

MASTER OF LAWS IN LABOUR LAW(MLA01)

The Examination on the Extend of the Application of the Occupational Health and Safety Act 85 of 1993 to Semi-skilled and Migrant Workers in South Africa

by

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Summary of the study

This research explored the Occupational Health and Safety (OHS) challenges faced by migrant and semi-skilled workers in South Africa. With globalisation and the mass movement of labour, these workers constituted a significant segment of the global workforce. However, they often work in sectors characterised by hazardous conditions, inadequate protection, and inadequate knowledge of their legal rights. The research further examines the various factors that contribute to workers' vulnerability. Furthermore, this research discusses the barriers that affect these workers and their development. This study also investigates the extent of the application of other legal instruments governing health and safety in the workplace for the migrant and semi-skilled workers. Additionally, the research addresses the repercussions which surround poor implementation and application of these legal instruments on migrant and semi-skilled work specifically in relation to work-related injuries, illnesses, and fatalities. Drawing from existing empirical studies and case examples, the research highlights successful interventions and measures that enhance OHS for specific category and group of workers. The research further looks at the progress achieved in the implementation of various capacity building programmes which incorporate workers' perspectives into OHS policies. The findings underscored the urgent need for government, employers, and other stakeholders to recognize and address the common OHS challenges faced by migrant and semi-skilled workers to ensure a safe and healthy work environment for all. The OHS is found to be a significant instrument that accommodates these workers needs if there could be proper implementation and regulation. The government support is critical in ensuring that migrant and semi-skilled workers rights are protected as espoused in the Constitution of South Africa, 1996, which guarantees protection, to some extent, to everyone who is in the country by whatsoever reason. This research recommends the development of policy for firm reliance to Code of Good Practice in the labour sector which could also help see the promotion of equal health and safety measures and ease on the achievement of the desired rights as critical components to address these workers challenges.

List of Abbreviated Terms

BCEA	Basic Conditions of Employment Act
COIDA	Compensation for Occupational Injuries and Diseases Act
EEA	Employment Equity Act
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organisations
MHSA	Mine Health and Safety Act
ODIMWA	Occupational Diseases in Mines and Works Act
OHS	Occupational Health and Safety
OHSA	Occupational Health and Safety Act
PAJA	Promotion of Administrative Justice Act
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights

Declaration

I, Tsamago William, declare that this mini dissertation is my own work. I have acknowledged all the sources I consulted or used in this mini dissertation. I also certify that this work has not been submitted for any other degree or examination at any other university, except now at the University of Limpopo.

Mr W Tsamago

15 November 2023

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DEDICATIONS

This mini dissertation is dedicated to my mother, Mrs Rosina Ramoraswi Tsamago, whose unwavering support has been my guiding light. In loving memory of my departed father, Mr Jack Mabitsela Letsoalo, whose wisdom shaped my journey. To my beloved grandmother Mrs Tshebela Dorcus Letsoalo, whose nurturing embrace, and timeless tales fuelled my imagination. Though you are no longer by my side, your memory is a cherished treasure, and your influence echoes in the corridors of my heart.

CHAPTER 1: INTRODUCTION AND BACKGROUND OF OCCUPATIONAL HEALTH AND SAFETY FOR MIGRANT AND SEMI-SKILLED WORKERS

1.1 Introduction

Illiteracy is a major challenge in South Africa and the whole continent of Africa. This issue can hinder individuals from fully understanding and complying with important regulations and safety measures in the workplace. In South Africa the Occupational Health and Safety Act¹ protects workers against the dangers in the workplace including diseases and related health issues. Although, all workers are exposed to workplace hazards, migrant workers and semi-skilled workers are the most affected and exposed to injuries in a workplace because they are involved in low skill labour due to a lack of qualifications.² Migrant workers leave their countries in search of employment where they can feed their families.

In terms of the Constitution of the Republic of South Africa, 1996,³ everyone has a right to work and choose their profession and trade regardless of their level of education. In a workplace employers must follow the Basic Conditions of Employment Act,⁴ to provide a healthy and safe working environment to their employees. The migrant workers also have a right to work in South Africa and they are protected by Immigration Act,⁵ this Act protect the migrant workers to ensure that they enjoy their stay in South Africa, and they are provided with working permits. Migrant workers are also protected by the OHSA and the other labour laws of South Africa. The Construction Contract Act⁶ must also protect construction workers to be assisted with the reading of their contracts so that they will know what is expected of them and know their duties because most of the workers in construction are migrant workers and they are illiterate.

OHSA Includes the prevention of workplace illness and injuries, the promotion of healthy lifestyles, and the evaluation, treatment, and management of workplace risks including stress, trauma, illness, and injury. It is a key component of public health, workplace health and safety, and the quality of life of workers. Additionally, semi-skilled workers may lack access to healthcare information, current events, and other sources of knowledge critical to making

¹ Occupational Health and Safety Act 85 of 1993 (hereinafter referred to as OHSA).

² Nirmala CJ et al, 'Occupational hazards and Public Health Concerns of Migrant Construction Workers: An Epidemiological Study in Southern India' (2019) *Journal of Community Medicine and Public Health* 340.

³ Constitution of South Africa, 1996 (hereinafter referred to as the Constitution).

⁴ Basic Conditions of Employment Act 75 of 1997(hereinafter referred to as BCEA).

⁵ Immigration Act 13 of 2002 (hereinafter referred to as IA).

⁶ Construction Contracts Act of 2013.

informed decisions. As stated by Altman⁷ that due to a lack of knowledge and skills, they are suffering from exploitation and discrimination.

Without adequate literacy skills, workers may lack the information necessary to understand safety regulations and rules, or even comprehend the importance of following them. This can lead to a greater risk of accidents, injury, and illness in the workplace. Semi-skilled workers may not be aware of the dangers of certain tasks and be less able to quickly comprehend and respond to safety warnings.

1.2 Research Problem

The OHS Act regulates safety and health in the workplaces in South Africa but there is little implementation and enforcement of the OHS Act by employers and inspectors which results in the semi-skilled and migrant workers being unprotected. Semi-skilled and migrant workers are unfairly discriminated against when it comes to health and safety in the workplace. Despite the existence of the Act, these workers continue to face numerous health and safety challenges in the workplace, including exposure to hazardous substances, poor working conditions, and inadequate protective equipment. The employers do not inform them about the dangers and risks associated with them as they are required to do so in terms of OHS Act. Most of them are unaware of the Compensation for Occupational Injuries and Diseases Act,⁸ and in the eventuality of workplace injuries, when employers do not help in claiming for such workplace injuries. Mullagee argues that some workers are abandoned in hospitals, and they are expected to pay the hospital bills from their own pocket.⁹

1.3 Research Methodology

The research methodology that will be used is qualitative research method instead of a quantitative method. Qualitative method allows a deep exploration of complex issues, and it will provide detailed insight into the subject of Occupational Health and safety. Qualitative method enables researchers to understand the context and it promotes a holistic understanding of phenomena by considering multiple perspectives and factors influencing the

⁷ Altman M, 'Low Wage Work in South Africa' (2006) World Bank Conference on Employment & Equity 32.

⁸ Compensation for Occupational Injuries and Diseases Act no 130 of 1993 (hereinafter referred to as COIDA).

⁹ Mullagee F et al, 'Domestic Workers in South Africa: Inclusion Under the Compensation of Occupational Injuries and Diseases Act' (2023) *University of Western Cape* 45.

topic. So, in this study qualitative method will enable a comprehensive examination of Labour law and migration law from various angles. It will include the legislation which are related to labour law and migration law, books, local and international journal articles, and the Constitution. International instruments will also be used in this study as well as the materials which are found in the library.

1.4 Literature Review

In South Africa, the Constitution is the supreme law of the Republic, and it protects the rights of the people. The freedom of trade and occupation is dealt with in terms of section 22 of the Constitution.¹⁰ This section provides that everyone has the right to choose their occupation and trade this means that you can work wherever you want. This also means that each citizen has the right to work. According to Lan¹¹ migrant workers are estimated to be the most vulnerable workers as they are engaged in a dirty, dangerous, and demanding job and they are often hidden from or invisible to the public eye and from public policy. And that amounts to a violation of section 23 of the Constitution¹² and the BCEA.¹³

The workers in terms of the OHSWA,¹⁴ have a right to refuse to work in unsafe working conditions. In the case of *PSA Obo Members v Minister of Health and others*,¹⁵ the workers refused to work in an unsafe working environment by refusing to enter the Civitas building as it was unsafe. They were later brought before a disciplinary hearing as they were accused of embarking on a strike. The Labour Appeal Court (LAC) interdicted the first and second respondents from taking any disciplinary action on account of their refusal to enter the Civitas building.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families¹⁶ addresses the rights of the migrant workers. According to Article 2 of the convention a migrant worker is defined as a person who is working in a country which

¹⁰ Note 2 above.

¹¹ Lan PC, 'White Privilege, Language Capital, and Cultural Ghettoization: Western High-Skilled Migrants in Taiwan' (2011) *Journal of Ethnic and Migration Studies* 210.

¹² Section 23 of note 2 above.

¹³ Section 24 of note 3 above.

¹⁴ Note 1 above.

¹⁵ *PSA obo Members v Minister of Health and Others* 2018 (1) 345 (LC).

¹⁶ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (hereinafter referred to as OHCHR).

he was not born in and has visited that country for employment.¹⁷ In South Africa, many migrant workers face challenges as they often do not speak the native language spoken in their workplace. This language barrier can lead to criticism, racial discrimination, and violations of their rights by employers and other employees, and such will violate the rights of the migrant workers as outlined in Article 7 of.¹⁸

According to Syed,¹⁹ semi-skilled and migrant workers in a workplace take greater risks on their jobs and perform work without proper training or wearing protective equipment, and do not complain about that condition as they fear losing their jobs. This condition is the most critical for them because they lack work authorisation and the necessary information, and they fear losing their jobs.²⁰ The employers in a workplace do not follow the Code of Good Practice on Safety and Health at which guides them on how to manage the occupational health and injuries of the employees in a workplace.²¹ This guide was enacted in 2022 and guided by Minister of Employment and Labour in terms of section 203(2A) of the LRA,²² it guides how employers in a workplace should develop and implement an OHS management system.

Bobek²³ indicated that in construction companies semi-skilled workers and migrant workers who are unskilled often perform physical tasks such as operating machinery, tools, and parts to construct or build products. They just require mental and physical strength, and they are the ones who are exposed to hazards and injuries. The International Labour Organisation states that "construction sites in developing economies are characterized by the most dangerous and risk working conditions that include unsafe working practices and unfair workloads".²⁴

Moyo et al ²⁵argues that contractors must improve the working conditions in which people work in industries as construction is recognized as an important asset in the economy.

¹⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (hereinafter referred to as OHCHR).

¹⁸ Article 7 of OHCHR.

¹⁹ Syed J, 'Employment Prospects for Skilled Migrants: A Relational Perspective' (2008) *Human Resource Management Review* 23.

²⁰Sally, C et al 'Migrant Workers and Their Occupational Health and Safety' (2014) School of Nursing, Oakland California p13.

²¹ Code of Good Practice for Occupational Health and Safety.

²² Section 203(2A) of the LRA.

²³ Bobek A et al 'Migrant Workers and the Construction Sector in Ireland' (2008) *Employment Research Centre* 7.

²⁴ International Labour Organisation (hereinafter referred to as ILO).

²⁵ Moyo, T et al, 'Decent Working Conditions for improved construction Worker's productivity on Zimbabwean Building Projects' (2019) *University of Free State* 23.

Deacon²⁶ emphasised that in the construction industry, many older workers grumble about their health and injuries, and other challenges such as climate influence, noise, physical labour, and dust. Working conditions in the construction industry are hard and extremely stressful.²⁷

Wilkin²⁸ emphasises more about the struggle of illiterate workers in the construction industry, particularly focusing on the struggle they encounter. He points out that communication barriers pose a major obstacle for semi-skilled workers, as they find it difficult to comprehend warning signs and effectively communicate with their employers, supervisors, or colleagues. Lindhout²⁹ argued that the issue of language barriers emerges as a primary cause of accidents on construction sites. This is primarily attributed to the fact that many migrant workers lack proficiency in the language commonly used in South Africa, leading to feign understanding out of fear of jeopardising their employment.

