



# How employers can utilise the law in South Africa to reduce and prevent xenophobic attacks against their employees in the hospitality industry

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## Abstract

This article explains case law precedent that has made it clear that even illegal immigrants without the requisite documents, or work permits, who are illegally in South Africa enjoy the protection provided in terms of labour legislation. The reason for this is that the constitutional right to fair labour practices is applicable to everyone including illegal immigrants. Secondly this article sets out the law with regard to xenophobic acts in the hospitality industry. It explains under what circumstances an employer can dismiss employees for partaking in xenophobic acts. It describes under what circumstances an employer can be held liable for damages and harm suffered by an employee who is a victim of xenophobic acts. It explains what steps an employer should take in order to avoid such liability.

**Keywords:** Xenophobia, discrimination, vicarious liability, compensation, fair labour practices, dismissal, common law.

## Introduction

The last two decades or so, has seen an upsurge in xenophobia in South Africa. This is despite the fact that international law obliges the state to respect the basic human rights of migrants or foreigners. As stated by the court in *Kiliko and others v Minister of Home Affairs and Others* (2006 (4) SA 114 (C): “the state under international law, is obliged to respect the basic human rights of any foreigner who has entered its territory, and any such person is under the South African Constitution, entitled to all the fundamental rights entrenched in the Bill of Rights...”

Some individual and shocking cases have made it to the courts. For example in the case of *S v Smith en Andere* [2002] JOL 9242(T) four police dog unit policemen who videotaped themselves seriously assaulting two Mozambican citizens were convicted. Later, in 2015, the Pretoria High Court heard the much publicised case where the Mozambican taxi driver, Mido Macia, was videotaped being dragged while handcuffed to a police van. The severe injuries he sustained in this brutal manner lead to his death shortly thereafter. In this case the eight ex-police officers were convicted of murder and each received a fifteen year prison sentence (Mail and Guardian April 6, 2018). Another Mozambican, Ernesto Nhamuave was set alight by a mob in 2008 and died from his injuries sustained as a result. The image of the burning man, on his hands and knees ‘screaming for his life shocked the world and made the world aware of the horrific xenophobic violence that has forced thousands of foreigners to leave South Africa, and 56 dead in 2008 (Daily Mail, 2008). In 2015 Emmanuel Sithole, another Mozambican was attacked by men in Alexandra township. This brutal attack resulted in his death (News 24 Correspondent 2016). According to Professor Loren Landau from the African Centre for Migration and Society at the University of the Witwatersrand it is not only Mozambicans who are targeted but, all foreigners from other parts of Africa and sub-continental Asia have been targeted. Prof Landau stated:



“In terms of the targets of the attacks I think there are a number of explanations. The most obvious is proximity: these are the groups of people who live and work in townships. As the violence is based on a mix of rage, frustration and opportunism, these are the obvious and ‘easy’ targets. That the police have done little to protect them does little to discourage such attacks.....Second, these are people working in sectors such as small business and manual labour that offer the few available economic opportunities to poor South Africans. While their presence may ultimately create jobs, it is not perceived that way.” (News 24 City Press 2015-04-15)

Finally Landau cited the following reasons for the xenophobic attacks:

“And this suggests a third reason: the consistent demonization of poor migrants from officials and leaders. The discourse about economic competition, illegal immigration and even the threats of disease and terrorism have largely pointed to migrants from Africa and Asia.” (News 24 City Press 2015-04-15)

The nature of work in the hospitality industry lends itself to the use of so-called ‘atypical employees’. These employees are generally not what is considered ‘typical’ employees’ who work full-time and whose contracts of employment are generally for an indefinite period, in other words they are not employed on a fixed term contract and are considered to be ‘permanent’ employees. (Webster and Nyman 2012;5). Atypical employees therefore include part time, fixed term and seasonal workers. Usually this type of work is transitional, not well paid, precarious, unskilled or semi-skilled, tenuous and often these employees or workers are not covered by the net of protection provided by labour legislation (and Nyman 2012;5). Since the hospitality industry is generally characterised by peak seasons when most of the clients take holiday leave, the industry is particularly well suited to the use seasonal workers.

