note that this Notice has been amended several times.

<sup>66</sup> Act 63 of 2001.

<sup>67</sup> (22808/2020) [2020] ZAGPPHC 308.

<sup>68</sup> (n67) at para 6.

access to social assistance, the right to equality and the right to human dignity. In relation to SERs, the courts had to deal with the issue of the right of access to social security. As noted earlier, this right is provided for in section 27 of the Constitution which provides that ‘everyone has the right to have access to social security, including, if they are unable to provide for themselves and their dependants, appropriate social assistance’.<sup>69</sup>

The fundamental question to be determined in this regard was whether there was a just reason for the exclusion of asylum seekers and social permit holders. The court found that these classes of persons were also not able to escape the effects of Covid-19. They had also been subject to the lockdown imposed on South Africa and were unable to move because of the lockdown and other circumstances from their home country. For this reason, the court found that it was irrational and unreasonable to use a person’s immigration status as a criterion for the eligibility of the grant.

While the right to equality is a civil and political right (CPR), the court analysed this particular right in the context of SERs. The court quoted a section of *Khosa and Others v Minister of Social Development and Others*<sup>70</sup> that provided that:<sup>71</sup>

Equality is also a foundational value of the Constitution and informs constitutional adjudication in the same way as life and dignity do. Equality in respect of access to socio-economic rights is implicit in the reference to ‘everyone’ being entitled to have access to such rights in section 27. Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance.

In *Khosa*, Mokgoro J directly linked the right to social assistance with the right to equality. The court in *Scalabrini Centre* noted that based on the reasoning in the *Khosa* judgment, it could not be argued that only citizens, permanent residents or residents were entitled to the Covid-19 relief grant as it would be a direct violation of section 9(1) of the Constitution of South Africa.<sup>72</sup>

The court went on to clarify the persons referred to in the judgment. It noted that an asylum seeker was a person whose application for refugee status in terms of section 22 of the Refugees Act 130 of 1998 had not been finalised. They are then issued with an asylum visa which allows them to be in the country temporarily. Such persons were entitled in terms of section 21 of the same Act to make such application. In contradistinction, special permit holders are persons

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<sup>69</sup> Section 27(1)(c) Constitution of South Africa.

<sup>70</sup> 2004 (6) SA 505 (CC).

<sup>71</sup> (n70) para 42.

<sup>72</sup> (n70) para 27.

whose applications were lawfully processed by the state and granted lawful stay in South Africa. The court noted these as being:

- (1) The Angolan Special Dispensation Permit awarded to Angolans who previously had refugee status but were now awarded stay until 31 December 2021;
- (2) the Zimbabwe Exemption Permits are valid until December 2021 which were issued to undocumented Zimbabwean migrants to regularise their stay; and
- (3) the Lesotho Exemption Permit that is valid for four years beginning 1 January 2020 which was granted to Lesotho nationals studying, working or running businesses in South Africa.

Similar to the right to equality, the right to dignity is cross-cutting and indispensable to SERs. Accordingly, the court found that the right to dignity of qualifying asylum holders and special permit holders had been violated because the government failed to consider the desperate circumstances, in particular, socio-economic conditions that they found themselves in. The court gave the Minister of Social Development 5 days to quantify the cost of further extending the grant to these categories and another five days to publish amended regulations.

Since the judgment, the Department of Social Development has indicated that the cost estimate of making the Covid-19 grant available to qualifying asylum holders and special permit holders is pegged at around R700 million.<sup>73</sup> To date however, the process for receiving the grants has been slow, with the process further complicated by alleged xenophobic officials who make processing difficult.<sup>74</sup> It is, however, worth noting that the general sluggishness in the processing of the Covid-19 is not unique to qualifying foreign nationals, but also to citizens.

This case is of vital importance because it highlights the importance of the need for non-discrimination in the provision of social protection and social assistance to migrants. They find themselves in the most desperate positions as a result of the unfavourable conditions that unfold for foreigners in unfamiliar jurisdictions.

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<sup>73</sup> See K Ngoepe & WA Afrika (21 June 2020) 'Sassa to spend R700m providing refugees with the R350 Covid-19 relief grant' *IOL News* <https://www.iol.co.za/sundayindependent/news/sassa-to-spend-r700m-providing-refugees-with-the-r350-covid-19-relief-grant-49703342> viewed 16 November 2020.

