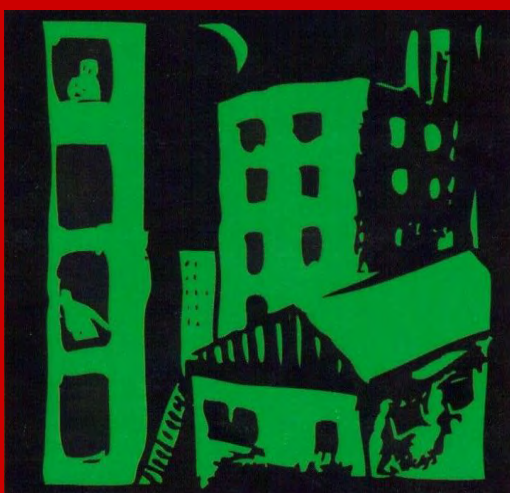
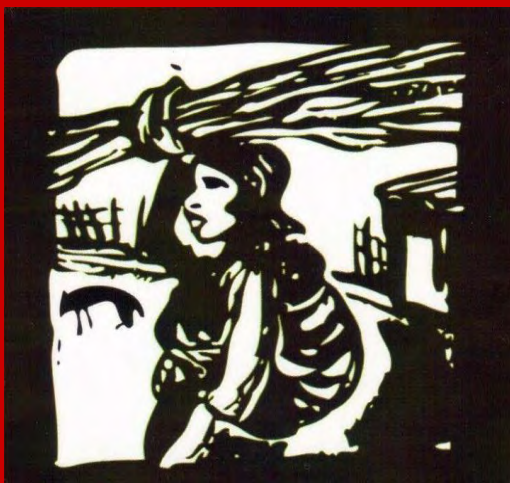


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Limitations on the rights of migrant workers: Is a compliant and consistent approach being followed?

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ABSTRACT

*Migration has become a global phenomenon and South Africa, like many other countries, is a recipient of migrant workers. Migrant workers can be classified under five categories: permanent residents, refugees, asylum seekers, temporary residents, and undocumented migrants. This article focuses on documented migrants and their right to engage in work. Integral to the right to work is the right to choose one's trade, occupation or profession freely. This is a constitutionally protected right, but is reserved exclusively for citizens, which implies that migrant workers can be lawfully excluded from working in certain occupations or professions. This ties in with South Africa's obligation to protect employment opportunities for citizens. However, South Africa has immigration laws in place that afford substantial rights to certain categories of migrants. Furthermore, as a member of the UN and International Labour Organisation (ILO), South Africa has certain international law obligations. Against this backdrop, this article engages with the recent Constitutional Court decision of *Rafoneke v Minister of Justice and Correctional**

Services where temporary residents were denied the right to be admitted to practise and be authorised to be enrolled as legal practitioners. The article seeks to establish whether this decision, which has been viewed as disappointing, complies with international law and upholds the legal principles endorsed in preceding cases.

Keywords: asylum seekers; Employment Services Act; foreign national; Immigration Act; international labour organisation; migrant worker; permanent resident; temporary residents; refugees

1 INTRODUCTION

South Africa is becoming an increasingly popular destination for migrant workers from other parts of southern Africa and beyond.¹ A migrant worker is defined as a person “who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”.² Migrant workers can be classified under five categories: permanent residents, refugees, asylum seekers, temporary residents, and undocumented migrants.³ The right of documented migrants to work in South Africa is uncontroversial. Section 25 of the Immigration Act 13 of 2002(IA) affords the holder of a permanent residence permit all the rights, privileges, duties and obligations of a citizen, except for those rights and privileges which a law or the Constitution ascribes only to citizens.⁴ Similarly, section 27 of the Refugees Act 130 of 1998 provides full legal protection to refugees, which includes the rights set out in the Bill of Rights, and the right to seek employment.⁵ While asylum seekers do not have an unconditional right to work, the blanket prohibition on this right has been withdrawn following the decision of *Minister of Home Affairs v Watchenuka (Watchenuka)*.⁶ Temporary residents are allowed

¹ Department of Employment & Labour “Draft National Labour Migration Policy for South Africa” (February 2022) available at <https://www.labour.gov.za/DocumentCenter/Publications/Public%20Employment%20Services/National%20Labour%20Migration%20Policy%202021%202.pdf> (accessed 15 November 2022) at 16 explains that in 2015 South Africa had become the largest host for international migrants in Africa and was hosting 3.1 million migrants. See also The Conversation “Xenophobia is on the rise in South Africa: Scholars weigh in on the migrant question” available at <https://theconversation.com/xenophobia-is-on-the-rise-in-south-africa-scholars-weigh-in-on-the-migrant-question-181288> (accessed 12 November 2022); Newaj K “Defining fairness in dismissals of unauthorised foreign nationals” (2020) 23(1) *Potchefstroom Electronic Law Journal* 1 at 2; Mokofe WM “The International Labour Organisation in pursuit of decent work in Southern Africa: An appraisal” (2020) *Obiter* 41(3) 573 at 584.

² Article 2 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families adopted by General Assembly resolution 45/158 of 18 December 1990.

³ Mpedi LG & Smit N *Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community* Sun Press (2011) at 3.

⁴ Section 25(1) of the Immigration Act 13 of 2002.

⁵ Section 27(b) & (f) of the Refugees Act 130 of 1998.

⁶ *Minister of Home Affairs and Others v Watchenuka and Others* [2004] 1 All SA 21 (SCA) para 36. At para 10 it is explained that asylum seekers were initially prevented from undertaking work based on the asylum seeker permit, which strictly prohibited this. See also Dass D & Raymond AL “A consideration of the employment rights of asylum seekers and refugees within South Africa as contextualised by the Watchenuka and Discovery Health Judgments” (2017) 38(1) *Industrial Law Journal* 26 at 32.

to work if they are in possession of a visa or permit that authorises this. Therefore, the only category of migrants that have no right to work are undocumented migrants, as section 38 of the IA expressly states that no person shall employ an illegal foreigner.⁷

Notwithstanding the right of documented migrants to seek employment in South Africa, their right to freely choose their trade, occupation or profession is not protected. Section 22 of the Constitution reserves this right for citizens. Recently, the plight of temporary residents intending to practise as legal representatives came under the spotlight in the Constitutional Court (CC) case of *Rafoneke v Minister of Justice and Correctional Services (Rafoneke)*.⁸ The nub of the case was the constitutionality of section 24(2)(b) of the Legal Practice Act 28 of 2014 (LPA), which requires a person to be a citizen or permanent resident in order to be admitted to practise.⁹ The litigation was initiated by migrants living and working in South Africa on the strength of spousal visas and special permits.¹⁰ The CC unanimously found that the impugned provision was valid.¹¹ This effectively means that, while temporary migrants can pursue law degrees in South Africa, can work as candidate attorneys, can undertake law school and pupillage, and can write the attorneys' and bar exams, they cannot be enrolled as, and cannot practise as, attorneys or advocates.

The policy considerations underlying the restrictive approach adopted by the LPA and given credence to by the CC can be understood in the light of the unprecedented levels of unemployment, which stood at 33.9 per cent in the second quarter of 2022.¹² As explained in the Draft National Labour Migration Policy, "reducing unemployment is a central and critical imperative for the future of South African society and economy". This ostensibly places substantial pressure on decision-makers in addressing issues of migration.¹³ South Africa has a fundamental duty to protect its citizens, which requires that measures be taken to ensure that citizens secure the limited employment opportunities that are available.¹⁴ However, South Africa has certain international obligations to migrant workers.¹⁵ There have also been several cases where the

⁷ Section 38(1)(a-b) of the IA.

