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UNFAIR LABOUR PRACTICES, LABOUR LEGISLATION AND PROTECTION OF MIGRANT WORKERS IN SOUTH AFRICA

by

THATO EDWIN PHIRI

Presented in fulfilment of the requirement for the degree of Master of Commerce (M.Com by full dissertation) in Human Resources Management

at the

School of Economic and Business Sciences

Faculty of Commerce, Law and Management

University of the Witwatersrand

Supervisor: Professor Olorunjuwon Samuel

Date: January 2015

DECLARATION

I, Thato Edwin Phiri hereby declare that this research is my own original work. It is being submitted in fulfilment of the requirements for the award of the degree of Master of Commerce (M.Com.) in Human Resources Management at the University of the Witwatersrand, Johannesburg. I declare that this work has not been submitted by the author for the award of any degree or examination in this or any other university.

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ABSTRACT

South Africa has a long history of the movement of people from one region to another with the intention of resettling to live and work. This is a phenomenon that is expected to continuously reconfigure and define everyday realities for a significant number of people in the country. Although labour migration has had a significant contribution to the development of the South African economy, there are increasing concerns about the experiences of unfair labour practices and exploitation in the South African labour market, which poses a challenge for the South African labour legislation and labour migrant workers' ability to successfully move, live and work in South Africa.

This paper investigated the experiences of migrant workers in the city of Cape Town and Johannesburg against the background of alleged prevailing cases of unfair labour practices across different industries in the South African labour market. Using a qualitative methodology, 20 domestic and international migrant workers (10 from Cape Town and 10 from Johannesburg) were interviewed using a semi-structured questionnaire developed by the researcher.

The study found abundant experiences of unfair labour practices and exploitation of migrant workers in the South African labour market. Furthermore, the study found that the perception of unfair labour practices and exploitation extended to other migrant workers across the South African labour market. Consequently, domestic and international migrant workers expressed a lack of confidence in the effectiveness of South African labour legislation to protect their labour rights. However, these workers are prepared to live with the unfair labour practices and exploitation they experience, as they have no better economic alternative available to them than the ones they currently choose.

Recommendations were made to the Department of Labour, employers of labour and migrant workers based on the findings of this study.

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To my immediate family, my mother Margaret Mrobogwane, my education is firmly built on the foundation of all your sacrifices. Words will forever disappoint how much I appreciate you. To my sister, Lumka Mrobogwane, I hope I have been a good example to you. To my grandmother, Eva Marita Phiri, I see God in you.

To my late father, Oupa Monate, I wish you were here to see all the things I'm doing. You would be so proud of your son.

To all my friends, colleagues and extended family, thank you for your kind words of support.

DEDICATIONS

This research is dedicated to:

All migrant workers of the world who are struggling to enjoy their fundamental right to work, which is important to successfully moving, working, and integrating in other regions as well as exercising other rights.

Every African child who has a dream, it is possible.

LIST OF ABBREVIATIONS

BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
CoRMSA	Consortium for Refugees and Migrants in South Africa
DoL	Department of Labour
EEA	Employment Equity Act
FIFA	Fédération Internationale de Football Association
GDP	Gross Domestic Product
ILO	International Labour Organisation
LRA	Labour Relations Act
OHSA	Occupational Health and Safety Act
PDA	Protected Disclosures Act
PSI	Private Security Industry
SADC	Southern African Development Community
SDA	Skills Development Act
UIA	Unemployment Insurance Act
UICA	Unemployment Insurance Contributions Act
UIF	Unemployment Insurance Fund
UN	United Nations

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CHAPTER 1: INTRODUCTION, PROBLEM STATEMENT AND OUTLINE OF THE STUDY

1.1 Introduction

The Southern African Development Community (SADC) region has a long history of labour migration, dating back more than 150 years (Crush, 2001). The movement of people across the various countries in the Southern African Development Community is one of the most important binding phenomena. Of the 15 SADC member states, South Africa has emerged as the destination of choice for migrant workers. The advent of democracy in South Africa (1994), coupled with favourable economic conditions, attracted internal and international migrant workers in search of better opportunities in the South African labour market. According to Hussein (1993), while labour migration across economic boundaries is not a new phenomenon in the world, patterns of movement have developed beyond moving to wealthier and more developed regions such as Europe and the United States (Selabe, 1997). Developing countries such as South Africa, with its specific locations with favourable economic climates, such as Gauteng and Western Cape, became a destination of choice for many migrant workers (Landau, 2004; McDonald, 2000; Solomon, 2003). Castles and Davidson (2000) contended that globalisation has had and will continue to have an effect on the movement of migrant workers across the globe, and more significantly, across developing regions of the world.

However, as South Africa continues to be a preferred destination due to its employment opportunities for local and international migrant workers, there are increasing reports of cases related to labour rights violations by employers of labour in South Africa (Alegi & Bolsmann, 2010; Crush, 2001; Daniele, 2007; Human Rights Watch, 2001; Kok, 2006). Cases related to labour rights violations by employers of labour in South Africa instigate the narrowing of labour rights in the labour market, consequently undermining provisions of certain sections of the Constitution of the Republic of South Africa (e.g. §23(1)) which state *inter alia* that everyone has the right to fair labour practice. 'Everyone' must therefore make provision for the protection of economic migrants – both local and foreign – who participate in the South African labour market.

The Labour Relations Act 66 of 1995 (the LRA) defines 'unfair labour practice' as 'any unfair conduct by the employer relating to issues such as promotion, demotion, probation,

training or provision of benefits to an employee' (§186(2)). Other unfair labour practices, according to the LRA, include unfair suspension or any other unfair disciplinary action short of dismissal in respect of an employee. A full discussion of the unfair labour practices in question is provided in Chapter 2 of this dissertation.

South Africa prides itself on and celebrates having one of the most progressive constitutions in the world (Crush, 2001). The South African labour relations practice is regulated by acts of constitutionally inspired legislation such as the Basic Conditions of Employment Act no. 75 of 1997 as variously amended (hereinafter referred to as BCEA as amended), the Labour Relations Act no. 66 of 1995 as variously amended (hereinafter referred to as LRA), and the Employment Equity Act no. 55 of 1998 (hereinafter referred to as EEA). Other labour legislation includes the Occupational Health and Safety Act no. 181 of 1993 (hereinafter referred to as OHSA), the Compensation for Occupational Injuries and Diseases Act no. 61 of 1997 (hereinafter referred to as COIDA), the Skills Development Act no. 97 of 1998 (hereinafter referred to as SDA), the Unemployment Insurance Contributions Act no. 4 of 2002 (hereinafter referred to as UICA), and the Unemployment Insurance Act no. 63 of 2001 (hereinafter referred to as UIA). The main purpose of enacting the various labour legislations is to enable greater protection of all employees due to the enormous power imbalance between employers and employees. The various legislations provide both employees and employers with guidelines, procedures and policies which regulate relationships between the parties in order to bring about harmonious and peaceful labour relations in the workplace. Provision of the various labour legislations are derived essentially from the principles that are entrenched in the Constitution of the Republic of South Africa (1996) (the Constitution) and other international sources such as the International Labour Organisation. Labour practices in the workplace are equally regulated by provisions of the International Labour Standards, Collective Agreements entered into between employers and employees or the unions to which they belong, Contracts of Employment and the Common Law.

The Constitution duly acknowledged the International Labour Organisation (hereinafter referred to as the ILO) as the foremost source of its labour dispensation (Cheadle, 2006). The ILO is an international function of the United Nations (hereinafter referred to as the UN) which seeks to promote issues primarily related to labour rights and social justice for all parties in employment relationships (Bhorat & van der Westhuizen, 2008). As such, the interpretation and application of various provisions of the South African labour legislation must comply with specific sections (e.g., section 23) of the Constitution and International

Labour Standards. The Constitution provides a legal basis for protection against labour rights violations for every person in the South African labour market.

1.2 Research problem

The ability of both internal and international migrant workers to successfully move, work, and integrate into their areas of employment and enjoy constitutionally guaranteed labour rights depends on the extent to which such rights are protected. The South African labour relations practice is widely acknowledged to be largely consistent with international standards. However, the labour relations environment in South Africa is constantly challenged by cases of unfair labour practices across the country's labour landscape (Kok, 2006). While it is generally believed that unfair labour practices are only experienced by international migrant workers (Consortium for Refugees and Migrants in South Africa (CoRMSA), 2011), a study by the African Centre for Migration and Society (2010) revealed that both internal and international migrant workers are subjected to similar degrees of unfair labour practices. The study identified the following as some of the pronounced areas in which unfair labour practices are perpetuated: undocumented contract of employment, unfair dismissals, and deprivation of entitlements and employment benefits (e.g., sick leave and contributions to the unemployment insurance fund (UIF)). An employment relationship without a documented contract of employment increases workers' vulnerability to unfair labour practices and deprivation. There is documented evidence to show that many workers are being subjected to long working hours under poor working conditions and remunerated below the minimum wage stipulated by the BCEA (CoRMSA, 2011). Unfair labour practices are not limited to any particular industry or geographic location, but are spread across various sectors of the South African labour market (The Human Rights Watch, 2011).

Furthermore, the prevalence of unfair labour practices in the employment landscape of South Africa has recently become a prominent subject of academic investigation because of its violation of certain constitutional provisions and labour legislation, which has profound negative implications on the livelihood and dignity of workers, and migrant workers in particular (CoRMSA, 2011). The problem under investigation is further exacerbated by the paucity of scholarly literature which specifically focuses on the protection of both internal and international migrant workers. Consequently, very little is currently known about the extent to which migrant workers enjoy labour protection or suffer unfair labour practices. This reality poses questions about South Africa's capacity and commitment to uphold the

protection of workers' rights, as stipulated by the ILO and the Constitution of the Republic of South Africa, and given effect to by various labour legislations.

1.3 Research questions

Given the research problems as articulated above, the following questions will provide a guide for the conduct of the empirical study.

1. Is the labour legislation adequate and effective in ensuring fair labour practices by employers of labour in South Africa?
2. Is there a discriminatory labour practice between internal and international migrant workers in South Africa?
3. Does the Department of Labour have the necessary capacity to enforce compliance with labour legislation in the workplaces?
4. What are the statutory remedies available to migrant workers in order to redress experiences of unfair labour practices by employers of labour?
5. Will future migrant workers successfully integrate and work in the South African economy?

1.4 Research objectives

Following the research problems and questions, the objectives of this research are to:

1. Investigate the extent to which internal and international migrant workers in South Africa enjoy fair labour practices in terms of the ILO Conventions, the South African Constitution and labour legislation.
2. Establish various ways by which employers of labour perpetuate unfair labour practices.
3. Examine whether there is differential application of labour practices between internal and international migrant workers in the workplace.
4. Evaluate various implementation and enforcement mechanisms being used by the Department of Labour to ensure compliance with labour legislation in the workplace.
5. Determine whether future migrant workers will be able to successfully integrate and work within the South African economy.
6. Make recommendations to the labour authorities in South Africa based on research findings in order to better understand and improve upon the complexities surrounding the issues of migrant workers.

1.5 Significance of the research

The movement of people across economic boundaries necessitates a new understanding of the nature of the relationship which exists between the labour rights of migrant workers on the one hand, and the application and effectiveness of labour legislation in South Africa on the other hand. The ushering in of democracy and the enactment of a democratic Constitution in the Republic of South Africa provided a substantial legal basis for the existence, recognition and application of a range of rights, specifically labour rights. Through the Constitution, South Africa declared its commitment to create a society firmly based on democracy, diversity, equality, human dignity and rights (Mbombo, 2006). While existing studies concentrated mostly on investigating the economic exploitation of 'international' migrant workers, this study considers the experiences of both 'internal' and 'international' migrant workers. This study is significant in its objective to investigate the prevailing relationship between migrant workers and the application and effectiveness of labour legislation in South Africa. This this study will provide useful insight into the extent to which the labour rights of migrant workers are being violated by employers of labour in South Africa. The study will also demonstrate the extent to which employers of labour comply with various provisions of the labour legislation and the extent to which the law has been effective in protecting the labour rights of migrant workers in South Africa.

In addition, the findings of this study will present the labour authorities with the experiences of migrant workers regarding employer compliance with the various provisions of the labour legislation. This understanding could significantly assist the labour authorities in monitoring and enforcing labour standards in the workplace, and also provide a basis for the amendment or improvement of the Code of Good Practices to further protect the rights of all workers, including migrants. Many migrant workers do not, in most cases, know their labour rights, and the existing protections offered by both the Constitution and labour legislation, and they are thus inhibited from challenging violations of their rights by employers.

The outcome of this study will therefore provide migrant workers with information about their labour rights and highlight the appropriate institutionalised procedures for remedying the perceived perpetration of unfair labour practices by their employers. It is also believed that the results of this study will contribute to the existing academic debate and literature, and further inspire social discourse concerning migrant workers' experiences. The study will further advance the frontiers of knowledge and contribute to the existing literature, thus providing a platform for further investigation by researchers regarding issues around the

protection of migrant workers in relation to unfair labour practices undertaken by their employers.

1.6 Unit of analysis

The survey involved migrant workers who are considered vulnerable to labour exploitation by employers and often subjected to unfair labour practices. This category of employees was mainly those who work in economic sectors in which workers are generally not organized into trade unions. The workers' non-membership in unions has profoundly increased their degree of vulnerability to unfair labour practices, unlike their counterparts who belong to trade unions and enjoy better conditions of service and are less vulnerable to discrimination and unfair labour practices through the process of collective bargaining.

1.7 Research setting

This study was conducted in two geographic locations, namely the city of Cape Town in the Western Cape province and the city of Johannesburg in Gauteng province of South Africa. According to Vearey (2010), Haupt (2010) and Landau and Seggatti (2011), Cape Town and Johannesburg are major economic hubs, and thus they attract migrant workers from other parts of the country and from all over Africa. These two migration-centric cities therefore present a suitable context within which to conduct an empirical investigation of the application and effectiveness of labour legislation in South Africa as it affects the labour rights of migrant workers. According to Landau, the migration of workers to Cape Town and Johannesburg presents a critical research need addressing their experiences (Veary, 2010). While the two geographic locations present an accessibility challenge for the research, the variability of different geographic locations presents the researcher with an opportunity to investigate and understand contextual factors that potentially affect legislative protection and the experiences of migrant workers related to unfair labour practices.

1.8 Research assumptions

According to Leedy and Ormord (2005), assumptions are conditions which the researcher intentionally takes for granted to improve the feasibility of a research project. This research made the following assumptions:

- Internal and international migrant workers will agree to participate in the empirical study; and

- Participants of the study will provide truthful responses to all questions during interviews without the intention to mislead the researcher.

1.9 Structure of the research dissertation

The research comprises of two main sections. The first section is the theoretical and methodology section which includes Chapters 1 to 3, comprising of the (i) introduction to research; (ii) the literature review; and (iii) the research methodology. The second section consists of the empirical study which includes data collection (field interviews), analysis and interpretation of data, research findings, discussions and recommendation. These activities are organised into Chapters 4 to 5.

Chapter 1 introduces the research by presenting an introductory section, research problem, objectives and questions. The chapter will further present the significance of the research, the researching setting and research assumptions.

Chapter 2 will present a detailed account of a literature review on domestic and international migration and labour legislation. The literature review will also provide discussions aimed at clarifying key concepts related to the legislative protection of migrant workers. To substantiate information presented in the literature review, case law and evidence from literature will be discussed. This chapter will be concluded with a brief overview.

Chapter 3 will outline the research methodology which will influence the progress of this research. The outline will feature a justification of the research paradigm, design and approach. Both disadvantages and advantages of this approach will be presented to provide a holistic understanding of the suitability of this research's framework. Further, the chapter will also feature discussions on the research population, sample and sampling technique, data collection and instrument, data analyses, rigor, delineation and ethical issues.

Chapter 4 will discuss research findings derived from the semi-structured interviews conducted, by providing answers to the research questions developed in Chapter 1. The research findings will address the main aim of this research, which is investigating the experiences of migrant workers related to their legislative protection in the South African labour market.

Chapter 5 will begin by outlining how all research questions developed in Chapter 1 were addressed. Thereafter, the chapter will feature a summary of the research findings and the

conclusion of the study. Based on the research results and limitations of this study, recommendations will be presented to relevant stakeholders.

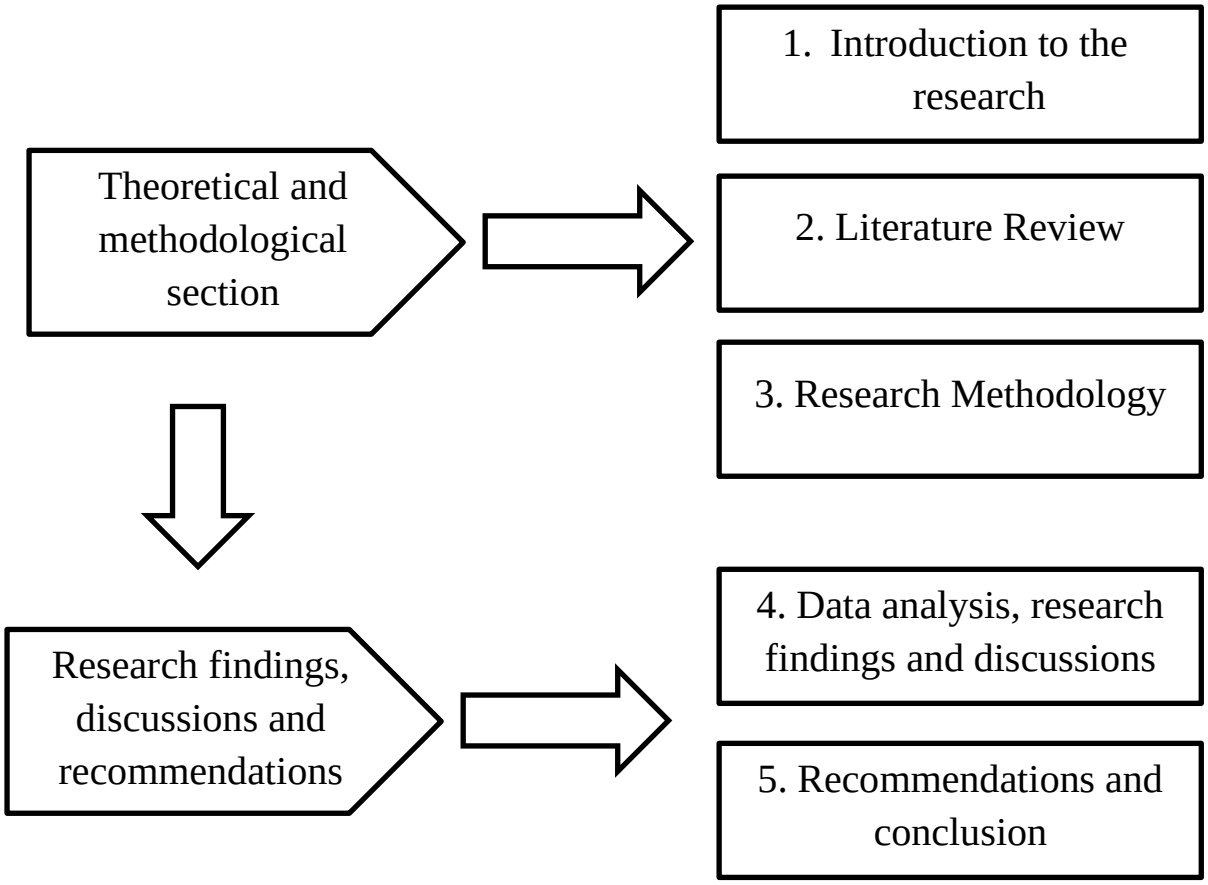


Figure 1: Graphic representation of the composition of the study

1.10 Summary of chapter

This chapter has outlined the introduction to this research and stated the research problem which would be addressed by successfully achieving the purpose set forth by this research. The purpose of this research is guided by the presented research questions, which this research aimed to address through an empirical study. The chapter also outlined the research setting which the empirical study would be confined to; further, assumptions which enabled the feasibility of this research were outlined. This chapter was concluded by an outline of chapters to follow and the structure of the research dissertation.

CHAPTER 2: WORK MIGRATION AND LABOUR LEGISLATION IN SOUTH AFRICA

2.1 Introduction

In Chapter 1, the research context was established by discussing the research problems, statement of research questions as well as the objectives of the research project. Chapter 1 also provided a lucid introduction to the subject of labour migration in South Africa and the legislative protection available to migrant workers. Further to the introduction provided in Chapter 1, the current chapter will explore related literature regarding the legislative protection and experiences of migrant workers within the context of unfair labour practices. This chapter will provide historical perspectives relating to both international and local work migration in South Africa. This chapter will also discuss the legislative environment which permeates the labour market in South Africa.