One of the major effects that migration has in the construction industry is visible through non-compliance with OHS as failure to understand the language used to write the safety signs. The Department of Labour made inspections in several provinces in South Africa such as KZN, Free State, Gauteng, and Western Cape as well as Northwest and they found that there was a lack of health and safety plans, unavailability of risk assessment on sites and failure by management to train workers in health and safety issues and workers not being provided with protective clothing.³⁰

It is also proven that the employers and the inspectors fail to put the warning signs for the employees as in *Serfontein and another v Spoornet*,³¹ the plaintiff claimed damages from the defendant in due to injuries sustained by the second plaintiff when he claimed the overhead power lines. The plaintiffs alleged that the defendant was negligent in several respect. Held that the probabilities were that the defendant had failed to erect the warning signs required and the defendant owed them a duty of care and was found negligent.

²⁶ Deacon CH (master's Dissertation) 'The health Status of Construction Workers' (2003) University of Port Elizabeth 170.

²⁷ Haupt, C et al 'Importance of Healthy Older Construction Workers' (2005) <https://journals.ufs.ac.za> >accessed 01 April 2023.

²⁸ Wilkins, L 'Construction Workers Perception of Health and Safety Training' (2011) <<https://doi.org/10.1080/01446193.2011.633538> >accessed 04 April 2023.

²⁹ Lindhout P, 'Learning from Language Problem Related Accidents Information in the Process Industry: A Literature Study' (2019) *Process Safety and Security Group* 8.

³⁰ Akindele, O et al 'The Impact of the Influx of Illiterate and Foreign Construction Workers on the Effectiveness of Construction Safety Induction in South Africa' (2008) School of Construction Economics and Management University of the Witwatersrand p56.

³¹ *Serfontein and another v Spoornet* 1999 (1) SA 217 (SE).

The employees who are employed cement industry are also semi-skilled and some of them are migrant workers as it requires physical and manpower, and that is where we find the semi-skilled and migrant individuals because they lack the necessary qualifications to work in better and advanced workplaces. They are exposed to dust, which damages the lungs when inhaled and causes respiratory illnesses such as silicosis, bronchitis, and emphysema.³² So the workers must be educated and well-informed about these diseases so that they will adhere to safety protocols. Meneesh³³ mentioned that the health and safety performance of the cement industry is falling behind compared to other, more proactive sectors within the manufacturing industry.

According to the U.S Bureau of Labour Statistics in 2019 it was reported that more than 250 000 non-fatal workplace injuries and illnesses were reported in the manufacturing industry.³⁴ This means that even in the manufacturing industry there are health and injuries as well and it is reported as a dangerous field.³⁵ The manufacturing companies must educate the semi-skilled employees about the importance of wearing protective gear when on the facility floor to reduce the possibility of sustainable injuries.

The employers in manufacturing companies also fail to install protective measures in the workplace if danger will not result. In the case of *Sea Harvest v Duncan Dock*,³⁶ the appellant sued the respondent for damages as the stock of the appellant burned down because the respondent failed to install a sprinkler system that could have extinguished the fire. But the court found the port master who approved the risk assessment not to be negligent.

The other industry where we find migrant workers and semi-skilled workers is agriculture. These workers are employed to watering and harvesting and they are exposed to the sun which might cause cancers, and they are not aware of the diseases associated with their field and they do not see the necessity of wearing protective measures. The Safety and Health in Agriculture Conversion³⁷ which was established by ILO was implemented to promote and protect the safety, health and well-being of agricultural workers and their families. The

³²Ahmed, O `Knowledge and Practices Related to Occupational Hazards Among Cement Workers' (2019) 21 Journal of the Egyptian Public Health Association p19.

³³Meenesh, O `Study of Occupational Health, Safety, and Environmental Aspects in Major Cement Manufacturing Industry' (2014) Environ Earth science 117-129.

³⁴Takala J, `Burden of Injury Due to Occupational Exposures' (2019) *Handbook of Disability, Work and Health* 71.

³⁵Chatty, L `Study of Occupational Health and Safety Knowledge, practice and Injury Patterns of Workers at a Specific Beverages Manufacturing Company' 2006 University of Cape Town 20.

³⁶ *Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Ltd and Another* 1999 SA 128 (A).

³⁷ Safety and Health in Agriculture Conversion, 2001.

convention was introduced to address the range of OHS risks encountered in agriculture and to prevent accidents and injuries in agriculture.

The other largest industry which is unsafe for workers and full of injuries and health hazards is the mining industry. This industry is full of illiterate workers, semi-skilled workers, and migrant workers. Most of the workers in these industries lack the necessary qualifications and they are taken to the underground. Working in mines can be dangerous because the miners can be trapped underground if a tunnel collapses, and they breathe dangerous gases and rock dust in the mine that can make them sick. That is the reason the Mine Health and Safety Act,³⁸ came into force to protect workers against such hazards. This act specifies that the miners must use and take care of personal protective equipment and other health and safety facilities.³⁹

Article 6 of the Safety and Health in Mines Convention,⁴⁰ obliges the employers in mining to take preventative and protective measures to eliminate the risk and control the risk and minimize the risk by means that include the design of a safe work system and providing the use of personal protective equipment. The employers are also required to provide the necessary training and retraining programs and understandable instructions for workers at no cost to them on safety and health matters as well as on the work assigned.⁴¹

South Africa is a country in Africa that has workers from Mozambique, Lesotho, Malawi, and Botswana.⁴² So it has been reported that this country has a large number of international migrant workers and they lack the necessary skills and knowledge of understanding OHS, number of studies showed that HIV/AIDS prevalence among miners in South Africa is due to a lack of knowledge.⁴³ Sometimes the employers and the inspectors in the mining industry hide behind the worker's diseases and do not want to pay the surviving spouses for the loss of their loved ones from the injuries sustained in the workplace. In the case of *Rustenburg Platinum Mines v Chief Inspector of Mines*,⁴⁴ A miner with AIDS had sustained a knee injury while working on the applicant company's mine. He subsequently died.

³⁸ Mine Health and Safety Act 29 of 1996 (hereinafter referred to as MHS Act).

³⁹ Section 22 of note 24 above.

⁴⁰ C176- Safety and Health in Mines Convention, 1995.

⁴¹ Article 10 of note 26 above.

⁴² CODERRE-PROULX M et al (2016) ` International Migrant Workers in the Mining Sector 1 ed 13 Geneva ILO p 13.

⁴³ Crush, J et al ` International migration and Good Governance in Southern African Region, Southern African Migration Project, Migration Policy Brief, Paper for Global Commission on International Migration (2006) 1 <<https://scholars.wlu.ca> > accessed 06 April 2023.

⁴⁴ *Rustenburg Platinum Mines Ltd v Chief Inspector of Mines & another* [2006] (T).

In terms of regulation 35.2 of MHS, the first respondent who is the inspector of mines is required to establish a 'safety risk factor' for every mine based on statistics of injuries and fatalities. Then, in this case, the inspector included the death of the miner as a fatality and the miner could have not died if it wasn't because of Aids. Then the applicant applied to the court to set aside the decision of the inspector in terms of the Promotion of Administrative Justice Act 3 of 2000.⁴⁵ Then the inspector's decision was set aside.

The workers have an important stake in OHS because it is their health, lives, and limbs which are at risk. The workers do not get engaged in ways that enable them to inform management of specific OHS concerns or to contribute their experimental knowledge of work and OHS hazards.⁴⁶ It has also been reported that most underground mineworkers did not complete their schooling. They require adequate preparation and training for the workplace, but most are relatively uneducated and do not qualify for registered programs.⁴⁷

This study also includes the work stress which is faced by the workers in workplaces and how they should be dealt with in terms of support and structures which can be implemented by employers.⁴⁸ The research shows that in mining industries the workers are working in hazardous conditions, and they often work in confined spaces where there is a risk of exposure to fumes, dust, and dangerous equipment. In addition, the minors are expected to work long hours on rotating shifts which can be taxing, as minors must often do the heavy lifting, work in uncomfortable positions, and crawl in those tunnels, which causes work stress to them contrary to BCEA at times.⁴⁹

1.5 Research Aim and Objectives

1.5.1 Aim

This research aims to assess the effectiveness and challenges faced in implementing and enforcing occupational health and safety regulations specifically targeted towards semi-skilled and migrant workers in South Africa. The research further aims to investigate the level of compliance with the OHSA among these specific groups, identify the barriers that hinder

⁴⁵ Promotion of Administrative Justice Act 3 of 2000(hereinafter referred to as PAJA)

⁴⁶ Hermanus, M 'Occupational Health and Safety in Mining- Status, new Developments, and Concerns' (2007) The Journal of The Southern African Institute of Mining and Metallurgy p 16.

⁴⁷ Tuchten, G et al 'Does ABET Contribute to OHS in Mining? Occupational Health Southern Africa (2012) < <https://hdl.handle.net/10520/EJC121623> > accessed 25 March 2023.

⁴⁸Ahmad, A et al 'Workplace Stress: A Critical Insight of Causes, effects and Interventions'(2015) European Review of Applied Sociology p 31.

⁴⁹ Note 3 above.

effectiveness implementation, explore the unique occupational health and safety risks faced by semi-skilled and migrant workers, and propose recommendations to improve the protection of their health and safety in the workplace. This research aims to examine the extent of application of the application on OHS and to find an alternative to enforce employers in various workplaces to follow the procedures which are imposed on them to regulate the health and safety of the workers.

1.5.2 Objectives

The study will undertake to achieve its aims by investigating the gaps and barriers which might exist in the OHS and assessing the issues relating to semi-skilled and migrant workers in a workplace and giving recommendations for solutions to the research problem. The study will further assess the level of awareness and understanding of the OHS among semi-skilled and migrant workers. The study will also identify the specific OHS challenges faced by semi-skilled and migrant workers in various industries.

1.6 Significance of the Study

The study analyses occupational health and injuries in the workplace and the challenges which are faced by semi-skilled and migrant workers in a workplace. There is a necessity for the enforcement of OHS to accommodate the migrant and semi-skilled workers in the workplace and the alternatives which should be implemented for the semi-skilled and migrant workers to understand the policies which are put in place for them. This research recommends that employers bear the duty to explain the role of COIDA to illiterate workers. The study also adopts a comparative analysis of the OHS frameworks from other jurisdictions such as Netherlands and Denmark as they are best in terms of OHS. The study will adopt the OHS from such countries and find the solution to the problem in this study.

1.7 Research Questions

The research will investigate

1.7.1. Whether the employer follows the duties imposed on them by OHS to provide a safe working environment to all workers?

1.7.2. Whether the employers in a workplace explain the policies regulating the safety and health of the workers to such workers?

1.7.3. Whether the workers in a workplace are treated the same and there is no discrimination regarding their literacy level and other factors such as the semi-skilled and migrants in a safe working environment?

1.7.4. Whether the workers in various workplaces understand the policies put in place for them? Which alternatives might be implemented for them to understand safety and health? Are the legislations which are enacted to regulate safety and health sufficient to semi-skilled and migrant workers?

1.8 Chapterisation

This mini dissertation comprises of five chapters.

Chapter one: introduces the topic and provides the background of occupational health and safety for migrant and semi-skilled workers.

Chapter two: provides the framework on the OHS and the international instruments governing OHS in line with migrant and semi-skilled workers in South Africa.

Chapter three: discusses South Africa's stance on the OHS of migrant and semi-skilled workers.

Chapter four: discusses comparative analysis of OHS practices of migrant workers from developing countries in Africa and developed countries in Europe with the best OHS practices.

Chapter Five: provides the conclusion and recommendations.

