IRREGULAR MIGRANT WORKERS' ACCESS TO HOST COUNTRY'S LABOUR DISPUTE RESOLUTION MECHANISMS: EXPERIENCES FROM THE SADC*

Juliana Masabo**

1. Introduction

Irregular migrant workers, broadly defined as persons who enter and remain in a country other than their and engage in remunerated activities of that other country without the necessary authorization, is a phenomenon affecting all countries.[1] In nearly every economy in the world, the number of irregular migrant workers are 'numerous enough to form a recognizable group." But, they most often live on the periphery of society and are especially vulnerable to various human rights violations and hazards.[2] They take unpleasant jobs that local people do not want, provide skills that local people lack but receive very low remuneration in return. And, in some cases, they are not remunerated. Employers tend to prefer them not only because they are less costly but also because, they can easily be dispensed with, without recourse to legal entitlement.

This contribution discusses the legal recourse available to this group of workers. It specially reflects on the ability of irregular migrant workers to access the host country's labour dispute resolution mechanisms. The contribution focuses on countries constituting the Southern African Development Community (SADC).[3] It starts with an overview of the sub-region's labour migration profile and its ensuring legal framework. It further maps the existing labour dispute resolution mechanisms, with a particular focus on their accessibility by medium and low-skilled workers. The paper further discusses the legal and factual barriers impending irregular migrant workers' access to labour dispute resolution mechanisms in host countries. A particular focus is placed on the barriers that are inherent in immigration and residence status. Finally, the contribution considers the various opportunities for improving the access of irregular migrant workers to these organs.

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**Lecturer in Law and Associate Dean, School of Law, University of Dar es Salaam, Dar es Salaam Tanzania. Email: jmasabo@gmail.com

[1] Article 5(b) of the International Convention on the Rights of All Migrant Workers ands Members of the Families, 1990.

[2] See Lyon, B *New International Human Rights Standards on Unauthorized Immigrant Worker Rights: Seizing an Opportunity to Pull Governments out of the Shadows* Villanova University Legal Working Paper Series (2006) available at http:// law.bepress.com/villanovalwps/papers/art45 (accessed on 2 September 2011). at http://www.ichrp.org/files/reports/56/122_report_en.pdf (accessed on 2 September 2014).

[3]The Southern African Development Community (SADC) is one amongst the major sub-regional economic communities in Africa. Situated in the Southern part of the continent, the SADC was initially conceived in the 1960-1970s as the "Front Line States" fighting for liberation of southern Africa (The Front Line States constituted Tanzania, Zambia, Zimbabwe, Lesotho, Mozambique and Angola) . In 1980 it was transformed into a development co-ordination body with the name of Southern African Development Co-ordination Conference (SADCC). In 1992 it was elevated into an economic community and changed its name to the Southern African Development Community (SADC). Today, SADC has a total of 14 members: South Africa, Zambia, Malawi, Zimbabwe, Tanzania, Angola, Namibia, Swaziland, Botswana, Lesotho, Democratic Republic of Congo, Mauritius, Seychelles and Madagascar.

2. Trends and Typologies of Labour Migration in the SADC

Migration and labour migration in particular, has over the decades shaped southern Africa's labour market. During colonial era, sizeable numbers of the region's inhabitants migrated to mineral and plantation rich areas where they were engaged as contractual labour.[4] Currently, southern Africa accounts for a considerable share of Africa's immigration population, largely characterised by intra-regional migration. According to the United Nation's Economic and Social Affairs Department, in 2013, Southern Africa had about 4.5 million migrants. Over three million of these migrants were of the working age (20 to 60 year).[5] The bulk of these migrants are from within the region.[6] The statistics from the United Nation's Economic and Social Affairs Department further suggests that SADC's migration is predominately economic-induced; out of the 4.5 million migrants only 300,000 were refugee.[7]

Statistics displayed here are exclusive of thousands irregular migrants, mostly low skilled workers, who migrate clandestinely towards less regulated forms of employment as casual or seasonal workers across a broad range of sectors. Although the actual numbers of these is difficult to obtain due to complexities deeply imbedded in irregular migration, it is reported that migrants in this group have significantly multiplied due to diminishing opportunities for legal migration.[8] Irregular migrants are largely dependent on smugglers who assist them to enter the territory of their intended destination and are most often in informal employment which although accommodates the large percentage of employees in the sub-region compared to formal employment, rarely enjoy the protection of traditional labour laws. They are often deliberately targeted for exploitative or extortion practices by labour brokers, unscrupulous employers and state agencies.[9] At work place they are equally exposed to unnecessary health hazards and poor safety conditions.[10] Even more complicated, the vast majority are in the 'marginally viable and sometimes semi-legal sectors, such as seasonal agricultural work, and hospitality and domestic work in which the protection of workers is extremely underdeveloped. Generally, the living and working conditions of these workers has been classified as precarious.[11] Their access to justice is, as result, equally limited and contentious.

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[4] Fenwick, C and Kalula E, *Law And Labour Law Market Regulation In East Asia And Southern Africa: Comparative Perspectives*, (Centre for Employment and Labour Relations Law, Working Paper No. 30, 2004)17.

[5] UN DESA, Population Division, Trends in Total Migrant Stock: The 2013 Revision, www.un.org/esa/population/publications/migstock/2013TrendsMigstock.pdf.

[6] The percentage of intra-regional migration is estimated to be as higher as 90 per cent. See Mudungwe, P *Migration and Development in the Southern Africa Development Community Region: The Case for a Coherent Approach* (Intra-ACP Migration Facility, 2012) at 45; and Crush, J & Williams, V 'Labour Migration Trends and policies in Southern Africa' (Southern African Migration Project (SAMP) Policy Brief No. 23, 2010) at 40.

[7] The proportion of migrants in individual countries varies considerably. For instance, in 2013 South Africa which is the leading host had about 2.4 million followed by Democratic Republic of Congo with 447,000 migrants and Zimbabwe and Tanzania which had 361,000 and 312,000 migrants, respectively.

[8] In South Africa where this problem is largely pronounced it is reported that, irregular migration towards this country, which is the economic giant of the sub-region, has grown tremendously following the demise of the apartheid. Between the year 1994 and 2010, South African deported over 1.5 million migrants to neighbouring countries, 90 percent of them being deported to Mozambique and Zimbabwe. See Crush & Williams, op cit, at 19.

[9] Ibid. Also see SADC policy on Labour Migration at 11.

[10] SADC Draft Policy in Labour Migration, 2013.

[11] Olivier, M *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)* Social Protection Discussion Paper No 0908, World Bank (2009) available at http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0908.pdf (accessed on 20th February 2015) at 17.

