

# Employment legislation concerning Chinese nationals in Botswana - Lessons from SADC and the ILO

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## **ABSTRACT**

This study examines the employment of non-citizens within the framework of appropriate regulatory statutes and constitutional dispensations, as contained in the domestic legislation of the individual countries, Botswana, Namibia, South Africa and Lesotho as part of the Southern African Development Community (SADC). Focusing on labour law development regarding the legislative position of the employment of non-citizens, such as; immigration requirements, basic minimum employment conditions and protection of employment rights have consequently been part of Africa-China economic relations with SADC host countries.

The People's Republic of China (PRC), or China, assistance and its Foreign Direct Investment (FDI) impacts SADC globalised market economies. China State and Chinese companies, increasing engagements in Botswana, Namibia, and South Africa and to a lesser extent in Lesotho, through extended foreign diplomatic and bilateral trade relationships, are characterised by dominant employment of Chinese non-citizens within these host countries.

Botswana and the other host countries' labour market regulative legislation, faces the challenge of developing labour law regulating the protection of decent work, within the international ILO framework for fair and stable globalisation. Assessment of the current labour laws, and economic influences of the individual countries, would bridge the legal cultural gap and enhance sustainable economic growth. Valuable lessons learned from within the region have the potential of ensuring a more mutually beneficial outcome to the "win-win" scenario, from an African perspective, regarding China-Africa relationships.

**KEY WORDS:** China-Africa, labour legislation, employment of non-citizens, Botswana SADC, basic minimum employment conditions, decent work economic policy.

## UITTREKSEL

Die navorsing ondersoek die indiensneming van nie burgers, binne die raamwerk van tersaaklike regulerende statute en konstitusionele bedeling, soos omsluit in die nasionale wetgewing en die individuele lande, Botswana, Namibië, Suid-Afrika en Lesotho as lede van die Suider Afrika Ontwikkelings Gemeenskap (SADC). Dit fokus op die arbeidsregtelike ontwikkeling; aangaande die wetgewende posisie; die indiensneming rakende nie burgers; bepaling van immigrasie wetgewing, die basiese minimum indiensnemings voorwaardes, die beskerming van werkers se regte, as integrale deel Afrika-Chinese ekonomiese verhoudings met die SADC gasheerlande.

Die Volks Republiek van China of China soos hierin verwys se hulpverlening en buitelandse direkte beleggings (FDI), in die tersaaklike SADC lande het direkte impak op wêreldomvattende ekonomie markte tot gevolg. China as die staat, asook Chinese maatskappye toon uitgebreide betrokkenheid in Botswana, Namibië, Suid-Afrika en in 'n mindere mate Lesotho, deur buitelandse diplomatieke en bilaterale handelsbetrekkings, wat kenmerkend die groot getalle indiensneming, van Chinese nie-burgers in die gasheerlande.

Botswana, insluitend die ander gasheer lande kom ten staan voor die uitdaging om arbeidswetgewing te ontwikkel, wat regulering en beskerming arbeidsgeleenthede binne die Internasionale Arbeids Organisasie (ILO) standaard van *Decent work* binne regverdige en globalisering. Die bepaling van die huidige stand van arbeidswetgewing en ekonomiese invloed daarop die wetgewende leemte ten aansien van kulturele uitdagings in volhoubare ekonomiese groei omskep word. Waardevolle lesse vanuit die streek, kan lei tot die bereiking van 'n meer bevoordelende "wen-wen" scenario van uit 'n Afrika perspektief op, China-Afrika verhoudings.

**Kernwoorde:** China-Afrika verhoudinge, arbeidsreg/ arbeidswetgewing, indiensneming van nie-burgers, Botswana/SADC, basiese minimum indiensnemings voorwaardes, asook ekonomiese beleid.

## LIST OF ABBREVIATIONS

AGOA	African Growth and Opportunity Act
AU	African Union
BEDIA	Botswana Export Development and Investment Authority
CCS	Centre for Chinese Studies
CESCR	Committee on Economic, Social and Cultural Rights
CFR	Council on Foreign Relations
CLS	Core Labour Standards
Ed	Editor
FDI	Foreign direct investment
FOCAC	Forum on China-Africa Corporation
GDP	Gross Domestic Product
ILO	International Labour Organisation
IMF	International Monetary Fund
IT	Information technology
IZA	Institute for the Study of Labour (Bonn Germany)
LaRRI	Labour Resource and Research Institute
MIDSA	Migration Dialogue for Southern Africa
MP	Member of Parliament
MPI	Migration Policy Institute
NDP	National Development Plan
NDP10	Tenth National Development Plan
NDP9	Ninth National Development Plan
NGO	Non-government organisation
OECD	Organisation for Economic Co-operation and Development
P	Pula (Botswana currency)

PRC	People's Republic of China
RITs	Regional Investment Treaties
SACU	Southern African Customs Union
SADC	Southern Africa Development Community
SADCC	Southern African Development Co-ordinating Conference
SMEs	Small and medium sized enterprises
SOE	State-owned enterprise
TIPA	Trade and Investment Promotion Agency
UNCESCR	United Nations Committee on Economic Social and Cultural Rights
UNCTAD	United Nations Commission on Investment, Technology and Related Financial Matters
WTO	World Trade Organisation



**Figure 1: Geographical location of Botswana within SADC Region<sup>1</sup>**

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1 Zizhou "Linkages between Trade and Industrial Policies in Botswana" p.i.

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# **Chapter 1: Labour law and employment legislation regarding non-citizens, with special reference to the employment of Chinese nationals in Botswana**

## **1.1 *Research question and problem statement***

This work seeks to examine the labour laws of Botswana, analytically regarding the employment of Chinese non-citizen nationals and whether any lessons are to be learned from the Southern Africa Development Community (SADC), more specifically South Africa, Namibia and Lesotho.

The question is how labour law<sup>2</sup> in the above countries regulates the employment of non-citizens, with specific focus on the close relationship between Chinese employment and China's Foreign Direct Investment (FDI). The particular significance of the law and statutes regulating employment of non-citizens is that it draws attention from numerous disciplines, such as constitutional, immigration, trade and development and the effective implementation of the International Human Rights framework as for the protection of non-citizens in a receiving country. Furthermore, the SADC countries referred to in this study are sovereign in labour related legislation and member states of the International Labour Organisation (ILO).<sup>3</sup>

## **1.2 *Problem analyses***

In order to assess non-citizen employment, the framework for labour laws and statues and the employment of non-citizens as per Botswana and neighbouring countries regarding the individual countries domestic constitutional dispensation, labour law and economic-trade related policy interaction should be deterrent. Although being members of SADC, all four independent countries have sovereignty in legal systems, which include political and economic governance which has direct influence on domestic related labour legislation. The attraction of FDI and Chinese involvement in

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2 Labour Law referring to the broad range of legislation and legislative intervention in the labour market, which attempts to regulate matters including labour supply (for example, by immigration laws), labour quality (for example, by vocational training-skills development, localisation policy), employment conditions, (for example working hours, minimum wage laws) employee-employer relations, (contracts, social responsibility and social security in sending country "China") enforcement and the incorporation of ILO standards court judgments.

3 International Labour Organisation is a United Nations agency dealing with labour issues, particularly international labour standards and decent work for all available at [www.ilo.org](http://www.ilo.org).

Africa has caused an increase in international migration numbers and inflow of non-citizens to Botswana, Namibia, South Africa and Lesotho. The predicament is finding the balance between the need for long term sustainable economic development through the attraction of FDI, and the protection of non-citizens within the host country's legal structures, international conventions and standards, while not compromising economic self-interest.<sup>4</sup>

What is needed is an African perspective regarding the contribution of non-citizen labour in economic growth and development when dealing with FDI. The negative impact of globalisation<sup>5</sup> on labour markets is that it allows foreign firms to exploit low wages and weak regulations which exist in many developing countries in order to produce end products.<sup>6</sup> Maintaining employment stability in diverse economic sectors remains a challenge in the development and harmonisation of labour laws on non-citizen employment, seen within the scope of increased trade relationships and attraction of FDI. China, as an industrialised investment nation, benefits from involvement in host countries with regards to employment created opportunities, access capital, international markets and the overall achievement of its economic growth.

What's more is that China<sup>7</sup> is the largest developing country in the world<sup>8</sup> and Africa encompasses the largest number of developing countries.<sup>9</sup> China's interest in Africa and more specifically the Southern African region offers both opportunity and challenge. Since the establishment of the Forum of China-Africa Cooperation in 2000 there has

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4 Ndegwa *Employment, education and attitudes toward immigration* "a simple attitude of economic self-interest suggests that lower-skilled workers will be opposed to inflows of low-skilled immigration" Chapter 1 p.2.

5 Globalisation - describes a process by which national and regional economies, societies, and cultures have become integrated through the global network of trade, communication, immigration and transportation. Financial times <http://lexicon.ft.com/Term?term=globalisation> - also defined as the tendency of investment funds and businesses to move beyond domestic and national markets to other markets around the globe, thereby increasing the interconnectedness of different markets. Globalization has had the effect of markedly increasing not only international trade, but also cultural exchange. Available at <http://www.investopedia.com/terms/g/globalisation>.

