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## **‘Trade Unions Are Their Own Obstacles’**

*Trade Union Policies and Practices in Response to  
Undocumented Migrant Labour in Post-Apartheid South Africa*

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for the Award of the

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### DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

# ABSTRACT

*The South African economy has a historically entrenched dependence on the Southern African regional labour market that dates back to the colonial period. In post-apartheid South Africa, rising domestic and global economic competition has prompted employers to seek flexible and cheap forms of labour. This has coincided with a rise in migration to South Africa by African migrants in search of economic opportunities, from the sub-Saharan region and beyond. 'Restrictionism' and 'protectionism' in the immigration regime has resulted in illegal migration and some African migrants work without legal authorisation. Such undocumented migrant workers are considered the cheapest and most flexible and compliant labour. This dissertation explores the response of the South African trade union movement to immigration in post-apartheid South Africa. In addition, while recognising that the extent of undocumented migrant labour is not known, the research also attempts an examination of the policies and practices of nine registered trade unions in the Western Cape province of South Africa in response to the vulnerability of undocumented migrant workers. The research focuses on registered trade unions in the construction sector, agricultural sector, private security and domestic services sector. Triangulation of research methods was employed, whereby semi-structured interviews were conducted and complemented with documentary sources of data. The dissertation concludes with the thesis that trade union federations, despite having demonstrated solidarity with, and defended, migrants during the post-apartheid immigration policy reform process, were diplomatically exclusionary and anti-immigration throughout that period. The second thesis is that migrants working in South Africa without legal authorisation continue to be excluded from trade unions. Thus, while trade unions claim*

*they have an 'open door' policy, undocumented migrants are excluded from trade union membership. This exclusion is embedded in policies and practices; thus trade unions remain 'their own obstacles' to organising undocumented migrants. Although trade unions have initially reacted defensively and failed to organise migrant workers, the threat and impact of xenophobia has led to increasing recognition that migrant workers must be incorporated in the labour movement and their rights defended for the greater good of all workers. Consequently, some trade unions have taken initiatives to organise and defend undocumented migrants, but these initiatives remain ad hoc and inconsistent. There have been no effective attempts to organise undocumented migrants beyond the workplace in terms of either policy or practice. Trade unions remain locked in 'narrow economism'. The nature of this response has challenged the notion of worker solidarity which is at the heart of the labour movement's rhetoric. Solidarity with migrants remains a 'publicly touted' truism that gets lost in everyday practices.*

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## LIST OF ACRONYMS

ACA	Aliens Control Act
ANC	African National Congress
AFL-CIO	American Federation of Labour and Congress of -Industrial Organizations
BAWUSA	Bawsi Agricultural Workers Union of South Africa
BCEA	Basic Conditions of Employment Act
BWAWUSA	Building, Wood and Allied Workers' Union of South Africa
BWU	Building Workers Union
CCMA	Commission for Conciliation, Mediation & Arbitration
CC.OO	The Worker's Commission (a trade union federation in Spain)
COSATU	Congress of South African Trade Unions
CONSAWU	Confederation of South African Workers' Unions
CoRMSA	Consortium for Refugees and Migrants in South Africa
DHA	Department of Home Affairs
DOL	Department of Labour
DRC	Democratic Republic of Congo
FAWU	Food and Allied Workers Union
FEDUSA	Federation of Unions of South Africa
FLOC	Farm Labour Organizing Committee
GAPWUZ	General Agricultural and Plantation Workers Union of - Zimbabwe
HSRC	Human Sciences Research Council
ICFTU-AFRO	International Confederation of Free Trade Unions- African Regional Organisation

ICU	Industrial and Commercial Workers Union
ILLD	Institute of Labour Law and Development (UCT).
ILO	International Labour Organisation
JIPSA	Joint Initiative for Priority Skills Acquisition
LRA	Labour Relations Act
MDA	Mineworkers Development Agency
NACTU	National Council of Trade Unions
NEDLAC	National Economic and Development Labour Council
NCFAWU	National Certified Fishing and Allied Workers Union
NDLON	National Day Labour Organizing Network
NUM	National Union of Mine Workers
PASSOP	People Against Suffering, Suppression and Oppression
SADC	Southern African Development Community
SADSAWU	South African Domestic Services and Allied Workers Union
SAMP	South African Migration Project
SATAWU	South African Transport and Allied Workers Union
SEZ	Special Employment Zone
TEBA	Employment Bureau of Africa
UGT	The General Union of Workers(Spain)
UN	United Nations
USA	United States of America
WNLA	Witwatersrand Native Labour Association

# INTRODUCTION

The confluence between the ‘sociology of globalisation’, ‘sociology of migration’, ‘sociology of work’ and ‘sociology of trade unionism’ leads to one of the subject areas that has attracted many scholars and has received wide coverage in South Africa and abroad, i.e. trade unionism and migrant labour. Globalisation of labour has attracted many scholars across other disciplines such as anthropology, history, demography and economics. For early sociologists such as Comte (1798–1857), Durkheim (1858–1917) and Marx (1813–86), the phenomenon of migration, as well as its consequences, were at the heart of sociological concerns and inquiry. For example, Durkheim was interested in the disintegration of rural solidarity and the subsequent movement to the cities for survival. Since the writings of the radical Marx, migration has been viewed as a ‘brutal and forceful process’ alienating humankind. Marx argues that masses of peasants who were forcibly separated from their land and means of subsistence, were ‘proletarianised’ in the labour market as ‘free’, defenceless and ‘rightless workers’.<sup>1</sup> The ‘sociology of migrant labour’ is as old as sociology itself.

Later sociological inquiries investigated the extent to which modern capitalism required migrant labour to function profitably. For example, Burawoy (1976, 1051) was interested in how ‘the flow of labour is

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<sup>1</sup> By the phrase ‘free’ proletarians, Marx means that workers were ‘freed’ or divorced from their own means of production (land) but also ‘unfree’, because they had to sell their labour, the only possession they were left with. An example of ‘unfree’ labour was of slaves imported from West Africa.

regulated to a greater and lesser extent to suit dominant political and economic interests in South Africa and the United States'. Miles (1982) was concerned with race relations and migrant labour in Britain, with labour vulnerability and discrimination against migrant labour being an area of concern. Other sociologists have explored the role of trade unions. The sociology of trade unionism became concerned with working class politics and trade union development<sup>2</sup>, as well as social transformation in the capitalist system (e.g. Munck, 2002). Other sociologists have focused on a topic that has not received much attention in post-apartheid South Africa; trade unions and their response to immigration, in particular Kahmann, 2002; Gordon, 2005, Trimikliniotis, Gordon and Zondo, 2008).<sup>3</sup> Migrant labour, whether local or international, is at the core of sociological inquiry in South Africa and abroad.

South Africa has a deeply entrenched dependency on other Southern African countries for labour. Labour migration to South Africa dates to the establishment of the Cape Colony in 1652 and the subsequent importation of slaves, indentured foreign labour and the highly formalised migrant labour system. The International Confederation of Free Trade Unions – African Regional Organisation (ICFTU-AFRO) Conference on Migrant Labour held in Nairobi in 2004 (2004: 5) noted in its summary that poverty, failed economic policies, poor governance and political instability, national and regional conflicts, and disorganised

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<sup>2</sup> e.g. Lester's (1958) classic view, Michel's iron law of oligarchy, Webster (1994) on the rise of social movement unionism in South Africa.

<sup>3</sup> Kahmann (2006) cited in Hyland (2012: 8) considers the 'ambiguous relationship' that trade unions in the western world have with migrant labour.

labour markets remain major push factors for international migration in Southern Africa and other parts of the sub-continent (also see Crush and Williams, 2001:4). With the fall of the apartheid regime in 1994, South Africa's relatively democratic and favourable economic environment continues to pull many African migrants from neighbouring Southern African countries and beyond. The post-apartheid government initially took an anti-migration stance, couched in the language of job protection for the citizens. As a result of 'restrictionism and protectionism' in the immigration policy (Crush and Williams, 2001: 9-10), it is extremely difficult for low-skilled African migrants to obtain legal documents authorising them to work in South Africa. While the number of undocumented or 'illegal' migrants working in South Africa is nearly impossible to calculate, it is acknowledged that a sizeable number of migrants proceed to work in South Africa without the legal authorisation.<sup>4</sup>

The rise in domestic and global competition has prompted employers to seek flexible forms of labour and undocumented migrant workers provide a final cushion for employers. As Sitas (2010) notes, they are considered to be flexible, cheap and compliant labour. The ICFTU-AFRO (2004: 2-5) concluded that 'migrant labour has assumed importance both for host and sending countries, yet migrant workers are usually found in three-D jobs'.<sup>5</sup> There is vast literature in South Africa

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<sup>4</sup> Undocumented migrants are sometimes referred to as 'unsanctioned' migrant workers, 'unauthorised' workers or 'illegal' migrant workers. These terms imply that they do not have work permits or the legal authorisation to work in South Africa. They are equivalent to the *sans papier* (without papers) in France.

<sup>5</sup> Dirty, dangerous and degrading.

documenting the vulnerability of undocumented international migrants (see CoRMSA, 2011; Mawadza, 2008; Mapira 2009, Barientos, 2007; Trad, Tsunga and Rioufol, 2008 and Griffin, 2011). Thus, although migrant labour has assumed importance for both sending countries and receiving countries (ICFTU-AFRO, 2004: 2-5), migration results in new vulnerabilities and realities that have to be negotiated by those involved, with dire consequences for those without the legal authorisation to sojourn and work in South Africa. On the other hand, there is a general expectation that trade unions are there to champion workers' interests. Commitment to 'international worker solidarity' lies at the core of the labour movement rhetoric and in most instances it is realised in practice. Hyman (1994, 2001) (cited in Hyland, 2012: 6) described unions as 'schools of war' in a struggle between labour and capital; and as 'vehicles for raising workers' status in society and advancing social justice'. The ICFTU-AFRO (2004: 5) argues that trade unions are duty bound to organise and defend the rights of migrants. Thus, in the growing globalisation of labour, trade unions and other social movements can respond, and have responded, in different ways to migration and the vulnerability of international migrants, documented or otherwise.

According to Munck (2011: 10), trade unionists may incorporate migrant workers into their organisations and press for the leveling-up of labour standards, or conversely, they may go along with the mainstream racist and xenophobic discourse and actively lead the exclusionary offensive in the workplace. The research presented here highlights the dilemmas that the labour movement, not only in South Africa but

globally, faces as to how to respond to inward labour migration. There are two dilemmas outlined by Penninx and Roosblad (2000) (cited in Hyland, 2012: 8): firstly, 'whether to co-operate with or resist authorities and employers on the employment of migrant workers in the first instance', and secondly how to respond once migrant workers are in the country, that is, whether to incorporate them fully into the rank and file, or exclude them. The research deals with these two dilemmas by investigating how the South African labour federations responded to immigration during the immigration policy reform process in post-apartheid South Africa. Secondly, it investigates how trade unions in the Western Cape Province of South Africa have responded to the vulnerability of undocumented African migrants once they are employed. While the focus is on undocumented migrant workers, 'one should bear in mind that legal migrants may also be vulnerable' (Vucetic 2004: 5, in Mawadza, 2008:1). However, the researcher asserts that undocumented migrants, by virtue of their illegality or irregular status, are more vulnerable than their legal counterparts.

Although some research has been done to explore the South African labour movement's response to immigration and migrant labour (see Kahmann, 2002; Gordon, 2005; and Trimikliniotis, et al., 2008), there remains a dearth of information on trade union policies and practices towards undocumented migrant workers in post-apartheid South Africa. This study was imperative because of the fact that the issue of 'illegal' migrant workers has become a topical in South Africa, as are xenophobia, immigration debates, unemployment and the call for decent

work. This issue deserves wide investigation and the proposed research could be beneficial to the academic community as it could be a basis for further research in this subject area. The research can also prove practically useful for the labour movement in its endeavour to organise and defend migrant labour in post-apartheid South Africa.

The task of exploring trade union responses to immigration and to the vulnerability of undocumented migrant labour in South Africa is spread across nine chapters. Chapter 1 gives a comprehensive background and review of existing literature on the history of migrant labour in South Africa. Chapter 2 explores the vulnerability of migrants and undocumented migrants in particular, giving both local examples. Literature on trade union responses to the migration of labour, giving both local and international examples for comparative analysis, is a preserve for Chapter 3. Chapter 4 explores trade union practices in regard to migrants, giving international examples. Research questions, the methods employed in the inquiry and the limitations thereof are explained in Chapter 5 and 6 respectively. Chapter 7 gives an analysis of the nature of the labour movement's response to immigration policy in post-apartheid South Africa, using Trimikliniotis et al.'s (2008) framework. Chapter 8 explores the current perspectives and practices of trade unions in response to the vulnerability of undocumented migrants. It looks at whether trade unions' perspectives pre-dispose them to respond in a certain way. Concluding remarks and further research issues are outlined in Chapter 9.

**PART ONE**  
**LITERATURE REVIEW**

University of Cape Town

# 1. HISTORY OF MIGRANT LABOUR IN SOUTH AFRICA

## *1.1 The Early Phase and 'Indentured Migrant Labour'*

A Cross-border migration for work is nothing new in South African history, nor are labour problems. As Crush notes, it 'preceded the drawing of colonial boundaries and continued after those borders were established', (nd: 1)<sup>6</sup>. Slaves were imported into the Cape Colony as early as 1652. Indentured labour was introduced by 1860 in the sugar plantations of Natal, to relieve the shortage of labour. The labour problems were also lessened by the importation of 'indentured Chinese from north of China' (Wilson, 1972: 4). Native African migrants were also 'roped' in to solve the labour problems. Labour problems escalated with the discovery of minerals in the second half of the 19th century. According to Wilson 'the Kimberley diggings employed no less than 10 000 black workers and by the turn of the century 100 000 migrant workers were employed in the Witwatersrand gold mines' (1972: 1). Local migrant labour was critical for industrial development, as it was for the farming industry. The shortage of labour in the farms and newly discovered established mines in the late 1890s led to tension between farmers and mine owners (Wilson, 1972: 4). Due to the persistence of labour shortage, labour was sourced from other southern African colonies. Jeeves notes that by 1902 the mining industry put unrelenting pressure on the Transvaal government, then on its Union successor, and colonial administrations of Nyasaland and Mozambique in its effort to

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<sup>6</sup> This article does not have a date, even the official article on the SAMP website.

control the emigrant labour of these sources (Jeeves, 2001: 12). It is evident that early migrant labour in South Africa was critical and had both an internal and international dimension.

### ***1.2 Highly Formalized Migrant Labour System: 1910-1990***

The colonial era witnessed a highly formalised and regulated contract labour system in the mines which depended on migrant labour (Kahmann, 2002: 14). Supporting the migrant labour system was a 'racially-motivated immigration system' that served to entrench white supremacy, the desire to expand the white population and control the mobility of African labour to meet the cheap labour needs of mining and agriculture (Gordon , 2005: 29 and Trimikliniotis et al., 2008: 1334). Internal migration also took place in the pre-1994 era where the majority of 'non-white' pass bearers were regarded as 'foreigners' recruited from reserves (Kanyenze, 2004: 2-3). The migrant labour system was the 'source of some of the central repressive institutions of white domination in South Africa - influx controls, single-sex compounds, the colour bar and low wage policies' (Crush, nd: 4). Although sectors such as agriculture and construction also relied on migrant labour from the SADCC region, the mining industry was the dominant employer of foreign workers and 'by 1973 80% of black labour employed in the mines was foreign' (Baraway, 1976: 1062). By 1966 between 50 000 and 75 000 Rhodesians (now Zimbabweans) were employed in South Africa, either in gold mines, farms or construction (Nkau, 2003). *Table 1*

below traces how many workers were coming into the South African mine industry from which sources countries.

Table 1: *Contract Migrant Labour in South African Mines, 1920-1990*

	Angola	Bots.	Lesotho	Mala	Moza.	Swazi	Tanz.	Zam b.	Zim	Othe r	Total
1920	0	2,112	10,439	354	77,921	3,449	0	12	179	5,484	99,950
1925	0	2,547	14,256	136	73,210	3,999	0	4	68	14	94,234
1930	0	3,151	22,306	0	77,828	4,345	183	0	44	5	99,355
1935	0	7,505	34,788	49	62,576	6,865	109	570	27	9	112,498
1940	698	14,427	52,044	8,037	74,693	7,152	0	2,725	8,112	70	168,058
1945	8,711	10,102	36,414	4,973	78,588	5,688	1,461	27	8,301	4,732	158,967
1950	9,767	12,390	34,467	7,831	86,246	6,619	5,495	3,102	2,073	4,826	172,816
1955	8,801	14,195	36,332	12,407	99,449	6,682	8,758	3,849	162	2,299	192,934
1960	12,364	21,404	48,842	21,934	101,733	6,623	14,025	5,292	747	844	233,808
1965	11,169	23,630	54,819	38,580	89,191	5,580	404	5,898	653	2,686	232,610
1970	4,125	20,461	63,988	78,492	93,203	6,269	0	0	3	972	265,143
1975	3,431	20,291	78,114	27,904	97,216	8,391	0	0	2,485	12	220,293
1980	5	17,763	96,309	13,569	39,539	8,090	0	0	5,770	1,404	182,449
1985		18,079	97,639	16,849	50,126	12,365	0	0	0	4	196,068
1990	0	15,720	108,780	72	50,104	17,816	0	0	2	0	192,044

**Source:** Crush & Williams (2002: 7).

As shown in *Table 1*, Crush (nd: 3) categorises the source countries into three distinct categories. Most of the foreign workers were recruited from ‘longstanding suppliers such as Mozambique, Botswana, Lesotho and Swaziland with relatively consistent numbers’ (Crush, nd: 3). ‘Episodic suppliers’ such as Malawi and Zimbabwe had fluctuating numbers over time (Crush, nd: 3). Lastly, there were ‘occasional suppliers’ such as Zambia, Tanzania and Angola whose labour was once important but was no longer important by 1970 (Crush, nd: 3). This

shows the heavy dependence on foreign labour in the economy of apartheid South Africa.

Some scholars have explored the organisation of recruitment of local and international migrant labour in the migrant labour system. Wilson (1972) and Jeeves (2001) examine the role of recruitment organisations in procuring migrant labour both within South Africa and in the Southern African region.<sup>7</sup> For example, in 1974 the Witwatersrand Native Labour Association (WNLA) and the Rhodesian government entered an agreement, and WNLA was given exclusive rights to recruit labour from the Southern African region (Kanyenze, 2004: 4).<sup>8</sup> Later on TEBA played a significant role in recruitment of foreign workers in the Southern African region. Scholars also explore the significant role of the state in organisation of the supply of labour. Jeeves (2001) notes that the state played a significant role through pass laws and other coercive statutes that regulated the movement of Africans and brought them under industrial discipline (Jeeves, 2001: 10).<sup>9</sup> Thus, ‘the industry could not have established its system without the massive and persistent intervention of the government’ (Jeeves, 2001: 10). In the same vein, Barawoy (1976: 1062) shows how the system was regulated to suit the dominant economic and political interests, particularly of capitalism and

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<sup>7</sup> Examples of organisations which recruited migrant labour are: The Rand Native Labour Association, the Native Recruitment Corporation (which organised recruitment of black labour within South Africa), and the Witwatersrand Native Labour Association (WNLA).

<sup>8</sup> WNLA is what the Employment Bureau of Africa (TEBA) is now. WNLA was not confined to Rhodesia (present-day Zimbabwe) only; it established recruitment stations in present-day Namibia, Botswana, Zimbabwe, Zambia, Malawi, Lesotho, Swaziland and Mozambique (Kanyenze, 2004: 4).