3. Regional and National Legal Framework on Labour Migration

Article 5(2)(d) of the Treaty establishing the SADC requires SADC to formulate policies aimed at progressive elimination of obstacles to the free movement of labour, and of the people of the region generally. In line with commitment, several policy and legal instruments with direct bearing on migration and labour migration in particular have been adopted. First amongst these is the Protocol on the Facilitation of Free Movement of Persons (hereafter referred to as "Protocol on Facilitation of Free Movement", or simply "the Protocol"). Adopted in 2005, the Protocol on Facilitation of Free Movement, was expected to provide a comprehensive labour migration legal framework to guide smooth transfer of skills between and across countries. But, circumventing these broad expectations the Protocol limited its scope to facilitating short term visa-free movements between and across national borders while leaving matters of relevance to labour migration, largely unaddressed. The Protocol remains unenforceable as it has not attained the ratification threshold for it to be enforceable.

The absence of a solid and legally enforceable labour migration framework has made the management of labour migration to rely on a series of uncoordinated policies and instruments from which some aspects of labour migration are found. These include, the Charter of Fundamental Social Rights in SADC (SADC Social Charter), 2003; and the Code on Social Security in the SADC, 2007, which although not specially designed for labour migration, constitute some important principles relevant to the protection of migrant's employment based-rights. The SADC Protocol on Education and Training, 1997 whose specific objectives include the promotion of labour policies, practices and measures which facilitate labour mobility; and bilateral agreements between states have also been useful.[12] But, none of these instruments is capable of adequately responding to the ever-growing challenges of labour migration.

At national level, the situation has not been upright. Policies and legislation governing labour migration although exist in most SADC countries are largely disconnected from each other both internally and across the countries, and are often administered by different ministries or institutions.[13] Yet, in most of the countries, migration is regarded as a security issue and therefore attracts security control measures. Rarely is migration seen as an opportunity capable of yielding economic benefits to the sending and receiving countries. Selective admission policies geared at reducing the number of foreign workers entering domestic labour market have remained popular. In the majority of the sub-region's member states, admission of non-national workers is exclusively reserved for foreign workers with skills that are scarce or not available in the host country's labour market.[14] Migrants with medium and low-skills hardly have prospects for legal admission even though given a chance they would prefer to migrate through legal channels.

In responding to some of these challenges, SADC has in the past three years registered a drastic change in its approach to migration. In 2013, SADC adopted a regional Labour Migration Action Plan 2013- 2015 through which a roadmap to a harmonized regional labour migration

[12] Bilateral labour agreements that exist so far are between the government of South Africa and different five individual countries: Mozambique, Swaziland, and Lesotho. A similar agreement existed between South Africa and with Malawi has expired.

[13] In Tanzania labour migration is administered by the Department of Employment (Ministry of Labour) and the Department of Immigration Services (Ministry of Home Affairs).

[14] For instance, in South Africa and Tanzania, immigration laws specify that only foreign workers with skills that are scarce or not available in the local market should be admitted See the (Tanzania) National Employment Promotion Services Act, No. 9 of 1999, s. 27(2). Also see the (South Africa) Immigration Act, No. 3 of 2002, s 19(2).

policy was set.[15] The specific planned activities include, identification and sharing of migration data and statistics; ensuring that migrants have access to social benefits and health services and continuum of care across borders; developing regional labour migration policy; creating synergies between national labour migration policies and the regional labour migration policy; and formulation of labour solid migration management system for purposes of monitoring the implementation of policies and legislation.

A comprehensive policy framework specially designed to promote sound management of intra-regional labour migration for the benefit of both, the sending and receiving countries as well as the migrant workers has also been formulated. The Policy Framework envisages, promotion of regular migration; development and implementation of national labour migration policies; development and conclusion of multilateral and bilateral labour agreements; protection of migrant workers' rights; and harmonisation and standardisation of national labour migration policies.

Even more important, the SADC Protocol on Employment and Labour, which was signed on the 18th August 2014 at the Summit of Heads of States at Victoria Falls in Zimbabwe, incorporates a comprehensive provision on labour migration. Article 19 which is specially dedicated to migration urges member states to: improve migration management and control; to accord fundamental rights to non-citizens, in particular labour/employment and social protection rights; to adopt measures to provide for the special needs of migrant women, children and youth; to harmonise national migration legislation and policies; to adopt measures to facilitate the coordination and portability of social security benefits; to facilitate the transfer of remittances by migrants; and to ensure coherence between labour migration, employment policies and other development strategies.

4. Labour Dispute Mechanisms in SADC Countries

The structure of labour institutions in SADC has seen considerable modifications in the recent past. Specialized labour dispute resolution organs manned by specialised personnel have been established with a view to improving efficiency in resolving industrial disputes.[16] These modifications were part of major labour law reforms undertaken in most of the SADC countries in the past two decades with technical assistance from the ILO. In countries such as Namibia, Malawi, Swaziland, Lesotho, Zambia, Tanzania, Botswana, Zimbabwe and South Africa, the reform involved far-reaching amendments to the existing employment and labour relations and enactment of new legislation while also creating new labour institutions.[17]

[15] The SADC Labour Migration Action Plan of Action was approved by Ministers and Social Partners responsible for employment and labour at their meeting held in Maputo, Mozambique, on 17 May 2013. The Plan of Action was developed based on the recommendations made the Migration Dialogue for Southern Africa (MIDSA) jointly convened by at the SADC Secretariat and the International Organisation for Migration (IOM) on 27 to 29 August 2012 in Balaclava, Mauritius.

[16] Khabo, F.M Collective Bargaining and Labour Dispute Resolution- Is SADC Meeting the Challenge? (ILO Sub-Regional Office for Southern Africa, Harare: ILO, 2008 (Issue paper No. 30), 14 available at *http://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---sro harare/documents/publication/wcms_228800.pdf* (accessed on 23 February 2015)

[17] In Botswana the reform involved amendments of the Employment Act, 1982 and the Trade Dispute Act; in Lesotho the Labour Code Order was adopted in 1992 and amended in 1997 and 2007; in Malawi a new Labour Act and Employment Act were enacted in 1997 and 2000, respectively; in Namibia a new Labour Act was passed in 1992 and amended in 2002; in South Africa the Labour Relations Act and the Basic Conditions of Employment Act were passed in 1995 and 1997, respectively; in Zimbabwe major amendment to the Labour Relations Act was carried out in 2003; and in Tanzania the New Labour and Employment Relations Act, 2004 and the Labour

The newly established mechanisms are in the forms of alternatives dispute resolution mechanisms (ADR) with mediation, arbitration and conciliation mandate and adjudication specialist courts, at the level of High Court. Alternative disputes mechanism are in place in South Africa (the Commission for Conciliation, Mediation and Arbitration (CCMA), Lesotho (the Directorate of Dispute Prevention and Resolution (DDPR))[18]; Swaziland (the Conciliation and Mediation Commission (CMAC));[19] and Tanzania (The Commission for Mediation and Arbitration).[20] All of these embrace the voluntary, informal, accessible and speedy resolution of labour disputes.