In South Africa peak season centres around the Christian religious holidays of Easter and Christmas. Public holidays such as New Year’s Day (1 January), Human Rights Day (21 March), Family Day (2 April, (freedom Day 27 April), Workers’ Day (1 May), Womens’ Day (9 August), Heritage Day 24 September) and the days before and after these days are relatively busier periods in the hospitality industry because most people do not work on these days. The nature of the industry is well suited to long, irregular and pressurised working hours (Webster and Nyman 2012;5).

The hospitality industry in South Africa and worldwide generally employs a proportionally higher number of migrants than other sectors. The International Labour Organisation (ILO) proclaims that migrants are a vital source of skills and labour for the hotel industry and migrant workers are to be found in the hotel industries of countries throughout the world, both within developed and less developed economies (International Migration Paper No 112.)The ILO concludes that the majority of migrant workers in the hospitality industry worldwide “are drawn into lower-paid informal or casual employment...they often remain at low skills levels compared to native workers.” (2010,93;1.) This enables the employers in the hospitality sector in South Africa to make use of cheaper and sometimes more skilled labour.

The then acting Home Affairs Minister in 2017, Malusi Gigaba, confirmed this when he stated that many businesses particularly in the construction and hospitality sectors prefer to employ migrants instead of South African workers because migrants “accept anything offered.”(South African Government News Agency report of October 2017.)Restaurant owners in Cape Town cited the following reasons for employing foreign especially Zimbabwean waiters instead of South Africans: They are well educated and offer superior service to customers, they are more hard working than South Africans, and most South Africans do not apply for these jobs as they prefer more corporate work (*Business Report* of 24 March 2015).



Given the high proportion of migrant workers and the huge contribution they make to the hospitality industry, the rampant xenophobic violence and discrimination perpetrated against migrants, it is vital that employers are familiar with the relevant legislative framework regarding the rights of migrant workers and what employers can legally do to curb xenophobic violence at the workplace. Violence and threats of violence against migrant workers is obviously bad for business as this results in less productivity, disharmony at the workplace and employee absenteeism. Secondly, given the rife exploitation of migrant workers in the hospitality industry (see Vettori ,2007), it is important for employers to realise that all migrants, whether they are legal or illegal are provided with labour law protection in terms of the Constitution, the Labour Relations Act 66 of 1995 (LRA) and other labour legislation. Thus employers must be conversant with the laws pertaining to the industry and employment in general.

## Methodology

This research is multi-inter-and transdisciplinary. The laws of the land and legal research can only have a purpose when operating in partnership with the socio-economic and political environment they were primarily designed for. In order to conduct this type of multidisciplinary research it is necessary to firstly, set out the relevant provisions of the law itself. The law emanates predominantly from statutes and court decisions. Having set out the relevant provisions of the law for the topic under discussion, the way they have been practically applied by the courts is explained. Essentially the research is a descriptive analysis of the relevant labour laws at the disposal of the employer, so the employer can mitigate the adverse effects of xenophobia at the workplace. The aim of the methodology is to demonstrate that an employer is not helpless in the eradication of xenophobia at the workplace and the labour laws support an environment where the equity and dignity of migrant workers is preserved.