CHAPTER 2: FRAMEWORK OF THE OHS AND THE INTERNATIONAL INSTRUMENTS GOVERNING OHS IN LINE WITH MIGRANT AND SEMI-SKILLED WORKERS IN SA

2.1 Introduction and Overview of OHS

OHS is the discipline concerned with protecting the health, safety, and wellbeing of people in the workplace. The duty is imposed on employers in a workplace to provide safe working conditions and to ensure that there are occupational health representatives in a workplace.⁵⁰ This duty entails identifying and managing workplace hazards and risks that may cause harm or injury to workers, visitors, or public. The duty to provide safe working environment is not only enforced by the legislation but also the common law.⁵¹ OHSA sets specific standards for workplace safety, but common law principles come into play. The standard for OHS vary by country and industry, but generally, employers have a duty of care to provide a safe and healthy work environment for their employees. This includes providing safe equipment, tools, and machinery, providing training on how to safely perform work tasks, and implementing procedures to prevent accidents and injuries.

Section 9 of the OHSA imposes the obligation to the employers and the government to provide safe working conditions to the employers.⁵² The benefit of OHSA includes reducing workplace reducing the cost of workplace accidents, improving worker engagement and productivity. This entails that an employer's failure to provide such safety and health, results in negligent conduct. In the case of *Van Deventer v Workmen's compensation Commissioner*,⁵³ it was stated that the employer must ensure that employees do not suffer because of the employer's personal negligence. Tshoose⁵⁴ argues that should the negligence of the employer be established, then the employees will be able to claim for the compensation in terms of COIDA.⁵⁵ In the case of *Joubert v Buscor Proprietary Limited*⁵⁶ it was stated that the employers owe duty of care to the employees as the employers are forceable third parties as contemplated by OHSA.

Workers' rights to safe and healthy working environment in South Africa cannot be understood without considering the history of the country, which has come a long way from apartheid to

⁵⁰ Tshoose, I ' Employer's Duty to Provide a Safe Working Environment: A South African Perspective' (2011) 6 *Journal of International Commercial Law and Technology* 165

⁵¹ *SAR & H v Cruywagen* 1938 CPD 219 at 229.

⁵² See section 9 of OHSA.

⁵³ *Van Deventer v Workmen's Compensation Commissioner* 1962 (4) SA 28 (T).

⁵⁴ Tshoose (2011) *JICLT* (no 6) 167.

⁵⁵ See Section 35 of COIDA.

⁵⁶ *Joubert v Buscow Proprietary Limited* 2016 (SA) 24 (HC)

democracy. Pre-1994, workers' rights to a healthy and safe work environment were non-existent. In the history of South Africa prior to 1994 working conditions were akin to servitude as labour laws did not protect workers' rights. However, this position changed with the advent of democracy and labour laws were enacted such as the OHS Act, COIDA and MSA. OHS legislation and regulations exist in most countries such as Netherlands and Denmark to ensure employers are providing safe workplaces for their employees. These regulations create minimum standards for the protection of workers from various risks in the workplace, and employers who fail to meet these standards may face legal consequences.⁵⁷ Additionally, OHS professionals play critical role as they ensure that employers comply with these standards and are held accountable. The OHS professionals are responsible to educate and train the employees and to conduct the regular inspections in the workplaces.

According to Levy et al,⁵⁸ the goal of OHS is to improve the well-being of employees in the workplace. The concept of employees includes semi-skilled and migrant workers who are illiterate and are unable to understand the implications and procedures which are necessary for safe work conditions. In Uganda the people who are struggling to read, write or to understand the script or language in which the document is written are protected by Illiterate Protection Act.⁵⁹ And this strategy should also be implemented in South Africa and applied to all the semi-skilled and the migrant workers as they lack knowledge.

The OHS is a constitutional imperative a command, not a request".⁶⁰ Therefore, the employer must understand the OHS and follow the guidelines and OHS regulations which are set by OHS Act.⁶¹ The semi-skilled and migrant workers who do not have the required qualifications to work in advanced workplace such as conducting office work, managing or operating, , they play a significant role in workplaces especially in the environment where manpower and physical strength is required. Therefore, it is imperative to ensure their safety and protection from workplace injuries and occupational diseases.

In South Africa we have people who are coming from the neighbouring countries such as Zimbabwe and Mozambique and others as well as the illiterate workers from South Africa.

⁵⁷ Katherine Stone, *Rethinking Workplace Regulations: Beyond the Standard Contract of Employment* (first published 2012, *Russels Rage Foundation* 2012) 87.

⁵⁸ Levy, BS et al `Occupational and Environmental Health: Recognising and Preventing Disease and Injury' (2011) *Oxford University Press*.

⁵⁹ Illiterate Protection Act 30 of 1918 (hereinafter referred to as IPA).

⁶⁰ Ferreira, J (master's Dissertation) `Managing and Implementing Occupational Health and Safety Policies in Selected Tshwane South Primary Schools, Gauteng Province' (2015) *University of South Africa*

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⁶¹ Ibid.

Such workers are discriminated against when the ohs laws must apply to them. Meaning they are not given the fair labour practices since they do not know the procedures which they will follow to claim and complain, and they don't know where to lodge their complains and some of them will fear to lose their jobs.

2.2 The Legal Framework of OHS in South Africa

2.2.1 Constitution of South Africa

The OHS laws in South Africa are regulated by several legislations, including the Constitution of South Africa.⁶² The Constitution of South Africa is the supreme law of the country, it establishes the structure of government, the rights and duties of citizens, and the principles that guide the nation. Section 24 of the Constitution,⁶³ guarantees everyone the right to an environment that is not harmful to their health or wellbeing, and it obliges the government to take steps to mitigate the risks associated with occupational hazards.

2.2.2 Occupational Health and Safety Act 85 of 1993

OHSA,⁶⁴ which is the mother legislation of health and safety aims to protect the health and safety of workers in all industries. OHSA places responsibilities on both employers and employees to ensure safe working environment. The OHSA regulates the protection of employees from harm in the workplace. The OHSA stipulates that employers must provide safe and healthy working environment to the employees. OHSA requires employers to identify potential hazards, to implement measures to control and mitigate them, and to provide appropriate training to employees. OHSA is imposed only at the advanced workplace and to the employees who are skilled and literate because the employers fear to be prosecuted and that shows that the equality is not recognised in the workplace and that breaches section 9 of the constitution,⁶⁵ as it stated that everyone is equal before the law and has the right to equal protection and benefits of the law and that apply to the all the workers in the workplace in terms of the OHSA. That also demonstrate to us that the employers are unfairly discriminating the semi-skilled and the migrant workers.

⁶² See sections 24 and 27 of the Constitution.

⁶³ Section 24 of the Constitution.

⁶⁴ See sections 7 and 23 of OHSA.

⁶⁵ See Section 9 of the Constitution.

2.2.3 Compensation for Occupational Injuries and Diseases Act 130 of 1993

COIDA,⁶⁶ deals with the claims and the funds for injuries sustained in a workplace by the employees. The act establishes the Compensation Fund, which is responsible for compensating employees who are injured or contract diseases at work. Employers are required to register with the Compensation Fund and contribute towards it based on their employee's earnings. The COIDA covers various aspects such as medical expenses, temporary or permanent disability benefits, and dependents' benefits in case of death. The act also outlines the procedures for reporting workplace injuries or diseases, claiming compensation, and resolving disputes. Overall, the COIDA plays a vital role in ensuring that employees are protected and compensated in case of work-related injuries or illnesses in South Africa.

2.2.4 Mines Health and Safety Act 29 of 1996

MHSA,⁶⁷ which applies to mines and ensure safety as there are lot of risks in mines. The Act establishes a framework for regulating the mining industry and sets out specific duties and responsibilities for employers, employees, and mining health and safety representatives. Employers are required to provide a safe and healthy working environment, while employees must take reasonable care for their own health and safety as well as that of others. Mining health and safety representatives are entitled to represent the interests of workers and participate in decision-making processes related to health and safety matters. The Act also provides for the appointment of inspectors, who have the power to enforce compliance with the regulations and impose penalties for non-compliance. Regular inspections, investigations, and reporting are essential components of the Act's enforcement mechanism.

2.2.5 Occupational Diseases in Mines and Works Act 78 of 1973

There is Occupational Diseases in Mines and Works Act,⁶⁸ which aims to protect workers' health and safety in various industries, including mining, construction, and manufacturing. The act outlines guidelines and requirements for employers to minimize health risks and provide necessary support for affected employees. Some common occupational diseases in South African workplaces include respiratory disorders, skin diseases, noise-induced hearing loss, and musculoskeletal disorders. Employers are required to conduct regular health

⁶⁶ See sections 38,39 and 65 & 68 of COIDA.

⁶⁷ See section 11 and 22 of MHSA.

⁶⁸ Occupational Diseases in Mines and Works Act 78 of 1973 (hereinafter referred to as ODMWA).

surveillance, provide personal protective equipment, and maintain a safe working environment to mitigate these risks.

2.3 Brief Discussion of Migrant and Semi-Skilled Workers

Migrant workers are those who come from another country and possess limited skills or qualifications in their field of work.⁶⁹ They may come to work in lower skilled positions such as labourers, cleaners, and hospitalities workers. In many countries, they are hired to perform jobs that are difficult to fill with local workers or because there is a shortage of workers in certain industries. These workers may work under temporary work visas or permanent residency depending on the policies of the country. Often these workers are paid lower wages than other workers and have limited access to legal protections or advancement opportunities. They play an essential supporting the economy and filling gaps in the labour market. In the article of Quandt, he stated that:

Migrant workers are recognized to be among the most vulnerable members of society. They are often engaged in what are known as 3-D jobs- dirty, dangerous, and demanding (sometimes degrading or demeaning)-and these workers are often hidden from or invisible to the public eye and from public policy.⁷⁰

South Africa is one of the developing countries as well as many countries in Africa as a whole and that is where this issue of OHS is increased. Ladou noted that small-scale industries in developing countries lack proper OHS regulations and control measures and other basic occupational health services and primary medical care.⁷¹

In South Africa also we have many people who are illiterate and semi-skilled, and they have a right to work so that they may provide for their families. Semi-skilled workers in South Africa are many and they are not required to be educated as their jobs require paying attention to details to or protecting against risks include complex job duties. Semi-skilled doesn't require you to have advanced training or education. They are treated the same way as the migrant workers because they perform the same duties in a workplace, and they are exposed to injuries and exploitation because they lack qualifications and knowledge to understand the OHS and its procedures. These types of workers are more likely to take risks at work and do

⁶⁹ Webb S, 'It's Who You Know Not What': Migrants 'Encounters with Regimes of Skills as Misrecognition' (2015) *Studies in Continuing Education* 34.

⁷⁰Quandt, SA et al '3-D jobs and Health Disparities: The Health Implications of Latino Chicken Catchers' Working Conditions (2013) *Am. I. Ind. Med.*

⁷¹ LaDou, J 'International Occupational Health' (2003) *International Journal of hygiene and Environmental health* 3.

not have the proper equipment or training. They also tend to ignore unsafe working conditions.⁷²

The OHS should be looked at in the human rights perspective as it affects the fundamental rights of the humans listed in chapter 2 of the constitution such as, health, safe environment, dignity and when we include the discrimination regarding access of the ohs that is where we mention section 9 of the constitution as it affects the equality as well. It has been stated in the declaration of Stockholm that:

Man has the fundamental right to freedom, equality and adequate conditions of the life, in an environment of a quality that permits a life of dignity and well-being.⁷³

The OHS laws do not do enough to protect such workers and they are the most vulnerable class of workers, and they are the most workers who are exposed to exploitation and dangers in a workplace. So, there is suspicion that the laws which regulates OHS are aimed at protecting the skilled and advanced workers who are not even exposed to dangers and risks. The employers who are not protecting the workers against dangers and safety in a workplace are not punished. The International Labour Organisation has identified globalisation to be the factor which had effect on the international labour migration as it has increased a number of the people migrating to seek employment to developed countries to escape poverty and political pressures from their homes.⁷⁴

2.4 International Instruments Regulating OHS

South Africa is the member state of the international community, and it is legally bound by the section 39(1)(b) of the Constitution⁷⁵ to consider the international law. International instruments on OHS are agreements and regulations which protect the worker's health and safety in the workplace, and they are important as they uphold the worker's rights and health. They also provide the common framework for countries to follow international instruments to promote OHS and they also encourage the cooperation among countries and governments as well as organizations.

