



The exploitation of Migrant Labour in the Hospitality Industry in South Africa

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Abstract

The purpose of this article is to demonstrate that despite a progressive Constitution that provides everyone with the right to fair labour practices as well as progressive labour legislation, migrant workers in the South African hospitality sector remain severely prejudiced and exploited by ruthless employers. This article sets out the nature of work in the hospitality sector and the consequent abundance of low paid and low skilled precarious jobs in the sector. The desperation of migrants and illegal aliens from countries such as Mozambique, Malawi and Zimbabwe, renders them willing to accept these exploitative jobs. The relevant provisions of South African legislation and how the courts have interpreted them are discussed. The reasons for the fact that these laws have been of little assistance to desperate migrants are explained. They include the fact that many migrant workers in the hospitality sector do not qualify as employees in terms of legislation and therefore do not enjoy protection in terms of the labour legislation; the fact that generally migrants are not unionised; the vulnerability of illegal immigrants vis-à-vis their employers thus opening them up to exploitation; the lack of capacity and or willingness on the part of the Department of labour to enforce the rights of workers and the lack of knowledge and financial resources on the part of migrants to enable them to pursue their rights.

Keywords: Atypical employees, informal workers, hospitality sector, discrimination, fair labour practices, part-time employees, fixed-term employees, trade unions, Bill of Rights

Introduction

The nature of work in the hospitality sector is globally very well suited to the use of part time, fixed term and seasonal workers, and South Africa is no exception. Typically these jobs are not well paid and are precarious. Migrant workers are often willing to settle for almost any wages and any work conditions just to survive. This article sets out the relevant labour law provisions regarding these workers. The practical application of the Constitutional right to fair labour practices with reference to migrant workers is discussed. The provisions in the Labour Relations Act 66 of 1995 that deal with atypical or informal employees as are found in the hospitality industry, such as part time workers, workers on fixed term contracts and workers employed by temporary employment services or labour brokers are discussed. Since many migrant workers are paid less than their South African counterparts for the same work or work of equal value, the recent amendments to the Employment Equity Act 55 of 1998 that deal with this form of discrimination are set out. The article sets out some of the reasons why some of these laws are not always applicable to workers in the hospitality industry and the reasons why the laws that are actually applicable to workers in the hospitality industry, especially migrant workers, are not properly monitored or enforced.

Research Methodology

The researcher has engaged in multi-, inter- and transdisciplinary research. The argument is that this will serve to break down working in "silos" and in one way or another lead to more innovative research. Multidisciplinarity for one, is something legal researchers commonly do. Since law is a social item, the consideration of legal issues and problems facing people always and inevitably requires considering the socio-political and economic factors, for example,



aspects that involve employees. The laws of the land and legal research are sagacious only within a socio-economic-political context of a country.

Legal scholarship historically tracks two wide-ranging traditions. The first is commonly referred to as 'black-letter law', and it focuses predominantly on the law itself as an internal self-supporting set of principles which are accessed through reading court judgments and statutes with scant or no reference to the world beyond the parameters of the law.

The researcher has conducted an essentially descriptive analysis of a number of technical and legal guidelines as found in primary and secondary sources. The primary aim of the methodology was to organise and describe legal aspects and to offer commentary on the importance of hospitality employers realising that they should not exploit migrant workers.

The South African hospitality sector

Hospitality forms part of the tourist industry and the sector includes accommodation - hotels, bed & breakfasts, caravan parks, camping sites, inns, game lodges and time sharing of apartments at resorts and also the food and beverage sector - restaurants, coffee shops, tearooms, fast food outlets as well as other catering services. Tourism is the fourth largest generator of Gross Domestic Product in South Africa.(Webster et al, 2012; 5.) The hospitality industry makes up 67% of all tourism in South Africa, followed by travel which constitutes 16% of the tourism sector (HSRC, 2005: 16.) "Hospitality is by far the largest subsector in the industry with a total of 16 444 registered employers at 40430 enterprises in 2009 (Fauvelle, 2017). The vast majority of these are very small, micro and medium sized enterprises making up 90% of the sector, with very few large enterprises. The majority of hotels and restaurants are small enterprises employing less than 10 employees. Large establishments employ only 1.4% of the employees in the industry" (Taal, 2012: 4).