6 Silverman "Avenues to improving workers' rights and labour standards compliance in a globalised economy".

7 Reference in this paper is made to the PRC as China. Botswana's diplomatic and economic relations are with China, because before the period 1975, diplomatic relations with the Chinese included those with Taiwan, but since January 1975 when the Government of Botswana of that time adopted a one-China policy and the relations with Taiwan were terminated.

8 Xinhua July 2011 China.org.cn Mobile RSS Newsletter <http://www.china.org.cn>.

9 Zemin 2009 Speech of President Jiang Zemin <http://www.fmprc.gov.cn>.

been a rapid development in China-Africa business relations.<sup>10</sup> The extent of China's cumulative direct investment in Africa and in particular, the Southern African region, emphasises the need to examine the labour and employment laws of these host countries.<sup>11</sup>

As a result of a non-uniform comprehensive framework of labour laws in the region, the effectiveness of providing adequate protection according to the internationally recognised ILO principles is found within the individual countries.<sup>12</sup> Labour legislation regarding non-citizen employment in some countries as referred to in the study, is weaker than others and invites exploitation of the core of socio-economic rights and *inter alia* human rights obligations as subscribed to by ILO members.

An openness to learn from within the region would be beneficial, as labour law and employment legislation, regarding non-citizen workers, has developed according to the needs and challenges experienced in various sections of the economy and industry in each country. Evidence thereof can be found in, for example, the textile and clothing industry in South Africa and Lesotho, the construction industry in Botswana and the mining and construction industry in Walvisbay, Namibia.<sup>13</sup>

The purpose of this research is to examine the current legal position pertaining to the non-citizen labour force. The findings of the research will then be measured against relevant labour laws in Botswana and the other mentioned countries, regarding non-citizen employment related legislation and practices, the relevant ILO conventions and discussions on the attracted Chinese FDI in these countries.

The significance of the employment of a non-citizen Chinese labour force has been a controversial component of FDI attraction in Africa, and an important part of China's global prosperity and economic growth in the past decades. It is of particular importance in this globalised era to abide by the principals and values as revealed in The

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10 Zhu 2014 *TSAR* 306-319.

11 Definition of host country: Nation in which individuals or organisations from other countries or states are visiting due to government invitation or meeting. [www.businessdictionary.com/definition/host-country.html](http://www.businessdictionary.com/definition/host-country.html). Host countries in this research: Botswana, Namibia, South Africa and Lesotho.

12 Fourie and Smit 2011 *International Journal of Comparative Labour Law and Industrial Relations* 41-64.

13 See further discussions within the chapters of this study.

*Declaration of Philadelphia*<sup>14</sup> which clearly states that "labour is not a commodity".<sup>15</sup> This stands as a warning against treating labour as just one more factor of production to be brought into use where and when the pay-off is the highest,<sup>16</sup> thus illustrating the need for countries to have and develop labour law within the framework of preventing the employment of non-citizens from becoming an 'international commodity', essential for future development. The attraction of FDI and foreign assistance could be problematic if the human spirit of labour has been nullified to merely a commodity and part and parcel of trade agreements and relationships.

Concerns have been raised that

Agreements on loans from the Chinese government to finance construction and infrastructure developments often include clauses that require the projects to be carried out by a Chinese contractor, using labour, materials and other inputs from China.<sup>17</sup>

Therefore, the inclusion of labour standards in multilateral and bilateral trade agreements dates back to 1948 and culminated in the launch of the WTO in 1995, but to this day the WTO does not include any affirmative provision of labour rights.<sup>18</sup> International trade has an intervening effect on national wealth distribution finding a multilateral response for the non-trade issues and compliance with the international labour standards within the trade forum is a critical issue for the theory of justice and

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14 The *Declaration of Philadelphia* was adopted at the 26th Conference of the International Labour Organisation in 1944 and was added as annex to the ILO's constitution. The declaration focused on a series of key principles to embody the work of the ILO <http://uslegal.com/>.

15 The *Declaration of Philadelphia* (1944), constituted the Chapter on the aims and objectives of the ILO [www.ilo.org/public/.../declarations.htm](http://www.ilo.org/public/.../declarations.htm).

16 Report of the Director-general ILO conference 103rd Session 2014, Report 1 (B) Fair Migration Setting an ILO agenda published ILO office Geneva 2014.

17 Ancharaz and Nowbutsing *The Impact of China-Africa Investment Relations*. "The scale of China's growing presence in Africa through trade, investment and aid channels has raised concerns about its possible adverse impacts on African development. In the case of investment, these fears are in part fuelled by the underlying motivations of Chinese FDI strategy in Africa, that the recent surge in FDI is a response to the Chinese government's strategic call for a 'go out' policy launched in 2000". Tewari 2013 "Will Chinese Investment Create Economic Development in Africa?" p. 43; Kamga-Raj 2013 "...The Beijing Consensus is a Chinese centred vision of the world and designed primarily to serve the needs of the Chinese nation and does not have a room for transfer of knowledge and experience to African people".

18 Silverman "Avenues to improving workers' rights and labour standards compliance in a globalised economy".

labour law.<sup>19</sup> The main focus in this study is the labour law development regulating non-citizen employment within the borders of economic investment.

### **1.3 Employment of non-citizens in Botswana**

Neither the *Constitution of the Republic of Botswana* 1966 (hereafter Constitution of Botswana) nor any other legislation regulates the status of international treaties in the domestic law system of Botswana. Before highlighting the international position on the substantive norms contained in the relevant ILO instruments, the status and applicability of these instruments in Botswana need to be determined. It is necessary to inquire whether these documents have been signed, ratified and if necessary enacted into legislation in domestic law. Botswana's constitutional order, before independence, has its roots in English law and particularly the system of parliamentary sovereignty. Unlike the current South Africa Constitution, there is no explicit provision in the Constitution of Botswana which governs the status and applicability of international instruments comparable to section 231 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).<sup>20</sup> Although, in the absence of any provisions dealing with the applicability of international law in its domestic law system, international agreements need to be transformed in domestic law to be binding on the country.

Amissah JP observed:

Botswana is a member of the community of civilized states which has undertaken to abide by certain standards of conduct, and unless it is impossible to do otherwise, it would be wrong for the courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. Judgment in Dow resulted in the declaring of sections 4 and 5 of the Citizenship Act 1982 *ultra vires* the Constitution.<sup>21</sup>

There are no provisions in either the Constitution of Botswana or any other piece of legislation that clearly defines the status of international law in domestic law.<sup>22</sup> The absence of legislation transforming international agreements into domestic law does not

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19 Razavi 2014 [http://works.bepress.com/hassan\\_razavi/1](http://works.bepress.com/hassan_razavi/1) For more details see Razavi 2014 *Labour Rights and Free Trade*.

20 Kirby 2005 *Am Soc'y Int'l L Proc* 327-357. "Particular constitutional provisions requiring or encouraging reference to international law exist in the national constitutions of India, Papua New Guinea and South Africa".

21 Tshosa "The status and role of international law in the national law of Botswana" 232.

22 Van Eck and Snyman 1999 [http://works.bepress.com/bruno\\_vaneck/1](http://works.bepress.com/bruno_vaneck/1).

mean that these instruments have no relevance in domestic law. International law may still serve as a valuable aid in the interpretation of statutes and the Constitution.<sup>23</sup> The Appeal Court of Botswana held in *Attorney General v Dow*<sup>24</sup> (hereafter Dow case) that a constitution is a unique document and should, therefore, be interpreted liberally and generously. This liberal and generous interpretation includes the consideration of international law as interpretation aid and has been used as such in Botswana labour case judgments.<sup>25</sup>

It could thus be concluded that

The application of international law by national courts depends on a decision by domestic legal systems. At present, there is no general rule of international law providing how States should incorporate international law into municipal legal systems. In fact, there is not even a general obligation that States should make international law enter into the national realm.<sup>26</sup>

The labour legislation and other statutes regulating employment of non-citizens in Botswana have been guided by labour standards and the application of the conventions and recommendations of the ILO and trade and developmental issues determining the economic growth of the country.<sup>27</sup>

Chinese non-citizen employment in Botswana and other SADC countries is the result of Chinese trade and investment in the respective countries, economic growth and development. Extended China-South African relationships extend to labour law development through the implementation of principals underwritten in legislative statutes.

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23 Kirby 2010 *Utrecht Law Review* 168. "The on-going judicial conversation" In a sense, the easiest way in which a national court might refer to international human rights principles, would be where (as in South Africa and other countries<sup>7</sup>) the national constitution authorises specific use of international law, for example in construing a national charter of rights or other domestic legal principles".

24 1994 6 BCLR 1 (Appeal Court of Botswana).

25 Chapter 4 De Villiers D, JP ILO standard, substantive fairness consideration for the termination of employment in judgment made in the Industrial Court Botswana.