⁷² Moyce, S ` Migrant Workers and Their Occupational Health and safety (2018) *University of California* 352 2

⁷³ Stockholm Declaration of the United Nations Conference on the Human Environment, <<http://www1.umn.edu/humanrts/instreet/humanenvironment.html>> accessed 02 May 2023.

⁷⁴ ILO International Labour Standards-A global Approach ILO Geneva (2002) 142.

⁷⁵ See Section 39(1)(b) of the Constitution.

The role of international instruments on OHS promotes economic development and sustainability. By ensuring a safe working condition, countries can promote sustainable economic development and reduce healthcare costs and increase productivity. It is very important to consider the international standards as it has been stated in the constitution of the Republic of South Africa section 233, that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.⁷⁶

It has been explained why the human right in the context of OHS are important and they mentioned the role of ILO in setting international standards around OHS.⁷⁷ It was found that the international instrument set by ILO play an important role in advising the governments and other stakeholders in making the policies to give them content to the fundamental rights of OHS in their laws.

The ILO has adopted the international instruments that deal with the occupational health and safety, and they are as follows:

1 United Nations Universal Declaration of Human Rights.⁷⁸ As it provides everyone the right to life, work and employment and favourable conditions of the work.

2 International Covenant on Economic, Social and Cultural Rights.⁷⁹ This provides everyone the right to work and enjoyment of the conditions of work such as safe workplace.

3 Convention of the Right of the Child article 24 (health)⁸⁰

4 Universal Declaration of Human Rights,⁸¹ article 25 as it deals with living conditions of the people.

⁷⁶ See section 233 of the constitution.

⁷⁷ Tshoose, C ` Placing the Right to Occupational Health and Safety Within a Human Rights Framework: Trends and Challenges for South Africa' (2013) *Institute of Foreign and Comparative Law* 277 2.

⁷⁸ United Nations Universal Declarations of Human Rights (1948) < <https://www.un.org>> accessed 04 May 2023.

⁷⁹ The International Covenant on Economic, Social and Cultural Rights (1976) < <https://www.ohchr.org>> accessed 04 May 2023.

⁸⁰ Convention on the Rights of the Child (1989) < <https://www.unicef.org/child-rights-convention> > accessed 03 May 2023.

⁸¹ Universal Declaration of Human Rights (1945).

5 International Covenant on Civil and Political Rights,⁸² and the article 6 of this convention deals with the right to life.

6 International Covenant on Economic, Social and Cultural Rights which in article 12 deals with the right to life.

7 Convention on the Elimination of Discrimination Against Women which deals with the living conditions.⁸³

2.4.1 Relevant International Instruments Protecting Semi-Skilled Workers

There are several international instruments that protect the rights and interests of semi-skilled workers. Some of the most notable ones are-

- International Labour Organisation (ILO) Conventions: The ILO which is a united Nations agency focused on promoting decent work, has several conventions that protect the rights of semi-skilled workers. For instance, Convention 98 ensures the right to organize and bargain collectively, while Convention 111 prohibits discrimination in employment.
- International Covenant on Economic, Social and Cultural Rights (ICESCR): The ICESCR is a treaty that recognizes the right of all workers, including semi-skilled workers, to just and favourable conditions of work, such as safe working conditions and fair remuneration.
- United Nations Universal Declaration of Human Rights:⁸⁴ Article 23 of the UN Universal Declaration of Human Rights recognizes the right to work, and states that everyone has the right to just and favourable remuneration for work done.
- International Association of Mechanists and Aerospace Workers (IAMAW): The IAMAW is an international trade union that represents trade unions that represent semi-skilled workers in the aviation, aerospace, and defence industries. The organisation advocates for fair wages, benefits, and working conditions of the workers.
- International Brotherhood of Electrical Workers (IBEW): The IBEW is a trade union that represents semi-skilled workers in the electrical industry. The organisation

⁸² International Covenant on Civil and Political Rights (1966) < <https://www.ohchr.org> > accessed 03 May 2023.

⁸³ Convention on the Elimination of Discrimination Against Women (1979) < <https://www.un.org> > accessed 04 May 2023.

⁸⁴ Article 23 of UNUDHR.

promotes the interests of its members and provides them with training and developments opportunity to enhance their skills and advance their careers.

2.4.2 Relevant International Instruments Protecting the Migrant Workers Against OHS

In the case of *Discovery Health Limited v CCMA and others*,⁸⁵ it was stated that with the increase of the illegal migration international instruments designed to address the situation of irregular migrants is to establish a framework that enables states to protect their labour markets while also protecting the rights of those who seek work in other countries. The international Labour Organisation has tried to protect those workers in terms of the prejudice, xenophobia, and racism of those workers.

The topic of the research includes the protection of the semi-skilled and the migrant workers against the hazards and injuries in a workplace. The case of Discovery Health has also mentioned the protection of the migrant workers through international instruments. So, there are several international instruments that provides protection the OHS of migrant workers, and they are as follows: -

1 International Labour Organisation (ILO) Convention 155 on Occupational Safety and Health. This convention provides a framework for ensuring the safety and health of workers, including migrant workers. It includes guidelines for employers and governments to implement best practices in OHS, including risk assessment, protective measures, training, and monitoring.

2 ILO Convention 189 on Domestic Worker- This convention recognizes domestic workers as a vulnerable group, including migrant domestic workers. It requires governments to ensure that domestic workers have access to safe and healthy working conditions, including protections for their physical and mental health.

3 United Nations Convention on the Protection of the Rights of All Migrant workers and Members of their Families. This convention protects the migrant workers, and it provides the right to have safe working conditions. It imposes legal obligations to the governments to provide the safe working conditions to migrant workers and not to be subjected to dangers and hazards in workplaces. This convention has been adopted in 1990 and it extends migrant workers who enter or reside in the host country illegally and members of their families. But in

⁸⁵ *Discovery Health Limited v CCMA and others* 2008 (1) ZALC 24 LC para45.

this matter, it is focused on the legal migrants who are in the Republic to work to be afforded the working conditions which are better.

4 Convention on the Rights of the Child. There are migrant children who are working and in terms of this convention, it provides for the protection of such children OHS rights, it requires the governments to ensure that children are not exposed to hazards or harmful work environments, and that they receive appropriate training and education to protect themselves from OHS risks.

2.5 Discrimination of the Semi-Skilled and Foreign Workers in the Workplace on OHS

The workers in a workplace are discriminated in terms of access to OHS as they receive unequal treatment, exclusion, or restriction of workers based on their level of qualification race, gender, and other matters. It has been stated that discrimination occurs where individuals and larger institutions, deliberately or without intend, treat racial groups differently, resulting in inequitable access to opportunities and resources e.g., employment, education and medical care.⁸⁶ So discrimination and racism are experienced by the migrant workers as it has been stated that they are ranked into social groups called "races" and uses its power to devalue, disempower and differentiate them and they are denied access to opportunities such as access to OHS and others in a workplace.⁸⁷

Section 6(1) of the EEA states that:

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, age disability, religion. HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.⁸⁸

This treatment in a work environment can prevent some employees from accessing critical workplace health and safety measures, including training and equipment, leading to a higher risk of injury or illness. The employers in a workplace can decide to provide the training and protective gear only to the South African employees and not provide the migrant workers, it would create a discriminatory environment at work, similarly, if an employer discriminates

⁸⁶ Williams, D ` Racism and Health: Evidence and Needed Research' (2019) *Annual Review of Public Health*, p111.

⁸⁷ Ibid.

⁸⁸ Employment Equity Act 55 of 1998 (Hereinafter referred to as EEA).

against workers who are uneducated by failing to make reasonable adjustments to ensure their safety and well-being, they will face charges if discrimination.

In South African industries such as mining agriculture and other firms where there a lot of foreign workers the major factor which give rise to health issues and hazards is discrimination of access to OHS because they are get unfair treatment, restriction, or exclusion from accessing OHS measures due to their nationality, race or ethnicity. It is believed that when the migrant workers or foreigners are employed, they have the right to the same level of OHS protection as South African. So, discrimination occurs in the following manners-

Unequal treatment when they get training- so when the workers get the training, the foreigners are not provided with the training and that will lead to them being harmed or injured and they might not access the health. Employers may fail to provide OHS training in languages other than the official language of the country, which may pose a significant barrier to foreign workers. Employers may also fail to provide necessary safety equipment and workplace modifications for foreign workers who may have different physical characteristics and needs.

It has been recommended that the employers must treat all the workers the same regardless of the race, gender, or educational level. The employers were advised to promote equal access to workplace OHS, employers should develop policies and guidelines that provide for equal opportunities, training, equipment's, and protection for all their workers regardless of their demographics. They should also conduct regular assessments reviews of their OHS programs to ensure that they comply with relevant laws and regulations and prevent any gaps in access to OHS measures. It is important for employers to promote an inclusive workplace culture that recognizes the rights of foreign workers and ensure equal access to OHS. It is also important for governments to enforce anti-discrimination laws and regulations in the workplace.

2.5.1. International Convention on the Elimination of All forms of Racial Discrimination.

This convention prohibits all forms of racial discrimination, including discrimination in access to safe and healthy working conditions. It requires governments to ensure that migrant workers are not subjected to discriminatory practices, and that they have equal access to OHS protections as other workers.

The importance of the immigration in labour is that they contribute to labour force growth. But they are exposed to discrimination when they must access the OHS protections. So due

to lack of skills and proper education they find themselves in the poor-quality jobs and in informal sector which is full of hazards and dangers as well as risks. So in the article of Agnieszka⁸⁹ he discussed how the immigrants faced the discrimination and racism with regard to health and safety. While the workers in a workplace face the serious challenges such as dangers and hazards and they are discriminated against when they must access the OHS, they also face the stress of discrimination and racism and workplace violence and ethnic discrimination.⁹⁰

2.6 Conclusion

In South Africa we have the laws which regulate the safety and health of the workers and the laws which regulate the aftermath of the injuries obtained in a workplace. There are migrant workers who leave their homes to come and work in South Africa so that they may provide for their families. We also have the semi-skilled workers in various workplaces and the laws of the republic do not do enough to protect them against the dangers in a workplace. The above-mentioned workers in workplaces are discriminated again when they must access the protection such as occupational health and safety. The international instruments which were mentioned in this study must be utilized to solve such issues in a workplace or on this country. South Africa also as a member state of the international organization must ratify some of the international instruments and adopt them so that the semi-skilled workers as well as the migrant and foreign workers may enjoy the protection against dangers and health in the workplace.

⁸⁹ Agnieszka, K ` Employment in a "land of Opportunity?" Immigrants' experience of Racism and Discrimination in the Australian Workplace' (2017) *Journal of International Migration and Integration* 483-1.

⁹⁰ Douglas, K.E et al ` Prevalence and Pattern of Workplace Violence and Ethnic Discrimination Among Workers in a Tertiary Institution in Southern Nigeria (2017) (4) *Open Access Library Journal*.

CHAPTER 3: SOUTH AFRICA'S STANCE ON THE ISSUE OF OHS OF MIGRANT AND SEMI-SKILLED WORKERS

3.1 Introduction

South Africa is a country which attracts migrant workers from African countries.⁹¹ The history of migrant labour in South Africa started in 1834 when African men were intergraded into wage labour. African men were settled in farming as Africa is known to have history of farming. African men from Bantustans and other neighbouring countries left their families behind to work as contract labourers in the mines.⁹²

African men were largely recruited to work in the mines and farms. This was largely due to the discovery of gold and diamond in the country, which created a huge demand for labour⁹³. Things became more difficult in 1886 after the discovery of gold as it meant more labour would be needed.⁹⁴ Some of the African men felt that they will not be able to sustain themselves and felt the need to seek employment from white-owned mine companies and other industries such as constructions and factories.⁹⁵

Despite the harsh work conditions, the wages paid to migrant labourers were higher than what they could earn in their home countries, which made the prospects of working in South Africa appealing.⁹⁶ This led to a steady stream of migrant workers from other African countries or SADC countries such as Mozambique, Zimbabwe, and Malawi. Hence, as the demand for labour increased, the South African government introduced a series of laws such as Natives (Urban Areas) Act,⁹⁷ Bantu Education Act⁹⁸ and Group Areas Act,⁹⁹ to control the movement of migrant workers. These laws included the pass laws, which required all black South Africans to carry the pass books, which stated where they were allowed to live and work.¹⁰⁰ Any person

⁹¹ Khumalo, B 'Social Insurance Coverage for SADC Migrant Workers in South Africa: A Regional and International Framework Compliance Analysis' (2011) *RMA Annual Report* 269.