<sup>74</sup> K Mafolo (23 October 2020) 'SA Human Rights Commissioner to speak to Labour Department on refugee Covid-19 grants' *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-10-23-sa-human-rights-commissioner-to-speak-to-labour-department-on-refugee-covid-19-grants/> viewed 16 November 2020.

The second reason why it is argued that the South African government has not done enough to protect migrant workers is that those migrants who have regularised their stay and have valid visas allowing them to live and work in South Africa have found it difficult to access the UIF funds. These funds are essential to the realisation of their SERs. The Employment and Labour Department has confirmed this, stating that payments to foreigners take longer because of the multi-layered process used to capture their information.<sup>75</sup> In addition, claims by foreign nationals are also subjected to clearance from the Department of Home Affairs (DHA). The rationale for this is that checks by the DHA will help in ensuring that payment is made to authentic and deserving beneficiaries.

One restaurant asked for comment in May 2020, provided information that out of its 36 staff members, 12 had been paid, with none of the foreign nationals having received payment.<sup>76</sup> However, UIF Commissioner, Tebogo Maruping, has assured the public that contributing foreigners will have their claims processed. He noted that –

the Fund paid an amount of R 275 139 235 to 11 637 employers with 65 823 foreign national workers standing to benefit. This is in addition to 23 000 paid last week, and in total 88 823 foreign national workers have been paid to the tune of R375 139 235.<sup>77</sup>

To date however,<sup>78</sup> R1.6 billion has been paid to documented and declared foreign nationals.

Legally, the UIF is now mandated to make payments to foreign workers including migrants. This emerges from very important judgements which have shaped the legislative framework in this regard.

The first case is that of *Saddiq v Department of Labour (Vereeniging) and Others*.<sup>79</sup> This matter involved an asylum seeker who had been contributing to the UIF fund for three years and subsequently lost his employment. Despite his monthly contributions, when he approached the Department of Labour to claim his UIF benefits, he was prevented from submitting a claim on the basis that he did not have a valid South African identity number. On the 4<sup>th</sup> of July 2017, the Equality

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<sup>75</sup> Go-Legal (11 June 2020) ‘Unemployment Insurance Fund Covid-19 claims under the spotlight’ <https://www.golegal.co.za/foreign-national-uif-covid/> viewed 18 September 2020.

<sup>76</sup> J Mahlokwane (11 May 2020) ‘Restaurants frustrated by lack of UIF payments’ *IOL News* <https://www.iol.co.za/pretoria-news/restaurants-frustrated-by-lack-of-uif-payment-47810242> viewed 18 September 2020.

<sup>77</sup> Go-Legal (n75).

<sup>78</sup> This is as of 30 September 2020.

<sup>79</sup> Unreported judgment of the Equality Court for the sub-district of Emfuleni, held at Vereeniging, Case No EQ04/2017.

Court handed down a judgment which ordered that the complainant be paid the UIF benefits owed to him and that the respondent amend their system to allow asylum seekers to be compensated.

While the Court in the *Saddiq* case did not address whether Regulations 1 and 2 of the Regulations to the Unemployment Insurance Act 63 of 2001 were unconstitutional to the extent that they barred asylum seekers from claiming UIF benefits, this question was dealt with in the case of *Musanga and Others v Minister of Labour and Others*.<sup>80</sup> The applicants, similar to those in *Saddiq*, were prevented from submitting UIF claims following their dismissal, having contributed for many years. The reason for this was the same, namely that they lacked South African identity numbers. In dealing with the matter, the court came to the finding that the aforesaid regulations were unconstitutional. The approach in *Saddiq* was correct because the Equality Court was sitting as a magistrate's court and was prohibited in terms of section 170 of the Constitution from making a pronouncement on constitutional issues.

Accordingly, on the 14<sup>th</sup> of February 2020, Regulation 1 was amended in line with the directive of the High Court.<sup>81</sup> Section 2 of the Unemployment Insurance Amendment substitutes the words identity document in Regulation 1 of the Regulations with the text reading that:

‘identity document’ means a 13 digit bar-coded RSA identity document and or an RSA bar -coded passport, and includes valid foreign identity documents and passports, as well as permits and other identifying documents contemplated in or issued in terms of the Refugees Act, 1998 (Act No.130 of 1998).