Specialized Labour Courts exist in countries as South Africa, Namibia, Lesotho and Tanzania. In Botswana and Swaziland adjudication is carried out by the Industrial Courts,[21] while in Malawi[22] and Zambia adjudication is done by Industrial Relations Court.[23] Where these structures do not exist, innovative approaches such as reconstituting the High Court as a Labour Court when determining labour disputes, as in the case with Namibia, are used.[24] Labour Appeal Courts also exist in South Africa and Lesotho. Specialized labour courts, unlike the normal courts, are informal in nature as 'they do not dwell on legal technicalities.'[25]

5. Accessibility of the new institutions

Improved accessibility to dispute resolution mechanisms is amongst the successes of the new structure. In the past, labour dispute mechanisms were largely inaccessible to the majority of workers. Medium and low-skilled workers who constitute the majority of the region's work force could not avail to the protection of labour dispute resolution mechanisms due to a number of reasons including, delays in dispensation of justice, costly procedures, legal technicalities and the need for legal representation which made the proceedings costly. In countries where the new structure exists it has been reported that workplace justice has become more accessible to medium and low-skilled workers. A study conducted in South Africa observed positive trends in accessibility to the specialised labour institutes largely associated with friendly pleading and referral procedures, relatively speed resolution and low cost for filing of cases which were described as major drive for improved accessibility. [26]

It is however disturbing that, while the new structure seems to be promising, in most of the countries, several limitations in terms personnel, fiscal resources and other non-human resource have been reported. In South Africa, Bhorat, Pauw **and** Mncube observe that, Labour Courts suffer from significant levels of inefficiency due to their human resource constraints such that,

Institutions Act was passed in 2004 to replace the Employment Ordinance Cap 366 and the Industrial Court of Tanzania Act.

[18] Established under the Labour Code (Amendment) Act 2000.

[19] Established under the Labour Relations Act, 1995.

[20] Established under the Employment and Labour Relations Act, 2004

[21] Botswana's Industrial Court was established by the Trade Disputes (Amendment) Act, 1992. Swaziland's Industrial Court was established under the Industrial Relations Act, No. 4 of 1980. The court adjudicates in matters arising from employment and trade disputes.

[22] The Industrial Relations Court (IRC) was established by the Section 110(2) of the Constitution Court of Malawi, 1994. The Court operates as a court subordinate to the High Court. It has original jurisdiction to hear and determine all labour disputes and any other disputes assigned to it.

[23] The Court is established under part XI of the Industrial and Labour Relations Act, Cap 269 of the Laws of Zambia.

[24] Khabo, op cit.

[25] Ibid.

[26] Benjamin, P *Assessing South Africa's Commission for Conciliation, Mediation and Arbitration* (CCMA) (ILO: Industrial and Employment Department, Woking paper no. 47, 2013) 12

they have found it difficult to attract sufficient judges of high calibre in the field of labour law and as a result, they are overly-reliant on acting judges, some of whom have little experience in labour law.[27] In the rest of the countries, Kalula, Odor and Fenwick observe that there are notable limitations in terms of sufficient qualified personnel, finances and other resources.[28] These, negatively affect the ability of these bodies to discharge their functions and to live up to their expectations. In South Africa it has been observed that the CCMA has not been able to resolve disputes as expeditiously as had been hoped at the time of its establishment. For instance, in South Africa, the requirement that dismissal disputes referred to the CCMA should be resolved within a period of 10 weeks, has according to available studies, proved to be largely unattainable.[29]

6. Irregular migrant workers' access to labour dispute resolutions mechanisms

Access to due process of law for migrants, particularly those in irregular residence and employment status has not received considerable scholarly attention. This is notwithstanding the fact that workers in this group have been categorized as the most marginalized section of migrants.[30] A few studies that exist so far indicate that even in the countries with sophisticated justice system such as those in Western Europe and Northern America, the access of migrants to the formal justice system is, notably, limited. A few migrants who have the courage to access the courts meet another barrier: the nullity of their employment contracts. For example, in a recent US case, *Hoffman Plastic Compounds, Inc v National Labor Relations Board*, the Supreme Court overturned a ruling of the National Labor Relations Board granting reinstatement and a back-pay award to a Mexican migrant irregularly employed in the USA, because his employment constituted a serious breach of the immigration laws.[31] In Europe, Jeremy McBride in a recent study commissioned by the Council of Europe, titled 'Access to Justice for Migrants and Asylum Seekers in Europe,' makes a following observation:

> Even where migrants do seek to engage with the justice system or are forced to do so as a result of measures being taken against them (such as at border controls, in the course of the enforcement of the criminal law and the making of rulings to expel them), they can suffer from a poor quality of decision-making which does not either appreciate the rights which they have under the law or does not recognise fully or at all that the facts of their situation brings them within the guarantee afforded by certain rights.[32]

These barriers are also present in the SADC. Although there is at present no empirical study on whether migrants and irregular migrants in particular have anyhow benefited from the recent labour law and institutional reforms one can safely draw a conclusion that the situation of workers in the region and their access to these bodies have not improved. The absence of cases involving irregular migrants in the labour law reports is in itself a good indicator that irregular

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[27] Bhorat, H., Pauw, K. and Mncube, L., Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data, at 8.

[28] Kalula, E, Okoye, A.O and Fenwick, C., Labour Law Reforms that Support Decent Work: The Case of Southern Africa. ILO Sub-Regional Office for Southern Africa, Harare: ILO, 2008, at 1

[29] Khabo, F.M op cit.

[30] ILO, *International labour migration. A rights-based approach (*Geneva, International Labour Office, 2010) 99.

[31] *Hoffman Plastic Compounds, Inc v National Labor Relations Board* (00-1595) 535 U.S. 137 (2002).

[32] McBride J *Access to Justice for Migrants and Asylum Seekers in Europe* (Council of Europe, 2009)124 available at *http://www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/CPEJ_McBride.pdf*

migrants have not taken advantage of the new system. The Committee on the Rights of Migrant Workers once noted that, '[The] lack of cases on record is reflective of the difficulties faced by migrant workers and members of their families, particularly those in an irregular situation, in seeking redress for violations of their human rights.'[33] The Committee made this conclusion when considering the initial report of Algeria, whereby Algeria claimed that there were no violations against migrant workers because her legal enforcement organs had not received any complaints about the rights of migrant workers being violated.[34]

5.1 Factors impending access

Factors impending access to the justice system are many and include legal and factual barriers. The most common barriers include procedural requirements, the need for legal representation; time limits to initiate court proceedings and legal restrictions expressed through the individual's overall financial capacity to seek redress before the courts. These are in addition to barriers that are specifically inherent in being a foreigner such as language barrier; knowledge of procedures and social codes; and fear of retaliation, detection and expulsion.[35] In this part we discuss the barriers inherent in immigration, residence and employment status and which in our opinion, notably, affect irregular migrant workers.