2.2 Historical perspective of migration in South Africa

South Africa has a long history of migration, as a result of both the significant number of people who have moved within the country, and those who have moved from other African countries and made South Africa their destination of choice (Landau, 2009). The movement of people across territorial boundaries is not a new phenomenon, and it is unlikely to end. Labour migration accounted for the fastest growing category of people movement (United Nations Population Fund, 2005) and it continues to restructure and define countries, cultures and everyday realities of a significant number of people around the world (Kok, 2006). South Africa is recorded as the most common destination of choice for migrant workers in Southern Africa and for migrant workers in the rest of the African countries (Adepoju, 2000). The development literature has always viewed labour migration as a favourable phenomenon in developing countries (Sriskandarajah, 2005) as it is a process which connects various regions by withdrawing surplus labour from one region to provide cheaper manpower to another region, achieving the benefit of industrial growth (Van Doorn, 2002).

2.2.1 International labour migration

Before attempting to provide an overview of international labour migration, it is essential to establish an understanding of the term “international labour migration”. This paper relies on the make-up of political and geographical distinctiveness to circumvent semantic complexities of defining international labour migration. Generally, international migration is

defined as the movement of a person or group of people from a country of usual residence to another country which effectively becomes their usual country of residence (Oucho & Gould, 1993). Subsequently, international labour migration is defined as the movement of a person or group of people from a country of usual residence for the purpose of living and working in another country (Ellerman, 2003).

According to Adam Jr. (2006), the interconnection of regions continuously contributes to internal and international labour migration across the world. The concept of globalisation has emerged as one of the most powerful concepts to have influenced the world as we know it today. The enduring influence of globalisation is undeniable; some suggest that we live in 'an age of globalisation' (Hulme, 2009). The globalisation of the labour market has fundamentally challenged the ways in which the idea of a state is commonly understood and how nations provide protection for individuals who participate in the labour market (Cornelisse, 2010). Consequently, due to the movement of people across states and labour markets, the South African labour legislation has had to extend protection to non-citizens who participate in the South African labour market.

From an organisational foundation, the current global political system is organised around the ideology of state sovereignty. Under the system of state sovereignty, individual states have political power legitimised by citizens' consent over clearly defined areas (Schulze & Ursprung, 1999). However, the end of the Second World War initiated the establishment of international bodies towards the ends of adjusting imbalances between individuals and states' use of political power. Accordingly, political power is circumscribed by the concept of human rights, which is guaranteed by international bodies and state constitutionalism (Cornelisse, 2010). These human rights, according to Cornelisse (2010), translate to universal human rights which surpass the system of sovereignty. South Africa is no exception: every person, regardless of nationality, migrant status, gender, race, or socio-economic status, should by virtue of their humanity enjoy these universal human rights. Migrant workers are guaranteed protection by a wide range of international human rights mechanisms, such as the various International Labour Organisation (ILO) Conventions and Recommendations, the 1948 Universal Declaration of Human Rights and the UN Convention 45/158. In the African continent, there are regional initiatives from both the African Union and South African Development Community that are meant to provide migrant workers and refugees with protection (Hungwe, 2013).

Due to recent economic and political challenges, Zimbabwe accounts for the largest number of international migrants in South Africa who are searching for better livelihoods (Polzer, 2010). Although the Zimbabwean diaspora is evident in many regions of the world, South Africa became host to a majority of Zimbabweans due to the proximity of the two countries. According to The African Centre for Migration and Society (2010), as of 2010, an estimated 1 to 1.5 million Zimbabweans had migrated to South Africa. Furthermore, an estimated 3,000 Zimbabweans migrate to South Africa on a daily basis (Polzer, 2010). South Africa continues to be a convenient destination for migrants with very limited resources and skills from Zimbabwe and other neighbouring countries such as Botswana, Lesotho, Mozambique, Namibia and Swaziland (Polzer, 2010). However, the second prominent group of migrants in South Africa is Nigerian nationals (Akinrinade & Ogen, 2011). Nigeria is the most populated nation on the African continent, which makes it the continent's demographic giant (Akinrinade & Ogen, 2011).

According to de Hass (2007), both the 1980 economic downturn due to the collapse of crude oil prices and political repression under successive military regimes and religious violence encouraged Nigerians to search for greener pastures in countries like Belgium, France, Germany, Ireland, Italy, Netherlands and Spain (Akinrinade & Ogen, 2011). However, Adepoju (2000) highlights that the booming South African economy has long been a convenient alternative to European destinations. Similarly, the failure of the political transition in the Democratic Republic of Congo in 1990 and the resulting government's inability to deliver improved living conditions and create jobs led to Congolese searching for better livelihood beyond their national borders (Atam, 2004). Consequently, a fair number of Congolese have considered South Africa to be their destination of choice in order to fulfil their economic aspirations (Atam, 2004).

For Mozambicans, reasons to migrate to South Africa and other parts of the world were generally provided by the Mozambican civil war between 1979 and 1992. It is estimated that 5.7 million Mozambicans migrated to Malawi, South Africa, Tanzania, Zambia and Zimbabwe (Polzer, 2004). While Malawi hosted a majority of those migrants; South Africa was the second biggest host of Mozambican migrants (Golooba-Mutebi & Tollman, 2004). South Africa also attracts a significant number of international migrants from countries such as Angola, Cameroon, Ethiopia, Ghana, Kenya, Malawi, Somalia, Tanzania, etc. (Maharaj & Moodley, 2000). According to various research findings by Vearey, Palmary, Thomas, Nunez, and Drimie (2010), Department of Home Affairs (DHA, 2011) and Leggett (2002),

the city of Cape Town and Johannesburg's populations both comprise of more than half international migrants who reside and work in South Africa.

2.2.2 Internal labour migration

South Africa has a longer history of people moving within what is now considered the South African border. McDonald (2000) points out that internal migration in South Africa cannot be dated to a specific period in time, and it presents the most significant form of movement in the history of South Africa (Polzer, 2010). For the purpose of this research project, internal labour migration is defined as the movement of a person or group of people within South Africa from one clearly defined geographic region for the purpose of living and working in another clearly defined geographic region (Ellerman, 2003). According to Bouare (2002), in South Africa, internal migration can be defined according to a person's or group's change in municipality, city or province of residence. For the purpose of this research project, internal labour migration is defined within the context of a person's or group's change in city of residence.

Primarily due to the reality that international labour migration is politically sensitive, the history of internal labour migration in South Africa presents a significant number of people who have moved within the South African borders in search of better livelihood, mostly in urban areas such as Cape Town and Johannesburg. According to Kok and Collinson (2006), South Africa accounts for the highest urban growth on the African continent. Furthermore, Lundau (2009) and Landau and Misago (2009) revealed that more than half of the people in South Africa live and work in urban areas.

A research report by Landau (2009) indicated that while Gauteng is the smallest province in land mass with 1.4 percent of the land area, it is highly urbanised and is the most densely populous province. According to Stats SA (2014), Gauteng recorded the highest Gross Domestic Product (GDP) growth rate of 4% from the last quarter of 2013 and accounts for the highest GDP contribution to the South African economy by province. By industry, finance was the biggest contributor (22.8%), with agriculture as the poorest contributor (0.4%) (Stats SA, 2014). Gauteng receives more migrant workers than any other province in South Africa; more migrant workers are moving from rural and urban areas into Gauteng than any other province in South Africa (Landau, 2009). Gauteng continues to be South Africa's economic powerhouse, with Johannesburg continuously accounting for most of Gauteng's economic performance (Krugell & Naude, 2003; Stats SA, 2014). Johannesburg's relative

successes in urbanisation, offering greater job opportunities, service delivery and association with better standard of living have attracted most migrant workers into the province (Landau, 2009). A report by Landau and Gindrey (2008) pointed out that in 2007, Johannesburg hosted a majority of the 46% of the South African population which was born outside but lived in Gauteng.

Landau and Gindrey (2008) reported that in addition to favourable economic conditions in Gauteng, labour migration can be understood in light of the city's accessibility to labour migration all over South Africa. Johannesburg is one of the most accessible cities in South Africa in terms of access to transportation. Most, if not all modes of transportation in South Africa have departure and arrival points in various parts of the city. A significant number of migrant workers to South Africa and Gauteng in particular arrive at or pass through the city.

Western Cape and Cape Town (in particular) share the same reality as Gauteng and Johannesburg. After Johannesburg, Cape Town receives more migrant workers than any other province or city in South Africa (Ndebele, 2003). Cape Town is a mid-sized city according to global standards, with a land area of 2,455 square kilometres, making it South Africa's biggest city. The Western Cape's economy is significantly driven by Cape Town's economic contribution of 72.1% of the provincial GDP (Statistics SA, 2014). Labour migration into Cape Town takes place primarily due to favourable economic realities informed by prospects of better living conditions, access to education, health care and more significantly, employment opportunities (Poswa & Levy, 2006). According to Ndebele (2003), internal labour migration into Cape Town contributes to the city's significant growth in its share of the country's population. Ndebele (2003) stated that Western Cape's share of the country's population increased by 1.3% from 10.1% to 11.4% in 2011, while Cape Town's share of the provincial population was the most significant.

The Eastern Cape province loses more people due to internal labour migration than any other province in South Africa (Bekker, 1999; Polzer, 2010). Due to poor employment opportunities in the Eastern Cape, Cape Town's proverbial favourable economic realities and the close proximity of the two provinces, most migrant workers from the Eastern Cape consider Cape Town as their destination of choice in search of a better life (Polzer, 2010).

Ndebele (2003) found that Cape Town and Johannesburg experienced massive population growth due to internal labour migration and according to the United Nations, Johannesburg and Cape Town rank amongst the most populous cities in Africa (Ndebele, 2003). For

Campbell (2006) and Oliveira (2011), the diversity of people in Cape Town and Johannesburg from other regions of South Africa, and indeed from other countries, presents a need to conduct research regarding the experiences of migrant workers.

2.3 Migration and development

The movement of people is an essential element of regional, national and international economies, and it provides a significant supply of labour in host communities. While migration has both positive and negative impacts on the host communities' labour markets and social experiences, Raimundo (2008) pointed out that most scholars have conventionally considered migration to be generally negative for the host communities. However, Holtz-Eakin (2005) stated that host communities benefit from an increase in labour supply, an increase in GDP and employment creation. Furthermore, Holtz-Eakin (2005) asserted that migrants' presence in host communities generally increases consumption, productivity, the quality of the labour force, innovative ideas and fulfils skills demand. Furthermore, Castel (2002) suggested that migrants are relatively reliable, hardworking and they have lower turnover rates.

However, labour migration presents negative consequences for host regions, as it leads to population increase, which generally has a direct relationship with competition for resources. Migration may contribute to unemployment as migrants are generally more likely to accept lower working wages which, according to Borjas (2003), consequently depresses the wages of domestic workers, thus eventually displacing them from the labour market.

Migration may further exacerbate underemployment when a significant portion of a migrant worker's wage is repatriated to his/her home country rather than being spent in the host region to stimulate local economic activities (Adepoju, 2000). Sibanda (2008) noted that migration may also contribute to the spread of HIV and other sexually related illnesses when infected migrants have multiple partners in the sending and receiving regions. Furthermore, there is a human capital cost to sending regions which incur a decrease in their labour force (Sibanda, 2008).

Cape Town and Johannesburg represent African economic hubs which have become destinations of choice for a significant number of domestic and international migrant workers. Although South Africa has one of the most progressive Constitutions and labour relations system in the world, the integration of the South African economy into the world

economy has resulted in challenges that are related to the application and effectiveness of labour legislation (Hungwe, 2013). The ability of both domestic and international migrants to successfully move, work, and integrate into the cities of Cape Town and Johannesburg has been impacted by overwhelmingly unfair labour practices (Hungwe, 2013).

2.4 South African labour legislation

The Constitution of the Republic of South Africa (Constitution), as the supreme law of the country, surpasses all other legislation. The Constitution of the Republic of South Africa sets and regulates government authority and guarantees the most fundamental rights to every individual living in the country, irrespective of nationality. Accordingly, all other law must be consistent with the Constitution. Rights associated with equality, human dignity, freedom, language and culture, access to courts, and most important for the purpose of this paper, rights that are associated with fair labour practices are guaranteed by the Constitution of the Republic of South Africa. South African labour legislation equally applies to all domestic and international migrant workers in the South African labour market. The Labour Court further held that applicability of South African labour legislation is regardless of a migrant workers' legal status (Cheadle, 2006). The right to fair labour practices is provided for in section 23(1) of the Constitution. Additionally, section 23 (2 & 3) of the Constitution prescribes the following labour rights:

23. (1) Everyone has the right to fair labour practices.
    (2) Every worker has the right -
        (a) to form and join a trade union;
        (b) to participate in the activities and programmes of a trade union; and
        (c) to strike.
    (3) Every employer has the right -
        (a) to form and join an employers' organisation; and
        (b) to participate in the activities and programmes of an employers' organisation.
    (4) Every trade union and every employers' organisation has the right -
        (a) to determine its own administration, programmes and activities;
        (b) to organise; and
        (c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

2.4.1 The concept of labour legislation

The starting point of any discussion about labour legislation should be an effort to establish a common understanding of labour legislation. However, after considering various definitions of labour legislation, Vettori (2005) argued that the concept of labour legislation can easily be challenging to define due to the lack of a universally accepted understanding of the concept. Consequently, the following definitions were provided by different authors:

- "labour legislation is the totality of rules in an objective sense that regulate legal relationships between employers and employees, the latter rendering services under the authority of the former, at the collective as well as the individual level, between employers mutually, employees mutually, as well as between employer, employee and the state" (Van Jaarsveld, Fourie, & Olivier, 2004:7).
- "the area of labour is defined in part by its subject matter, in part by an intellectual tradition. Its immediate subject-matter consists of the rules which govern the employment relationship. However, a broader perspective would see labour legislation as the normative framework for the existence and operations of all the institutions of the labour market: the business enterprise, trade unions, employers' association, and, in its capacity as regulator as employer, the state" (Deakin & Morris, 2012:1).

Vettori (2005) argued that although these definitions were centred on the management of the employment relationship, they however emphasised different aspects of the concept. Despite the lack of a universally agreed upon definition of labour legislation, Creighton and Stewart (2010) identified three themes which provided labour legislation with conceptual cohesion:

I. the regulation of relations concerning organised labour, the employer and/or state;
II. the rationalisation of actions and activities between the primary parties in the employment relationship; the employee, employer and government;
III. the moderation of the market for the benefit of all employees, employers and the general public (Creighton & Stewart, 2010).

In describing these themes as providing conceptual cohesion for the concept of labour legislation, it follows that the function of the South African labour legislation is to establish a legal system that organises and regulates productive individual or collective employment relationships by providing a framework that rationalises the actions and activities between employees and employers through enforcing regulatory measures and processes to formalise the labour market in the interests of socio-economic justice and of the well-being of the economy (Creighton & Stewart, 2010). To this effect, , the South African labour legislation gives effect to rights contained in 2.4 and section 23 of the Constitution for all workers, including domestic and international migrant workers for the sustainability of the employment relationship and benefit of all parties in the employment relationship.

However, section 36(1) of the Bill of Rights provides that rights contained in the Bill of Rights may be limited only in terms of law of general application to the effect that the limitation is reasonable, justifiable and yields greater benefits for a democratic society. Courts have the power to test the validity of any limitation by taking into according the following factors;

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

Section 23 of the Bill of Rights entrenches the right to strike as a fundamental labour right and important bargaining tool for all employees and unions. However, the LRA regulates the right to strike; section 65 and 66 set out limitations on the right to strike.

Furthermore, Section 36(2) provides that except as outlined in section 36(1) or in any other relevant provision provided by the Constitution, no other legislation may limit any right contained in the Bill of Rights. Accordingly, the South African labour legislation provides extensive yet limited protection for all workers, including domestic and international migrant workers.

2.4.2 Labour Relations Act, No 66 of 1995 (the LRA)

The LRA is the main framework for regulating labour relations in South Africa with the purpose of advancing economic development, social justice, labour peace and democratising

of the workplace. The Act gives effect to and regulates the fundamental rights conferred by section 23 of the Constitution and also gives effect to obligations incurred by the country as a member state of the International Labour Organisation.

This Act governs and regulates all relationships that exist between individual employees, trade unions, employers and their organisation, and matters relating to workplace discipline, employee conducts and dismissals and indeed all matters that are of mutual interests between the parties.

The 2002 amendment of the LRA introduced provision 200 which introduced the rebuttable presumption that any person is an employee if any of the following factors are present;

(a) the manner in which the person works is subject to the control or direction of another person;
(b) the person's hours of work are subject to the control or direction of another person;
(c) in the case of a person who works for an organisation, the person forms part of that organisation;
(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
(e) the person is economically dependent on the other person for whom he or she works or renders services;
(f) the person is provided with tools of trade or work equipment by the other person; or
(g) the person only works for or renders services to one person.

Section 200 of the LRA further gives effect to rights contained in 2.4 and section 23 of the Constitution for all workers, including domestic and international migrant workers.

The LRA is applicable to all workers and employers of labour (including the State), but excludes independent contractors and members of the following organizations:

National Defence Force

National Intelligence Agency

South African Secret Service

Members of the National Defence Force, National Intelligence Agency and South African Secret Service have special obligations and duties towards the state; as such, they do not

share the same employment rights as those of the general public. However, members of the above mentioned organisations have the right to fair labour practices, such as joining a trade union as prescribed in the Constitution. The application of the Act to members of the South African Police Services, domestic workers and essential service and maintenance service workers is restricted in terms of the right to strike and the acquisition of organisational rights.

2.4.3 Basic Conditions of Employment Act, No 75 of 1997 (the BCEA)

The BCEA was enacted with the purpose of advancing economic development and social justice and to give effect to the right to fair labour practise for everyone by establishing and enforcing basic conditions of employment. The BCEA provides guidelines for employment relations to provide protection against unfair labour conditions. The BCEA regulates the following aspects of the employment relationship: regulation of working time, leave, particulars of employment and compensation, termination of employment, prohibition of employment of children and forced labour, variation of basic conditions of employment, sectorial determinations, employment conditions commission, monitoring and enforcement, and legal proceedings.

Following section 200 of the LRA, the working conditions of all workers, including domestic and international migrant workers have to comply with all guidelines outlined in the BCEA. In an event of an employment relationship without a documented contract of employment, section 4 provides that the BCEA forms part of all employment contracts to the extent that any other law and/or conditions of the employment contract between employee and employer are more favourable. Section 4 provides relief for all workers, specifically migrant workers who are subjected to employment relationships without documented contracts of employment (CoRMSA, 2011).

The BCEA is applicable to all employees and workers, with the exception of members of the following organizations:

National Defence Force

National Intelligence Agency

South African Secret Service

Further, the section of the BCEA which regulates working hours excludes the following categories of workers:

- unpaid volunteers working for charity,
- senior managerial employees,
- employees who earn an excess of R205,433.30 per annum,
- sales employees who travel to customers' premises and regulate their working hours,
- employees who work less than 24 hours a month,
- employees engaged in emergency work.

2.4.4 Employment Equity Act, No 55 of 1998 (the EEA)

South Africa has a remarkable history of discrimination based on race, gender and disability, which historically denied certain categories of people access to equal opportunities for employment and fair labour practice. The Employment Equity Act was designed and enacted by the democratic South African government in response to discriminatory laws enacted by the apartheid predecessor who intentionally created disparities in employment opportunities, occupation and income in the South African labour market. The EEA aimed to achieve its purpose of redressing this legacy of discrimination through two mechanisms. The first purpose of the Act is to promote equal opportunity and fair treatment through the elimination of unfair discrimination practices against employees and applicants (section 2a). Its secondly purpose is to implement and enforce affirmative action measures to redress past discrimination according to race, gender and disability for designated groups to ensure employee representation in the labour market (section 2b).

Until the Act was enacted in 1996, employers had no legal obligation to develop and implement affirmative action; it was no more than a moral obligation. The Act provided employers with a legal framework for implementing affirmative action with measures to enforce compliance by employers. Furthermore, the Act contains provisions which deal with unfair discrimination and mechanisms for legal proceedings, monitoring and enforcing of the Act (chapter 5). The EEA protects and promotes the rights of all migrant workers to equal opportunity by rejecting discrimination on the grounds of race, sexual orientation, gender, language, religious belief and ethnic origin.

The EEA is applicable to all employers, workers and job applicants with the exception of members of the following organizations:

National Defence Force

National Intelligence Agency

South African Secret Service

Furthermore, the provisions for affirmative action are applicable to;

employers with 50 or more workers, or whose annual income is more than the amount specified in Schedule 4 of the Act,

municipalities,

organs of State,

employers ordered to comply by a bargaining council agreement,

any employers who volunteer to comply.

It is important to note that Chapter III of the Act, dealing with affirmative action, applies only to designated employers and people from designated groups (black people, women and people with disabilities).

2.4.5 Skills Development Act, No 97 of 1998 (the SDA)

The SDA was enacted in 1998 to redress the legacy of apartheid by promoting a work environment that is conducive to the proactive improvement of skills for people. According to The National Skills Development Strategy (1997), a majority of black people (Africans, Coloureds, Indians, and lately the Chinese) were denied quality education and training by the apartheid government. Consequently, South Africa is currently experiencing the problem of skills shortage. The SDA provides a framework for organisations to develop and implement a skills development plan to develop the skills of the South African workforce by promoting education and training.