<sup>9</sup> The Glen Grey Bill, The Native (Urban Areas) Act of 1923, The Bantu Laws Amendment Act, The Aliens Control Act and The Group Areas Act of 1950 are examples of statutes enacted by the state in its effort to regulate the migrant labour system.

the white minority.<sup>10</sup> South Africa's dependence on the regional labour market continued after the demise of apartheid.

### ***1.3 Post-apartheid Migration (1990s to Present)***

#### *1.3.1 Initial 'Protectionism'*

The fall of apartheid, as well as deteriorating social and political conditions in the sending countries, e.g. in Lesotho or Mozambique, 'most likely contributed to the new attractiveness of border crossings to South Africa' (Kahmann, 2002: 14). This led to the increase of migration, especially by African migrants from the Southern African region long excluded or confined to serve as cheap labourers in the mine' (Trimiklinotis et al., 2008). Until 2002, 'the post-apartheid South African government was generally unfavorable to the movement of skilled labour' (Kabwe-Segatti, 2008: 36). Thus, the post-apartheid South African government 'initially took a strong anti-immigration stance, couched in the language of job-protection for the citizens' (Kahmann, 2002: 14). Given the apartheid legacy of poverty and unemployment, highest importance was placed on stimulating employment and eradicating unemployment among South African citizens, to reverse the historical social injustice (Kabwe-Segatti (2008: 36). Despite the protectionism, there was still heavy dependence on migrant labour in South Africa. As Williams, Peberdy and Crush (2005: 7) note, 'by the 1990s mines continued to employ large numbers of foreign migrants...ironically the mines experienced major downsizing

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<sup>10</sup> As Wilson (1972: 127) notes, 'it was propped up by influx control and legislation', hence one cannot escape the fact that it was also political.

and retrenchments and retrenched native workers at a much faster rate than foreign workers during this period' (Williams et al., 2005:7). A study by Lincoln and Mararike (2000: 45-48) shows that, even after the fall of apartheid there was still a heavy dependence on Zimbabwean migrant workers in what they refer to as the "special employment zone" (SEZ) in the Limpopo province farms.<sup>11</sup>

### *1.3.2 Policy Inconsistency: Immigration and Economic Development*

Tenacious arguments from private sector employers and researchers that South Africa was experiencing a major skills crisis that was inhibiting economic growth led to a major shift in government immigration policy in the early 2000s towards what Crush (2011: 11) refers to as a 'skills-based immigration policy'. Kabwe-Segatti (2008: 36) notes that the government has 'stated with increasing clarity its conviction to encourage immigration by skilled workers' and this has been plainly spelt out in the Joint Initiative for Priority Skills Acquisition (JIPSA). Thus, the immigration of skilled labour is of strategic importance for South Africa as it run parallel to the economic need for skilled labour in South Africa. As a result, the Immigration Act of 2002 was designed to facilitate importation of skills (Crush, 2011: 11). However, there is a contradiction in post-apartheid immigration policy as far as the skills shortage is concerned. As Kabwe-Segatti (2008: 37) notes, the ruling party and its core constituency (notably in the labour movement) lend

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<sup>11</sup> Agricultural employment of Zimbabweans is "legal" within this zone under the terms of a special arrangement endorsed by both governments. Hence the Southern Africa region has long been serving as the labour reservoir for the South African gold and diamond; and farming industries (Lincoln and Mararike, 2000: 45 - 48).

their support to the ‘South African first’ employment policy, which is not easy to reconcile with the economy’s need for skilled labour. In the same vein CoRMSA (2011: 98) observed that, while very skilled migrants are critical, ‘it appears that the vast majority of international migrants (skilled or unskilled) are involved in informal employment and in labour-intensive sectors such as mining, construction, farming, hospitality, and security’. It is in this context that Kabwe-Segatti (2008: 37) argues that ‘the policy is not always easy to reconcile with the country’s overall need to recruit sufficient numbers of skilled workers, including from abroad where necessary’.

### 1.3.3 ‘Restrictionism’ and Illegal Migration

Academics and policy researchers have attributed the post-1994 surge in illegal migration to strict immigration policies. For example, Kahmann (2002: 14) notes that as a result of protectionism legal immigration dropped to an all-time low of less than 10,000 per annum in the late 1990s. Even in the post-2000 immigration regime, temporary residence and work permits became difficult to obtain. Crush and Williams concurred that ‘legal migration into South Africa was low and this growing *restrictionism* even penetrated the area of temporary migration for the purpose of work, and since 1990 there has been a decline in the issue and re-issue of temporary work permits’ (2001: 9-10) Explaining this state of affairs, Trad et al. (2008:10) argue that the policy requires migrants to be too qualified to get the legal documents to work in South Africa. Coupled with this, the ‘South African first’ employment policy requires employers to demonstrate that after due diligence they could not

find a South African to employ. According to Trad et al. (2008:10), most migrants work in low-skill sectors such as agriculture, construction and hospitality; and it is difficult for an employer to demonstrate that they could not find a South African to work in these sectors. Furthermore, the immigration policy also confines access to work permits for migrants by 'strictly linking it with an economic activity, and making it difficult to shift from one type of permit to another' (Trad et al., 2008: 36). As a consequence, hiring workers from abroad has become increasingly difficult and those 'foreign workers who are recruited, find themselves entwined in Department of Home Affairs (DHA) red tape' (Rogerson and Rogerson, 2002: 73-98). Because of the factors outlined, the shift to a protectionist policy did not prevent the strong increase in noncontract migration to South Africa (Kabwe-Segatti, 2008: 36). Migrants proceed to work in South Africa without the legal authorisation as 'various kinds of informal, unregulated and clandestine border crossings happen' (Kahmann, 2002: 14). A strict immigration policy coupled with red tape in the immigration department has been implicated as the main cause of irregular or undocumented migrants in the post-apartheid South Africa.

#### ***1.3.4 Quantifying Undocumented Migrants: a Clandestine Population***

Illegal migration to post-apartheid South Africa is nothing new. According to Crush et al. (2001:3) 'migrants in effect came and went virtually as they wished prior to the 1960s, although the system was strictly regulated through the pass laws. Employment of illegal migrants continued regardless of the apartheid government attempts to tighten its

controls on such movements (Crush et al., 2001: 3). There is controversy surrounding the number of migrants in South Africa. This is what Trimikliniotis et al. referred to as 'the numbers game' (2008: 1325-1326), where the number of migrants is constructed and stigmatised as a 'problem'. This has fuelled xenophobia. The Freedom Front has placed the number of illegal migrants at almost 8 million (Minaar & Hough, 1996: 127). The Human Sciences Research Council (HSRC) claimed that the population of illegal migrants is somewhere between 2.5 and 4.5 million – a figure which it withdrew later (Crush and Williams, 2001: 13). The number of 'illegal migrants were estimated to be somewhere between 3 and 6.5 million by a news article in the *Mail & Guardian* (28 January 2007). Reitzes (1998) and Crush (1998: 1-11) have criticised most of these figures as being magnified. Trimikliniotis et al. (2008: 1325-1326) argue that the numbers of illegal immigrants are near impossible to calculate, so we would hesitate to guess at figures.

There is a dearth of reliable and accurate information available about illegal migrant workers in South Africa. However, there are some attempts at gauging the number of illegal immigrants in South Africa. A mechanism for gauging the Zimbabwean influx into South Africa is through official deportation figures (Trimikliniotis et al., 2008: 1325-1329). Since the demise of the democratic dispensation, the number of illegal migrant deportations has grown significantly, according to Department of Home Affairs (DHA) figures given by Gordon (2005:

19).<sup>12</sup> Gordon's analysis shows that these reports, narrowly focusing on Zimbabwean illegal migrants, give the number of deported Zimbabweans at roughly 155 000 in 2003; and more than 167 000 in 2004. As demonstrated by the DHA statistics, Zimbabwean migrants make up an increasing high proportion of those deported, swelling from 47 697 (2001) to 74 765 (2004) and nearly 100 000 in 2005. In 2010, 275 762 irregular Zimbabwean migrants applied for work permits, according to the Zimbabwean Documentation Project Briefing by Department of Home Affairs Chairperson Ms M Maunye in September 2011. From such figures it is safe to conclude that legal migration into South Africa is low, but the number of illegal immigrants in SA remains uncertain and difficult to quantify given the clandestine nature of migration.

#### ***1.4 Summary***

The first point to be made is that the Southern Africa region has long been serving as a labour reservoir for the South African mining and farming industries. There is an entrenched dependency on migrant labour in South Africa, dating back to the colonial area. Although there are political reasons for migrating to South Africa, as in the case of refugees, the primary cause of temporary migration from the Southern African region remains the search for work and better livelihoods. Policy inconsistency in the post-apartheid immigration regime has resulted in illegal or undocumented migration in South Africa. The number of

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<sup>12</sup> This information comes from the Annual Reports of the Department of Home Affairs, 1994–2000; and Department of Home Affairs, Head Office, 2001–2004.

illegal migrants and undocumented migrant workers in South Africa is nearly impossible to accurately enumerate, given the clandestine nature of illegal migration, although researchers can examine deportation figures to gauge the prevalence of undocumented migration in South Africa. It is acknowledged that there is a 'problem' of undocumented migration in South Africa. However the extent of this problem is not known.

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## 2. VULNERABILITY OF MIGRANT LABOUR

### *2.1 Marxism, Class Structure and Migrant Labour*

Marxist literature concerning migrant labour locates the position of migrant labour within class relations, i.e. the position of migrant workers in the relations of production (Miles, 1982: 152). The *Unitary Working Class* thesis postulates that migrants share with the indigenous working class the dependent conditions of exploited waged labour (Miles 1982: 152). Coupled with this, racial and ethnic discrimination only serves to increase the impact upon these migrants of those otherwise common disadvantages. Scholars who subscribe to this notion argue that immigrants are an integral part of the working class (Westergaard and Resler, 1976: 356-60, as cited in Miles 1982: 152). The thesis advances the notion that the subject of exploitation is the same. Conversely, the *Underclass* thesis claims that migrants do not share the same experience as the native working class because of the impact of discrimination upon their position in the employment, education and housing markets (Miles, 1982: 152). They then occupy a class beneath the working class by virtue of these circumstances, hence the concept 'underclass' used by Rex and Tomlinson (1979: 275-6, as cited in Miles 1982: 152). Miles notes that discrimination ensures that they occupy a position within this 'underclass' with the consequence that they cannot be assimilated into

the mainstream working class (Miles, 1982:152). The *Divided Working Class* thesis concurs with the unitary perspective in that ‘both migrants and indigenous workers constitute the working class by virtue of their identical position to the relations of production’ (Miles, 1982: 15). Migrants, because of their inferior social conditions and lower incomes, occupy a distinct economic position within the working class (Miles, 1982: 152). Scholars such as Castells and Kosack (1973: 477, as cited in Miles 1982: 165) advance this notion and conceive of the working class as divided into two distinctive strata. These theoretical postulations have not escaped criticism. The *divided working class thesis* is dismissed by Miles (1982: 165) as economistic Marxism, because it fails to appreciate the significance of the impact of the political and legal framework on labour migration into host countries. The *unitarist* theory has also not escaped the same criticism, as it suggests that political and legal circumstances do not impact on the socio-economic conditions of migrant workers.

## ***2.2 Globalisation, Workplace Restructuring and Migrant Labour***

Research by Webster and Von Holdt demonstrates that ‘liberalization of the South African economy has intensified competition, leading to the evolution of three different worlds of work in which some workers benefit from global integration, some survive in employment, but under worse conditions, and others are retrenched and forced to make a living

in informal and unpaid work' (Webster, 2005: 56-57).<sup>13</sup> Thus, economic trends are creating an underclass commonly referred to as the 'precariate'. Standing goes on to describe this 'precariate' as a vulnerable class because their conditions are characterised by job insecurity, lack social security and benefits (Standing, 2011: 10). Gallo-Mosala posits that 'African migrants enter the South African labour market when it is undergoing structural changes as short-term and casual employment is growing, leaving many workers without protection' (2008: 3). Barientos draws a link between globalisation and the vulnerability of migrant labour in South Africa;<sup>14</sup> and demonstrate that the dynamics of global production are driving the intensified use of migrant labour (Barientos, 2007: 13). Based on five case studies, she concludes that 'the use of flexible migrant labour provides the final buffer for producers operating in this system' (Barientos, 2007: 13). Migrant and contract workers are considered the most flexible and lowest cost source of labour (Barientos, 2007: 13),<sup>15</sup> because as Sitas (2010) put it, they are 'hirable' on demand, available on call, exploitable at will and 'firable' at will.

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<sup>13</sup> The core workers are those in standard employment relationship which is usually permanent and secure; and on the other end of the spectrum there is non-core/non-standard workers and the peripheral workers (Theron and Godfrey, 2000: 4).

<sup>14</sup> This was also the case with other case studies in Chile, India, United Kingdom and Bangladesh.

<sup>15</sup> The study found that in all these countries 'conditions for migrant and contract workers were relatively worse than other workers as they were recruited through agents or third party labour contractors, some of who are unscrupulous, and at the worst extreme directly abused workers' (Barrientos, 2007: 7-10).

### ***2.3 'Illegality' and Vulnerability of Undocumented Migrants***

Standing notes that a 'denizen' is someone who, for one reason or another, has limited rights in practice (Standing, 2011: 14). Thus, denizens can be both locals and migrant workers who have been pushed to the periphery of society, economy and politics (Standing, 2011: 14). Undocumented migrants can be regarded as 'denizens' because of their precarious legal status. This is because, as Munck (2011: 10) argues, 'precarious work is matched by precarious citizenship status for many migrants'.<sup>16</sup> In other words 'labour market segmentation can be directly correlated to differential citizenship status' (Munck, 2011: 10). This is evident in South Africa where undocumented migrants are the most vulnerable owing to their 'illegality' (Trad et al. 2008: 5). Although casual and informal workers are vulnerable in general, undocumented migrant workers are regarded as the most vulnerable, cheap and compliant because of their immigration status. It is argued that 'citizenship categories are probably the main source of division within the global workforce (Munck, 2011: 10). This assertion gives credence to the *Underclass* perspective advanced by Miles (1982:165), as it suggests that political and legal circumstance do impact on the socio-economic conditions of migrant workers.

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<sup>16</sup> The French sans *papier* (undocumented) are a salient example of this new mobile, temporary, and disposable workforce (ibid)

The ICFTU-AFRO (2004: 2-5) noted that ‘instruments protecting migrant workers are not applied both locally and internationally’. In the same vein, CoRMSA observed that ‘while migrant workers are protected by certain aspects of South African law,<sup>17</sup> the immigration act undermines the rights accorded to undocumented migrants’ (2011: 98-99). The Immigration Act criminalizes the employment of undocumented migrants, which means that undocumented workers may be reluctant to report unfair treatment at workplaces for fear of arrest, detention, and deportation (CoRMSA, 2011: 99). Polzer, Kola and Araia (2010:10) argue that the criminalisation of such employment and strict immigration laws run the risk of exacerbating the conditions of work for many migrants.<sup>18</sup> ‘It creates conditions where such workers are discouraged to report abuses and exploitation by employers (Polzer et al., 2010: 10). Consequently, because of their precarious legal status, most undocumented migrants do not claim their rights nor seek redress for fear of arrest and deportation (Trad et al., 2008: 5). CoRMSA observed that many undocumented migrant workers who are arrested at their workplace or elsewhere are unable to claim their salaries or any other employment benefits to which they are entitled before their deportation, despite the broad embrace of protective labour legislation (CoRMSA, 2011: 99). While undocumented migrants might be protected by the labour legislation, they do not have the right to be in the country illegally. The legal dilemma is the source of many abuses faced by undocumented migrants in South Africa.

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<sup>17</sup> In South Africa migrant workers are protected by the i) the Constitution ii) The Labour Relations Act protects the right of workers regardless of nationality or immigration status iii) Many are also protected under rules related to refugees and asylum seekers vi) the International Labour Organisation’s (ILO’s) Migration for Employment Convention, The ILO Migrant Workers (Supplementary Provisions) Convention

<sup>18</sup> This is also the case with sex workers, as sex work is prohibited.

A perusal by Bosch (2006) of pre-2008 case law dealing with unauthorised foreigners in South Africa reveals that most decisions found that they are not 'employees', therefore are not entitled to the protection in the LRA, BCEA and other labour statutes.<sup>19</sup> According to Bosch, the stronger argument for such a finding is that such workers have no contracts of employment with their employers because such contracts are rendered null and void by virtue of being contrary to applicable legislation.<sup>20</sup> Some argue that permitting unauthorised workers to access labour legislation would undermine the objectives of the Immigration Act, by promoting clandestine and irregular migration, thereby permitting the very situation that the Immigration Act sought to prevent (Bosch, 2006). Bosch argues that a balance should be struck between the two legislations to the extent that irregular and clandestine migration is not promoted, at the same time employers who employ illegal migrants are not incentivised if they know they can exploit them and 'get away with it'. But there remains controversy as experts and practitioners are divided over the issue.

The shift by the CCMA in 2008 towards a more protective attitude to undocumented migrants has been hailed as a milestone.<sup>21</sup> However, as

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<sup>19</sup> See the *Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 1480 (LC).

<sup>20</sup> Section 38 (1) (a) (b) (c) and (2) of the Immigration Act No. 13 2002 prohibits the employment of migrants without a work permit or any other immigration document authorizing them to work. The act imposes penalties on employers found employing foreigners.

<sup>21</sup> See the *Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 1480 (LC).

Trad et al. note, 'in principle undocumented migrants have recourse but in practice, this is not the case in the hierarchy of laws' (2008: 6). In reality, the Bill of Rights and labour legislation protecting undocumented migrant workers' rights are subordinated to immigration legislation (Trad et al., 2008: 6). Coupled with this, inspections are rare and only occasionally lead to penalties for the employers (Trad et al., 2008: 5). Therefore, there are no 'disincentives for employers to continue using, and abusing' undocumented migrants (Trad et al., 2008: 5). Despite the new legal climate, undocumented migrants are still vulnerable and are hesitant to approach the CCMA (see Griffin, 2011). Employers take advantage of this legal dilemma to exploit undocumented migrants in the labour market. Research by Polzer challenges this general assumption. Her research demonstrates in various ways that 'there is discrimination and exploitation in the labour market which goes beyond documentation-related issues' (Polzer, 2008: 50). Undocumented migrants remain more vulnerable than their legal counterparts and native workers.

#### ***2.4 Attitude of the Public towards African Migrants: Xenophobia***

A review of the South African Migration Project's (SAMP) series of public opinion surveys of South Africans' attitudes towards immigrants and immigration between 1997-2000 shows that South Africans are generally not tolerant of outsiders. Crush concluded that they are 'latent xenophobes' not yet prepared to translate those attitudes into action

(Crush, 2001: 6). These feelings are widespread and transcend age, education, gender, economic status and race (Crush 2001: 6).<sup>22</sup> These latent xenophobic tendencies were overtly manifested in the May 2008 xenophobic attacks against non-South African migrants. The treatment of migration issues in the media also tends to promote a largely negative representation of migration and foreign migrants (Trad et al., 2008: 6). Migrants are 'cast as an economic threat, viewed as competitors and consumers for sacred resources and opportunities' (Gordon, 2010: 6). Scholars found that where the government is seen to have failed in its obligation to manage immigration, 'residents adopt coercive practices of their own in an attempt to define citizenship and its limits' (Von Holdt et al., 2011: 15). Research by Misago, Monson, Polzer and Landau (2010) into the 2008 xenophobic attacks also shows that underclass communities seem to regard xenophobic violence as a direct implementation of the immigration laws which the state has failed. Thus, the South African public is intolerant of African migrants and the objective of immigration law in their view is to exclude non-citizens.