The nature of work in the South African hospitality sector

Given the seasonal nature of work in the hospitality sector it comes as no surprise that many workers in this sector can be characterised as "informal workers". Many of these workers in the terminology of the Labour Relations Act 66 of 1995 (hereinafter the "LRA") are "part time", "fixed term" or "temporary workers". Informal work is generally tenuous and insecure (Webster et al, 2012: 5).

The seasonal nature of the hospitality industry renders the work labour-intensive and pressurized with the majority of guests and customers utilising the services of the establishments during peak holiday seasons. The working hours are consequently long and irregular. Furthermore, the employees are informal workers and are generally paid low wages and the informal nature of the work means that they have little job security hours, low wages and a lack of job security (Webster et al, 2012: 5).

In April 2017 The African Centre for Migration and Society (ACMS) published a fact sheet on foreign workers in South Africa based on research undertaken by the Migrating for Work Research Consortium (MiWORC) for 2012 to 2014. The following was documented: In 2012 the hospitality sector employed 567 378 people. Between 2008 and 2010 employers in the hospitality sector experienced high competition levels and consequently tightened their belts and began outsourcing non – activities which resulted in up to 50% wage cuts for employees rehired as contractors. Also as a result of employees fearing losing their jobs employees in the hospitality sector began accepting less attractive working conditions with longer hours, with extra duties with no extra remuneration. In 2012 more than 50% of hotel staff were employed by temporary employment services (Jinnah and Cazarin, 2017).



Migrants in the hospitality sector

According to the International Labour Organisation (ILO) International Migration Paper No 112, 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. The ILO (2010, 93:1). 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.” Furthermore, foreign-born employees face racial and xenophobic discrimination from other workers and managers. For example, a hotel manager who is of a certain ethnic group may favour employees from the same grouping and discriminate against others who are of a different persuasion.

As mentioned above, workers in the South African hospitality sector, whether they are native workers or migrants, occupy low paying, informal jobs in the hospitality sector. This is simply because the nature of work in the hospitality sector is conducive to low paid precarious jobs. However, it is suggested below that migrant workers in the hospitality sector are open to more abuse by unethical employers and are even less fortunate than their South African counterparts when it comes to wages and other working conditions. According to the South African Government News Agency report of October 2017, the then Home Affairs Minister Malusi Gigaba, stated that many businesses particularly in the construction and hospitality sectors do not hire South African workers because they prefer to hire migrants. He further stated that one of the reasons that migrants are preferred to South African workers in these industries is that migrants “accept anything offered” as they are desperate and thus they are easy prey for unscrupulous tourism industry and hospitality sector role-players.

According to the Business Report of 24 March 2015, 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

The Magazine reported further that the President of the South African Commercial, Catering and Allied Workers Union, Louise Thipe stated that often employers prefer to employ foreigners instead of locals because foreigners are not protected by trade unions. She stated that employers often threaten foreigners with dismissal if they join a union and that employers control migrant workers without the requisite documentation by threatening to go to the authorities if they do not comply with their conditions.

Foreign-born migrants are more likely to be employed in precarious work than South Africans are. Usually migrants are not provided with written contracts of employment. The consequence of this is that they do not know what their rights are, nor the details concerning their conditions of service such as whether their jobs are for an indefinite period or whether they are temporary. This state of affairs allows employers to change and impose conditions of service with impunity.

Foreign-born workers often hope to use a precarious job as a stepping stone to a promotion or a more formal position. Although they may be successful at times usually they find themselves stuck in low paying positions with no benefits and no job security, no or little paid leave, long hours, no notice periods and no social benefits such as unemployment insurance (UIF). A contributing factor to a lack of UIF contributions by the employers for migrant workers is that migrant workers are not legally entitled to unemployment benefits unless they have permanent residence status or refugee status. (Jinnah and Cazarin, 2017).