## Migrants' labour law rights

In the landmark Labour Court decision of *Discovery Health Ltd v CCMA & Others* ([2008] 7 BLLR 633 (LC), the employer argued that migrant workers who do not have the necessary documents in terms of migratory legislation do not qualify for protection in terms of South African legislation. The Labour Court found that an immigrant who did not have the necessary documents in terms of the Immigration Act and was therefore employed contrary to the terms of this legislation, was still entitled to protection in terms of the LRA. Section 38(1) of the Immigration Act provides:

*"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;*
- (c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status'."*

The basis of van Niekerk J's finding was that the constitutional rights and in particular the right to fair labour practices should be upheld even if this flies in the face of other legislation such as the Immigration Act. Van Niekerk J stated:

*"There is a sound policy reason for adopting a construction of s 38(1) that does not limit the right to fair labour practices. If s 38(1) were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it is not difficult to imagine the inequitable consequences that might flow from a provision to that effect. An unscrupulous employer, prepared to risk criminal sanction under s 38, might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee would be deprived of a remedy*



*in contract, and if Discovery Health's contention is correct, she would be without a remedy in terms of labour legislation."*

Judge Van Niekerk concluded that the contract concluded between Discovery Health and the plaintiff was not invalid despite the provisions in s 38(1) of the Immigration Act. He added that even if there was no valid contract entered into between the plaintiff and Discovery Health, the plaintiff still qualified as an "employee" in terms of the LRA and was therefore entitled to the protection provided in terms of the LRA.

In November 2017, this decision was upheld by the Labour Court in overturning an arbitration award that held that an illegal immigrant was not entitled to the protection provided by the LRA (*Sithole and Metal and Engineering Industries Bargaining Council, Joseph Mpahphuli NO and Spray Systems Specialists (Pty) Ltd.* [2017] ZALCJHB 434 24 November 2017).

### **Can an employer take disciplinary action against employees that seriously threaten or assault migrant workers?**

If assault or any type of harassment is committed by an employee against another employee at the workplace in working hours it is obvious that the employer can take disciplinary action against the errant employee as this constitutes serious misconduct. What if the misconduct occurs after hours and outside of the workplace? Usually an employer cannot take disciplinary action against an employee if the misconduct was committed off the company premises and outside of working hours. However, there are exceptions to this rule. The basis of the employment relationship is that it is a relationship of good faith (*Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA)). This implies a relationship of trust. In terms of the common law, the employee has the following duties towards the employer. Since the contract of employment is good faith or trust, if the misconduct by the employee is sufficiently serious to sever the relationship of trust and thus render the relationship intolerable, then dismissal is an appropriate sanction.

In order to justify dismissal the misconduct must be serious and of such gravity that it makes a continued employment relationship intolerable (LRA Schedule 8: Code of Good Practice: Dismissal). Therefore if the misconduct that was committed off premises and outside of working hours has the effect of severing the trust relationship between employer and employee, dismissal would be an appropriate sanction despite the fact that the misconduct was committed off company premises and outside of working hours. In order to determine whether or not the misconduct has indeed resulted in a severance of the trust relationship thus rendering the relationship intolerable, all surrounding circumstances must be taken into account. For example in *Saal v De Beers Consolidated Mines* (2000- 2 BALR 171.) an employee had assaulted a domestic worker in the village and outside of working hours. The employee was dismissed. The dismissal was upheld on the basis that the employee knew that it was against company rules to assault a non –employee in the mining village.

The Labour Appeal Court in *SA Polymer Holdings (Pty) Ltd t/a Megapak v CWIU & Others* [1996] 8 BLLR 978 (LAC) had to decide whether an employer could legitimately take disciplinary action against employees who were involved in an armed robbery off the company premises and outside of working hours. The employees were dismissed for this infringement of the law. The Labour Appeal Court upheld the dismissals on the basis of the effect of the misconduct on the employer. The court found that in the employer could assess the conduct in the context of the actual or potential effect the misconduct would have on the workplace, other staff members and the property of the employer. The court stated if the misconduct within the context of the surrounding circumstances severed the relationship of trust between the employer and the employee, then the employer could legitimately dismiss the errant



employees. In order to determine whether or not the conduct had seriously damaged or severed the relationship of trust the following factors are relevant:

- i) the nature of the conduct
- ii) the nature of the work or services performed by the employees
- iii) the potential effect which the conduct would have on the employer's business and in particular its profile in the eyes of its clients and the public, and
- iv) the impact which the conduct may have on the relationship between the employee and his or her fellow employees.