Von Holdt et al. (2011) demonstrate the interplay between community protest violence and xenophobic violence in South African townships. Thus, xenophobic violence and protests should be understood against the backdrop of 'mass poverty and the struggle over livelihoods and resources' in post-apartheid South Africa (2011: 24).<sup>23</sup> Marginalised and

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<sup>22</sup> Although research shows that whites are generally more hostile than blacks towards African immigrants. [Crush, 2001]

<sup>23</sup> 'The transition to democracy has given rise to a dynamic process of class formation, on the one hand the rapid formation of new black elite, on the other the expansion of an already existing underclass struggling to exist in conditions of socio-economic precariousness - and this is generating fierce struggles over inclusion

poor communities 'engage in 'struggles to enforce a national citizenship regime through which they are defined as citizens with the right to lay claims to a redistribution of resources through the simultaneous exclusion of foreign nationals as non-citizens' (Von Holdt et al., 2011: 25). Migrants' access to these resources is regarded as illegitimate. In this instance, 'certain ethnicities are confirmed as authentic South African citizens, while others are defined as non-citizens even in cases where they may hold formal citizen rights' (Von Holdt et al., 2011: 25). These studies demonstrate that the vulnerability of migrants, documented or otherwise, is not confined to the workplace only as they are also insecure and vulnerable in the broader society.

## 2.5 Summary

The literature has demonstrated wide-spread vulnerability of undocumented migrants in the labour market. There are commercial trends (particularly casualisation, externalisation and informalisation of labour in the global economy) which drive migrant and native labour into a precarious position. The three Marxist theories provides lenses through which one can view or position migrant labour within the class system or society. However, the widely documented vulnerability of undocumented migrants in South Africa and other countries gives credence to the *underclass thesis*. This is largely because it takes into account the significance of the impact of the political and legal

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and exclusion both within the elite, between elites and subalterns, and within the subaltern classes themselves' (Von Holdt et al., 2011: 24)'.

framework on labour migration into host countries. Political and legal circumstances impact on the socio-economic conditions of migrant workers. Whereas migrants documented or otherwise are 'part and parcel' of the broader working class which has been rendered vulnerable by these global economic trends and workplace restructuring, they are an *underclass* because of 'illegality'. Given xenophobia and xenophobic attacks, the vulnerability of migrants is not only confined to the workplace but also extends into the broader society. Although legal migrants may be vulnerable, the legal framework and political circumstances compounds undocumented migrants' vulnerability. Undocumented migrants are protected by the labour laws in principle, but in practice the labour laws are subordinate to immigration laws.

## 3 TRADE UNIONS AND MIGRANT LABOUR

### *3.1 The Post-Apartheid Labour Movement and its Current Challenges*

The post-apartheid labour movement was born out of a protracted struggle for workplace citizenship that has been ongoing since the formation of the first black independent trade union in 1919 (Maree, 1985: 280).<sup>24</sup> The highly formalised migrant labour system that endured from the 1910 to the early 1980s was accompanied by a racialised labour relations system. The system that prevailed was commonly referred to as the 'dual labour relations system' (Friedman, 1987; Maree, 1985). Whereas Whites, Coloureds and Indians had industrial citizenship - meaning they could form and join trade unions, African workers were denied organisational rights to African trade unions and restricted to plant-level bargaining through works committees and later liaison committees (Maree, 1985: 295-340). State repression severely hampered African trade unions.<sup>25</sup> The Durban strike wave broke the silence that prevailed in the 1960s and is regarded as a turning point in the history of the South African labour movement history. It heralded the rebirth of African trade unionism (Maree, 1985: 286, Friedman 1987: 59). With the Wiehahn Commission's recommendations, labour laws were

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<sup>24</sup> The term Black Independent Unions refers to trade unions whose membership was predominantly black and independent from the state, capital and parental white unions (Maree, 1985: 279). The very first union was the Industrial and Commercial Workers Union (ICU) founded in 1919 by Clements Kadali, a Malawian migrant worker in Cape Town Africa (See Maree, 1985: 280).

<sup>25</sup> E.g. the Suppression of Communism Act of 1950.

amended to accord organisational rights to African trade unions, and there was an upsurge in African trade unionism.

Once trade unions were accorded industrial citizenship and had the political space, they began to tackle broader socio-economic issues beyond the workplace. As Webster (1994: 268) notes, 'in apartheid South Africa where the majority did not have a meaningful voice in the political system, unions inevitably began to play a central role in the political system'. For example, alliances and collaborations were established with political parties (e.g. COSATU and the ANC) and other community organisations in the fight for democracy in SA. Thus a distinct type of unionism was born out of the struggle for both workplace and political citizenship (Webster, 1994: 268). Trade unions have long argued that exploitation in the workplace is intrinsically linked to the wider political system. Edler and Webster make the case that social-movement unionism challenged the 'social contract between the apartheid state, employers and white labour based on protectionism and cheap black labour'. (1995: 79) Historically South African trade unions had 'two faces', the 'economic face' and that of a 'socio-political' institution (Webster, 1994: 268). Trimikliniotis (2008: 1335) notes that the tradition and identity of the labour movement was defined by concrete political and ideological factors which aligned race and class together in resistance.

Like most trade unions globally, the post-apartheid labour movement<sup>26</sup> is facing challenges of globalisation, particularly how to respond to globalisation. In economic terms, a global production system refers to the system of interactions between different levels of policies, institutions, firms, and social actors influencing a chain of productive activities required to produce and supply goods and services (Barrientos, 2007). In South Africa, globalization of the economy since the adoption of neoliberal economic policies has led to massive restructuring and retrenchments and shrinkage of the manufacturing base (Von Holdt and Webster, 2005). As Barrientos notes ‘there are commercial trends (casualisation, informalisation and externalization) in the nature of global production systems that are driving costs and risks downwards, and the use of flexible labour provides the final buffer for producers operating in this system’ (2007: 13). These trends have led to differentiation within the world of work into three major zones, which according to Von Holdt and Webster (2005) are the *core zone*, the *non-core* and the *periphery*.<sup>27</sup> As a result of these trends, trade unions are facing a diminishing membership base and crisis of representation.<sup>28</sup> And the crisis of representation also extends to migrant labour (see Polzer, Kola and Araia et al., 2010). This has negative repercussions on labour solidarity, causing fragmentation and weakening of the labour movement. Sitas (2004: 830) shows that there is still strong ‘solidarity of

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<sup>26</sup> There are currently 4 trade union federations, namely COSATU, formed in 1985 (the largest federation); FEDUSA, formed in 1997; NACTU, formed in 1986; and CONSAWU formed in 2003.

<sup>27</sup> The *Core zone* comprises those in formal economy. They enjoy all worker rights and benefits. They are in a standard employment relationship, whereas the *Non-core zone* experience variable economic exclusion. In other words they are economically included, but are insecure to varying degrees. They are sometimes referred to as the ‘new working poor’. The *Periphery zone* involves those who are excluded from the formal economy; and according to Von Holdt and Webster et al. (2005) are “making a living” as opposed to “earning a living”

<sup>28</sup> It is argued that trade unions tend to represent the ‘elite’ amongst workers, i.e. those in relatively well-paid, stable and permanent jobs.

comradeship' and the 'elastic band' that held the movement together still holds despite class mobility and divergent socioeconomic needs; however, these global trends pose mounting challenges to the movement. Von Holdt and Webster (2005) note that if trade unions are to rise to the challenge of differentiation and polarisation they need to turn rhetoric into commitment to organize the non-core and periphery. The limitations of industrial-style unionism in organising informal and flexible workers are clear: the challenge for the labour movement is how to organise informal and casual workers.

Trade unions need to develop ways to mobilise and defend the growing army of the 'working poor'. The central question is how the labour movement can prepare itself for the future in order to stay relevant. Thus, there is controversy among scholars surrounding the relationship among some federations with government and political parties, specifically COSATU. That is, whether trade unions' interests are best served through alliances and collaboration with political parties (Pillay, 2006:174-77; Habib and Taylor, 1999). Some scholars have argued that the alliance with political parties has led to divided loyalties within the labour movement (Habib et al., 1999: 13-18). Some have recommended broad-based coalitions with the new social movement and the revival of its social movement unionism role (e.g. Von Holdt and Webster , 2005; Pillay 2006: 118). Habib et al. (1999: 13-18) recommend that COSATU break ranks with the ruling party and form a labour party, as the alliance has proved disadvantageous to the working class. These are all options

that the South African labour movement has to consider in its endeavour to counter the adverse effects of globalisation on the working class.

### ***3.2 Response to Immigration in post-apartheid South Africa***

Historically, international migrant workers were assimilated into the South African labour movement during the apartheid era. Both local and international migrants were treated as ‘migrant workers’ subjected to the so called ‘dual labour relations’ (Maree, 1985: 288). They were united by the same cause, i.e. the struggle for democracy and workplace citizenship and this blurred the division between local and international migrants. In the early 1990s, the National Union of Mine Workers (NUM) did not form particular structures for migrant workers but ‘this did not prevent the union from pressuring in many ways for the cause of their migrant worker membership’ (Kahmann, 2002: 18). According to Kahmann (2002: 18) NUM i) ‘campaigns against the obligation to renew contracts of the migrant miners on an annual basis ii) pushed for the creation of the Mineworkers Development Agency (MDA) aimed to give retrenched foreign workers social security through training programmes and micro-loans to set up businesses iii) ‘fought for a dignified return of dead miners’ bodies to their home countries including sending delegations, travel and funeral expenses to be paid by the mine’ iv) ‘won the right for those workers to be regarded as citizens or permanent residents who had lived and worked up to 1986 as citizens of

the country' (Kahmann, 2002: 18). In these instances solidarity with international migrants was demonstrated.

Research by Gordon (2005: 47-48) and Trimikliniotis et al. (2008: 1331-1333) noted the 'contradictory or hypocritical' responses of the South African trade union movement to the immigration during the immigration policy reform in post-apartheid South Africa. Trimikliniotis et al. argue that the movement 'demonstrates its commitment to greater worker solidarity, while at the same time expressing support for a system in which foreigners are prevented from legally obtaining work in South Africa' (2008: 1331-1333). Interestingly, academics and policy researchers have attributed the surge in illegal migration to the 'strict immigration policies of the post-apartheid government (see Kahmann, 2002: 14; Crush et al., 2001: 9-11). It is in this vein that Kabwe-Segatti (2008: 37) argues that the ruling party's constituencies, notably in the labour movement, supported a "South Africa first" employment policy that is not always in tandem with the need to recruit labour from abroad where necessary. Thus for Trimikliniotis et al. although the movement 'shares its sympathies with migrants, it believes that large-scale entry of foreigners into the labour market would disadvantage citizen workers' (2008: 1331-1333). Their position is that these citizen workers must have priority in employment. Whereas French trade unions have sometimes been at the forefront of attacks on migrants (Munck, 2012: 11), South African trade unions are covert in their defensive stance against migrant labour. Trimikliniotis et al. (2008: 1333) argue that 'COSATU perceives xenophobia as an 'artificial' phobia created and

spread by employers to divide workers.<sup>29</sup> Ironically, trade unions were ‘hypocritical’ in that, while ensuring the advancement of the rights of migrants’, they were ‘raising xenophobia through advocating for more stringent immigration policy’ (Trimikliniotis et al., 2008: 1334). It is in such instances that Caglar and Javaher-Haghighi (1998, in Kahmann, 2002: 26) argue that there is often ‘a tendency amongst unionists to ascribe racism and discriminatory acts to society at large while denying their existence in the workplace and trade unions’.

One of the important tools that trade unions in South Africa can rely on to protect all migrant workers, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW), has not been ratified by the South African government.<sup>30</sup> As explained by Williams, Crush and Nicholson (2006: 1), ‘the Convention seeks to play a role in preventing and eliminating the exploitation of all migrant workers and members of their families, including an end to their illegal or clandestine movements and to irregular or undocumented situations’. An inquiry by Williams et al. (2006: 15) into why South Africa did not ratify the convention shows the ‘concern remains that by promoting the rights of migrant workers and their families in the manner proposed by the convention, local workers may be (seen to be) disadvantaged’. According to the research and this concern was shared at all levels of elected government representatives.

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<sup>29</sup> Trade unions understand xenophobia as emanating from the practices whereby employers deliberately target migrants ahead of South Africans because of the possibility that they can exploit them. South African citizens hold the view that migrants are ‘taking their opportunities.

<sup>30</sup> The United Nations General Assembly approved the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) on 18 December 1990.

Another obstacle identified is the fact that ‘there is little awareness and knowledge of the Convention itself’ (Williams et al., 2006: 15). These factors pose some difficulties for the ratification of the Convention. Trade unions have not taken steps to raise awareness and knowledge of the convention. All respondents in the government and labour ‘were also clear that... [in the convention]...a distinction should be made between documented and undocumented migrant’ (Williams et al., 2006: 14). Thus according to the findings, the implication is that the convention could only apply to documented migrants. However, NUM and COSATU had a reservation, namely, that once a person is employed, they are entitled to the protection of the South African Labour laws (Williams et al., 2006: 15). This demonstrates divided loyalties in the trade union movement, reflecting the political allegiance of some trade unions to the ruling party (ANC) on one hand and the need to foster unity among all workers on the other.

Despite the ICFTU-AFRO (2004: 5) report, which indicates that unions are ‘duty bound’ to organise migrants and defend their rights, trade unions in South Africa have not developed strategies for organising migrants, documented or otherwise. Research by Polzer, et al. (2010) suggests that migrant workers in construction are not organised into local labour unions. Hlatshwayo (2011: 2) demonstrates that certain COSATU provincial structures played an important role in anti-xenophobia awareness and providing humanitarian aid to victims of

xenophobia in May 2008. However, despite resolutions on xenophobia<sup>31</sup> COSATU ‘has not held an in-depth discussion and strategy on organising migrants as a powerful tool for combating xenophobia’ (Hlatshwayo, 2011: 2). On a more positive note, (Hlatshwayo, 2011: 2) argues that the recent COSATU Congress Resolution on xenophobia opens space for developing a platform for protecting the rights of migrants and migrant workers. While his research has shown that some unions are starting to defend migrants, this needs to be extended to other unions and the townships (Hlatshwayo, 2011: 40).

Different explanations are put forward to explain why migrants are not incorporated into unions; some of which are linked to the legal framework governing immigration. Polzer et al. (2010: 32) note technical issues that prevent workers from accessing membership. As explained by CoRMSA (2011: 100) ‘unions expect workers to pay their membership fees electronically through their employers, which are impossible for the many who are employed casually and informally’. ‘One of the biggest obstacles to organising migrant workers in Spain is the widespread mistrust of unions by migrants as they are viewed as being part of the national institutions’ (Kahmann, 2002: 25). This is also the case with undocumented migrants in South Africa (CoRMSA, 2011: 100). In South African trade unions there are no outreach programs targeting migrant workers, according to unions investigated by Polzer et al. (2010: 33). Another reason is the threat of dismissal by employers of

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<sup>31</sup> See the 9<sup>th</sup> and 10<sup>th</sup> COSATU Congress Resolutions.

which migrants opt to keep their jobs (CoRMSA (2011: 101). For Gordon 'there is insistence by the union leadership that all workers within the industry should subordinate their distinctive personal struggles to the general causes of the trade union' (2005: 56-57). This means migrants 'becoming absorbed into existing organisational forms and distinctions that were developed without reference to their own needs', hence the 'real obstacle are rather the unions themselves' Gordon (2005: 56-57). Related to this is the argument by CoRMSA (2011: 100) that the 'political identity' of unions in South Africa deters many migrant workers as 'unions are perceived as too political to draw migrants into their constituencies'. Trade unions have not changed to embrace diversity in the workplace.

### ***3.3 Summary***

Literature demonstrates the assimilation of international migrant labour into local trade unions during the apartheid era, which was characterised by a 'dual' labour relations system that treated local and international migrants as one entity. However, some scholars argue that in post-apartheid South Africa the labour movement's response to immigration was contradictory and hypocritical. Thus, trade union federations were seeking to exclude migrants from the labour market, while advancing their position with citizens. The labour movement has also been reluctant to advocate for the ratification of some important international instruments which would be valuable for defending the rights of undocumented migrants. The reluctance can be partly explained by the

divided loyalties that seem to bedevil some sections of the labour movement. Literature also highlights the exclusion of migrants in trade unions, caused by a number of barriers and the lack of strategies to organise these workers. Lastly, the response of trade unions to migrant labour should be understood in the context of globalisation and workplace restructuring which is driving the use of docile migrant labour. The broader challenge which trade unions are facing concerns how to respond to this globalisation. All these dynamics are relevant in our efforts to understand the current response of trade unions to migrant labour.

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## 4. MIGRANT LABOUR AND TRADE UNION REVIVAL

### 4.1 *Migrant Labour Trade union Revitalisaion*

The growing academic literature on trade union revitalisation across the globe ‘has found advances in the strategic areas of organizing new sectors, greater political actions, reform of trade union structures, coalition building, and, last but not least, international solidarity’ (Frege and Kelly 2004, as cited in Munck 2011: 14). For example, social movement unionism emerged in the South where trade unions went beyond ‘narrow economism’ to be champions of broader democracy and played a central role towards furtherance of that democracy (Webster, 1994: 264 -281).<sup>32</sup> Unions in Britain strived towards what is referred to as community unionism, that was ‘supportive of the mainly migrant low-paid workers in the capital’ (Holgate 2009: 66, as cited in Munck, 2011: 15). In the United States of America ‘*poor workers’ unions* value direct action, flexibility and collaboration over the bureaucratic and legalistic methods on which traditional unions have often relied’ (Tait 2005: 310 as cited in Munck, 2011: 14 ). In South Africa alliances have been forged with ruling parties (e.g. the tripartite alliance) and other social movements<sup>33</sup>. In all the examples above, bureaucratic impasse was

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<sup>32</sup> In South Africa, Zimbabwe and Zambia where trade unions went beyond ‘narrow economism’ and forged alliance with community and civil society organisations to fight for democracy.

<sup>33</sup> See De Wet (2010: 11) for the alliance between COSATU and the Treatment Action Campaign in respect of HIV/AIDS treatment advocacy in South Africa.

overcome and in the process a new unionism was discovered, enabling labour to keep abreast with the changing socio-economic environment.

In light of the above, it is 'incumbent on trade union movements to respond with an inclusive policy toward migrant workers and not through national protectionism as happened quite often in the past' (Penninx and Roosblad, 2000; as cited in Munck, 2011: 9). Munck argues that 'there is no escaping the fact of migration and the impossibility of a coherent trade union and democratic renewal strategy which does not take migrant workers into account' (2011: 11). This is largely because migrant labour has become so central to the global labour market that exclusion proves costly to both the labour movement and to migrant workers. Kahmann argues that 'it is increasingly important for trade unions to develop new strategies and new ways to fight with and for migrant workers and their rights' (2002: 26). Munck echoes the same sentiments when he posits that 'the most risky labour movement strategy today is the "business as usual" approach' (2011: 17). Innovation is imperative in terms of organising migrant workers. Trade unions which rely on traditional or industrial-style unionism or have a narrow workplace focus risk alienating themselves from the growing migrant labour and casualised labour which is beyond the reach of traditional unionism.