The Act further regulates and governs bodies such as the National Skills Authority, the National Skills Fund, Sector Education Training and Authorities (SETA) and the Skills Development Planning Unit, which promote collaboration between the public and private sectors of the economy in order to promote skills development within the South African workforce. Private organisations are provided with financial incentives for collaborating with government in their implementation of the SDA and creating a workplace environment which promotes education and learning.

2.4.6 Employment Services Act, No 4 of 2014 (the ESA)

In recognition of levels of unemployment and challenges faced by work seekers, in particular vulnerable work seekers, the ESA facilitates the employment of foreign nationals in a manner that is consistent with the purpose of the act and all other relevant acts in South Africa. According to ESA, all foreign nationals in the South African labour market will be protected in terms of section 23 of the Constitution.

In addition to the above-mentioned legislation, there exists other legislation which impacts South African labour relations. These include the Compensation for Occupational Injuries and Disease Act, No. 130 of 1993 which facilitates compensation for occupational injuries, diseases and disabilities; Occupational Health and Safety Act, No. 85 of 1993 which promotes the health and safety of all workers in the workplace; Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 which prevents employers and workers from discriminating against anyone on the grounds of race, sexual orientation, gender, language, religious belief and ethnic origin; Protective Disclosure Act, No. 26 of 2000 which protects workers who disclose information of unethical and unlawful conduct by their employers or fellow workers from occupational detriment; South African Qualifications Authority Act, No. 58 of 1995 which was enacted to provide for the development and implementation of a National Qualifications Framework and related matters; and the Unemployment Insurance Act, No. 63 of 2001 which facilitates the registration of workers who are employed for more than four hours per month for the Unemployment Insurance Fund (UIF).

2.5 Unfair labour practices

The LRA deals with what constitutes unfair labour practices in section 186(2). According to the Act, unfair labour practices are acts or omissions between employees and employers that involve;

a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

Section 186(2)(a) involves acts in which the process of subjecting an employee or group of employees to demotion or offering promotional and training opportunities is as a result of discrimination. Unfair conduct related to demotion, promotion and training lack procedural and substantive merit to justify why an employee or group of employees were subjected to the conduct while an equally deserving employee or group of employees were not. Disputes related to unfair conduct in the acts of demotion, promotion and training may be referred to the Employment Equity Commission.

Section 186(2)(b) refers to cases in which an employee or group of employees are subjected to unfair suspension or any other disciplinary action short of dismissal. In the case of a suspension during a disciplinary enquiry, the employee or group of employees are entitled to be paid their remunerations. However, if suspension is contemplated as a disciplinary action, payment of remunerations to the suspended employee may not be undertaken. Disputes relating to unfair disciplinary action may be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA).

Section 186(2)(c) refers to the refusal by an employer to reinstate or re-employ a former employee. Generally, there has to be an existing contractual relationship (written, verbal, individual or collective) to justify reinstatement or re-employment of an employee who was retrenched due to operational requirements of the employer.

Section 186(2)(d) refers to a case in which an employee or group of employees are prejudiced for making a protected disclosure in terms of the Protected Disclosures Act 26 of 2000 which, inter alia, classifies the following information to be ‘protected’:

- any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following improprieties:

- that a criminal offence has been committed, is being committed or is likely to be committed
- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject
- that a miscarriage of justice has occurred, is occurring or is likely to occur
- that the health or safety of an individual has been, is being or is likely to be endangered
- that the environment has been, is being or is likely to be damaged

- any matter referred to above has been, is being or is likely to be deliberately concealed

Disputes relating to unfair labour practices must be referred to the CCMA. In terms of the LRA, such referral must occur within 90 days from the date an employee become aware that an act or omission that constitutes unfair labour practice has been committed by the employer.

In order to give effect to the right to fair labour practices, the LRA guarantees every employee the right to not be subjected to any unfair dismissal, as this is a form of severe unfair labour practice. Chapter VIII of the LRA deals extensively with various types of dismissals with or without notice by an employer. The LRA defines dismissal to mean that:

a) an employer has terminated a contract of employment with or without notice;
b) an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
c) an employer refused to allow an employee to resume work after she-
   i. took maternity leave in terms of any law, collective agreement or her contract of employment; or
   ii. was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child;
d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee;

f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

According to the LRA, any arbitrary dismissal constitutes an unfair labour practice. Similarly, section 187(1) provides grounds for automatically unfair dismissals:

A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-

a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;
b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;
d) that the employee took action, or indicated an intention to take action, against the employer by-
    (i) exercising any right conferred by this Act; or
    (ii) participating in any proceedings in terms of this Act;
e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or
h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.

Section 188 provides that a dismissal is unfair when an employer fails to justify that the reasons for dismissal are related to an employee's conduct, capacity or employer's

operational requirements. Additionally, the employer has to follow all the correct procedures before dismissing an employee. The Code of Good Practice: Dismissal outlines guidelines regarding the dismissal process on the basis of misconduct, capacity or operational requirements in terms of Schedule VIII of the LRA. The fundamental purpose of The Code of Good Practice: Dismissals is to guide employers to ensure that any dismissals are valid, lawful and fair.

2.6 The concept of fairness: substantive and procedural fairness

In order to determine the scope of section 23(1) of the Constitution, it is important to establish what is meant by fairness, as the Constitution does not expressly define the concept of fair labour practice. According to Vettori (2005), the concept of fairness can be interchanged with concepts such as just, reasonable, equitable, balanced, honest and according to the rule of law. All these words contain high degree of ethical and moral obligations, similarly to fairness. Therefore, not only is fairness a challenging concept to limit to a specific definition, it is also flexible. Fairness can be interpreted differently according to culture, context and individual cases (Vettori, 2005).

In the case between *NEHAWU v UCT and Others* (2003) ILJ 95 (CC), the Constitutional Court held that the concept of fairness in incapable of a standard definition applicable to every unique case, and that what is fair is determined by facts and value judgement of a specific case and context (Conradi, 2013). However, the case between *Osche Webb & Pretorius (Pty) Ltd v Vermeulen* (1997) 18 ILJ 361 (LAC) confirmed that fairness in labour legislation has two primary requirements; substantive and procedural fairness (Van Jaarsveld et al., 2004). According to Van Jaarsveld et al. (2004), substantive fairness refers to the authority for an employer or even an employee to make decisions that on a balance of probabilities are the most suitable for the employment relationship. On the other hand, procedural fairness refers to the duty for the employer or employee to act in a manner that is according to all established and agreed upon sequences for the goal of legitimising actions. Accordingly, parties in employment relationships have a common, value-based obligation to all Codes of Good Practice not to act in any manner that is likely to damage or destroy the trust in the employment relationship.

In order to address substantive and procedural fairness within the context of a dismissal, the LRA contains the Code of Good Practice as per Schedule Eight of the LRA. The Code of Good Practice is based on the principle of mutual respect for workers and employers and

outlines key aspects of dismissals related to misconduct and incapacity. The Code of Good Practice is largely and intentionally general as it accepts that each case of dismissal is unique, and departure from set norms is acceptable, depending on the circumstances and valid justification.

The Code of Good Practice recognises three grounds on which a dismissal is legitimate. These are surrounding an employee's conduct or capacity and the operational requirements of an employer. However, the dismissal has to be effected for a fair reason and in accordance with a fair procedure. The Code of Good Practice recognises that a dismissal is automatically unfair if the reason for dismissal infringes on workers' and unions' fundamental rights or if the reason is within those listed in section 187 of the LRA. Further, in a case of unfair dismissal, the onus is on the employer to prove the fairness of the dismissal.

The Code of Good Practice provides guidelines in cases of dismissal related to misconduct and incapacity;

Guidelines in cases of dismissal for misconduct

Any person who is determining whether a dismissal for misconduct is unfair should consider-

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not-

(i) the rule was a valid or reasonable rule or standard;

(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii) the rule or standard has been consistently applied by the employer; and

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

Guidelines in cases of dismissal for poor work performance

Any person determining whether a dismissal for poor work performance is unfair should consider –

(a) whether or not the employee failed to meet a performance standard; and

(b) if the employee did not meet a required performance standard whether or not-

(i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

(ii) the employee was given a fair opportunity to meet the required performance standard; and

(iii) dismissal was an appropriate sanction for not meeting the required performance standard.

Guidelines in cases of dismissal arising from ill health or injury

Any person determining whether a dismissal arising from ill health or injury is unfair should consider-

(a) whether or not the employee is capable of performing the work; and

(b) if the employee is not capable-

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work.

2.7 The concept of 'everyone'

With the exclusion of employees working in organisations such as the National Defence Force, National Intelligence Agency and South African Secret Service from the protection of key labour legislation, it is necessary to then look at the category of people who can rely on the word 'everyone' as contemplated in section 23(1) of the Constitution. This attempt will provide some clarity as to the category of workers who are entitled to protection against any unfair labour practices.

Section 23(1) reads as follows;

"Everyone has the right to fair labour practices".

The broad terms used may suggest that the provision is open-ended without restriction. Consequently, the broad scope of section 23(1) could lead to interpretation and application uncertainty. However, the Constitutional Court has held that all laws and regulations, including labour legislation, should always be subjected to legal scrutiny to give effect to rights guaranteed by the Constitution. Both the Constitutional and Labour Court have had and

continue to have crucial roles in the interpretation and application of labour legislation. However, the Constitution provided in section 36 that any constitutional right may be limited only in terms of law of general application. When this is considered, it then seems justifiable for the notable labour legislation (the LRA, BCEA and EEA) to exclude certain categories of employees from their protection.

In the case between *NEHAWU v UCT and Others* (2003) ILJ 95 (CC) the Constitutional Court has held that the concept of 'everyone' extends to every person, which refers to both a natural and juristic person. A natural person is a living human being, while a juristic person is a partnership, corporation or legal entity that is not human and is recognised by law to have legal rights and responsibilities (Cheadle, 2006). However, the Constitutional Court also suggested that the word "everyone" should be interpreted in the context of the employment relationship as suggested by the word "labour practices" (Cheadle, 2006). Labour practise arises from the relationship between employer/s and worker/s and is regulated by the state; therefore, the term "everyone" should be interpreted in this context. Consequently, the term "everyone" includes workers, workers' representatives, employers and employers' representatives (Cheadle, 2006).

While South African labour legislation does not make specific reference to international migrant workers, nonetheless, the legislation provides that every employee should be subject to fair labour practices, without any reference to nationality, citizenship or employment conditions. This statement is reflective of section 23(1) of the Constitution. Effectively, international migrant workers fall within the scope of "everyone" and can rely on section 23(1) of the Constitution for protection. This constitutional protection was demonstrated in the Labour Court ruling in *Discovery Health Ltd v CCMA & others* (2008) 29 ILJ 1480 (LC). The court held that foreign nations employed in the South African labour market with or without work permits are covered by the term 'everyone' in the Constitution. There is no indication that the term 'everyone' in section 23(1) of the Constitution and the definition of employees according to the LRA excludes migrant workers. This principle is also supported by the ILO Convention 87 (Cheadle, 2006).

2.8 Protection of illegal migrant workers

Migrant workers are identified as a vulnerable population. Migrant workers live and work in regions they are not familiar and they are detached from their traditional social and family network. In additional, international migrant workers often find themselves in unfamiliar

labour environment and cultures. Being an illegal migrant worker bring additional legal implications which diminish the opportunity to enjoy fair labour practice and legislative protection. The Immigration Act 13 of 2002 prohibits employers of labour from employing 'illegal' foreign migrant workers (Araia et al., 2010). Section 38(1) of the Immigration Act 13 of 2002 provides that:

38. (1) 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 in a capacity different from those contemplated in such foreigner's status.

According to Masiloane (2010), the Immigration Act 13 of 2002 prohibits employers of labour from intentionally employing foreign migrant workers with an irregular status; as such an action would aggravate challenges for those migrant workers to enjoy their constitutional right to fair labour practices. The Constitution conforms to the realities of migration which are defined by the significance of the number of irregular foreign migrants and migrant workers in the South African labour market (Masiloane, 2010) by extending protection to everyone. While the Immigration Act 13 of 2002 prohibits the employment of irregular foreign migrant workers, the inclusiveness of the Constitution prevents employers of labour from subjecting workers to unfair labour practices in the absence of any legislative protection.

In *S v Jordaan & others* (2002) (6) SA 642 (CC), the Constitutional Court held that although prostitution in South Africa is illegal, legislation illegalising prostitution does not make reference to infringing on sex workers' rights to privacy and dignity. Similarly in *"Kylie" v CCMA & others* (2008) 9 BLLR 870 (LC), the Constitutional Court noted that while sex workers are considered employees according to conditions provided in the definition of an employee according to the LRA, the statutory right not to be subjected to unfair dismissal is not applicable due to the fact that there cannot be a valid contract of employment. The Constitutional Court's reasoning in this case was perhaps based on the illegality of such work. The logic goes as follows: reinstating a sex worker would be promoting prostitution, compelling South African labour legislation to afford such workers labour rights and thus

prompting institutions such as the courts and the CCMA to manage and regulate an illegal industry.

2.8.1 Enforcement mechanisms used by the Department of Labour

The Constitution and labour legislation provides substantive grounds for the protection of every worker against unfair labour practice or labour exploitation. The state is primarily responsible for the protection of every worker in order to uphold and sustain the principles outlined in the Constitution and labour legislation to ensure compliance to international labour standards.

The Department of Labour has developed, implemented and relies on various enforcement mechanisms to ensure compliance with labour legislation in the workplace. These include; the CCMA, the Labour Court, the Labour Appeal Court and the Constitutional Court (Hungwe, 2013).

2.8.2 Commission for Conciliation, Mediation and Arbitration (CCMA)

The CCMA (Commission for Conciliation, Mediation and Arbitration) is an independent (it has no links to any business, union or political party) dispute resolution body established according to the LRA. The Governing Body of the CCMA is the highest policy-making body and consists of a chairperson and three representatives from the state, organised labour and organised business, respectively. These representatives are nominated by NEDLAC and the CCMA Director, who is also nominated by the Governing Body.

The CCMA has offices in all the 9 provinces in South Africa, whose function amongst others includes:

- Resolving employee and employer disputes through conciliation (exploring compromises to settle a dispute by agreement), or arbitration (objectively providing a legally binding dispute resolution award)
- Providing support in establishing workplace forums
- Publishing guidelines on dispute resolutions
- Providing legal advice
- Deciding on dispute resolution fees
- Managing and publishing information on CCMA procedures, processes, documentation and calculating costs

- Providing training to employers and employees regarding dispute resolution

The CCMA resolves dispute cases by appointing a commissioner who develops a conciliation strategy that includes mediation, collecting information and evidence, and recommending a solution to attempt to resolve the dispute within 30 days. Following this process, the commissioner has to provide a certificate describing the outcome of the case.

The CCMA is mandated to protect and uphold the rights of employees and employers according to South African labour legislation. There are a number of cases which have been referred to the CCMA for dispute resolution by migrant workers. Accordingly, these referrals include but are not limited to Discovery Health Ltd v CCMA & others (2008) 29 ILJ 1480 (LC), Vundla and Millies Fashions (2003) 24 ILJ 462 (CCMA), Moses v Safika(2001) 22 ILJ 1261 (CCMA) and Georgieva-Deyanova/Craighall Spar [2004] 9 BALR 1143 (CCMA).

2.8.3 The Labour Court

Following the CCMA, the Labour Court is the next stage of dispute resolution for unresolved disputes. The Labour Court was also established according to the Labour Relations Act 66 of 1995. It consists of a Judge President, Deputy Judge President and a number of judges determined by its effective functioning and as the President of South Africa considers necessary. However, the President acts on advice from NEDLAC and in collaboration with the Judge President of the Labour Court and Minister of Justice.

According to the section 158 of the LRA, the Labour Court has the following powers:

a) make any appropriate order, including; the grant of urgent interim relief, an interdict, an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act, a declaratory order, an award of compensation in any circumstances contemplated in this Act, an award of damages in any circumstances contemplated in this Act and an order for costs,
b) order compliance with any provision of the LRA,
c) make any arbitration award or any settlement agreement an order of the Court,
d) request the Commission to conduct an investigation to assist the Court and to submit a report to the Court,

e) determine a dispute between a registered trade union or registered employers' organisation, and any one of the members or applicants for membership thereof, about any alleged non-compliance with –
    (i) the constitution of that trade union or employers' organisation (as the case may be) or
    (ii) section 26(5)(b),
f) subject to the provisions of the LRA, condone the late filing of any document with, or the late referral of any dispute to, the Court,
g) subject to section 145, review the performance or purported performance of any function provided for in this LRA on any grounds that are permissible in law,
h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law,
i) hear and determine any appeal in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993) and
j) deal with all matters necessary or incidental to performing its functions in terms of the LRA or any other law.

The power of the Labour Court is to deal with dispute types such as unfair dismissals for misconduct, incapacity and operational requirements. Further, the BCEA grants the Labour Court the authority to determine disputes related to contracts of employment, and the EEA grants the Labour Court the authority to make rulings related to unfair discrimination disputes.

The relevance of the Labour Court in the protection of migrant workers was highlighted by the ruling in *Discovery Health Ltd v CCMA & others* (2008) 29 ILJ 1480 (LC). This matter was initially referred to the CCMA, however, Discovery Health Ltd contented that the CCMA did not have the jurisdiction to rule on case referred by an individual or people who are not employees according to section 200A of the LRA. The matter was then resolved at the Labour Court.

2.8.4 Labour Appeal Court

If a dispute remains unresolved in the CCMA and Labour Court, an appeal can be made to the Labour Appeal Court for the decision to be reversed. The Labour Appeal Court is the ultimate court of appeal for all judgements and orders of matters within its jurisdiction. The

Labour Appeal Court has the same structure as the Labour Court: a Judge President, a Deputy Judge President and as many judges as necessary, determined by its effective functioning.

According to section 174 of the LRA, the Labour Appeal Court has the following powers:

> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the Labour Appeal Court, or to remit the case to the Labour Court for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Labour Appeal Court considers necessary; and
>
> (b) to confirm, amend or set aside the judgment or order that is the subject

Subject to the Constitution and despite any other legislation, the Labour Appeal Court has the exclusive jurisdiction:

> (a) to hear and determine all appeals against the final judgments and the final orders of the Labour Court; and
> (b) to decide any question of law reserved in terms the Powers of Labour Court.

2.8.5 Constitutional Court

The Constitutional Court is South Africa's highest court with regard to constitutional matters, and the court is primarily responsible for the interpretation, protection and enforcement of the Constitution. The court will hear any matter (including labour disputes) on the basis that the matter raises questions regarding the application or interpretation of the Constitution. The Constitutional Court developed from South Africa's first democratic Constitution in 1994 and it constitutes 11 judges who are appointed by the President of the country following consultations with the Chief Justice and political party leaders represented in the National Assembly.

According to sections 167(3), (4), (5), (6) and (7) of the Constitution, the Constitutional Court has the following powers:

(3) The Constitutional Court -

> (a) is the highest court in all constitutional matters;
>
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and

(c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

(4) Only the Constitutional Court may -

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

(c) decide applications envisaged in section 80 or 122;

(d) decide on the constitutionality of any amendment to the Constitution;

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or

(f) certify a provincial constitution in terms of section 144.

(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court -

(a) to bring a matter directly to the Constitutional Court; or

(b) to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

As the highest court primarily responsible for the interpretation, protection and enforcement of the Constitution, the Constitutional Court has played a significant role in the regulation of the South African labour market. In the case between *"Kylie" v CCMA & others* (2008) 9

BLLR 870 (LC), the matter was initially referred to the CCMA and after passing through the enforcement mechanisms mentioned above, a ruling was made at the Constitutional Court.