26 Torrijo 2008 *Rev Jur UPR* 483.

27 Botswana: *Moatswi v Fencing Centre (Pty) Ltd* (2004) AHRLR 131 (2002) Judge Ebrahim-Carstens used the ILO interpretation of International standards such as In the Discrimination (Employment and Occupation) Convention 111, the terms 'employment' and 'occupation' include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. See also Article 5 of the ILO's *Termination of Employment Convention* 158 of 1982.

#### **1.4 Employment of non-citizens in South Africa**

Chapter 2 of the Constitution of the Republic of South Africa,<sup>28</sup> regarding immigrants and migrants<sup>29</sup> stipulates that non-citizens have no "right" to be given a permit to come to South Africa, which includes entering the country to live and work. This referred to permission is, when granted, in accordance with the laws governing foreign nationals.<sup>30</sup> The employment of such non-citizen, should, therefore, fall within the framework of domestic related statues, regulatory labour law, membership obligation to international labour standards regarding socio-economic and human rights and pertinent issues subject to this area.

The amended *South African Immigration Act*<sup>31</sup> (hereinafter referred to as the *Immigration Act*) was only implemented on the 1<sup>st</sup> of April 2014,<sup>32</sup> and provides a right based regulatory approach for non-citizens entering South African borders as well as criteria for work permits. Subsequently non-citizens seeking employment have to hold a legal work permit and show prospects of a binding contract of employment. Only then are they under the domestic statues regulating the employment of non-citizens, resulting in the inclusion and stipulation of what the rights of non-citizens to diverse employment issues and protection are. Case law and further labour law developments will be part of further discussions in this study.

#### **1.5 Employment of non-citizens in Lesotho**

Lesotho in the past has primarily been seen as a sending rather than a receiving country with regard to labour migration. It has been more of a sending than a receiving

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28 Constitution of the Republic of South Africa, 1996.

29 Chapter 2 Citizenship, *Constitution of the Republic of South Africa*, 1996, Laws governing foreign nationals. "There are some people who come here for the purpose of work, and they are called immigrants and migrants".

30 *Immigration Act* 13 of 2002 as amended, the *Aliens Control Act* 96 of 1991 and the *Aliens Control Amendment Act* 76 of 1995.

31 *Immigration Act* 3 of 2007, as amended (South Africa).

32 The proposed amendments to the *Immigration Act* and the New Immigration Regulations that are to be "implemented" on the 1st of April 2014, its promulgation has been delayed pending the final deliberations over the Immigration Regulations, which are still not finalized, and therefore the current immigration laws are still very much in place. Craig Smith & Associates [www.migrationlawyers.co.za/immigration-act-laws-2014](http://www.migrationlawyers.co.za/immigration-act-laws-2014).

country.<sup>33</sup> Labour migration to the country and the employment of non-citizens is categorised into

Four main groups: those entering under the Aliens Control Act 96 of 1991; contract workers, mainly for the mines, entering under bilateral treaties; undocumented workers; and refugees.<sup>34</sup>

Further complicating the labour migration issue is that, in addition to the criteria of obtaining the necessary work permit it should be noted that:

..jurisdiction over key issues relating to labour migration and the regional labour market belong to a range of government departments. Departments involved include Labour, Home Affairs, Foreign Affairs, Trade and Industry, Defence and Police. This clearly has implications for the manner in which policy is implemented and, at least, necessitates co-ordination between affected departments to ensure that individual policies are both complementary and effective.<sup>35</sup>

The challenges the above holds were evident in the relocation of South African Newcastle factories and the impact thereof on Lesotho's textile industry, as can be seen in further discussions in this study.

## **1.6 Employment of non-citizens in Namibia**

The Constitution of the Republic of Namibia as in the case of South Africa has incorporated Chapter 3 in the Bill of Rights, yet economic, social and cultural rights are not included in this chapter.<sup>36</sup> In the Namibian case, economic, social and cultural rights are only treated equally to civil and political rights with the ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and being part of the countries' constitutional dispensation since 28<sup>th</sup> of February 1995.<sup>37</sup> Such rights are only part of Chapter 11 of the country's constitution and form part of the Principles of State Policy.

Without going into a detailed discussion, nevertheless the link and impact of the above constitutional dispensation can be said to favour foreign Chinese investment. Further

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33 Extensive migration of Lesotho citizens to South Africa seeking employment on the mines and other industries.

34 Chapter 9 Labour Migration Trends Relating to Migration paragraph 516 [www.polity.org.za](http://www.polity.org.za).

35 See footnote 34 Chapter 9 Labour Migration Trends Relating to Migration paragraph 512.

36 Constitution of the Republic of Namibia, 1990.

37 Nakuta "The justifiability of social, economic and cultural rights in Namibia" 89-100.

research regarding labour law development on employment of non-citizens, related issues which arise from the economic impact of Articles 95, 98 and 99,<sup>38</sup> of the Namibian constitution, is recommended.

### **1.7 ILO regulations as international instruments regarding the employment of non-citizens working in these SADC countries**

The ILO is the international body responsible for setting international standards in labour practises. The ILO was founded in 1919 is now an arm of the United Nations (UN) and has the responsibility of monitoring worldwide labour protection. Furthermore, 185 of the 193 UN member states are members of the ILO, which include Botswana, South Africa, Namibia and Lesotho, who are signatory members.<sup>39</sup>

Only Namibia, has not ratified one part of the conventions regarding discrimination, all of five the countries, also known as Southern Africa Customs Union (SACU), have ratified every core ILO convention.<sup>40</sup>

There are eight fundamental Conventions (on prohibition of forced labour, child labour, the right to organise in a trade union, and suffer no discrimination) which are binding upon every member country of the International Labour Organisation from the fact of

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38 Throughout the discussions reference to; the countries Botswana, Namibia, South Africa and Lesotho compete in their actions to attract FDI. The employment of Chinese non-citizens has been characteristic of Chinese FDI and China State assistance. Assessment and in-depth knowledge of statues, motivational political and economic background from each other will influence legislation and labour law development the employment of non-citizens in the region. The following information is as such not labour related, but mentioned as part of understanding constitutional differences interlinked by economic needs and aspirations of the different countries, influencing the actual harmonisation possibility of labour related legislation in the region.

Within a Namibian context the following legislation directly impacts FDI to the country and consequently indirectly influences policies and the legal labour development in the future. – Article 96, Foreign Relations-Article 98, Principals of Economic Order - opens the door to foreign investment, while Article 99 lays claim to all natural resources: The ESC rights listed in Article 95, Promotion of the Welfare of the People- do not place a heavy burden on the State. Article 98(2) lists the different types of ownership envisaged for Namibia: private, public, joint public-private, co-operative, co-ownership, and small scale farming. In addition, Article 98(1) bases the economic order of Namibia „on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians“. Article 99 Foreign Investments and Article 100- Sovereign Ownership of Natural Resources. *Constitution of the Republic of Namibia*, 1990 (as amended up to 2010) [www.wipo.int](http://www.wipo.int).

39 ILO member states [www.ilocarib.org.tt/projects/labour\\_legislation](http://www.ilocarib.org.tt/projects/labour_legislation).

40 International Trade Union Confederation (ITUC) Internationally recognised core labour standards in Botswana, Lesotho, Namibia and South Africa Report for the WTO general council review of trade policies of the five countries of the Southern Africa Customs Union (SACU) Geneva, 4 and 6 November 2009 1 "Namibia has ratified just one of the two ILO core labour standards addressing discrimination, but the other four countries have ratified both Conventions".

membership, since the Declaration on Fundamental Principles and Rights at Work in 1998. The other Conventions are binding upon member countries whose legislatures have chosen to ratify them.<sup>41</sup>

The most significant ILO instruments, which specifically protect migrant workers and their families, are the following conventions; Convention 97 of 1949 concerning the migration for employment; Convention 143 of 1975 which deals with equal treatment of migrant workers and Convention 118 of 1964 concerning equality of treatment in social security. Botswana, South Africa, Namibia and Lesotho have ratified the above Conventions.

The ILO conventions and recommendations generally protect the rights of all workers irrespective of citizenship. In 1999, the ILO introduced the concept and goals of the Decent Work Agenda,<sup>42</sup> sufficient employment opportunities, social protection, rights at work, and social dialogue. The *Declaration on Fundamental Principles*<sup>43</sup> is a further development within the ILO that imposes obligations on all member states by virtue of their membership in the Organisation, to promote and realise, in good faith, the principles concerning the fundamental rights that are the subject of those conventions.

The work of Olivier and others emphasises that even before the adoption of the above Conventions for the protection of migrant workers, the ILO founding documents specified the need for the "protection of the interests of workers when employed in countries other than their own".<sup>44</sup> Thus, international labour standards on specific issues are laid down in ILO-Conventions dealing with different topics. The ILO is not a passive organisation, it is rather actively part of negotiations between the three parties

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41 The eight fundamental ILO or core Conventions [www.ilo.org](http://www.ilo.org).