Kahmann notes that 'the first pillar of such a strategy should be to oppose the humiliating and divisive effects of discrimination and xenophobia' (2002: 26). This is very important since xenophobia exists

both within the workplace and trade unions (Caglar et al., 1998; as cited in Kahmann, 2002: 26). Echoing the sentiments and recommendations by Polzer et al. (2010), CoRMSA challenges trade unions in South Africa to ‘proactively engage migrant workers to participate in collective mobilisation and bargaining processes’ (2011:101). Coupled with this, ‘the question of how to close the common “participatory gap” between native and migrant unionists need to be equally addressed’ (Kahmann, 2002: 26), as this would help build trust between trade unions and migrant workers. As Gordon notes, the ‘insistence by the union leadership that all workers within the industry should subordinate their distinctive personal struggles to the general causes of the trade union’ is a barrier (2005: 56-57). This is largely because migrant voices and struggles need to be represented in the local unions. One way is to address the participatory gap between native workers and migrants in local unions. CoRMSA (2011: 101) also recommends that trade unions in South Africa review membership procedures and payment conditions to allow casual and informal workers to access membership.

Another pillar of such a strategy is to forge alliances and partnerships with other civil society organisations, particularly diaspora and migrant worker rights organisations. Munck notes that ‘the prudent choice is to seize the moment to pursue alliances previously unheard of and to look at what unites the broader counter-movements rather than what separates them’ (Munck, 2011: 17). Specific areas of common concern for diaspora organisations and trade union have been noted by scholars. For example, in vulnerable groups of workers

such as women, migrant workers and ethnic minorities where union organisation is traditionally very problematic, unions ‘by necessity’ seek alliances and cooperation with organisations (Spooner, 2002: 3). Unions can develop relationships with diaspora organisations in the fight against anti-immigrant attitudes in society, improving working conditions and providing information (Mthetho, 2008:107). In other countries such alliances have been utilised for the greater good of unions and migrant workers.<sup>34</sup> Beirnaert (2011:<sup>35</sup>) notes that ‘community based organisations such as migrants’ rights, faith-based and diaspora organisations sometimes have direct access to migrant communities and could increase the trade unions’ capacity to reach out to the most vulnerable groups’. Coupled with this, Spooner argues that ‘unions have always had broader social and political concerns over a wide range of national and international issues’ (2002: 2) relating to migrant labour.<sup>36</sup> Regularisation campaigns and policy advocacy is another area of collaboration. The argument by these scholars makes the case for alliances and partnerships with migrant worker rights groups compelling..

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<sup>34</sup> For example, the move towards community unionism in the United Kingdom ‘allowed unions to find common cause with groups cemented around, religious, ethnic, or other affiliations, effectively linking the struggle for redistribution with that of recognition’ (Wills 2001: 469; as cited in Munck, 2011: 15).

<sup>35</sup> Article does not have page numbers.

<sup>36</sup> For example social movement unionism in SA collaborated with community-based organisations and political parties in the struggle for democracy. In Zambia and Zimbabwe trade unions teamed up with other progressive leftist organisations to form political parties that challenged de facto one party states in these countries.

## ***4.2 Mobilising and Organising: International Experiences***

Trade unions in other parts of the world have taken active steps towards socio-economic development of migrant workers. There are plenty of examples, but only two will be presented below. It does not mean that these trade unions have been completely successful in organising and defending migrant workers, but the fact that they have taken active steps towards organising and defending migrants is worth noting. These trade unions have shown the political will to organise and defend migrants. They have not fallen back on what Munck refers to as ‘defending vested interests or relying on protectionism’ (2011: 18) but have demonstrated flexibility in accommodating the diversity of their working class constituency.

### **Example 1**

According to Kahmann (2003: 25), trade unions in Spain have developed an extraordinarily positive and active attitude towards immigration issues. Research by Kahmann show that two largest trade union confederations in Spain put in place special bodies and centres to deal with ‘specific sub-Saharan African migrant workers issues’ (2003: 22).<sup>37</sup> According to Kahmann both confederations have a network of special centres for migrant workers,<sup>38</sup> whose functions are to advise and

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<sup>37</sup> The *Union General de los Trabajadores* [General Trade Union of Workers] (UGT) and the *Comisiones Obreras* [The Workers' Commissions] (CC.OO.)

<sup>38</sup> The CC.OO's Information Centres for Foreign Workers and the UGT's Advisory Centres for Immigrants and Refugees.

support on administrative and labour law issues, regularisation of campaigns, provide ongoing information by means of publicity campaigns, media announcements or leafleting, training for migrant workers<sup>39</sup> and awareness-raising for various groups (2002: 23). Kahmann also noted that in terms of organisational change, ‘the commitment to anti-discrimination has led to internal programmes on anti-discrimination and the immigration issue’ (2002: 24). ‘Although the number of immigrants employed at various levels of the UGT and the CC.OO is rising, they remain concentrated in areas specifically deal with migration issues’ (Kahmann, 2002: 24).

### Example 2

The case of the Farm Labor Organizing Committee (FLOC) and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) in the United States of American is another example of best practices in terms of organising migrant workers and policy advocacy respectively. The FLOC has advanced worker rights through organising and collective bargaining for migrant workers (Welsh et al., 2007: 17, & Kahmann, 2003: 13). Welsh et al. cite an example in 2004 when FLOC ‘helped Mexican migrant farm workers win a historic first union contract covering more than 1,000 farms throughout North Carolina’ (2007: 17).<sup>40</sup> ‘Welsh et al. note that ‘conditions improved and most important, the migrant farm workers have a direct voice in their

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<sup>39</sup> Spanish language, professional training and job-finding courses e.g. through CC.OO.’s Training and Employment Foundation (Kahmann, 2002: 22)

<sup>40</sup> ‘The groundbreaking contract between FLOC and the North Carolina Growers Association gave 8,500 seasonal workers from Mexico a voice on the job. The first contract ever signed by farmers in the notoriously anti-union state of North Carolina, it also allows FLOC to recruit and hire the Mexican workers, ensuring their safety and their legal ability to work in the United States’ (Welsh et al., 2007: 18).

conditions through a national labour union and an effective process for resolving grievances and problems' (2007; 18). The trade unions also promote or advocate nationally and internationally for the rights of migrant workers. The AFL-CIO led 'the United States labour movement's effort to ensure that immigration law reform makes protecting workers a main priority, and by protecting migrant worker rights, trade unions help to reduce the vulnerability of migrant workers to trafficking' (Welsh et al., 2007: 17). The AFL-CIO has also developed a partnership with the National Day Laborer Organizing Network (NDLON)<sup>41</sup> to further protect the rights of documented and undocumented migrant workers in the United States (Welsh et al., 2007: 17). The union has not responded defensively but welcomed migrant labour as an opportunity to re-invent and advance worker solidarity.

### ***4.3 Summary***

There is growing academic literature across the globe on the impossibility of trade union revitalisation that does not harness migrant labour. There is evidence that trade unions in the North and South have evolved from traditional unionism to other forms of unionism such as community unionism, social movement unionism, political unionism, etc. In other words, some sections of the global trade union movement have moved beyond the narrow 'economism' or workplace focus into what is commonly referred to as 'social' unionism' which focus on

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<sup>41</sup> It is a network of over 140 Worker Centers or migrant worker organisations (Mthetho, 2008: 107).

organising migrant workers beyond the workplace. International examples of trade union responses to migrant labour shows that some trade unions in the USA (California) and Spain, although initially reacting defensively, have successfully managed to go beyond the workplace to organise and defend the rights of migrants. The literature also demonstrates that globalisation and the changing socio-economic environment necessitate renewal and revitalisation of the labour movement.

There is a dearth of scientific knowledge about trade union practices regarding undocumented migrants in post-apartheid South Africa, and this research project attempts to address this problem. To do so, the research harnesses theoretical frameworks provided in the literature. Firstly, the research builds on postulations by Trimikliniotis et al. (2008) and Gordon (2005) regarding the response of the labour movement to immigration policy in post-apartheid South Africa. Secondly, Munck's (2011:10) spectrum of inclusion-to-exclusion of migrant labour is insightful and helps in gauging the nature of trade unions' response. Thirdly, the vulnerability of migrants, particularly undocumented migrants, as demonstrated in the literature is central to this research (current Marxist theorisation of migrant labour outlines different perspectives from which one views migrant labour, i.e. either from a *Unitary*, *Underclass* or *Divided Working Class* point of view). Fourthly, the responses of trade unions in other international examples also provide a framework within which to investigate the South African trade union responses to undocumented migrant labour. Here, these

international practices are brought into dialogue with South African trade union responses and practices. The dissertation draws on the theoretical framework outlined above to explain trade union responses and practices.

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**PART TWO**  
**RESEARCH METHODOLOGY**

## 5. RESEARCH AIMS

### 5.1 Research Questions

The research attempts to explore, firstly, trade union responses to immigration in post-apartheid South Africa and, secondly, how trade unions respond to undocumented migrants workers employed in South Africa. The Central Research Question of this dissertation is: *How did trade unions respond to immigration and to the vulnerability of undocumented migrant workers in post-apartheid South Africa?* The research aims to fulfil the following research objectives:

- 1) to assess the nature of the response of trade unions to immigration in post-apartheid South Africa
- 2) to assess the perspectives of trade unions regarding a) the circumstances that lead to undocumented migrant labour in South Africa b) rights and recourse of undocumented migrant workers in South Africa.
- 3) to assess policies and practices undertaken by trade unions towards undocumented migrant workers on issues in and outside the workplace.
- 4) to determine the extent to which alliances and partnerships are forged between trade unions and migrant worker rights groups/diaspora organisations in the Western Cape.<sup>42</sup>
- 5) to assess the implications that trade union policies and practices in response to the vulnerability of undocumented migrants have for ‘international worker solidarity’.

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<sup>42</sup> See Appendix B for a list of diaspora and migrant worker rights organisations in the Western Cape. Note that the list is not exhaustive.

## **5.2 Conceptual Framework**

### *5.2.1 Typology of Irregular/Undocumented Migrants*

Trad et al. (2008: 5) define undocumented migrants as being any person [foreigner] living and working in South Africa who does not have a proper legal status [see Table 2].

Table 2: *Categories of Undocumented Migrant Workers*

	<i>1. Entry Lawful, Stay Lawful</i>	<i>2. Entry Lawful, Stay Unlawful</i>	<i>3. Entry Unlawful, Stay Lawful</i>	<i>4. Entry Unlawful, Stay Unlawful</i>
<i>A. No of Migrants</i>	<input type="checkbox"/> Work permit Holders <input type="checkbox"/> Mine/farming contracts	<input type="checkbox"/> Retrenched workers who remain <input type="checkbox"/> Working in Different sector <input type="checkbox"/> Overstayers	<input type="checkbox"/> Forced migrants (refugees) <input type="checkbox"/> Immigration amnesty beneficiaries	<input type="checkbox"/> Border jumpers <input type="checkbox"/> False documents <input type="checkbox"/> Trafficked
<i>B. No. working Illegally</i>	<input type="checkbox"/> Contravening work permit conditions <input type="checkbox"/> Holding valid visitors permit	<input type="checkbox"/> Working in different sector <input type="checkbox"/> Expired work permits	<input type="checkbox"/> Some forced migrants (refugees)	<input type="checkbox"/> Border Jumpers <input type="checkbox"/> False documents <input type="checkbox"/> Trafficked

Source: The ILO, cited in Crush et al. (2010: 20).

This research focused on trade union's responses on undocumented migrants as conceptualised in category 2 AB and 4AB. These are migrants who enter into South Africa lawfully but become undocumented during their stay and work illegally; and those whose entry is unlawful and they also proceed to work illegally. Trad et al. (2008: 5) include undocumented asylum seekers until they manage to

properly register with the reception office and present a refugee claim, and registered refugees who are dispossessed of their refugee certificate or were unable to renew it.

### *5.2.2 Descriptive Orientation*

The ICFTU-AFRO (2004: 5-7) identified and recommended three themes of action or 'response' which are instrumental for the promotion of migrant workers' welfare: (i) support and enhancement of legislation (advocacy) (ii) organising migrant workers (iii) social dialogue and awareness [of migrant worker rights]. The research uses this framework to see what trade unions are doing in these complementary areas. The research is also of the view that there are 'Inside-the-Workplace Issues' and 'Outside-the-Workplace Issues'. Inside-the-Workplace Issues will be defined as issues pertaining to terms and conditions of employment; and issues regarding labour rights whereas 'Outside-the-Workplace Issues' are issues pertaining to immigration and other non-workplace issues. There is a 'migration' of issues from civil society into the workplace and vice versa. Hence the research investigates trade unions' responses in and outside the workplace.

The research takes a descriptive and inductive approach to gain detailed and in-depth knowledge of trade unions' responses to migrant worker issues inside and outside the workplace. As Thomas puts it, 'the primary purpose of the inductive approach is to allow research findings to

emerge from the frequent, dominant or significant themes inherent in raw data, without the restraints imposed by structured methodologies' (2003: 2). When researchers adopt a deductive and hypothesis testing research, key themes are often obscured, reframed or left invisible because of the preconceptions in the data collection and data analysis procedures imposed by such an approach (Thomas, 2003: 2). The research generates insights that cannot be generalised to other situations; hence the emphasis is on 'depth' rather than 'breadth'; and on understanding a phenomenon in its context.

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## 6. QUALITATIVE RESEARCH METHODS

The conceptual method adopted demanded a qualitative paradigm. Accordingly, qualitative research techniques were chosen for this particular enquiry because of the unique contributions, i.e. the primacy of the depth of understandings that qualitative methods can provide. It is often a superior approach to the creation of knowledge and a depth of understanding of concepts (Tewksbury, 2009: 38). ‘The superiority of qualitative techniques lies in the fact that the knowledge gained through qualitative investigations is more informative, richer and offer enhanced understandings compared to that which can be obtained via quantitative research’ (Tewksbury, 2009: 38). Qualitative methods are approaches that ‘centralise and place primary value on complete understandings, and on how people (the social aspect of our discipline) understand, experience and operate within milieus that are dynamic and social in their foundation and structure’ (Tewksbury, 2009: 39). For the reasons spelt out above, the research harnessed qualitative methods of sampling, data gathering and data analysis.

### *6.1 Sample*

A combination of *Purposive Sampling* and *Judgmental Sampling* was employed. According to Babbie and Mouton (2001:166) it is appropriate

for one to select a sample on the basis of your knowledge of the population, its elements, and the nature of your research aims – that is based on your judgment and the purpose of your study. Researchers conduct judgment sampling when they know the population well enough to determine its members' expertise and potential contribution to the study. Thus, the researcher chose to recruit trade unionists from unions that operate in sectors in which migrant are gravitating towards.<sup>43</sup> Four commentators who are well informed about the immigration and migrant labour were selected. Trade union officials in 2 federations, 9 regional trade unions and national trade unions that have regional offices in the Western Cape were interviewed. The two federations below were also investigated [see Table 3 on page 59]. Most trade unionists in the study were middle and upper level office bearers such as secretary generals, organisers and a few shop stewards. They participated in their capacity as union officials, so their views, perspectives and positions are union views. Trade unions can also be classified by their particular political positions. COSATU and its affiliates have a historical allegiance to the ruling party, the ANC, whereas CONSAWU and its affiliates subscribe to the non-political stance. One Independent trade union also allied itself to the ANC, the BAWUSI. Political allegiances or the absence of political ties can have repercussion on the unions' responses. Ethical obligations towards respondents dictated that participation be voluntary. Anonymity and confidentiality was guaranteed to respondents.

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<sup>43</sup> Research has shown that most migrants, especially undocumented migrants find employment in the agricultural sector, domestic, security sector, hospitality, catering sector (Mawadza, 2008: 5) and construction (Polzer et al., 2010: 5)

The sample is not representative of all the trade unions in the Western Cape and in South Africa as a whole. The number of unions interviewed is not statistically significant to warrant transferability.<sup>44</sup> Consequently the results of this study cannot be generalised to other situations as they are context-bound.

Table 3: *Sample Elements*

<i>COSATU</i>	<i>CONSAWU</i>	<i>Independent Trade Unions</i>	<i>Commentators</i>
SADSAWU SATAWU FAWU NUM	BWU BAWUSA NCFAWU	Sikhula Sonke BAWUSI	People Against Suffering, Suppression and Oppression (PASSOP).  Institute of Labour Law and Development (UCT).  Southern African Migration Project (SAMP).  Scalabrini Centre of Cape Town.

## **6.2 *Semi-structured Interviews and Documentary Sources***

The research employed multiple sources of data gathering. *Semi-Structured Interviews* were conducted in conjunction with *Documentary*

<sup>44</sup> Transferability refers to the degree to which the results of qualitative research can be generalised or transferred to other contexts or settings.

*Sources of Data.* According to Grix (2001) as cited in Mogalakwe (2006: 226), ‘this is referred to as *data triangulation* or the use of multiple data sources to investigate the same phenomenon’.<sup>45</sup> Social scientists, by triangulation, can rise above the deficiencies that flow from one method (Babbie and Mouton 2001: 275). Documents are ‘naturally occurring objects with a concrete or semi-permanent existence which tell us indirectly about the social world of the people who created them’ (Payne and Payne 2004; as cited in Mogalakwe, 2006). Documentary methods entail the analysis of documents that contain information about the phenomenon we wish to study (Bailey 1994, as cited in Mogalakwe, 2006: 224 -225). The documents contained information about the perspectives and response of trade unions to the predicament of undocumented migrant workers. The documentary sources data was chosen because documents are not deliberately produced for the purpose of the research. The rationale was that the documents consulted are free from distortion and manipulation because they are prepared independently and beforehand. This overcomes the shortfalls with one-one-one interviews where respondents tended to give politically correct responses because of the highly political nature of this subject area of unions and migrant labour in South Africa. Measures were taken to ensure authenticity, credibility and meaningfulness of the trade union documents.<sup>46</sup> In relation to the ethical and legal requirements

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<sup>45</sup> Method triangulation should not be confused with data triangulation; method triangulation is the use of two or more research methods to investigate the same phenomenon (Grix, 2001; as cited in Mogalakwe: 2006: 229).

<sup>46</sup> In handling documents, measures were taken to ensure authenticity, credibility, representativeness and meaningfulness of trade union documents. Scott (1990) as cited in Mogalakwe (2006: 224 -225) has formulated quality control criteria for handling documentary sources. These are authenticity, credibility, representativeness and meaning. ‘*Authenticity* refers to whether the evidence is genuine and from impeccable sources; *credibility* refers to whether the evidence is typical of its kind, *representativeness* refers to whether

relating to handling private documents, the researcher was aware of the importance of abiding by the rights and restrictions conferred in the prevailing legal provisions of copyrights, freedom of information and data protection.

Semi-structured interviews are a method of gathering information from individuals and or institutions about their behavior, opinions, attitudes, and experiences. Complex questions and issues were clarified as the interviewer could probe areas suggested by the respondent's answers, picking-up information that had either not occurred to the interviewer or of which the interviewer had no prior knowledge. The interviews were one-on-one/face-to-face interviews with the respondents. 22 interviews were conducted across all unions and commentators. These respondents were asked general questions but other unplanned questions were administered (see Appendix C for an Interview Schedule). Qualitative data in the form of audio material and words was gathered. Coupled with this, qualitative data in the form of various documents were obtained from trade unions; and downloaded from trade union websites with the permission of trade union officials.

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the documents consulted are representative of the totality of the relevant documents, and *meaning* refers to whether the evidence is clear and comprehensible' (Mogalakwe : 2006: 224-225).