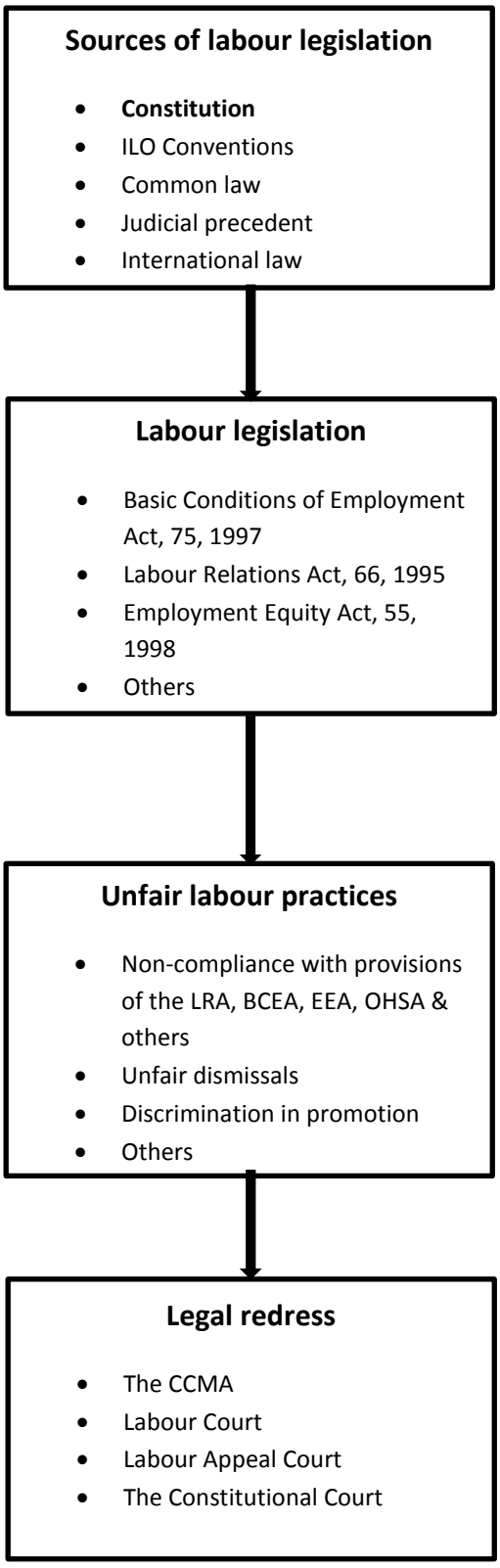


Figure 2: Labour legislation and protection of migrant/vulnerable workers

2.9 The role of international labour legislation

When interpreting and applying South African labour legislation, it is a necessary condition to consider the constitutional and statutory interpretive framework which is the South African Constitution (Gauss, 2011). Specifically, the LRA highlights that the application of the Act must comply with the South African Constitution and South Africa's international law obligation incurred as a member state of to the ILO. Furthermore, the LRA states that one of its primary purposes is to give effect to commitments and obligations as a member state of the ILO. The South African Constitution acknowledged the ILO as the foremost source of its labour dispensation (Cheadle, 2006); therefore, the interpretation and application of South African labour legislation should be consistent with international legislation. Accordingly, the significance of international labour legislation is highlighted in section 233 of the Constitution, which states that "When interpreting any legislation, every Court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." (Gauss, 2011:25).

This constitutional obligation to consider international jurisprudence was demonstrated in *South African National Defence Union v Minister Of Defence & Another* (CCT65/06) [2007] ZACC 10, wherein the Constitutional Court asserted that ILO conventions and recommendations are important guidelines for understanding the meaning of "worker" according to section 23 of the South African Constitution (Gauss, 2011). This position was similarly reflected in *NUMSA & others v Bader Bop (Pty) Ltd & another* (CCT14/02) [2002] ZACC 30, wherein the Constitutional Court pronounced the need to give consideration to ILO Conventions and Recommendations in the interpretation of the South African laws (Gauss, 2011).

According to the ILO (2003), the concept of international labour legislation is a recent development relative to world history. The idea of international labour legislation was prompted in the nineteenth century, primarily by the Industrial Revolution and the related idealism movement related to international human rights, and specifically of international labour rights (ILO, 2003). The increasing prevalence of unfair labour practices and the imbalance of power in the employment relationship emphasised the importance of establishing international labour standards to provide protection for workers. Nonetheless, industrialists feared the financial implications of unilaterally improving working conditions for workers. Consequently, the ILO was established in 1919 on the principle of regulating the

market by primarily balancing the industrialists' concerns with the protection of workers (Gauss, 2011). The main strategy of the ILO was in developing international standards in the form of conventions and recommendations which member states were obliged to comply with. The development and application of international standards is proposed as vital for social progress, economic development and a mutually beneficial labour market (ILO, 2003).

A unique feature of the formation and function of the ILO which sets it apart from other international labour organisations is the element of tripartism. The inclusion of governments, employees and their representatives and employers with representatives is an integral feature of the ILO. Although the nature of the tripartism relationship is generally defined by conflict, it is a necessity for this relationship to be built and sustained on common ground to be socially and economically mutually beneficial. Standards that develop from a tripartite relationship have a large degree of flexibility and universality due to the inclusive and consultative nature of the relationship between workers, employers and the government. Consequently, standards adopted in this relationship accommodate a wider scope of social and economic realities, while maintaining their universality. Simultaneously, the ILO conventions and recommendations are closely linked with a wide range of other human rights. Without this solid basis, ILO conventions and recommendations would lose their meaning and credibility in the idealism movement towards international human rights.

Some of the most important ILO conventions which South Africa has adopted in regulating labour matters include: Freedom of Association and Protection of the Right to Organize Convention 87 of 1948, Right to Organize and Collective Bargaining Convention 98 of 1949, Forced Labour Convention 29 of 1930, Abolition of Forced Labour Convention 105 of 1997, Discrimination (Employment and Occupation) Convention 111 of 1958, Equal Remuneration Convention 100 of 1951, Minimum Age Convention 138 of 1973, and Worst Forms of Child Labour Convention 182 of 1999 (Gauss, 2011).

The foremost source of international protection for migrant workers stems mainly from ILO Conventions such as the Migration for Employment Convention 97 of 1949, the Migrant Workers Convention 143 of 1975 and the Protection of the Rights of All Migrant Workers and Members of Their Families Convention 45/158 of 1990. The Migration for Employment Convention requires that every migrant worker in regular status be subjected to the same treatment and employment conditions as those of nationals. The Migrant Workers Convention focuses on labour migration under less favorable conditions and equality in

treatment and opportunities. This Convention emphasises the need for action to be taken against clandestine employers and organisations which subject migrant workers to abusive employment conditions. The Protection of the Rights of All Migrant Workers and Members of Their Families Convention provides protection for migrant workers and their family members throughout the migration process. This Convention covers other issues, not limited to assistance of their countries' consular services, confiscation of identity documents, human rights, family reunification, forced labour, medical care, protection against violence, slavery, education of migrant workers' children and transfer of earnings (ILO, 2009).

The above-mentioned Convention highlights the importance of the protection of migrant workers to the international community and the founding principle of the International Labour Organisation in 1919, which was the "protection of the interests of workers when employed in countries other than their own" (ILO, 2009). In principle, unless otherwise stated, all international labour legislation documents are automatically applicable to migrant workers.

2.10 Evidence of unfair labour practises

Section 185 of the Labour Relations Act, No 66 of 1995 provides that

> Every employee has the right not to be;
>
> a) unfairly dismissed; and
>
> (b) subjected to unfair labour practice.

Despite the extensive protection provided by international labour organisations, the South African labour legislation, guidelines from The Code of Good Practice and dispute resolution institutions like the CCMA, Employment Equity Commission, Labour Court, Labour Appeal Court, and the Constitutional Court, unfair labour practices are a common feature of the South African labour market (Hungwe, 2013).

A report by the Human Rights Watch (2011) stated that farm workers around South Africa are amongst the most vulnerable to labour rights violations. According to the report, farm workers are subject to a lack of access to fundamental labour rights stipulated in South African labour legislation such as the BCEA, LRA, EEA, OHSA, SDA, UIA, UICA, and UIA. The report revealed that:

- Basic rights such as drinking water and sanitation were in an appalling state;
- Workers' accommodation was inhabitable;
- Workers didn't have access to adequate working tools;
- There were major compromises made regarding the occupational health and safety conditions of workers;
- Employers openly disregarded minimum wage by compensating workers with food and shelter;
- Workers were discouraged from joining unions (Human Rights Watch, 2011).

Freedom of association is a principle that is at the core of ILO and South African labour legislation values. This principle is proclaimed in the Bill of Rights contained in Chapter 3 of the Constitution of the Republic of South African and ILO Constitution (1919), ILO Declaration on Fundamental Principles and Rights at Work (1998), and the Universal Declaration of Human Rights (1948) (Cheadle, 2006).

Section 5 of the LRA stipulates that:

> (1) No person may discriminate against an employee for exercising any right conferred by this Act.
>
> (2) No person may do, or threaten to do, any of the following -
>
> (a) require an employee or a person seeking employment -
>
> (i) not to be a member of a trade union or workplace forum;
>
> (ii) not to become a member of a trade union or workplace forum; or
>
> (iii) to give up membership of a trade union or workplace forum;
>
> (b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or
>
> (c) prejudice an employee or a person seeking employment because of past, present or anticipated -
>
> (i) membership of a trade union or workplace forum;
>
> (ii) participation in forming a trade union or federation of trade unions or establishing a workplace forum;

(iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum;

(iv) failure or refusal to do something that an employer may not lawfully permit or require an employee to do;

(v) disclosure of information that the employee is lawfully entitled or required to give to another person;

(vi) exercise of any right conferred by this Act; or

(vii) participation in any proceedings in terms of this Act.

(3) No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.

The right to freedom of association is considered an essential requirement for sound employment relations wherein workers' rights and interests are acknowledged and respected. This was presented in the case between *Food & Allied Workers Union & another v The Cold Chain* (2007) 16 LC 8.29, wherein a shop steward was dismissed after he declined a job on a higher grade with the condition that he relinquished his position as a shop steward. The Court held that every worker has the right to freedom of association as prescribed by the Bill of Rights, and further has the right to form and/or join a trade union as prescribed by section 23(2) of the Constitution. The Labour Court also took a similar position in *Coin Security Group (Pty) Ltd vs Adams and Others* (2000) 4 BLLR 371 (LAC). It therefore amounts to unfair labour practice and discrimination for an employer to deny any workers promotions based on their union membership and activities.

The 2011 Human Rights Watch report is consistent with previous reports presented in 2003 and 2008 by the Human Rights Watch. All reports documented similar labour rights violations. It is important to note that while the Human Rights Watch (2008) report highlighted that Mozambican and Zimbabwean migrant workers were most vulnerable to such labour rights violations, South African migrants were not exempted from similar experiences, as shown by research from CoRMSA (2011). Similarly, a study by the African Centre for Migration and Society (2010) supported the view that labour rights violations are not exclusive to international migrant workers but are also extended to domestic migrant workers; however, international migrant workers are more vulnerable.

Domestic service is increasingly becoming a significant sector of employment in South Africa, particularly for women. According to the Labour Force Survey (2007), there was an increase from 6.9% in 2001 to 7.7% in 2007 in the domestic employment in South Africa. In 1998, the BCEA provided additional rights to domestic workers, and these provisions include a contract of employment, national minimum wage (subject to yearly increases), standard working hours, compensation for overtime and Unemployment Insurance Fund access (UIF) (Fish, 2006). Despite the amendment of the BCEA, a study by Community Agency for Social Enquiry (CASE, 2010) stated that the abuse of domestic workers was frequent in suburban areas, rather than being a bygone of the past. According to Human Rights Watch (2011), regardless of the important roles domestic workers play, they are among the most abused and exploited workers in the world. The Human Rights Watch highlighted issues such as long working hours, remuneration below minimum wage, physical abuse, and limited freedom of movement and association. However, according to Fish (2006), the biggest problem for domestic workers is the disregard of minimum wage by domestic workers' employers. Similarly, Crush et al. (1992) stated that the South African mining industry survived on low wages for workers and further predicted that the mining industry would maintain low wages if left unchallenged in the future (Crush, 1992). This prediction is not surprising, considering that the mining industry employs mostly unskilled domestic and international migrants who are often poor and lack formal education.

The Private Security Industry (PSI) is yet another industry which has presented past studies addressing cases of exploitation of migrant workers' labour rights. The PSI is among South Africa's fastest growing sector, significantly contributing to employment in the South African economy. In Gauteng, PSI employs 36% of all security workers in South Africa (Conradie, 2011). However, Daniele (2007) observed that PSI has a history of workers' rights violations. One of the most successful private security providers, Group 4 Securicor (G4S), was reported to have an extensive history of frequently disregarding workers' rights and labour regulations. The study by Daniele revealed employment of inadequately trained security guards, below-standard working conditions, worker exploitation and low wages. Consequently, Group 4 Securicor earned a reputation as one of the worst employers in South Africa (Daniele, 2007). Earlier studies by Barret (1993) and Forrest (1993) highlighted how watchmen in the security industry were generally expected to work long hours without leave for 365 days of the year, benefits or social dialogue.

The common factor among farming, domestic services and the mining sector is that all sectors employ a majority of unskilled and semi-skilled labour without tertiary education. The construction sector is no different in the labour force it employs; this sector has a long-standing history of employing unskilled workers who are migrants in their majority (Goldman, 2003). The successful bid by South Africa to host the 2010 FIFA (Fédération Internationale de Football Association) World Cup coincided with a boom in employment in the construction sector. However, the construction sector experienced stagnation and decline soon after the 2010 FIFA World Cup. The limited jobs available in the South African construction sector were mostly temporary and often required workers to be mobile (African Centre for Migration and Society, 2010). The decline in the construction sector and high unemployment in South Africa depressed labour costs for employers, who can further choose to pay workers less and subject them to low-quality working conditions (African Centre for Migration and Society, 2010). The 2010 FIFA World Cup presented construction workers a suitable platform to express their dissatisfaction with low wages and poor working conditions, which often result in frequent labour strikes (Alegi & Bolsmann, 2010).

Regardless of the findings from the scholarly literature, the successful integration and participation of migrant workers in the South African market will play a significant role in preventing social exclusion and marginalisation of people, irrespective of their place or country of origin. Furthermore, migrant workers will be in a better position to add value to the socio-economic development of their host communities, and indeed the country at large, through their participation in the labour market. Migrant workers' sending regions will also benefit through remittances to family members who reside in their countries of origin.

2.11 Summary of chapter

This chapter has outlined a historical perspective of migration in South Africa and internationally with a specific focus on regions which contribute significantly to the movement of unskilled migrant workers within and to the South African labour market. Migration in the context of development was also discussed by presenting both positive and negative consequences of migration on the South African developmental agenda. The chapter also presented a discussion of a variety of domestic and international labour legislation that are primarily related to the legislative protection of workers. Domestic and international commitments made by South Africa related to migrant worker protection formed part of this discussion. Concepts relevant to migrant workers' legislative protection were discussed and

clarified; concepts such as, but not limited to, the notion of a migrant worker, labour legislation, unfair labour practice, fairness, and ‘everyone’ (as used in section 23(1) of the Constitution). Enforcement mechanisms used, which the department of Labour relies on to protect migrant workers, were discussed by identifying their character, role and power. This chapter was concluded by a review of the literature to assess the validity of increasing concerns about the prevalence of labour rights violations in the South African market. The literature review revealed that the scholarly literature has observed and reported on various labour rights violations in the South African market.

CHAPTER 3: RESEARCH METHODOLOGY

3.1 Introduction

Research is commonly phrased as the search for knowledge. Conteh et al. (2005) defined research as a systematic process of inquiry to providing information for an identified problem or proposed solution. Methodology provides "a justification of why we use certain tools in preference to others and why we have decided upon particular combinations of methods and approaches to examine the particular phenomenon in question" (Conteh et al., 2005:108). The present chapter will discuss the methodology used in conducting this study. Concepts to be discussed in this chapter include the research paradigm, research design, research approach, population, sampling procedure, sample size, data collection method and instrument, validity and reliability of the measuring instrument, data analysis and ethical considerations.

3.2 Research paradigm

According to Guba and Lincoln (1994), every research project is determined or influenced by the researcher's research paradigm, which is based on their ontology and epistemological worldview. Ontology is a type of philosophy concerned with the nature of reality (Ponterotto, 2005). This type of philosophy poses questions such as: is there an independent reality that is independent from our knowledge or reality is socially and discursively constructed in a particular culture or time (Marsh & Furlong, 2002). The term epistemology is derived from the Greek word episteme, which translates to knowledge. Epistemology is a type of philosophy concerned with knowledge related to how we come to understand and give meaning to reality (Trochim, 2000). This type of philosophy poses questions such as: how do we know what we know? What is the relationship between he who knows and what he knows? What constitutes knowledge? (Trochim, 2000). Additionally, Weaver and Olson (2006: 460) defined paradigm as "patterns of beliefs and practices that regulate inquiry within a discipline by providing lenses, frames and processes through which investigation is accomplished". Ontology and epistemology are intimately related as they created the relationship between the philosophy of reality and how we come to understand that reality (Krauss, 2005).

According to Creswell (2003), there are two general types of research paradigm: quantitative and qualitative research. The quantitative paradigm is a systematic approach in which the researcher understands and explains reality by utilising computational, mathematical and

statistical techniques (Creswell, 2003). The underpinning assumptions of quantitative research are that reality is objective, singular and independent from the researcher (Goertz and Mahoney, 2006). The qualitative paradigm aims to gain an in-depth understanding of reality by making sense of how people bring meaning to reality (Creswell, 2003). The underpinning assumptions of qualitative research are that reality is subjective, pluralistic and independent from the researcher.

However, Creswell (2003) highlights that recently; there has been a strong interest and development in a mixed method approach to research. The mixed method approach involves the consolidation and use of both the qualitative and quantitative research types (Johnson & Onwuegbuzie, 2004). According to Johnson and Onwuegbuzie (2004), the growing interest in the mixed method approach is premised on the argument that both qualitative and quantitative researches have limitations which can be addressed by the effective combination of both qualitative and quantitative research methods. However, this approach has also been faced with its own shortcomings, such as how to consolidate two contrasting world views (Johnson & Onwuegbuzie, 2004).

Ultimately, no single research paradigm is perfect. Specific paradigms are more suitable for specific kinds of research. The suitability of a research paradigm can be determined by the research area. Given that this research aimed to evaluate non-professional migrant workers' legislative protection and experiences of unfair labour practice, a qualitative research paradigm was the most suitable approach for this research project.

The qualitative research paradigm is consistent with the philosophical foundation of the interpretive school of thought which advocates the view that there are many realities which are shaped by factors such as but not limited to one's experiences, social and political environment.

3.2.1 Qualitative research design

Ontology and epistemology are also intimately related to research design as it contains specific practices and processes of how we attain knowledge of our reality (Krauss, 2005). Cooper and Schindler (2003) defined research design as a blueprint for executing a research project in order to answer specific research questions. Similarly, Marvasti (2004) defined research design as a planned, structured and strategic investigation to address research

problems or answer research questions. Hair et al. (2003) suggests that a research design should be employed on the following grounds:

- The research design will acquire relevant knowledge
- Knowledge will be acquired efficiently in order to acquire valid and accurate answers to the research question
- The limitations of acquiring relevant knowledge will be minimised (Kumar, 2005)

3.2.2 Advantages of qualitative research

Qualitative research encompasses vital characteristics which were most suitable in achieving the objectives of this research as stated in section 1.4.

- Qualitative research focuses on understanding how individuals understand and interpret reality and experiences.
- Research participants were not limited in their responses and explanation towards a specific question; participants had the privilege to fully explain and elaborate on their perceptions. Moreover, the researcher had the opportunity to ask further questions to enhance the depth and quality of obtained information.
- The final product of qualitative research is rich descriptions of peoples' understanding of the specific phenomenon of concern for this research project.
- Qualitative research highlighted that reality is not singular; individuals have different experiences which shape their understanding of reality distinctively (Merriam, 2009)

In addition, as Huberman and Miles (1984) highlighted, qualitative research had the power to produce serendipitous results, thus allowing the researcher to discover new knowledge beyond the expectations of the research project. By not limiting participants in their responses, they were encouraged to provide more information which was important to acquire while attempting to understand a phenomenon (Huberman and Miles, 1984).

3.2.3 Disadvantages of qualitative research

Regardless of the suitability of qualitative research for this research, it still had disadvantages that the researcher had to consider before the execution of the research project. Yin (1984) unconvincingly argued that qualitative research lacks accuracy, as it does not allow for the use of statistical analysis to understand the phenomenon of concern. This view is further supported by Gummesson (1991). However, the merit of this argument may have since been

eroded, since the goal of qualitative research is to understand phenomena of concern from a subjective point of view by highlighting how individuals bring meaning to reality based on the condition that reality is pluralistic, and is thus true for every individual (Creswell, 2003).

One of the disadvantages of qualitative research, highlighted by Huberman and Miles (1984), is its openness to multiple interpretations depending on the researcher's identity, bias and preconceived ideas. The present research has taken this shortcoming into consideration and has therefore devised a strategy to address this. This strategy is discussed in section 3.8 of this chapter.

A general criticism of qualitative research is based on questioning the appropriateness of a small sample size in reaching general conclusions (Leedy and Ormrod, 2005). According to Leedy and Ormrod (2005), a small sample size is not representative of the general population, and thus it has limited value in reaching general conclusions in a similar context. While the justification for the small sample size is discussed in section 3.5 of this chapter, it is noteworthy that the strategic goal of qualitative research is not concerned with generalizability, but rather with developing an in-depth understanding of a phenomenon (Merriam, 2009).

It is however important for every researcher to acknowledge that all research paradigms have various shortcomings. Regardless of the shortcomings associated with qualitative research, it remained the most suitable and potent research design for the present study, as it provided better and more in-depth understanding and rich descriptions of migrant workers' experiences in relation to their legislative protection and unfair labour practices in South Africa.