⁹² Massey D, 'Class Struggle and Migrant Labour in South African Gold Mines' (1983) *Canadian Journal of African Studies* 34.

⁹³ Seabela, M "A Brief History of Labour Control in South Africa: Migrant Labour and the Recruitment, the 1890s-1970s" (2021) *Ditsong Museum of South Africa* 5.

⁹⁴ Wilson, F 'Labour in South Africa Gold Mines 1911-1969' (1972) 6 *Cambridge University Press* 2.

⁹⁵ Bundy, C "The emergence and decline of the South African peasantry" (1972) *African Affairs* 369

⁹⁶ Ibid.

⁹⁷ Natives (Urban Areas) Act 21 of 1923.

⁹⁸ Bantu Education Act 47 of 1953.

⁹⁹ Groups Areas Act 41 of 1950.

¹⁰⁰ Vosloo, C 'Extreme Apartheid: The South African System of Migrant Labour and Its Hostels' (2020) <<http://dx.doi.org/10.17159/2617-3255/2020/n34a1>> Accessed 08 November 2023.

found without a pass could be arrested and punished.¹⁰¹ These laws made it difficult for migrant workers to move freely in South Africa and effectively created a system of apartheid in which black and white people were segregated and treated very differently. Despite these challenges, migrant labour continued to be part of an important part of the South African economy throughout the 20th century. Today, many African migrants continue to work in South Africa, although the conditions and regulations surrounding their employment changed significantly.

South Africa has instituted various laws to protect migrant and semi-skilled workers in terms of OHS. The most notable law in this regard is the OHS Act, which was enacted in 1993. This law outlines the health and safety standards that employers are required to adhere to protect their employees. But most employers do not follow this law to protect such workers.

3.2 The Impact of SADC Countries on the Effectiveness of OHS Measures

As SADC comprises of 15 member states, which includes Botswana, Lesotho, Malawi, Zambia, Mozambique, Zimbabwe, Tanzania, South Africa, and other countries in Africa, more OHS problems seem to be unresolved.¹⁰² These countries are disadvantaged and experiencing most of unfair practices of OHS and one of the objectives of SADC is to support, through regional integration, those who are socially disadvantaged.¹⁰³ As migrant workers in SADC countries are denied access to social security,¹⁰⁴ it must be noted that social security includes the OHS and the access to the compensation for the injuries sustained in the workplaces as well as death because of the workplace dangers. International Labour Organisation Convention 102 of 1952 defines Social Security as:

The protection which society provides for its members, through a series of public measures, against the economic and social distress of public measures, against the economic and social distress that otherwise will be covered by the stoppage or reduction of earning resulting from sickness, maternity, employment injury, unemployment, invalidity, old age, provision of medical care and provision of subsidies for families with children ¹⁰⁵

¹⁰¹ Natives (Urban Areas) Act of 1923.

¹⁰² Southern African Development Community. < <http://www.sadc.int/about-sadc> > Accessed 07 July 2023.

¹⁰³ Article 5(1)(a) of the SADC Treaty.

¹⁰⁴ Mpedi LG and et al ` Access to social services for non-citizens and the Portability of social Benefits within Southern African Development Community (2011) *Law Democracy & Development* 6.

¹⁰⁵ International Labour Organisation Convention 102 of 1952.

Article 17(2)(a) provides that members states must enable migrant workers to participate in the social security schemes of the host state and that members states should not differentiate between citizens and non-citizens. This means the migrant workers are also covered in the social security schemes and they should not be discriminated against.¹⁰⁶ ILO introduced the instruments which guided the SADC countries about the promotion of workplace health and safety and in managing OHS programmes, but many SADC member states lack a comprehensive OHS policy and the resources to implement them.¹⁰⁷

SADC has taken various measures to address the OHS of migrant workers such as implementing some guidelines. SADC has developed regional guidelines on OHS to provide a common framework for member states. These SADC regional guidelines on OHS include Southern African Development Community (1999) Protocol on Health in the Southern African Development Community (The SADC Protocol).¹⁰⁸ This SADC Protocol was designated to promote safe working conditions and protect the rights of workers, including migrant workers. SADC further introduced South African Development Community (SADC). (2009). SADC Labour Migration Policy Framework that aims to guide member states in managing labour migration effectively and address the challenges faced by migrant workers.¹⁰⁹ This framework includes provisions for protecting the health and safety of migrant workers and addresses the challenges faced by migrant workers.

South Africa has taken specific measures to address the OHS of migrant workers by implementing national legislation such as OHS Act that aims to protect all workers, including migrant workers. This legislation sets out the rights and responsibilities of employers and workers regarding OHS. At common law every employee has a right to a safe working environment.¹¹⁰ The strides made in SADC assisted in the introduction of the COIDA to provide for a no-fault compensation claim for workers.¹¹¹ The COIDA defines an employee as a person who has entered work under a contract, whether the contract is express or implied, oral or in

¹⁰⁶ Article 17(2)(b) of the SADC Code on Social Security of 2007.

¹⁰⁷ Puplampu B, et al `Key Issues on Occupational Health and Safety Practices in Ghana: A Review' (2012) 3 *Int Business Soc Sci* 19.

¹⁰⁸ Southern African Development Community. (1999). Protocol on Health. < <https://www.sadc.int/themes/health/protocol-on-health/>> Accessed 09 March 2024.

¹⁰⁹ SADC Labour Migration Policy of 2013.

¹¹⁰ Myburgh et al `Social Security Aspects of Accident Compensation: COIDA and Raf as Examples' (2000)4 *Law Democracy & Development* 44

¹¹¹ Nyenti et al "Access to Social Services for Non-Citizen and the Portability of Social Benefits Within the Southern African Development Community: South Africa Country Report" (2007) < http://siteresources.worldbank.org/INTLM/Resources/390041-1244141510600/Nyenti_Plessis_Apon-South_Africa-2007.pdf > accessed 07 July 2023.

writing.¹¹² The definition of the employee is clear that it does not include immigration status or citizenship.¹¹³ But still the migrant workers are still experiencing challenges when they claim for compensation under the COIDA due to their immigration status which they claim is a factor used to discriminate against them.

All these narrated efforts by SADC aim to protect and promote the OHS of migrant workers in Africa. However, there are ongoing difficulties in enforcing OHS measures for migrant and semi-skilled workers in South Africa.

3.3 The Significance of OHSA on the Protection of Migrant and Semi-Skilled Workers in South Africa

An employee in terms of the OHSA means any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person.¹¹⁴ The OHSA does not specifically mention to which employees is protection extended, and it does not choose the citizens which are entitled to the protection. This means that it included the semi-skilled and migrant workers because they are also employed in South Africa. The employer refers to the person who provides work for any person and remunerate that person.¹¹⁵ The OHSA protects everyone who is employed regardless of their immigration status. Section 8 of the OHSA imposes a general duty on employers to ensure the protection of the health and safety of all workers in the workplace.¹¹⁶ It states that:

Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.¹¹⁷

This section echoes the common law rule which entails that an employer has a duty to provide a safe working environment, a safe equipment and tools and a safe method of work.¹¹⁸ This common law is also supported by section 8(2) (a),¹¹⁹ which states that the maintenance of systems of work, plant, and machinery that, as far as is reasonably practicable, are safe and without risks to health. Such steps will be taken by the employer to decrease the chances of the employees to sustain injuries in the workplaces. The OHSA outlines the employer's duty

¹¹² See section 1 of COIDA.

¹¹³ Khumalo (2011) RMA 575.

¹¹⁴ See section 1(1)(ix) of OHSA.

¹¹⁵ See Section 1(1)(x) of OHSA.

¹¹⁶ Basson A Essential Labour Law 5th edition, 2009 South Africa 384-385.

¹¹⁷ See section 8(1) of OHSA.

¹¹⁸ SAR & H v Crywagen 1938 CPD 219 at 229.

¹¹⁹ See Section 8(2)(a) of OHSA.

to inform workers of any workplace hazards that they could be exposed to.¹²⁰ The OHSa further requires employers to provide personal protective equipment to workers, including migrant and semi-skilled workers.¹²¹

OHSa mandates employers to develop a health and safety that is communicated to all workers.¹²² It also outlines the role of labour inspections in enforcing the OHSa's provisions, it also includes ensuring that employers comply with the provisions concerning the safety and health of migrant workers.¹²³ The OHSa imposes specific duties on employers to ensure that migrant workers receive the same level of protection as local workers. The OHSa also provides for the role of labour inspections in enforcing the OHSa concerning the safety and health of the migrant workers.

The purpose of OHSa is to provide for health and safety of persons at work and the health and safety of persons in connections with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection to the activities of persons at work; to establish an advisory council for OHS. Windapo states that the OHSa must form part of a plan for building a society that is based on democratic values of human dignity, equality, and freedom.¹²⁴ Under the OHSa, several regulations were promulgated, such as the Construction Regulations which were introduced in July 2003 specifically to regulate the health and safety in the construction industry.¹²⁵

The OHSa like any legislation, has its strengths and weaknesses in terms of protecting all workers, including migrant workers, against occupational diseases and injuries in the workplace.¹²⁶ However, there is lack of enforcement which often fails to hold employers accountable for violations. Migrant workers are more vulnerable to exploitation and unsafe working conditions due to their precarious legal status, making enforceable even more crucial. Migrant workers especially those who don't understand English may face challenges in

¹²⁰ See Section 13 of OHSa.

¹²¹ See Section 16 of OHSa.

¹²² See Section 23 of OHSa.

¹²³ See Section 37 of OHSa.

¹²⁴ Windapo AO 'Relationship Between Degree of Risk, Cost and Level of Compliance to Occupational Health and Safety Regulations in Construction' (2013)23 (2) *Australian Journal of Construction Economics and Building* 78.

¹²⁵ Hefer EH (master's Dissertation) 'The Impact of the Construction Health and Safety Regulatory Framework on Construction Costs' (2016) *University of KwaZulu-Natal* 109.

¹²⁶ Delius, P 'Migrant Labour in South Africa (1800-2014) Oxford Research Encyclopaedia of African History: Economic and Social History, Southern Africa'(2017)<<http://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001/acrefor-e-9780190277734-e-93> > Accessed 07 November 2023.

understanding their rights and responsibilities under the OHS Act.¹²⁷ Furthermore, the OHS Act does not include sufficient outreach programs and resources specifically targeted at informing and educating migrant workers about their rights and hazards they might face in their workplaces. Furthermore, migrant workers are underrepresented in workers' organisations and labour unions. OHS Act could do more to support their rights to organise and have a collective voice in advocating for workplace safety.

3.4 Analysis of the Issues and Challenges faced by Migrant and Semi-Skilled Workers in Selected Sectors of South African Economy

OHS laws are a paramount concern in South Africa, a nation marked by a diverse economy comprising various sectors, each with its own unique set of challenges and risks. The selected sectors which will be discussed in this section such as domestic work, agriculture, construction, and mining stand out as areas grappling with substantial OHS issues. Ensuring the well-being of migrant and semi-skilled workers in these sectors is not only a matter of legal obligations but also a moral imperative, given the significant impact that safety and health conditions have on the lives and livelihoods of individuals and communities. In this discussion, we will delve into these selected sectors highlighting the specific challenges they face in promoting and maintaining OHS standards.

3.4.1 Safety of the Vulnerable Workers Employed in Agriculture Industry

Agricultural labour dates back in the 1600s, when local Khoisan's and imported slaves worked on farms owned by Dutch colonisers.¹²⁸ Vulnerable workers such as the illiterate, slaves, Khoisan and migrant workers experienced abuse and such abuse included the acts such as rape, child labour, inhumane living conditions and the eviction of families of farmworkers. After the transition to a democratic dispensation in 1994, progressive legislations were introduced that conferred economic, social, cultural, civil, and political rights to all South Africans,¹²⁹ including labour laws that regulated the relationship between employers and employees and aimed to protect workers against unfair labour practices.¹³⁰ It has been noted

¹²⁷ Meyer DJ, 'Migrant Workers and Occupational \health and Safety Protection in South Africa' (2009)21*South African Mercantile Law Journal* 838.