### ***6.3 Data Analysis***

Data Analysis was employed following the Miles and Huberman approach to qualitative data analysis, i.e. thematic analysis (1994; as cited in De Wet and Erasmus, 2005). The Miles and Huberman approach as outlined by De Wet et al. (2005), involves 4 steps. The first stage is *Close Reading of Data*: reading the transcripts repeatedly and closely with the research question in mind. The second stage was coding, which in turn involves two levels. *First Level Coding* is a way of summarising segments of data, thus contributing towards data reduction, whereas *Second Level Coding* involves two steps. a) Identifying clusters and hierarchies of information. This phase entails identifying hierarchies and clusters within the first level codes, which are grouping them into clusters that are coherent and meaningful. b) Identifying relationships, patterns and possible explanations. This required the researcher to display data in order to identify relationships and patterns in data for verification and conclusion drawing. On the other end of the spectrum, document analysis was employed to make sense of the documentary sources of data. Document analysis is defined as the detailed examination of documents produced across a wide range of social practices, in this case produced by the trade unions. It is argued that official documents are intended to be read as objective statements of fact but they are themselves socially produced (Wharton, 2006: 41). Following the interpretivist paradigm, the research employed what is referred to as *textual analysis* which, according to Wharton (2006: 41), is usually thought of as being part of the qualitative and interpretivist tradition. Hence in this research the emphasis was less on the amount

and frequency of occurrences but on interpreting the meaning the document might have in relation to the research questions underpinning this study.

#### ***6.4 Validity, Reliability and Limitations***

It is recommended that when doing research measures be taken for demonstrating *reliability* and *validity* in qualitative research. Since the research relied on the participation of union officials, the researcher ensured that the participants offered reliable information or data. To maximise validity and reliability, the researcher verified facts and information through follow-up interviews with informants asking for clarification and following-up when unsure of certain facts; verified facts between multiple sources [interviews and documentary sources], i.e. triangulation of methods to make the work scientific. To a greater extent the results will be consistent over time; and can be reproduced and replicated under the same methodology and context, i.e. the results or observations are repeatable. It is very likely that the respondents will give the same answers if interviewed again. The notion of *reflexivity* has it that researchers are social actors or part of the social world they investigate; consequently we see the world from different stand-points. Our stand-point as migrants or international students can influence the way we see the things or social phenomenon we investigate and influence the outcome one way or the other. The research strived to

maintain objectivity and rigour throughout data analysis to make the work scientific.

However there are some limitations that are worth commenting on. By focussing exclusively on trade union narratives regarding undocumented migrant workers, the voices of trade unions have been given prominence in the research. Other voices are ignored, specifically undocumented migrants and employers. What do employers say about their employment practices and what do undocumented migrants say about their own predicament? Due to the limited magnitude and scope of the research, resources and time constraints these areas could not be explored. Further research need to be done to fill this vacuum so that different voices are brought into dialogue with one another. Secondly, the research focused on middle and upper structures of trade unions. Middle and upper level union officials were interviewed, along with a few of lower level officials. It is important to look at what actually happens at the rank and file level or grassroots level, and this is surely an area for further study. It is possible that things that happen at grass root level go unnoticed by union leadership. This is another shortfall that resulted from resource and time constraints of the study.

As Mogalakwe (2006: 229) notes, bureaucracies are notorious for secrecy, and it is possible that researchers could be denied access to information, particularly given the political nature of this subject area. There are grounds for taking this as a methodological limitation

encountered in the research. Follow-up interviews with some unionists proved futile. Repeated attempts to contact them failed. Hence some crucial information might have been missed in the process and certain facts could have been misrepresented. Despite these problems, analysis and presentation of facts was done rigorously and with due regard to the social research ethics, particularly objectivity.

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**PART 3**  
**FINDINGS**

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## 7. LABOUR RESPONSE TO IMMIGRATION

### *7.1 Clash of Ideologies*

This section draws on and expands from the work by Gordon and Trimikliniotis et al. on the response of trade unions to immigration in post-apartheid South Africa by examining several correspondences between the movement and the DHA during the immigration policy reform process leading to the enactment of the Immigration Act 2002 (see Gordon, 2005: 41-47; Trimikliniotis et al., 2008: 1313-1336). These scholars focussed on the labour movement's response to immigration in general, whereas this dissertation will try to narrow down to issues relating to undocumented migrant workers in post-apartheid immigration policy reform. COSATU, later acting in conjunction with NACTU and FEDUSA (and referred to here as the labour movement)<sup>47</sup> made submissions to the Green Paper and White Paper on International Migration and the Immigration Bill.<sup>48</sup> In analysing the proposals and counterproposals of the labour movement, particular attention will be paid to the principles underpinning the movement's positions and how these principles are grounded in two divergent and sometimes irreconcilable ideologies.

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<sup>47</sup> CONSAWU was formed in 2003 after the immigration policy reform process and is not represented at NEDLAC; hence it is exempted from this section as it did not play any role. The results of this section cannot be generalised to CONSAWU.

<sup>48</sup> The Green Paper on International Migration (30, May 1997) was a discussion document for initiating dialogue, the White Paper on International Migration (March 31, 1999) was the policy statement and the Draft Immigration Bill (15, February 2000) was the precursor to the Immigration Act 2002, and then Draft Regulations, Immigration Act 2002 (31, May 2002) are set of laws which regulated specific aspects in the Act.

The submissions by the movement were underpinned by several principles, of which four are important for the purpose of this analysis. The first principle as outlined is that '*...migration policy must not compromise the interests of workers in Southern Africa....migrant workers must have [all the rights].*<sup>49</sup> Thus, the phraseology 'worker in Southern Africa' implies that immigration, if not properly crafted, will lead to exploitation of migrants. The second principle is that '*immigration policy must avoid a situation where the employment of foreign workers leads to a de facto erosion of labour standards and a deterioration of the conditions of all workers in South Africa and any potential for the development of a two-tier labour market must be explicitly undermined.*<sup>50</sup> The last two principles should be understood against the backdrop of high unemployment and low skills among the native labour force in South Africa. This led to the idea that '*In the short to medium term, only a specified number of migrants from neighbouring SADC countries should be allowed access to the South African labour market...*' (COSATU Submission on Draft Green paper, Sept 1997, para 1.3.5). The argument was that efforts to eradicate unemployment should not be compromised by influx of migrants hence local jobs have to be protected by allowing a 'specified number' of migrants in the labour market. The third principle is that '*immigration policies aimed at attracting skilled workers must not jeopardise the priority of developing skills in South Africa....*' (COSATU Submission on Draft Green Paper,

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<sup>49</sup> COSATU Submission on Draft Green Paper on International Migration, Presented to the Department of Home Affairs, 5 September 1997: para 1.3.1

<sup>50</sup> A two tier labour market 'made of legal South African workers and 'illegal' foreign workers'. See COSATU Submission on Draft Green Paper, September 1997, para 1.3.3

Sept 1997, para 1.3.6). The last principle privileges and gives primacy to the local interests which could be compromised by unregulated influx of migrants into the labour market.

In turn, these principles were grounded in two divergent ideologies which are sometimes very difficult to reconcile, i.e. the ideology of nationalism, and commitment to ‘international worker solidarity’. On one hand the movement’s commitment to international worker solidarity led the movement to defend the rights of migrants, documented or otherwise. Firstly, the trade union movement did not target undocumented migrants, instead they advocated for penalties to be imposed on employers who employ undocumented migrants (COSATU Submission on Draft Green Paper, Sept 1997, para 1.3.5). Secondly, the trade union movement accused the DHA of a xenophobic pre-occupation with illegal migrants.<sup>51</sup> Thirdly, the labour movement defended the rights of illegal migrants outside the labour market regarding arrest and detention and deportation.<sup>52</sup> In all these cases the labour movement demonstrated solidarity with migrant workers, documented or otherwise. However, there was no dialogue and policy clarification on the rights of undocumented migrant workers once they find themselves in employment in South Africa. Should they be regarded as ‘employees’ for the purpose of the LRA, should they enjoy all the rights under the

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<sup>51</sup> COSATU argued that the White Paper is replete with reference to illegal migrants, and this would prevent the DHA from crafting a ‘coherent, progressive and humane immigration policy’ (See COSATU Submission on the White Paper on International Migration, May 2000, para 7.2).

<sup>52</sup> Federations argued that ‘an audit be done of all provisions in the Bill in order to ensure compliance with the Constitution and give effect to international obligations; and this must also be consistent with legislative obligations emanating from the Constitution, including the Promotion of Administrative Justice, Promotion of Access to Information and the Promotion of Equality and Prevention of Unfair Discrimination Acts’ (See Labour Initial Submission on the Immigration Bill to the NEDLAC Labour Market Chamber, para 9).

labour legislations, should they have recourse to the CCMA and Labour Court? Inasmuch as it was assumed that the labour laws apply to ‘employees’ or ‘workers’, it was left to the courts to develop jurisprudence in respect of undocumented migrants. The jurisprudence which developed afterwards did not recognise undocumented migrants for the purposes of the LRA.<sup>53</sup>

Given the realities of post-apartheid South Africa, i.e. poverty, inequality, unemployment and a relatively unskilled labour force, the nationalism ideology helps explain the trade union movement's defensive stance against immigration. The last two principles are grounded in nationalism, with the movement advancing the interests of the citizens. The labour movement showed implied and sometimes explicit support for strict regulation of work permits.<sup>54</sup> Coupled with this, the White Paper proposed ‘temporary programmes’ that would allow migrants access to the South African labour market (1998, para 4.4.7), and the labour movement opposed the ‘temporary programmes’ arguing that the government was opening itself up to a two-tier labour market.<sup>55</sup> Because of the concern that influx of migrants into the labour market has disastrous implications for efforts to eradicate unemployment among citizens, the movement supported the ‘South Africans first’

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<sup>53</sup> See *Moses v Safika Holdings (Pty) Ltd* [2001] 22 ILJ 1261 (CCMA), *Vundla v Millies Fashions* (2003) 24 ILJ 462 (CCMA) to mention a few.

<sup>54</sup> Labour Submission on the Draft Immigration Amendment Bill Submitted to the NEDLAC Labour Market Chamber 6 July 2004. It advocates for monitoring and strict regulation of work corporate, quota work permits and general work permits.

<sup>55</sup> See COSATU Submission on the White Paper, May 2000, para 5.1. where it argues that government would be opening itself up to the possibility of a two-tier or multi-tier labour market.

employment policy.<sup>56</sup> This requires South African employers to demonstrate that ‘after diligent search’ they could not find a South African to employ.<sup>57</sup> However given the low skill-sectors targeted by migrants (such as security, construction, agriculture and hospitality), it would be difficult for an employer to demonstrate that they could not find a qualified South African. The movement was defensive in the sense that they were concerned by the influx of migrants into the labour market and they supported strict regulation of permits and influx controls. For the labour movement, openness and flexibility will both contribute to the exploitation of migrants and disadvantage locals with regard to employment and skills development.

## ***7.2 Conclusion***

Trade unions defended the rights of migrants during the immigration policy reform and this led them into what Trimikliniotis et al. (2008: 1332-1334) refers to as the ‘pro-migrant’ stance in the sense that once migrants are working in South Africa they should be accorded all the labour rights.<sup>58</sup> However, while trade unions defended the rights of migrants, documented or otherwise, they also exhibited covert and sometimes overt support for provisions that could limit migrants’ legal access to the labour market. Thus they partially resisted immigration,

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<sup>56</sup> The strict regulation of permits or what researchers (Williams et al.: 2001: 9-10) referred to as ‘restrictionism’ had unintended consequences of limiting legal access to the labour market.

<sup>57</sup> See section 19 (2) (a) of the Immigration 2002. COSATU supported the ‘South African first’ employment policy (see The Joint submission of COSATU; NACTU and FEDUSA on the Immigration Bill, para 2.3.).

<sup>58</sup> With one grey area regarding the rights and recourse of undocumented migrant workers which was largely overlooked, hence the legal dilemma that ensued (see section 8.1.2).

drawing the labour movement into what Trimikliniotis et al. refer to as an ‘anti-immigration’ stance (2008: 1332-1334). Kabwe-Segatti criticised the response of the labour movement for ‘lending their support to a “South Africa first” employment policy that is not always easy to reconcile with the country’s overall need to recruit sufficient numbers of skilled workers, including from abroad where necessary’ (2008: 37). It is in this instance that Trimikliniotis et al. argue that trade unions exhibited contradictory responses or hypocrisy (2008: 1332-1334). It can be concluded that trade unions were anti-immigration as they believed that influx of migrants would threaten local interests, but demonstrated solidarity with migrants who had managed to negotiate through the strictly regulated immigration system and find themselves in the labour market. In other words, the movement was supporting the right of migrants who were actually in the labour market, while diplomatically and clandestinely working against opening up immigration opportunities. The labour movement was indeed ‘hypocritical’ in its response because, faced with two divergent, irreconcilable and equally important ideologies, it failed to strike a balance. By diplomatically and covertly supporting limitations on migrants’ legal access to the labour markets through, the labour movement made a trade-offs that gave primacy to national interests and their citizens in exclusion of migrants, with negative repercussions for worker solidarity. The next section deals with how trade unions, having been covertly and diplomatically anti-immigration, respond to undocumented migrant workers once they are employed in South Africa.

## 8. RESPONSE TO UNDOCUMENTED MIGRANT LABOUR

### *8.1 Perspectives*

While it is recognized that trade unionists are not immigration and labour law experts, it is necessary to look at their understanding of i) the circumstances that lead to undocumented migrant labour in the South African labour market, and ii) the extent to which the labour legislation protects undocumented migrant workers.<sup>59</sup> With regard to the protection of undocumented migrant workers, the CCMA and Labour Court has, since 2008, shifted its stance to give undocumented migrants protection, arguing that they are ‘employees’ and the labour laws apply to ‘employees’.<sup>60</sup> Trade unionists’ understanding of these developments is crucial as it has repercussions for their response to undocumented migrant labour. It is necessary to assess the extent to which their perspectives and understanding of these issues influence their policies and practices regarding undocumented migrants.

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<sup>59</sup> For the trade unions under COSATU, it is essential to see if the ideals propagated by its Parliamentary Office which made submissions to the Home Affairs Portfolio on International Migration, are filtered down to the individual affiliate.

<sup>60</sup> *The Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 1480 (LC) was the turning point.

## 8.1.1 Cause of Undocumented Migrant Labour

### 8.1.1.1 Undocumented Migrant Labour Attributed to Political Factors

Some trade unionists believe that the current ‘problem’ of undocumented migrant labour in South Africa is a result of what they referred to as ‘red tape’ in the Immigration Department.<sup>61</sup> One trade unionist believes that undocumented migrants are eager to get work permits but circumstances in the immigration system act as deterrent: *‘I think in a process we are saying you are welcome in our country and then we have a lot of red tape. I think this is making people to work illegally’*. Coupled to this, some trade unionists think that the presence of undocumented migrant workers is partly a reflection of poverty and unaffordability of work permits among poor African migrants. The legal process and requirements of acquiring work permits is conceived to be very cumbersome and expensive for poor African migrants.<sup>62</sup> One trade unionist goes further, and attaches racial connotations to this situation by arguing that the immigration system prejudices poor African migrants and privileges wealthy immigrants of European origin. In another instance, a trade unionist understood undocumented migrant workers to be ‘refugees’. The term refugee connotes a state of helplessness and forced migration. All the reasons given by these trade unions denote an impression that undocumented migrant workers are ‘victims’ rather than

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<sup>61</sup> Red tape is used as a symbol for the hoops you have to jump through, the paperwork you have to fill out, and the things you have to do in order to get a permit from government bureaucracy. Some people only call something ‘red tape’ if it is actually a useless procedure.

<sup>62</sup> Another view propagated has racial connotations as one unionist argued that the immigration system in South Africa prejudices African migrants and privileges wealthy migrants, mostly from European and American.

than wilful transgressors of the immigration laws. In other words, this ‘school of thought’ implies that undocumented migrant labour is a result of structural and political factors in the South African immigration regime, although they could not rule out the criminal intent among some migrants.

#### *8.1.1.2 Undocumented Migration Attributed to the Criminal Intent of Migrants*

In contrast to the sentiment that undocumented migrants are ‘victims’ of structural and policy circumstances, some trade unionists believe that South Africa has the ‘best immigration policy’. South Africa, in contrast to other countries has, since the demise of the apartheid system, opened its doors to many migrants. One trade unionist said: *‘If you compare South Africa’s immigration policy to other countries, South Africa has the best immigration policy....’* The implication is that undocumented migrant labour can only be attributed to the migrants’ criminal intent to flout the immigration laws. It can be deduced that undocumented migrants wilfully transgress the immigration laws and do not seek the legal documents to work in South Africa. Closely linked to this school of thought is the perception amongst some unionists that illegal immigrants intentionally flout the immigration laws to come into South Africa to work illegally, and even commit crime. This was covertly implied by trade unions with a xenophobic pre-occupation with ‘illegal immigrants

and crime'.<sup>63</sup> The implication is that there are no structural and political factors that push undocumented migrants onto the labour market.

#### *8.1.1.3 Uninformed about Immigration Issues.*

Trade unionists in this category professed lack of knowledge on the causes of undocumented migrant labour in South Africa. Some trade unionists either did not have a clear understanding or perspective on the circumstances that lead to undocumented migrant labour, or they declined to comment. For example, one trade unionist in construction declined to criticize the DHA and pleaded lack of knowledge: *'I cannot say per se as to what really is the problem there ... I do not also want to criticize our department of home affairs because I do not know what it is exactly that is happening there'*. The plea for ignorance could be interpreted as lack of concern over immigration issues as they exclusively interact with the South African labour market dynamics.<sup>64</sup> The reason for declining to comment could also be political given the high political sensitivity of immigration issues in the post-apartheid South Africa.

#### *8.1.1.4 Commentators' Perspectives*

Trade unionists who attribute the phenomenon of undocumented migrant labour to political factors concur with academics and policy researchers

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<sup>63</sup> One trade unionist said that the trade union has no problem with undocumented migrants who come with the intention to work, but it has a problem with those who come to rob banks.

who have found that the ‘restrictionism or stringency’ in the immigration policy has resulted in undocumented migration to South Africa (see Williams et al., 2001: 9-10; Crush et al., 2007; Rogerson and Rogerson., 2002: 73-98). Crush et al. (2001: 9-10) conclude that the ‘restrictionism’ in the immigration regime has even penetrated the area of temporary migration for the purpose of work and is implicated even within the limited legal procedures which leaves migrants stranded in DHA red tape. Bureaucratisation and ‘racialisation’ of the system was also noted by researchers. According to one commentator: ‘*South African bureaucracy historically is designed to keep out black migrants.....But it’s actually very difficult to get the legal documentation....*’ Ironically, the labour movement supported policies that could restrict migrants’ legal access to the labour market.<sup>65</sup> In contrast to these unionist and researchers, anti-immigration unionists seem to conform to widespread sentiments in the South African society, notably some specific sections of civil society<sup>66</sup> who maintain that the phenomenon of undocumented migrant labour is attributed to the migrants’ choice to contravene the laws and reluctance to apply for legal papers. Other trade unionists, who plead ignorance and declined to comment, could be said to exhibit lack of concern or political motivation. However, given the long history of migrant labour in South Africa, one would expect trade unions to be acquainted with these issues, as they lie at the heart of the labour market dynamics in South

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<sup>65</sup>This line of argument tempts one to implicate COSATU, FEDUSA AND NACTU in the restrictionism that dominates the immigration system because they supported provisions that could narrow legal access to the labour market for migrants.

<sup>66</sup> For example, the AfriForum, in its criticism of the Department of Home Affairs on the Zimbabwean Dispensation Project, said ‘*Illegal immigrants have already proven their disrespect for South African legislation by their illegal presence in the country. Issuing work permits to them, will only encourage further lawlessness....*’ (AfriForum Press Release, 07 Aug 2006).

Africa. In addition, the choice to decline to comment could be political, given the relationship between some trade unions and the ANC-led government, and it is very likely that there are divided loyalties. The following section looks at trade union views regarding the status of undocumented migrants before the whole body of labour laws in South Africa.