3.3 Research approach

An exploratory case study was adopted to understand and account for migrant workers' experiences in relation to their legislative protection and unfair labour practices. The exploratory approach is generally used to develop understanding and insight into an issue with limited information and knowledge (Dumba & Chirisa, 2010). The qualitative, exploratory approach holds that reality is not independent from individuals, that individuals have different experiences and that it is these experiences which create and influence their understanding of reality (Wheatley, 1999). Ponterotto (2007) advocated this view by arguing that people have different perceptions about reality because they are exposed to different experiences and in different degrees; therefore, there is no single reality, there are multiple

subjective realities which are true for each and every specific individual. Individual and subjective realities are influenced by one's social belief system, environment and experiences.

A brief summary of issues which are central to addressing the research paradigm are highlighted in Table 1.

Table 1: Methodology approach summary

Ontology	**Epistemology**	**Research Paradigm**	**Research Approach**
There are multiple subjective realities that true for each and every person	Knowledge develops from obtained data through coding of themes and patterns	Qualitative Research	Exploratory study

3.4 Research population

According to McClendon (2004), a research population is defined as the total number of participants who share a common characteristic and can be included in a study. However, the International Organization for Migration (2004) stated that the concept of the migrant worker does not fit well into one definition because different authors and organisations emphasize different aspects of the concept. The organisation therefore described a migrant worker as a person who has moved from a specified geographic location to another to engage in remunerated activities (International Organization for Migration, 2004). The research population of the proposed study comprised all identifiable non-professional workers who are not organised into trade unions and have moved from specific geographic locations to live and work in either Johannesburg or Cape Town.

3.5 Sample and sampling technique

The study drew a portion of participants (sample) from the population in order to obtain information to answer the research questions and achieve the objectives of this research project. This process is termed sampling and is the most practical approach to conducting research on an extensive population. Due to time and financial constraints, the sample size of this study comprised of 10 participants from each of the two research settings. In total, the sample size of this study comprised was 20 participants.

Following the scope of the population, the following criteria were used to select participants from the population into the sample;

- People who have moved to live and work in Johannesburg or Cape Town.
- Workers who are not organised into trade unions.
- Non-professional workers.

Shaughnessy and Zechmeister (1997) highlighted that there are generally two types of sampling procedures: probability and non-probability sampling. Probability sampling is the selection of sample in such a way that every participant in the population has an equal and known chance of being included in the sample. Non-probability sampling is the selection of a sample without equal and known chance for participants to be included in the sample (Cooper & Schindler, 2003). For this research, non-probability sampling method, using a purposive sampling technique, was used to select participants.

Purposive sampling, also known as judgmental or convenience sampling (Bryman and Bell, 2003), refers to the selection of a sample based on the researcher's knowledge of the population elements and nature of the research objectives (Creswell, 2003).

The advantage of purposive sampling is that it allowed the researcher to select participants based on their migration status. However, due to the inherent challenges in identifying migrant workers; the researcher also relied on the snowballing sampling technique. Snowballing sampling, also referred to as referral or network chain, enabled the researcher to gain access to more migrant workers from the referral of migrant workers that had already been identified for participation in the study (Bernard, 2000). Furthermore, the researcher contacted organisations such as the Migrant Workers' Association of South Africa and Jesuit Refugee Services for possible assistance in accessing migrant workers who were members of their organisations. All participants were approached and requested to participate in their own personal capacity and outside of their working hours and employer's premises.

3.6 Data collection method and instrument

Following the identification of the population and the selection of the sample, the researcher proceeded to obtain relevant information, which assisted in providing answers to the research questions. This process is called data collection. Olsen (2012) defined data collection as a systematic process of obtaining relevant and accurate information which is important for the research outcome. Merriam (2002) suggested that qualitative research contains three major

methods of data collection: documents, observations and interviews. The objective of the proposed study was to evaluate the degree of legislative protection and experiences of unfair labour practices within the South African labour market. Therefore, the semi-structured interview was the most suitable data collection method for this research project.

To ensure that semi-structured interviews are an efficient tool for obtaining relevant answers to the research question, as per Kazi and Khalid's (2012) recommendation, the researcher ensured that the interview questions had the following characteristics. They were: related to the phenomena of concern, adequate for the problem intended to address, and simple and precise in their wording. Furthermore, during the interviews, the participants were all asked the questions in the same way.

3.6.1 Disadvantages of interviews

While semi-structured interviews were deemed the most suitable and potent method of data collection, generally, interviews are not immune to shortcomings. The first shortcoming of interviews is that they are relatively time-consuming (Tashakkori & Teddlie, 2003). Considering the limited timeframe allotted to develop and execute this research project, time was constantly a challenge in organising and conducting interviews with the sample of 20 participants. A second disadvantage was the possibility of the researcher's behaviour and bias affecting the proceedings of the interviews. However, the researcher was cognisant of the disadvantages associated with conducting interviews, and therefore the researcher was highly attentive and cautious in limiting the scope of his behaviour and bias in affecting the conduct of the interviews.

3.6.2 Advantages of interviews

The advantage of semi-structured interviews is primarily that they create an environment in which the participants are free to respond according to their experiences regarding the matter at hand, as they are not constrained by options in their responses (Tashakkori & Teddlie, 2003). As such, participants had the opportunity to seek clarity on any issue before, during and after each interview session. When a participant did not understand how a question was phrased, the researcher would rephrase questions or explain specific terms for better clarity and understanding. The interview structure also enabled the researcher to use probing questions to explore and gain access to relevant and in-depth information and knowledge about migrant workers' experiences (Creswell, 2003). These are significant advantages that are rarely available with other data collection methods.

3.6.3 Data collection procedure

The researcher issued a formal request letter (see Appendix A) to all potential participants. The letter highlighted information about the purpose of the interview, the researcher, the researcher's and supervisor's contact details, reasons why individuals were selected to participate, what participation entailed, the data collection instrument, the researcher's responsibilities and the participant's rights. The researcher also explained the format of the interview and indicated how long the interview might last. At this stage, the researcher began initiating a rapport-building process in order to build a relationship with each participant that enabled the research to obtain actual, detailed information about each participant's experiences. Following potential participants' display of interest in participating in the study, they were issued with two consent letters; informed consent for participation and informed consent for interview recording (see Appendices B and C). The researcher discussed the content of both letters and addressed all related questions and concerns regarding informed consent letters. The recording instrument was checked and prepared for the interview.

3.6.4 Interview atmosphere and structure

According to Knoxa and Burkarda (2009), the most beneficial interview technique is a researcher's ability to create an environment in which participants are free and motivated to answer questions truthfully, while the researcher guides the conversation to produce relevant information. The researcher equipped himself with interview knowledge suggested by Berg (1989). According to Berg (1989), during interviews, researchers should learn to use their body movement in a manner that does not make participants uncomfortable and consequently discourages participants from giving detail and truthful responses. Berg (1989) suggested that researchers should position their body in the direction of the interviewee, have regular eye contact, and encourage responses by making frequent acknowledgement gestures such as nodding. Furthermore, the researcher should avoid talking while participant is talking (Berg, 1989). The above discussed techniques are referred to as synergistic effect by Berg (1989).

The interview structure has three segments, namely the introduction, body and conclusion. The introduction was used to build rapport and obtain demographic information about the participant. It is important to mention here that participants (interviewees) were not asked personal questions relating to their gender or sexual orientation. The second segment, body, comprised of questions aimed at obtaining in-depth descriptions of the participants' experiences related to the legislative protection and perceived unfair labour practices in the

South African labour market. As discussed in section 3.6, the employed interview structure was semi-structured. While the interview guide provided a framework to assist the researcher in asking specific questions, the researcher used probing questions to obtain more information from participants. In the closing statement, the researcher asked participants for any further information they would like to add or highlight before the close of the interview. The researcher followed by thanking each participant for their valuable time and gave them an opportunity to voice any questions and concerns they had regarding the research and the interview process.

3.6.5 Interview setting

The goal of qualitative research is to study a phenomenon in its natural setting or an environment that is not manipulated. However, in order to ensure that the researcher would conduct and obtain information from each participant, all interviews had to be conducted in a setting with minimal distraction. Given that the research was conducted in two different cities, there was no central venue for all participants to be interviewed. Therefore, the researcher utilised study rooms in private library rooms and coffee shops.

3.6.6 Post-interview practices

After each interview session, participants were provided with the researcher and supervisor's contact details in order to communicate any future concerns and requests for a summarised copy of the final report. Documents from the Department of Labour containing information on general and sector specific workers' rights and unfair labour practices were presented to each participant. All interviews were tape-recorded and transcribed for the purpose of data analysis.

3.7 Data analysis

According to Braun and Clark (2008), data collection is followed by data analysis, which is the process of applying reason to understand and interpret collected data. Thematic content analysis was employed to organise, describe, compare and summarise obtained data in a bid to address the research questions and objectives. Braun and Clarke (2008) defined thematic content analysis as a logical technique of describing, summarising and comparing data to give meaning to raw data by finding, classifying, studying and reporting patterns and themes.

3.8 Rigour

According to Agar (1980), people often make the error of evaluating qualitative research against criteria relevant to quantitative research. Qualitative and quantitative research are different in their nature and purpose, and thus it is erroneous to employ the same criteria of worthiness. Concepts such as reliability and validity are related to quantitative research, and thus they are not pertinent to qualitative research (Agar, 1980). On the other side of the coin, Leininger (1985) argues that the issue is not whether research is valid or reliable, but how these concepts are defined. Nonetheless, Guba (1981) postulates that a distinct model for evaluating the trustworthiness of qualitative research should be employed. Notwithstanding the other models of evaluating qualitative research trustworthiness (Eisner, 1991), and goodness (Emden & Sandelowski, 1998; Marshall, 1990), this research project was based on Guba's (1981) model because it is the most prominent, and it is conceptually well-developed. Guba's (1981) model is grounded on four aspects of trustworthiness: truth value (credibility), applicability (transferability), consistency (dependability) and neutrality (confirmability).

Truth value refers to the extent to which the researcher has established confidence in the truth of the findings with the participants and the context of research. Truth value is gained from the discovery of human experiences and the way they are lived and perceived by participants (Guba, 1981). According to Sandelowski (2002), truth value is the most important criterion for qualitative research, because qualitative research is credible when it accurately describes or interprets human experiences. In a bid to establish the truth value of this research, the researcher declared that there were no financial gains involved and that the research project was solely for academic purposes. Thus, the research was independent of any third party that could potentially have influenced the direction of the research in any way. A number of strategies were employed to ensure the credibility of this study, such as prolonged engagements with literature, and supervisor examination and discussion (Guba, 1981). When a research project includes third parties, Guba (1981) suggested further strategies such as member checking, which refers to the verification of obtained data after data collection, and triangulation, the technique of using multiple methods to obtain data (Guba, 1981).

Applicability is defined as the degree to which the findings of one study can be applied to other contexts and groups (Guba, 1981). Guba and Lincoln (1994) argued that applicability is the primary responsibility of a researcher who intends to apply the findings of one research undertaking to another context or group. However, the authors also argued that the initial

research has to contain adequate descriptive data to allow applicability (Guba & Lincoln, 1994). In that regard, this research project has provided adequate information regarding the findings and process leading to the findings of this research project.

Consistency is the third criterion which is concerned about the degree to which findings would be consistent if this study was replicated with the same participants or in a similar context (Guba & Lincoln, 1994). Field and Morse (1995) argued that in qualitative research, variability is a common feature of replication, because this type of research aims to represents the unique experiences of individual in an uncontrolled context, rather than general experiences in a manipulated context. However, Guba and Lincoln (1994) argued that some level of consistency can be achieved when truth value and applicability are achieved. Furthermore, Guba and Lincoln (1994) suggested that consistency can be further enhanced by substantial descriptions of research design, implementation and operational details of data collection. Furthermore, consistency can be improved by limiting the interference of the researcher behaviour and action in the research process (Guba & Lincoln, 1994).

Neutrality considers the degree to which the findings are a sole function of the experiences of the participants as they are lived and perceived. Neutrality refers to the freedom of results from bias (Guba & Lincoln, 1994). Neutrality can be established by employing both reflexivity and confirmability. Reflexivity refers to an on-going reflexive dialogue from the research on issues (social, economic, political, religious, cultural, and historical) that may cause bias in the research process and findings (Kelly & Russel, 2002). In qualitative research, the researcher is the primary 'instrument' of data collection and analysis, and thus reflexivity is deemed to be essential (Russsel & Kelly, 2002; Stake, 1995). In light of this reality, the researcher had on-going reflexive introspections to ensure that the researcher's initial bias and preconceived ideas were expelled, to help ensure objectivity throughout the research proceedings, and more significantly during data collection and analysis.

Confirmability refers to the notion of having a similar outcome from the same data, independent of the party analysing or assessing the research results (Lincoln & Guba, 1981). To guarantee the conformability of this research, in addition to its reflexivity, the research provided proof for all descriptive analyses by quoting participants diligently. The analysis of this research was primarily determined by the data obtained from participants.

3.9 Delineation of the study

The research setting of this study comprised of the city of Johannesburg in the Gauteng province and the city of Cape Town in the Western Cape province of South Africa. South Africa has other geographic locations such as Durban, Tshwane and Limpopo with a significant presence of migrant workers; however, this research project focused on these two locations due to time and financial constraints.

3.10 Ethical considerations

Sampling, data collection and analysis in research do not exist in a vacuum. All these stages and processes included people who were critical in gaining insight and knowledge regarding the topic of interest. Therefore, the research bore a high degree of responsibility, in ensuring that all the participants were protected and their rights were respected at all times. According to Wassenaar (2006), the moral integrity of every research project is based on four principles: autonomy and respect, beneficence, non-maleficence and justice (Wassenaar, 2006). Accordingly, researchers are accountable to sovereign laws and regulations and to a body which grants permission to develop and execute a research project (Wadeley, 1991). Preceding sampling, data collection and analysis, the researcher applied for and obtained permission from the University of the Witwatersrand Research Ethics Committee (see appendix E)

Consent to participate in the study was obtained from all the participants who were equally informed of their rights in the course of their participation. Following gaining consent to participate, the researcher had a further obligation to protect all participates from harm (Terre Blanche et al., 2006). Sensitivity and vulnerability are two concepts that are fundamental to investigating and understanding unskilled migrant workers' experiences in the scope of legislative protection and unfair labour practice, while addressing the ethical considerations involved (Clement et al., 1999).

The researcher further protected the identity of all participants by not disclosing their identities or collecting information which might reveal their identity. In order to further protect the personal identity of the participants, voice recordings were only accessible to the interviewer and the research supervisor.

3.11 Benefits of the research

Wadeley (1991) argued that research should make a contribution and be beneficial in one form or another. The research study contributed to scholarly literature by investigating the legislative protection and experiences of unfair labour practice. Such an investigation will assess South Africa's ability to fulfil its state obligation, continental and international commitments, and promises made to various institutions. Furthermore, the findings of this study will present the labour authorities with the experiences of migrant workers regarding their employers' compliance with various provisions of the labour legislation. According to Clements et al. (1999), such research regarding vulnerable individuals should be even more beneficial for the participants. All participants of this study were presented with relevant documents from the Department of Labour, which are industry-specific and contain information regarding unfair labour practices and workers' rights. The documents were presented with the aim of enhancing workers' knowledge and interpretation of various labour legislation and provisions. Furthermore, the documents also contain information about labour law enforcement agencies and suitable channels for gaining legislative protection.

3.12 Summary of chapter

The research methodology has provided suitable methodological approaches to an exploratory case study to understand and account for migrant workers' experiences in relation to their legislative protection and unfair labour practices.

A non-probability sampling method, using a purposive sampling technique, was used to select 10 participants from each of the two research settings. Semi-structured interview were used to collect data which was analysed using thematic content analysis. Further, ethical considerations were discussed in the context of sampling, data collection and analyses to produce results reported in the next chapter of this research dissertation.

CHAPTER 4: DATA ANALYSIS AND DISCUSSION

4.1 Introduction

The previous chapter described the methodology which was used in conducting the empirical study. The chapter discussed the research design, data collection techniques and content analysis techniques. This chapter presents the results and discussion of the data analysis. The analysis of the findings will focus on four issues as follows: characteristics of the sample, reasons why migrant workers choose Johannesburg and Cape Town as their cities of migration, the experiences of unfair labour practices by migrant workers in these two cities, and lastly the perceptions and prospects of future of migrant workers in the two cities.

4.2 Sample profile

The sample of this research comprised of internal and international migrant workers living and working in Cape Town and Johannesburg, respectively. The sample comprised of 20 migrant workers. As shown in Figure 3, there is a relatively high proportion of internal migrant workers, which amounted to 70% of the sample, while international migrant workers amounted to 30% of the sample size. From the sample, a total of 40% of internal migrant workers and 10% of international migrant workers are from the city of Cape Town, while 30% of internal migrant workers and 20% of international migrant workers are from the city of Johannesburg. As discussed in section 2.2.1 of this dissertation, it is not surprising that the number of internal migrant workers in the sample is relatively higher. International migration is politically sensitive, while internal migration in South Africa presents significantly reduced political challenges.

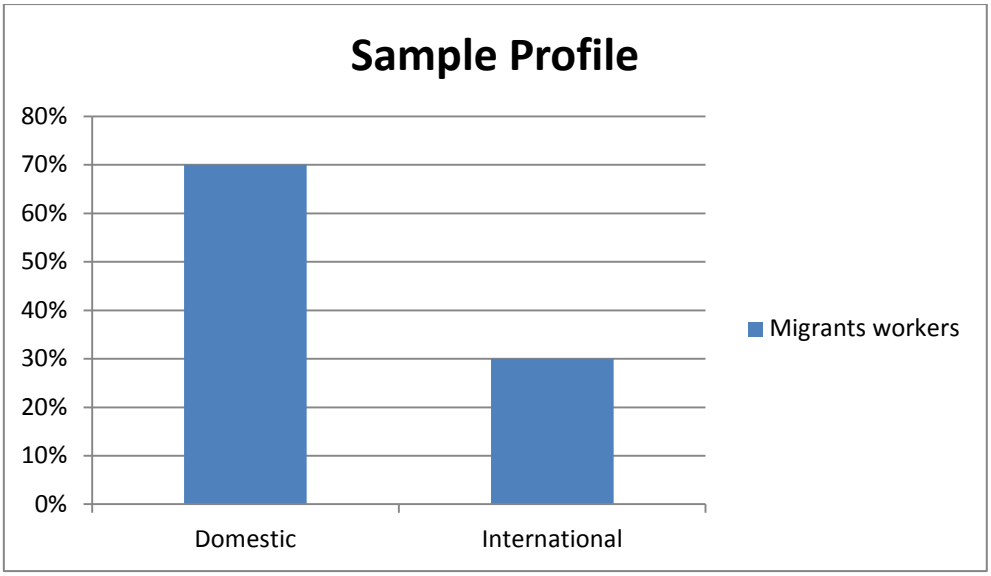


Figure 3: Sample profile

4.2.1 Age structure by migrant type

The pattern of the age distribution of the sample reveals distinct similarities and differences between internal and international migrant workers. As shown in Figure 4, the age group of 35-44 has the highest proportion of both internal and international migrant workers, which amounted to 50% of internal and international migrant workers respectively, and subsequently 50% of the total sample. In addition, some differences are shown in the distribution of the sample; internal migrant workers are represented in all the age groups, while international migrant workers are represented in 2 of the 4 age groups.

Type of migrant worker	Percentage distribution of age				
	18-24	25-34	35-44	45-older	Total
Internal	(1) 5%	(2) 10%	(7) 35%	(4) 20%	(14) 70%
International	0	(3) 15%	(3) 15%	0	(6) 30%
Total	(1) 5%	(5) 25%	(10) 50%	(4) 20%	(20) 100%

Figure 4: Age distribution of respondents

In a migration study, Maphosa (2011) found that migration occurred predominantly before the age of eighteen. Results from this study were different as it was found that migrant

workers in both the Cape Town and Johannesburg sample migrated after the age of eighteen. The median age of migration for the Cape Town sample was 23, while for Johannesburg it was 25. Results from this study are consistent with results from a study by Hungwe (2013), who found that migration predominantly occurs after the age of eighteen.

4.2.2 Sending internal regions

Migration is generally discussed with reference to sending regions to obtain a broader understanding of the migration process. According to Landau (2009), both Cape Town and Johannesburg receive the largest number of migrant workers; more than any other city in South Africa. However, these two cities have different sending regions, primarily due to their geographic location.

As discussed in section 2.2.1, Figure 5, derived from the sample, confirms the expectation that the province of Eastern Cape is a relatively greater contributor to the sample of internal migrant workers in the city of Cape Town. According to studies from Bekker (1999) and Polzer (2010) the Eastern Cape is a significant contributor to internal migration into Cape Town due to close proximity of the two regions and Cape Town's proverbial favourable economic realities. As shown in Figure 5, the Eastern Cape contributed 50% to the Cape Town sample size; the province of Free State contributed 20%, while the Northern Province contributed 10%. "Other" in the figure below represents the contribution made by international migrant workers.