Many employers in the hospitality industry do not abide by the labour law with regard to hours of work, minimum wages as set out in the relevant sectoral determinations. Furthermore, many employers do not offer any social benefits such as pensions or provident funds, medical aid schemes, workers compensation and other social security benefits were extremely rare for workers in the hospitality industry and almost non-existent for migrant workers. Generally, migrant workers were unaware of what they were legally entitled to in terms of employee benefits thus rendering them unable to demand their rights. (Jinnah and Cazarin, 2017).

The legal and policy framework

The constitutional right to fair labour practices, the provisions in the Labour Relations Act 66 of 1995 regarding informal or atypical employees and the anti-discrimination provisions contained in the Employment Equity Act 55 of 1998 are discussed briefly hereunder. Legislation and quasi legislation dealing with minimum working conditions and minimum wages contained in the Basic Conditions of Employment Act 75 of 1997 (BCEA) and relevant sectoral determinations applicable to the hospitality sector go beyond the scope of this article. For detail concerning these provisions (see: Vettori 2015).

South African labour legislation is often lauded for its progressive nature. Likewise, the South African Constitution is known to be one of the most progressive constitutions in the world. It is unique in that it protects the right to fair labour practices for “everyone”(section 23[1]) The only other country that provides a constitutional right to fair labour practices is Malawi which followed the South African Constitution. Since the Constitution does not define what is meant by “everyone” this word has been open to interpretation and the question whether it includes only employees or casts the net of protection further, has arisen. Given the ever increasing number of informal or atypical employees and migrant workers worldwide in the last four decades (Vettori , 2009). the view that that the legislative net of protection for workers should be cast as wide as possible prevails. In 2007 the International Labour Organisation (ILO) made the following recommendation:

The issue of who is and who is not in an employment relationship-and what rights/protections flow from that status-has become problematic in recent decades as a result of major changes in world organisation and the adequacy of legal regulation in adapting to those changes...In addition Member States of the ILO and their social partners have emphasized that the globalized economy has increased the need of workers for protection....

The South African courts have also taken this view and when given the opportunity to give meaning to the word “everyone” in section 23(1) of the Constitution. The Constitutional Court held that the word should be given a broad interpretation to include a worker who does not necessarily qualify as an employee in terms of the law.(SA National Defence Union v Minister of Defence and Another) In this case, the Constitutional Court in applying the Constitutional imperative to have recourse to international law contained in section 39 of the Constitution, followed the approach of the ILO and concluded that the right to fair labour practices is available for the protection of a worker who is not in the strict sense an employee in terms of the law. The Court therefore concluded that even though members of the armed forces did not have an employment relationship with the Defence Force in a strict legal sense, they nevertheless qualified as workers for purposes of the Constitution and therefore had the right to fair labour practices as provided in terms of section 23(1) of the Constitution.

Cheadle also argues for a broad interpretation of the word “everyone”. He argues that it should go beyond an “employee”. The crux of the enquiry as to whether a person qualifies as a “worker” in terms of section 23(1) of the Constitution is whether there is an element of dependency in the relationship. “Dependency” in this context refers to a situation where the



worker is financially dependent on the provider of work in the sense that the worker has no other means of earning a living (Cheadle et al, 2002: 364-365). In summary, the constitutional right to fair labour practices is intended to protect informal workers and other workers who have a relationship that is akin to an employment relationship with the provider of work. This right would have to be pursued through the Constitutional Court. The costs attendant thereto are not normally available to unskilled workers. Furthermore it is unlikely that migrants are aware of this constitutional right.