The court emphasised that the above list of factors was not a *numerus clausus* and there could be surrounding circumstances that give rise to other relevant factors that are useful in determining whether or not the trust relationship has been severed or severely damaged. Therefore, at the end of the day, a court must take all surrounding circumstances and the context of the employment relationship into account in coming to a common sense conclusion as to whether or not the dismissal or other disciplinary action imposed by the employer was legitimate and justified.

In the context of xenophobic attacks against fellow employees outside the workplace and outside of working hours by employees of the company, it is clear that this would impact the relationship between the perpetrators and their fellow migrant employees. Furthermore, it cannot reasonably be argued by an employee committing such misconduct that he/she was unaware of a company rule against such conduct. It is not unreasonable for an employer to expect employees to understand that there is an unwritten rule against such conduct in cases where the company does not have a disciplinary policy and procedure or where the policy and procedure is silent about xenophobic threats at the workplace or outside the workplace on fellow employees. If however the xenophobic attacks or threats are perpetrated against people who are not employed by the employer outside of the workplace it is unlikely that the employer would be able to legitimately take disciplinary action against such employee perpetrators.

### **Can an employer be held vicariously liable for its employees' unlawful and/or discriminatory acts against migrant workers?**

In terms of the common law an employer is obliged to provide employees with safe working conditions. This includes not only conditions that are conducive to the employees' physical wellbeing but an employer is also obliged to ensure that workplace conditions are safe with regard to employees' emotional wellbeing as well. (*Media 24 Ltd & Another v Grobler* (2005) 26 ILJ 1007 (SCA). The Constitution mandates the courts to develop the common law "taking into account the interests of justice." (section 173). The courts are further mandated to develop the common law in line with the "spirit, purport and object of the Bill of Rights" (section 39(2).) These constitutional imperatives are likely to add impetus to the employer's duty towards its employees to provide a safe working environment.

In terms of South African common law an employer is obliged to provide safe working conditions for its employees. An employer owes a common law duty to its employees to take reasonable care for their safety (*Van Deventer v Workman's Compensation Commissioner* 1962 (4) SA 28 (T) at 31B-C and *Vigario v Afrox Ltd* 1996 (3) SA 450 (W) at 463F-I). This duty includes an obligation to take reasonable steps to protect employees from *physical* harm caused by what may be called *physical* hazards and must also in appropriate circumstances include a duty to protect employees from psychological harm caused, for example, by sexual harassment by co-employees. (*Media 24 Ltd and Another v Grobler* (301/2004) [2005] ZASCA 64; [2005] 3 All SA 297 (SCA) (1 June 2005).



If an employer fails to provide a safe working environment for its employees the employer is liable for any damages suffered by the employees who have been adversely affected by the unsafe environment on the basis of a breach of the contractual duty to provide a safe work environment for its employees. Whether the working conditions were safe or not is a question of fact. If it is found that the working conditions were not safe, whether they were a consequence of an employer's acts or omissions, the employer will be liable.

What if someone suffers physical or emotional harm not as a consequence of the employer's act or omissions but as a direct consequence of the conduct of an employee of an employer? In this instance, provided the employees that caused the harm were acting in the course and scope of their employment and their conduct was unlawful (i.e. either a crime or a delict), the employer will be held vicariously liable for the acts of its employees. This is the case whether the person(s) who suffered harm are employed by the employer or not. In short, an employer can be held accountable for damages and harm suffered as a result of xenophobic acts committed by its employees if these acts are wrongful in terms of the law. It is obvious that threats of violence and violence perpetrated against migrants constitute wrongful acts in the form of crimes. The fact that the employer is not at fault, or even did its best to prevent the crimes being committed is no defence and strict liability is applicable (*Minister of Safety and Security v Morudu and Others* 2016(1) SACR 68 (SCA)).

