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A CRITICAL OVERVIEW OF LABOUR PROTECTION FOR FOREIGN WORKERS IN
SOUTH AFRICA AND REGIONAL ECONOMIC COMMUNITIES

By

ALEXIA TAMARA PRIOR

STUDENT NUMBER: 200917881

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1. Introduction

This study is about the challenges that foreign nationals face when accessing the labour market. The challenges which have been chosen to discuss relate in the first instance to practical difficulties that foreign nationals encounter with immigration requirements. For this section South Africa has been chosen as a case study and the reasons for doing so are because firstly, South Africa has experienced a fairly recent change in immigration legislation and some of the amendments have become problematic in practice. Secondly, a landmark judgment was handed down by the South African Labour Court which addresses the recourse that foreign nationals have when involved in labour disputes¹ however, a discussion regarding immigration compliance is left open. This being said, the recent enactment of the Employment Services Act² is acknowledged but developments subsequent to its enactment are yet to be seen.

A point of importance to address at the beginning of this study is the limitation of available sources. I would like to mention that extensive research was conducted to obtain articles and opinions on the subject matter however, the sources applicable to the discussion are limited. The purposes of mentioning this at the outset is to acknowledge that the list of references is restricted and to pre-empt any concerns with respect to the level of research conducted in preparation for this study. Further to the above, it should be noted that some of the sources referenced in the study are not accessible to the public but are referred to by other authors in rare instances where they have managed to study the sources themselves³. Extensive research and numerous attempts to obtain the original sources have been unsuccessful.

In addition, part of the knowledge regarding the difficulties that foreign nationals encounter with the South African immigration requirements is practical and not prescribed and as such the knowledge to a large extent is policy. The importance of providing reliable references is very important and this study in no way intentionally tried to undermine this requirement however, it needs to be recognised that a small number of the sources discussed are not accessible nor available in some instances and this is acknowledged in the footnotes accordingly.

¹ *Discovery Health v CCMA and Others* 2008 7 BLLR 633 (LC).

² Act 4 of 2014.

³ see Oucho and Crush “Contra Free Movement: South Africa and the SADC Migration Protocols” 2001 *Indiana University Journal* 143 in reference to the Department of Home Affairs “Memorandum on the Freedom of Movement of People across International Borders with Specific Reference to Southern Africa” as an example.

In the second instance, South Africa is a destination of choice for migration within the African continent and forms part of the Southern African Development Community (SADC). This section will analyse South Africa's response to the Draft Protocol on the Free Movement of Persons in SADC and discuss how South Africa's lack of participation is an example of the wider challenge for SADC member citizens who wish to access labour markets within the economic community. This section outlined what regional economic integration as a policy entails and how the freedom of movement and the right to work are essential for successful regional economic integration. Freedom of movement and the right to work are interrelated topics in this study, given that foreign nationals or citizens within a regional community require a degree of movement in order to access other labour markets. One would not be able to exercise the right to work without being able to lawfully enter and reside in the country of destination.

This study is important because migration of foreign nationals from one country to another is unavoidable, particularly where foreign nationals are in search of better political and economic opportunities.⁴ What we know about the challenges that foreign nationals face when accessing neighbouring or global labour markets is that freedom of movement is essential to the right to work.⁵ In addition, a lack of participation in regional economic integration by member states does not further the possibilities of improving the standard of living for those nationals who reside within the community nor does it further the possibility of improving the economic conditions of member states.⁶

The first part of this study that discusses the practical issues with immigration requirements (using South Africa as a case study) is inseparable from the wider challenge of South Africa's participation in regional economic integration which is discussed in the latter half of the study as freedom of movement is what links these two challenges. Allowing the degree of freedom of movement necessary by relaxing immigration requirements and ultimately implementing a program for regional economic integration is a contentious issue. Many of the criticisms that are levelled against regional economic integration as the wider objective relate to the implications of relaxing immigration requirements and allowing a degree of free movement. This study includes a discussion on these criticisms and possible counter-arguments as well

⁴ Nwonwu "The Neo-liberal Policy, Free Movement of People and Migration: Patterns in the Southern African Development Community" 2010 *Africa Insight* 149.

⁵ see page 24 below.

⁶ see section 4 below.

as a discussion on education and the harmonisation of educational qualifications as a response to the critics' concerns.

The scope of the study has been limited to regional instruments in Africa however, the European Union as well as NAFTA and ASEAN are acknowledged in the subject matter of the study. As the full extent of regional integration has not yet been seen in Africa like is has in the abovementioned programs but rather, only progressive steps forward made by some African regional economic communities (such as ECOWAS), it is challenging to confirm that all the criticisms are unfounded.

As with the discussion on regional instruments in Africa, the scope of the discussion on labour protection has also been limited but to South Africa specifically. The reason for this limitation is because South Africa has already confirmed the position on labour protection for foreign nationals in a landmark judgment⁷ and therefore this is not necessarily a challenge when accessing the labour market however, the practical difficulties associated with obtaining work authorisation in South Africa from an immigration perspective are still open for debate. This study proposes to discuss the possible drawbacks, the criticisms and the counter-arguments with a view to understanding the challenges that foreign nationals face when accessing the labour market.

2. An overview of *Discovery*

The position surrounding foreign nationals' recourse to the Labour Relations Act⁸ has already been confirmed in the *Discovery* case.⁹ This important judgment has already clarified the above-mentioned position on foreign nationals' right to the South African Labour Relations Act. In addition, an outline of the Labour Court's reasoning as well as the facts of the case are worth deliberating as a preliminary note to further the discussion on the actual immigration process in South Africa which will follow below. The reason for opening this study with a discussion on the *Discovery* case is because the facts of the case relate to how immigration compliance affects access to the labour market and although the judgment confirms the position on where the Labour Relations Act comes into play, the challenges of obtaining and maintaining work authorisation in South Africa require further discussion.

⁷ n 1 above.

⁸ Act 66 of 1995.

⁹ n 1 above.

Van Niekerk AJ confirmed that the right to fair labour practices¹⁰ is a fundamental right and that the legislation regulating the employment of foreign nationals¹¹ does not intend to limit this right.¹² Van Niekerk AJ argues that there is sound reasoning behind a construction of section 38(1) of the Immigration Act¹³ that does not limit the right to fair labour practices.¹⁴

Section 38(1) of the Immigration Act¹⁵ provides that no person shall employ an illegal foreigner; a foreigner whose status does not authorise him or her to be employed by such person; or a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.¹⁶ This section of the Act not only prescribes the duties and obligations of employers with respect to illegal foreign nationals, the section also confines those foreign nationals with valid work authorisation to the specific conditions of their work visas. This is important to note because being confined to the conditions on a work visa ultimately means that work visa holders are restricted in terms of their employment and not authorised to change employers without first changing the conditions on their work visa.

In *Discovery*, Van Niekerk AJ argues that if section 38(1) were to render an employment contract concluded with a foreign national who does not possess a valid work visa void, it would be easy to imagine the unfair consequences that might follow.¹⁷ This judgment confirms that by criminalising only the conduct of an employer who employs a foreign national who does not hold a valid work visa, the aim of the legislature was not to render the employment contract invalid.¹⁸ Further to this, Van Niekerk AJ argues that even if the contract of employment is considered invalid (hypothetically), the protection afforded against unfair labour practices in section 23(1) of the Constitution¹⁹ is not dependent on a contract of employment.²⁰

Following this argument, the third respondent was regarded as an "employee" defined within the parameters of the Labour Relations Act²¹ and it was decided that the CCMA had jurisdiction to handle the third respondent's unfair dismissal dispute that was initially

¹⁰ s 23(1) of the Constitution of the Republic of South Africa, 1996.

¹¹ s 38 of the Immigration Act 13 of 2002.

¹² par 29.

¹³ Act 13 of 2002.

¹⁴ par 30.

¹⁵ n 12 above.

¹⁶ s 38(1)(a) – (c).

¹⁷ n 13 above.

¹⁸ par 32.

¹⁹ n 9 above.

²⁰ par 41.

²¹ s 213 of the Labour Relations Act 66 of 1995.

referred. The significance of this judgment should not be diluted and the purpose of this discussion is not to undermine the outcome in any respect. The facts of the *Discovery* open another discussion which relates to challenges that foreign nationals face; not just access to South Africa's labour legislations but also, challenges and restrictions associated with South African immigration compliance.