⁸ *Rafoneke and Others v Minister of Justice and Correctional Services and Others (Makombe Intervening)* 2022 (12) BCLR 1489 (CC).

⁹ *Rafoneke* (2022) at para 1.

¹⁰ *Rafoneke* (2022) at paras 8, 14, 18, 20, 28 & 29.

¹¹ *Rafoneke* (2022) at paras 101 & 103.

¹² Statistics South Africa "Quarterly Labour Force Survey (QLFS) – Q2:2022" available at https://www.statssa.gov.za/?p=15685&gclid=Cj0KCQiAgribBhDkARIsAASA5buxy4_fk229vPI3lqq1r3PcjvQ-WZTOLWQ2qLISQVnYtp4gOq-Nrr4aAr-TEALw_wcB (accessed 12 November 2022).

¹³ Department of Employment & Labour "Draft National Labour Migration Policy for South Africa February 2022" available at <https://www.labour.gov.za/DocumentCenter/Publications/Public%20Employment%20Services/National%20Labour%20Migration%20Policy%202021%202.pdf> (accessed 15 November 2022) at 29.

¹⁴ This is evident from the preamble to the IA, which states that work opportunities of citizens should not be compromised through the employment of foreign nationals.

¹⁵ As stated in section 3 of this article.

judiciary engaged with the rights of migrants, from which important legal principles emerge. Against this backdrop, the CC decision of *Rafoneke*, which has been viewed as disappointing,¹⁶ must be evaluated against international law and existing jurisprudence. Such an assessment is directed towards understanding whether the judgment aligns with the position postulated by the judiciary in earlier cases, and whether it is consistent with international law.

This will be done by firstly discussing South Africa's legal framework, starting with section 22 of the Constitution, followed by the IA and the Employment Services Act, 4 of 2014 (ESA). Secondly, South Africa's obligations in terms of international law will be considered. Thereafter, a discussion of relevant case law ensues. Lastly, conclusions are drawn.

2 THE LEGISLATIVE FRAMEWORK

2.1 Section 22 of the Constitution

The Constitution does not provide for a general right to work. It does however, provide for the right to choose one's trade, occupation and profession. This is a right enshrined in the Bill of Rights and reserved exclusively for citizens. Despite a migrant's being permitted to work in line with South Africa's immigration laws, his or her right to be engaged in certain professions or occupations can accordingly be limited based on the Constitution. In 1996 when the Constitution was referred to the CC for certification,¹⁷ an objection to section 22 was raised. The objector argued that this right is a "universally accepted fundamental right" which should be extended to everyone, irrespective of citizenship.¹⁸ The CC rejected this argument, seemingly because the international instruments relied on did not support such an interpretation. While the court did not indicate which international instruments were cited by the objector,¹⁹ the CC relied on the International Covenant on Economic, Social and Cultural Rights (ICESCR), among other instruments, to support its refutation of the objection.²⁰ The CC further referred to foreign jurisdictions in which this right was reserved for citizens only, notably the United States of America, Canada, India, Italy, Germany, and Ireland.²¹

¹⁶ Lawyers for Human Rights "Regulatory authority's bar on properly qualified non-citizen lawyers practising, merely because of citizenship, is an unjustifiable human rights violation" available at <https://www.lhr.org.za/lhr-news/press-statement-regulatory-authoritys-bar-on-properly-qualified-non-citizen-lawyers-practising-merely-because-of-citizenship-is-an-unjustifiable-human-rights-violation/> (accessed 12 November 2022). See also Cliffe Dekker Hofmeyr "So close yet so far: An analysis of *Rafoneke v Minister of Justice* and the issue of admitting foreigners into the legal profession" available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Probono/probono-alert-1-october-so-close-yet-so-far-an-analysis-of-rafonekevministerof-justice-and-the-issue-of-admitting-foreigners-into-the-legal-profession.html> (accessed 12 November 2022).

¹⁷ *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) para 2.

¹⁸ *Certification* (1996) at para 17.

¹⁹ *Certification* (1996) at paras 18–20.

²⁰ *Certification* (1996) at paras 18–20.

²¹ *Certification* (1996) at para 21.

2.2 The Immigration Act

The IA is the starting-point for migrants wishing to work in South Africa. The best protection afforded to migrant workers is permanent residence, as they have all the rights that citizens have, except for rights reserved exclusively for citizens. Therefore, they are free to work and to earn a living in South Africa. There are four primary ways in which to acquire permanent residence status. First, through an offer of permanent employment pursuant to having been in possession of a work permit for five years, or where the prospective employer can prove that the position was advertised and no suitably qualified citizen or permanent resident was available to fill it.²² Secondly, if a migrant is in a spousal relationship with a citizen or permanent resident for five years, provided that the Department of Home Affairs is satisfied that a good-faith spousal relationship exists.²³ Thirdly, if the migrant has been afforded refugee status and has resided in South Africa for a continuous period of 10 years.²⁴ Fourth, if the migrant works in an area designated as a critical skill.²⁵ Additionally, the IA gives the Minister of Home Affairs the discretion to grant permanent residence in terms of section 31 if the applicant can prove the existence of special circumstances. Permanent residents, by virtue of being afforded substantially the same rights as citizens, have superior rights to other migrant workers.²⁶

A foreign national who is not a permanent resident may enter the country only if he or she has a valid passport and a valid visa.²⁷ There are various types of visas available.²⁸ Of relevance is a work visa, which is valid for a period not exceeding five years.²⁹ In line with the objective of reserving available jobs for citizens and permanent residents in the first instance, there are requirements attached to the attainment of a work visa. Notably, section 18 of the Immigration Regulations requires the prospective employer to confirm that despite conducting a diligent search it was unable to employ a person in South Africa with qualifications or skills and experience equivalent to those of the migrant.³⁰ Another category of visa is a corporate visa, which companies must apply for should

²² Sections 26 & 27 of the IA.

²³ Section 26 of the IA.

²⁴ Section 27 of the IA

²⁵ Section 27 of the IA.

²⁶ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) BCLR 569 (CC) (4 March 2004) para 59.

²⁷ Section 9(4) of the IA. It must be noted that refugees can become permanent residents in terms of section 27(d) of the IA. To qualify for permanent residence, a refugee must, in terms of section 27(c) of the Refugees Act, have resided in SA for a continuous period of 10 years. Apart from this, a refugee is entitled in terms of sections 27(d)–(f) to an identity document, a travel document and to seek employment. Refugees who are not permanent residents can therefore enter the country without a visa and are allowed to work in SA.

²⁸ Sections 10(2) & 11–23 of the IA.

²⁹ Section 19 of the IA & sections 18(4) & (6) of the Immigration Regulations, 2014, issued in terms of section 7 of the IA.