42 ILO 2001 Reducing the decent work deficit – a global challenge, Geneva: ILO 'Initiated in 1999 by ILO Director-General Juan Somavia, the Decent Work Agenda promotes a development strategy that recognizes the central role of work in everyone's life' [www.ilo.org](http://www.ilo.org).

43 In 1998, the 86th International labour Conference adopted the *Declaration on Fundamental Principles and Rights at Work* and identified eight conventions as fundamental principles and rights at work which all members have obligation to implement them even if they have not ratified them. The standards embodied in these conventions have been called the "Core labour Standards" (CLS). these eight conventions deal with freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. See also Addo 2002 "The Correlation between Labour Standards and International Trade: Which Way Forward?" *Trade* 285-303.

44 Olivier Political and regulatory dimensions of access, portability and exclusion 1-24. See also "Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part I)" 129-163.

consisting of the governments of the member states, the national trade unions as representing the employees and the employers' associations<sup>45</sup> regarding labour related issues, for example rights at work. The ILO's Decent Work Agenda, is instrumental to the principals regarding rights at work, and highlights national commitment to the basic rules and framework of development.<sup>46</sup> The ILO Decent work principal<sup>47</sup> summarises the different dimensions of work, including employment and its quality, rights at work, representation and voice and social protection.<sup>48</sup> Thus, it could be said that decent work is promoted through the Decent Work Agenda. The ILO is committed to advancing opportunities through the promotion of social justice and fair globalisation on a local level in each individual member state under the Decent Work Country Programmes (DWCP):

The ILO introduced time-bound and resourced programmes, called Decent Work Country Programmes (DWCP) in 2004. They are informed by international development agendas and based on priorities of constituents and national development objectives. They detail the policies, strategies and results required to realize progress, in each country, towards the goal of decent work for all.<sup>49</sup>

Botswana and the other countries in the study, namely Namibia, South Africa and Lesotho as well as China, are currently, or have been engaged in such country orientated programme.<sup>50</sup> The outcomes and information at the end of such programmes are of immense value, because of the legality in the form of a memorandum of understanding showing the commitment by the national tripartite constituents and the ILO. With this in place and the financial ILO assistance, the DWCP ensures an adequate framework and reaffirms the ILO *Declaration of Social Justice for a Fair Globalisation*, as adopted in 2008. Further enhancing, the ILO and within the UN, the Ruggie-principles or "Guiding Principles on Business and Human Rights" were

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45 The three party system, referred to as the ILO's tripartite constituents or representation within the ILO.

46 The Decent Work Agenda in Africa: 2007–2015 Eleventh African Regional Meeting Addis Ababa, April 2007 Report of the Director-General International Labour Office Geneva [www.ilo/public/english/standards/relm/rgmeet/africa.htm](http://www.ilo/public/english/standards/relm/rgmeet/africa.htm).

47 ILO Decent work principal, the Decent Work is a globally accepted goal and instrument for improving the lives of people.

48 Kalula, Ordor and Fenwick Labour Law Reforms that Support Decent Work: The case of Southern Africa, issue 28. Fenwick, Kalula and Landau "Labour law: A Southern Africa Perspective Discussion"

49 ILO Decent Work Country Programmes A Guidebook Version 3 Preface.

50 See details of the running period of each country's DWCP in Table 2-2 Chapter 2 of this study.

developed. The focus and aim of this is to provide a road map, or practical measurable instrument, for ensuring responsible global corporate practices. Individual countries in the region should learn from each other, to solve a seemingly unsolvable problem of understanding the relationships between business, government rights and law. Coherence in such a relationship will ensure regional stability and sustainability.

This concept is of paramount importance because Chinese investment in Africa is rapidly growing, and more and more Chinese firms are operating in Africa,<sup>51</sup> thereby balancing the local labour possibilities and FDI labour created opportunities within the scope of legislation and regulation of non-citizen employment. Many Chinese firms choose South Africa as their first destination when investing in Africa, as it provides a useful springboard for operations serving the Southern African market. Chinese State and private investment are eminent in each of the country's part of this study and continue to grow. Labour structural adjustment programmes are intended to provide employment protection, non-citizens included.

Chinese non-citizen nationals are mainly employed by Chinese companies with a link to non-government organisations (NGOs) or the Chinese government. The following factors such as unemployment rates in China, the Chinese labour force, work ethics and productivity, and cultural differences, are contributing to the gap in knowledge and understanding of Chinese individual employment and employment conditions in Botswana and other host countries. Furthermore, issues such as the requirements for work permits, employment regulations and the enforcement of the law will be explored. Additional research regarding Chinese individual contract employment, their working conditions and ILO standard adherence within Chinese operating companies, is needed.

## **1.8 Assumptions and hypotheses**

### *1.8.1 Assumptions*

Botswana, Namibia, South Africa and Lesotho will continue to remain members of the ILO and SADC and SACU. These countries and China will, as member states of the

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51 Huang and Ren "A study on the employment effect of Chinese investment in South Africa".

ILO, partake and facilitate adherence to all ILO conventions and recommendations which include providing for the protection of migrant workers.

### *1.8.2 Hypothesis*

Botswana and the SADC countries in this study have a pressing need for job creation and human development which should be regulated when promoting foreign trade and investment in a sustainable economy. The international (ILO) and regional (SADC) norms and standards are applicable to all workers including migrant workers. The current legal position pertaining to the employment of foreign nationals, particularly Chinese nationals, in Botswana and the SADC countries dealt with in this study do not meet the goals, norms and standards of the ILO and SADC in every instance.

### **1.9 Objectives of the study**

The proposed research will include key areas regarding employment of non-citizens in the domestic legal framework in Botswana, Namibia, South Africa and Lesotho. International instruments, such as the ILO standards and conventions regarding non-citizens will be examined. Laws regarding the employment of Chinese non-citizens and interlinked relationships with regard to Chinese investment in Botswana will be the main focus of the study. Chinese labour law and contract law will be outlined for the purpose of explaining some of the cultural differences. The study aims to identify the long-term role of domestic law and enforcement thereof in global sustainable China-Southern African region business relations and social-economic development.

This research will examine the employment of the Chinese as non-citizens, with regards to work permits and basic employment requirements, employment contracts, and protection against unfair labour practice. It will touch on Chinese FDI, trade, and its influence on government in the process towards economic growth. It will identify and show the adherence by each country of ILO applicable conventions and standards and other labour related issues in the individual countries economic development.

### **1.10 Framework of the dissertation**

The chapters, as set out below will provide a structured framework for achieving the goals proposed for this dissertation.

1. Introduction
2. Labour laws in SADC; Botswana, Namibia, South Arica and Lesotho, and China in a non-citizen employment context
3. International Labour Law: ILO conventions and recommendations, the SADC and the African Union
4. The legal system in Botswana with regards to labour law for the employment of non-citizens and case law, with special reference to the Chinese non-citizen employment
5. A brief examination of similar issues in Botswana, Namibia, South Africa and Lesotho
6. Conclusion and recommendations

### ***1.11 Research methodology***

The research envisages an international literature study of labour law, consisting of conventions, recommendations, instruments, treaties, domestic legislation, reported and unreported judgments and the opinion of legal writers expressed in textbooks, academic journals and internet sources, on the subject of the employment of non-citizens in Botswana and selected SADC countries, with reference to Chinese trade and globalisation.

### ***1.12 Relevance for the Research Unit***

The study falls in the broad focus of development, and particularly the utilisation of Labour Law to promote decent work in South Africa and the SADC region. It is anticipated that the study will demonstrate a new approach to labour law, by viewing the legal systems of the SADC neighbours as components of a developing SADC legal system, in the light of, and under the influence of globalisation. The research falls within the scope of the sub-project: New Thinking in Law. The study will aim to demonstrate a new manner of thinking in the field of labour law, specifically relating to the need for labour law to develop in the changing economic demanding environment.

## **Chapter 2: An analysis of the labour law and employment legislation regarding non-citizens in Botswana, South Africa, Namibia and Lesotho and its application regarding Chinese nationals**

### **2.1 Background**

The Chinese labour force, or non-citizens employed in host countries,<sup>52</sup> has been credited as one of China's greatest "commodities".<sup>53</sup> The interaction between the promotion of Chinese FDI and the impact of Chinese migration flows on the host country's labour legislation development and has the potential of greatly influencing economic policy in the region. A study of the effect of labour laws and employment legislation on particularly Chinese nationals requires some appreciation on the cultural differences between the host countries and the People's Republic of China.

Knowledge of Chinese labour law development will result in a better understanding of the issues that may arise from cultural misunderstanding of Chinese labour practices. Such issues should be addressed, as the increasing Chinese non-citizen employment influenced by China's internationalisation and policies, will affect Africa's economic and socio-political dimension.<sup>54</sup>

Chinese workers in Botswana are the common denominator, as within the other SADC countries, as they indirectly complete China's FDI into the host countries for economic growth.<sup>55</sup> Chinese domestic labour law development and regulations, as practiced on home soil, will significantly affect China's outlook on ILO instruments, and considerably influence principals of fair and stable globalisation. The Chinese labour force in host countries is considered beneficial to several projects, such as infrastructure development and renewed deeper economic ties in 2015.<sup>56</sup> Foreign investment will

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52 Zhang "The role of migration in shaping China's economic relations with its main partners" MPC (Migration Policy Centre) Research Report 2013/07 "Overseas Chinese" refers to ethnic Chinese residing outside of China, Taiwan and Hong Kong, regardless of citizenship. Chinese migrants are considered as a "flow of individuals" during a given year.p.1.