From a broader perspective, it will be argued below that although immigration requirements are necessary, it may be more beneficial to relax these rules where regional economic integration is concerned and the encouragement of freedom of movement. This is discussed further in the relevant section below.²²

2.1. The facts

It is important to confirm that the facts in *Discovery* are mentioned only to open the discussion into how immigration requirements are, to some extent, excessively challenging for foreign nationals in South Africa. This discussion will lead to an evaluation on how freedom of movement is crucial to the successful integration of regional instruments in Africa and why regional economic integration is important but to start, immigration requirements are necessary to filter the number of foreign nationals who take up employment in South Africa and this cannot be undermined given the high unemployment rate within the local population. What is being discussed here are the shortcomings that stem from applying these principles in practice and their effect on those foreign nationals who do meet the qualify criteria to access the South African labour market and who would therefore benefit the market. Please note that here there is an important distinction regarding the type of foreign nationals being discussed; reference will be limited to foreign nationals who have professional skills and who are eligible for work authorisation as opposed to a wider group of migrants. The reason for this distinction is not to undermine the importance of discussions on migrant workers but rather to limit the scope this paper.

Before unpacking some of the facts in the important *Discovery* judgment, it should first be mentioned that these facts were not necessarily agreed upon between the parties. Van Niekerk AJ confirms that the history of the dispute is recorded on the basis that not all of the facts are necessarily agreed and with the intention of placing the issue of the CCMA's jurisdiction in

²² See page 24.

context and to give coherency to his judgment.²³ The reason for making this observation is that part of this discussion will make reference to the facts of the case as they are mentioned in the case law for purposes of this study.

The third respondent, Lanzetta, obtained a work visa which permitted him to work in South Africa until 31 March 2004. He then applied to extend this work visa and obtained an extension to work for a company until 31 December 2005. This work visa was the subject of the dispute.²⁴ Discovery Health, not associated with this company, offered Lanzetta employment with effect from 01 May 2005 which was accepted by Lanzetta.²⁵ Lanzetta claimed that during September 2005 he requested his manager to provide him with the documentation required to renew his work visa expiring in December of that year and that due to the delay in receiving the documentation, his work visa expired.²⁶

There are a number of points which should be mentioned from the outset when considering these facts. Firstly, section 38(1)(c) of the Immigration Act²⁷ prohibits South African employers from employing foreign nationals whose visa status does not allow them to work specifically for that employer. It can be argued that Discovery Health should not have extended an offer of employment to Lanzetta without reviewing his current immigration status and/or before requiring Lanzetta to first change the conditions of his work visa to indicate that he would be employed with Discovery Health. The Employment Services Act²⁸ which was recently promulgated on 9 August 2015 mentions in section 8(1) that an employer may not employ a foreign national in South Africa prior to such foreign national producing an applicable and valid work permit issued in terms of the Immigration Act. Although this provision has come long after the *Discovery* case, it reinforces the position in section 38(1)(c) of the Immigration Act regarding duties of employers.

Prior to the Employment Services Act, an important consideration would have been that foreign nationals when taking up employment are reliant on their South African employers to ensure that they (the employers) are compliant with the relevant immigration requirements on the employers' part. In addition, foreign nationals also rely on their employers to provide the necessary documentation to the Department of Home Affairs to comply with the law. This

²³ par 6.

²⁴ par 8.

²⁵ par 6.

²⁶ par 6.

²⁷ Act 13 of 2002.

²⁸ Act 4 of 2014.

dependency highlights the vulnerability of foreign national employees in a foreign labour market.

Secondly, Lanzetta made an allegation that due to the slowness of Discovery Health with providing the required documents for his work visa application, the work visa expired. This allegation opens up an interesting discussion on the practical implications of the immigration requirements in South Africa, particularly against the backdrop of the recent amendments that came into effect in May 2014. It can be argued that a number of the amendments create new found hurdles for foreign nationals in accessing the labour market in South Africa and this will be discussed below with reference to the immigration requirements in South Africa as well as the practical implications of the recent changes to immigration policy.

Lastly, the view that foreign nationals are vulnerable persons in the South African labour market initiates an interesting debate on the responsibilities of South African employers to ensure immigration compliance versus foreign nationals' access to the South African labour market. One may argue that employers who employ foreign nationals are in an exceptional position of power, perhaps more so than compared to what they would be in an employment relationship with a South African citizen or permanent resident, as not only does the employment relationship sway in favour of the employer but to a large extent, the foreign national's immigration status in South Africa is dependent on this relationship as in most circumstances, proof of an employment relationship with a local South African employer must be presented to the Department of Home Affairs when filing an application for a South African work visa.

3. South African Immigration

This part of the paper discusses the impact of South African immigration requirements on foreign nationals' access to the labour market. With particular reference to the immigration amendments, this section aims to unpack the practical issues that have followed the amendments whose purpose is not only to consider the need to employ South African citizens, but also to effectively facilitate the transfer of foreign skills to the local workforce and encourage foreign investment in South Africa. By understanding the administrative challenges of immigration requirements, the aim of this section is to illustrate this impact on

the freedom of movement (with a view to taking up employment) of foreign nationals in advance of the discussion on regional economic integration below²⁹.

3.1 The immigration amendments

The South African Amendment Acts³⁰ came into operation on 26 May 2014³¹ in line with the 2014 Immigration Regulations.³² The amendments brought about a number of changes to South African immigration compliance and although many of these changes are positive, a number of changes can be criticised when viewed from a practical perspective.

The Minister of Home Affairs, Minister Malusi Gigaba, released a media statement to announce the implementation of the 2014 amendments and in his responses to the media, he discussed the purpose of the amendments and what the Department of Home Affairs hopes to achieve with the new provisions.³³ What is evident from the Minister's responses is that the Department of Home Affairs aims to ensure that they effectively manage immigration in the interests of the country's security on the one hand, and on the other hand that they contribute to economic development.³⁴

The Department of Home Affairs' goal to balance these two interests is noteworthy and this discussion is not aimed at criticising this objective nor is it challenging the need to filter foreign nationals who enter South Africa to take up residence and employment. The interests of South Africa's own citizens and permanent residents who are unemployed should not go unnoticed. However, those foreign nationals who satisfy the immigration requirements arguably face unnecessary challenges and this impedes their access to the South African labour market. This aspect is what this section aims to explore as a precursor to the discussion below on the evaluation of regional integration in Africa and the impact that it has on labour mobility.

²⁹ See page 21 below.

³⁰ Act 3 of 2007 and Act 13 of 2011.

³¹ "Media Statement and transcript by Minister Malusi Gigaba on the new Immigration Regulations" Pretoria 28 May 2014. <http://www.dha.gov.za/index.php/statements-speeches/465-minister-malusi-gigaba-s-address-on-new-immigration-regulations-pretoria-28-may-2014> (07-10-2015).

³² Immigration Regulations to the Immigration Act 13 of 2002.

³³ n 31 above.

³⁴ above.

3.1.1 Overview of the advantages

Firstly, it is important to begin with explaining that a number of the new amendments have not necessarily been negatively received and arguably bring positive changes to the current immigration process in South Africa. Although the new changes may require foreign nationals to meet extra criteria and make additional administrative efforts to comply this, weighed up against the advantages of ensuring developmental and security measures, is justified.

The validity period of Intra-Company Transfer visas has been increased to 48 months whereas previously it was 24 months.³⁵ It can certainly be argued that this is a positive change and therefore an added advantage for foreign nationals who enter South Africa on an Intra-company transfer for an international secondment with the South African affiliate company of their employer abroad. Increasing the permissible validity period postpones the need to file an application to renew the visa since an international assignment in South Africa can now be for a duration of up to 48 months. As a result, the bulk of renewal applications filed with the Department of Home Affairs is reduced as well as the administrative burden on employers and foreign nationals to obtain the required documents in time to file a renewal application.