³⁰ The Immigration Regulations, 2014.

they wish to employ foreign nationals. The application process, similarly, has safeguards in place to protect citizens and permanent residents.³¹

The requirements for work visas, corporate visas, and permanent residence (based on an offer of a permanent position), seek to protect the livelihoods of citizens and existing permanent residents. This ties in with the preamble to the IA, which declares that the contribution of foreigners in the South African labour market must not adversely impact on the rights and expectations of South African workers.³²

2.3 The Employment Services Act

The objectives of the ESA are to improve work seekers' access to the labour market, and to improve their employment prospects, among other matters.³³ Significantly, it regulates the appointment of foreign nationals,³⁴ who are defined as individuals who are not South African citizens or permanent residents.³⁵ Section 8 authorises the Minister of Labour to develop regulations to facilitate the employment of foreign nationals. In line with such regulations, employers may be required to demonstrate that there are no other persons in the Republic with suitable skills to fill a vacancy. Secondly, they may be required to prepare and implement a skills transfer plan in respect of any position in which a foreign national is employed. While no regulations have been issued in terms of section 8, it echoes the requirements of the IA.³⁶ Amendments to the ESA are on the table in the form of the Draft National Labour Migration Policy and Employment Services Amendment Bill (Amendment Act).³⁷

Noteworthy amendments include a revision of the definition of foreign national, which excludes refugees.³⁸ Significantly, a separate chapter dealing with the employment of

³¹ In line with section 21 of the IA and section 20 of the Immigration Regulations, the company must submit corroborated representations of the need to employ foreigners, as well as the number of citizens and permanent residents employed by the company and their respective positions. Additionally, the company is required to provide proof that at any given time during which the visas are in operation at least 60 per cent of the total staff complement are citizens or permanent residents.

³² The High Court in *Mukuru Financial Services (Pty) Ltd and Another v Department of Employment and Labour* (2022) 43 ILJ 1171 (WCC) para 20 explained that, based on the preamble to the IA, both the need for foreign nationals to work in the company, as well as the training of South African citizens to meet that specific need, must form part of the portfolio of evidence in the application for the corporate visa.

³³ Section 2(1) of the ESA.

³⁴ Section 2(1)(h) of the ESA

³⁵ Section 1 of the ESA.

³⁶ The first prerequisite accords with section 18 of the Immigration Regulations, while the second prerequisite promotes section (j) of the preamble to the IA, which states that a policy connection must be maintained between foreigners working in South Africa and the training of South African citizens.

³⁷ The Draft National Labour Migration Policy and Employment Services Amendment Bill, 28 February 2022 (Government Notice 45962).

³⁸ It states that a foreign national is either an individual who is not a South African citizen or does not have a permanent residence permit issued in terms of the IA; or has not been granted recognition as a refugee in terms of the Refugees Act.

foreign nationals has been added.³⁹ First, it specifies that a foreign national is eligible to be employed only if the individual is a holder of a visa issued under the IA; is the holder of an asylum seeker visa in terms of the Refugees Act, which has been endorsed with the right to work; or is permitted to work in terms of any other legislation or international agreement binding upon the country.⁴⁰ Secondly, it places a number of requirements on the employer. Before employing a foreign national, the employer must establish that the foreign national is entitled to work in South Africa. Where the person is entitled to work, the requirements set out in section 8 of the current ESA are mandatory.⁴¹ The Amendment Act gives the Minister the authority to set quotas for the employment of foreign nationals. Such quotas may apply in specific sectors; in specific occupational categories; nationally; or to specific regions. The factors to be considered in setting quotas are the purpose of the Act; the availability of the requisite skills among citizens, permanent residents or refugees who are available to work in the sector; and the country's obligations to permit foreign nationals to work in terms of an international agreement.⁴²

The ESA, and more so the Amendment Act, signifies a concerted effort by government to ensure that the employment of citizens and migrants who have a strong association with South Africa are not compromised when affording jobs to foreign nationals. While the IA is based on a similar premise, the Amendment Act seeks to employ stricter measures to safeguard employment opportunities for citizens, permanent residents and refugees.

3 INTERNATIONAL LAW

International law plays a fundamental role in the interpretation and application of South Africa law, based on its constitutional recognition in sections 39 and 233. Section 39 requires a court, tribunal or forum to consider international law when interpreting the Bill of Rights, while section 233 requires a court when interpreting any legislation to prefer a reasonable interpretation of the legislation that is consistent with international law over an alternative interpretation that is inconsistent with it.⁴³ Considering that South Africa is a member of the United Nations (UN) and the International Labour Organization (ILO),⁴⁴ these international instruments come to bear upon South Africa.

From a UN perspective, there are four instruments of relevance: the Universal Declaration of Human Rights (UDHR);⁴⁵ the International Convention on the Elimination

³⁹ Chapter 3A.

⁴⁰ Section 12A(1) of the Draft National Labour Migration Policy and Employment Services Amendment Bill GN 45962.

⁴¹ Section 12A(2) of the Draft National Labour Migration Policy and Employment Services Amendment Bill GN 45962.

⁴² Section 12B of the Draft National Labour Migration Policy and Employment Services Amendment Bill GN 45962.

⁴³ Constitution of the Republic of South Africa, 1996.

⁴⁴ Van Niekerk A & Smit N (eds) *Law@Work* 5th ed (2019) at 23.

⁴⁵ Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948.

of All Forms of Racial Discrimination (ICEAFRD);⁴⁶ the ICESCR;⁴⁷ and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICPRMW).⁴⁸ The ICEAFRD and the ICESCR have been ratified by South Africa, while the ICPRMW has not.⁴⁹ All four of these instruments address to some extent the rights of migrant workers. First, the UDHR emphasises that all human beings are born free and are equal in dignity and rights. Therefore, everyone is entitled to all the rights and freedoms set out in the declaration, without distinguishing between people based on race, colour or national origin.⁵⁰ One of the rights provided for is everyone's right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment.⁵¹ This right is reiterated in the ICEAFRD.⁵²

In line with the above, the ICESCR, which seeks to give effect to the principles set out in the UDHR,⁵³ requires state parties to recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts. It also requires state parties to take appropriate steps to safeguard this right.⁵⁴ However, it provides discretion to developing countries. It states that "developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to *non-nationals*".⁵⁵

The ICPRMW similarly permits member states to restrict access to migrant workers. While it provides that migrant workers shall have the right to freely choose their remunerated activity,⁵⁶ it allows a country to limit entry into certain categories of employment if this is in the interests of the country and provided for by national legislation.⁵⁷ The ICESCR and ICPRMW, which were enacted after the UDHR and the

⁴⁶ International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly Resolution 2106 (XX) of 21 December 1965.

⁴⁷ International Covenant on Economic, Social and Cultural Rights, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966.

⁴⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted by UN General Assembly Resolution 45/158 of 18 December 1990.

⁴⁹ Department of Employment and Labour "Draft National Labour Migration Policy for South Africa February 2022" available at <https://www.labour.gov.za/DocumentCenter/Publications/Public%20Employment%20Services/National%20Labour%20Migration%20Policy%202021%202.pdf> (accessed 15 November 2022) at 48–49.

⁵⁰ Preamble to the ICEAFRD.

⁵¹ Article 23(1) of the UDHR.

⁵² Article 5 of the ICEAFRD requires state parties to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration.

⁵³ Preamble to the ICESCR.

⁵⁴ Article 6 of the ICESCR.

⁵⁵ Article 6 of the ICESCR.

⁵⁶ Article 52(1) of the ICPRMW.

⁵⁷ Article 52(2) of the ICPRMW.

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ICEAFRD, and which seek to give effect to these instruments,⁵⁸ both recognise the right of member states to limit a migrant worker's entitlement to freely choose his or her occupation.