¹²⁸ Bernstein, H `South Africa's Agrarian Question: Extreme and Exceptional?' (1996) *Journal of Peasant Studies* 52.

¹²⁹ Rapatsa M, `Transformative Constitutionalism in South Africa: 20 Years of Democracy' (2014) *Mediterranean Journal of Social Sciences* 8.

¹³⁰ Phiri TE, `Unfair Labour Practices, Labour Legislation and Protection of Migrant Workers in South Africa' (2015) *University of Witwatersrand* 43.

that agriculture sector has many migrant workers, especially in geographic areas where South Africa and Zimbabwe share borders such as Mpumalanga and Northern Province.¹³¹

Amongst the laws which were introduced, was Extension of Security of Tenure Act 1997¹³² which aimed to protect dwellers' tenure security rights and sectoral determination for farm workers. This Act was also introduced to protect those who are living in rural areas, on farms and on undeveloped land. It also protects people living on land that is encircled by a township or land within a township that is marked for agricultural purposes.

Employers in the agriculture sector are now required to issue written contracts to all farm workers, to pay an annually adjusted minimum wage, to provide protective clothing to workers who are exposed to pesticides, to allow workers to join trade unions and to allow labour inspectors to monitor working conditions on farms. However, this research will demonstrate that significant number of farmers and farm managers are not complying with these requirements.¹³³ The OHS Act states that 'every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of the employees.'¹³⁴

Most of the farms employ more women than men, such women mostly are from other African countries or migrant female workers. Such workers are experiencing hygiene and sanitation issues as they do not have access to washing facilities and toilets, their dignity is compromised as they are forced to seek alternatives, and negative health implications follow from their lack of access to water for drinking and washing their hands after relieving themselves and before eating.¹³⁵ For some workers who are provided with the toilets, some are not hygienic. Women face additional difficulties when they are menstruating as they will be required to go to the bushes to change their sanitary towels, they are then faced with serious challenges when they go to the bushes as they might get raped or get injured.¹³⁶ Such challenges are not given much attention. However, when they are addressed, they are not taken as a priority, especially if the employer is male.

¹³¹ Crush, J et al 'International Migration and Development: Dynamic and Challenges in South and Southern Africa,' United Nations Expert Group Meeting on International Migration and Development' (2005) *New York United Nations* 14.

¹³² Extension of Security of Tenure Act 62 of 1997 (Hereinafter referred to as ESTA).

¹³³ Devereux, S 'Violation of Farm Workers Labour Rights in Post-apartheid South Africa, Development Southern Africa (2020) < <https://doi.org/10.1080/0376835x.2019.1609909> > Accessed 21 July 2023.

¹³⁴ See section 8(1) of OHS Act.

¹³⁵ Robins T, 'Occupational Hazards, Living Conditions, and Physical Assault of Sugar Cane Workers in KwaZulu-Natal, South Africa' (1998)88 *South African Journal of Medicine* 1120.

¹³⁶ Ibid.

In the farms where they employ a majority of the semi-skilled and migrant workers, most of these workers are not familiar with the OSHA and the procedures which must be followed when they claim for compensation under COIDA.¹³⁷ Both OSHA and COIDA were introduced to protect the employees whether educated or not, the employers in the agricultural sector do not educate their employees about compensations and the OSHA.¹³⁸ Some of the workers such as the seasonal workers, migrant workers and semi-skilled workers are not registered and do not have contracts of employment and they are taken advantage of. The OSHA along with BCEA, imposes a legal obligation on employers to provide employees with necessary protective measures for any job-related health risks. But those of them who receive such protective gear are compelled to pay for them out of their wages.¹³⁹

In contrast, in the United States legislative framework is in place to protect migrant workers and seasonal farm workers even if they do not have a permit to work, such as the Migrant and Seasonal Agriculture Worker Protection Act 1983¹⁴⁰. This Act aims to protect migrant and seasonal agricultural workers by creating employment standards for wages, housing, transportation, discourses, and recordkeeping.¹⁴¹ In the United States, Latino Migrant farmworkers are a particularly vulnerable population because of their limited knowledge of OHS risks and workers' rights, inadequate training on protection from environmental hazards, lack of access to medical care, documentation status and language and cultural barriers.¹⁴²

The health and well-being of vulnerable workers in agriculture is affected by chemicals, hygienic, biological, and physical hazards. These workers are vulnerable to exploitation as they fear to report any injuries and dangers in this sector as they fear to lose their jobs. Hence the OHS of the vulnerable workers in agriculture such as the seasonal workers, migrant workers, semi-skilled workers must be a priority. This requires targeted interventions, including appropriate training, effective communication. Regular monitoring, evaluation and

¹³⁷ Naidoo S, 'Women's Occupational Health Working in Small-Scale Agriculture in South Africa' (2011) *University of KwaZulu-Natal* 12.

¹³⁸ Mobed K, 'Occupational Health Problems Among Migrant and Seasonal Farm Workers, In Cross-Cultural Medicine-A decade Later' (1992) *Western Journal of Medicine* 370.

¹³⁹ Masiri, BJ (master's Dissertation) 'Willing Victims: A Study of Zimbabwean Migrant Workers in The Citrus Industry of the Sundays River Valley, Eastern Cape' 2020 University of Western Cape.

¹⁴⁰ Migrant and Seasonal Agriculture Worker Protection Act 1983 (hereinafter referred to as MSPA).

¹⁴¹ United States Department of Labour 1983. The Migrant and Seasonal Agriculture Worker Protection Act (MSPA) wages and Hour Division <<https://www.dol.gov/agencies/whd/agriculture/mspa#:~:text=The%20Migrant%20and%Seasonal%20Agriculture,2C%20transportation%20disclosures%20and%20recordkeeping> > Accessed 21 July 2023.

¹⁴² Castillo F et al 'Environmental Health Threats to Latino Migrant Farmworkers' (2021) <https://doi.org/10.1146/annurev-pubhealth-0124220-105014> > Accessed 21 July 2023.

collaboration with relevant stakeholders are also crucial to ensure long-term improvements in worker safety.

3.4.2 The OHS of the Domestic workers in South Africa

Domestic workers are not noticed and praised for their hard work. They are a powerful group of men and women whose hard work enables their children to prosper and pursue their studies.¹⁴³ Domestic workers are employees who performs domestic work in the homes of their employer, such people include, gardeners, persons employed by a household as drivers of a motor vehicle and a person who takes care of children, the aged, or the disabled. Domestic work is said to be one of the oldest and most important occupations for women around the world and it comes from the global history of slavery, colonialism, and other forms of servitude.¹⁴⁴

OHS for domestic workers in South Africa is a crucial concern to ensure the well-being and protection of this vulnerable group of employees.¹⁴⁵ Domestic workers often face unique challenges, including informal employment arrangements, long working hours, and limited access to OHS protections. Domestic workers are predominantly black females,¹⁴⁶ who lack knowledge about trade unions.¹⁴⁷ In South Africa, domestic workers are protected by the OHS Act and COIDA. However, the OHS Act does not specifically address the unique OHS challenges faced by domestic workers. Domestic workers often work in private residences, which can pose safety risks, such as hazardous cleaning chemicals, unsafe appliances, and exposure to second hand smoke.¹⁴⁸ Long working hours, limited breaks, and few rights to refuse unsafe work can lead to physical and mental health issues.

Domestic workers have the right to safe working conditions, reasonable working hours, and protection from abuse and harassment. They are entitled to compensation for work-related injuries or illnesses under COIDA. Unfortunately, they are not aware of such protections and

¹⁴³ International Labour Organisation Report 'Domestic Workers Across the World: Global and Regional Statistics and the Extent of the Legal Protection' (2013) ILO Report.

¹⁴⁴ ILO 'Report of the Director-General: Decent Work' (1999) International Labour Conference: Geneva, 87th Session < www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm#1 > Accessed 20 October 2023.

¹⁴⁵ Russell M, 'The Employment of Domestic Workers by Black Urban Households'(2002)26 *Centre for Social Science Research University of Cape Town* 13

¹⁴⁶ ILO 'Domestic workers across the world: Global and regional statistics and the extent of legal protection' (2013) International Labour Office: Geneva < www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_173363.pdf > accessed 20 October 2023.

¹⁴⁷ D du Toit 'Extending the frontiers of employment regulation: The case of domestic employment in South Africa' (2010) 14 *Law Democracy & Dev.* 207

¹⁴⁸ Health and Safety Protection for Domestic Workers: Report 2023.

rights because majority of them are not educated, and some are migrant workers, and they lack knowledge of such rights. Informal employment arrangements and limited awareness of their rights can make it difficult for domestic workers to access OHS protections.¹⁴⁹

There is a need for more comprehensive OHS regulations specific to domestic work, including guidelines for safe working conditions, appropriate work hours, and minimum wage protections. Employers should be encouraged to provide proper training and resources for domestic workers to ensure they understand OHS risks and are equipped to address them.¹⁵⁰

In the case of *Mahlangu and Another v Minister of Labour and Others*,¹⁵¹ the issue was social security for domestic workers as they were not recognised as employees in terms of COIDA. Ms Mahlangu as a domestic worker was employed in a private home in Faerie Glen, Pretoria. On the Morning of March 2012, she was drowned in her employer's pool while executing her duties.¹⁵² Following her death, as her daughter was financially dependent on her mother at the time, she approached the Department of Labour to enquire about compensation for her mother's death and her unemployment insurance benefits. She was informed that she can neither get compensation under COIDA, nor could she get unemployment insurance benefits. The Applicants launched an application in the High Court of South Africa to have section 1 (xix)(v) of the COIDA declared unconstitutional to the extent that it excludes domestic workers employed in private households from definition of "employee".¹⁵³

The High Court failed to furnish reasons for its declaration of constitutional invalidity and the matter was taken to the Constitutional Court. The Respondents submitted that the exclusion of domestic workers amounts to unfair discrimination and impairs the fundamental dignity of domestic workers. They further submitted that because domestic workers are predominantly Black women that means the discrimination against them constitute indirect discrimination based on race and gender. The constitutional court found section 1 (xix)(c) unconstitutional and invalid.¹⁵⁴

¹⁴⁹ Wright E, 'Workplace Hazards and Health Among Informally Employed Domestic Workers in 14 Cities, United States, 2011-2014-Using Four Approaches to Characterize Workers Patterns of Exposures' (2022) *Department of Social and Behavioural Sciences* 20

¹⁵⁰ Domestic Workers and Global Risks and Prevention European Federation for Services to India Report.

¹⁵¹ *Mahlangu and Another v Minister of Labour and Others* 2021 (1) BCLR SA 54 (CC).

¹⁵² 2021 (1) BCLR SA 54 (CC) para 7.

¹⁵³ See Section 1 (xix)(c) of COIDA.

¹⁵⁴ *Ibid.*

Authorities should monitor and enforce OHS regulations in the private household sector. This may include conducting inspections and addressing violations.¹⁵⁵ Domestic workers should have access to healthcare services for the treatment of work-related injuries and illnesses, as required by COIDA.¹⁵⁶ Efforts should be made to empower domestic workers with knowledge of their rights and the confidence to assert those rights when needed. Ensuring the OHS of domestic workers in South Africa is a matter of social justice and equity. It is essential to address the specific vulnerabilities and challenges they face while working in private homes. Comprehensive legislation, effective enforcement, and ongoing awareness campaigns can help improve OHS conditions for this often-marginalized group of workers.

3.6 Conclusion

In conclusion, South Africa's stance on the issue of OHS for migrant and semi-skilled workers employed in agriculture, domestic sector, construction, and mining is a complex and evolving one. The country has made significant strides in recognising the importance of safeguarding the well-being of these vulnerable working groups. However, challenges persist, including inconsistent enforcement of OHS regulations, inadequate training and awareness, and barriers to accessing healthcare services. This chapter illustrates an inherent gap in the system of OHS in South Africa. There is a need for a unified system which will address issues of OHS in a coordinated and unified manner.