### *8.1.2 Undocumented Migrant Workers Protected*

The discussion on the labour rights and recourse of undocumented migrants was conspicuous by its absence in the whole migration policy process. Whereas trade unions defended the rights of undocumented migrants as far as xenophobia, arrest and deportation were concerned, there was no policy statement on the labour rights of undocumented migrant workers once employed. As one commentator argues: “...it’s about writing everything in the policies, if it was written that undocumented migrants have labour rights and recourse there was not going to be any dilemma...” The legal dilemma that later ensued was a direct result of this policy vacuum. As Bosch (2006) notes that the whole body of labour laws is silent, and it was assumed that the labour laws applied to all workers regardless of status.<sup>67</sup> However, this was not the case with the jurisprudence that developed afterwards which did not regard undocumented migrants as ‘employees’ and left them with no recourse. The CCMA and Labour Court have since shifted its stance to

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<sup>67</sup> Bear in mind that the Immigration Act 2002 outlaws the employment of ‘illegal migrants’ and imposes penalties for employers caught doing so (See Section 39).

give undocumented migrants protection since 2008, arguing that the labour laws protects people who are in an ‘employment relationship’.<sup>68</sup>

All trade unionists concurred that undocumented migrants, in principle are protected by the LRA and have recourse to the CCMA as long as they ‘are working for employers’.<sup>69</sup> Commentators such as Jan Theron (in a 2012 interview with this author) also argue that undocumented migrants have to be in an ‘employment relationship’, which transcends beyond a ‘contract of employment’, in order to be protected by the labour laws).<sup>70</sup> What differed across trade unions is the depth of knowledge of the status of undocumented migrants before labour laws. Some trade unionists (five) were privy to the changes in undocumented migrant labour jurisprudence at the CCMA and Labour Court. For example one says: ‘...before [2008] they had no right and recourse to any law. I don’t have the detail of the law but all I know now is that they are now covered because what has happened you see from our side we argued with the government to say that because you are not prepared to protect these guys....these people [employers] now use that to exploit them...’<sup>71</sup> However, not all trade unionists are privy to these dynamics in undocumented migrant labour jurisprudence. But it is prudent for trade

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<sup>68</sup>The labour rights of illegal immigrants may develop further through cases over time, as the *Discovery Health* case has certainly extended the debate and opened the door for illegal workers to pursue their unfair dismissal claims (Gauss, 2011: 19). Also see *Discovery Health Limited v CCMA & others* (2008) 29 ILJ 1480 (LC) 1483.

<sup>69</sup> This was consistent with the researcher’s findings at the CCMA where it was discovered that there are no administrative barriers for undocumented migrants to launch their cases. The issue of work permits is not considered, only if the employer raises it or if it is the subject of the dispute. The CCMA workers intimated that proof that one is employed is required.

<sup>70</sup> And also see Ivan Israelstam [2008] *Recent Labour Court Case Shows General Assumption’s Fallacy*, *The Star*.

<sup>71</sup> This is in line with the recent development at the CCMA and labour court jurisprudence regarding the rights and recourse of undocumented migrants. However, the shift by the CCMA to give effect to the rights of undocumented, although belated, has opened doors for the protection of undocumented migrants. See the *Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 ILJ 1480 (LC).

unionists to know the status of workers before the labour laws for them to defend their rights with due diligence.

Some trade unionists demonstrated a thorough understanding of the legal dilemma that is faced by undocumented migrant workers because of the tension between the immigration law and the labour laws. The dilemma as explained by one trade unionist in the agricultural sector is as follows: *'once you have the rights under the labour legislation, you don't have the right to be here undocumented [illegally]'* Coupled with this, there is some recognition among unionists that arrest and deportations of undocumented migrant workers is an infringement of their labour rights as enshrined in the labour laws. For example the Domestic Worker Summit organised by trade unions demanded that *'Migration laws and procedures be amended [,] migration officials [should] not be involved in disputes [and] domestic workers must not be deported whilst the person's case is still in dispute and not resolved'*.<sup>72</sup> Despite the legal dilemma "the illegal immigrant accordingly has the necessary *locus standi* to approach the CCMA to pursue an unfair dismissal dispute and to pursue the processes and remedies envisaged in the LRA (Gauss, 2011: 191). It is interesting to note that most trade unionists claimed that they would take chances to represent undocumented migrants despite this legal dilemma on the grounds that the work permit issue falls outside the purview of labour laws.

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<sup>72</sup> See the Domestic Workers Summit held on the 27-28 August 2011 Declaration, Organised by the South African Domestic Services and Allied Workers Union (SADSAWU) COSATU, NACTU, FEDUSA and other civil society organizations.

In line with the Immigration Act, two trade unionists held the view that employers are the ones who should be sanctioned for employing undocumented migrants. One trade unionist asserts that *'...what should be done if those things surface, it's that employers who should be penalised heavily for failing to adhere to the immigration act'*. In response to the Labour Court ruling in the Discovery Health Ltd v the CCMA case, Israelstam, in a 2008 article in 'The Star', explains that *'the labour law does not penalize undocumented migrants for accepting employment but employers have the legal responsibility to make sure that those in their employ are documented'*. Coupled with this, employers are sanctioned while the sanctity of the contract of employment is protected. Most of the assertions by trade unionists were based on *'what the law is'*, i.e. in principle. In this researcher's interview with Theron, he argued that *'It's one thing for trade unions to say that the law applies to undocumented migrants and to say they can actually be able to do so in practice'*.<sup>73</sup> Having said undocumented migrants have rights and recourse, most trade unionists are not quite certain about the practicality of representing undocumented migrants at the CCMA. Only two trade unions had practical experience with regard to the possibility of undocumented migrants approaching the CCMA. These trade unionists claimed with certainty that undocumented migrants have recourse to the CCMA.

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<sup>73</sup> A visit to the CCMA reveals that there are no administrative barriers for undocumented migrants to report their case, but the process of filing a complaint requires some form of identification.

Trade unions claim that undocumented migrants are protected by the South African labour legislation, but they have to make decisions and choices about what actually happens to those workers. The pros and cons of the trade unions' policies and practices in response to undocumented migrant labour in South Africa are unpacked in the next section.

## ***8.2. Policies and Practices in Responses to Migrant Labour***

### *8.2.1 Internal Barriers and the Irony of 'Open Door Policies'*

While trade unions have not been 'attacking' undocumented migrant workers, statements made by them show that they have been 'attacking' employers for employing undocumented migrants because of the possibility that they will exploit them.<sup>74</sup> Coupled with this, trade unions claimed that they are inclusive and have an 'open door' policy emanating from the '*a-worker-is-a-worker*' mantra. They contended that work legality is not a pre-requisite for joining trade unions; and that once migrants are employed trade unions have an obligation to organise and protect those workers regardless of immigration status. They have also publicly encouraged migrant workers to join trade unions.<sup>75</sup> While

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<sup>74</sup> SATAWU *Press Statement Condemning all Forms of Discrimination Including Xenophobia*, Released: 28 May 2008., Du Plessis, C (2009) *Illegal Immigrants Urged [by COSATU] to Join Union*, 26 November 2009., *COSATU Says No to Xenophobia*, Press Statement, 22/05/2008.

<sup>75</sup> See for example Du Plessis, C (2009). *Illegal Immigrants Urged [by COSATU] to Join Union*, 26 November 2009.

this demonstrates a pro-migrant stance at face value, undocumented migrants have not joined trade unions despite trade unions' appreciation of migrants as workers (regardless of immigration status). This can be partly explained by trade union policies and practices discussed below.

Trade unions also do not have policies exclusively geared towards migrants, documented or otherwise, although some unions do have policies that reflect unique vulnerabilities and needs of other particular grouping of workers.<sup>76</sup> While this was justified by the argument that they do not make distinctions when it comes to workers, it cannot be assumed that the circumstances of undocumented migrants can be equated to that of their legal counterparts and native workers. Borrowing Gordon's words, 'the problems faced by illegal migrants do not fit into the existing union frames of reference because they are not part of the unions' narrow workplace focus, but are rather migrant-specific issues that separate migrants from citizen workers'. (2005: 56-57) Trade unions clearly understood the vulnerability of undocumented migrants as emanating from the legal dilemmas which render them more prone to exploitation and more difficult to organise, but the particular needs of such workers are not reflected in trade unions. Trade unions expect migrants (documented or not) to assimilate into the unions while they remain rigid in their policies which do not reflect the diversity in the working class constituency. This implies that undocumented migrant workers are 'becoming absorbed into existing organizational forms and

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<sup>76</sup> For example one trade union in the agricultural sector has policies tailored towards vulnerability of women and gender equality.

distinctions that were developed without reference to their own needs' Gordon (2005: 56 -57). Closely related to this sentiment is CoRMSA's (2011: 100) observation that the political identity of South African unions precludes migrants from joining trade unions. The assumption by the union leadership, that 'all workers should subordinate their distinctive personal struggles to the general causes of the trade union' (Gordon, 2005: 56 -57), does not augur well for the diversity of the workforce in South Africa, given the personal struggles faced by undocumented workers. In sum, while trade unions expect migrants to assimilate, trade unions have not embraced diversity in their policies and organisational forms.

Trade unions alleged that undocumented migrants (and native workers too) are threatened by dismissal if they opt to join trade unions. Employers threaten them not only with dismissal but also with deportation should they be non-compliant.<sup>77</sup> Another barrier mentioned is that undocumented migrant workers are scared of trade unions as they are viewed as synonymous with the immigration officers and police. As one trade unionist in the security sector put it: '*most of them are very much resistant to be involved with trade unions because.....to them any organisation that has an office in town then it's like these are trying to deport us....they are very negative towards joining trade unions*'. Language barriers were also mentioned by some unionists as impediments. All these barriers render undocumented migrants difficult to organise and in the words of one unionist '*...[undocumented*

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<sup>77</sup> Most trade unionists said that employers threaten to alert the immigration officials about the presence of undocumented migrants should they be non-compliant.

*migrants always fly under the radar...*’ In this case external barriers are used as justification for not having made significant progress in organising undocumented migrants. These external barriers were also identified in various studies (e.g. CoRMSA, 2011: 99-102; Gordon, 2005: 56-57), but they are only a tip of the iceberg, as explained below.

Trade unions absolve themselves by attributing failure to organise undocumented migrants to these external barriers, but in some trade unions internal barriers and exclusionary practices exist. Some of the barriers can be characterised as technically exclusionary practices not only to undocumented migrants but also to casual native workers. For example, one trade union in the construction industry as a matter of policy organises permanent workers only. Its official explains the policy: ‘...we are not allowed to make casuals members of the union. They should be permanent so that we could organize them. Then we couldn’t organize them [referring to a group of migrant workers in construction] because they are not permanent and the company refused because they do not have permanent [immigration] documents...’ It is far-fetched to expect undocumented migrants to be in a standard employment relationship where more natives are employed on a casual and contract basis in construction and other low-skill sectors. Research has documented the growing trend towards casualisation; informalisation and externalisation of labour in South Africa (see Von Holdt and Webster, 2005; Polzer et al., 2010). The practice of limiting trade union membership to permanent workers has negative implications on undocumented migrants who are hardly permanent workers. It is in this

instance that Polzer et al. (2010: 33) posit that new forms of unionisation which do not limit membership to workers with formal and permanent contracts are imperative.

Secondly, the failure of some trade unions to organise undocumented migrants can be attributed to practical problems, such as electronic transfer of membership fees among other things. Three trade unions from the sample have no alternative mechanism for membership procedures and payment of subscription fees other than payment of subscription fees through the employer's electronic payroll system. In some trade unions, membership fees are paid only electronically according to trade union policy and the requirement is that employers should contribute a percentage of the member's salary. (see Table 4 on page 87 for examples of flexible practices).<sup>78</sup> One has to bear in mind that employers generally do not want trade unions to discover that they employ undocumented migrants because of the legal consequences. It is far-fetched to expect the employers to register the undocumented migrants on their electronic payroll system and remit their subscription fees to trade unions. As one trade unionist understands it: *'...the challenge is for us to reach out to them is a very simple one....we don't know they exist meaning when you go to these companies, on the employee data base, their names do not even appear but they are there. So they are not on the payroll, they are not on the company administration.....they are paid cash, so you take this container to Waterfront, bring back my truck and I will pay you in cash'*. The system

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<sup>78</sup> A few trade unions have payment of subscription fees in cash or directly into the union bank account. Three trade unions allow migrants to pay subscriptions in cash at the union offices.

at one of the bargaining councils is also an example of an exclusionary practice by a cartel of unions and employers party to the council.<sup>79</sup> Migrants cannot register at the bargaining council to get a ‘code’ which requires some form of identification. Consequently they are unable to launch unfair dismissal cases and abuses for redress at the council because of this administrative barrier.

Table 4: *Membership Subscription Modalities*

Union 1	Direct stop order facility between employer, union and worker	Members can pay in cash at the union offices	Union members can pay directly into the union bank account and bring proof of payment	Members can pay at the bargaining council
Union 2	Stop order facility between employer, union and employee	Members can pay in cash at the union offices		

Polzer et al. argue that ‘these systems are not aligned with the reality of [undocumented migrant worker] employed by subcontractors and brokers who are usually paid in cash not through the bank and electronic

<sup>79</sup> A visit to the bargaining council revealed that undocumented migrants generally do not go to the council to launch their complaints for redress. In this case there is an administrative barrier where union members have to pay their subscriptions through their employer electronically. Coupled with this, registration at the council requires some form of identification. The technicalities at the bargaining are explained by one trade unionist: ‘So you need to be registered and to register you need the necessary and correct documents and those documents will also be necessary to open bank accounts not necessarily in the workplace alone, like it goes a long way like the banks. Everything must be paid via the electronic system at the bargaining council. We do not allow a system where there is cash flow from employee to employer hand to hand.’

payments' (2010: 33). Given the growing trend towards labour broking, trade unions need to reconsider such practices because of the negative implications they have on their endeavour to organise migrants. Alternative payment methods, without the bureaucratic intercession of the employers' administrative systems, are imperative if trade unions are to recruit undocumented migrants.

Participation of migrants in local trade unions also determines whether undocumented migrants can join the trade unions. There remain a participatory gap between foreign nationals and natives in local trade unions, although some trade unions have managed to integrate migrant workers into their union structures as shown by the following examples (see Table 5).

Table 5: *Migrants in Union Structures*

<b>Trade Union</b>	<b>Migrant officials and their roles in the union</b>
A	Employs a female Zimbabwe migrant who works as cleaner and she sometimes works at the union reception in the security sector. <sup>80</sup>
B	Has migrant shop stewards and they are part of the shop steward committees in the fisheries. <sup>81</sup>
C	This union's chairman at Sola Salt Farm is a Namibian national. He organizes farm workers for the union.

<sup>80</sup> Although she does cleaning and administrative work, her strategic location at the reception is very important because that's where members are assisted and this can help migrants feel comfortable in a society that is polarized between foreign nationals and locals.

<sup>81</sup> The researcher met one of the shop stewards at the office and had a 15 minutes interview with him.

The huge participatory gap implies that the needs and aspirations of migrants (documented or otherwise) are not represented. Secondly it would be very difficult for trade unions to break the mistrust that exists among migrants if migrants are not integrated into trade union structures and participate in union activities.<sup>82</sup> This is even worse for undocumented migrants who are legally insecure. As one commentator says ‘...whether a migrant joins a trade union depends on the person on the ground...’ Most of the unions in the sample are akin to ‘fortresses’ where the organisations are a preserve for native workers and migrant workers are generally marginalised in union structures. This may entrench the mistrust that undocumented migrants have of trade unions because of their fear of deportation. As Gordon (2005: 57) observed in his case study, foreigners make up a relatively small percentage of union membership of trade unions investigated and most of those migrants that are members are not part of the organisational process of the trade union. It is not surprising that, because of the relative marginalization of migrants within the structures, migrants have a limited voice in trade union affairs. However, the participatory gap means that the needs of migrant workers are under-represented in local trade unions and this also relates to the argument by CoRMSA (2011) regarding the political identity of South African trade unions.

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<sup>82</sup> It is generally held that undocumented migrants view trade unions as part of the national institution, hence fear of deportation. This view is shared by trade most trade unionists interviewed.

### 8.2.2 Migrant Worker Rights Awareness

All trade unions concurred that undocumented migrants are protected by the South African labour legislation and from their *modus operandi* ‘*a worker is a worker*’ regardless of nationality and immigration status. The assertion by trade unions that most migrants do not know about their rights is also shared by CoRMSA (2011: 100) which observed that ‘there is a lack of awareness with regard to labour laws, and institutions such as the (CCMA) and the labour courts among migrant workers’. Whereas there is recognition among trade unions that most migrants (documented or not) are ignorant about their labour rights, most of the trade unions have not embarked on migrant worker rights awareness targeting these migrants. Xenophobia awareness campaigns normally directed at the South African public seem to be more prevalent than migrant worker rights awareness campaigns targeting undocumented migrants and encouraging them to exercise their rights. Trade unions in the agricultural and domestic services recognised that migrant workers, do not know about their rights, hence they have launched some initiatives to educate migrants although they remain ad hoc and reactive because of the threat and impact of xenophobic violence. (See Table 6 on page 91).

In some trade unions embarking on undocumented migrant worker rights, awareness was construed as promotion of the ‘problem’ of undocumented migrant labour; the very practice which trade unions are striving to stamp out. For example, one trade unionist said: ‘...*once we*

do that [campaigns for undocumented migrant rights] we seem to be encouraging them, to stay as illegal.... we seem to be encouraging them not to have those documents from the department of the home affairs department....’ The irony is that this trade unionist argued that undocumented migrants are protected by the labour laws but was at the same time opposed to programmes that could help them to exercise their rights.

Table 6: *Migrant Workers Rights Initiative by Trade Unions*

<i>Unions</i>	<i>Migrant Worker Rights Initiatives</i>
A	Inconsistently, raised awareness in its meetings and workshops with domestic workers and migrant domestic workers, even the undocumented attend. Union officials also attend churches to reach-out to and educate domestic workers including migrants.
B	Inconsistently, migrant worker rights awareness in the case of undocumented migrant workers is done for the purpose of alerting migrants to exercise their rights and to allay the fear they have due to their legal dilemma
C	Inconsistently, some of the migrant worker rights awareness has been carried-out in partnership and alliance with migrant worker rights organizations.
D	Launched campaigns to educate foreign farm workers in partnership with GAPWZ officials from Zimbabwe. The trade union recognized that migrants do not know their rights and went on to have education workshops on the farms. The union launched a campaign to raise awareness of the health and safety of migrant workers who are ferried to work by insecure trucks to work. In so doing they also defended the rights of migrant workers, many of whom according to the union are undocumented

Some law experts and scholars also argue that permitting unauthorised workers to access labour legislation would undermine the objectives of the Immigration Act by promoting clandestine and irregular migration, thereby permitting the very situation that the Immigration Act sought to prevent (see the arguments in Bosch, 2006). It is in this instance that one commentator said *'if trade unions are saying undocumented migrants have rights and recourse, it is important that they say that to the people who matters most [undocumented migrants themselves], perhaps they are saying that to the wrong people'*. Arguing that 'a worker is a worker' at the same time as being unwilling to defend certain sections of the working class shows the hypocrisy that bedevil some trade unions.

### 8.2.3 *The Fight against Xenophobia: Latent Xenophobia in Unions*

Trade unionists believe that xenophobia arises from a situation where employers deliberately target migrants for employment ahead of South Africans because they are cheap, exploitable and compliant.<sup>83</sup> Hence the blame for xenophobia is placed by trade unions squarely at the employers' doorstep. Trimikliniotis et al. (2008; 1333) argue that COSATU regards xenophobia among native workers as 'an artificial phobia' created by employers to divide the workforce. This logic denies the 'natural' existence of xenophobia among South Africans. Trade unions have played a leading role in the fight against xenophobia in the

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<sup>83</sup> Trade unionists also recognize that some of the undocumented migrants are employed because they possess skills that are scarce locally.