Turning to the ILO, its ultimate objective is the attainment of social justice, which it seeks to achieve through the development of conventions and recommendations in the field of labour and social security law.⁵⁹ South Africa has ratified all eight core ILO labour conventions.⁶⁰ One of the core conventions is the Discrimination (Employment and Occupation) convention,⁶¹ which seeks to eliminate discrimination in employment and occupation. "Employment" and "occupation" are defined as being inclusive of access to employment and to particular occupations.⁶² "Discrimination" is defined as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, *national extraction* or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".⁶³ "National extraction" has been defined as being inclusive of one's citizenship or nationality.⁶⁴

These provisions suggest that it is not permissible to limit the rights of migrant workers to access occupations, including the legal fraternity. However, it is notable that reference is made in the convention to the pursuance of national legislation by means that are appropriate to national conditions and practice.⁶⁵ This presumably suggests that South Africa's policy stance in implementing the convention must be mindful of the conditions that prevail in the country. This would include factors such as the high unemployment rate, which could be mitigated by protecting the job market for citizens and permanent residents. The convention must furthermore be considered in the light of the provisions in the ICESCR and ICPRMW, which were enacted subsequent thereto.

The Migrant Workers (Supplementary Provisions) Convention,⁶⁶ though not ratified by South Africa, requires member states to enact national policy that is designed to promote equality of opportunity and treatment in respect of the employment and

⁵⁸ Preamble to the ICPRMW.

⁵⁹ Tshoose CI "Appraisal of the selected themes on the impact of international standards on labour and social security law in South Africa" (2022) 25(1) *Potchefstroom Electronic Law Journal* 1 at 4.

⁶⁰ Van Niekerk & Smit (2019) at 26.

⁶¹ Convention 111 of 1958.

⁶² Article 1(3) of Convention 111 of 1958.

⁶³ Article 1 of Convention 111 of 1958.

⁶⁴ "Fair Work Commission" available at <https://www.fwc.gov.au/national-extraction> (accessed 15 November 2022). See also the "International Labour Organisation General Observation (CEACR) – adopted 2018, published 108th ILC session (2019): Discrimination (Employment and Occupation) Convention, 1958 (No. 111)" available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3996050,,2018 (accessed 15 November 2022).

⁶⁵ Articles 2 & 3 of Convention 111 of 1958.

⁶⁶ Convention 143 of 1975.

occupation of migrant workers *lawfully* within its territory, among other measures.⁶⁷ However, akin to the Discrimination convention, the envisaged national policy and legislation must take account of the national conditions and practice of the country.⁶⁸ More than this, it permits member states to restrict access to limited categories of employment where this is necessary in the interests of the state.⁶⁹ Ratification of ILO conventions require member states to adopt national legislation and policy in accordance with the standards set out in the convention.⁷⁰ South Africa is bound by the conventions that have been ratified, and has an obligation to enforce national legislation to give effect to the terms of the convention, subject to its national conditions.⁷¹ While the ILO will only monitor South Africa's compliance with ratified conventions, cognizance is given to unratified conventions by the judiciary.⁷² Having regard to both ratified and unratified conventions, it is evident that international law, while pursuing equal rights for documented migrants, permits their exclusion from certain categories of employment or occupations.

4 JUDICIAL INTERPRETATION

What follows is a discussion of cases in which the rights of documented migrants were engaged. This section concludes with an analysis of the legal principles that have been established. This will be used to evaluate whether the CC decision of *Rafoneke* followed a consistent approach, or whether it deviated from established jurisprudence.

4.1 *Larbi-Odam v MEC for Education*⁷³

In *Larbi-Odam*, a group of foreign nationals, some permanent and others temporary residents, held temporary positions as teachers.⁷⁴ A rationalisation process led to an oversupply of teachers,⁷⁵ resulting in a decision to abolish temporary positions. This would have left the applicants without employment, as one of the eligibility requirements for appointment as a permanent teacher in terms of Regulation 2(2) was South African citizenship.⁷⁶ The applicants challenged the constitutionality of Regulation 2(2), alleging that it violated section 8(2) of the Interim Constitution,⁷⁷ which prohibited unfair discrimination on a number of grounds. The court *a quo* found

⁶⁷ Article 10 of Convention 143 of 1975.

⁶⁸ Articles 10 & 12 of Convention 143 of 1975.

⁶⁹ Articles 14(c) of Convention 143 of 1975.

⁷⁰ Van Niekerk & Smit (2019) at 25.

⁷¹ Article 2 of Convention 111 of 1958.

⁷² Tshoose discusses case law wherein ILO conventions were relied on. Some conventions were unratified, such as ILO Convention 158, which deals with termination of employment. See Tshoose (2022) at 27.

⁷³ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1997 (12) BCLR 1655.

⁷⁴ *Larbi-Odam* (1997) at para 4.

⁷⁵ *Larbi-Odam* (1997) at para 7.

⁷⁶ *Larbi-Odam* (1997) at paras 2 & 3.

⁷⁷ *Larbi-Odam* (1997) at para 3.

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that while Regulation 2(2) was contrary to section 8(2), as it unfairly discriminated on the unlisted ground of citizenship, it was a justifiable limitation under section 33(1).⁷⁸ It accepted the contention of the government that it had a legitimate interest in providing employment to its own citizens. Waddington J stated:

It seems to me that it is a matter of common-sense that the government of any state would wish to ensure that, in fields where employment opportunities are limited, available jobs should in the first instance be made available to the citizens of that state.⁷⁹

The CC disagreed to the extent that this objective was achieved at the expense of permanent residents.⁸⁰ It relied on the three-stage test laid down in *Harksen v Lane*.⁸¹ In line with this test, the first question to be determined is whether the differentiating provision bears a rational connection to a legitimate government purpose. If it does not, it leads to an immediate finding that there was a violation of the right to equality. If it does, that is not the end of the enquiry, as it might nevertheless amount to discrimination, which might be unfair. Determining whether the differentiation amounts to unfair discrimination requires an evaluation in the first instance of whether it amounts to discrimination. If the ground of differentiation is not one that is expressly listed under the right to equality, such as citizenship, the question to be answered is whether the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Where this is determined in the affirmative, the enquiry moves to determining the fairness of the discrimination, which has to be established by the complainant (in the case of unlisted grounds such as citizenship), and which focuses on the impact of the discrimination on the complainant. If, at the end of this stage of the enquiry, the discrimination is found to be fair, then there will be no violation of the right to equality. However, if it is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitations clause.⁸²

The CC found that the differentiating ground of citizenship was based on attributes and characteristics that had the potential to impair the fundamental right to human dignity. This was because minority groups in all countries had little political muscle, which made it easy for their interests to be overlooked and for their rights to be violated. Furthermore, citizenship was a personal attribute which was difficult to change. Therefore, it rejected the imputation that the applicants were unworthy recipients of a

⁷⁸ *Larbi-Odam* (1997) at para 7.

⁷⁹ *Larbi-Odam* (1997) at para 8.

⁸⁰ *Larbi-Odam* (1997) at para 10 & 30-35.

⁸¹ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489. *Larbi-Odam* (1997) at para 15.