53 Voigt 2013 "China workers at crossroads". See also discussions on the *Philadelphia Declaration* in Chapters 1 and 3 <http://edition.cnn.com/2013/03/20/business/china-workers-crossroads>.

54 Mohan and Tan-Mullins 2009 *European Journal of Development Research* 588–605.

55 See chapter 1 footnote 12, 3.

56 Botswana and China expect deeper economic ties in 2015. Interview with Ma Lianxing, the Economic and Commercial Counsellor at the Chinese embassy in Botswana "the counsellor also

continue to affect non-citizen labour market regulations within the China-Africa relationship. This relationship is built on a delicate balance as China offers a ready market for Africa's oil, iron, timber, cotton, sugar and other natural resources and the importation of Chinese labour then also completes Chinese-organised infrastructure and mining projects.<sup>57</sup>

The basis of this China-Africa relationship regarding migration of the Chinese labour force to parts of SADC acting as host countries has been laid within the constitutional dispensation of SADC's labour law development and strategic economic development.

## **2.2 A concise overview of the system of labour law development in China**

### *2.2.1 Introductory background*

The People's Republic of China is situated in the eastern part of Asia, on the west coast of the Pacific Ocean and covers a territory of 9.6 million square kilometres.<sup>58</sup> In 2005 China had a total population of 1,306,000,000.<sup>59</sup> According to estimated figures the China today has a population estimated to be in the region of 1,355,692,544.<sup>60</sup> After the loss of the Opium War the Chinese signed the Nanking Treaty with Britain in 1842, and its national sovereignty reduced to a 'semi-colonial' country. After friction between the Nationalist Party and the Communist Party and the Japanese invasion during World War II, Mao Zedong, the then chairman of the Communist Party proclaimed the founding of the People's Republic of China. The 1950 theme was the "Great Leap Forward" characterised by massive political campaigns and economic construction. The death of Mao started the new "socialist market economy" slogan of the 1978,<sup>61</sup> and the liberalisation of emigration legislation in the 1985's. Thousands of Chinese medical personnel, teachers and technicians travelled to Africa and were employed on contracts

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said Chinese engineering contractors make contributions to Botswana's development". China could provide Botswana with its needed products like daily necessities, industrial products, clothing building materials at low prices with high quality, while Botswana's rich mining resources could meet China's needs. Anon, *The Voice* .8.

57 Rotberg China into Africa trade, aid and influence preface viii.

58 China Geography [www.travelChinaGuide.com](http://www.travelChinaGuide.com).

59 2005 Chinese population [chinaembassy\\_us@fmprc.gov.cn](mailto:chinaembassy_us@fmprc.gov.cn).

60 THE WORLD: Population 2014 Top 100+ <http://www.geoba.se/population.php?pc=world>.

61 Pulitzer 2008 *China and Africa: Stronger economic ties mean more migration*  
See also internet article <http://www.migrationinformation.org/feature/display.cfm>.

and construction projects such as Africa's railways, roads hospitals, schools and dams.<sup>62</sup>

A socialist market economy was endorsed by China's constitutional amendment in 1993.<sup>63</sup> The fall of the Eastern European socialist regimes convinced China of the need to move towards a system of social and economic reform and a less politically authoritarian system. This change reflected change in wordings such as "state economy" to "state-owned economy". Since the joining of the World Trade Organisation in 2001, the Chinese economic reform has been placed on the international forefront.

In 2006, Beijing released an official White Paper<sup>64</sup> with the title 'China's Africa Policy', which states the basis of China's official policies towards Africa. Later the same year the Forum on China-Africa Cooperation (FOCAC) was held in Beijing.

China's economic "deep reform" structure has been explained by Taylor.<sup>65</sup> He highlights that China's economic slogan, "go global", strategy requires a peaceful international environment which encourages Chinese corporations to invest overseas and play a role in international capital markets. Management and control in state-owned enterprises (SOEs) as established in several African countries financed by Chinese government ministries is complex. It soon became clear that the State-owned Asset Supervision and Administration Commission (SASAC) has a clear incentive to maximize value and profit in China's SOEs even if the pursuit of profits results in damage to China's broader diplomatic or strategic interests in Africa.<sup>66</sup>

China's aid and building of infrastructure in Africa has been seen as the use of "soft power".<sup>67</sup> By providing this form of aid, China ensures that the infrastructures of chosen Africa countries are in place, laying the path for further economic investment. Chinese

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62 Park 2009 "Chinese migration in Africa" .

63 Gazette of the State Council of the PRC, 8 July 1993, no 10 416.

64 Beijing White Paper 2006.

65 Taylor *China's new role in Africa* and several other publications on China Africa relations, professor at the School of International Relations at the University of St. Andrews.

66 Gill and Reilly 2000 *Survival: Global Politics and Strategy* 42-60; Gill and Reilly 2007 *Washington Quarterly* 37-51.

67 Gazibo and Mbatia *The Newsletter* - Soft power refers to when a country tries to obtain desired outcomes in world politics indirectly, "because other countries; admiring its values, emulating its example, aspiring to its level of prosperity and openness – want to follow it".

investment in Africa is synonymous with Chinese employment, as Chinese migrants in various African countries are employees of SOEs and other independent Chinese companies.

The general perspective is, however, that Chinese migration flows have been typically oriented toward countries where entry regulations are not strict or where the immigration of Chinese professionals and labourers is organised via direct government-to-government arrangement.<sup>68</sup> China's labour law has shown fundamental developments in this labour challenging global era.

*2.2.2 Labour Law development in China*

To be able to understand Chinese non-citizen workers a brief historical background of the development in the labour legal system in China is necessary, as can be seen from the subsequent table, illustrating the major developments during the specific to year.

**Table 2.1: Major development of labour laws and industrial relations in the 2000s<sup>69</sup>**

Year	Major development
2000	Implementation decree on collective wage negotiation, issued by the MOLSS
2001	Revision of Trade Union Law
2001	Establishment of national tripartite consultation committee for coordination of industrial relations
2001	The National Tripartite Committee issued 'Joint Notification for Promotion of Collective Bargaining and Collective Agreements'
2003	At the 14th National Congress, the ACFTU announced its new policy of actively organising rural migrant workers
2003	The ACFTU began its experiment in direct election of enterprise union leaders in some localities
2004	Revision of Provisions on Collective Agreements, by the MOLSS
2006	National Tripartite Committee issued 'Common Views on Promoting Regional/Sectorial Collective Bargaining
2006	The ACFTU made a breakthrough in organising Wal-Mart branches
2007	The National People's Congress (Chinese legislature) adopted the Labour Contract

68 Kuang 2008 [www.ssi.sagepub.com](http://www.ssi.sagepub.com).

69 Lee "Industrial relations and collective bargaining in China".

Year	Major development
	Law, the Employment Promotion Law, and the Labour Disputes Mediation and Arbitration Law, all of which came into effect in 2008
2008	The Shenzhen municipal people's congress adopt a new regulation on "harmonious industrial relations" which for the first time delineated official procedures for handling strikes, giving partial recognition to strikes
2008	China's 2008 Labour Contract Law

The typical Chinese worker has been shaped by imperial cultural and domestic forces through many years of exceptionally hard work in a socialist controlled government.<sup>70</sup> Professor Chen summarises the Chinese labourers' struggles and development the last decades as,

During the imperial period, (1949) Chinese labourers experienced a long history of struggle in order to change their position as slaves in the agricultural society, for their subsistence. Dynasties were frequently overthrown and replaced by one after another, but the situation changed little for the labourer. At the beginning of the 20th century, the industrial workers emerged as a new dynamic force in modern Chinese history. According to Mao Tse-Tung's class analysis, the severity and cruelties of the oppression suffered by the Chinese labourers were very rarely among the various other nations in the world, because the Chinese labourers were subject to; threefold oppression; by imperialism, the bourgeoisie and feudal forces. Labour law developments can be seen as part of the modern history in which the Chinese labourers struggled to their deaths for their economic, social and political positions.<sup>71</sup>

On the 1<sup>st</sup> of January 2008 a new Labour Contract law was implemented in China.<sup>72</sup> It contains provisions that provide protection of workers. Great achievements have been made and the adoption of the Employment Promotion Law (EPL) in 2008 received a wide applause from the international community as well as the ILO. The new law provides, *inter alia* that:

- employers are obligated to provide workers and increased severance payments to fired workers.
- employment contracts must be open-ended after a worker completes two fix-term contracts or ten years of employment.
- open-end contracts may only be terminated for cause. Fixed term contracts terminate without cause.