Although the above-mentioned amendment is an advantage of the 2014 amendments, it does not necessarily associate with direct access to the South African labour market as the Intra-company Transfer visa category is not designed for local employment in South Africa but rather, international assignments where the foreign nationals in question retain employment with their home company abroad. Regulation 18(8) of the regulations confirms that an application for an Intra-company Transfer visa shall be accompanied by the foreign national's employment contract with the company abroad and a letter confirming that the foreign national will be *transferred* to a branch, subsidiary or affiliate of that company in South Africa.³⁶ It is important to note the distinction between visa categories which require foreign nationals to obtain local employment within South Africa and those which pertain to international secondment packages as this distinction separates those foreign nationals who enter South Africa for purposes of finding local employment from those who are merely entering to work on an international assignment. For purposes of this study, access to the labour market refers to obtaining local employment. The amendment to the Intra-Company

³⁵ reg 18(10) of the Immigration Regulations to the Immigration Act 13 of 2002.

³⁶ reg 18(8)(a) – (b)(i).

Transfer visa mentioned above is merely done so to acknowledge a positive change as a result of the Amendment Acts.

The amendments introduced a new visa category called Critical Skills.³⁷ This category has replaced the abolished Quota permit³⁸ and Exceptional Skills permit³⁹ and has been introduced in order to attract specific skills to the South African labour market that are deemed critical and likely to advance national interest.⁴⁰ The Department of Home Affairs chose to publish these skills in a list through government gazette on 3 June 2014.⁴¹

There are advantages for foreign nationals who qualify and obtain work authorisation under the Critical Skills visa category, namely that a Critical Skills work visa may be obtained without first securing employment in South Africa (provided that proof of employment is shown to the Department of Home Affairs within 12 months of issuance of the visa⁴²) and that holders of a Critical Skills work visa are immediately eligible to apply for permanent residence.⁴³ One may therefore argue that the Critical Skills visa category attracts foreign nationals with skills that are deemed important to the South African labour market and such these foreign nationals are eligible for long-term South African work authorisation by virtue of their skills.

With the implementation of the amendments and new regulations, the Department of Home Affairs has partnered with a third-party vendor called VFS (Visa Facilitation Services) Global. Pursuant to the Department's goal of modernising the immigration process "by overhauling the administration of the permitting process,"⁴⁴ the Department has appointed VFS Global to receive visa applications on its behalf while still retaining the responsibility of deciding on the outcomes of visa applications. This decision is undoubtedly a progressive move made by the Department of Home Affairs with an aim to "strengthen South Africa's

³⁷ s 19(4) of the Immigration Amendment Act 13 of 2011.

³⁸ s 19(1) of the Immigration Act 13 of 2002.

³⁹ s 19(4).

⁴⁰ "Overview of the new immigration laws and regulations and their implications by Home Affairs Director-General Mkuseli Apleni at the information session for Members of Parliament" Parliament 23 April 2015 <http://www.dha.gov.za/index.php/statements-speeches/600-overview-of-the-new-immigration-laws-and-regulations-and-their-implications-by-home-affairs-director-general-mkuseli-apleni> (07-10-2015).

⁴¹ Government Gazette 3 June 2014 No. 459.

⁴² n 38 above.

⁴³ s 27(a)(ii) of the Immigration Amendment Act 13 of 2011.

⁴⁴ "Media Statement and transcript: Minister Malusi Gigaba's address to the department's weekly media briefing on the new Visa Facilitation Centres" Pretoria 05 June 2014 <http://www.dha.gov.za:8087/index.php/statements-speeches/468-minister-gigaba-address-to-the-departments-weekly-media-briefing-on-the-new-visa-facilitation-centres-pretoria-5-june-2014> (07-10-2015).

immigration policy to meet the country's goal of transforming the economy, attracting investment, creating sustainable jobs and improving the lives of our people.”⁴⁵

Another progressive step taken by the Department of Home Affairs was the opportunity for South African companies to apply for Corporate Account status through the Department of Home Affairs Directorate: Corporate Accounts. The Directorate partnered with the Gauteng Growth and Development Agency (GGDA), the Gauteng Investment Centre (GIC) and VFS Global to establish a “premium One-Stop-Shop for visa and permit renewals and a put in place a shorter, more efficient process for visa applications of foreign nationals employed by corporate companies.”⁴⁶

Foreign nationals who wish to take up local employment in South Africa perhaps encounter greater challenges to meet the relevant immigration criteria for a number of reasons. The visa categories that are intended for foreign nationals who wish to take up local employment in South Africa have undergone changes and although some of the amendments are positive strives forward, some of the amendments are arguably impractical and encumber lawful access to the South African labour market.

3.2. Access to the labour market: law and policy

3.2.1. Processing times

It may be argued that the time it takes the Department of Home Affairs to process a work visa application can affect a foreign national's access to the labour market in South Africa. If one examines the service level agreement of the Department of Home Affairs through VFS in South Africa, applications filed through the standard processing centres should take approximately 8 weeks to be finalised and those submitted through the Premium Processing centre should be finalised within 4 weeks. This is based on current information available on the VFS Global website.⁴⁷ In addition, work visa applications that are filed by foreign nationals at the relevant South African consular post in their country of origin or residence are handled in accordance with the particular consular post's processing time. The processing times in this regard may vary from consular post to consular post.

⁴⁵ above.

⁴⁶ Government Gazette 12 May 2015 No. 386.

⁴⁷ http://www.vfsglobal.com/dha/southafrica/_/07-10-2015.

Immigration service providers publish alerts through online subscriptions that give us an indication of delays with the adjudication of applications. Fragomen Worldwide⁴⁸ as one example, regularly publishes information on its website regarding changes in immigration processes and anticipated delays. For instance, on 03 September 2015 Fragomen issued an alert with respect to delays as a result of the VFS online portal undergoing system maintenance.⁴⁹ More recently, on 28 October 2015 Fragomen issued an alert describing the delayed adjudication process taking place at the South African consular missions in India.⁵⁰

Arguably there are number of reasons why delays occur during the adjudication process but these reasons would only be known internally by the immigration officials themselves and this information would not likely be made available to the public. From a practical perspective, one may presume that delays in processing times occur as a result of high application volumes during peak periods; understaffed processing centres and South African consular missions abroad; or perhaps a bottleneck as a result of the unavailability of senior officials who are required to take the final decision on pending applications.

3.2.2. Extensions and changing conditions of employment

Foreign nationals who have obtained a work visa to take up local employment and wish to either extend their visa or change the conditions of their current visa in order to take up employment with a different South African employer can be left in quite a predicament.

Section 38(1)(b) of the Immigration Act⁵¹ provides that no one shall employ a foreign national whose immigration status does not authorise him or her to be employed by such person. A literal interpretation of this provision implies that those foreign nationals whose current work visa is coming up for expiry should not continue working past their visa expiry date until their immigration status is renewed. This implication suggests that even if an application to renew their current work visa is pending with the Department of Home Affairs, to continue working would be conducting work activities prematurely and that the foreign national should wait until the successful outcome of that application is received. This begs

⁴⁸ <https://www.fragomen.com/> (07-10-2015).

⁴⁹ “Online Visa Portal Unavailability Likely to Cause Delays” 09 September 2015 <https://www.fragomen.com/knowledge-center/immigration-alerts#!24466> (07-10-2015).

⁵⁰ “Work Permit Applications Delayed at South African Mission in India” 09 September 2015 <https://www.fragomen.com/knowledge-center/immigration-alerts#!25111> (07-10-2015).

⁵¹ s 38(1)(b) of the Immigration Amendment Act 13 of 2011.

the question, if a foreign national is merely renewing a work visa on the same terms that the visa was initially granted, is it fair that they must stop working beyond the expiry of their initial work visa until the renewal of same is finalised, particularly if there are delays with the processing of applications as discussed above under 2.2.1?

In reality, one may agree that South African employers who have foreign nationals in this type of situation will require them to continue working while their applications are pending to avoid disrupting business operations however, the legislation does not provide clear guidance on this. It begs the question; should the foreign national discontinue work beyond the expiry of his or her work visa until the renewal application is finalised or, by the very fact that the foreign national has filed an application to renew, may the foreign national continue working until the outcome of his or her work visa is received? Without clear guidance from the legislation, a delayed processing time in the adjudication of a pending application in the above-mentioned scenario could arguably lead to non-compliant behaviour of employers and foreign nationals or unnecessarily obstruct business operations where foreign nationals are required to discontinue working until their immigration status has been renewed.

3.2.3. Professional Bodies

Regulation 18(5)(b) of the Immigration Regulations provides that foreign nationals who wish to apply for a Critical Skills work visa must provide proof of membership with a South African professional body, council or board recognised by the South African Qualifications Authority. In addition, foreign nationals must also provide written confirmation from the professional body attesting to their skills and academic credentials.