⁸² *Harksen v Lane* (1997) at para 52. The limitation clause of the Interim Constitution provided that the rights entrenched in the Bill of Rights could be limited by law of general application only to the extent that such limitation was reasonable and justifiable in an open and democratic society based on freedom and equality.

permanent position, solely by virtue of their being non-citizens of South Africa.⁸³ Having found that they were discriminated against, the CC proceeded to establish the impact of the discrimination on the applicants to determine whether it was unfair.⁸⁴

The CC remarked that a person's profession is an important part of his or her life. Security of tenure permits a person to plan and build his social and professional life. As the regulation affected employment opportunities, it undoubtedly had a negative impact.⁸⁵ Referring to permanent residents, the court emphasised that it was contradictory to permit people to stay permanently in a country, but then to exclude them from a job that they were qualified to perform. It reached the conclusion that those who were permanent residents had been unfairly discriminated against.⁸⁶ It further found that this exclusion constituted an unjustifiable limitation.⁸⁷ While reducing unemployment amongst South African citizens was a legitimate purpose of government, this objective equally applied to permanent residents, who should not have been viewed differently from citizens. The attempt to reduce unemployment among South African citizens by increasing unemployment among permanent residents was regarded as unlawful.⁸⁸

Turning to temporary residents, the CC found that it may have been a reasonable decision to give preference to a citizen over a temporary resident to address the oversupply of teachers.⁸⁹ It explained that temporary residents had no right to remain in the country beyond the period for which they had been granted a permit, unlike permanent residents.⁹⁰ Notwithstanding this, the CC noted that the temporary resident applicants lived in South Africa and had worked as teachers for many years through the renewal of their work visas. For example, the first applicant had worked as a teacher in South Africa since 1989. It accepted the contention that "the applicants have come to regard their employment as being of a fairly extended nature and have regulated their financial, social, residential, professional and family lives accordingly". This led the court to the conclusion that although their legal status was that of temporary residents, in substance their employment was not temporary.⁹¹ The CC found it inappropriate to subject the temporary resident applicants to discrimination in the job market for as long as they were permitted to live and work in South Africa.⁹² Therefore, Regulation 2(2)

⁸³ *Larbi-Odam* (1997) at paras 19–20.

⁸⁴ *Larbi-Odam* (1997) at para 23.

⁸⁵ *Larbi-Odam* (1997) at para 23.

⁸⁶ *Larbi-Odam* (1997) at paras 24 & 25.

⁸⁷ *Larbi-Odam* (1997) at para 26.

⁸⁸ *Larbi-Odam* (1997) at paras 27, 30 & 31.

⁸⁹ *Larbi-Odam* (1997) at para 35.

⁹⁰ *Larbi-Odam* (1997) at paras 24, 37 & 38.

⁹¹ *Larbi-Odam* (1997) at para 41.

⁹² *Larbi-Odam* (1997) at paras 41 & 43.

was found to be inconsistent with the Constitution, in respect of both permanent and temporary residents.⁹³

4.2 *Minister of Home Affairs v Watchenuka*

Watchenuka dealt with the validity of the blanket prohibition against work that was contained in permits issued to asylum seekers in terms of the Refugees Act.⁹⁴ In the court *a quo*, the applicant challenged this prohibition on the basis that her savings had been depleted and she needed to be allowed to secure employment to support herself and her son.⁹⁵ She sought an order declaring the prohibition to be contrary to the Constitution, and a declaration that the Department of Home Affairs allow her to work.⁹⁶ The High Court granted the order.⁹⁷ The Supreme Court of Appeal (SCA) found that the general prohibition against employment conflicts with the Bill of Rights and was unlawful.⁹⁸ The SCA did not embark on the enquiry set out in *Harksen v Lane* to establish unfair discrimination. Instead, it engaged with the concept of human dignity, which it profoundly remarked had no nationality. It explained that:

the inherent dignity of all people – like human life itself – is one of the foundational values of the Bill of Rights. It constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights.⁹⁹

Significantly, it found that the freedom to engage in productive work was an important component of human dignity even if work was not required to survive but undertaken rather for self-fulfilment.¹⁰⁰ However, the court acknowledged the permissibility of limiting the right to human dignity but stated that this would be prohibited where employment was the only reasonable means for the person's support. In these situations, a limitation of the right will not merely restrict a person's ability to attain self-fulfilment, but will prevent a person from living without humiliation and degradation.¹⁰¹ The SCA ordered the Standing Committee responsible for the issuance of asylum seeker permits to refrain from the implementation of a blanket prohibition on the right to undertake employment, and rather to take account of the circumstances of each asylum seeker, whether on a case-by-case basis or by formulating guidelines.¹⁰²

⁹³ *Larbi-Odam* (1997) at para 39 & 47.

⁹⁴ *Watchenuka* (2004) at paras 10 & 11.

⁹⁵ *Watchenuka* (2004) at paras 11 & 13.

⁹⁶ *Watchenuka* (2004) at para 13.

⁹⁷ *Watchenuka* (2004) at para 14.

⁹⁸ *Watchenuka* (2004) at para 24.

⁹⁹ *Watchenuka* (2004) at paras 25 & 26.

¹⁰⁰ *Watchenuka* (2004) at para 27. The SCA stated that "mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful".

¹⁰¹ *Watchenuka* (2004) at paras 28 & 32.

¹⁰² *Watchenuka* (2004) at para 34.

4.3 *Khosa and Mahlaule v Minister of Social Development*¹⁰³

In *Khosa and Mahlaule v Minister of Social Development*, the CC had to decide whether provisions of the Social Assistance Act that restricted social grants to South African citizens only¹⁰⁴ violated the constitutional right in section 27(1)(c) of the Constitution, which affords everyone the right to access social security.¹⁰⁵ The government explained that one of the primary reasons for the limitation was that it needed to put South Africa citizens first, which was an objective pursued in many jurisdictions.¹⁰⁶ The CC rejected the citizens-first argument on the basis that the IA affords permanent residents all the rights of citizens, save for those expressly ascribed to citizens.¹⁰⁷ The government's reliance on the benchmark set in developed countries was also discounted due to the wording of South Africa's Constitution, which provides everyone with the right to access social security.¹⁰⁸ Notwithstanding the CC's counter to these arguments, it was willing to assume that there was a rational connection between the citizenship provisions of the Social Assistance Act and the immigration policy it was said to support.¹⁰⁹

It moved on to determine whether the differentiation amounted to discrimination and whether it was unfair.¹¹⁰ Relying on the decision of *Larbi-Odam*, it found, first, that the differentiation constituted discrimination¹¹¹ and, secondly that it was unfair, based on its impact on the human dignity of permanent residents.¹¹² The following pronouncements are noteworthy:

In my view the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies.¹¹³

Notably, unlike the High Court which found that the right should be extended to all non-citizens,¹¹⁴ the CC found that it may be reasonable to exclude migrants who have only a tenuous link to South Africa. It explained that the position of permanent residents was

¹⁰³ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) BCLR 569 (CC).

¹⁰⁴ Section 3(c) of the Social Assistance Act, 13 of 2004.

¹⁰⁵ *Khosa and Mahlaule* (2004) at para 38.

¹⁰⁶ *Khosa and Mahlaule* (2004) at paras 54, 55, 57 & 60. See also Mpedi LG "Charity begins – but does not end – at home *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC)" (2005) *Obiter* 26(1) 173 at 181 & 182.

¹⁰⁷ *Khosa and Mahlaule* (2004) at para 57.

¹⁰⁸ *Khosa and Mahlaule* (2004) at para 54.

¹⁰⁹ *Khosa and Mahlaule* (2004) at para 67.