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70 See references to The Spirit of Law later discussed in this study Chapter 4.

71 Chen Labour law in China.

72 Gallagher *et al* "China's 2008 Labour Contract Law".

- probation period for new contracts is limited to one to six months depending on the length of the contract.<sup>73</sup>

The above developments in China's labour laws, shows greater employment regulations, in order to protect Chinese workers. Labour law developments, in any country that adheres to ILO standards, with special emphasis on China, has to deal with the concept of human dignity.<sup>74</sup> Thus the objective in uniform labour laws within all member states through ILO principal based employment legislation should strive to enforce the protection of all human beings, irrespective of race or sex, and have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, economic security and equal opportunity.

## **2.3 Labour law, in Botswana**

### *2.3.1 Introductory background*

In 1992 Botswana introduced major changes to its labour laws by amending existing statutes. The Industrial Court was established by section 17 (1) of the *Trade and Disputes (Amendment) Act 23 of 1992* (hereafter the *Trade Dispute Act*) for purpose of settling trade disputes, and the furtherance, securing and maintenance of good industrial relations in Botswana.<sup>75</sup>

Botswana's labour law and policies, and employment related legislation was initially formulated showing characteristics of a time before independence and influenced by British autocracy. Botswana as a developing country has relied heavily on the importation of skills into its local labour force. Botswana's growth is based on principles; demonstrating:

a knack for participatory democracy, integrity, tolerance entrepreneurship and the rule of law.<sup>76</sup>

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73 Gallagher *et al* "China's 2008 Labour Contract Law". See further discussions of these points in the Botswana Industrial Court case of *Kgosi Roosevelt v China Civil* case Chapter 4.

74 The ILO conventions and standards are based on human rights and protection of human dignity.

75 Molatlhegi 1998 *Journal of African Law* 215-222. Case note Botswana's paradox: Saving the Industrial court compromises labour law autonomy: *Botswana Railways Organisation v Setshogo & 198 Others* Court of Appeal civil appeal no 51 of 1995 (unreported).

76 Rotberg 2004 <http://www.foreignaffairs.com/articles/59914/robert-i-rotberg/strengthenin-african-leadership>.

The country's labour law and legislation on the platform of defending human rights, has encouraged civil liberties and actively promotes its citizens' social and economic development.<sup>77</sup>

In 1992 Botswana introduced major changes to its labour laws by amendment of existing statutes. The Industrial Court was established by section 17 (1) of the *Trade Disputes (Amendment) Act 23 of 1992* (hereafter the *Trade Dispute Act*) for the purpose of settling trade disputes, and the furtherance, securing and maintenance of good industrial relations in Botswana.<sup>78</sup>

The Botswana migration and labour policies concern the employment of foreign workers which are handled by a combined system of Ministries of Labour and Home Affairs. Regional offices, which are situated throughout the country, receive applications for work and residence permits, but the final approval is given by a board at head office. In Botswana the following legislation governs the issuing of employment permits *Employment of Non-Citizens Act 11 of 1981* (the *Non-citizen Employment Act*) and the *Immigration Act 3 of 2011* (hereafter referred to as the *Immigration Act*).

The successful awarding of an official work permit and 2014 High court decision highlights certain aspects of the constitutional rights affecting the non-citizens right to be employed in Botswana. The United Nations Conference on Trade and Development's (UNCTAD) Investment Policy Review of Botswana in 2003, reported on the issue of work permits and matters related to foreign direct investment, as follows:

Work permits for employees are only granted on the basis of the following: a labour market test (i.e. that there are no suitable national candidates, although the precise condition is worded more enigmatically in the legislation); and submission by the employer of a satisfactory programme to train a citizen replacement for each position. An applicant's qualifications are also considered, although there is no explicit legal basis for this assessment and that Work permits for self-employed non-citizens have the same labour market test but, obviously, without training and localization conditions

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77 Baetes *The concept of equality in international trade and Investment law* -he quantifies the concept of equality as a catalyst for sustainable development in global justice.

78 Molathegi 1998 *Journal of African Law* 215-222. Case note Botswana's paradox: Saving the Industrial court compromises labour law autonomy: *Botswana Railways Organisation v Setshogo & 198 Others* Court of Appeal civil appeal no 51 of 1995 (unreported).

attached. Work and residence permits are granted for 3-5 years and may be subject to renewal on the same conditions.<sup>79</sup>

In the case of *Molefi v Blue Blends Investment (Pty) Ltd T/A Nescafé*<sup>80</sup> hereafter referred to as the Blue blend-case the applicant was employed without a work permit. For a comprehensive discussion on the case and Industrial Court ruling see Chapter 4.

The country's labour law and legislation on the platform of defending human rights, has encouraged civil liberties and actively promoted its citizens' social and economic development.<sup>81</sup>

### 2.3.2 Botswana-China relationship

The Botswana-China relationship<sup>82</sup> started with, Botswana's vote in favour of the PRC taking a seat at the United Nations in 1971.<sup>83</sup> During the period 1970 to 1980 China's diplomatic and political support for Botswana was of utmost importance. In 2006 the then president, Festus Mogae, attended the FOCAC Summit in China and commented that he placed a high value on Botswana's bilateral relationship with China, including its economic benefits.<sup>84</sup> Ambassador Liu Huanxing stated that the relationship has always been very level headed.<sup>85</sup> Conversely there has been a change in the increased numbers of Chinese labour force in the country initiating a negative response within community relations. The situation intensified with the local unemployment rate and resentment towards the Chinese community in the minds of local people. President Ian Khama, raised concerns about excessive migration of Chinese people who he claimed were taking jobs that should be allocated to Botswana (local Botswana people).

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79 UNCTAD 2003 Investment Policy Review report: Botswana UNCTAD 1994 World Investment Report: Transnational Corporations, Employment and the Workplace, New York: United Nations UNCTAD 1999 World Investment Report 1999: Foreign Direct Investment and the Challenge of Development, New York: United Nations 33.

80 2004 1 BLR 259 (IC).

81 Baetes *The concept of equality in international trade and Investment law* quantifies the concept of equality at a catalyst for sustainable development in global justice see footnote 77 p.21.

82 The Botswana-China relationship started with the first president Seretse Khama, going against the objections of his cabinet, voted in favour of the PRC taking a seat at the United Nations in 1971.

83 Youngman "Strengthening Africa-China Relations: A Perspective from Botswana".

84 Youngman "Strengthening Africa-China Relations: A Perspective from Botswana".

85 Ambassador Liu Huanxing "Memories and Blessings of China-Botswana relations' 2010 speech that the Botswana-China relationship was an all-round friendly and cooperative partnership".

Botswana has welcomed Chinese investment. Several Chinese (owned) companies are operating in the country especially in the construction and infrastructure development sectors. Large projects like the Morupule Power Station, the expansion of the Seretse Khama airport and several others, require the employment of skilled Chinese workers.<sup>86</sup>

The research has revealed that the greatest contributing factor towards unemployment in Botswana is the shortage of skills, especially entrepreneurship, a wrong attitude towards work, low productivity and lack of capital. Chinese investment through FDI included a Chinese labour force, which has shown willingness and enthusiasm towards completing the projects. The challenge to the labour market is that in the process of development of the economy as a whole, the situation proves detrimental to growth and employment generation in the country.

The labour laws of the country regarding the employment of non-citizens are applicable to all. The impact of globalisation and the focus on the Chinese workers as external workforce have not inspired new legislation, but rather an increase in labour related conflict which has highlighted the legal and legal-cultural gap in the labour laws of Botswana and China. The regulation and impact of the Chinese labour force in Botswana is not unique. A great deal of Chinese migration is visible in the SADC countries discussed in this study, as experienced through Chinese investment, loans, grants and entrepreneurship. The question is what are the implications on local labour opportunities and regulations, when dealing with the Chinese non-citizen labour force in Africa and the Southern region?

## **2.4 Labour law development of Namibia**

### *2.4.1 Introductory background*

The Republic of Namibia was formerly known as South-West Africa. It gained independence from South Africa on 21 March, 1990.<sup>87</sup> The country has an estimated

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86 Hogg 2014 <http://www.biznews.com>. Morupule Power Station Botswana's massive investment in energy infrastructure cost the government dearly. The director of energy affairs Kenneth Kerekang's words "Doing business with the Chinese was an expensive mistake".

87 Namibia gains Independence SAHO South African History online [www.sahistory.org.za](http://www.sahistory.org.za).

population of 2,182,852 as at July 2013.<sup>88</sup> Namibia is a member state of SADC and SACU.