The implications of the requirements in Regulation 18(5)⁵² are that firstly, those South African professional bodies who have the relevant accreditation⁵³ receive applications for membership from foreign nationals for the purposes of obtaining a Critical Skills work visa. One could argue that a foreign national who does not qualify for membership with the specific professional body that regulates their field of work should therefore by implication not qualify for a Critical Skills work visa. This argument does appear to be aligned with

⁵² reg 18(5) of the Immigration Regulations to the Immigration Act 13 of 2002.

⁵³ reg 18(5)(a)-(b).

Regulation 18(5) as it stipulates that an application for a Critical Skills work visa shall be accompanied by proof that the applicant falls within the Critical Skills category in the form of confirmation in writing from the professional body and proof of application for a certificate of registration with the professional body.⁵⁴

However, this argument does not take into account the diversity of professional bodies in South Africa and the varying requirements and discretion for obtaining membership that are applicable. In addition, it can be debated that the requirement to provide proof of an application made to obtain membership with the relevant professional body in Regulation 18(5)(b) is problematic and the legislation does not provide further guidance on this aspect. Ultimately, foreign nationals who meet the main qualifying criteria for a work visa under the Critical Skills category could be confronted with the challenge of an inconsistent, extensive and time-consuming process to register with the relevant professional body in their chosen field of work.

Due to the variation of requirements and processing times of the different professional bodies in South Africa, the process to obtain professional membership is not consistent for foreign nationals and this results in an unequal application process for Critical Skills work visas overall. A good example to highlight the inconsistency can be taken from the process to obtain membership with the Engineering Council of South Africa or 'ECSA' as it is commonly known. Should a foreign national apply for a Critical Skills under the Engineering category, he or she would be required to first obtain membership with ECSA and produce proof of such membership in the work visa application. In order to obtain membership with ECSA, an application must be filed with the council and this application process may take up to 8 months.⁵⁵

ECSA has its own independent process to evaluate foreign qualifications and therefore obtaining membership is not simply a matter of submitting documents and paying a membership fee like it would be with some professional membership applications for

⁵⁴ n 52 above.

⁵⁵ Please note that the Engineering Council of South Africa has an official website however, they have not published the above-mentioned processing time nor are they willing to confirm same in writing. The application processing time referenced above is taken from what is experienced in practice and this in itself is subject to change depending on the capacity of the Council at any given point in time. Efforts have been made to reference the above statement including regular monitoring of the website for any changes in relation to the publishing of the application processing time.

example, the South African Institute of Business Accountants or commonly known as 'SAIBA'.⁵⁶ The vast difference in processing times and requirements to obtain the correct professional membership certainly poses a challenge to foreign nationals who wish to obtain work authorisation under the category of Critical Skills and arguably it also creates an unequal and inconsistent process for foreign nationals who qualify under different Critical Skills occupation categories.

If one compares the membership process of ECSA with that of SAIBA, it becomes clear that the process to obtain a Critical Skills work visa is not uniform for every foreign national as the professional registration process may differ drastically by virtue of the particular category that they would be applying under. Those who fall within the Business, Economics and Management Studies category⁵⁷ and within that, the External Auditor sub-category, and who choose to obtain membership through SAIBA would obtain membership far quicker and easier than those who fall within the Engineering category and are required to apply for membership with ECSA for example.

Comparing ECSA and SAIBA is merely one example of the divergence and capricious nature of the registration process for the different Critical Skills categories. What may also be considered a challenge is the lack of guidance as to which professional body should be applied for. As mentioned above, the professional body must be accredited by the South African Qualifications Authority and as such, the pool of professional bodies that can be approached for membership for the purposes of obtaining a Critical Skills work visa is limited to those bodies who have the relevant accreditation. In addition, there is no mention of how the correct professional body should be identified.

Regulation 18(5)(b)⁵⁸ stipulates “proof of application for a certificate of registration with the professional body, council or board recognised by SAQA” and what is not clear is the mention of “proof of application” and how this requirement is meant to support the purpose of requiring foreign nationals, who wish to obtain work authorisation under the Critical Skills work visa category, to obtain membership with the relevant professional body. “Proof of application” for instance, could simply mean evidence that an application has been made to

⁵⁶ <https://saiba.org.za/joinus/membership> (07-10-2015).

⁵⁷ *Government Gazette* 03 June 2014 No. 459 14.

⁵⁸ Immigration Regulations to the Immigration Act 13 of 2002.

register with a professional body such as a receipt or confirmation email from the body or council that an application has been received.

“Proof of application” is not defined in the Regulations and if one interprets the requirement literally, the meaning relates to proof that the foreign national has made an application to the relevant professional body to obtain membership (which would be issued in the form of a certificate of membership). The implication of this is that the outcome of the registration application does not have to have been issued by the professional body in order for the foreign national to apply for a Critical Skills work visa. One has to question the purpose of this specific requirement especially since the overall purpose of obtaining membership with the relevant professional body is to indicate that the foreign national falls within the applicable Critical Skills category. As such, even a purposive interpretation would indicate that only mere evidence of applying to obtain membership is the requirement envisaged by the legislation.

This questions the feasibility of having foreign nationals incur the costs and delays associated with obtaining membership with a professional body as according to the legislation, only proof of application is required. The legislation does not mention in what form this proof should come in nor does it mention that foreign nationals should maintain continuing membership with the professional body for the duration of their work visa. Presumably, one would expect membership to be maintained however, if mere proof of membership is required to support the work visa application, the purpose of obtaining membership as a qualifying criterion of the Critical Skills category appears to be nonsensical. The implications of this are not necessarily a direct challenge to obtaining membership to support the work visa application but would require foreign nationals to satisfy a qualifying criterion with very little guidance.

What may also be considered a challenge is the absence regarding how membership with the appropriate professional body must be determined. Regulation 18(5) nor the Critical Skills Occupation List make any mention of how one must identify the correct professional body to obtain membership. The only requirement mentioned is that the professional body must be accredited by the South African Qualifications Authority in terms of section 13(1)(i) of the

National Qualifications Framework Act.⁵⁹ For a number of Critical Skills sub-categories, identifying the appropriate professional body is not a challenge as there is only one accredited South African professional body to join. For instance, those foreign nationals who wish to obtain a Critical Skills work visa under the IT category⁶⁰ would more than likely apply for professional membership with the Institute of Information Technology Professionals South Africa (IITPSA).⁶¹ The IITPSA is currently the only body for information technology professionals that is accredited by SAQA and therefore, no further deliberation is necessary provided that foreign nationals fall directly into the relevant Critical Skills IT sub-category.

3.2.4. Department of Labour Requirement

The 2014 Immigration Regulations introduced a new requirement for the General work visa⁶² and Corporate visa categories that requires participation from the Department of Labour.⁶³ Regulation 18(3)(a)(i)⁶⁴ stipulates that an application for a General Work visa must be supported with a certificate from the Department of Labour confirming that despite a diligent search, a suitable citizen or permanent resident with credentials equivalent to those of the applicant has not been found. Equally, Regulation 20(1)(b)(i)⁶⁵ provides that an application for a Corporate visa shall be accompanied by a certificate from the Department of Labour confirming that despite a diligent search, the corporate application (employer) was unable to find suitable South African citizens or permanent residents to occupy the position available in the company.

According to Director-General Mkuseli Apleni, the aim of the above-mentioned Department of Labour requirement (as well as all the 2014 immigration amendments) is aligned with the overall purpose of the Department of Home Affairs to ‘better manage immigration in a way that balances South Africa’s openness to travellers as well as developmental and security imperatives.’⁶⁶ It is credible that the aim of the Department of Home Affairs to involve the Department of Labour in these applications contributes to an immigration process which first

⁵⁹ Act 67 of 2008.

⁶⁰ n 53 above.

⁶¹ <http://www.iitpsa.org.za/critical-skills-visa/> (07-10-2015).

⁶² s 19(2).

⁶³ s 21.

⁶⁴ Immigration Regulations to the Immigration Act 13 of 2002.

⁶⁵ above.

⁶⁶ n 40 above.

considers South African citizens and permanent residents who may have the relevant skills and/or qualifications to occupy the positions instead of foreign nationals. This imperative is not being challenged in this discussion, particularly in light of the issue of unemployment in South Africa.