¹¹⁰ *Khosa and Mahlaule* (2004) at para 68.

¹¹¹ *Khosa and Mahlaule* (2004) at para 71.

¹¹² *Khosa and Mahlaule* (2004) at paras 76,77 & 80.

¹¹³ *Khosa and Mahlaule* (2004) at para 82.

¹¹⁴ *Khosa and Mahlaule* (2004) at para 9.

quite different to that of temporary or illegal residents.¹¹⁵ Mokgoro J proceeded to state that “for these reasons, I exclude temporary residents and it would have been appropriate for the High Court to have done so”.¹¹⁶ It is worth noting that the minority judgment came to a different conclusion regarding the provision of old-age grants to non-citizens. It found the government’s argument to be compelling,¹¹⁷ and concluded that the exclusion of both permanent and temporary residents from the receipt of such grants was a justifiable limitation.¹¹⁸

4.4 *Union of Refugee Women v Director, Private Security Industry Regulatory Authority*¹¹⁹

In *Union of Refugee Women*, the registration of several refugees with the private security industry was withdrawn by the regulatory body.¹²⁰ Furthermore, the applications of those who applied for registration was rejected. The basis for the withdrawal and rejection was that they were not South African citizens or permanent residents, which was a requirement for registration.¹²¹ The applicants contended that section 23(1)(a) of the Security Act¹²² which provided for this discriminatory requirement was unconstitutional as it violated their right to equality.¹²³ Using the *Harksen v Lane* test, the majority found that the differentiation bore a rational connection to a legitimate government purpose and that it did not constitute unfair discrimination.¹²⁴ The purpose sought to be achieved by section 23(1)(a) was to protect the safety and security of the public. While the CC found that foreign nationals, including refugees, could not be said to be inherently less trustworthy, the reality was that citizens and permanent residents would more easily be able to prove their trustworthiness.¹²⁵ Therefore, differentiating between citizens and permanent residents, on the one hand, and all other foreigners, on the other, had a rational foundation and served a legitimate governmental purpose.¹²⁶ The CC assumed that the differentiation amounted to discrimination.¹²⁷ In respect of unfairness, the court’s point of departure was that while refugees had the right to seek

¹¹⁵ *Khosa and Mahlaule* (2004) at para 59.

¹¹⁶ *Khosa and Mahlaule* (2004) at para 59.

¹¹⁷ *Khosa and Mahlaule* (2004) at para 126.

¹¹⁸ *Khosa and Mahlaule* (2004) at para 134.

¹¹⁹ *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC).

¹²⁰ *Union of Refugee Women* (2006) at para 8.

¹²¹ *Union of Refugee Women* (2006) at para 14.

¹²² Section 23(1) of the Security Act provides as follows: “Any natural person applying for registration in terms of section 21(1), may be registered as a security service provider if the applicant is a fit and proper person to render a security service, and— (a) is a citizen of or has permanent resident status in South Africa.”

¹²³ *Union of Refugee Women* (2006) at paras 20 & 26.

¹²⁴ *Union of Refugee Women* (2006) at paras 42 & 54.

¹²⁵ *Union of Refugee Women* (2006) at para 42.

¹²⁶ *Union of Refugee Women* (2006) at paras 37–42.

¹²⁷ *Union of Refugee Women* (2006) at para 45.

employment in terms of the Refugees Act, they did not have a constitutional right to freedom of trade, occupation and profession,¹²⁸ which was the right limited by section 23(1)(a) of the Security Act. It emphasized that this limitation did not restrict their right to seek employment and to work, as they were not precluded from working in industries other than the private security industry.¹²⁹

The court considered the argument that section 17(1) of the United Nations Convention Relating to the Status of Refugees entitles them to be treated the same as permanent residents.¹³⁰ This argument was rejected by the CC. Accordingly, the discrimination was found to have had very little, if any, potential to impair their human dignity in any significant or substantial manner and was considered fair.¹³¹

The dissenting judgment written by Mokgoro J and O'Regan J found that the applicants were unfairly discriminated against,¹³² as the impact of the discrimination was damaging in a significant manner. Even though refugees were permitted to work in other industries, it was found that there was evidence to suggest that the relatively low-skilled work available in the private security industry was a significant source of employment for many refugees. Therefore, their exclusion from working in the industry was not inconsequential but rather one that could have a severe impact on their ability to earn a livelihood in South Africa.¹³³ A noteworthy point was that refugees were more akin to permanent residents than temporary residents, as they had a right to remain in South Africa indefinitely in accordance with the Refugees Act.¹³⁴ Therefore, section 17(1) of the UN Convention was accorded an interpretation that refugees be afforded the same work opportunities as permanent residents.¹³⁵

4.5 *Scalabrini Centre of Cape Town v Minister of Social Development*

In this case,¹³⁶ the payment of the Covid-19 social relief of distress grant, which was available only to South African citizens, permanent residents and refugees as per the directive issued by the Minister of Social Development, was contested.¹³⁷ The applicants submitted that their exclusion was arbitrary, irrational and unreasonable, and that it

¹²⁸ *Union of Refugee Women* (2006) at paras 46 & 51–54.

¹²⁹ *Union of Refugee Women* (2006) at para 47.

¹³⁰ *Union of Refugee Women* (2006) at paras 62 & 64.

¹³¹ *Union of Refugee Women* (2006) at paras 65 & 66.

¹³² *Union of Refugee Women* (2006) at para 91.

¹³³ *Union of Refugee Women* (2006) at para 122.

¹³⁴ *Union of Refugee Women* (2006) at para 99.

¹³⁵ *Union of Refugee Women* (2006) at para 109.

¹³⁶ *Scalabrini Centre of Cape Town and Another v Minister of Social Development and Others* (2021) (1) SA 553 (GP).

¹³⁷ *Scalabrini* (2021) at paras 13 & 14. The directive issued by the Minister was in line with the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance issued in terms of the Social Assistance Act, 13 of 2004. Here, the eligibility requirement to receive a social grant is citizenship, permanent residence or refugee status. See, for example, sections 2(e) and 3(a) of the Regulations.

violated the constitutional right of lawful asylum seekers and special permit holders to equality, dignity and access to social security.¹³⁸ The special permit holders were those with Angolan special permits, Zimbabwean exemption permits and Lesotho exemption permits, who qualified as temporary residents.¹³⁹ Considering the purpose for which the grant was paid,¹⁴⁰ the High Court found that asylum seekers and special permit holders, like other categories of people, equally endured the negative consequences of the pandemic and the lockdown, as they were unable to move and work and to secure resources to buy food and other basic necessities for their families.¹⁴¹ For these reasons, the court found that the applicants' immigration status became irrelevant as a criterion for eligibility of the grant.¹⁴² Such an interpretation was held to be consistent with the Bill of Rights as it upheld the applicants' rights to equality, dignity and social assistance.¹⁴³

4.6 Legal principles established by the judiciary

First, the court in *Larbi-Odam* case sanctioned the legitimacy of measures to reduce unemployment amongst citizens. While such measures cannot be used to limit a permanent resident's right to take up employment or to be employed in a specific profession, the same fortification is not conferred on temporary residents. The CC in *Khosa and Mahlaule* similarly accepted the citizens-first argument in respect of categories of migrants other than permanent residents. Therefore, measures implemented to protect the employment of citizens and permanent residents bear a rational connection to a legitimate government purpose. A key legal principle that emanates from *Larbi-Odam* is that differentiation based on citizenship amounts to discrimination. This was endorsed in *Khosa and Mahlaule*, as well as in *Union of Refugee Women*. Another is that discrimination perpetrated against permanent residents will be unfair, as their right to seek or take up employment and to choose an occupation without any limitations discernibly flows from the authorisation given to them to live in South Africa permanently. *Khosa and Mahlaule* confirmed that discrimination based on citizenship against permanent residents constitutes unfair discrimination. Therefore, there is sound authority for the view that permanent residents should not be treated differently from citizens.