Our courts have also held that even if there is no contract of employment between the provider of work and the worker, the worker can still qualify as an employee in terms of the labour legislation (*Discovery Health Ltd v CCMA*). In this case, on discovering that the applicant did not have a valid work permit, Discovery Health Ltd dismissed him. The applicant made application to the Commission for Conciliation, Mediation and Arbitration (CCMA), (a public body that mediates and arbitrates labour disputes), claiming that he had been unfairly dismissed. The respondent (*Discovery Health Ltd*) argued that the CCMA lacked jurisdiction to hear the matter because there was no contract of employment between the applicant and Discovery Health Ltd (the respondent) because the applicant was an illegal immigrant and this rendered the contract of employment void. The CCMA issued an arbitration award that found that the employment relationship transcends the contract of employment and the jurisdiction of the CCMA is founded upon the employment relationship not the contract of employment. Discovery Health Ltd took this CCMA award on review to the Labour Court. On review in the Labour Court, AJ Van Niekerk, agreed with the finding of the CCMA but for different reasons. Although conceding that contracts that violate legislation are generally void, he found that this is not an absolute rule. In the light of the constitutional imperative upon courts and tribunals to “promote the spirit, purport and objectives of the Bill of Rights” (section 39(2)) of the Constitution, in interpreting legislation, Van Niekerk AJ concluded that interpretations that undermine fundamental rights contained in the Constitution (in this case the right to fair labour practices) should be avoided. AJ Van Niekerk also put forward the following policy consideration in support of his argument:

If employers were aware that foreign nationals who do not have valid work permits had rights of recourse to the LRA and BCEA (and thereby to the CCMA and to this court), they would be less likely to breach section 38(1) of the Immigration Act by entering into contracts in these circumstances. (par 34).

In the case of *Kylie v CCMA and others*, AJ Cheadle supported this policy consideration and stated:

The ability to pay less than the established rates of pay in respect of foreign and child workers doing the same work as those in legal employment without the risk of having to be held to the established rate of pay undermines the established rate, threatens the employment and pay security of those in legal employment and encourages the employment of illegal workers... (par 49)

In other words the determining factors were to give an interpretation that would discourage violation of immigration legislation and that would give effect to fundamental rights contained in the Bill of Rights of the Constitution. The Discovery Health decision is of significant importance to migrants because they have access to the CCMA which is a public body which hears labour disputes free of charge. The CCMA is a creation of the LRA and hears disputes pertaining to breaches of the LRA which is the centrepiece of labour legislation in South Africa. In particular, the CCMA hears disputes concerning unfair labour practices and unfair dismissals (Section 186 of the LRA). Its arbitration awards are final and binding. This means they cannot be taken on appeal. They can only be taken on review for limited reasons, for example the arbitrator did not apply the law accurately or properly, the arbitrator exceeded his



or her powers or was biased, the arbitration was not properly conducted or the decision is unreasonable given the evidence before the arbitrator (Section 145(2) of the LRA).

Unfortunately, many migrants are still not fully aware of their legal rights if at all and are often too afraid that they will be dismissed for taking their employers to task for the commission of unfair labour practices if they have not been dismissed, or they are in fear of being reported to the authorities if they have already been dismissed.

In 2015 the LRA was amended to introduce provisions to protect informal and atypical employees. Section 198 of the LRA now extends protection to informal workers in the categories of fixed term employees, part time employees and those employed by temporary employment services (TES), more commonly known as labour brokers.

Regarding employees of TES's, the new section 198(A) of the LRA provides that employees who earn below a certain threshold who work for more than three months for the client are considered to be employees of the client, unless the employee works as a substitute for somebody who is temporarily absent. Furthermore, the section provides that termination of the employee's services by the TES, whether at the insistence of TES or the clients in order to avoid "deemed employment," is considered to be a form of unfair dismissal. The section also provides that "deemed employees" must on the whole be treated not less favourably than comparable employees unless justifiable reasons exist for differentiation in treatment. In terms of section 198(D)(2) justifiable reasons include seniority, experience, length of service, merit, quality or quantity of work and any other similar criteria. The provision specifically provides that affordability on the part of the employer is not a justifiable reason.