In addition, the Immigration Act provides that a General work visa may be issued to a foreign national who does not fall within the Critical Skills immigration category.⁶⁷ In theory, it seems appropriate that employers who wish to sponsor foreign nationals who do not possess skills that are deemed critical should prove that the South African labour market has been considered.

What is of relevance is the practical implication of this requirement and how foreign nationals (and to an extent, prospective South African employers) are faced with an added administrative challenge of obtaining a recommendation from the Department of Labour. Current IFP leader (and ex-Minister of Home Affairs) Prince Mangosuthu Buthelezi MP writes in a recent article that the Department of Labour is ill-equipped to certify that foreign nationals applying for the relevant work visa have the required skills and will not be taking the job opportunity from a South African.⁶⁸

Buthelezi argues that when he entered the Department of Home Affairs in 1994, immigration policy required a complete transformation as it was founded on an Apartheid mentality which sought to keep “everyone out unless they fit a narrow and racist description of ‘desirable’” and that among the challenges the Department faced, was the fact that the Department of Labour was ill-equipped to provide recommendations for immigration purposes.⁶⁹ This called for a process which was more efficient and that shifted the administrative burden onto the employer and as such, the requirement for employers to prove that no suitable South African could be identified by way of advertising in the national media was introduced.⁷⁰ The justification for this requirement is that “the mere fact that an employer would accept a

⁶⁷ n 62 above.

⁶⁸ Buthelezi “SA's dysfunctional work permit system” 15 January 2015. [http://www.politicsweb.co.za/news-and-analysis/sas-dysfunctional-work-permit-system--mangosuthu-b \(07-10-2015\)](http://www.politicsweb.co.za/news-and-analysis/sas-dysfunctional-work-permit-system--mangosuthu-b (07-10-2015)).

⁶⁹ above.

⁷⁰ above.

greater administrative burden to employ a foreigner than they would to employ a citizen suggested that a need did in fact exist for the skills that foreigner provided.”⁷¹

Buthelezi highlights the fact that the Department of Labour is experiencing a backlog of applications for certificates and that “months are being added onto what is already a drawn out process.”⁷² As a result, the delays associated with this requirement arguably bring the responsibilities of administrative justice into question and may perhaps make it understandable for skilled foreign nationals to question whether the South African government is intentionally obstructing immigration processes.⁷³

4. Introduction to regional economic integration

In the previous section of this discussion, the challenges that foreign nationals face with accessing the South African labour market were explored with specific reference to South Africa’s immigration requirements. Various sections of the relevant immigration legislation were unpacked in light of some problematic implications that occur in practice. It should be noted that the importance of a comparative evaluation of the immigration requirements of other countries does not go unnoticed however, the scope of the previous section is limited to South Africa because it is a destination of choice for migration, particularly for Sub-Saharan African countries, and as a member state of SADC, it is a forerunner for the next study on regional economic integration in Africa.

The section below discusses how South Africa, as a significant member state within the region of the Southern African Development Community (SADC) and as a destination of choice where employment opportunities are concerned, is not adequately participating in regional economic integration through SADC as an instrument of economic integration. In addition, a discussion on the role of regional instruments that includes a comparative analysis and a wider argument on how freedom of movement and access to employment are key for successful integration is also encompassed below.

It should also be noted that in the previous section, the discussion was aimed at global foreign nationals with a view to and without limiting the discussion to foreign nationals within the Sub-Saharan Africa region. The discussion below will focus mainly on nationals within specific geographical regions of Africa with respect to the discourse on freedom of

⁷¹ above.

⁷² above.

⁷³ above.

movement and access to work within regional economic communities. Although there is a distinction regarding foreign nationals here, the main concern is the challenge that foreign nationals face when attempting to access another labour market. Lack of participation in regional economic integration by neighbouring states is perhaps the wider challenge that foreign nationals face when attempting to access neighbouring labour markets within the specific community of integration.

The Southern African Development Community (SADC) consists of 14 member countries within the Southern African region and came into existence in 1992 following the collapse of Apartheid in South Africa. One of the purposes of SADC outlined in Article 5 of the SADC Treaty is the “progressive elimination among member states of obstacles to the free movement of capital and labour, goods and services, and of people.”⁷⁴ This purpose is also informed by the Lagos Plan of Action and Abuja Treaty which aim to use regional economic communities to achieve an African Economic Community.

The free movement of persons and the free flow of other economic factors facilitates regional economic integration however, the desire for this has not always been received positively by state leaders, especially with reference to SADC. The Draft Protocol on the Free Movement of Persons in SADC (here on out referred to as the Draft Protocol)⁷⁵ has not been ratified as it has failed to be accepted by South Africa, Botswana and Namibia who notably, are regarded as the strongest economies in SADC.⁷⁶ When one considers the problematic areas of immigration requirements in South Africa, regional integration, which would at least benefit citizens within the region of SADC, could eliminate some of the challenges where freedom of movement is concerned and therefore increase the prospects of labour mobility for the region.

South Africa and other opposing states argue that integration will result in drainage of skills and financial problems for neighbouring countries. However, the reality remains that migration is global phenomenon driven by human instinct and citizens of neighbouring countries will always be driven to migrate in the search of better social, political and economic opportunities. The discussion below aims to explore the common disparagements of regional economic integration by analysing regional integration and the free movement of

⁷⁴ art 5(2)(d) of the Southern African Development Community Treaty 1992.

⁷⁵ Draft Protocol on the Facilitation of Movement of Persons 1995.

⁷⁶ Williams *An Overview of migration in the SADC region* (presented at the SAMP/LHR/HSRC Workshop on Regional Integration, Poverty and South Africa’s Proposed Migration Policy, Pretoria 23 April 2002) 63 <http://www.queensu.ca/samp/Conferences/Agendas/Agenda7f.pdf> (01-02-2016).

persons in Africa with regard to examples of regional economic instruments and incorporating South Africa's response to the Draft Protocol as an example.

4.1. South Africa's response to the Draft Protocol

The first draft of the Free Movement of Persons in SADC protocol was circulated to member states in 1995 and South Africa immediately commissioned a panel of experts in the form of the Human Sciences Research Council (or HSRC) to compile an expert opinion.⁷⁷ This report included a critical commentary on the Draft Protocol and was circulated to various government departments as well as to the Cabinet and Parliamentary Portfolio Committee on the Department of Home Affairs in South Africa.⁷⁸

The HSRC report⁷⁹ levelled arguments against the Draft Protocol based on various factors and ultimately concluded that "some aspects of the Draft Protocol could well be considered by South Africa but it is recommended that no commitment towards a Schengen-type agreement be made in the foreseeable future."⁸⁰ From this statement one is led to conclude that regional economic integration and the ultimate objective of the Draft Protocol for free movement within SADC are contentious issues for South Africa. Although it is acknowledged that there may be arguments in favour of the HSRC's findings, Oucho and Crush argue that South Africa's reluctance to ratify the Draft Protocol is confusing and contradictory and in addition, the failure of the Draft Protocol's program is "ultimately foundered on the rocks of strong South African opposition."⁸¹ They also argue that the HSRC report proved to be very influential in South Africa's negative reaction to the Draft Protocol.⁸²

What can be taken from South Africa's reaction to the Draft Protocol is that the goal of free movement within SADC, which ultimately relies on the relaxation or adaptation of immigration requirements, is perhaps not considered an essential goal for South Africa as a

⁷⁷ Human Sciences Research Council "A Research Review of the Policies Surrounding the Issue of the Free Movement of People across International Borders with Specific Reference to Southern Africa and the Particular Effect Thereof on South Africa" Pretoria 1995 as referenced in Oucho and Crush "Contra Free Movement: South Africa and the SADC Migration Protocols" 2001 *Indiana University Journal* 143.

⁷⁸ above.

⁷⁹ Human Sciences Research Council "A Research Review of the Policies Surrounding the Issue of the Free Movement of People across International Borders with Specific Reference to Southern Africa and the Particular Effect Thereof on South Africa" Pretoria 1995 as referenced in Oucho and Crush "Contra Free Movement: South Africa and the SADC Migration Protocols" 2001 *Indiana University Journal* 143.

⁸⁰ Oucho and Crush (n 77) 145.

⁸¹ above 154.