The Government of the Republic of Namibia (GRN) is actively seeking foreign investors particularly in value-added job generating ventures in order to address unemployment and inequality. Investment opportunities exist in oil exploration, mining, logistics, agriculture, tourism, construction, retail, manufacturing, and many other sectors. The Namibia Investment Centre (NIC) serves as Namibia's official investment promotion and facilitation office.<sup>89</sup>

Namibia adheres to the principles of rule of law, the supremacy of the Constitution and the independence of the judiciary.<sup>90</sup> Thus it could be said that the Namibian Constitution guarantees all persons the right to acquire, own and dispose of all forms of property throughout Namibia, but also allows Parliament to promulgate laws concerning expropriation of property and to regulate the right of foreign nationals to own or buy property in Namibia.<sup>91</sup> The Namibian Constitution allows for the formation of independent trade unions to protect workers' rights and to promote sound labour relations and fair employment practices. The country has a lengthy process of obtaining work permits. Under the *Foreign Investment Act* of 1990 which calls for equal treatment of foreign investors, the government of Namibia attracts FDI to stimulate economic growth and employment.<sup>92</sup>

In Namibia the requirements are to have a work permit as permission to enter and stay as a non-citizen for the purposes of taking up employment. Application is made to the Ministry of Home Affairs where the Immigration board applies certain criteria before the approval thereof which include:

There are some key considerations that the Immigration board take into account when assessing whether to issue a Namibia employment work permit:

- It is essential to prove that the applicant possesses the required skills, qualifications and experience in their specific field.
- That the prospective employer has been unable to recruit and fill the position with a Namibian candidate. Currently Namibia does have a shortage of skills in certain

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88 Namibia Country profile KPMG Africa Region 2012/2013 kpmgafrica.com.

89 United States Investment Climate Statements 2011 [www.state.gov/documents/organization/229174](http://www.state.gov/documents/organization/229174).

90 Koep & Partners Namibia [www.koep.com.na](http://www.koep.com.na).

91 Narib "Is there an absolute right to private ownership of commercial land in Namibia?" 1-7.

92 United States Investment Climate Statements 2011 [www.state.gov/documents/organization/229174](http://www.state.gov/documents/organization/229174).

areas and there is a basic understanding of the need to recruit expatriate workers to fill these positions.<sup>93</sup>

The holder of a legal work permit will fall under the Namibian labour laws, statutes and regulations with regard to the protection of employment and daily work related issues. The 2007 *Labour Act* consolidates the core base of rights as enshrined in the ILO conventions and provides for improved leave provisions. The new *Labour Act* also provides for the conciliation and arbitration of labour disputes and will replace the expensive, time-consuming, court-based system of dispute resolution.<sup>94</sup> The new *Labour Act* has a provision that prohibited the hiring of temporary or contract workers ("labour hire"), but the provision was ruled unconstitutional by the Supreme Court.<sup>95</sup> In late 2011, the Government tabled in Parliament amendments to the *Labour Act* introducing strict regulations with respect to the use of Labour Hire, and defining the "user" of temporary workers as their legal employer under a triangular employment relationship. In addition, these amendments placed strict limitations on short-term employment contracts. These amendments effectively may make the use of labour hire non-viable.

The Labour Amendment Act of 2012 introduced strict regulations with respect to the use of temporary workers. Essentially temporary workers must receive compensation and benefits equal to that of non-temporary workers.<sup>96</sup>

These labour laws in Namibia regulate the relationship the country has with China and labour relations with Chinese employment.

#### 2.4.2 *Namibian-Chinese relationship*

In 2005 the Namibian and Chinese presidents expressed their desire to strengthen cooperation in tourism, justice and human resource development as well as road and harbour construction, power generation, telecommunications, agriculture, fishing and mining.

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93 Integrate Immigration [www.workvisanamibia.com](http://www.workvisanamibia.com).

94 The 2007 *Labour Act*, entered into force in November 2008.

95 *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2011 1 BLLR 15 (NmS) (1). The Court ruled that section 128 of the Labour Act, 2007, 3 which outlawed labour hire activities in Namibia, was constitutional. This means that it is unconstitutional and illegal to engage or conduct business as a labour broker or to hire workers to a third party for a reward.

96 United States Investment Climate Statements 2011 [www.state.gov/documents/organization/229174](http://www.state.gov/documents/organization/229174).

In Namibia the Chinese state tended to use its aid for high profile infrastructure projects and used Chinese State-Owned Enterprises (SOEs) to undertake the bulk of the work. Today, much of the Chinese aid is "tied" or in the form of export credits so that Chinese firms benefit.<sup>97</sup> Namibia's Works and Transport Minister Helmut Angula is reported to have indicated that the Chinese government was pursuing for Chinese workers to do construction work in Namibia, seemingly because African workers have a "different culture". There is believed to be up to 40, 000 Chinese nationals in the country. The Minister also pointed out that the Chinese government doubted the capacity of Namibian construction companies to undertake large projects.<sup>98</sup>

Kerry McNamara, (well-known Namibian architect) documented in detail how Chinese construction companies were awarded government tenders despite the tender rules which require applicants to adhere to local laws and regulations, including the Affirmative Action (Employment) Act, the Labour Act, the Social Security Act as well as the gazetted minimum wages and agreed conditions of employment. He pointed out that government had become an accomplice in breaking its own laws and warned: 'Once the laws and the state are corrupted, those who are still honest will be in trouble. Corruption becomes a self-reinforcing process of self-destruction.'<sup>99</sup>

Jauch and Sakaria<sup>100</sup> have highlighted the numerous and regular violations of Namibian labour laws thus it reveals a serious breach of legislation and undermining the core of the ILO conventions by Chinese companies in Namibia. Officials in the economic ministries seem willing to subordinate workers' rights and interests to the interests of foreign capital.

Such attraction of Chinese FDI reveals a negative comprehensive addition to the struggle to find decent employment or legislation and regulation of labour laws. It requires a Chinese perspective so clearly noticed in the words of Parkhouse<sup>101</sup> who has applauded Chinese work ethics

The Chinese know how to work. It is in their culture to work... They work from early morning until the evening and even on a Sunday. Unfortunately it is not rubbing off onto

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97 Jauch and Sakaria Chinese Investments in Namibia 1-44.

98 Anon 2009 *The Namibian* 10 February; Amadhila 2012 *African East-Asian Affairs* 1-29.

99 Jauch and Sakaria Chinese Investments in Namibia p.16 1-44.

100 Jauch and Sakaria Chinese Investments in Namibia 1-44.

101 Parkhouse Tim, General Secretary of the Namibia Employers Federation.

Namibians. I think they see it as a threat instead of saying: if they can work that hard, we can do so too.<sup>102</sup>

Research on Chinese national's employment included the impact on the South African labour law development and the two countries' relationship based on the prospective economic growth.

## **2.5 Labour law development in South Africa**

### *2.5.1 Introductory background*

In 1961, the Union of South Africa became the Republic of South Africa. In 1994 the first multi-racial elections were held. The Constitution<sup>103</sup> came into force on the 4<sup>th</sup> of February 1997. Chapter 2 of the South African constitution deals with Citizenship and in particular immigrants and economic migrants. South Africa has an estimated population of 48,601,098 as at July 2013,<sup>104</sup> and 54 million in 2014 of which a total of 6 million are estimated to be illegal immigrants.<sup>105</sup> South Africa has a historical non-citizen employment background both with regard to non-citizens from its neighbouring countries and China. All labour laws are negotiated through the National Economic Development and Labour Council (NEDLAC), consisting of the representation of government, business, and organised labour. South Africa has membership in BRICS (Brazil, Russia, India, China and South Africa) indicating a particular close relationship with China, as well as participation in the following international organisations: AU, ILO, WTO, SACU, SADC.

The procurement of a valid legal work permit is a pre-condition to the protection and befalling of constitutional rights affecting non-citizen's right to be employed in South Africa. Newly enforced immigration laws will affect the criteria for permits and impact the employment of non-citizens in South Africa:

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102 Parkhouse, general secretary of the Namibia Employers Federation, as interviewed on the 30 July 2008; Jauch and Sakaria *Chinese Investments in Namibia* 16.

103 *Constitution of Republic of South Africa*, 1996.

104 South Africa Country profile KPMG Africa Region 2012/2013 kpmgafrica.com.

105 Wilkinson *Mail & Guardian* 04 Dec 2014

Requirements for work and residence permits in South Africa are currently subject to change, South African Department of Home Affairs deals with the all enquiries related to work permits and each application is treated as an individual case.<sup>106</sup>

The protection of citizens and non-citizens in the *Constitution of South Africa* continues as in the case of *Larbi-Odam v Member of the Executive Council of Education (North-West Province)*<sup>107</sup> who held that:

A permanent resident qualifies for access to social security, and that discrimination on the basis of non-citizenship in the context of social assistance amounted to unfair discrimination.<sup>108</sup>

The ruling in the *Khosa* case<sup>109</sup> is of the utmost importance within the country's constitutional dimension. The ruling held that rights in the Bill of Rights that are reserved for 'everyone' therefore, cannot be constructed to refer only to 'citizens'. This case marks the inclusion of socio-economic rights in the South African Constitution. The ruling in the case changed Social Assistance legislation<sup>110</sup> for non-citizens to bring permanent residents within the protection of the Act.