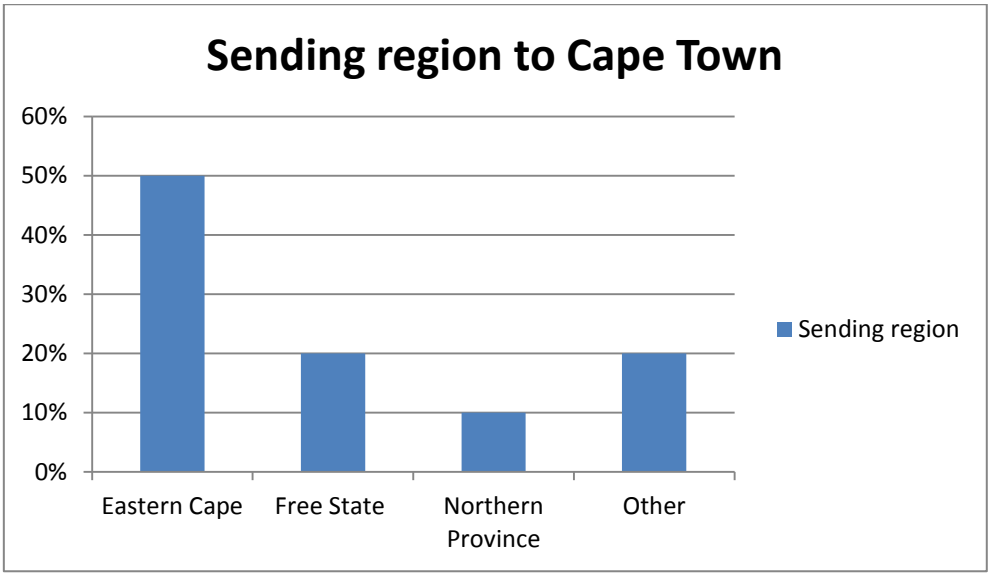


Figure 5: Sending internal regions to Cape Town

As shown in Figure 6, the sample's regional contribution of Johannesburg's internal migrant workers reveals that two provinces contributed to the Johannesburg sample size. The province of Limpopo had the highest contribution for a single region, with a contribution of 40%, while the province of Mpumalanga contributed 20% to the Johannesburg sample size. Various international regions, which will be discussed below, contributed 20%.

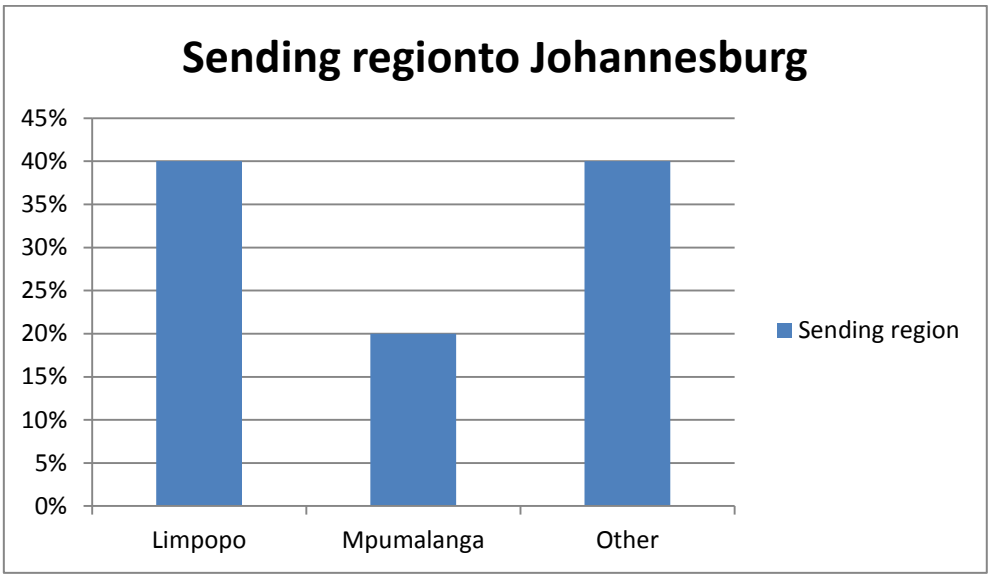


Figure 6: Sending internal regions to Johannesburg

The regional pattern of internal migration to Cape Town and Johannesburg reveals similarities and differences. A distinct similarity is that both cities have a specific region with the highest and most notable contribution. A notable difference between Figures 5 and 6 is that Cape Town accounted for more sending regions with a low contribution from international regions, while Johannesburg had few sending regions and the highest contribution from international regions, which amounted to 40% of the city's sample size.

4.2.3 Sending international regions

Following the discussion on sending internal regions, there is little surprise that sending international regions had a relatively low contribution to the sample size for both Cape Town and Johannesburg. However, in the context that Africa has major migration contributors such as Nigeria, Mozambique, Malawi, Namibia and Lesotho and Swaziland (which are relatively closer to both Johannesburg and Cape Town) (Polzer, 2010) it is surprising that Figure 7 shows that Zimbabwe was the only contributing international region in the Cape Town sample, with a 20% contribution. Other in Figure 7 refers to the contribution made by internal regions as shown in Figure 5.

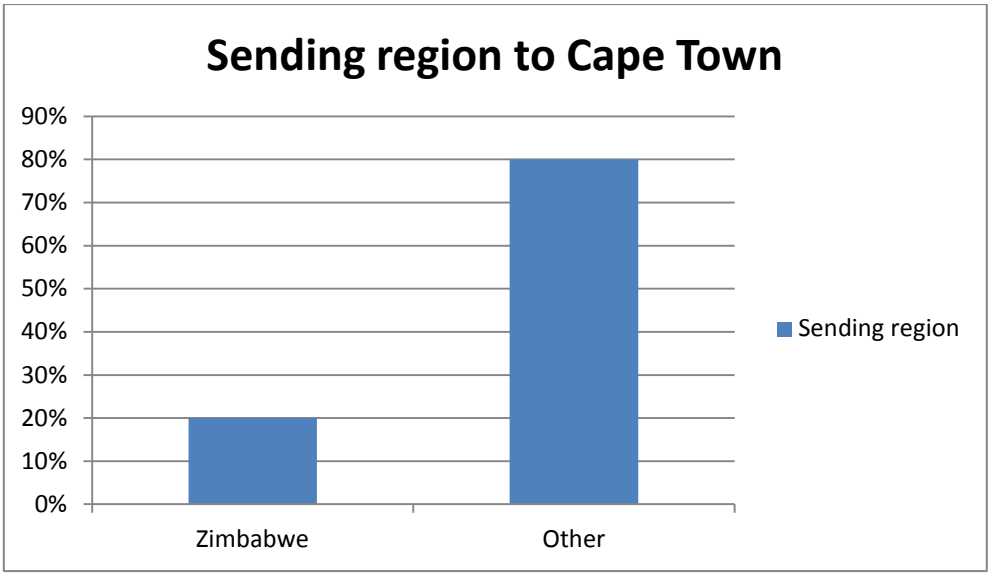


Figure 7: Sending international regions to Cape Town

Similarly to Cape Town, sending international regions had a relatively significant contribution to the Johannesburg sample. International regions amounted to 40% of the Johannesburg sample; in addition, as shown in Figure 8, two countries were represented equally in the Johannesburg sample, in comp arison to the Cape Town sample, in which one country was represented.

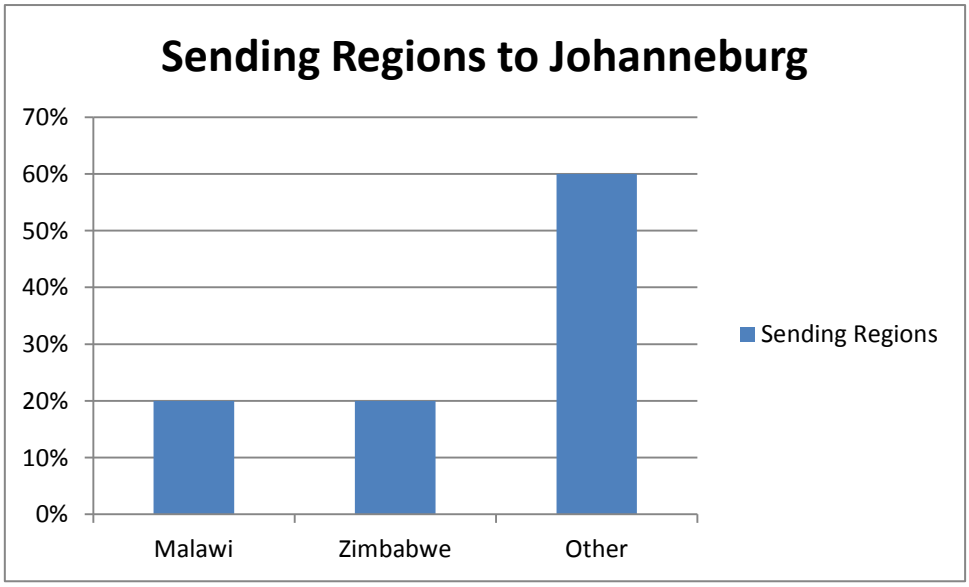


Figure 8: Sending international regions to Johannesburg

Sending international regions had a median contribution of 30% of the total sample size. Johannesburg, which is in a north-east direction from Cape Town and is closer to both

contributing international regions, Malawi and Zimbabwe, contributed 20% of the 30% from international sending regions.

4.2.4 Level of education/qualification

Although the ILO International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families guarantees migrant workers and their families access to education and vocational training guidance (Gauss, 2011), labour migration literature generally highlights that migrant workers have low levels of education thus exacerbating their exposure to unfair labour practice, relative to highly skilled migrant workers with formal education (Cheadle, 2006). All the participants were given an opportunity to elaborate on their level of education and the qualifications they possessed. Figure 9 shows that 80% of the Cape Town sample is evenly distributed between participants whose level of education/qualification is below a Senior Certificate or an equivalent, and participants who have obtained a Senior Certificate or an equivalent. In addition, 10% of the samples had obtained a Higher Education Certificate and the remaining 10% had obtained a Diploma.

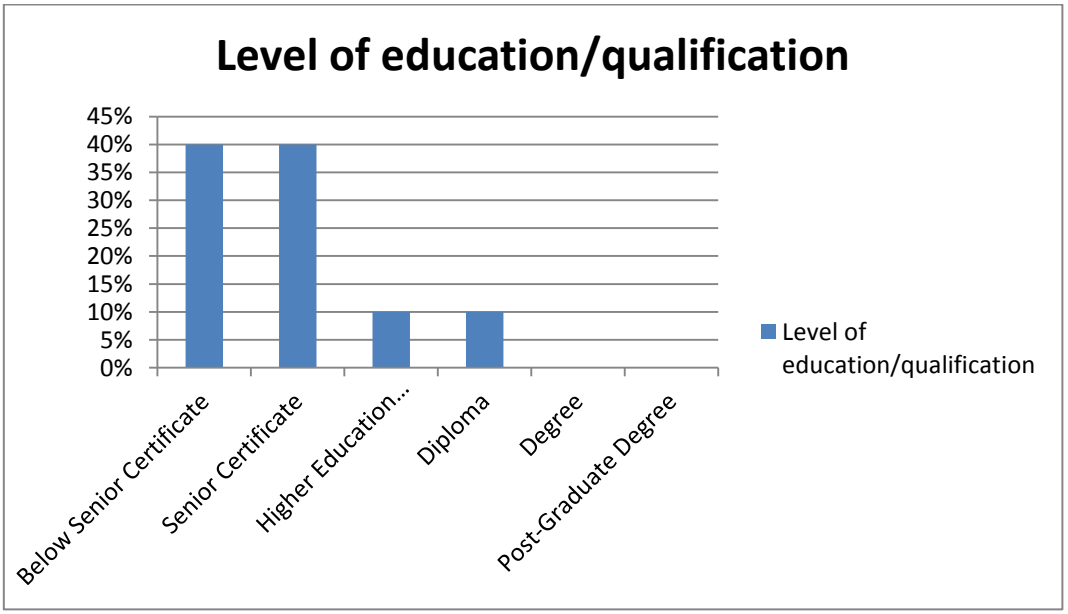


Figure 9: Level of education/qualification for Cape Town sample

The Johannesburg sample is represented across 3 levels of education/qualification. Figure 10 shows that 20% of the Johannesburg sample's level of education is below a Senior Certificate or an equivalent, while another 30% holds a Higher education certificate. A majority of the Johannesburg sample, 50%, has obtained a Senior Certificate or its equivalent.

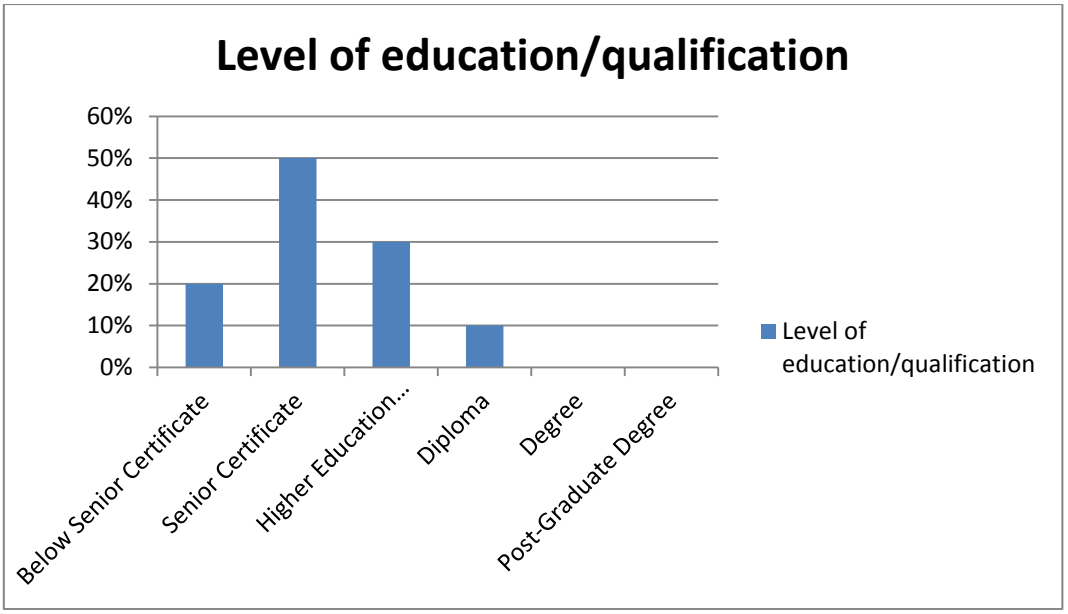


Figure 10: Level of education/qualification for Johannesburg sample

The distribution of the level of education/qualification between internal and international migrant workers indicates that all the international migrant workers have obtained at least a Senior Certificate or an equivalent. From the total pool of international migrant workers, 50% have obtained a Senior Certificate or an equivalent, 33% have obtained a Higher Education Certificate, while the other 17% has obtained the highest education/qualification level, a diploma, from the total sample. Conversely, 86% of internal migrant workers are evenly distributed between between those whose level of education/qualification is below Senior Certificate or an equivalent, and those who have obtained a Senior Certificate or an equivalent. Thus, 14% have obtained a Higher Education Certificate.

4.2.5 Sector of employment

According to Chirwa (1998), the history of labour migration in South Africa is characterised by a consistent, significant distribution of migrant workers in the mining and agricultural sectors, relative to other economic sectors. The discovery of diamond and gold in South Africa and the need for agriculture led to massive labour migration to satisfy the demand for cheap unskilled labour (Solomon, 2003). Over the past decades, the South African labour market has evolved from being primarily based on agriculture and mining to include sectors such as but not limited to the security, automotive and manufacturing sectors. Figure 11 shows that the sample was distributed across 10 sectors, with the manufacturing sector accounting for the highest frequency of the sample.

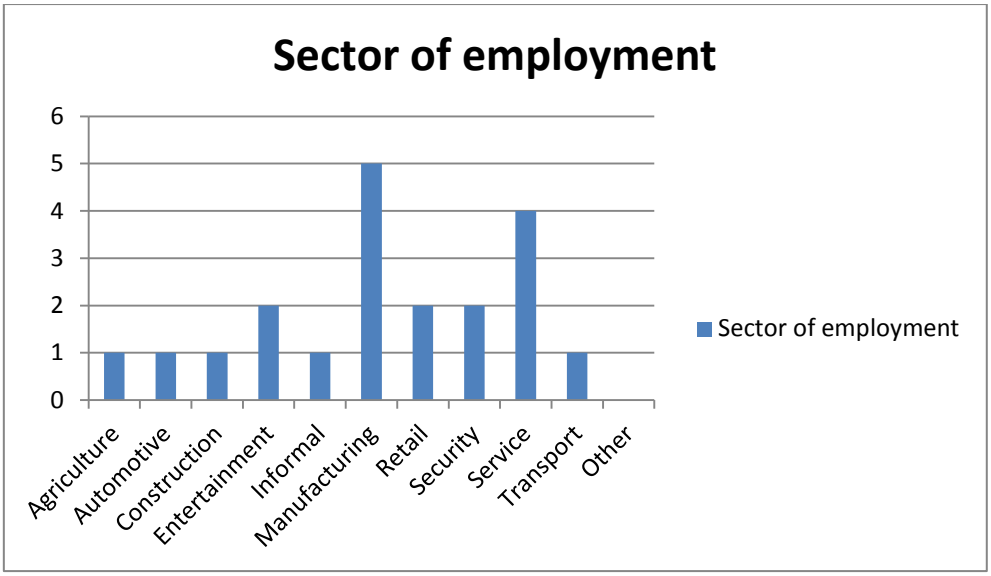


Figure 11: Sector of employment

As discussed in section 3.2.2, the researcher found serendipitous information related to the participant's knowledge of their sector of employment. A significant majority of the sample were not aware of their employment sector. While some participants admitted not knowing their employment sector, some participants provided responses which were discrepant from their descriptions of their jobs.

4.3 Reasons for migration

Migration is generally discussed with the reason underlying the migration; a vast body of literature presents various causes which contribute to migration. However, for migrant workers, it is held in general consensus that the primary motivation for migration is linked to new or better employment opportunities (Gindrey, 2008; Holtz-Eakin, 2005; Ndebele, 2003; Poswa & Levy, 2006; Raimundo, 2008). The decision to migrate has profound consequences on most, if not all, aspects of the migrant's life, and thus this is a critical decision. Figure 12 depicts reasons that informed the participants' migration to Cape Town and Johannesburg. A majority of the sample based their decision to migrate on favourable economic conditions which translated to more and better employment opportunities. Migration based on favourable economic conditions was cited in the following comments;

"*The city is known for having many job opportunities that pay a lot of money. Also back at home, the jobs are small and the people are many, here there are jobs. People from home, move from home to come get work here*". (Participant 11)

Similarly, other respondents asserted that:

"*..it is the economy of the country, that is where everything is economically and you know Jozi (Johannesburg) has been said as we grow up, it is the place of gold*". (Participant 3)

"Many Zimbabweans come here to seek a better life like me. I come to South Africa, Cape Town as it is one of those cities where people all over even South Africa, come to look and get jobs". (Participant 19)

The motivation to migrate based on favourable economic conditions is consistent across all the various age categories, internal and international migrant workers in the Cape Town and Johannesburg sample.

An additional reason cited for migrating by some of the respondents was the quest to join their partners who have migrated to South Africa. Accordingly, 10% of the sample, 5% from Cape Town and 5% from Johannesburg migrated to live with a partner. However, the two cities' favourable economic conditions also contributed to the decision to consider migration to live with a partner.