This has led to a change in approach to the payment of foreign workers during the Covid-19 crisis. Nevertheless, bureaucratic procedures still impede the timeous processing of these payments. These should be streamlined by the government to ensure that migrant workers are not unnecessarily disadvantaged.

The third reason why the government has failed to protect migrant workers is that the C-19 TERS excludes employers who did not contribute to the fund and undocumented migrants. However, many migrant workers are employed as domestic and farm workers. As a result of the precarious nature of their employment, these are some of the worst affected individuals as there are high levels of non-compliance in these sectors by their employers.<sup>82</sup> This is because

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<sup>80</sup> Unreported judgment of the North Gauteng High Court (Pretoria), Case No 29994/18.

<sup>81</sup> See GG 43023 of 14 February 2020 GN R173.

<sup>82</sup> T Broughton (27 May 2020) ‘Workers whose employers did not register them for UIF can now apply for funding’ *Ground Up* <https://www.groundup.org.za/article/covid-19-workers-whose-employers-did-not-register-them-uif-can-now-apply-funding/> viewed 18 September 2020.

many employers do not register their workers for UIF. While there have been amendments to the regulations to include workers who should have received benefits, this remains difficult to administer as offending employers may be reluctant to provide documentation.

Furthermore, as noted above, undocumented migrants will not receive payment. This is because the amendments brought about by the *Saddiq*<sup>83</sup> decision only include those migrants that are documented. A generous interpretation of *Discovery Health Limited v CCMA & Others*<sup>84</sup> where it was held that an illegal immigrant could be considered as an employee, could lead us to the conclusion that there is nothing preventing an illegal immigrant, who is recognised as an employee, from claiming UIF. This is somewhat debatable and would need to be argued in a court of law to find an accurate legal position.

The fourth reason is that the government has not taken enough action to protect migrant workers and foreigners more broadly. There have been reports of destitute foreign nationals being turned away from shelters because they did not have a South African identity document. In several provinces, there were reports that food parcels that were distributed during the pandemic to avert hunger were only being given upon presentation of a South African identity document. In one report, a woman stated that:

The councillor was walking around the area registering people. When I asked that I also be registered, he said that was not possible because I am not a South African.<sup>85</sup>

While the government has denied that this is its official position, the failure to take strong action against such unsavoury practices put many foreign nationals at risk of hunger. A well-known dog walker in Sea Point, Cape Town, took his own life after suffering from poverty and hunger as a result of the lockdown and failing to receive social assistance.<sup>86</sup> The government has to take necessary action to ensure that the SERs of all who reside in South Africa, including migrants, documented, or undocumented, are protected and promoted, to prevent unnecessary loss of life and untenable living conditions.

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<sup>83</sup> *Saddiq* (n79).

<sup>84</sup> *Discovery Health* (n61).

<sup>85</sup> T Monama (17 April 2020) 'We're denied food parcels as we're not South Africans, claim foreigners' *IOL News* <https://www.iol.co.za/the-star/news/were-denied-food-parcels-as-were-not-south-africans-claim-foreigners-46824060> (viewed 18 September 2020).

<sup>86</sup> R Grobler (8 June 2020) 'Beloved Sea Point dog walker seemingly takes own life as lockdown drives him to poverty' *News24* <https://www.news24.com/news24/SouthAfrica/News/beloved-sea-point-dog-walker-seemingly-takes-own-life-as-lockdown-drives-him-to-poverty-20200608> viewed 18 September 2020.

Finally, the government, especially at the beginning of the Covid-19 pandemic, did not take sufficient steps to ensure that migrants, especially without a regularised stay, are not turned away from hospitals or Covid-19 testing centres. Some undocumented migrants could not obtain treatment because they did not have legal papers to be in the country.<sup>87</sup> This made it difficult for undocumented migrants to present themselves at hospitals and testing centres because they feared deportation. The healthcare system must operate outside of immigration laws and the pandemic cannot be used as a reason to hunt down illegal migrants.<sup>88</sup> It goes against section 27 of the Constitution as well as various international instruments that provide that everyone has the right to have access to healthcare. Prevention, testing and treatment should be made available to everyone regardless of nationality or immigration status.<sup>89</sup> This is vital in ensuring the human rights of everyone in South Africa as envisioned by the Constitution.<sup>90</sup>

Given the above arguments, it is important to note that, beyond the human rights dimension and the ensuing arguments for inclusion and non-discrimination, there are also equally forceful and related arguments, for which this debate would be incomplete without considering. These focus on matters such as public health goals in addressing the spread and effects of Covid-19 and the status of foreign nationals in South Africa. The main point here is that, without support, migrants would suffer the hard consequences of lockdown. They would be a risky group that will break lockdown regulations in search for survival. In turn, they would be arrested, putting pressure on the justice system. Consequently, this would exacerbate existing tensions between migrants and locals who believe that migrants are responsible for most of the crime in South Africa. Of course, these statements are in fact and principle not true.