Section 198(B) provides protection for employees on fixed term contracts. In terms of the section an employee may only be employed on a fixed term contract for more than three months in circumstances where the nature of the work is of a limited or definite duration or there is a justifiable reason for fixing the term. A justifiable reason includes: replacing an employee who is temporarily absent; where there is a temporary increase in work that is longer than 12 months; so that a student can gain experience; where a person is engaged for a specific and limited duration project; work for a non-citizen with a work permit; seasonal work; a public works scheme; where there is external funding; or the person has reached retirement age. An employee who is on a fixed term contract the duration of which is longer than three months may on the whole not be treated less favourably than permanent employees performing the same or similar work, unless there are justifiable reasons. Justifiable reasons are the same as those mentioned above. Employees on fixed term contracts must be provided with equal access to opportunities for vacancies from the first day of their employment with the employer. Employees on fixed term contracts the duration of which is longer than 24 months are entitled to severance pay unless alternative employment on similar terms and conditions is provided or offered prior to the expiry of the fixed term contract. These protective provisions are not applicable to employees who earn above the threshold, or where there is a collective agreement, statute, or sectoral determination which allows for a fixed period. These provisions are also not applicable if the employer employs less than 10 employees or the employer employs less than 50 employees and whose business has been in operation for less than two years.

In terms of section 198(C), a "part-time employee" is defined as an employee who works shorter hours than a comparable full-time employee and is paid according to the time worked. A "comparable full-time employee" is an employee who is paid for a full day and is identifiable as a full-time employee in terms of custom and practice. This section is not applicable during the first three months of employment. It is also not applicable if the employee earns more than the threshold, or works less than 24 hours per month, if the employer employs less than 10



employees or if the employer employs less than 50 employees and the business has been in operation for less than two years.

Part-time employees may not be treated less favourably than equivalent full-time employees unless it is justified. The justifiable reasons are the same as those mentioned above. After three months, part-time employees must be provided with the same access to opportunities for vacancies as well as access to training and skills development.

The 2014 amendments to the EEA may assist migrants in claims based on discrimination when they are receiving less remuneration than their South African counterparts for the same work.

Section 6 (1) of the EEA prohibits direct and indirect unfair discrimination against employees on grounds of inter alia race, ethnic or social origin, colour, religion, culture, language and birth in both access (recruitment) and treatment (job classification, remuneration, employment benefits, employment terms and conditions, promotion and dismissal) by an employer. Where discrimination is alleged on one of the listed grounds, the employer bears the burden of proving that the discrimination is fair or justified. Discrimination can be justified or fair if it is necessary for an inherent requirement of the job or the reason for the discrimination is affirmative action.

The following sections have also been added to section 6 of the EEA:

“(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1) is unfair discrimination.”

Since the 2014 amendments to the EEA, section 10(6) of the EEA provides that if an employee earns less than the threshold determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act, that employee may refer a dispute about discrimination, which includes sexual harassment, to the CCMA. This provision renders access to justice accessible to the poorer members of community since access to the procedures provided by the CCMA are free of charge.

Barriers to enjoyment of these progressive labour legislation

Despite the progressive labour legislation discussed above migrant workers generally, and specifically in the hospitality sector, do not often enjoy what is internationally accepted as fair working conditions or decent working conditions. The reasons for this are many. One of the major factors contributing to this state of affairs is an institutional unwillingness and/or inability to implement labour laws. There is also a lack of access to resources and a lack of knowledge by migrants to enforce labour rights. The nature of the labour market in that there is a grave shortage of highly skilled labour and an over- supply of unskilled human resources resulting in high rates of unemployment. This in turn results in Xenophobia in that migrants are perceived as “stealing” the already scarce unskilled jobs available to South Africans. Consequently the employment of migrants is very politically charged and open to abuse as a consequence of popular perceptions and sensitivities regarding migrant workers.

Capacity constraints at the Department of Home Affairs lead to undue delays in the processing of documents for migrants. Furthermore even when permits are granted they are usually for



short periods of time resulting in migrants having to renew their documents regularly. This is sometimes impossible to achieve timeously as a result of the long delays and capacity constraints that the South African Department of Home Affairs is notorious for. In short the documents issued to refugees and asylum seekers often hinder their prospects of obtaining work because the permit is of such short duration. (PMG 2015/2016 Report)

To exacerbate matters for migrant workers, immigration law is enforced with much more zeal than labour law. In March 2017 the then Minister of Home Affairs, Malusi Gigaba raised concerns about the hiring of migrants in the hospitality and construction sectors in South Africa. The Minister said that this raised concerns for many South African citizens. He stated that South Africa had seen many unfortunate attacks some of which were a result of employment practices. He said that this in turn tarnished South Africa's reputation internationally. The result was that the South African hospitality sector agreed to employ a minimum of 60% South Africans in their enterprises. (South African Government News Agency, March 2017.)