⁸² above 148.

wider member state of SADC. Oucho and Crush argue that this shows South Africa's position is based more on an anti-immigration discourse than a systematic analysis of the merits and drawbacks of the proposals for freer movement within the SADC region.⁸³ An example that alludes to this argument is the primary concern which was expressed by the Department of Home Affairs namely, that free movement would make South Africa "compromise its immigration policy" and would put its citizens at great disadvantage.⁸⁴

The Department of Home Affairs commissioned the authors of the original HSRC report to create an alternative version of the Draft Protocol, here on out referred to as the South African Draft Protocol.⁸⁵ The South African version had the objectives to "facilitate the crossborder movement of citizens between states by 'gradually removing obstacles impeding such movement;' to expand bilateral agreements between states; to 'cooperate in preventing the illegal movement of citizens of Member states and the illegal movement of nationals of Third states within and into the Region' and to promote common immigration policies 'where necessary and feasible.'"⁸⁶

The South African version of the protocol did not develop any substantive proposals beyond reciprocal visa exemptions based on bilateral agreements and had more pointed objectives as opposed to the initial Draft Protocol with the main objective to confer, promote and protect the right to enter another SADC state freely and the right to reside, establish oneself and work in another state.⁸⁷ These objectives with regard to the freedom of movement are integral to effective regional integration and ultimately successfully accessing neighbouring labour markets. In the section below, the discussion will lead into an argument about how freedom of movement is important for successful regional integration and that migration is an unavoidable reality. In the first instance, one should also understand what regional integration entails and the possible drawbacks in the process. This is what will be unpacked in more detail below.

4.2. Freedom of movement and its importance for regional economic integration

⁸³ above 140.

⁸⁴ Department of Home Affairs "Memorandum on the Freedom of Movement of People across International Borders with Specific Reference to Southern Africa" Pretoria as referenced in Oucho and Crush "Contra Free Movement: South Africa and the SADC Migration Protocols" 2001 *Indiana University Journal* 143.

⁸⁵ *Government Gazette* 30 May 1997 No. 849 3.

⁸⁶ above.

⁸⁷ Oucho and Crush (n 77) 149.

“Migration is a global and natural phenomenon, a universal principal that prompts the movement of people from areas of social and economic distress to those with better economic opportunities. Migration, either local or international, could be voluntary or forced, and is usually triggered by a stimulus and a desire for better comfort and improved welfare.”⁸⁸

What can be drawn from the above statement is that migration is unavoidable, particularly where foreign nationals are in search of better political and economic opportunities and with particular regard to countries within the African continent, political unrest and financial instability are common occurrences. Access to labour markets in neighbouring or near-by countries therefore goes hand-in-hand with migration and freedom of movement is an important aspect to facilitate access to labour markets outside one’s country of origin. For purposes of this discussion, freedom of movement includes the necessary authorisation granted by a country for taking up local employment and residence.

Successful regional integration within Africa is dependent on the freedom of movement and accessibility to neighbouring labour markets. This is what will be discussed below but what should first be unpacked in more detail is what regional integration involves and how it is a relevant challenge that foreign nationals encounter in their search for work opportunities in neighbouring countries or destinations within their particular geographical region.

4.2.1. Understanding regional integration

In order to understand regional integration, it is important to first take into consideration that it is both a process and a condition. As a process, regional integration comprises the merger of activities and loyalties towards a newly established centre.⁸⁹ As a condition however, it is “the process of formation and development of institutional mechanisms through which values are authoritatively dispensed among political units in a geographical area.”⁹⁰ Therefore, for purposes of the discussion below, regional integration can be surmised as “a formal, conscious process designed to catalyse and increase interconnectedness and interrelatedness between and within a group of geographically contiguous countries”⁹¹ and ultimately this

⁸⁸ Nwonwu “The Neo-liberal Policy, Free Movement of People and Migration: Patterns in the Southern African Development Community” 2010 *Africa Insight* 149.

⁸⁹ Uzodike “The Role of Regional Economic Communities in Africa’s Economic Integration: Prospects and Constraints” 2009 *Africa Insight* 3.

⁹⁰ Adar “New Regionalism and Regional Construction: The Case of the East African Community” 2005 *Politeia* 29-30.

⁹¹ above.

process is characterised by the removal of barriers to trade and cooperation amongst neighbouring nations within a particular geographical area.

Ufo Okeke Uzodike argues that in order to resolve the challenges of economic weakness and decline, as well as the associated global economic dependence that has faced African countries, the response has been to promote regional economic cooperation and create “synergies across national boundaries.”⁹² This recourse is not unique to the continent of Africa and has been a “dominant feature of the international political economy since the second half of the 20th century.”⁹³ The creation and development of what is now the European Union is a prime example of regional integration but one should also consider other eminent integration strategies such as the Association of Southeast Asian Nations (ASEAN) and the North American Free Trade Agreement (NAFTA).

The desirability of regional integration within Africa can be linked to its “centrality in facilitating industrialisation, developing intra-African trade, reducing Africa’s vulnerability vis-à-vis the fluctuating commodity prices, enhancing Africa’s participation in the global economy, mobilising and maximising skills and capital, and promoting African unity in both the political and economic realms.”⁹⁴

The African Economic Community (AEC), established by the Abuja Treaty in 1991⁹⁵ and the Constitutive Act of the African Union (AU)⁹⁶ endorse eight regional economic communities as the “building blocks for Africa’s economic integration,”⁹⁷ namely: the Arab Maghreb Union (UMA); the Common Market for Eastern and Southern Africa (COMESA); the Community for Sahel-Saharan States (CEN-SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD); and the Southern Africa Development Community (SADC).

Uzodike contends that what can be deduced from the profiles of the above-mentioned regional economic communities is that their objectives are the same and promote the idea of integrating the economies of member states by eliminating barriers to trade, harmonising

⁹² Uzodike (n 89) 3.

⁹³ above.

⁹⁴ Asante “The Need for Regional Integration: A Challenge for Africa” 1995 *Review of African Political Economy* 574.

⁹⁵ Abuja Treaty Establishing the African Economic Community 1991.

⁹⁶ Constitutive Act of the African Union 2000.

⁹⁷ Uzodike (n 89) 6.

policies and the crystallisation of cooperation that unifies the region.⁹⁸ Notably, this involves the relaxation of immigration requirements for nationals of member states to live and work easily within the region. Being able to take up employment freely within the region of integration is a fundamental aspect to realising the interconnectedness and unity that the economic communities above aim to achieve.

In section 3 above, the issues with South Africa's immigration model were used as an example to illustrate challenges that foreign nationals face when accessing the labour market from a practical immigration perspective. A state's lack of participation in regional integration can therefore, be viewed as a wider challenge to accessing labour markets for citizens of a particular region. South Africa has been used as an example of a negative response to regional integration for its fear of what free movement within the region will produce. There are a number of fears, some which extend beyond the implications of free movement, and these fears should be acknowledged to understand why regional economic integration is a contentious issue for its critics. This will be discussed in the section below.

4.2.2. The fears of regional economic integration

The policy of regional integration does not go without criticism and it is argued that there are a number of constraints which affect the performance of regional economic communities.⁹⁹ One of the most well-known shortcomings is the issue of overlapping or multiplicity of regional communities. Many countries in Africa are member states to more than one economic community whose immediate objectives and programmes may differ however, where the action plans of these communities do not differ, countries may end up duplicating efforts and wasting resources, and in cases where there are considerable differences in the objectives of the overlapping communities, member states may adopt and implement conflicting policies.¹⁰⁰ It is argued that overlapping creates complications and retards progress a member state may become a "conduit for leakage from one [regional] arrangement to another."¹⁰¹

Examples of overlapping can be illustrated by the relationships between ECOWAS and the West African Economic Community (CEAO), and between COMESA and SADC where

⁹⁸ above 7-8.

⁹⁹ above 10.

¹⁰⁰ above.

¹⁰¹ above.

arguably, the divided loyalty and poor funding have stunted regional integration.¹⁰² In addition to overlapping are the constraints associated with the rights of residence and establishment of community nationals.¹⁰³ The issue of overlapping does not appear to have a clear solution.

Another chosen shortcoming to be discussed relates to the freedom of movement within uneven economic development among member states of a regional instrument. The resulting disadvantage of this is a brain-drain from one member state to another. The response to this problem is the theory of circular migration which will be discussed in more detail below as a precursor to the section on the role of education within the regional integration context.