5.1.1 The limited relevance of labour law

The limited relevance of the protection accorded by national employment and labour law statutes emanate from the fact that, the significant majority of irregular migrant workers in the sub-region are concentrated in employment sectors that are not adequately protected by labour law. Labour legislations in the regions are largely influenced by the traditional concept of labour law as transplanted in the region during colonial reign which accords protection to a defined section of workers. The beneficiaries of these legislation are statutory defined based on the existence of formal employment relationship between the employer and the worker whereby the existence of a contact of employment between the employer and the worker, is used as a threshold to determine not only the individual worker's status but also his/her entitlement to the protection accorded under the employment and labour relations statutes.[36]

The case of Zambia suffices to elaborate this point further. Section 3 of the Employment Act defines an employee as "any person who has entered into or works under a contract of service, whether the contract is express or implied, is oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or kind, but does not include a person employed under a contract of apprenticeship made in accordance with the Apprenticeship Act or a casual employee." The contractual relationship required under this provision for one to qualify for labour law protection means that, workers such as those who are in disguised

[33] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families *Concluding Observations of the Committee on the Initial Report Submitted by Algeria* CMW/C/DZA/00/1 para 16, available at http://www2.ohchr.org/english/bodies/cmw/docs/co/CMW-C-DZA-CO1.pdf (accessed on 12 February 2015).
[34] See Masabo J, The Protection of the Rights of Migrant Workers in Tanzania, PhD thesis, University of Cape Town, 2012.
[35] Taran, P Globalization, Labor and Migration: *Protection is Paramount*, Conferencia Hemisférica sobre Migración Internacional: Derechos Humanos y Trata de Personas en las Américas (Santiago de Chile, 20-22 November 2002)14.
[36] Olivier,M, Masabo J& Kalula, E *Informality, employment and social protection: Some critical perspectives for/from developing countries* (Paper Presented at the International Labour and Development Association (ILERA) I6th World Congress, Philadelphia, 2-5 July 2012.)

employment relationship, self-employment and triangular relationship where the employer cannot be identified without difficulties cannot qualify for protection.

This limitation has serious ramifications on the part of irregular migrants because, unlike migrants in regular situation, irregular migrants are more likely to fall into these category of employment as they do not have the necessary authorisation. The concentration of irregular migrants in this category of work which rarely enjoy the protection of traditional labour laws limit significantly, their ability to access the labour dispute resolution mechanisms for recourse.[37] It is also true that, the vast majority of irregular migrants are in the 'marginally viable and sometimes semi-legal sectors, such as seasonal agricultural work and domestic services, in which the protection of workers is extremely underdeveloped and the labour movements are not as strong. In Tanzania, the significant numbers of irregular migrants, mostly Malawians, Burundians, Kenyans and Ugandans are in domestic work and in the tourism industry, where the level of unionization is very limited.[38] Likewise in South Africa, Zimbabweans, Malawians and Mozambicans constitute the vast majority of workers in these sectors while women from Lesotho constitute the majority of workers in the Free States farms[39]

5.1.2 Disputed validity of employment contacts

Whereas the existence of an employment relationship between a worker and an employer is an important factor if irregular migrants are to enjoy the protection of labour law, it is not the only factor upon which such protection can be extended. Attempt by irregular migrants to enjoy labour law protection and to access the labour dispute resolution mechanisms for redress can be further impended by the status of such contract. This is most often, reinforced through 'the usual conflicting relationship between immigration laws on the one hand and labour law on the other.'[40] Immigration laws in the sub-region's member countries, contain provisions which expressly or impliedly prohibit employment of irregular migrants.

In almost all the countries, an authorization is required before a migrant can take up or engage in any economic activity. For example, the [Tanzania] Immigration Act, 1995 stipulate that 'no person shall engage in paid employment under an employer resident in Tanzania except under a permit ….'[41] Also, the [Tanzania] National Employment Promotion Services Act, 1999, provides that 'no person shall employ any "foreigner", and no "foreigner" shall take up any employment with any employer, except under and in accordance with a work permit issued to such foreigner.'[42] In South Africa, Section 38(1) of the Immigration Act, 2002 provides that 'No person shall employ (a) an illegal foreigner; *(b)* a foreigner whose status does not authorise him or her to be employed *(c)* a foreigner on terms conditions or in a capacity different from those contemplated in such foreigner's status. Also it obliges an employer to make a good faith effort to ascertain that no *illegal foreigner* is employed by him or her and to ascertain the status

[37] Olivier, Masabo & Kalula, op cit.
[38] See, Masabo, J The Protection of the Rights of Migrant Workers in Tanzania, (PhD Thesis submitted to the University of Cape Town 2012)201.
[39] See Steinberg, the Lesotho/Free State Border (ISS Paper 113, 2005), available at http://dspace.cigilibrary.org/jspui/bitstream/123456789/31230/1/Paper113.pdf?1' last accessed 30 December 2014).
[40] Olivier, M *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)* Social Protection Discussion Paper No 0908, World Bank (2009) available at http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0908.pdf (accessed on 24 February 2015
[41] Section 16(1) of the [Tanzania] Immigration Act, 1995.
[42] Section 26 of the [Tanzania] National Employment Promotion Services Act, 1999.

or citizenship of those whom he or she employs.[43] Likewise in Botswana, Section 4 of the Employment of Non-Citizens Act provides that no non-citizen shall engage in any occupation for reward or profit unless he is the holder of a work permit and no person shall employ a non-citizen unless the said non-citizen is the holder of a work permit permitting him to be employed.

In some of the countries, employment of a foreigner without authorization culminates into criminal liability on the part of the employer,[44] the worker[45] or both, the employer and the worker as the case in Tanzania and Botswana.[46] The criminal liability emanating from these forms of employment and the illegalisation of irregular migrants that ensures, puts irregular migrant workers in precarious position, and notably impairs their ability to seek enforcement of employment-related entitlement. The question that emerges every time irregular migrant workers seek redress before the labour dispute resolution mechanism is whether or not a contract that was concluded in contravention of immigration law can be considered valid and whether the same can be enforced before these bodies. There is to date, no common position in the region as to whether such contracts can be relied upon to extend labour law protection to workers in this group.