Furthermore, section 38(1) of the Immigration Act 13 of 2002 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; or
- (c) a foreigner on terms, conditions, or in a capacity different from those contemplated in such foreigner's status.

Thus, the employment of illegal immigrants is prohibited in terms of legislation and employers who are caught doing this are susceptible to fines.

Union membership in the hospitality sector is notoriously low. The main reason for this is the diverse nature of the work in this sector, "covering everything from five-star hotels to camping sites bring challenges to unions for organising workers who find themselves in very different circumstances and conditions despite being in the same sector. Not just in terms of diversity of establishment but also size of establishment, where 90 per cent of workers are in very small locations with two or three other workers, presents challenges." (Taal, 2012: 19-22).

The fact that many workers work irregular hours, many of the workers are on fixed term contracts of short duration or they are seasonal workers, or they only work on a part time basis when they are needed, or they are employed by temporary employment services makes recruitment by trade unions difficult. The time of work for many workers in the hospitality industry is often outside of normal office hours. This also contributes to making recruitment more difficult. Unions are sometimes reticent to recruit informal workers because of the difficulties in collecting union fees as they are often paid in cash and are not permanently employed (Taal, 2012).

Another more sinister reason for low union membership from the hospitality sector, especially amongst migrants, is the fear of being fired for being union members. According to the South African Commercial Catering and Allied Workers Union (SACCAWU) president Louise Thipe, foreigners are usually not protected by unions. She stated: "Some foreign employees are threatened with dismissal if they want to join a union. Those without the required documentation are controlled by their employers who threaten to go to the authorities if they don't comply with their conditions. Without a union, foreigners can be paid a minimum salary because they don't have us to negotiate this for them," (Economy, 2015.) Without unions, migrants have no-one to represent them in disciplinary enquiries, no-one to advise them of



their legal rights and no-one to negotiate better working conditions on their behalf, thus exacerbating their desperate plight.

The fact that most migrants work in informal, low skilled jobs in the hospitality sector makes it easy for management to impose strategies to deter migrants from joining unions. Since the migrant informal workers are willing to accept exploitative wages and other conditions of work this places them in direct competition with full time regular employees, This “sews divisions among workers who see immigrants as destroying the hard won gains for conditions that South Africans have fought for as well as making it more difficult for locals to get jobs.”(Taal, 2012.) These sentiments have been manipulated by management to enable strategies of dividing workers into locals and migrants. The result is that local workers ostracise migrant workers and discourage them from joining unions in solidarity with them.(Taal, 2012: 21).

This is despite section 5 of the LRA which provides protection for job seekers regarding their right to freedom of association. This section prevents inter alia the discrimination or prejudice against a job applicant for being a member of a trade union, or having been one or intending to become one.

The often remote location of holiday resorts, hotels, lodges and bed and breakfast establishments, renders it difficult not only for trade unions to recruit members but also for the Department of Labour to monitor and enforce protective labour legislation. Furthermore, even if a migrant worker becomes aware that his or her rights have been violated, the expense of travelling to the CCMA is often too high to venture. Therefore, even though the CCMA does have the jurisdiction to protect the labour rights of migrants whether they are legal or illegal migrants, many of them cannot have access to the CCMA because of the burdensome logistical costs in getting there.

The fact that more than 90% of employers in the hospitality industry employ less than 10 employees (Jinnah and Cazarin, 2017.) renders the 2015 amendments to the LRA regarding part-time and fixed term employees inapplicable. In practice most migrant workers in the hospitality industry fall under these two categories because of the nature of work in the hospitality industry. Furthermore, even if more than ten people are employed by the establishment, in order for the provisions regarding part-time and fixed term employees and employees employed by labour brokers to come into force, the workers have to work at the establishment for more than three months. Given the seasonal nature of the hospitality industry, more often than not, these workers work for less than three months, rendering the protective provisions of the LRA inapplicable.