The most obvious fears of regional integration can be illustrated from the South African HSRC report in response to the Draft Protocol on the Free Movement of Persons in SADC and most of these concerns stem from the general reservations on allowing freedom of movement within the SADC region. From the outset, it can be argued that all borders are porous and controls on movement are ineffectual at best¹⁰⁴ and that it is a reality that there has been more or less effective “free movement” for thousands of people within the SADC region.¹⁰⁵ This being said, for purposes of the discussion it will be valuable to understand these criticisms in relation to successful regional economic integration and its need for a free movement program in order to be effective.

i. Threat to local work seekers

The HSRC argued in its report that implementation of the Draft Protocol would increase the already unmanageable flow of work seekers to South Africa and would result in added pressure of work seekers to the availability of jobs.¹⁰⁶ In response to this, one can argue that while the number of SADC workers and work seekers legally in South Africa declined in the 1990s as the mining industry reduced, the number of undocumented workers has increased in

¹⁰² above.

¹⁰³ above 12.

¹⁰⁴ Crush and McDonald “Transnationalism, African Immigration and New Migrant Spaces in South Africa” 2000 *Canadian Journal of African Studies* 34.

¹⁰⁵ Oucho and Crush (n 77) 146.

¹⁰⁶ Human Sciences Research Council “A Research Review of the Policies Surrounding the Issue of the Free Movement of People across International Borders with Specific Reference to Southern Africa and the Particular Effect Thereof on South Africa” Pretoria 1995 as referenced in Oucho and Crush “Contra Free Movement: South Africa and the SADC Migration Protocols” 2001 *Indiana University Journal* 143.

the agriculture, construction and services sectors¹⁰⁷ yet there is no evidence that by these workers or work seekers' presence, South Africans are being deprived of work.¹⁰⁸

ii. Working conditions

The HSRC argued further that a regional labour market will lead to intensified job competition, exploitation poor working conditions.¹⁰⁹ Oucho and Crush argue that the HSRC suggests that the best way to protect non-South African workers from abuse and exploitation is not through the enforcement of minimum labour standards but to “not let them in in the first place.”¹¹⁰ They argue however that if we accept that it is impossible to do this, then we must also accept that abuse and exploitation are “far more likely when labour is ‘illegal,’ working conditions are unregulated and trade union organisation is denied.”¹¹¹

iii. Increased xenophobia

According to the report, free movement for non-South African nationals would lead to increased xenophobia amongst South Africans and violence towards non-South Africans.¹¹² The fallacy with this argument is that there is no proof that the presence of migrants necessarily disadvantages South Africans.¹¹³ The HSRC condemns xenophobia in its response yet, as Oucho and Crush argue, other than restricting the movement of foreign nationals, it has no substantial recommendations about how to counteract xenophobia and as such the implication appears to be that the best way to eliminate xenophobic attitudes is to give into their demands.¹¹⁴

The feasibility of regional economic integration will surely depend on whether the regional communities will be able to overcome these challenges.¹¹⁵

¹⁰⁷ Crush “The Discourse and Dimensions of Irregularity in post-Apartheid South Africa” 1999 *International Migration* 125 – 151.

¹⁰⁸ n 105 above.

¹⁰⁹ Human Sciences Research Council “A Research Review of the Policies Surrounding the Issue of the Free Movement of People across International Borders with Specific Reference to Southern Africa and the Particular Effect Thereof on South Africa” Pretoria 1995 as referenced in Oucho and Crush “Contra Free Movement: South Africa and the SADC Migration Protocols” 2001 *Indiana University Journal* 143.

¹¹⁰ Oucho and Crush (n 77) 147.

¹¹¹ n 107 above.

¹¹² Human Sciences Research Council “A Research Review of the Policies Surrounding the Issue of the Free Movement of People across International Borders with Specific Reference to Southern Africa and the Particular Effect Thereof on South Africa” Pretoria 1995 as referenced in Oucho and Crush “Contra Free Movement: South Africa and the SADC Migration Protocols” 2001 *Indiana University Journal* 143.

¹¹³ n 110 above.

¹¹⁴ above.

¹¹⁵ n 104 above.

4.3. Regional integration and the right to work within specific areas of integration

*“Ceding sovereignty to intergovernmental arrangements has value to the nationals of states concerned only if it results in an improvement in their material well-being, and if the sub-regional space allows human rights to prosper in ways that were impossible in the nation state.”*¹¹⁶

Although it is argued that the purpose of regional economic communities is to increase trade and improve economic conditions of member states, there is a link between human rights and one of the primary objectives of regional communities which is to improve the standard of living of their citizens and such improvement is closely linked to the realisation of socio-economic rights.¹¹⁷ Examples of such primary objectives can be taken from article 2(b) of the ECA Treaty;¹¹⁸ article 3(1) of the ECOWAS Treaty;¹¹⁹ and article 1(a) of the SADC Treaty.¹²⁰

Below, examples of the regional economic communities envisaged by the AEC will be discussed. In addition, reference will also be made to specific human rights such as the freedom of movement and the right to legally work within the regions. Some argue that member states of regional economic communities must allow free movement of persons and the right of establishment to enable community nationals to access education and work. This, it is argued, deepens regional integration as a primary objective.

Freedom of movement has been discussed in the sections above with regard to the fears of implementing regional economic integration within SADC and with respect to its importance for successful integration. Below, the right to work will be addressed in relation to regional economic integration and from the outset it should be acknowledged that freedom of movement the right to work are mutually enforcing rights. A foreign national will not be able to access the labour market if his or her freedom of movement is restricted. In addition, both these rights can ultimately increase the standard of living for citizens who are members of the economic community which is one of the primary aims behind the philosophy of regional economic integration.

¹¹⁶ Viljoen *International Human Rights Law in Africa* (2007) 495.

¹¹⁷ above.

¹¹⁸ East African Community Treaty 1999.

¹¹⁹ Economic Community of West African States Treaty 1993.

¹²⁰ Southern Africa Development Treaty 1992.

Due regard should also be given to the role of education in successful regional economic integration and how this right, next to the freedom of movement within the region, is important to the right to work within the region and how education can alleviate the fears associated with regional economic integration. This will be discussed in section 5 below.

4.3.1. The right to work

The right of community nationals to access work within the region (including the right to access education in order to qualify for work within the region) and the member states' obligation to create employment in the region are integral to economic integration in Africa and there is a mutual relationship between these categories.¹²¹ The International Covenant on Economic, Social and Cultural Rights (ICESCR)¹²² is the first binding instrument which guarantees the right to education and the right to access work.¹²³ Article 6(1) of ICESCR recognises the right to work and article 6(2) obliges states to take the relevant steps in order to protect this right.

As mentioned above, the primary aim of regional integration is to raise the standard of living of those nationals who are citizens or permanent residents of member states. Raising the standard of living can be done through the introduction of social security or through the creation of livelihoods however, it is argued that social security is not a sustainable solution to raise the standard of living as a long-term objective.¹²⁴ Therefore, the main focus should be on providing necessary tools for people to make a living for themselves and their families through the accessibility of education, employment and creation of meaningful employment opportunities.¹²⁵ Successful regional economic integration is therefore the conduit for the above-mentioned aims to be realised and a means to an end to achieve accessible employment.

For purposes of this argument, the right to work is important for the realisation of other rights and consideration should also be given to the realisation of the right to accessible education. Although the *Grootboom*¹²⁶ and *Soobramoney*¹²⁷ cases concerned matters within a national sphere, the cases demonstrate that when individuals do not have the type of employment that

¹²¹ Forere "The Relationship between the Right of Access to Education and Work, and Sub-Regional Economic Integration in Africa" 2011 *African Human Rights Law Journal* 593.

¹²² International Covenant on Economic, Social and Cultural Rights 1966.

¹²³ Forere (n 121) 593.

¹²⁴ above 598.

¹²⁵ above.

¹²⁶ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

¹²⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC).

enables them to enjoy socio-economic rights (for example: health and shelter), their human dignity is infringed. As a result, one needs to obtain a certain level of education or skills to be in a position to secure (and maintain) employment and as a result satisfy basic needs like healthcare and housing.¹²⁸ Consequently, by making education accessible as part of regional economic integration one is able to create employment opportunities for all within the area of integration.¹²⁹ In addition, education may very well be the solution to some of the fears associated with the implementation of regional economic integration. This will be discussed in the next section below.