South Africa serves as an illustration. Until recently, irregular migrant workers who approached the labour dispute resolution mechanisms in South Africa were denied access to these bodies on grounds that their matters could not be entertained in these bodies because they were products of employment relationships which were void *ab initio*, having been concluded in contravention of the immigration laws. The Commission for Conciliation, Mediation and Arbitration (CCMA) had on different occasions cited this reason to dismiss applications brought before it. For instance, in 2004, the CCMA was asked to determine an application by a migrant worker who was dismissed by her employer because she did not have an employment permit. Dismissing the matter, the CCMA stated that it had no jurisdiction to hear the matter because the contract upon which the application was based was void *ab initio* as it violated the immigration laws.[47] Prior to this, several other cases were dismissed on this ground. These include *Vulda and Millies Fashions*,[48] where the services of a Zimbabwean sales assistant were terminated due to her failure to produce a work permit, and *Moses v Safika Holdings*, where an American citizen employed as an advisor in the company was dismissed for failure to provide

[43] Section 38(2) of the [South Africa] Immigration Act, 2002.
[44] See Section 42 of the [South Africa] Immigration Act, 2002.
[45] Section 54 of the [Zambia] Immigration and Deportation Act No. 18 of 2010 provide that, 'any foreigner who engages in any employment, prescribed trade, work or business or any other occupation without a permit commits an offence.
[46] According to section 26(2) of the [Tanzania] National Employment Promotion Services Act, 1999, section 26(2). An employer who employs a foreigner and a foreigner who takes up employment in the absence of a work permit commits an offence and is liable upon conviction to a fine not less than 1 million Tanzania Shillings (US$665), or to imprisonment for a term of six months, or to both such fine and imprisonment. In Botswana Section 4(2) of the Employment of Non-Citizens Act provides that, contravention of provisions relating to employment of non-citizens is punishable by a fine of P1 000 or 12 months imprisonment or both, fine and imprisonment.
[47] *Georgierva-Deyanova/Craighall Spar* (2004) 9 BALR 1143 (CCMA). Prior to this, several other cases were dismissed on this ground. These include *Vulda and Millies Fashions* (2003) 24 *ILJ* 462 (CCMA), where the services of a Zimbabwean sales assistant were terminated due to her failure to produce a work permit, and *Moses v Safika Holdings* (2001) 22 *ILJ* 1261 (CCMA), where an American citizen employed as an advisor in the company was dismissed for failure to provide a work permit.
[48] *Vulda and Millies Fashions*[48] (2003) 24 *ILJ* 462 (CCMA).

a work permit. The major argument in these cases has been that, courts of law should not give effect to or enforce illegal contracts.[49]

This position was reversed by the Labour Court in *Discovery Health Ltd v CCMA*.[50] In this case, the Court made a ground breaking judgment when it firmly declared that, the existence of employment contact and enforcement of the same is not dependent on the employee's residence status. In other words, the validity of employment contract and the rights inherent in employment relationship are independent from immigration laws. While interpreting sections 38(1) and 49 (3) of the [South Africa] Immigration Act which are more or less similar to corresponding provisions in immigration legislation in other SADC member states, the Court presided over by Van Niekerk, J, made a following observation which we find worth reproducing here:[51]

> If section 38(1) were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it is not difficult to imagine the inequitable consequences that might flow from the provision to that effect. An Unscrupulous employer, prepared to risk criminal sanction under s 38(1), might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee would be deprived of a remedy in contract, and if Discovery Health's contention is correct she would be without a remedy in terms of labour legislation. The same employer might take advantage of an employee by requiring work to be performed in breach of BCEA, for example by requiring the employee to works hours in excess of the statutory maximum and by dying her the required time off and the rights to annual leave, sick leave and family responsibility. It does not require much imagination to construct other examples of the abuse that might easily follow a conclusion to the effect that the legislature intended that contract be invalid where the employer partly acted in breach of s 38(1) of the Act. This is particularly so when persons without the required authorisation accept work in circumstances where their life choices may be limited and where they are powerless.[52]

On the basis of these grounds, the Court boldly held that, the contract of employment concluded between the respondent and Lanzetta, an Argentinean national, was not invalid despite the fact

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[49] The legal rationale of this argument was advanced by Innes, CJ in *Schierhout v Minister of Justice* 1926 AD 99 where he argued that 'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. ... So what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the law giver has expressly so decreed or not, the mere prohibition operates to nullify the act.'

[50] *Discovery Health Ltd v CCMA and Others* (2008) 29 *ILJ* 1480 (LC).

[51] Section 38(1) of the Immigration Act provides that: No person shall employ an illegal foreigner; a foreigner whose status does not authorise him or her to be employed by such person; or a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status. Section 49(3) provides that : Anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year, provided
that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding three years without the option of a fine

[52] para. 30.

that Lanzetta did not have a work permit. Hence, Lanzetta was an 'employee' in the context of s 213 of the LRA and therefore 'entitled to refer the dispute concerning his unfair dismissal to CCMA'. The Court was further of the opinion that, even if the contract between parties was invalid because Discovery Health was not permitted by immigration laws to employee Lanzetta, 'Lanzetta was an 'employee' as defined by s.213 of LRA because that definition is not dependent on a valid and enforceable contract of employment.'[53]

Prior to the decision in *Discovery Health*, in Botswana, a partial reverse of the old position was made by the Industrial Court in *Molefi V Blue Blends Investments (PTY) Ltd.*[54] The applicant, Olena Molife, a citizen of Ukraine had sued the respondent for compensation in respect of unlawful dismissal and withholding of leave pay. The applicant worked for the respondent without a work permit or a letter of offer of employment which could have facilitate acquisition of work permit. The respondent had promised to provide her with a letter but never provided. It was argued on behalf of the respondent that the applicant, being a non-citizen who was employed without a work permit, could not sue on an illegal contract as the contract for which the claims are based was unenforceable. Partly allowing the application, Legwalia J, held that, although the applicants claims for compensation and notice pay are not enforceable as enforcing the same would amount to enforcing an illegal contract, the respondent should not be allowed to be unjustly enriched at the expense of the applicant. The respondent was therefore ordered to pay the applicant for the services actually rendered and for the rest days not taken.

The position in other SADC countries is unclear. However, as Professor Olivier observes, it would appear that '[J]urisprudential responses in SADC in this regard ..... usually follow suit, and refuse to accord legality to the work and social security relationships entered into by irregular migrants, thereby effectively barring them from accessing adjudication structures .....'[55] The uncertain that exist, exacerbated further the vulnerability of irregular labour migrants.