However, this right does not extend to other categories of migrants. In *Larbi-Odam*, as well as in *Khosa and Mahlaule*, it was indicated that the position of temporary residents is not analogous to that of permanent residents, as temporary residents only have a provisional right to live and work in South Africa. Therefore, discriminating against temporary residents based on citizenship will not automatically constitute unfair discrimination. The merits of the case will have to be engaged with to determine the

¹³⁸ *Scalabrini* (2021) at para 7.

¹³⁹ *Scalabrini* (2021) at paras 30–32.

¹⁴⁰ *Scalabrini* (2021) at para 23.

¹⁴¹ *Scalabrini* (2021) at para 24.

¹⁴² *Scalabrini* (2021) at para 25.

¹⁴³ *Scalabrini* (2021) at para 38.

impact of the discrimination. This distinction in rights is evident from the decision reached in *Khosa and Mahlaule*. Here, the court was not willing to extend section 27(1)(c) rights to temporary residents, despite this right being afforded to ‘everyone’. Although, the High Court in *Scalabrini* extended the right to access appropriate social assistance to asylum seekers and certain categories of temporary residents, this does not permanently extend social grants to temporary residents. It specifically allows them to benefit from the social relief of distress grant, which is a temporary measure.¹⁴⁴

Union of Refugee Women endorsed the view that discrimination against categories of migrants other than permanent residents will not automatically amount to unfair discrimination. The minority judgment made the point that refugees are more “closely allied to permanent residents than to those foreign nationals who have rights to remain in South Africa temporarily only”.¹⁴⁵ This reinforces the fact that refugees have preferential rights compared to that of temporary residents.¹⁴⁶ Notwithstanding their superior status, they were not afforded protection by the CC, which weakens the position of other categories of migrants such as temporary residents. It will not be easy for temporary residents to prove that they have been unfairly discriminated against. However, even if unfair discrimination is established, the court will still have to engage with the question of whether the discriminatory provision constitutes an unjustifiable limitation on the temporary residents’ right to equality, which will not be an easy hurdle to overcome.

Although *Watchenuka* does not expressly engage with the rights of temporary residents, it made important pronouncements on the right to take up employment and its impact on the human dignity of a person. Importantly, it emphasised that one’s right to human dignity is negatively affected when one is denied the freedom to engage in productive work, irrespective of whether engagement in the work is for the purposes of self-fulfilment or survival. This arguably extends to instances where one’s right to follow a specific occupation or profession is limited. However, the SCA reminds us that the right to dignity, like other rights in the Bill of Rights, is capable of being limited. Limitations on the right to engage in productive work are justifiable unless the limitation deprives a person in need of earning a living. It is for this reason that the SCA did not order that all asylum seeker permits should provide for the permissibility to undertake work, but rather that each case should be judged on its merits. The CC in *Union of Refugee Women*, in deciding whether refugees had been unfairly discriminated against, considered the extent to which their human dignity had been affected. One factor that pointed towards their human dignity not being significantly or substantially impaired by the discrimination was their continued right to work, albeit not in the security industry.

¹⁴⁴ Section 5(1) of the Regulations Relating to Covid-19 Social Relief of Distress Grant 22 April 2022 (Government Notice 46271) states that the grant is payable for the months 1 April 2022 to 31 March 2023.

¹⁴⁵ *Union of Refugee Women* (2006) at para 99.

¹⁴⁶ As things stand, refugees are afforded a superior status based on the rights accorded to them by section 27 of the Refugees Act. Furthermore, they are entitled to social grants in line with the Regulations issued in terms of the Social Assistance Act. See sections 2(e) and 3(a), among others.

4.7 *Rafoneke v Minister of Justice and Correctional Services*

In this recent decision, the CC was called upon to decide whether provisions of the LPA, which disallowed temporary residents from being admitted and authorised to be enrolled as legal practitioners, should be declared inconsistent with the Constitution and invalid.¹⁴⁷ The disputed provision was section 24(2)(b), which states that

the High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she is a South African citizen; or permanent resident in the Republic.

The applicants were Lesotho and Zimbabwean nationals who were authorised to reside and work in South Africa as holders of a Lesotho or Zimbabwean special permit, or having received spousal visas. All six of the applicants had obtained South African law degrees and thereafter completed articles of clerkship or pupillage. They went on to pass the attorney admission exams or bar exams.¹⁴⁸ Those who were holders of special permits were allowed to temporarily reside and take up employment in South Africa, but were not eligible to apply for permanent residence irrespective of their duration of stay.¹⁴⁹

Relying on *Harksen v Lane*, the CC proceeded to establish whether the differentiation bore a rational connection to a legitimate government purpose. Thereafter, it considered whether the differentiation amounted to discrimination and whether the discrimination was unfair. For purposes of the first question, the Minister of Justice and Correctional Services (the first respondent) contended that the purpose of section 24(2)(b) was, first, to reserve access to the profession for citizens and permanent residents and, secondly, to protect the public from unscrupulous and unqualified legal practitioners.¹⁵⁰ The Legal Practice Council (the second respondent) explained that the provisions of section 24(2)(b) were based on section 22 of the Constitution.¹⁵¹

The CC engaged with this constitutional right and stated that the legislature was free to decide how far it wished to extend the admission into the legal profession to non-citizens. It found nothing wrong with its choice to draw the line at permanent residents.¹⁵² It pointed out that it was justifiable to treat permanent residents preferentially, as they had been granted the right to live and work in South Africa permanently.¹⁵³ Despite acknowledging that some of the applicants had been in the country for a long time and did not wish to return to their home countries, the bottom line remained that they were given permission to work only for a limited time and purpose. This meant they did not have “fixity of connection” to the country. The court

¹⁴⁷ *Rafoneke* (2022) at para 1.

¹⁴⁸ *Rafoneke* (2022) at paras 6–29.

¹⁴⁹ *Rafoneke* (2022) at para 8.

¹⁵⁰ *Rafoneke* (2022) at para 43.

¹⁵¹ *Rafoneke* (2022) at para 60.

¹⁵² *Rafoneke* (2022) at paras 77–78.