Efforts must continue to enhance protection for these workers, addressing disparities in OHS standards, and ensuring that regulations are effectively implemented and enforced across all sectors. Moreover, collaboration between government, employers, and labour unions, as well as engagement with international organisations will be crucial in achieving better safety and health outcomes for migrant and semi-skilled workers. Ultimately, South Africa's commitment to improving OHS for these workers reflects its dedication to upholding human rights and social justice, making progress in this area is a critical endeavour for the nation's future prosperity and inclusivity.

¹⁵⁵ International Labour Organisation: Labour Inspection in Domestic Work New ILO Curriculum on Building Modern and Effective Labour Inspection Systems (2022) <http://www.ilo.org/whatwedo/events/WCMS_209484/lang--en/index.htm> Accessed 10 November 2023.

¹⁵⁶ Sjoberg E, (Masters Dissertation) 'Enforcement of Laws Regulating Domestic Work, A Case of study of South Africa' (2011) Faculty of law Lund University <<http://lup.lu.se/lup/download?File&recordOID=2158754&fileOLD=2164686>> Accessed 11 November 2023.

CHAPTER 4: COMPARATIVE ANALYSIS OF OHS PRACTICES OF MIGRANT WORKERS FROM DEVELOPING COUNTRIES IN AFRICA AND DEVELOPED COUNTRIES IN EUROPE WITH THE BEST OHS PRACTICES.

4.1 Introduction

OHS of vulnerable workers such as semi-skilled and migrant workers, remains a pressing issue in many African countries. The issue of OHS practices is also affecting domestic workers as they are working in unsafe working environments. To gain a better understanding of the treatment of these workers and the OHS practices in different countries, a comparative analysis is done. In this chapter, the comparison will be made between South Africa, Denmark, and Netherlands. By examining the experience and approaches of various countries, we can find similar challenges, best practices, and potential solutions to improve the OHS conditions.

This comparative analysis aims to shed light on the similarities and differences among countries that are struggling with the protection and well-being of their vulnerable workforce, contributing to the development of effective strategies for enhancing OHS standards across the continent. International Labour Organisation has listed some countries in Africa that have poor OHS standards and South Africa is one of those countries. As Denmark has been marked to be the country with advanced OHS practice(s),¹⁵⁷ it will be used in the comparative.

4.2 Common Occupational Health and Safety Issues Faced by Migrant and Semi-Skilled Workers in Africa.

Puplampu discussed various factors which affect OHS practices in Africa.¹⁵⁸ These factors revolve around issues of language barriers. Migrant workers may have limited proficiency in the local language, which makes it difficult for them to communicate with their supervisors and their co-workers.¹⁵⁹ Such vulnerable workers are not provided with the necessary training concerning the required health procedures and regulations. Some employers do not provide the workers with personal protective equipment (PPE). PPE includes hard hats, safety boots, gloves, and respirators, to protect them from workplace hazards.

¹⁵⁷ International Labour Organisation (2015) < <https://www.ilo.org/safework/countries/africa/lan-en/index.htm> >accessed 05 May 2023.

¹⁵⁸ Puplampu BB, 'Key Issues on Occupational Health and Safety Practices in Ghana: A Review' (2012) *International Journal of Business and Social Science* 32.

¹⁵⁹ Janta H et al 'Migrant Networks, Language Learning and Tourism Employment' (2012) *Tourism Management* 45.

The migrant and semi-skilled workers are usually paid low wages and thus have limited job security which often makes it difficult for them to negotiate safe working conditions. The migrant and semi-skilled workers who are employed in manufacturing industries such as timber textiles are often faced with physical hazards such as Machine-related injuries.¹⁶⁰ Most of the workers who are employed in the mining industry/sector, especially those who work underground, sustain musculoskeletal injuries because they spend most of their time kneeling, bending, and carrying metals.¹⁶¹

Some countries such as (Denmark and Netherlands) have strict regulations and policies to protect the OHS of workers who are semi-skilled and foreigners, while others may have more relaxed or non-existent regulations. It is essential to research and understand the specific laws and regulations related to the OHS of each country. The problem of OHS laws and compliance does not only affect the African continent but most parts of the world. Countries around the world have laws regulating OHS, but they are struggling to enforce those laws. Kumie et al noted that-

Globally, the traditional way of producing goods and commodities has been revolutionized since the advent of the Industrial Revolution. This has made the workplace a concern of the public health sector. This concern seems to have appeared from the duty to protect workers from adverse health effects of workplace hazards. According to an estimate made by ILO, about 330 million accidents annually occur globally.¹⁶²

Some industries in Africa, such as the mining, and construction industries may pose significant risks to the health and safety of foreign workers due to the use of hazardous chemicals, heavy machinery, and other dangerous working conditions.¹⁶³ Employers must provide workers with protective equipment to protect themselves against dangers in the workplace.

Governments need to ratify international instruments and modify internal laws to protect those working in informal industries as vulnerable semi-skilled workers. There is also a problem of discrimination in these workplaces where workers are often reminded of their origin. Discrimination in the workplace is stressful, and it can affect the health of the

¹⁶⁰ Agriculture Safety. National institute for Occupational Health and safety. < <https://www.cdc.gov/niosh/topics/aginjury//default.html> > accessed 10 May 2023.

¹⁶¹ David, KG, et al ` Understanding the ergonomic Risk for Musculoskeletal Disorders in the United States Agriculture Sector' (2007) *Am F Ind. Med* 11

¹⁶² Kumie, A et al ` Occupational Health and Safety in Ethiopia: A Review of Situational Analysis and Needs Assessment' (2016) *Ethiop J Health Dev* 2.

¹⁶³ Amponsah- Tawiah K, `Occupational Health and Safety: Key Issues and Concerns in Ghana'(2011) 2 (14) *International Journal of Business and Social Science* 124.

workers amid OHS issues.¹⁶⁴ These discriminations also extend to the provision of medical aid, where they are side-lined because of them not being citizens in those countries.

4.3 The Occupational Health and Safety of Migrant and Semi-Skilled Workers in Ghana

As it has been stated, Ghana is also struggling with OHS practices and compliance. In Ghana, OHS is enforced by the Labour Act¹⁶⁵ which contains a provision for OHS. In terms of Article 175 of the Labour Act, which states the definition of a worker, extends to Migrant workers as well as domestic workers.¹⁶⁶ The laws which are enacted must protect the migrant workers regardless of their nationality. The government of Ghana introduced the Safety and Health in Agriculture Convention,¹⁶⁷ with its aim to protect the workers who are employed in the agriculture industry to ensure the well-being of agricultural workers.

The OHS of migrant and semi-skilled workers in Ghana are of great concern. Ghana has the most unskilled people who usually perform physical labour such as working with heavy materials and carrying metals and they lack knowledge of the OHS requirements. Migrant and semi-skilled workers are mostly found in the construction industry, and they are subjected to health hazards.¹⁶⁸ OHS in Ghana is not given research attention. Barling¹⁶⁹ has noted that less than one percent of organizational and national research focuses on issues concerning OHS issues.

Ghana's Constitution as the supreme law of the country, especially article 24(1)¹⁷⁰ of that Constitution, which states that "every person has the right to work under satisfactory, safe and health conditions"; has resulted in several legislative frameworks being enacted to regulate issues of OHS in Ghana which include the Factories, Offices and Shops Act,¹⁷¹ and Mining Regulations Act.¹⁷² When employees have sustained injuries in the workplace, they are

¹⁶⁴William, D et al ` Racism and Health: Evidence and Needed Research' (2019) *Annual Review of Public health* 111.

¹⁶⁵ Labour Act 1 of 2003(Labour Act).

¹⁶⁶ See Article 175 of the Labour Act.

¹⁶⁷ Safety and Health in Agriculture Convention 184 of 2001.

¹⁶⁸ Kheni, NA ` health and Safety management in Developing Countries: A study of Construction SMEs in Ghana' (2008) *Construction Management and Economics* 1169

¹⁶⁹ Barling, J et al ` Development and Test of a Model Linking Safety-specific Transformational Leadership and Occupational Safety' (2002) *Journal of Applied Psychology* 496.

¹⁷⁰ Ghana Constitution of 1992.

¹⁷¹ Factories, Offices and Shops Act 328 of 1970(FOSA).

¹⁷² Mining Regulations Act 665 of 1970(MRA)

entitled to compensation which is regulated by Workman's Compensation Law.¹⁷³ They also have the Environmental Agency Act¹⁷⁴ which is responsible for the safety of the workers.

The above legislation was enacted to put in place measures that could help workers to follow and be protected for their safety. However, it is generally accepted that these laws are inefficient to protect semi-skilled workers who are vulnerable due to informal industries. The other contributing factor to the issues of OHS is lack of supervisor training and poor infrastructures which may imminently collapse. There is also a lack of adequate professionals to monitor OHS standards imposed by law. It was stated by Muchiri¹⁷⁵ that-

Poor OHS infrastructure and finding, an insufficient number of qualified OHS practitioners, and the general lack of adequate information are among the main drawbacks to effective OHS practices.

There is a low level of ratification of the ILO conventions which regulate OHS in Ghana. Furthermore, there is a low level of implementation of OHS regulatory policies. Bavon¹⁷⁶ posits that factors that contribute to high occupational injuries in Ghana are lack of commitment to injury prevention, and the funds for injury prevention in public companies and individual companies as some of the factors.

4.5 Occupational Health and Safety Practices in Denmark

OHS in Denmark are governed by the Danish Working Environment Act,¹⁷⁷ which sets out the regulations and guidelines for the protection of the health and safety of workers in all industries. DWEA stipulates that the employer has the sole responsibility for the avoidance of risks at work and for the application of control measures necessary to secure a healthy and safe working environment. From the 1970s the major blocks in the Danish parliament, employers, and unions supported the system of OHS.¹⁷⁸

DWEA is therefore responsible for enforcing health and safety laws in the workplace. The workplace health inspectors in Denmark conduct regular inspections and guide employers and

¹⁷³ Workman's Compensation Law 187 of 1987(WCL).

¹⁷⁴ Environmental Agency Act 490 of 1994(EAA).

¹⁷⁵ Muchiri, FK `Occupational Health and Development in Africa, Challenges and the Way Forward' (2003) *African Newsletter on Occupational Health and Safety* 13.

¹⁷⁶ Bavon Al `Occupational Health and Safety in Ghana: An Agenda for Reform' (2000) 1 *African Social Science Review* 11.

¹⁷⁷ Danish Working Environment Act 1977(DWEA).

¹⁷⁸ Kabel, A et al `Occupational Health Services in Denmark-the Rise and Fall of a Multidisciplinary and Preventative Approach' (2016) < <http://dx.doi.org/10.1080/14774003.2007.11667700> > Accessed 27 July 2023.

employees on how to comply with the regulations. Employers and inspectors are required to provide access to occupational health services, which offer medical examinations, advice on workplace health issues, and assistance in promoting a healthy and safe working environment. The employers in Denmark are bound to provide information, training, and protective measures to employees.

DWEA provides guidelines for OHS authorities, regulatory agencies, and internal health and safety teams to prevent musculoskeletal disorders. The authority investigates accidents to identify their cause and looks for ways to prevent similar incidents in the future. Employers are encouraged to provide proper equipment and work organization that supports employee well-being. Other measures were implemented to address the OHS issues in Denmark. That includes the ratification of various international instruments.

4.5.1 The International Instruments which are Ratified by Denmark

- I. International Labour Organisation Convention No.155,¹⁷⁹ the convention was adopted in 1981 and it deals with occupational safety and health in the workplace. It aims to promote measures for the prevention of occupational accidents, injuries, and diseases, as well as the provision of appropriate occupational health services.
- II. ILO Convention No 161 on OHS services,¹⁸⁰ this convention emphasizes the importance of providing adequate health services to workers to promote a safe working environment for all including migrant workers as well as other vulnerable groups of workers. It was adopted in 1985 and it covers a wide range of occupations and industries. It sets guidelines and principles that should be followed by governments, employers, and workers to achieve and maintain effective occupational health services.
- III. This convention is important as it promotes and protects the health and well-being of workers worldwide. These services ensure the prevention and control of occupational hazards, diseases, and accidents, promoting overall workplace safety and well-being. This convention emphasizes the right of workers to the

¹⁷⁹ International Labour Organisation (ILO) Convention No.155 on occupational health and safety, 1981 <https://www.ilo.org> >accessed 09 August 2023.