5. Accessible and harmonised education: a response to the fears

Economic integration is largely concentrated on the penetration of state economic borders and equal treatment of local and foreign trade and investment.¹³⁰ As the objective is to create a common market within the particular region of integration, allowing free movement and adopting a common policy is unavoidable in order to achieve this goal. However, “many African states are sceptical of doing this, largely because of state sovereignty and the protection of their own economies.”¹³¹

A good example of the above-mentioned scepticism can be taken from South Africa and the regional economic instrument SADC as discussed in section 4.2.2 above.¹³² The goal of reaching a common market is hindered because of fears that once it is implemented, nationals within the SADC region will leave their home countries and flood the market in South Africa.¹³³ As a result of this concern, it is argued that apart from free trade agreements little has been done to achieve the goal of common regional markets even though being able to access work intra-regionally (labour mobility) is a key component to economic integration.¹³⁴

Labour mobility can assist with removing the barriers to trade through economic activities that are performed by regional nationals who have crossed borders to find education, work and perhaps engage in entrepreneurial activities. In addition, other sectors of labour markets that were not previously integrated may become integrated, resulting in “spillover” which is fundamental to economic development and integration.¹³⁵ Labour mobility also contributes to

¹²⁸ Forere (n 121) 599.

¹²⁹ above.

¹³⁰ above 600.

¹³¹ above.

¹³² See page 27.

¹³³ Oucho and Crush (n 77) 141-143.

¹³⁴ Forere (n 121) 600.

¹³⁵ above.

the circulation of financial capital in terms of wages¹³⁶ which arguably has the potential to alleviate poverty within the region of integration.

The freedom to move within the region of integration where there is uneven development among member states could be problematic however.¹³⁷ Using SADC as an example, South Africa as a member state is a major power and therefore there is a tendency for nationals of economically weaker states to migrate to South Africa in search of a better standard of living.¹³⁸ Apart from South Africa, Nigeria is another example as it is a major power within the ECOWAS region and therefore the same concerns regarding uneven economic development apply.¹³⁹

As a result, the above-mentioned migration improves the labour pool in the receiving country but leaves a brain drain in the sending country which is not significantly rectified by the sending back of wages to family members in the sending country.¹⁴⁰ Ordinarily, those who leave their countries of origin are young and skilled and therefore possible producers, whereas those who remain are usually consumers and dependents.¹⁴¹ The response to this result is replacement migration which may be direct or indirect: directly, replacement migration occurs when jobs left by emigrants are filled directly by incoming migrants; while indirect replacement migration occurs when the jobs of skilled emigrants are filled by workers from lower occupational positions.¹⁴² However as a result, the jobs left vacant by departing skilled workers do not attract foreign skilled labour from within the region of integration.¹⁴³

A suggested solution to the insufficiency of replacement migration is labour circulation. This involves promoting the return of emigrants to their home countries to participate in economic and human development with the skills that they have developed abroad.¹⁴⁴ As such, it is important for member states within the region of integration to strengthen their own internal

¹³⁶ Nassar *Intra-regional Labour Mobility in the Arab World: An Overview* 2010 (A report, part of a joint project between the International Organisation of Migration and the Arab Labour Organisation) 31 http://publications.iom.int/system/files/pdf/alo-iom_intra-regional_labour_mobility_en.pdf (01-02-2016).

¹³⁷ Trebilcock and Howse *The Regulation of International Trade* (2005) 9.

¹³⁸ Forere (n 121) 601.

¹³⁹ above.

¹⁴⁰ above 602.

¹⁴¹ Jovanovic *The Economics of International Integration* (2007) 99.

¹⁴² Nassar (n 136) 22.

¹⁴³ Forere (n 121) 602.

¹⁴⁴ International Organisation for Migrants “World Migration Report” 2010 53 http://publications.iom.int/system/files/pdf/wmr_2010_english.pdf (01-02-2016).

education and job creation policies.¹⁴⁵ This leads us to the following discussion on the integral role of accessible education within the region of integration and its positive impact on labour mobility.

5.1. The role of education in regional economic integration and labour mobility

It is contended that a prerequisite for regional labour mobility is accessible education and this requires that the same treatment that is given to nationals of a member state must be extended to other nationals of the region.¹⁴⁶ The educational tuition fees should therefore be the same for all nationals and visa requirements should be removed as arguably they inhibit the right to access to education within the region.

ECOWAS, through its Supplementary Protocol on the Implementation of the Third Phase of the Protocol on Free Movement of Persons, Right of Residence and Establishment (1990), aims to enable ECOWAS citizens to access employment and education from anywhere within the region without any discrimination on the basis of nationality which includes the payment of tuition fees.¹⁴⁷ Notably, this is a progressive step towards successful integration amongst member states and it goes without saying that the SADC region has not taken the same extensive steps where education is concerned.

5.2. Harmonisation of educational qualifications

The right to access education and right to access work arguably go hand-in-hand especially where economic communities have integrated and therefore, they require educational qualifications within the region of integration to be harmonised to facilitate the mobility of nationals throughout the region for accessing employment.¹⁴⁸ Further to this, it is argued that harmonising educational qualifications will expedite the return of educated migrants to their home countries which reduces the threat of a brain drain as discussed above.¹⁴⁹

If one considers the policy in South Africa (as a member of SADC) to have foreign qualifications evaluated by a local authority (the South African Qualifications Authority) to obtain results on the closest comparable or equivalent South African qualifications, the ECOWAS Supplementary Protocol on the Implementation of the Third Phase of the Protocol

¹⁴⁵ Forere (n 121) 602.

¹⁴⁶ above 603.

¹⁴⁷ above.

¹⁴⁸ Hoosen *et al* "Harmonisation of Higher Education Programmes: A Strategy for the African Union" 2009 *African Integration Review* 2.

¹⁴⁹ Forere (n 121) 602.

on Free Movement of Persons, Right of Residence and Establishment is notably, a great step forward to synchronise and harmonise education within the region and therefore pave the way for successful labour mobility of its member nationals.

Economic integration is not only focused on the removal of trade and employment barriers but it is also centred on the development of technology and infrastructure within the continent.¹⁵⁰ As such, the right to education is important because as the size of the market increases, the competition and supply of skills become “important ingredients in the complex links between technological opportunities and entrepreneurial decisions.”¹⁵¹ Research and development also play a significant role in the innovation process for sustaining a supply of knowledge¹⁵² and same are especially dependent on the population’s educational attainment creating a regional hub for technological skills and innovation.¹⁵³

6. Findings

By evaluating areas of the immigration requirements where issues of practicality come to light, the challenges that foreign nationals face in their efforts to obtain employment within South Africa become visible. These challenges are problematic mainly because they impede the free movement of persons who may happen to meet main qualifying criteria for work authorisation in South Africa and as a result, their ability to access the labour market is encumbered. With respect to the greater SADC region, regional economic integration has not been achieved in line with what the Draft Protocol entailed. South Africa’s lack of participation in the objectives of regional economic integration is an example of the wider challenge for SADC member citizens who wish to access labour markets within the economic community.

The goal to eliminate obstacles to the free movement of capital and labour, goods and services, and of people among member states of regional integration does not go without criticisms. South Africa in particular has its reservations which include: an increase in the already unmanageable flow of work seekers to South Africa and as a result, added pressure of work seekers to the availability of jobs; intensified job competition, exploitation poor working conditions; and increased xenophobia amongst South Africans and violence towards non-South Africans. The counter-arguments to the above-mentioned concerns have one thing

¹⁵⁰ above 605.

¹⁵¹ above 605.

¹⁵² Jovanovic (n 141) 99.

¹⁵³ Forere (n 121) 605.

in common, namely; that there is no evidence to suggest that these fears would become realities.

The overlapping of community membership is one set-back which does not appear to have a clear solution however, this cannot be said regarding a drain of skilled workers to a member country with better economic and social opportunities. Through circular migration and the accessibility and harmonisation of education within regions of integration, skilled citizens within the region will be able to return to their home countries as they will be in the position to do so.

Labour mobility can assist with removing the barriers to trade through economic activities that are performed by regional nationals who have crossed borders to find better opportunities however, making education accessible and harmonising educational qualifications will expedite the return of educated migrants to their home countries which reduces the threat of a brain drain as discussed above.



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