"*I moved here in 1998, my husband moved from Eastern Cape to work here, when he found a job, I came to live with him and also work*". (Participant 2)

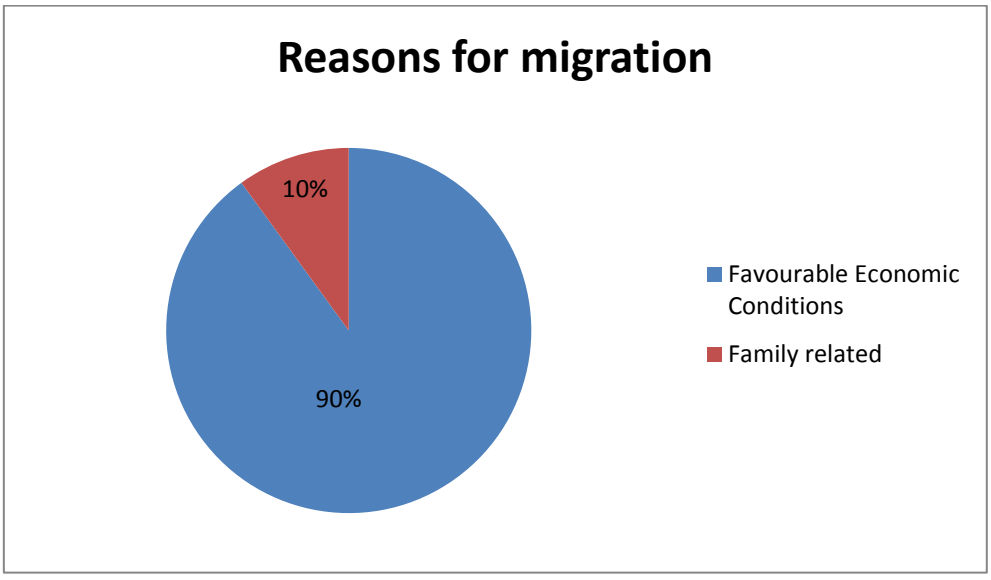


Figure 12: Reasons for migration

The findings regarding reasons for migrating to Cape Town and Johannesburg indicated that favourable economic conditions in Cape Town and Johannesburg were informed and

reinforced by improved financial autonomy of returning or visiting migrant workers. This finding was partially expressed by an internal migrant worker who stated that he migrated to Johannesburg because:

"*it is the economy of the country, that is where everything is economically and you know Jozi* (Johannesburg) *has been said as we grow up, it is the place of gold and when you learn about it in school, it used to attract a lot of interest because as a young boy I studied in Swaziland and then I finish my schooling there of which it created a lot of interest in Johannesburg as a whole and knowing it from another perspective".* (Participant 3)

Similarly, an international migrator from Zimbabwe stated that:

"*When you are home, you see that people from Joburg* (Johannesburg) *are coming with nice things and they are having a better life than if they were in Zim* (Zimbabwe) *They can support their families and they seem happier".* (Participant 10)

4.4 Knowledge of labour rights

The ILO holds that the protection of migrant workers can be partially achieved by educating migrant workers on their rights and legal recourse in cases of unfair labour practices or exploitation by employers of labour (Cheadle, 2006). The legislative protection of migrant workers is expressed through the awareness of unfair labour practices or exploitation and enforcing corrective action against the perpetrators.

Figure 13 suggests that a majority of the sampled migrant workers understood their labour rights. As shown, a significant 75% of the sample expressed that they had an understanding of their labour rights, while 20% admitted not to have this understanding and 5% expressed that they were uncertain about their level of knowledge.

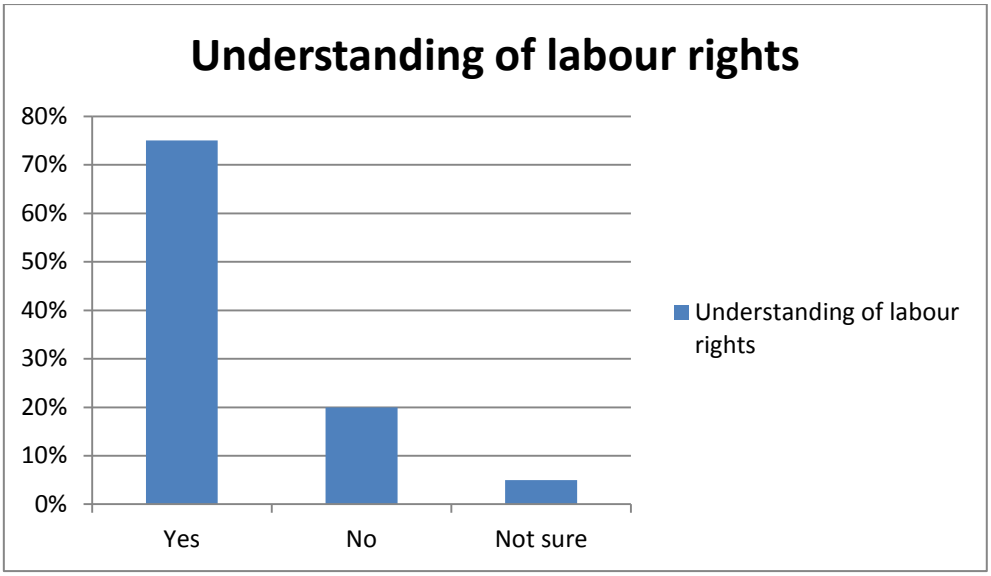


Figure 13: Knowledge of labour rights

As discussed in section 3.2.2 of this dissertation, one of the advantages of qualitative research and semi-structured interviews is the power to use probing questions to obtain clarity or seek further understanding of participants' responses. While most of the sampled migrant workers expressed that they had an understanding of their labour rights, when the researcher probed by requesting an understanding of migrant labour rights and core migrant labour rights, the researcher discovered serendipitous results. Finding serendipitous results is a further advantage of employing semi-structured interviews in research, as highlighted by Greenbank (2003). Out of the 75% of participants who expressed that they had an understanding of their labour rights, as shown in Figure 14, responses to probe questioning revealed that 81.25% of this sample had no substantive understanding of their labour rights.

When participants were probed to elaborate on their labour rights, the following responses were manifested:

"*Like, I need to be treated fairly at work; I need to have a voice in the decisions that are taken within my organisation*". When the participant was asked about additional rights he knew, the response was "*I have the right to fair labour practice*". The researcher further requested the participant to elaborate on his understanding of fair labour practice, the participant responded that "*I think my right my supervisor must understand that we are just colleagues, it is not like, it is just a job and it is not personal*". (Participant 2).

"*The right to be respected and treated like a person. All these things happen and when we report to management, nothing happens; the treatment we get is similar to the one we got during apartheid"*. (Participant 4)

"..if you are a worker, you are working to be paid so you must get money for work. Things are not the same now, we are all equal, people must be treated better". (Participant 9)

"I know that I have the right to be paid for my work and that I should have days off to rest and see my family back home". (Participant 11)

"I know that, I know my right that I must do my work good so I can keep my job. I must be treated good by everyone so I can go on to do my job good". (Participant 12)

"As someone from Zimbabwe, I may not be protected by all laws from South Africa but there are international laws that protect me...I don't know them all but I know there are laws from the UN that protect me". (Participant 13)

"I know that I must not do anything we did not agree on. If I feel not comfortable I will talk to my boss or the man and we will find a good way. I'm human and I deserve normal needs like food, and water. I must also report violent things when it happens to me". (Participant 14)

"Yah I know that we should be provided with safety clothing and training on how to use the different machines that we are using in order for us to be protected from injuries and other health issues". (Participant 17)

"I know my rights as a worker is to get basic needs to survive, we call them survival kit in security language, like drinking water, to go to the toilet, my security uniform. Also, I know that my boss must give me my pay according to my shifts; if I work overtime he must pay for that. The right of a security is also to report any behaviour or wrong things in the premises, my boss knows I report something 'fishy' when I notice". (Participant 18)

" I know them but not all of them and some I know them but don't really know them. I mean I know the right but I don't really understand it. Law isn't easy so you can think you know but you don't". (Participant 20)

While most of the participants made a reference to a single or multiple conditions of employment, there was no substantive mention of core labour rights as suggested by various

ILO Conventions and Recommendations on migrant workers, UN Convention and applicable South African labour legislation on migrant workers.

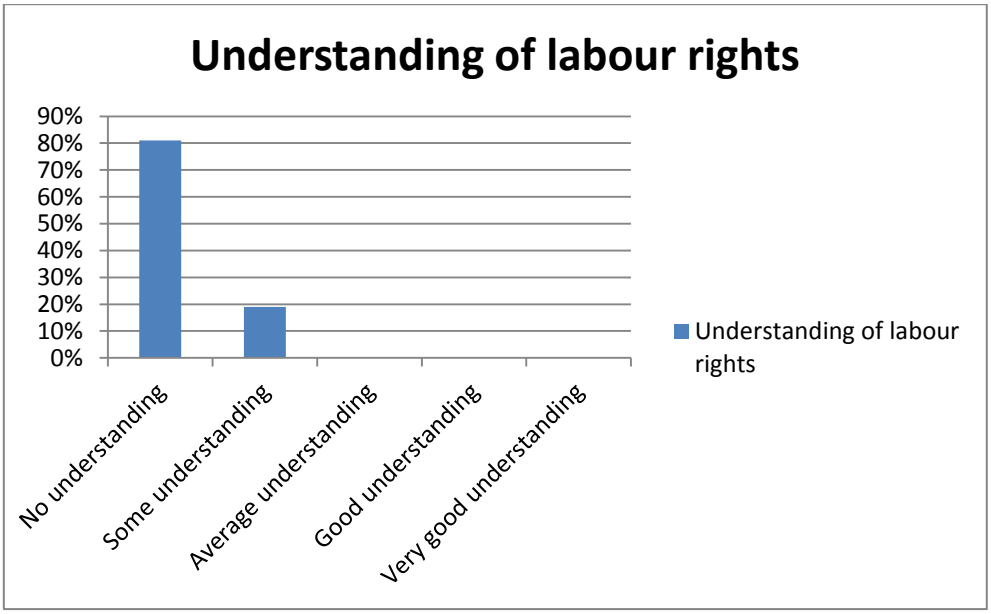


Figure 14: Understanding of labour rights

4.5 Experiences of unfair labour practice/labour exploitation

Migration in the South African labour market has been recently discussed within the context of increasing labour rights violations (Hungwe, 2013). Similarly, Figure 15 presents findings about migrant workers' experiences of unfair labour practices or explicit exploitation. These findings provide information regarding participants' experiences of labour practices which compromise workers' rights. Figure 15 reveals that a significant 95% of both the Cape Town and Johannesburg sample stated that they have been victims of unfair labour practices or explicit exploitation by employers of labour in South Africa.



Figure 15: Experiences any form of unfair labour practices/labour exploitation

Figure 15 suggests that unfair labour practice or explicit exploitation does not discriminate between internal and international migrant workers and was a common occurrence across different age groups, economic sectors, education/qualification levels and migrant workers' knowledge of their labour rights.

As discussed in section 2.5 of this dissertation, the LRA in section 186(2) outlines what constitutes unfair labour practices. An analysis of the data showed that 42% of the migrant workers' experiences fall within the scope of unfair labour practices.

"...you find that there are favouritisms when it comes to maybe appointments for positions. People sometimes employ their own friends, sometimes briberies work; people give briberies in order to get certain positions, such things. Sometimes you find that you have got the ability, you qualify for such a position but just because you didn't give a bribery, maybe there is no one on the higher level at work who knows you, who is a friend or relative, you are sidelined, such things". (Participant 1)

"I have been suspended so many times whereby one, I mean the manager instructed me to do something that wasn't within my work scope. He said to me, I mean I must go clean whereas the cleaners are suppose to clean. I told him no I can't do that because that is not what I have been employed to do. So I filed a complaint and we went for the hearing where I was lucky enough because I know my rights. They looked at the imbalances of the instruction itself whereby was it fair for me to clean because are we all cleaning, are we all cleaners or it was

me specifically me who had to clean but there are cleaners who are employed to clean so that is where, I mean I experienced some of these". (Participant 3)

"Last month, we were forced to sign papers that we stole stock and we didn't but we signed because we didn't want to lose our jobs". (Participant 10)

"I know of someone who was performing sexual favours to one of our superiors, in exchange for a better position that everyone applied for and she got it". (Participant 13)

"Our employer can be exploitive, he treats those he likes better, they get the nice jobs and some of us work hard but we get nothing". (Participant 15)

"The boss and white securities are in the office or driving as I have said but for all of us, we have to work". (Participant 18)

"Yes I have. I was once unfairly suspended when my money for the till was short. It was done on the spot, it was a lot of money but I was a month without pay. Other people get warning and final warning but with me it was different, I don't know why. A similar situation happened with someone I work with, but because he got away with a verbal warning". (Participant 19)

"...recently there were internal promotions and recruitment, the process was done only by the managers, we don't know how people were selected and why. Those who are liked got nice positions while the casuals and many others had nothing". (Participant 20)

Notably, a majority of the responses presented above are related to internal job movements, while a single reference was made regarding unfair disciplinary action short of dismissal as contemplated in section 186(2b) of the LRA.

When Participant 13 was requested to substantiate his answer regarding unfair labour practice related to promotion, the respondent asserted that:

"The issue was confirmed by her when she told her friends while bragging about the new job, when the manager was asked, he didn't give a straight answer. The issue sat with HR and there was a hearing on the issue and the lady was removed from the job but the manager is still with the company". (Participant 13)

The analysis of migrant workers' experiences of unfair labour practice reveals similarities between internal and international migrant workers in the cities of Cape Town and

Johannesburg. The experiences of unfair labour practice are common in both internal and international migrants from Cape Town and Johannesburg. However, they were most prevalent in the Cape Town sample, which accounted for 62%, while Johannesburg contributed 38%.

The concept of labour exploitation, as defined by Koettl (2009), is inclusive of unlimited actions and activities which compromise workers' rights to the benefit of employers of labour. Therefore, the concept of labour exploitation is broader than the concept of unfair labour practice, as defined by the LRA in section 186.

The analyses of the data indicated that 58% of the total sample stated that they have been victims of labour exploitation. A recurring theme throughout the data was related to ill-treatment by employers of labour in both Cape Town and Johannesburg. Considering that the employment relationship is based on the rationale of mutual benefit for both workers and employers of labour, both internal and international migrant workers were especially concerned about the treatment which compromised their rights and dignity as workers.

To this effect, migrant workers stated:

"The first one is regarding the way our managers speak to employees, they sometimes use vulgar words and the law states that they shouldn't use such words but they still use them regardless". (Participant 4)

"... you are not treated, you are treated bad, some of the bosses know that you need the money and you can't do anything to them". (Participant 6)

"The people we work for treat us bad, there is no complaining". (Participant 7)

"The people I work with, we are not treated the same. The managers treat others with respect and some of us, they treat us the other way". **(**Participant 8)

"Sometimes we are not treated like we should, our bosses shout at us like kids when other people don't do their jobs good. It is not right, it is not nice". (Participant 12)

"My employer will use words that hurt me sometimes and it is not my fault, I try to explain but will not listen to me like "you are useless"". (Participant 14)

"Workers are not treated like people sometimes". (Participant 17)

Experiences of actions and practices which compromised migrant workers' rights and dignity, which relate to ill-treatment by employers, were also common in both Cape Town and Johannesburg. However, they were more common in Johannesburg, given that Cape Town contributed more to the experiences of unfair labour practice. Johannesburg contributed by 57% to experiences of ill-treatment by employers, while Cape Town contributed by 43%. Further, Johannesburg accounted for all international migrant workers (27%) who had been subjected to ill-treatment.

While ill-treatment by employers does not amount to exploitation, such actions and practices are no less significant for the purposes of this dissertation. As stated previously, South African labour legislation is based on the Constitution. One of the founding principles of that Constitution is human dignity. According to Chapter 2 of the Constitution, Bill of Rights, section 10, "Everyone has inherent dignity and the right to have their dignity respected and protected". Further, the Bill of Rights is a cornerstone of democracy in South Africa and applies to all law.

As discussed in Chapter 2 of this research dissertation, South Africa's Constitution and labour legislation are recognised as among the best in the world (Goldman, 2003). However, the findings of this study are consistent with similar findings by Hungwe (2013) and the African Centre for Migration and Societies (2010) which revealed that workers' rights violations by employers is a common feature of the South African labour market.

Further, a study by the Consortium for Refugees and Migrants in South Africa (2011) explained that there are general perceptions that workers' rights violations are limited to international migrant workers as a result of their vulnerability (CoRMSA, 2011). The findings of this study reveal that both internal and international migrant workers are vulnerable to workers' rights violations by employers.

4.5.1 Scope of experiences of unfair labour practice/labour exploitation

It is undoubtedly a legislative concern that a majority of the migrant workers shared that they have been subjected to various forms of workers' rights violations. It is a further concern that these migrant workers have seen other people being subjected to the same conditions. As shown in Figure 15, a significant 95% of migrant workers reported that they had been subject to workers' rights violations. However, Figure 16 shows that 100% of migrant workers reported that they had seen other workers falling victim to workers' rights violations.



Figure 16: Experiences of workers' rights violation by others

4.6 Experiences of discrimination

While experiences of unfair labour practices and/or workers' rights violations were common among both internal and international migrant workers, 100% of migrant workers reported that they had seen other workers being victims of unfair labour practices or explicit exploitation. Further, 100% of migrant workers reported that discrimination related to experiences of unfair labour practice or workers' rights violation. An analysis of data from the Cape Town and Johannesburg samples revealed fundamental differences. From the Cape Town sample, 100% of the participants indicated that experiences of unfair labour practice or workers' rights violations were extended to other workers. However, 90% of the participants made reference to racial discrimination. The respondents indicated that African workers were mostly subjected to unfair labour practice or workers' rights violation, while 'white' workers were treated better as a result of their racial background. Additionally, international migrant workers indicated that their experiences of unfair labour practices or workers' rights violations were more severe, relative to internal migrant workers and other workers in their workplaces. The following remarks support this finding:

"Cape Town is a very racist city, it is even worse when it comes to us foreigners. But discrimination happens is a lot in this city, I have lived in other cities and it is not that bad. I'm not the only one, it happens to every black skin person at this working place. It is worse for all my brothers and sisters from other countries. We all talk and we all share some experiences in different levels". (Participant 13)

"..it is the same, black is black, there is no such thing that if you are black and from Johannesburg then you are better, you will be treated like all other blacks. Even you with your education, they would treat you like you are black because you are black". (Participant 15)

"Based on my experience and what I realised, we all treated the same really when it comes to the question you asked. But if you are white then you are treated different to everyone else". (Participant 19)

Such serendipitous results from the Cape Town sample are consistent with common discussions which refer to the Western Cape as a racially tense province, relative to any other province in South Africa (Dlamini, 2010; Field et al., 2007; Salo et al., 2010).

A similar trend was found in the Johannesburg sample, in which 80% of both international and internal migrant workers expressed experiences of discrimination. Unlike in Cape Town, discrimination towards migrant workers in Johannesburg was not defined by race, but rather ethnicity and province of origin, as stated by the respondents in the following remarks:

"Those who are from Johannesburg are treated better because they from here, those of us who are from other provinces and countries are not treated good because we are accused of stealing jobs and we are called 'rats'". (Participant 5)

Similarly to Cape Town, international migrant workers in Johannesburg also related their experiences of unfair labour practice or workers' rights violations to be more severe than those experienced by internal migrant workers. This finding was informed by remarks such as:

"That is true, for us foreigners when they hear that you are not South African, they think that they can abuse you because you not from South Africa. But these things happen to everyone but it is worse for us". (Participant 6)

"We all have them but it is worse for me who is from Zim (Zimbabwe)*, I'm treated bad at work and I'm also treated bad because I'm not South African".* (Participant 8)

"It is not my language but my country, I can also speak Zulu but because I'm from Zim (Zimbabwe), *I'm not treated like everyone else".* (Participant 10)

The results further indicated that migrant workers are aware that they are vulnerable; however, they feel helpless in the face of unfair labour practices and workers' rights violations and discrimination. Consequently, migrant workers are not in any position to challenge the perpetuation of unfair labour practices or workers' rights violations and discrimination by their employers.

"...I see people being exploited but there is nothing I can do because I see it from a distance and you hear them complaining". (Participant 2)

The threat of losing their jobs was mainly responsible for the inability to challenge employers who perpetuate unfair labour practices or workers' rights violations and discrimination.

"You can't take this to the CCMA, you won't win and you will lose your job when you come back. It is better to complain with a job than without one hey". (Participant 15)

4.7 Confidence in labour legislation

Subsequent to the experiences of unfair labour practice or workers' rights violations and discrimination by a significant number of migrant workers in the Cape Town and Johannesburg samples, 80% of the overall sample expressed a lack of confidence in the legislative protection of South African labour legislation. While some of the migrant workers acknowledged that South Africa has developed one of the best legislative frameworks, the lack of confidence in South African labour legislation was informed by the ineffectiveness of the law in protecting the labour rights of migrant workers.

"The government has developed good laws but when it comes to companies, companies change these laws, they don't treat workers according to government laws". (Participant 4)

"...we have the laws and government but it doesn't show that we have them here, maybe they protect others in other places and with money but here for me and my friends, no". (Participant 16)

"I think South Africa has good laws about migrants and workers but when you look at what is happening on an everyday basis, you ask yourself what is happening with that good law, it is there but people on an everyday basis don't really say it is there and I have seen it work for me". (Participant 19)

"I think not, if they did, we wouldn't be having these experiences. You can't say the law is good when things are bad. You can't". (Participant 20)

To this effect, Participant 15 further expressed that "*the law is there but it is a nice to have".*

It is generally accepted that the employment relationship is generally based on trust (Vettori, 2005); the reality that 80% of the overall sample expressed a lack of confidence in the legislative protection of South African labour legislation creates a profound concern for labour relationship in the South African market. Both employers of labour and workers equally rely on labour legislation to regulate and moderate the employment relationship for the benefit of all parties in the employment relationship. Therefore, the lack of confidence in the framework that should ensure that the employment relationship is mutually beneficial compromises the trust which the employment relationship is based on.