¹⁸⁰ International Labour Organisation (ILO) Convention No 161 on Occupational health and safety services, 1985 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NOP55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C161,/Document > accessed 09 August 2023.

highest attainable standards of physical and mental health concerning their work environment. It recognizes the importance of preventative, curative, and rehabilitative OHS measures to protect workers from occupational-related risks.

- IV. ILO Convention No 187 on Promotional Framework for OHS and Health,¹⁸¹ this convention is of great importance in promoting and ensuring the safety and health of workers worldwide. It provides a comprehensive framework for countries to develop and implement effective occupational safety and health policies and programs. By ratifying this convention, countries commit to extending occupational safety and health, providing guidelines and principles that member states can follow to improve workplace safety for all workers.
- V. European Framework Directive on Safety and Health at Work,¹⁸² this convention improves working conditions. It also prevents workplace accidents, illnesses and promotes the overall health and safety of its workplace. The ratification of this convention demonstrates Denmark's alignment with its labour laws and regulations with international standards to protect the rights and welfare of its workers.

Denmark has also introduced certified OHS management (OHSM) which became an important instrument for companies in their efforts to ensure a healthy and safe work environment.¹⁸³

Migration has been known in countries all over the world, where people have moved to other countries for varied reasons. The DWEA ensures that migrant workers receive appropriate training and information on occupational health and safety. Danish law requires employers to provide training and information to all employees, regardless of their nationality or migration status. This shows that migrant workers in Denmark enjoy the same legal protections as local workers. There may still be challenges related to work conditions and equality, especially in industries with a higher concentration of migrant labour. Efforts are made to address these issues, as Denmark promotes equal working conditions for all employees.

Denmark has a well-established system for ensuring OHS in workplaces, with a focus on the prevention of regulations, employee participation, and the enforcement of regulations to

¹⁸¹ International Labour Organisation (ILO) Convention No 187 on Promotional Framework for Occupational Health and Safety and Health, 2006. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::P12100_ILO_CODE:C187 > Accessed 09 August 2023.

¹⁸² European Framework Directive on Safety and Health at Work (Directive 89/391/EEC).

¹⁸³ Hohnen P et al 'Making Work Environment Auditable-A Critical Case Study of Certified Occupational Health and Safety Management Systems in Denmark' (2011) < <https://doi.org/10.1016/j.ssci.2010.12.005> > Accessed 09 August 2023.

protect worker's well-being. Some countries may try to ratify some international conventions regulating OHS to decrease the accidents and health issues that are experienced by vulnerable workers.

4.6 OHS Practices of Netherlands

In the Netherlands, the OHS practices are taken seriously as they affect the fundamental rights of the employees. Employers have the primary responsibility for providing a healthy and safe workplace. Employees are obliged to follow the relevant safety conditions that apply within the workplace.¹⁸⁴ In the Netherlands, the legislation that is equivalent to South Africa's OHS is Occupational Safety and Health (OSH).¹⁸⁵ This act requires employers to ask for professional support when they formulate and implement their OHS policies which will guide the employees in the workplace. These are efforts that were taken by the government of the Netherlands to ensure the safety and health of employees in the workplace.

The Dutch Working Conditions Act was introduced to ensure that the employees and employers in the workplace follow the policies that are formulated. It provides that employers and employees must take personal responsibility for health and safety. Under this legislation, the employees are duty-bound to behave responsibly. This means that employees may not jeopardize their safety or that of others. Employees must comply with work instructions and use materials that they were given to protect themselves.

OHS for migrant workers in the Netherlands is an important aspect of ensuring their well-being while working in the country. The Dutch government and relevant authorities have taken steps to safeguard the rights and safety of all workers including migrants. Migrant workers are entitled to equal treatment. This includes the same legal protections, access to safe working conditions, fair wages, and proper accommodation.

Dutch laws and regulations mandate that employers provide a safe working environment for all employees, including migrant workers. This involves ensuring proper training, providing necessary safety equipment, and addressing potential hazards. Migrant workers have access to health services. Unions and advocacy groups are urged to support migrant workers to avoid exploitation.

¹⁸⁴ The Netherlands Labour Authority Works for Fair, Healthy and Safe Working Conditions and Socio-economic Security for Everyone. < <https://www.nl labourauthority.nl/topics/health-and-safety#:~:text=Employers%20have%20the%20primary%20responsibility%20for%20providing%20a%20situation%20whereby,that%20apply%20within%the%20workplace>> Accessed 19 August 2023.

¹⁸⁵ Occupational Safety and Health Act.

4.6.1 The International Conventions Which Regulate Migrant Workers' Working Conditions in the Netherlands

In terms of International Labour Standards on Migrant Workers' Rights,¹⁸⁶ it defines migrant workers as people who leave home to find work outside of their hometown or home country. The Netherlands Labour Authority considers agriculture as one of the top risk sectors for unfair work of migrant workers. Research has proven that most of the migrant workers from central and Eastern Europe are employed in agriculture.¹⁸⁷ That shows us that the Netherlands is also experiencing the same challenges. But they have enacted better laws that are protecting the migrant workers. The Netherlands ratified the following international instruments to ensure that the OHS issues are addressed.

- I. ILO Multilateral Framework on Labour Migration,¹⁸⁸ This convention states that the human rights of all migrant workers, regardless of their status, should be promoted. All migrant workers should benefit from the principles and rights in the 1988 ILO Declaration on Fundamental Principles and Rights at Work and its follow-up, which are reflected in the eight fundamental ILO Convention. It further states that governments should ensure that national laws and practices that promote and protect human rights apply to all migrant workers and that they are respected by all concerned.
- II. European Social Charter,¹⁸⁹ This charter outlines the right of workers to safe and healthy working conditions, including measures to protect workers in hazardous occupations and during night work. The Netherlands ratified this convention to protect the migrant workers.

Three international instruments focus specifically on migrant workers and migration for employment which are - ILO Convention 143, the Migrant Workers (Supplementary Provisions)

¹⁸⁶ International Labour Standards on Migrant Worker's Rights (2007) Guide for Policymakers and Practitioners in Asia and the Pacific *International Labour Office* 7.

¹⁸⁷ Astrid, K et al `Migrant Labour in Dutch Agriculture: Regulated Precarity (2022) *European Journal of Migration and Law* 2.

¹⁸⁸ ILO Multilateral Framework on Labour Migration < <https://www.unhcr.org/sites/default/files/legacy-pdf/4b9fabe99.pdf&ved=2ahUKEwjKnfbH--eAAxWrVEEAHWVwC1oQFnoFnoECC8QAQ&usq=AOvVaw1f0OvVaw1f0O6tmllwhMqhn71tAoeD>> Accessed 19 August 2023.

¹⁸⁹ European Social Charter Chapter 1 Article 3 < <https://www.google.com/search?q=european+social+charter+article+3&og=&qs=chrome.1.69i58j35i39j36i524i14.-1j19&client=chrome-mobile&ie=UTF-8#sfbu=1&pi=european%20social%20charter%20charter%201%20article%203> > Accessed 19 August 2023.

Convention,¹⁹⁰ and the UN International Convention on the Protection of the Rights of Migrant Workers and Members of their Families. These international instruments protect the migrant workers against OHS and social security adopted by the ILO. The Netherlands has ratified these instruments to protect the migrant workers who are working in the Netherlands.

The Netherlands is often considered one of the countries with strong OHS practices. The Dutch government has established strict OHS regulations that companies are required to adhere to. These regulations cover a wide range of workplace safety aspects, from ergonomics to hazardous materials handling. The Netherlands placed a strong emphasis on worker participation in OHS matters. This includes the formation of works councils that allow employees to have a say in safety and procedures.

In the Netherlands, they also have supportive structures that include safe and modern workplaces, proper equipment, and technologies that contribute to overall safety. Collaboration also assists in lowering the risks and health issues in the workplace. Collaboration between government agencies, employers, and trade unions fosters a cooperative approach to OHS practices, leading to better implementation and enforcement. The Netherlands has invested in research and innovation related to occupational health, which helps in developing cutting-edge practices and limits death and injuries in the workplace.

4.7 Conclusion

Most African countries are experiencing OHS practices, especially for migrant workers. The comparative analysis was conducted to check the laws, regulations, and policies that govern OHS in workplaces in various countries in Africa. It was discovered that legislations are put in place for the protection of the workers, and the responsibilities are passed to the employers, but there is a lack of enforcement of such regulations.

There is little research related to workplace exposures and their impact because scholars are not advised to conduct research about health and safety in workplaces. Most of the governments in African countries do not ratify the conventions that regulate the health and safety of the workers. The governments must be advised to ratify the conventions to limit the high OHS that are found in Africa.

¹⁹⁰ ILO Convention 143, Migrant Workers (Supplementary Provisions) Convention, (1975) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::P12100_instrument_id:312288> accessed 21 August 2023.

The comparative analysis was conducted where two African countries such as South Africa and Ghana as developing countries that are experiencing high OHS issues. There are similarities in terms of legislations and policies that regulate the OHS of migrant workers. The two other countries that are developed in terms of OHS are Netherlands and Denmark and were used in this comparative analysis. This is because Denmark and the Netherlands are ranked as the best countries with OHS practices in Europe.

The governments of the Netherlands and Denmark are taking part in improving the safety and health of workers in informal workplaces. They modified the laws to ensure that workers and employers comply with them. This comparative analysis is important because it provides valuable insight due to the advanced social welfare systems, strong labour regulations, and high standards for workplace safety. This comparative analysis highlighted effective strategies, areas for improvement, and potential lessons for South Africa.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

In the dynamic tapestry of South Africa's labour landscape, the health and safety of migrant and semi-skilled workers emerge as crucial threads woven into the fabric of sustainable development. As we navigate the intricate challenges faced by this resilient workforce, this study serves as both a compass and a call to action. In South Africa we have the laws which regulate the safety and health of the workers and the laws which regulate the aftermath of the injuries obtained in a workplace. There are migrant workers who leave their homes to come and work in South Africa so that they may provide for their families. We also have the semi-skilled workers in various workplaces and the laws of the republic do not do enough to protect them against the dangers in a workplace.

The international instruments which were mentioned in this study must be utilized to solve such issues in a workplace. South Africa also, as a member state of the international organisation must ratify some of the international instruments such as ILO Convention 143 on Migrant Workers and ILO Convention 97 on Migration for Employment so that the migrant and semi-skilled workers may enjoy the protection against dangers and health in the workplace.

The comparative analysis was conducted in this study to check the laws, regulations, and policies that govern OHS in workplaces in various countries in Africa. It was discovered that there is little research related to workplace exposures and their impact because scholars are not advised to conduct research about health and safety in workplaces. Most of the governments in African countries do not ratify the conventions that regulate the health and safety of the workers. The governments must be advised to ratify the conventions to limit the high OHS that are found in Africa.

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5.2 Recommendations

Improved safety trainings

Improvement in the health and safety programmes for migrant and semi-skilled workers is an important step. This program should be accessible, language inclusive, and cover essential aspects of workplace safety, hazard awareness and emergency procedures.

Multilingual communication

The linguistic diversity among workers must be recognized to ensure that all safety communications, including training materials, signage, and emergency protocols are available in multilanguage commonly spoken by the workforce.

Regular health check-ups

There must be establishment of routine health check-ups for migrant workers, addressing both physical and mental well-being. This includes access to basic healthcare services, vaccinations, and mental health support to mitigate the impact of the often stressful and challenging work environments.

Research and continuous improvements

The government must invest in ongoing research to understand the evolving challenges faced by migrant and semi-skilled workers. Use the findings to continuously adapt and improve ohs policies and laws.

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