5.1.3 **Migrants' reluctance to use the law**

It is commonly noted that irregular migrants are, most often, reticent to assert their rights before the host country's law enforcement mechanism. Reticent is largely attributed to the fear of detection and possible deportation. Irregular migrants fear that any encounter with the law is likely to bring their irregular status to the attention of the authorities and expose them to detention, expulsion, deportation or other risks.[56] This is particularly the case in countries such as those in SADC, where the malpractices in the form of administrative detention and deportation is preferred over recourse to judicial processes. As Olivier rightly observe, one of the major characteristics of migration policies in the SADC countries is that, they usually tend to '.... focus on identifying and deporting violators with the minimum of due process."[57] The situation is such that, once an irregular migrant is in the hands of public authorities, "he/she

[53] Ibid, para 54.
[54] *Molefi V Blue Blends Investments* (Pty) Ltd T/A Nescafé 2004 (1) BLR 259 (IC).
[55] Olivier Olivier, M *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)* Social Protection Discussion Paper No 0908, World Bank (2009)
[56] ILO *Migrant Workers: Report of the Committee on the Application of Standards* International Labour Conference, 87th Session, Geneva, 1999, para 302.
[57] Ibid.

is put across the border without any possibility to request salary and present an appeal before the judicial authorities of the country of employment.[58]

Cases of detention, arbitrary deportation and expulsion are widespread in region. In 2004, the government of Angola operating within the framework of the *Operação Brilhante* deported around 300,000 irregular migrants mainly from the diamond mining areas. Significant numbers of these were from the Democratic Republic of Congo (DRC) and West Africa.[59] Also, in the year 2009 and 2010, there were reciprocal arbitrary expulsions between Angola and the DRC.[60] South African authorities are reported to have deported over 1.5 million migrants to neighbouring countries, 90 per cent of these deported to Mozambique and Zimbabwe.[61]

This is notwithstanding the fact that the Protocol on the Facilitation of Movement of Persons in SADC, 2005 contains comprehensive safeguards against indiscriminate expulsion in articles 24 and 25. Article 24 obligates members to refrain from indiscriminate expulsion of collectives or groups. In article 25 is a comprehensive universal- procedural guarantees, including the requirement that migrants should be accorded recourse to the appropriate judicial or quasi-judicial bodies, and that if expulsion is to take place, the expellee should be allowed a reasonable time to attend to his or her personal affairs and to enable him or her to settle his or her personal affairs including the management and disposal of business or professional practices.[62]

Reticent can also be partly attributed to mistrust on the law enforcement mechanisms due to corruption and ruthless treatment of irregular migrants. The law enforcement organs: the judiciary, police and immigration departments are believed to be among the institutions with high levels of corruption in the region. As a result of this they have lost the trust not only of the foreigners but also of the general public. Ruthless treatment of irregular migrants by some of the law enforcement organs, the police forces in particular also diminishes further the ability of migrants to approach the general and specialized law enforcement organs. The recent video footage of Mido Macia, a 27-year-old Mozambican migrant in South Africa who was tied to the back of a police van and dragged over 400 meters along the pavement in Daveyton, Johannesburg in early 2013 is one of many brutal acts committed against migrants and which drive them far away from any encounter with law enforcement organs, even where such an

[58] Taran, PA and Geronimi, E *Globalization, Labour and Migration: Protection is Paramount*, Perspectives on Labour NO 3e (ILO Geneva, 2003) at 14 available at http://www.ilo.org/public/english/protection/migrant/download/pom/pom3e.pdf (accessed on 24 September 2014).

[59] See Africa Files 'Diamond Industry Annual Review: Republic of Angola 2005', available at *www.africafiles.org* (accessed on 24 May 2012).

[60] In 2009, 18,000 Congolese were expelled from Angola. The DRC reciprocated by expelling thousands of Angolan nationals from its territory. Later in October 2010, significant numbers of Congolese were violently expelled from Angola. A significant number of women, men and children were sexually violated in the last incident. See 'ANGOLA-DRC: Expulsions mark rising tensions over resources' 28 October 2010 (IRIN) available at http://www.irinnews.org/report.aspx?reportid=90906 (accessed on 23 May 2012). Also see Davies, C 'Reciprocal-violence-mass-expulsions-between-Angola-and-the-DRC' (The Human Rights Brief, Centre for Humanitarian Law, 17 February 2011), available at *http://hrbrief.org/2011/02/reciprocal-violence-mass-expulsions-between-angola-and-the-drc/* (accessed on 24 December 2014).

[61] Crush, J & Williams, V 'Labour Migration Trends and policies in Southern Africa' (Southern African Migration Project (SAMP) Policy Brief No. 23, 2010) at 21.

[62] See, Article 25(d).

encounter is for the purpose of enforcing violated rights.[63] Incidents of this nature, paint a negative image not only of institutions that are directly involved in the incidences but also of other law enforcement organs, including the specialized ones such as the labour dispute resolution organs.

5.1.4 Anti- migration sentiments and xenophobia

Hostility and prejudice towards migrants has been pronounced and in the case of South Africa this escalated into physical attacks claiming a number of lives and leaving considerable number of migrants, particularly those of African origin, homeless. For instance, the xenophobic attacks waged in 2008 was reported to have claimed 62 lives and to have left 67 others wounded while between 30,000-100,000 immigrants became homeless.[64] Hostilities and intolerances are also reported in other major countries of destination such as Botswana and Namibia. These actions are to a larger extent rooted in the fears to be swamped by the immigrants and the increased competition for jobs in the labour market and national resources which are already scarce.[65] This is notwithstanding that, in some cases migrants are concentrated on jobs which the locals are not willing to perform and their access to public services is severely restricted.

Xenophobic driven attacks are more likely to affect irregular migrant. As Cholewinski and Taran rightly observe on a different context, 'xenophobic phenomena is both associated with and clearly driven by the resurgence and generalization of terminology of "illegal alien", "illegal immigrant", "illegal worker" in discussing migration and minorities.[66] Such generalization is likely to exacerbate further the vulnerability of workers in this group and significantly affect their enjoyment of fundamental right rights which demand that everyone should be recognized as person before the laws.[67] Their ability to seek any remedy before the host country's law enforcement mechanisms is also notably impaired in the circumstances.

5.1.5 Inefficiency of labour institutions

While major improvements have been undertaken to improve the structure and the performance of labour institutions and to make them respond to the contemporary labour market needs, some of them still suffer from serious inefficiency. As Kalula, Ordor and Fenwick correctly remark, most of the labour institutions in the sub-region still 'lack the capacity to do the job assigned to them by law.'[68] They suffer from serious limitations in terms of qualified personnel, finances and other resources. These and others have been a cause to further delays, an evil which the reforms in the labour market institutions sought to eliminate.

Even in South Africa, where the system is fairly developed compared to some other countries in the region, delays are reported to subsist. It is reported for example that, the requirement in the Labour Relations Act that, the for a dismissal dispute should be held within a further 30 days after referral and the decision delivered within another 14 days, has proved has proved to

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[63] See Taxi driver dragged to his death in South Africa is pictured with his sister as eight police officers are charged with MURDER *at http://www.dailymail.co.uk/news/article-2286421/Mido-Macia-Taxi-driver-handcuffed-police-van-dragged-death-cops-responsible-suspended.html#ixzz2V4QSBMhI*
(accessed on 25th May 2013)

[64] Mudungwe, op cit, at 88.