4.8 Prospects of migrant workers' future participation in the labour market

Kok (2006) highlighted that the movement of people across economic boundaries is not a new phenomenon, nor one that is likely to end. South Africa is among the most common destinations of choice for migrant workers and it is expected to remain a common destination of choice (African Centre for Migration and Society, 2010).

In light of experiences of unfair labour practices and/or workers' rights violations of both internal and international migrant workers by their employers, and given the level of discrimination and lack of confidence in the effectiveness of various labour legislations, a significant 90% of the Johannesburg sample and 80% of the Cape Town sample remain optimistic and expressed their willingness to continue participating in the South African labour market.

"We have to come here, where else can we go? Where are there jobs in South Africa that is close to home. There is nothing we can do because we want to live and also our family to live also." (Participant 8)

Clearly, the willingness to continue participating in the South African labour market is not based on anticipated improvements in legislative protection of migrant workers but due to the reality that fewer cities offer more favourable economic conditions than Cape Town and Johannesburg.

The results from this analysis should be viewed within the context of a labour market which is regulated by a legislative framework that is acclaimed as one of the best in the world, which guarantees every person the right to fair labour practices and protection. Further, the results should also be considered in the context of all commitments that South Africa has made to various regional and international communities.

4.9 Summary of chapter

This chapter has discussed the characteristics of the sample, the reasons why migrant workers choose Johannesburg and Cape Town as their cities of migration, migrant workers' understanding of relevant labour legislation, and research findings derived from the semi-structured interviews conducted in order to provide answers to the stated research questions. This chapter has quoted participants extensively to support all the research findings. The results revealed that a majority of participants have been subject to unfair labour practices and workers' rights violations by employers in the South African labour market. Consequently, the results further revealed that a majority of migrant workers have lost confidence in the legislative protection granted by South African labour legislation. However, migrant workers expressed their willingness to continue participating in the South African labour market due to favourable economic conditions.

CHAPTER 5: SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter will outline the summary of research findings and make recommendations to relevant stakeholders, and additionally suggest areas for further research. The chapter will also highlight the limitations of the study.

5.2 Summary of research findings

Five research questions were formulated to provide a guide for conducting the empirical study. A summary of the research questions and the ways in which they were answered is provided in the following section.

5.2.1 Research question 1

Is the labour legislation adequate and effective in ensuring fair labour practices by employers of labour in South Africa?

The results showed a discrepancy between labour legislation and the protection enjoyed by migrant workers in terms of constitutional provisions (section 23(1)). Results from this study revealed that 95% of migrant workers have experienced unfair labour practices or explicit exploitation by employers of labour in the cities of Cape Town and Johannesburg. Additionally, the results revealed that 100% of migrant workers have seen other workers being subjected to unfair labour practices or explicit exploitation by their various employers.

5.2.2 Research question 2

Is there a discriminatory labour practice between internal and international migrant workers in South Africa?

The study found that both internal and international migrant workers were discriminated against by their employers based on ethnicity, race and nationality. However, international migrant workers experienced more discrimination relative to internal migrant workers in the City of Johannesburg on the basis of their ethnicity.

5.2.3 Research question 3

Does the Department of Labour have the necessary capacity to enforce compliance with labour legislation in the workplaces?

Responses that were derived from research questions 1 and 2 suggested that the Department of Labour does not have the necessary capacity to enforce compliance with labour legislation, particularly in regard to internal and international migrant workers.

5.2.4 Research question 4

What are the statutory remedies available to migrant workers in order to redress experiences of unfair labour practices by employers of labour?

This study revealed that the majority of the respondents have no knowledge regarding their rights to fair labour practices and the institutionalised procedures available (e.g. the CCMA) for redressing abuse of such rights by their employers.

5.2.5 Research question 5

Will future migrant workers successfully integrate and work in the South African economy?

A significant 85% of respondents believed that there is a future for internal and international migrant workers in the South African labour market. However, this belief is not informed by predicted improvements in legislative protection of migrant workers, but by the reality that the cities of Cape Town and Johannesburg will continue to offer relatively better economic opportunities to migrant workers.

5.3 Achievement of research objectives

The main purpose of this research was to study the experiences of migrant workers in relation to their legislative protection in the South African labour market. Five objectives were developed to provide a framework for achieving this purpose by interviewing 20 migrant workers (10 from Cape Town and 10 from Johannesburg) using semi-structured interviews. All interviews were recorded and transcribed for the purpose of data analysis. Content analyses were used to understand and interpret the collected data by finding and reporting key themes.

Achievement of objective 1

The first objective was to investigate the extent to which internal and international migrant workers in South Africa enjoy fair labour practices in terms of the ILO, South African Constitution and labour legislation.

This objective was achieved through responses to interview questions by respondents regarding their or other colleagues' experiences of any form of unfair labour practices or explicit exploitation from their employers. Responses to these questions were reported in section 4.5 of this dissertation. Furthermore, migrant workers were asked to share whether they had seen other workers being subjected to unfair labour practices or explicit exploitation in order to determine the extent of migrant workers' legislative protection.

Achievement of objective 2

The second objective was to examine whether there is deferential application of labour practices between internal and international migrant workers in the workplace.

This objective was achieved through responses to interview questions by respondents who were asked questions regarding their experiences of discrimination between internal and international migrant workers by their employers. The responses were recorded in section 4.5.1 of this dissertation.

Achievement of objective 3

The third objective was to evaluate various implementations and enforcement mechanisms being used by the Department of Labour to ensure compliance with labour legislation in the workplace.

This objective was achieved by means of literature reviewed in Chapter 2 of this dissertation regarding the mechanisms which are being used by the Department of Labour to ensure compliance with labour legislation by employers of labour. In addition to the reviewed literature, the researcher sought to discover from respondents whether they had confidence in the abilities of various forms of labour legislation to protect their interests. The responses were reported in section 4.7 of this dissertation.

Achievement of objective 4

The fourth objective was to determine the prospects of migrant workers to successfully integrate and participate in the South African labour market, given the experiences of the respondents. This objective was achieved through responses to interview questions by respondents regarding their perception of prospective migration workers' willingness to participate in the South African labour market. Responses to this question were presented in section 4.8 of this dissertation.

Achievement of objective 5

The fifth objective was to make recommendations to various stakeholders based on the research findings. This objective was achieved through the recommendations made to the Department of Labour (section 5.5.1), employers of labour (section 5.5.2) and migrant workers (5.5.3) in this dissertation**.**

5.4 Conclusions of the study

The findings of this research indicated that migrant workers (both local and international) experienced different forms of unfair labour practices based on race and ethnic considerations.

It was also found that respondents have little knowledge regarding their labour rights and recourse to legal redress. Further, the results revealed that respondents do not have confidence in the protective capacity of the South African labour legislation. This lack of confidence was informed by the reality that the legislative protection guaranteed by the Constitution was compromised by the inability of the Department of Labour to deal decisively with employers of labour who perpetuate unfair labour practices. The experience of these unfair labour practices would not however discourage the respondents from further participation in the South African labour market.

5.5 Recommendations

Based on the findings and conclusion of this research project, the following recommendations are made.

5.5.1 Recommendations to the Department of Labour

While South African labour law is very progressive and inclusive, the results of this study showed that the application of labour legislation is less effective. A key challenge for the Department of Labour is to ensure that all workers in the South African labour market enjoy the labour rights which are guaranteed by the Constitution and the various labour legislations.

The DoL has a major role in the application of international labour legislation. This can be achieved by ensuring consistency with international labour standards and principles and the application of labour legislation at the national and provincial levels. The ILO has provided non-binding principles with specific guidelines for labour migration, as set out in the ILO

Multilateral Framework on Labour Migration. Synergy between international and national labour legislation and their application can be achieved by (but not limited to) increasing the supervision capacity of the labour inspectorate in terms of their numbers, training and powers. Labour inspectors should be empowered to instantly remedy confirmed cases of unfair labour practices at the workplace, and to then refer such cases for further investigation and action. For example, cases of unfair dismissal could be redressed by a labour inspector while the affected employee pursues the case at the CCMA. This measure would provide such an employee with a means of livelihood pending the resolution of the case by the CCMA. This measure could be achieved through legislative amendments to the CCMA rules by Parliament.

Migrant workers' legislative protection can be enhanced through the education and training of workers on their rights, and statutory remedies to the violation of such rights by employers. Such education and training should be championed by the DoL. This could involve the establishment of a specialised directorate to deal with the education and training of documented migrant workers (and especially international migrants). The DoL could, in addition, establish an information channel which encourages every non-unionised worker to promptly report cases of unfair labour practices and discrimination to the DoL.

It is further recommended that the DoL take the initiative in encouraging and mobilising workers into trade unions. This can be achieved with the active involvement and collaboration with existing labour unions and federations. Where workers are unable to organise themselves into labour unions, the DoL should facilitate amendments to the LRA for the purpose of recognising 'workers' committees' which may be formed for the purposes of collective bargaining and strike actions. The present practice only allows for registered trade unions with organisational rights to engage in collective bargaining with employers. Similarly, the DoL should make registration requirements and procedure flexible enough for vulnerable workers.

The DoL should further pursue legislative amendments which impose severe penalties on employers who are found to repeatedly perpetuate unfair labour practices, particularly those which involve the economic exploitation of workers. A maximum penalty of 12 months' salary compensation currently imposed by the LRA on employers for unfair dismissals is considered too light and may not serve as a deterrent, considering the meagre remunerations

earned by workers (especially unskilled workers) in comparison with the massive economic powers which are controlled by the employers.

5.5.2 Recommendations to employers

The underpinning principle for an employment relationship is that it should be beneficial to both the employer of labour and the worker. It is a constitutional provision that 'everyone' is entitled to fair labour practices and it is therefore obligatory that employers should uphold this provision. Employers of labour are further obligated to promote the aspirations of the constitution and various labour legislations to uphold the dignity of all workers and promote and advance economic development, social justice and labour peace in the workplace. It is beneficial for employers to advance and implement the core principles of the international labour standards in terms of the right to freedom of association (unionise), and the right to collective bargaining and non-discrimination in employment (equal pay for equal work). Adherence to these democratic values and standards by employers will promote a peaceful and productive labour relations environment in the workplace.

5.5.3 Recommendations to migrant workers

The results of this study have shown that migrant workers have very little knowledge of their labour rights and relevant legal recourse. The ILO recognises that legislative protection of workers who are vulnerable to unfair labour practices and explicit exploitation can be achieved through the identification of actions and practices that compromise workers' rights and the need for workers to be educated on the course of redress. Therefore, there is the clear need for migrant workers to actively seek to know their rights under the law and the procedures to follow in ensuring that their labours are not exploited by employers through the perpetration of unfair labour practices. It is also important for workers to organise themselves into trade unions with affiliation to labour federations in the country. This will provide the necessary platform through which their labour rights can be effectively recognised and protected.

Civil society has a significant role to play in ensuring that migrant workers are protected from unfair labour practices and exploitation by initiating social dialogue among government representatives (such as the DoL), employers and workers. Therefore, it is important for migrant workers to identify NGOs and civil society groups which are concerned with migrant workers' labour rights and to establish relationships based on exchange of information. The main objective of social dialogue is to promote cooperation, foster good governance and

resolve conflict on matters of mutual interests. This can be achieved through collaboration between organised migrant workers' forums and the relevant civil society groups.

5.6 Limitations of the study

Limitations are accepted as a common feature for any research, and thus it is important to present limitations for the benefit of presenting recommendations for future research. This research has the following limitations:

In terms of its research setting, this research was confined to two cities, the city of Cape Town and Johannesburg. South Africa has other geographic locations such as Durban, Tshwane and Limpopo with a significant presence of migrant workers.

The sample size was also limited to 20 migrant workers (10 from Cape Town and 10 from Johannesburg) due to time and financial constraints in conducting research on a larger sample size in two different geographic locations. In view of this limitation, care should be exercised in generalising these research findings.

5.7 Recommendations for future research

During the course of this research, areas of further research were identified for the benefit of enhancing legislative protection for all migrant workers in the South African labour market.

Based on the results of this study, the first recommendation for future research would be to investigate why the Department of Labour's capacity to enforce compliance with labour legislation in the South African labour market has not translated to the protection of internal and international migrant workers. Such research will indicate whether unfair labour practices and exploitation occur due to legislative shortcomings or the application thereof.

The delineation of this study (section 3.9) was limited to the city of Cape Town and Johannesburg. Future research should therefore expand upon the scope of study by investigating other geographic locations such as Durban, Tshwane and Limpopo in order to determine if geographic location has any influence on the perpetration of unfair labour practices among employers in South Africa.

Future research should also investigate the protection and experiences of migrant workers based on factors such as age, gender, industry of employment and immigration status of workers.

It is further suggested that future research should also be concerned with understanding why employers of labour perpetrate unfair labour practices and undertake exploitation of workers. Such understanding will assist the DoL in initiating parliamentary amendments to existing legislation in order to strengthen the protection of vulnerable workers in the labour market.

5.8 Overall conclusion

This research examined the legislative protection of internal and international migrant workers in the cities of Cape Town and Johannesburg, in view of increasing concerns regarding the perpetration of unfair labour practices by employers of labour within the South African labour market. This practice is a direct negation of many of the provisions of the South African Constitution, which has been generally described as one of the best in the world. The Constitution therefore constitutes one of the sources of South Africa's labour legislation which is widely described as progressive and inclusive, considering the systemic economic segregation and deprivation of previously disadvantaged people under the apartheid regime.

In light of these results, this research presented recommendations to the Department of Labour, workers, and employers of labour, and made suggestions for future research directions. It is envisaged that these recommendations and suggestions will provide outcomes that will lead to the eradication of the various forms of unfair labour practice within the South African labour market, and will further strengthen both economic and labour relationships between employers of labour and workers.

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APPENDIX A: INVITATION TO RESEARCH STUDY

PARTICIPATION INFORMATION SHEET

Good Day

My name is Thato Phiri and I am a student at the University of Witwatersrand in the faculty of Commerce, Law and Management. I'm presently completing my Master's degree in Human Resources Management. As part of my partial requirements, I'm conducting research on migrant workers' experiences in relation to the South African Labour legislation.

As a migrant worker, you are invited to take part in the research. Your participation will involve answering questions during an interview. Your answers are important and there are no correct or incorrect answers. The interview will be conducted using a semi-structured approach in which probe /follow-up questions will be used to gather further information from your responses.

Participation in the study is voluntary and you have the right to decline participation. If you do choose to participate, you may withdraw from the study at any point. There will be no penalty for withdrawal and there will be no benefits or incentives for participating in the study.

You are guaranteed that data obtained from you is solely for academic purposes, the data will not be made available or accessible to a third party. The results will not feature any personal information to protect your individual identity. As such, confidentiality is guaranteed.

The study will be guided and will adhere to all ethical guideline in order to prevent causing you any harm. Your participation in the study will contribute to consolidating an incongruent body of literature on the prevailing relationship migrant workers' experiences in relation to the South African Labour legislation.

You have been selected as a potential participate in the study primary solely because you are a migrate workers living in Cape Town/Johannesburg with legal status to work in South Africa. On this regard, I'm inviting you to participate in interviews which will be

approximately 60 minutes. After participation, a summary of the research will be available at your request.

Thank you for considering participation in this research. Should you have any concerns or questions about the research, please contact me on Phiri.thato@gmail.com or my supervisor Prof. Samuel on Olorunjuwon.Samuel@wits.ac.za

Researcher's Signature

Kind Regards
Thato Phiri
Masters Student: Division of Human Resources Management
University of the Witwatersrand, Johannesburg.

APPENDIX B: RESEARCH CONSENT FORM

INFORMED CONSENT: PARTICIPANTS 18 YEARS OF AGE AND OLDER

Title of research project: migrant workers in South Africa: an evaluation of legislative protection and experiences of unfair labour practice.

Name researcher: Thato Phiri
Telephone: 0845456251
Email: Phiri.thato@gmail.com
Nature of the research: Academic Research
Name of participants:_____

As a participant in this study, you should understand the following:

1. You may decline to participate or withdraw from participation at any time without consequences.
2. Your identity will be kept anonymous.
3. The researcher, Thato Phiri, has thoroughly explained the parameters of the research study and all of your questions and concerns have been addressed.
4. The interviews will be recorded. You understand that the information from the recorded interviews will be transcribed. The researcher will structure a coding process to assure that anonymity of your name is protected.
5. The research results will be used for academic purposes only.
6. You agree to participate in this research project.

By signing (with an X) this form you acknowledge that you understand the nature of the study, the potential risks to you as a participant, and the means by which your identity will be

kept confidential. Your signature on this form also indicates that you are 18 years old or older and that you give your permission to voluntarily serve as a participant in the study described.

Signature of the interviewee (with an X) _____ Date _____

Signature of the researcher _____ Date _____

APPENDIX C: INTERVIEW CONSENT FORM

INFORMED CONSENT FOR INTERVIEW RECORDING



Title of research project: migrant workers in South Africa: an evaluation of legislative protection and experiences of unfair labour practice.

Name researcher: Thato Phiri
Telephone: 0845456251
Email: Phiri.thato@gmail.com
Nature of the research: Academic Research
Name of participants:_____

As a participant in this study, you should understand the following:

You agree to participate in this research project.

You agree that the interview will be recorded

I have read this consent form and the information it contains and had the opportunity to ask questions about them.

I agree to my responses being used for education and research on condition that my privacy is respected, subject to the following:

I understand that my personal details will not be included in the research

I understand that I am under no obligation to take part in this project.

I understand I have the right to withdraw from this project at any stage.

Signature of the interviewee (with an X) _____ Date _____

Signature of the researcher _____ Date _____

APPENDIX D: SEMI-STRUCTURED INTERVIEW

Opening

Greetings, my name is Thato Phiri, I am a student at the University of Witwatersrand in the faculty of Commerce, Law and Management. I'm presently conducting my Masters research. I would like to ask you questions about your experiences related to the application and effectiveness of South African labour legislation. All obtained information shall be treated with outmost confidentiality; your identity will not be disclosed to your employer or anyone else. You are free to answer any questions you are comfortable with and may withdraw from the interview at any stage without penalty.

Introduction

How old are you?

What is your country of origin?

If South Africa, which province?

If not South African, what is your residence status in South Africa?

What is your level of education/qualification?

Which sector of the economy does your employer belong?

Which kind of work do you do?

How long have you been working in South Africa generally and how long have you been working for your present employer?

Body

When did you move to Cape Town/Johannesburg?

Why did you choose the city of Cape Town/Johannesburg as your destination of migration?

What were the travel conditions to the city of Cape Town/Johannesburg from your place of origin?

Do you know what your rights are as a worker?

Have you experienced any form of unfair labour practice or explicit exploitation by your employer?

Have you experienced any form of discrimination by your employer due to your nationality/race?

Have these unfair labour practices been limited to you or they extend to those around you?

In your experiences as a migrate worker in Cape Town/Johannesburg, are local workers treated better than migrant workers?

Do you belong to any labour union in South Africa?

Do South African labour laws provide adequate protection for you as a migrant worker?

Do you think that you and other migrant workers have a future in the city of Cape Town/Johannesburg's labour market?

Closing

Is there any further information you think I should know about your experiences in relation to legislative protection and experiences of unfair labour practice within the South African labour market?

I appreciate the time you took for this interview. I have all the information I need. Are there any concerns you think I should know about?

Thank you so much once more, all the best with your job and future endeavours.

APPENDIX E: RESEARCH ETHICAL CLEARANCE CERTIFICATE

Research Office

HUMAN RESEARCH ETHICS COMMITTEE (NON-MEDICAL)
R14/49 Phiri

CLEARANCE CERTIFICATE	**PROTOCOL NUMBER H14/08/28**
PROJECT TITLE	Migrant workers in South Africa: An evaluation of legislative protection and experiences of unfair labour practices
INVESTIGATOR(S)	Mr T Phiri
SCHOOL/DEPARTMENT	Economic & Business Science
DATE CONSIDERED	22 August 2014
DECISION OF THE COMMITTEE	Approved Unconditionally
EXPIRY DATE	21/09/2016

DATE 22/09/2014 **CHAIRPERSON** E.M. Takane
pp (Professor T Milani)

cc: Supervisor : Prof O Samuel

DECLARATION OF INVESTIGATOR(S)

To be completed in duplicate and **ONE COPY** returned to the Secretary at Room 10000, 10th Floor, Senate House, University.

I/We fully understand the conditions under which I am/we are authorized to carry out the abovementioned research and I/we guarantee to ensure compliance with these conditions. Should any departure to be contemplated from the research procedure as approved I/we undertake to resubmit the protocol to the Committee. **I agree to completion of a yearly progress report.**

Signature

23 / 09 / 2014
Date

PLEASE QUOTE THE PROTOCOL NUMBER ON ALL ENQUIRIES