Western Cape through issuing press statements condemning xenophobia<sup>84</sup> and embarking on anti-xenophobia awareness campaigns. Some even provided humanitarian aid in 2008.<sup>85</sup> In two trade unions, anti-xenophobia education is a ‘daily’ and consistent practice. The union official said ‘..... since 2008 each and every trade union, and each and every member speaking on a platform they are crushing this thing away....’ Hlatshwayo (2011: 2) argues that trade unions successfully helped to quell xenophobic violence but have not successfully organised migrants as a powerful tool for preventing xenophobia. However, anti-xenophobia practices by all trade unions have opened up the possibility for trade unions to organise and defend the rights of migrants (documented or otherwise) in and outside the workplace.

The notion that xenophobia happens in the wider society or certain segments of society seems to prevail among unionists, but ironically some trade unionists harbour xenophobic tendencies.<sup>86</sup> Even the DHA was not spared by pro-migrants groups in the labour movement, because of its xenophobic pre-occupation with illegal migrants during the immigration policy reform (see COSATU Submission on the White Paper, 2000 para 7.2). The inputs of three trade unionists from different trade unions suggested xenophobic beliefs pertaining to crime and the

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<sup>84</sup> See *Spotlight Interview with Khulile Nkushubana (CONSAWU)*, Interviewed by Samuel Grumiau, 3 July 2009. *SATAWU Press Statement Condemning all Forms of Discrimination Including Xenophobia*, Released: 28 May 2008., *Job seekers, COSATU Young Workers Forum (Western Cape) and PASSOP Lodge Human Rights Complaint Against BP*, Press Statement Released 13 October 2011., COSATU (Johannesburg) *Press Statement on the Xenophobic Issue in the Western Cape*, Released 15 July 2010.

<sup>85</sup> For comprehensive analysis of COSATU’s response to xenophobia see Hlatshwayo (2011).

<sup>86</sup> Here xenophobia is understood as including beliefs that people have towards foreigners among other things. These beliefs may be unfounded and based on generalisations.

alleged 'taking' of socio-economic opportunities by foreigners. Beliefs that illegal migrants are involved in crime have led to widespread collective condemnation of all migrants despite the dearth of evidence. One trade unionist says: *'criminals also come as undocumented....so you have people of any characters that are undocumented who can you trust.....people that are documented there is a trail.....you can follow-up to see who exactly they are.* These perceptions have permeated South African society despite the lack of evidence to support them, and some sections of the trade union movement have clearly accepted these xenophobic ideas too. Mistrust exists on both sides: some trade unions are suspicious of migrants in terms of crime while migrants are wary of trade unions as they view them as synonymous with the state. In addition, the nationalist ideal that South Africans should be prioritised ahead of foreigners in terms of socio-economic opportunities has led to dislike of foreigners, as they are accused of depriving locals of their opportunities. One trade union had this to say: *'.....this country would not want to be burdened by undocumented people at the expense of its citizens....it makes sense?....'* Research by Von Holdt (2011: 25) shows that poor communities regard migrants' access to resources as illegitimate and locals are defined as citizens with the right to lay claims to a redistribution of resources through the simultaneous exclusion of foreign nationals as non-citizens'. These ideas seem to be resident within certain section of the labour movement.

Trade unions are facing a challenge in terms of exorcising themselves of xenophobia and the jeopardy that accompanies such efforts. For

example, the idea of xenophobia in trade unions took a twist when one of the trade unionists criticised other trade unions, while not exonerating his own union and federation, by arguing that the very people who are supposed to fight for migrant workers are the same people who are saying ‘...*what are they doing here?.....*’ Such self-introspection by trade unions is crucial, as the examples above show that trade unionists are expected to defend migrant workers at the same time they harbour xenophobic tendencies. Trade union native membership has become progressively more xenophobic and according to some unionist this has proved to be a risk for the trade unions. As one trade unionist in the construction sector put it: ‘.....*that is very very sensitive and in certain situations you cannot read the mood of the community at the time. It’s very difficult to read the mood of the community. The communities do not hesitate to turn against the trade union. My own members could be xenophobic, my very own members...*’ This shows the dilemma that trade unions are facing by sympathising with migrants, as they risk alienating themselves from themselves from their native membership.

Although trade unions have been at the forefront in extinguishing xenophobia, the results above demonstrate two important complexities. Firstly, there is often a tendency amongst unionists to ascribe racism, xenophobia and discriminatory acts to the wider society while denying their existence in the trade union movement itself (Caglar et al. 1998; as cited in Kahmann, 2002: 26). Secondly, as Gordon (2005: 64) also noted, ‘trade unionists seem to be reluctant to embrace a controversial issue such as undocumented migrant workers as it could endanger

support for the union among the local workforce that is becoming increasingly xenophobic'. Trade unions are walking a tightrope in their efforts to incorporate migrants into their ranks. All these sentiments among rank and file members of trade unions result in lack of 'political will' and less inclination to organise and defend undocumented migrants.

#### *8.2.4 Traditional Organising Techniques and 'Narrow Workplace'*

##### *Focus*

In this dissertation, innovative ways of organising are conceptualised as initiatives undertaken to remove the external and internal barriers that obstruct trade union ability to reach out to and organise undocumented migrants. There are some trade unions which have demonstrated some innovation, marking a decisive break with the traditional approach that seems to dominate in most unions (see Table 7 on page 97). These innovative initiatives however remain ad hoc, incidental and inconsistent. Generally, most trade unions have not devised innovative ways of reaching out to undocumented migrants and other difficulty-to-organise workers. Coupled with this, there are no consistent and proactive initiatives and 'recruitment drives' targeting migrants. One trade unionist had this to say: *'..... we don't have a recruitment drive that says this is purely for undocumented migrants. If we have a recruitment drive for a certain sector, we would have a recruitment drive for the security sector, for the maritime sector or for the cleaning sector but they will*

*never be a recruitment drive for a certain group of people..’*. It is also crucial to note that trade unions do not have particular strategies or plans for reaching out to undocumented migrants integrated in their overall recruitment programmes.

Table 7: *Examples of Innovative Organising Techniques.*

1	A trade union in the farms established a partnership with union officials from (GAPWUZ) to educate and recruit Zimbabwean women in the farms in Stellenbosch after recognizing the trust and language barriers which obstructed them from recruiting migrants in the farms.
2	Distributes pamphlets to residences and communities; and attend churches meetings to network and reach out to domestic workers, and hold meetings in workers’ home towns e.g. Khayelitsha. Thus going beyond the workplace to recruit from the community. These methods are used to both educate and recruit migrant and native domestic workers because workplace-focused recruitment is problematic as trade union access to homes proves very difficult
3	The farm worker trade union has an organizer who is a foreign national. This helps break the mistrust that migrants have of local unions if migrants are integrated into the structure and are in charge of recruiting fellow migrants.
4	One trade union in construction worked with PASSOP to organise temporary migrant workers. Because of its policy to organize permanent workers only, this proved fruitless as the employers refused to give the workers permanent contracts because they did not have permanent immigration status. However, the diaspora organization is the one which took the initiative to bring the workers to the attention of the union.
5	One federation established an alliance with PASSOP to educate farm workers in workshops organised by PASSOP.

At federations-level, unions have not held an in-depth discussion or devised a strategy for organizing migrants, documented or otherwise. COSATU, in its 9<sup>th</sup> and 10<sup>th</sup> congresses, held in-depth discussions on combating xenophobia but fell short of coming up with strategies for organising migrants<sup>87</sup>. Consequently trade unions rely exclusively on traditional organising methods; and one such method is what most trade unions referred to as ‘*word of mouth*’.<sup>88</sup> The chief bureaucratic method involves the use of fulltime or contract union organisers who recruits in the workplaces.<sup>89</sup> These methods are what Tait (2005: 310, as cited in Munck 2011: 14) refers to as ‘bureaucratic and legalistic methods’ on which traditional unions have often relied to organise workers, regardless of diverse circumstances. These traditional union organising *modus operandi* at workplace-level have often proved unsuccessful for organising and defending undocumented migrant workers. This is largely because the circumstances and vulnerability of undocumented migrants cannot be equated to that of their native and legal counterparts. Their ‘illegality’ defies these ‘traditional, bureaucratic and legalistic methods’ that trade unions relying on.

Most trade unionists and academic commentators concur that trade unions are already facing challenges in these sectors.<sup>90</sup> In many countries ‘where union density among migrants is low, it is seen to be as

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<sup>87</sup> See the 10<sup>th</sup> and 9<sup>th</sup> Congress Resolutions.

<sup>88</sup> This method relies on networks of union members who spread the word to un-recruited workers and convince them to join workers.

<sup>89</sup> Once workers agree to join the union, an employment verification exercise follows, in which the employers take part.

<sup>90</sup> Academics and trade unionists concur that construction and other sectors such as domestic and agriculture are difficult to organise because of labour broking and casualisation; hence trade unions are already facing a challenge.

an effect of occupational segregation and the difficulty migrants have in getting jobs in unionised workplaces' (Hyland, 2012: 10). While it should be acknowledged that trade unions worldwide are already facing challenges in these sectors because of the growing trend towards casualization, externalization and informalisation of labour, these barriers and challenges can be overcome.

New and targeted strategies to reach out to the migrant workforce are imperative if trade unions are to succeed in organising undocumented migrants. As Hlatshwayo (2011: 2) notes, COSATU's congress resolution on xenophobia opens up the opportunity for in-depth discussion to map a strategy for organising migrants in the SA labour market. In general, trade unions in the Western Cape are facing challenges in organising undocumented migrant workers, due to inadequate contacts and experience with migrant communities.<sup>91</sup> They also lack insight into the needs of these migrant communities. One way for trade unions to effectively organise undocumented migrants is to work with diaspora organisations and migrant worker rights groups, who could help trade unionists to understand the particular needs and circumstances of migrant workers. Diaspora organisations also have direct and easy access to migrant communities which are otherwise inaccessible to trade unions because of issues of mistrust of trade unions by undocumented migrants. However, thus far there are few examples of partnerships and alliances established by trade unions in the Western Cape showing that trade unions can work closely with diaspora

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<sup>91</sup> One unionist said that there is no place that migrants congregate so that they can be organised.

organisations (see Table 8). For example, although in the 10<sup>th</sup> Congress resolutions COSATU recommended that alliances and partnerships be established with the refugee community, the implementation by the affiliates remain discordant largely because there have been neither report-backs by affiliates nor follow-up by the federation. It seems that there is no motivation to form enduring partnerships and alliances with migrant worker rights groups among unions. Partnerships and alliances that were developed by some unions are ad hoc, inconsistent and mostly a response to the threat of xenophobic attacks.

Table 8: *Trade Union – Diaspora Organisation Alliances*

Trade union 1	Migrant domestic workers who do not have the legal papers required for them to work in South Africa are referred to PASSOP so that they can be assisted by PASSOP to acquire permits at the Home Affairs Department. The union leaders also attend the meetings by an organisation called the Ogoni Solidarity Forum.
Trade union 2	Another case is one where the migrant rights organisation took the initiative to bring migrants to the trade union. This is the only example identified in this research where trade unions form an alliance and partnership with an organization for migrants to organise migrant workers, but the union was not pro-active. It was the migrant worker rights group which took the initiative to organize the workshops. Trade unions should take initiatives.
Trade union 3	A farm-worker union worked together with an organisation called Black Sash in the fight against xenophobia through awareness and education campaigns in the farming communities where xenophobia was rife.
Federation 1	Claims to have worked alongside the Human Rights Watch to help quell xenophobic violence in the Western Cape
Federation 2	Partnerships were also formed between this federation and PASSOP in the De Doorns farms, Western Cape, where both organisations launched initiatives to educate migrant workers in the farms about their rights.

Trade unions in the Western Cape seem to struggle to identify good access points to reach out to migrant workers. Spooner, (2002: 3) and Beirnaert (2011) makes a compelling argument that trade unions need to work with migrant rights groups to effectively to gain access and organise migrants. For example cooperation between unions and diaspora organisations in Spain has resulted in migrant workers' service centres where trade unions answer to labour related questions and migrant workers associations to migration related queries (Beirnaert, 2011). This strategy has not been fully utilised at the grassroots level in the area of organising migrants by trade unions in the Western Cape. The current ad hoc partnerships established during the xenophobic attacks provide a platform to do so. Where partnerships have not been developed, trade unions can seize the opportunity and establish links. Where they do not exist, mutually beneficial coalitions and collaboration could be initiated. Social unionism focuses on organising workers beyond the workplace (Munck: 2011:14),<sup>92</sup> and will increase trade unions' capacity to reach-out to the most vulnerable and difficulty-to-organise groups of workers.

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<sup>92</sup> Whereas 'economic unionism focused on workers as sellers of labour power, and political unionism focused on the nation-state to advance labor's cause, social unionism recognized that workers were part of society and had to organise beyond the workplace' (Munck, 2011: 14) .

### 8.2.5 Assistance with Legal Documentation

There seems to be insistence on ‘narrow economism’<sup>93</sup> or narrow workplace focus and lack of willingness on the part of most trade unions to take up other socio-political issues that falls outside the workplace but have repercussions on workplace relations in respect of undocumented migrants. Anecdotal evidence shows that some trade unions have embarked on direct assistance with acquisition of legal documents, although as in the cases of all the initiatives, these assistance initiatives are not on-going practices but rather ad hoc and incidental (See Table 9).

Table 9: *Trade Union Assistance with Legal Documents.*

Union	Type of assistance
1	The trade union wrote letters to the Department of Home affairs Department recommending that migrants, among them a Cameroonian national, be issued with work permits in 2004.
2	The trade union in domestic services refer migrant domestic workers who have problems acquiring legal documents to PASSOP, a migrant rights organisation that deals with permits acquisition.
3	One case that is very reliable involves a trade union in the farms which, through its lawyer, assisted an undocumented migrant to get a refugee permit and proceeded to represent him at the CCMA against his employer who had refused to compensate him for injuries sustained at work.

<sup>93</sup> ‘Economic unionism’ focuses on workers as sellers of labor power. (Munck, 2011: 14).

On the other end of the spectrum there are trade unions which regard assistance with acquisition of legal documents as an immigration issue that falls outside the purview of trade unions. In one trade union, documentation is regarded as a 'pro bono' issue which unions are willing to assist should undocumented migrants come forward: *'the trade union in its scope cannot assist with all that documentation. What we can assist with is providing necessary support for our members giving them guidance for where to go, not maybe liaising with the immigration, because that doesn't fall within our scope. We can liaise with employers and make use of our bargaining power to make them comply'*. Generally, assistance with work permit acquisition was seen as quasi-trade union business by most trade unionists, consequently most trade unions have not assisted undocumented migrants in this respect.

The view that work permit issues fall outside the scope of trade unions is not well supported. Firstly, it disregards international examples of trade unions in other countries which have taken up immigration issues and effectively organised undocumented migrants. In Spain the two trade union federation created centres that deal specifically with migrant worker issues, including assistance with permits through regularisation campaigns (see Kahaman, 2002: 23). Secondly, to accept the view is to ignore the history of the labour movement in South Africa and other African countries where trade unions have taken up wider political and social issues that transcend the workplace, e.g. through social movement

unionism.<sup>94</sup> Locally trade union federations have already embraced broader socio-economic issues, through public participation in immigration policy formulation and involvement at NEDLAC. Trade unions in other countries have embraced these issues as an opportunity to revitalise the movement, whereas in South Africa some unions remain in the shackles of narrow ‘economism’ and hesitate to take up broader societal issues.

#### *8.2.6 Representation and Employer Engagement*

Despite the claim that undocumented migrants have rights and recourse to the CCMA and Labour Court, there is uncertainty among most unionists whether they can actually represent undocumented migrants at the CCMA and Labour Court in practice. Some unionists are hesitant to represent undocumented migrants, either at the CCMA or in Bargaining Councils because of their ‘illegality’. One trade unionist says: ‘....we also operate within the parameters of the laws so it will be futile and improper for me as a trade unionist to have someone joining knowing that ultimately I won’t be able to help them.... I will have to prove that this person is legal. For example the case goes to the labour court; I cannot take the case to the labour court for someone who is not legal to work....’ Most undocumented migrant workers do not join trade unions in the first instance; hence it should not come as a surprise that most

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<sup>94</sup>The following examples also give credence to the argument that assistance with regularisation can be regarded as trade union ‘business’. E.g. COSATU’s critical role in the fight for democracy in SA. COSATU-TAC Alliance to fight for the rights of the working class to HIV/AIDS treatment and drugs (See De Wet, 2010).

trade unions are uncertain about the possibility of representing undocumented migrants at the CCMA. Although unions have represented undocumented migrants in a few situations (see Table 10 on page 106), most have never represented the undocumented ones at the workplace, bargaining council or CCMA for unfair labour practices.

Coupled with this, most trade unions interviewed have not engaged employers either at workplace and bargaining council level in respect of the employment of undocumented migrants. However there are some trade unions who have taken some steps to engage employers. Anecdotal evidence from one union in the agriculture sector shows that the trade union has engaged farmers on the treatment of undocumented migrants. The unionist says '*... it's an offence for him to employ people without permits. That is how we get them to comply with the labour legislation. So we [tell the employers] we will keep quiet about these people [undocumented migrants] not having papers as long as you give them their labour rights, if you treat them like human beings....*'. In this example the trade union does not demand the dismissal of undocumented migrants employed by the farmers but tries to strike a deal that benefits both employers and the undocumented migrants.

Table 10: *Trade Union Representing Undocumented Migrants*

<p>Example 1</p>	<p>Represented an undocumented migrant worker when the farmer refused to compensate him for the injury incurred on duty. The union then assisted the undocumented migrant to get the legal papers and took the case to the CCMA and he was awarded compensation. They also represented another undocumented migrant at the police station to pen an attempted murder case because they allege that the police were reluctant to open a case.</p>
<p>Example 2</p>	<p>Also represented three undocumented migrants, but when they came to the CCMA the migrants withdrew the cases. This is probably because of the issue of documents. Currently one of its organisers is representing an undocumented migrant from the Democratic republic of Congo (DRC) at the CCMA. He first went to the CCMA without union representation and was not assisted. The undocumented migrant in question was arrested by immigration and was in custody at the time of the interview. The union with the help of PASSOP is trying to get him released from custody and pursue his case at the CCMA.</p>
<p>Example 3</p>	<p>Represented an undocumented migrant worker at the CCMA, but she was already a union member before she failed to renew the permit resulting in her being undocumented. The matter went to the labour court and she won the case.<sup>95</sup> This case is exceptional in that the worker was in the country legally but working illegally. This could be different from those in the country illegally and working illegally also.</p>
<p>Example 4</p>	<p>Claims to have represented undocumented migrants at the CCMA. The issue of work permits never came up at the CCMA. Claims that at the CCMA the question of legality is not raised unless it is the subject of the dispute. However, the process of filing a complaint requires at the CCMA some form of identification is required such as ID number.</p>

<sup>95</sup> See the *Southern Sun Hotel Interests (Pty) Ltd I.R.O. Southern Sun Waterfront Hotel v CCMA and Others* (C255/09; C362/09) [2011]

Trade unions party to the Road Transport and Freight Industry Bargaining Council have engaged employers not only through the media<sup>96</sup> but also in bargaining council on the issue of undocumented migrants, resulting in the clause in the Road Transport and Freight Collective Bargaining Agreement that stipulates that no employer who falls within the scope of the bargaining council should employ illegal migrants (April 2009, Para 40). Most trade unions have repeated the calls for employers to stop employing undocumented migrants and those calls are disregarded. These calls are no more than reiteration of Section 38 of the Immigration Act 2002, which prohibits employers from employing undocumented migrants and sanctions employers who are caught doing so. Firstly, given widespread non-compliance with the immigration regulations by employers as demonstrated by literature on employment of illegal migrants in construction (See Polzer et al., 2010: 26), the trade union approach is questionable.