The Employment Equity Act 55 of 1998 (EEA) provides for the vicarious liability of the employer in cases of acts of harassment committed by employees on fellow employees if certain conditions are met (section 60).

Section 6(1) of the EEA provides that no person may unfairly discriminate against an employee, or an applicant for employment, in any employment policy or practice, on the basis of inter alia race, ethnic or social origin, colour, religion, culture, language and birth.

Section 6(3) of the EEA provides that harassment of an employee is a form of discrimination where the harassment is based on any one of the grounds listed in section 6(1) of the EEA.

An "employment policy and practice" is defined in section 1 of the EEA as including but not limited to the following: a) recruitment procedures, advertising and selection criteria; b) appointments and appointment process; c) job classification and grading; d) remuneration, employment benefits and terms and conditions of employment; e) job assignments; f) the working environment and facilities; g) training and development; h) performance evaluation systems; i) promotion; j) transfer; k) demotion; l) disciplinary measures other than dismissal; and m) dismissal. This exhaustive list is all encompassing of human resource practices at the workplace. Despite its comprehensive terms it is not limited to this list of processes and could include other practices in the light of the words "including but not limited to" preceding the exhaustive list in the legislation.

Section 60 of the EEA reads as follows:

*"1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer. 2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act. 3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision. 4) Despite subsection 3, an employer is not liable for the conduct of any employee if that employer is able to prove that it did all*



*that was reasonably practicable to ensure that the employee would not act in contravention of this Act.”*

Therefore if an employer fails to take practical and significant steps to avoid unfair discrimination in any form and on any prohibited basis by its employees on fellow employees, it will be held vicariously liable for the acts of discrimination perpetrated by its employees on other employees. Clearly xenophobic acts qualify as forms of discrimination based on race, ethnic or social origin, colour, religion, culture, language and birth.

Failure by an employer to take reasonable steps to prevent xenophobic acts could result not only in expensive litigation costs, but in very significant awards for damages against the employer. This is because the EEA places no cap on the amount of compensation that the Labour Court can award in favour of an employee who has been discriminated against at the workplace. Section 50(1) (d) and (e) of the EEA provide that the Labour Court may make any appropriate order, including awarding compensation and damages “in circumstances contemplated in this Act”. Section 50(2) of the EEA further provides that where an employee has been unfairly discriminated against the Labour Court may make “any order that is just and equitable in the circumstances” including payment of compensation and payment of damages by the employer to the employee.

## **Conclusion**

The law has armed the employer with the ability to discipline and even dismiss employees who commit xenophobic acts against its employees whether or not this conduct takes place in or out of working hours or in or outside of the workplace. The employer should not shy away from taking such disciplinary action against employees who commit acts of xenophobia. Failure to do so may result in an employer being held vicariously liable for the acts of its employees. This vicarious liability could result in hefty compensation awards being awarded against the employer with obvious dire economic consequences for the employer. Secondly, the employer must ensure that it puts policies and practices in place to prevent discrimination including xenophobic conduct at the workplace. This is to ensure that the employer is not faced with vicarious liability in terms of the common law and the EEA for the xenophobic acts of its employees.

These measures should not be taken lightly as the economic consequences of not providing a safe work environment and not taking reasonable steps to employees from discriminating unfairly against their fellow employees can result in hefty economic penalties against the employer in the form of court orders for compensation and damages for the aggrieved parties. In short all employers must take all reasonable steps to provide a safe working environment for all their employees. Failure to act can also result in liability on the part of an employer. Therefore, whenever it is appropriate to do so and employer should take disciplinary action including dismissal against employees that commit xenophobic acts. In this way, the employer will not only be able to keep migrant employees that contribute meaningfully to the enterprise, but will also protect itself against civil suits that could cost a significant amount of money.

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