Regarding the EEA, direct and indirect unfair discrimination against **employees** (my emphasis) is prohibited, in any policy or practice. Only employees and job applicants therefore enjoy protection.(Whitehead v Woolworths.) The first hurdle for a migrant worker would then be to prove that he or she is in fact an employee. This would prove difficult for most informal migrant workers in precarious seasonal jobs. If they do qualify as employees the latest amendments to the EEA allowing the reference of discrimination disputes to the CCMA by those who earn less than a particular threshold set by the Department of Labour may be useful provided they can afford the travel costs of getting to the CCMA offices.

Conclusion

The amendments to the LRA with regard to part time and fixed term employees that are so relevant in the hospitality sector in South Africa have very little impact on the lives of most informal or atypical workers in this industry. The reasons for this are twofold: firstly, less than



ten per cent of employers in the hospitality industry employ more than ten employees thus rendering the provisions relating to fixed term and part-time employees not applicable.

Secondly, even in cases where the employers employ more than ten employees these workers often work for less than three months at a time given the seasonal nature of their work. Furthermore, the lack of capacity of the Labour Department to monitor and enforce basic conditions of employment as set out in the BCEA especially in remote rural areas where many hospitality establishments are situated, means that these employers can simply violate these minimum standards with impunity. Even if the Department of Labour is active in monitoring and enforcing these minimum standards, and very often migrant workers are too afraid to report violations of legislation for fear of losing their jobs or for fear of further discrimination.

The employers in the hospitality industry have been known to control migrant employees and to force them into submission and acceptance of exploitative wages and working conditions by threatening to alert the authorities of their illegal status when they do not have the necessary documents required by the Department of Home Affairs in line with the immigration laws. Therefore, these vulnerable informal employees and immigrants who are ignorant of their rights and often in South Africa illegally accept abusive and exploitative conditions because they are desperate. In order to ensure that migrants have no recourse at all some employers in the hospitality sector have resorted to implementing strategies of exclusion of migrants from trade union membership and protection. This is done simply by threatening migrants with dismissal should they become members of a trade union. In addition to this the strategy is to encourage the perception among the South African employees that migrants are in competition with them because they accept inferior working conditions. The trade unions and their members therefore perceive migrants as a threat to their hard won improved wages and working conditions and solidarity between locals and migrants is therefore lost.

In the end, it seems that for many migrants the only recourse is the constitutional right to fair labour practices and the anti-discrimination provisions in the Employment Equity Act. The enforcement of the right to constitutional fair labour practices comes with all the costs and delays associated with going to court. Thankfully, the latest amendments to the EEA allow low paid employees alleging discrimination, including pay discrimination can refer these disputes to the CCMA. Having said that, most migrants are ignorant of these rights and even if they know about them without the means or support of trade unions they are all but helpless to have them enforced. Secondly and more importantly, these workers might still not be heard even in these cases of discrimination because given the precarious and informal nature of the work they do, they may not even qualify as employees. Since the EEA prohibits discrimination by "an employer" those in precarious informal jobs who do not qualify as employees will thus be deprived of any rights in terms of the EEA.

Despite our progressive Constitution it is clear from the above that migrants suffer severe violations of human rights. Aside from xenophobic attacks the minimum conditions of work as provided for in the relevant sectoral determinations are not endorsed. The norm of providing food for workers in the hospitality industry is not adhered to regarding many migrant workers and if food is provided money is sometimes deducted from their measly salaries to pay for the food. The Department of Labour must be provided with the capacity to enforce these minimum standards. In the interests of the economy in general and the hospitality sector in particular the community and government should ensure that the laws that have been put in place to allow migrants legal entry into jobs are enforced. Secondly, the laws of the country that protect their labour rights and other fundamental rights should be enforced.

Labour migration policy should be a significant force in ensuring that migrants are appreciated for what they add to the economy rather than being perceived as poaching jobs of the nationals. This is especially relevant given the poor state of the economy and the significant role migrants play in driving the economy especially in the hospitality sector.



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