[65] Crush& Williams, op cit, at 40.

[66] Cholewinski R & Taran, P 'Migration, Governance and Human Rights: Contemporary Dilemmas in the Era of Globalization' *Refugee Survey Quarterly (2010)* 28(4): 1-33 at 11.

[67]Ibid.

[68] Kalula, E; Okoye, O. A & Colin F *Labour Law Reforms that Support Decent Work: The Case of Southern Africa (*ILO Sub-Regional Office for Southern Africa, Harare: ILO, (Issue paper No. 28)2008.

be largely unattainable as disputes take long than expected.[69] Labour courts in the regional are also reported to face the same challenges. Delays in dispensation of justice may inhibit further the ability of irregular migrants to seek remedy in these bodies due to the time limits within which they are supposed to leave the country after they have been declared illegal. Immigration laws in SADC countries do not provide adequate time for migrants to resolve their dispute before the expulsion order takes effect. Because of this, some of the migrants may consider formal institution of proceedings as wastage of time while those who dare to try may not have enough time to wait for the verdict of their pending cases.

5.2 Some Prospects for Improvement

5.2.1 Upholding the independence of labour law

Rights of irregular migrant workers and the possibility for enforcement of the same through the existing justice mechanisms cannot be achieved if countries in the region do not set a clear demarcation between the application of employment and labour laws on the one hand and immigration laws on the other. Unscrupulous employers will always subject migrants to abusive and exploitative conditions taking advantage of the justice system that does not draw any distinction between the two and which tend to favour the former over the latter.

To eliminate the prevailing injustice, judicial and quasi-judicial labour institution in SADC member countries should consider emulating the spirit of the South Africa Labour Court which in *Discovery Health* [discussed in section 5.1.2 above] boldly managed to draw a clear distinction between labour laws and immigration laws and thereby according an irregular migrants her employment related entitlements.

The Courts' position in *Discovery Health* is in line with the jurisprudence in human rights law and international labour law. The Inter-American Court of Human Rights in its landmark *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* issued in 2003 held that, when a migrant (regular or irregular) is employed, he or she 'acquires rights that must be recognized and protected because he is an employee, irrespective of his regular or irregular status' in the state where he or she is employed.[70] Thus, irregular migrants cannot be deprived of their rights because of irregularity in terms of their status or residence. In summing up this position, the court concluded that:

> The migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of

[69] Khabo, op cit.

[70] Inter-American Court of Human Rights *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* (requested by the United Mexican States) OC-18/03, para 133. The advisory opinion was given in response to a request by the government of Mexico, which alleged the denial of fundamental workplace rights to irregular migrant workers in the United States of America Although not specifically stated, the request is believed to emanate from the decision of the United States Supreme Court in *Hoffman Plastic Compounds v National Labor Relations Board* (535 US 137 (2002) which held that irregular migrants who were wrongfully dismissed for taking part in trade union activities were not entitled to back pay. See Cleveland, SH 'Legal Status and Rights of Undocumented Workers: Advisory Opinion OC-18/03' (2005) 99(2) *American Journal of International Law* 460–465 at 460.

> employment. These rights are a consequence of the employment relationship.[71]

The ILO's Committee on Freedom of Association (CFA) have also on several instances upheld this position in dealing with complaints concerning irregular migrant workers right to join and participate in trade unions.[72]

Members of SADC could also borrow a leaf from the Botswana's Industrial Court decision in *Molefi V Blue Blends Investments* which although not as bold as *Discovery Health,* offers notable relief to irregular migrants.

5.2.2 Innovative construction of the term employee

Innovative construction and application of the term employee is an important factor in enhancing protection to categories of workers currently excluded from national employment and labour legislation. Slight modifications to the term 'employee' in the existing framework have to be done so that the workers currently excluded from labour law can also enjoy the protection accorded in these laws and, by way of implication, access to justice.

Some countries in the region are gradually taking certain initiatives to address this problem. Such measures have been undertaken in Tanzania, where section 4 of the Employment and Labour Relations Act, 2004 innovatively defines an employee as an 'an individual who has entered into a contract of employment; or has entered into any other contract under which the individual undertakes to work personally for the other party to the contract; and the other party is not a client or customer of any profession, business, or undertaking carried on by the individual. In Swaziland, the use of control test in determining the existence of employment relationship has been incorporated in the [Swaziland] Industrial Relations Act. Under this Act, the terms employee is innovative construed to include persons who work for pay or other remuneration not only under a contract of service but also 'under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person.'[73] South Africa, have gone further to include the use of a rebuttable presumption of employment.[74] Such innovations are in line with the ILO Employment Relationship Recommendation 198 of 2006 which recommends several alternatives in determining the existence of an employment relationship.[75]

Innovative approaches used in these countries means that, some categories of workers who would otherwise not be entitled to labour law protection are now in a position not to enjoy the protection provided for, but also the ability to have their grievances heard and determined by the specialist labour dispute resolution mechanisms. The over representation of irregular migrant workers in these categories of employment means that their access to labour dispute

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[71] Ibid para 134.

[72]See Case No 2227, Complaint presented by the American Federation of Labour and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM); ILO Committee on Freedom of Association, Report No 332 (18 October 2002); Case No 2121 (Spain), Complaint presented by the General Union of Workers of Spain (UGT) against the Government of Spain; ILO, Committee on Freedom of Association, Report No 327 (23 March 2001); and Case No 2620, Complaint against the Government of the Republic of Korea presented by the Korean Confederation of Trade Unions (KCTU) and the International Trade Union Confederation (ITUC); ILO, Committee on Freedom of Association, Report No 362 (November 2011).

[73] Swaziland Industrial Relations Act, no. 1 of 2000.

[74] Section 83 of the [South Africa] Basic Conditions of Employment Act (BCEA) 75 of 1997;

[75] Among other things, the Recommendation recommends the use of legal presumptions of employment in determining the existence of an employment relationship. See Clause 11 of the Recommendation.

organs will improve if the application of labour law is extended beyond its narrow boundaries. Countries that are yet to address this problem should strive to emulate these innovations in their jurisdictions not only for the benefit of migrant workers but for a significant section of the working force which enjoy no protection.