‘Inspections conducted by the Department of Labour remain rare and only occasionally lead to imposing penalties on the employers’ (Trad et al., 2008: 5). Employers are not likely to stop the practice because the penalties are not acting as deterrants. For example, despite the collective agreement, employers in the road freight industry still engage in the practice of employing migrants without work permits. Secondly, some of these demands can have an equivocal meaning, in that it could easily be construed to suggest that employers should just not employ migrants. Migrants could easily interpret these demands as xenophobic;

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<sup>96</sup> The anti-xenophobia SATAWU press statement released on 28 May 2008 rebukes employers who employ undocumented migrant workers.

consequently this has negative repercussions on migrants' trust of local unions. It is prudent for trade unions to organise all workers regardless of their immigration status as determined by the state, rather than urging employers to make divisions between different sections of the proletariat when hiring them. This would also fly in the face of worker solidarity which the labour movement has relied on as its resource. This does not necessarily mean trade unions will be condoning irregular workers.

#### *8.2.7 Trade Unions and Policy Enhancement*

The South African government has not yet ratified one of the international instruments considered crucial for the protection of undocumented migrants, and trade unions cannot rely on the convention in defending the rights of migrants. Federations have called for the Government to ratify the UN International Convention on the Protection of All Migrants and Members of their Family (ICMW), but have not taken further and significant steps towards pushing for ratification. Prakashne Govender, writing on behalf of the COSATU Parliamentary Office in 2008, says that '...there remain a number of interventions which should be implemented to target COSATU membership [assumed as including migrant workers] which include launching a campaign through all structures to advocate for the ratification of ILO and UN Conventions on migrant worker rights....'. (2008: 57). Labour federations claimed to have made representation to parliament on the ratification of the convention in 2009, but there seem to be not 'enough

political will' among trade unionists to lobby and advocate for the ratification of the instrument. In terms of immigration policy enhancement, COSATU's 9th and 10th Congress Resolutions reiterate its call for a human and progressive and a rights-based immigration policy. Coupled with this, the Domestic Worker Summit organised by trade unions and civil society organizations resolved that: *Migration laws and procedures [should] be amended; migration officials [should] not involve in disputes. Domestic workers must not be deported whilst the person's case is still in dispute and not resolved.*<sup>97</sup> The research could not establish with certainty whether these demands were presented to the Department of Labour (DOL) and DHA.<sup>98</sup>

Trade unions have not taken significant steps to push for the ratification of the Convention; neither did the Domestic Worker Summit caucus taken substantial initiatives to lobby the government to implement the proposed policy reforms. A study by Williams et al. shows similar reluctance because 'the concern remains that by promoting the rights of migrant workers and their families in the manner proposed by the convention, local workers may be (seen to be) disadvantaged' (2006: 15). It seems that there is widespread concern among government representatives and trade unionists that ratification of the convention would give unwarranted rights to 'illegal migrants'. This would be contrary to government objectives to stamp out illegal migration to

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<sup>97</sup> On the 27-28 August 2011 the South African Domestic Services and Allied Workers Union (SADSAWU) COSATU, NACTU, FEDUSA and other civil society groups convened a Domestic Worker Summit during which the concerns of migrant domestic workers was raised (p. 2).

<sup>98</sup> One trade unionist revealed that there has not been any representation to government in terms of the Summit's demands.

South Africa. It is not surprising that in the study by Williams et al., all respondents in the government and labour were clear that in the convention ‘a distinction be made between documented and undocumented migrants’ (2006: 14). The implication is that the convention could only apply to documented migrants; otherwise it would run contrary to the government’s objective to prevent ‘illegal’ migrant labour. The fact that trade unions were adamant that once a person is employed he/she is entitled to the protection of the South African Labour laws (Williams et al., 2006: 15), demonstrates the divided loyalties in the trade union movement (which in some cases is torn between maintaining political relationship between some trade unions and the ruling party on one hand; and the need to foster unity among all workers on the other). The political will to advocate for the ratification of the convention and implementation of the Domestic Worker Summit resolutions seems be deficient.

### ***8.3 Summary of Findings***

#### *8.3.1 Continuity in Exclusion*

While trade unions were covertly anti-immigration and exclusionary in their response to migrant labour in post-apartheid South Africa, they demonstrated solidarity with migrants (documented or otherwise).<sup>99</sup> In

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<sup>99</sup> This cannot be said for trade union and federations which did not participate in the Immigration policy reform process or which were formed after the immigration policy reform, e.g. CONSAWU.

the present there is continuity of this contradiction. Thus, while trade unions 'publicly' demonstrate solidarity with migrants (undocumented documented or otherwise) and purport to have an 'open door' policy,<sup>100</sup> they exclude undocumented migrants from trade union membership. In other words while demonstrating solidarity and encouraging undocumented migrants to join trade unions, there is exclusion entrenched in policies and practices. These policies and practices are not congruent with the realities of undocumented labour in South Africa. Most trade unions seem to be still insisting on traditional methods of organising and these methods are out of sync with the unique circumstances and vulnerability of undocumented migrants. As a result of such practices, most trade unions have failed to reach out to undocumented migrants and organise them. A few pro-undocumented migrant initiatives undertaken by trade unions in defence and furtherance of the rights of undocumented migrants remain ad hoc and inconsistent. Political will also counts, and in most cases trade unions do not exhibit that political will to organise undocumented migrants. However, the threat and impact of xenophobic violence in 2008 has awakened trade unions to the need to incorporate migrants into the trade unions. In some trade unions there is influence from above, i.e. from federations, for example COSATU's congress resolutions on xenophobia has seen some of its affiliates forging alliances with migrant rights communities although the implementation by affiliates remain acrimonious.

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<sup>100</sup> Trade unions are publicly demonstrating this logic by chastising employers and not 'illegal immigrants'.

### 8.3.2 *Inconclusive Link Between Perspectives and Practices*

There is no clear-cut relationship between trade unionists' perspectives on i) causes of undocumented migration ii) recourse of undocumented migrants on one hand; and their predisposition to organise and defend undocumented migrants on the other. (see Table 11 on page 113). Four trade unions regarded the phenomenon of undocumented migrants as 'political circumstances' and they have demonstrated their willingness to defend undocumented migrants and have embarked on initiative to organise and defend undocumented migrants (see Category A unions). However this relationship between perspectives and practices is confounded by Category B trade unions which are more complex. They have undertaken some pro-undocumented migrant practices despite having diverse and conflicting perspectives on both circumstances that leads to undocumented migrant labour and the rights thereof. The inconsistency between views of trade unions and their practices in respect of undocumented migrants can best be explained by the tendency to say things for reasons of political expedience. It is one thing to say that undocumented migrants have rights and are protected by the labour legislation, and another thing to actually organise them and defend their rights. One researcher and commentator argues that *'if trade unionists give politically correct responses, this means that they know what they are supposed to be doing and why they are not doing it'*. Having a particular perspective on the circumstances that lead to undocumented migrant labour and holding the view that undocumented migrants have rights and recourse does not pre-dispose trade unions to respond in a certain way to the phenomenon of undocumented migrant labour. Some

of the trade union views could be conveyed for political expedience when they are not actual reflections of what the unions believe in.

Table 11: *Inconsistence between Perspectives and Practices.*

<b>CATEGORY A</b>	<b>Circumstances</b>	<b>Rights and Recourse</b>	<b>Practices</b>
A	Victims of circumstances	Have rights and Recourse	Ad hoc pro-undocumented migrant worker practices [but this category has done better than Category B]
B	Victims of circumstances	Have rights and Recourse	
C	Victims of circumstances	Have rights and recourse	
D	Victims of circumstances	Have rights and recourse	
<b>CATEGORY B</b>			
E	Victims of circumstances	Have rights and recourse	Some ad hoc practices that were pro-undocumented migrant practices and Category A seem to be better than this category.
F	Perpetrators	Have rights and Recourse	
H	Declined to comment	Have rights and recourse	
I	Perpetrators	Have rights and recourse	
G	Perpetrators	Have rights and recourse	..... <sup>101</sup>

<sup>101</sup> A follow-up interview to get more information proved unsuccessful.

**PART 4**  
**CONCLUSION**

University of Cape Town

## 9. CONCLUSION

### *9.1 Summation*

The dissertation, as do previous studies (Penninx and Roosblad, 2000); Kahmann, 2002; Gordon, 2005; Trimikliniotis et al., 2008), has identified the contradiction in trade union policies towards immigration on one hand and policies and practices towards undocumented migrant workers once they are in the country on the other. Precisely, it is the tension between guarding the rights and interests of citizens against the supposed hazard of migrant labour; the tension between resisting immigration completely or partially versus the moral imperative of trade unionism to defend and vindicate the rights of all workers for the greater good. In a review of various studies Hyland (2012: 8) concludes that ‘historically and internationally trade unions saw their interests as being best served by restrictions on migrant labour’. The South African labour movement is no exception. By calling for stringency and restrictions on the flow of migrants in the labour market, the South African labour movement, with the exception of CONSAWU ‘ was in quest of preserving the position of one segment of the working class at the expense of another segment. This dissertation confirms Gordon (2005: 48) and Trimikliniotis et al.’s (2008: 1331 -1334) conclusion that the labour movement’s response to immigration has been hypocritical, i.e. while being publicly pro-migrant the movement was covertly and diplomatically anti-immigration. The movement has lent support to provisions that could exclude migrants from the labour market. The

contradictory response demonstrates the incongruence between ‘international worker solidarity’ and nationalist ideals. Using Trimikliniotis et al.’s phraseology (2008: 1336), the labour movement is ‘torn between its struggling traditions of anti-racism and discrimination as an essential strategy for the achievement of unity of all workers against capitalism, and on the other, its sectional defense of a ‘national working class’ against African migrant labour’.

A second contradiction concerns trade union policies and practices towards undocumented migrant workers once they are employed in the country. Munck (2011: 10) hypothesises that trade unions can respond to [undocumented] migrant labour in two different ways, i.e. they may incorporate these workers into their organisations and press for the leveling-up of labour standards or they may go along with the mainstream xenophobic discourse and actively lead the exclusionary offensive in the workplace. On a continuum ranging from exclusion to inclusion, there exists an ambiguous relationship between trade unions and undocumented migrant workers in the Western Cape. It can be argued that the response of South African trade unions in the Western Cape is leaning towards the exclusion end of Munck’s (2011: 10) spectrum. The research concludes with the thesis that there is continuity in the contradiction exhibited by trade unions during immigration policy reform but it is of a different nature. Thus, Trimikliniotis et al. (2008: 1333) are spot on when they theorise that historically migration was construed as a mechanism for the cheapening and exploitation of labour (local and international) and in the post-apartheid period it has been

construed as a mechanism to undermine labour standards. They further deduce that this logic allows trade unions to view employers as the culprits who target undocumented migrants, thereby demonstrating harmony with undocumented migrants. While not publicly raising the spectre of xenophobia and exclusion of undocumented migrants in their organisations, the exclusion of undocumented migrants from trade unions is not overtly xenophobic but embedded in policies and practices which are out of sync with the realities of undocumented migrant labour. It is ironic for trade unionists to 'publicly' demonstrate solidarity with undocumented migrants and proclaim an 'open door policy' while exclusionary policies and practices exist. Thus, it can be argued and concluded that trade unions are, to some extent, 'their own barriers and obstacles' to organising migrants, documented or otherwise.

Previous findings have also shown that trade unions have not effectively organised migrants largely because they have not held an in-depth discussion to map a strategy to organise migrants (See Gordon, 2005, Hlatshwayo, 2011). Indeed, as employers are shifting from recruiting within the trade unions' traditional support base, trade unions remain locked in their struggle to advance their position in that citizen support base. Coupled with this, while employers are restructuring employment, such as employing undocumented migrants to maximise labour flexibility while collaterally eroding labour market security, (while trade unions remain locked in the traditional *modus operandi*). Undocumented migrants are in a legal dilemma and beyond the reach of the traditional labour movement. The unique circumstances and vulnerability of

undocumented migrants resist what Tate (2005: 310, in Munck, 2011: 14) refers to as 'bureaucratic and legalistic' methods of organising which the South African trade unions seem to use. They have not broadened their roles beyond narrow 'economism' or workplace focus to tackle outside-the-workplace issues. With the threat and impact of xenophobia, there is growing recognition of the need to organise migrants and some trade unions have undertaken innovative techniques to organise undocumented migrants. However these initiatives remain ad hoc and inconsistent and South African trade unions are still very much traditional trade unions whose organising strategy focuses on particular workplaces in particular industries. Trade union policies and practices are based on the assumption of predictability, whereas the workplace reality is that of unpredictability. As Munck (2011:10) argues, the 'business as usual approach' that seems to permeate trade unions 'is the most risky labour movement strategy today'. Hypothetically, if trade unions had responded to undocumented migrant labour as an *Underclass*<sup>102</sup>, specific and targeted initiatives to organise and defend the undocumented migrants could have been developed and consistently implemented.

Two explanations can help understand why trade unions have not been successful in their endeavour to organise undocumented migrants. The first is lack of political will to organise and defend undocumented migrants, related to the covert anti-immigration stance and latent

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<sup>102</sup> Thesis claims that migrants do not share the same experience as the native working workers because illegality and discrimination ensure that they occupy this underclass (Miles, 1982:152).

xenophobic tendencies in some trade unions. Secondly, Michel's iron law of oligarchy and Webster's postulations regarding bureaucratic organisations' slow pace of change seem to be at work in the South African labour movement even in the face of increasing exploitation of undocumented migrant labour.<sup>103</sup> 'With diminished capacity to mobilise traditional forms of economic and political pressure' (Hyland, 2012: 7), trade unions are ill-prepared to react in a far less sympathetic and predictable environment. There is a need to break the bureaucratic impasse and take risks to forge alliances with diaspora organisations and finding innovative ways of organising undocumented migrants.

The difficulty in reconciling nationalist ideals and a commitment to international worker solidarity still haunts the labour movement. Trade unions seem to be reluctant to organise undocumented migrants because they could risk alienating themselves from citizens.<sup>104</sup> Gordon also concluded that 'the more immediate need of the trade union movement to maintain and advance their position within their citizens takes greater precedence than the need to foster new unity among diverse groups' (2005: 57). As Hyland notes, such defensive actions 'contradict notions of international solidarity that are historically such a fundamental part of union ideology, and rhetoric' (2012: 8). Consequently, the defensive stance and exclusionary practices render trade unions' claim to international solidarity as nothing more than espoused values which are

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<sup>103</sup> According to Michel's Iron law of Oligarchy democracy in trade unions ultimately requires bureaucracy and as trade unions mature they become bureaucratic and dominated by a small leadership group - i.e. oligarchy. Change is slow in bureaucratic organisations.

<sup>104</sup> Citizens are increasingly becoming xenophobic and believe that undocumented migrants are posing unfair competition and taking their opportunities.

far removed from practice, or a truism that gets lost in everyday practices. It is in such instances that Munck (2011: 5) argues that ‘internationalism begins at home’. South African trade unions’ response to undocumented migrant labour tears the idea of worker solidarity in tatters. As long as trade unions remain ‘shields of vested interests’ (Gordon, 2005:68), the idea of worker solidarity is in rags. All evidence shows the character of a movement which gives primacy to its citizens, i.e. defending vested interests and relying on protectionism of some sort.

As Munck (2011: 11) notes, ‘Trade unions have universally been severely affected by the last twenty-five years of restructuring of capital, but despite their failings trade unions remain the major collective expression of workers’ interests and retain, however unevenly, the capacity to reinvent themselves and play a positive role for social transformation’. Trade unions should rather view the challenge of organising undocumented migrants as an opportunity for trade union renewal. To borrow Munck’s question, ‘what if it leads to trade union revitalisation? (2011: 10)’ Indeed, organising undocumented migrants is an opportunity for trade union revitalisation and broader democratisation. As much as it is a challenge ‘there is no escaping the fact of migration and the impossibility of a coherent trade union and democratic renewal strategy which does not take them into account’ (Munck, 2011: 11). Exclusion has proved to be very costly and disadvantageous for both migrant labour and trade unions.

## ***9.2 Further Research Issues***

There are certain research issues that remain unexplored in this research. Possibly these could form part of further research on trade unions and migrants in South Africa. The research has shown to some extent that there is some influence from federations but there remains a void that needs to be filled regarding the relationship between the federations and their respective affiliates. The second unexplored issue is the federation and individual trade unions' relationships with political parties and government. Are there confused and divided loyalties in respect of migrant labour? Do trade unions have voices of their own or are their responses influenced by particular political positions? All these issues should form part of further research to develop our scientific knowledge of trade unions and migrant labour in post-apartheid South Africa.

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***B. Migrant Worker Rights Organisations in the  
Western Cape***

1. Ogoni Solidarity Forum
2. Scalabrini Centre of Cape Town
3. People Against Suffering, Suppression and Oppression (PASSOP)
4. Agency for Refugee Education, Skills Training and Advocacy.
5. Sonke Gender Justice Network (Refugee One Man Can Project).
6. Alliance for Refugee in South Africa
7. Migrant Workers Committee (Save A Soul Brigade offices )
8. Nigerian Union Western Cape (NUWC)
9. Rwandan Community Western Cape (RCWC)
10. Cameroonian Association Western Cape (CAWC)
11. Eritrea Movement for Human Rights and Democracy
12. Cape Town Refugee Centre
13. University of Cape Town Law Clinic

### *C. Interview Schedule*<sup>105</sup>

How do foreign nationals end up working in South Africa without legal documents?

What is the trade union's perspective on immigration law and labour legislation in terms of undocumented migrant workers?

To what extent does the South African labour legislation protect undocumented migrants?

What rights and recourse do undocumented migrants have?

Why do employers employ undocumented migrants?

When people come to South Africa and start working without legal documents, how does the trade union deal with that?

What policies towards migrant workers (undocumented or otherwise) does the trade union have in place?

What is the trade union's position on undocumented migrants who are already employed?

What pre-requisites are there for migrant workers to join the trade union?

What practices for mobilising and organizing undocumented migrants your trade union has?

What successes are involved in these strategies?

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<sup>105</sup> This guide was used throughout the fieldwork and was adapted for commentators. Some questions asked during the interview did not follow the exact, sequence, format and wording in this guide and some questions were improvised during the interviews. However, all the themes in this guide were covered in each and every interview.

What problems are you encountering in trying to organize undocumented migrants?

In terms of migrant worker rights awareness and education what initiatives have you taken?

How many workers does your trade union represent - estimates? How many migrants are members?

To what extent are migrant workers represented in the trade union structures?

What actions has the trade union taken to assist undocumented migrants to get legal documents [work permits or refugee permits]?

What role did you play during the Zimbabwean Dispensation Project [a regularisation exercise for undocumented Zimbabwean migrants]?

Have you been engaging employers or employer associations [at various levels like workplace, bargaining council etc] on issues to do with undocumented migrants? If yes, on what terms?

Have you as a trade union represented undocumented migrants at the CCMA or Labour Court?

What partnerships have you established with migrant worker rights organizations/diaspora organizations on migrant worker issues?

What role has the trade union [for federations only] has played towards labour law reform relating to migrant workers?

What role has the trade union [for federations only] played towards immigration policy reform?

What role did the trade union play during the May 2008 xenophobic attacks?

What role is the trade union playing to help migrants integrate into the South African society?

-END OF INTERVIEW SCHEDULE-

University of Cape Town