¹⁵³ *Rafoneke* (2022) at paras 80 & 81.

explained that while the policy choice to protect opportunities for South Africans and permanent residents may be open to debate, it was not arbitrary or illegitimate. Rather, it was “restrictive and protectionist”, which was found to be a permissible governmental objective.¹⁵⁴ Support for this finding was garnered from foreign law. Reference was made to the jurisdictions of India and Canada, where the citizenship requirement for admission to the legal profession was found to be valid.¹⁵⁵

The CC was cognisant of the allowance that was given to the applicants to study law and graduate from universities across the country, as well as the permissibility of serving articles of clerkship or undergoing pupillage. However, the CC was not convinced that these factors discounted the rationality of the policy choice, as those who chose to study in South Africa and then proceeded to do vocational training would have, or at least should have, been fully conversant with their ineligibility for admission.¹⁵⁶ It was emphasised that while they could not be admitted, they were not deprived of the right to be employed in other capacities.¹⁵⁷ Despite the CC’s rejecting the second purpose (protecting the public), its overall finding was that the differentiation bore a rational connection to a legitimate governmental purpose.¹⁵⁸

The court then turned to determine whether the differentiation constituted discrimination. First, it rejected the applicant’s argument that differentiation based on citizenship can be defined as discrimination on the listed ground of social origin. It stated that nationality is not a matter of social origin but rather national origin.¹⁵⁹ However, it found that differentiation on the unlisted ground of citizenship constitutes discrimination in line with the decision reached in *Larbi-Odam*.¹⁶⁰ To determine whether the discrimination was unfair, the CC focused on the impact of the discrimination. The court rejected the applicant’s argument that it had the effect of impairing their human dignity, as they were not left destitute with no alternative source of employment.¹⁶¹ It explained that the applicants were neither prevented from working and nor was there a blanket ban on employment in the legal profession.¹⁶² In fact, some of them were gainfully employed. Therefore, section 24(2)(b) did not curtail their employability in different capacities that did not require admission as legal practitioners.¹⁶³

4.7.1 *Analysis of Rafoneke*

¹⁵⁴ *Rafoneke* (2022) at paras 82 & 83.

¹⁵⁵ *Rafoneke* (2022) at paras 88 & 90.

¹⁵⁶ *Rafoneke* (2022) at para 91.

¹⁵⁷ *Rafoneke* (2022) at para 91.

¹⁵⁸ *Rafoneke* (2022) at para 92.

¹⁵⁹ *Rafoneke* (2022) at para 94.

¹⁶⁰ *Rafoneke* (2022) at paras 95–96.

¹⁶¹ *Rafoneke* (2022) at paras 97–102.

¹⁶² *Rafoneke* (2022) at para 98.

¹⁶³ *Rafoneke* (2022) at para 102.

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The outcome is undoubtedly unfavourable for temporary residents who wish to practise law in South Africa. Many will argue that the judgment is unfair to these migrant workers, as it prevents them from working as attorneys and advocates, despite having pursued a line of study and vocational training in South Africa with this specific goal in mind. The facts of the matter are indeed emotive. However, the purpose of this article is to evaluate the judgment against international law and judicial precedent. In this regard, the CC cannot be faulted for finding that the reservation of work opportunities for South Africans and permanent residents was a permissible governmental objective. This finding accords with the earlier decisions of the CC. While *Larbi-Odam* and *Khosa and Mahlaule* rejected the treatment of permanent residents in a less favourable manner to achieve similar objectives, none of these cases rejected the protection of job opportunities for citizens and permanent residents above other categories of migrants.

It is uncontroversial that differentiation based on citizenship constitutes discrimination, which was endorsed in *Rafoneke*. Turning to fairness, the pronouncements made in earlier decisions are instructive. In *Larbi-Odam* and *Khosa and Mahlaule*, it was found that discrimination against temporary residents would not necessarily be unfair because they do not have the right to permanently live and work in South Africa, and are not by virtue of the IA accorded rights conferred on citizens. In the minority judgment of *Union of Refugee Women*, despite it having been found that the limitation of the Security Act on refugees constituted unfair discrimination, its *obiter* remarks suggested that it would not have reached the same conclusion in respect of temporary residents. It explained that refugees have similar rights to permanent residents, which does not apply to categories of migrants that are only temporarily permitted to live in South Africa.

The CC in *Rafoneke* rejected the applicants' argument that the limitation in the LPA impaired their right to human dignity. This was due to the fact that the applicants were not denied the right to work, but rather the right to practise as attorneys or advocates. This reasoning aligns with the pronouncements made by the SCA in *Watchenuka*. Similarly, in *Union of Refugee Women*, the majority was not persuaded that the applicants had been unfairly discriminated against, as they were not prevented from working but were merely restricted from working in the private security industry. Although the CC in *Larbi-Odam* afforded protection to temporary residents, this was based on the extended period of time during which they had worked as temporary teachers and the authority granted to them to continue to work by virtue of the extension of their work permits.

Having found that the discrimination was fair, the CC did not engage with whether the differentiating provision was an unjustifiable limitation. Therefore, some commentary is warranted in this regard. The applicants averred that the limitation was unjustifiable under section 36 based on provisions in the IA and ESA which ostensibly ensure that citizens get preference over foreigners in the labour market.¹⁶⁴ First, while the IA provides safeguards which were discussed earlier, these do not apply to migrants who

¹⁶⁴ *Rafoneke* (2022) at para 48.

have spousal visas and exemption permits.¹⁶⁵ If the applicants had been given permission to be admitted and enrolled, they would have been able to practise without obtaining work visas and would have been exempt from the safeguards documented in the IA. Secondly, the safeguards in the ESA apply only if a migrant were to apply for and fill a vacancy. It is trite that legal practitioners can work without being employed. Advocates practise independently, and several attorneys choose to practise under their own names. Therefore, the measures in the IA and ESA would not necessarily have addressed job preservation of citizens and permanent residents.

5 CONCLUSION

This article set out to determine whether the CC judgment of *Rafoneke* accords with the decisions of preceding cases that engaged with the rights of migrants. It further sought to evaluate whether the judgment is congruent with international law. With due regard to the above discussion, it cannot be said that the judgment violates international standards or that it is inconsistent with the earlier approaches of the judiciary. Notwithstanding the above, the CC correctly made the point that while the policy choice of excluding temporary residents was not arbitrary or illegitimate, it is open to deliberation. Though the CC cannot be faulted for its decision, which was made in line with the existing legal framework, there may be room for the legislature to re-examine the parameters of the LPA.

What is required is for the legislature to look more circumspectly at this limiting provision in the LPA, to establish the prejudice that will be suffered by citizens and permanent residents if the eligibility requirements for admission into the legal profession are broadened. This will require research and analysis. As a starting-point, it is notable that the Draft National Labour Migration Policy explains that migrant workers are concentrated in the informal and not the formal sector. An analysis of the demographic profile of the South African workforce by skill level for the period 2007–2018 illustrated a reduction in the participation rate of foreign nationals in the *formal economy*. The specific sectors in which there were higher rates of employment among migrant workers than South African workers were agriculture, mining, manufacturing, construction, wholesale and retail (including the hospitality sector and private households), including the domestic sector.¹⁶⁶

Notably, the legal profession does not feature. Even though the practice of law is not regarded as a critical skill,¹⁶⁷ further investigation should be undertaken to determine to what extent allowing temporary residents to practise law could impact negatively on the work opportunities of South Africans and permanent residents. Although the

¹⁶⁵ Section 11(6) of the IA.

¹⁶⁶ Department of Employment and Labour “Draft National Labour Migration Policy for South Africa February 2022” available at <https://www.labour.gov.za/DocumentCenter/Publications/Public%20Employment%20Services/National%20Labour%20Migration%20Policy%202021%202.pdf> (accessed 15 November 2022) at 36–37.

¹⁶⁷ *Rafoneke* (2022) at para 56.

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constitutional right to freely chose one's occupation, trade and profession is limited to citizens, this right can be extended to migrant workers in specific occupations if it does not compromise the protection that must be afforded to South African citizens and permanent residents in that occupation.

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