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<sup>87</sup> R Adeola (20 April 2020) 'Letter: Migrants, undocumented or not, also need help during SA's Covid-19 crisis' *The Star* <https://www.iol.co.za/the-star/opinion-analysis/letter-migrants-undocumented-or-not-also-need-help-during-sas-covid-19-crisis-46922231> viewed 14 September 2020.

<sup>88</sup> S Ekambaram (29 April 2020) 'Covid-19 is not a reason to hunt down illegal immigrants' *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-04-29-covid-19-is-not-a-reason-to-hunt-down-illegal-immigrants> viewed 18 September 2020.

<sup>89</sup> See A Mbiyozo (8 April 2020) 'Covid-19 responses in Africa must include migrants and refugees' *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-04-08-covid-19-responses-in-africa-must-include-migrants-and-refugees/> viewed 18 September 2020.

<sup>90</sup> The Constitution of South Africa as discussed above, provides that 'South Africa belongs to all who live in it' (Preamble). Naturally, this includes migrants, documented or otherwise.



It is estimated that only 7.5% of the prison population are foreign nationals.<sup>91</sup> Therefore, the notion of non-discrimination within the human rights arguments, has in fact underlying pragmatic, functional and practical reasons, beyond simply wanting human beings to be treated equally – such as ensuring the success of the Covid-19 measures and protecting the standing of migrants in a society where their presence is often challenged.

## 1.7 CONCLUSION

Migrants workers in South Africa have faced extra-ordinary challenges, both socially and economically during the Covid-19 crisis. The challenges of migrant workers in South Africa are not new. They are well documented, dating back several decades. By and large, as described in the earlier parts of this paper, they are based on the perception of citizens towards migrants. These attitudes are drawn from very controversial understandings of citizenship and belonging. This then translates into a culture of nativism at all levels, including individual, organisational, and national levels.

Nativism expressed through government apparatus is perhaps the crudest of these. Unpalatable perceptions are formalised through several government laws and policies which disenfranchise those who are foreign born. Migrant workers in South Africa, documented or otherwise, have suffered greatly. Their challenges have further deepened under the Covid-19 crisis.

As discussed in this chapter, migrant workers have been excluded from many of the social responses from government, and where they have been accommodated, the process to receive such assistance has been burdened with bureaucratic red tape. There is an urgent need for the government to ensure that the SERs of migrant workers are realised. It is suggested that all existing relief measures, where possible, be amended to include migrant workers. Furthermore, cumbersome processes for migrant workers to gain access to available packages such as UIF need to be streamlined to remove any unnecessary delays.

More broadly, however, there is a general need for a shift in the manner in which migrants are viewed in the country. The perceptions that migrants are a burden to the economy and put unnecessary pressure on scarce resources have to be rethought. These ideas are naïve and pose a danger to migration in a global economy. The consciousness that brought us to independence should be regained. Communities must embrace the value of ubuntu as fundamental to confronting our challenges. An awareness must therefore be created of the need

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<sup>91</sup> G Newham (15 November 2020) 'Do foreigners really commit SA's most violent crimes?' *Institute For Security Studies* <https://issafrica.org/amp/iss-today/do-foreigners-really-commit-sas-most-violent-crimes> viewed 15 November 2020.

for a deeper morality. Beyond this, the government must ensure that its domestic and international obligations towards the realisation of the welfare of migrants are fulfilled.

At an institutional level, the South African Human Rights Commission (SAHRC) needs to do more to ensure the promotion of the rights of migrant workers. The SAHRC expressed concern over practices such as the distribution of food parcels using South African IDs, which many migrant workers do not have. It has simply monitored the situation without instituting any particular interventions with the relevant authorities. The impact of overlooking migrants in social responses is that many were put at risk of hunger and needed stronger action in challenging government processes.