5.2.3 Implementing and enforcing regional and international migration norms

A few international and regional legal instruments on international labour migration that exist provide an important avenue for improving the protection of irregular migrant workers and ensuring their access to justice. The Protocol on the Facilitation of Movement of Persons in SADC of 2005 which stands as the sub-region's legal framework on migration is the first case in point. The Protocol constitutes substantive and procedural safeguards against indiscriminate expulsion which can help to advance further the cause for irregular migrant workers' access to host country's law enforcement mechanisms. Most important is the requirement in the Protocol that migrants should be accorded recourse to the appropriate judicial or quasi-judicial bodies, and that if expulsion is to take place, the expellee should be allowed reasonable time to attend to his or her personal affairs and to enable him or her to settle his or her personal affairs.[76]

Strictly enforcement of these safeguards has the potential of providing an immensurable relief to workers in this category. This is because, the application of these principles would mean that, an irregular migrant whose presence have been declared 'illegal' by the host country's administrative authorities will be accorded an opportunity to have his/her grievances heard on review or appeal. Also, even where a conclusive decision by the highest decision making body declaring a migrant as illegal has been made, that migrant should be allowed enough time to have his/her employment related grievances, if any, determined and resolved by the labour institutions. In other words, the time granted to these workers between the time they are convicted or declared illegal and when they are required to leave or to face deportation should be reasonable enough to allow them to seek recourse for their rights, particularly those arising out of employment. It is obvious that, strictly adherence to the provisions of the Protocol will reduce the degree of detention and deportation and transform the sub-region's profile from being a place for detention and deportation into a region with due processes. Sadly, as discussed earlier on, this Protocol is not in force, yet.

The newly adopted instruments, The SADC Labour Migration Policy Framework and the SADC Protocol of Employment, are similarly potential instrument, but again, this will depend on political will of individual states to subscribe and to implement the agreed principles.

Specific labour migration instruments, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 and the ILO Convention on Migrant Workers (Supplementary Provisions), 1975, [77] in particular, are also important tools especially in countries that subscribe to these instruments. Article 25 of the of the Convention on Migrant workers explicitly provides that irregular migrant workers should, like regular migrant workers, be accorded equal treatment with nationals in respect of remuneration and other basic terms and conditions of work. This means that they should enjoy the same protection with regard to working hours, weekly rest entitlement, paid holidays, safety, health and termination. It further urges states to take precise measures to ensure that migrants in irregular situations are not deprived of the enjoyment of these rights because of their irregular status. Employers should not, as a matter of principle, 'be relieved of any legal or contractual

[76] See Article 24 and article 25 of the Protocol.
[77] ILO Convention on Migrant Workers (Supplementary Provisions), No 143.

obligation', nor should their obligation be limited by reason of the employee's irregular status.[78]

Convention 143, which was the first to issue binding standards in favour of irregular migrant workers, provides that irregular migrant workers should not be denied their rights arising out of past employment.[79] Generally, the goal of these provisions was to ensure that migrant workers enjoy a basic level of protection even when they have emigrated or are employed illegally and their situation cannot be regularized, a goal which cannot be achieved if these workers are not able to petition before the courts if their rights are violated. The application of these instruments is however likely to be impended by low ratification. None of the three instruments enjoy wide ratification in the sub-region. The Convention on Migrant Workers has been ratified by only two countries (Lesotho and the Seychelles) while none of the SADC countries has ratified Convention 143. Commendably, the South Court invoked these instruments in reaching at its landmark decision in *Discovery Health.*

The ILO general conventions may also be of help. The structure of most of the ILO instruments including those which have been declared as the most fundamental Conventions under the ILO system of which countries in the region undertake to abide to under the auspices of the Declaration on Fundamental Principles and Rights at Work, 1998 suggest that they are of universal application. They are geared towards ensuring that workers are not subjected to abusive conditions of work and are able to enjoy fair employment standards. If this goal is to be achieved, access to justice by workers in the periphery such as those in this category who run the risk of exposure to forced labour, poor work conditions and other undesirable conditions of work must be guaranteed.

5.2.4 Human rights and constitutional guarantees

Human rights guarantees in international and regional instruments also constitute a good avenue for advancing a cause for irregular migrant workers' access to the host country's justice system. This is due to the fact that, access to courts constitutes an important element of the right to a fair trial which has been recognized as one of the fundamental rights. The International Covenant on Civil and Political Rights, 1996 which has been widely ratified by SADC members enshrines the principle of quality before the laws and demands, through article 14(1) that, every person should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, whenever his or her obligation in law suit is being determined.' This provision enjoys wide protection in the SADC as it has found its way into the constitutions of most of the SADC's member states. The constitutions of Namibia, Tanzania, Zambia, Botswana, Swaziland and Lesotho, have provisions identical to the provision of Article 14(1) of the Covenant.[80]

The Constitution of Malawi and that of South Africa have stretched this further by including specific provisions on access to court. Article 41 (2) of the Constitution of Malawi provides that, '*every person* shall have access to any court of law or any other tribunal with jurisdiction for final settlement of legal issues.' In South Africa, article 34 of the Constitution provides that '*everyone* has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate,, another independent and

[78] See article 25(3).
[79] Article 9.
[80] See article 12(9) of the constitution of Namibia, 1990; Article 18(9) of the Constitution of Zambia, 1996; Article 21 (1) of the Constitution of Swaziland, 2005; article 13(6)(a) of the Constitution of Tanzania, 1977; Article 10(9) of the Constitution of Botswana, and Article 12(8) of the Constitution of Lesotho, 1993.

impartial tribunal or forum.' The selective choice and use of the words 'every one' and 'every person' in these provisions and also in corresponding provisions in the constitutions of other member states, is an indication that, the guarantee was not only intended to national but to everyone or every person within the jurisdiction of the country.

This assertion has been confirmed by the Human Rights Committee in its General Comment No. 32 on the Right to equality before courts and tribunals and to a fair trial as provided for under Article 14 of the ICCPR. According to this Committee:

> 'the right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. A situation in which an individual 's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14.[81]

Employment related rights enshrined in most of national constitutions can also be constructively invoked in protecting irregular migrant's employment related rights. Again, a leaf could be borrowed from Discovery Health where the Court opined that, sanction a claim of contractual invalidity to deny the applicant of her entitlement would defeat the primary purpose of s 23 (1) of the Constitution which is to give effect, through the medium of labour legislation, to the right to fair labour practices.

6. Conclusion

This contribution has reflected on the ability of irregular labour migrants to access the host country's labour dispute resolution mechanisms. It points to the precarious nature of irregular migrants, in particular, their inability to access the existing labour dispute resolution due to a number of barriers some of which inherent in their immigration and residence status, such as language barriers, knowledge of procedures and social codes and reticent on the part of irregular migrants. It is observed that, while the laws of the host country do not prohibit migrant workers from accessing the labour dispute resolutions, their access to these bodies is significantly limited. There are also incidents where the courageous and exceptionally few irregular migrants tried to enforce their employment related rights but their cases were dismissed on ground of illegality of the employment relationship that exist between them and their employers. The contribution recommends several measures that could help in advancing the case for irregular migrant workers' access to labour market institutions and thereby ensure that workers in this group can also enforce their employment related rights through the existing labour dispute resolution mechanism.

[81] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).