In addition the amendments to the Immigration Act, which commenced in March 2014, specifically set out the rights enjoyed by the defined categories on non-citizens, more particular in relation to socio-economic rights.<sup>111</sup>

Labour law legislation determines the legal position of the protection of workers' rights. The dispute against the government by certain factories in Newcastle's (see further discussions in the study) focuses on labour law development and the protection of workers in foreign owned clothing and textile companies. It is notable that although employment rights were available to all the workers, some chose not to exercise them e.g. by not joining and refusing representation by trade unions.

The dispute resolution process and procedures of the *Labour Relations Act*,<sup>112</sup> the *Basic Conditions of Employment Act*,<sup>113</sup> (investigation of conditions of employment for workers

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106 Working in SA: work permits 21 January 2015 [www.southafrica.info](http://www.southafrica.info).

107 1998 1 SA 745 (CC).

108 See footnote 114, for judgment in the case also referred to in footnote 107.

109 *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC) (4 March 2004).

110 Social Assistance Act of 2004.

111 Immigration Amendment Act 19 of 2004.

112 Labour Relations Amendment Act 6 of 2014.

113 Basic Conditions of Employment Amendment Act 20 of 2013.

employed in protected work places) BCEA Regulations, and new CCMA Rules, are the main labour statutes and regulation is applicable to citizens and non-citizens alike.

### 2.5.2 South Africa-Chinese relationship

During South Africa's democratic transformation, China sent a clear signal that diplomatic relations between the two countries would be impossible as long as diplomatic relations with Taiwan existed. After a brief period when South Africa and China were represented in their capitals through "Interest Offices", South Africa adopted the "One China Policy" in December 1997 and established full diplomatic relations with the PRC on the 1st of January 1998. Thereafter, in April 1998, the then South African Deputy President Thabo Mbeki visited China and in February 1999, his counterpart, the Chinese Vice President Hu Jintao visited South Africa. Chinese President Jiang and the late President Nelson Mandela signed the *Pretoria Declaration on the Partnership between the PRC and South Africa* in April of 2000.

In the clothing and textile industry basic rights appear to conflict with the economic and commercial needs of both developing and multinational enterprises. In 2010 the Minister of Labour and Social security began closing down Chinese clothing and textile factories in Newcastle.<sup>114</sup>

André Kriel, general secretary of the Southern African Clothing and Textile Workers Union (SACTWU) has said that

Some Newcastle employers expect us to decrease wages and compete in the world as a low wage country. This is a short and impractical view. If we drop wages, other countries will respond by dropping theirs further – a vicious downward spiral. Getting trapped in a race to the bottom is not a sustainable option. The other option, which we support, does not focus only on wages but also includes a long-term, sustainable and human rights-based solution. It requires compliance with our laws, decent work, a focus on improving productivity, modernising work, up skilling workers, improving quality, diversifying product range and ensuring reliable delivery times.<sup>115</sup>

South African labour law and policy in the Newcastle clothing industry was said to benefit clothing factories in China and not those in South Africa. The government held

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114 The case against Labour minister Mildred Oliphant and the National Bargaining Council for the Clothing Manufacturing Industry by five small Chinese-owned clothing firms in Newcastle.

115 Webster "The Dilemma of Job Creation and Decent Work" 1-2.

the opinion that setting the minimum wage in the clothing sector benefited job creation by establishing industry-wide terms and conditions of employment.<sup>116</sup> It is the opinion of Meibo and Peiqiang that

From the competitive effect of Chinese firms in South Africa's market, we can see whether Chinese investment would "crowd out" the business of local firms, and then have a negative effect on local jobs creation.<sup>117</sup>

Ann Bernstein<sup>118</sup> held a very practical opinion, she expressed her views in that the government, should stop destroying jobs through policy choices and stop closing down such affected factories.<sup>119</sup> Criticising government's actions, in that in promoting "decent work" and levelling the playing fields for all producers, through a process of structural adjustment labour-intensive employment jobs are exported to lower-wage countries such as Lesotho and China.<sup>120</sup>

South Africa has been using labour regulations (such as the decision to close down the Newcastle clothing factories) and the new *Immigration Act* of 2014 to control the employment of non-citizen workers in general. Thus change in legislative special skills and other criteria for the granting of work permits could have an effect on Chinese non-citizens employment as part of China's investment and FDI into the country. Chinese non-citizens working in both the formal and informal sectors of the economy, as for all South African workers are protected by, the *Labour Relations* and the *Basic Conditions of Employment Acts*.<sup>121</sup> These two laws now presume that a worker is an employee rather than an independent contractor unless the provider of work can prove otherwise.<sup>122</sup>

These developments have caused Webster to observe:

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116 Herskovitz *Mail & Guardian* 16<sup>th</sup> May 2013.

117 Meibo and Peiqiang "A study on the employment effect of Chinese investment in South Africa" 1-41.

118 Ann Bernstein, executive director of the Centre for Development and Enterprise (CDE).

119 Natrass and Seekings "Job destruction in South African Clothing Industry" 1-30.

120 Natrass and Seekings "Job destruction in South African Clothing Industry" 1-30.

121 Natrass and Seekings "Job destruction in South African Clothing Industry" 1-30.

122 US Department of labour Bureau of International Labour Affairs, "Final Report: Informal Worker Organizing as a Strategy for Improving Subcontracted Work in the Textile and Apparel Industries of Brazil, South Africa, India and China" Office of Trade and Labour Affairs Contract Research Program.

A new labour paradigm has emerged in the Global South that does not see decent work as an obstacle or add-on to development, but is instead attempting to integrate decent work into an alternative developmental path.<sup>123</sup>

Global economics changed the current economic environment, of which Chinese FDI played an important role. The need for sustainable growth in South Africa will ensure further changes, directly or indirectly related to labour law development regarding non-citizen employment. The increasing numbers of Chinese nationals migrating and finding employment in South Africa challenges a closer look into the areas of protection and regulation of non-citizen employment rights.

China has engaged in economic relations with Lesotho. As a SADC country within the region the country also competes for the attraction of FDI. The employment of non-nationals has also impacted the labour law development in Lesotho.

## **2.6 Labour law of Lesotho**

### *2.6.1 Introductory background*

Basutoland was renamed the Kingdom of Lesotho in 1966 when Lesotho received independence from Britain. In 2013 the population was estimated at 1,936,181 with a then estimated 5000 Chinese nationals.<sup>124</sup> The country is ruled by a constitutional monarchy government and a National Assembly. Lesotho is a member of SACU and SADC and many Basotho nationals are employed in South Africa, with it having a higher proportion of its labour force temporarily employed outside its borders than any other country.<sup>125</sup> The *Companies Act* of 1967 and amendments in 2011 are the guiding governmental instrument regulating FDI to Lesotho as the country lacks a specific FDI policy.<sup>126</sup> The employment of non-citizens in Lesotho, even when employed or the investor as within Chinese locally registered companies requires the obtaining of the necessary work related permits.

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123 Webster "The Dilemma of Job Creation and Decent Work" 1-2.

124 Lesotho Country Prolife KPMG Africa Region 2012-2013 [www.kpmgafrica.com](http://www.kpmgafrica.com).

125 Cobbe Lesotho: From Reserve to Depopulating Periphery The author has pointed out in his article that Lesotho once had the distinction of having a higher proportion of its labour force temporarily employed outside its borders than any other country, the effect of this was that, with the men working in the South African mines, large numbers of women left in the country are employed as textile industry workers.

126 US Bureau of economic and business affairs 2012 [www.state.gov/e/eb/rls/othr/ics/2012/191183.htm](http://www.state.gov/e/eb/rls/othr/ics/2012/191183.htm).

The employment of non-citizens is regulated by the Lesotho labour Code and specifies the need for a valid documentation regarding proof of a work permit, section 165 (1) that:

No employer shall employ any person in Lesotho who is not a citizen of Lesotho and no such person shall accept employment in Lesotho unless that person is in possession of a valid certificate of employment (work permit) issued by the Labour Commissioner. (4) An application for a certificate of employment (work permit) shall be made in accordance with the provisions of the Fifth Schedule.<sup>127</sup>

Lesotho is reported to be committed to private investment and generally open to FDI, of which the bulk is channelled into the manufacturing industry. Due to a lack of strong local entrepreneurs, the Lesotho government has received no pressure to exclude foreign investment in Lesotho to the advantage of local investors.<sup>128</sup> Lesotho has been a member of the ILO since 1966 and has ratified 23 international labour conventions, including all eight fundamental human rights, instruments of the ILO.<sup>129</sup> Lesotho's Labour Code Order of 1992 and its subsequent amendments are the principal laws that govern the terms and conditions of constitutional rights regarding non-citizen employment in Lesotho. The Labour Court and the Labour Court of Appeal are the key judicial entities dealing with labour disputes. Foreign investors have full and equal recourse to the Lesotho courts for commercial and labour disputes and courts are regarded as fair and impartial.

### *2.6.2 Lesotho-Chinese relationship*

Lesotho has done remarkably well during the past couple of years in relation to the attraction of foreign direct investment. Business infrastructure is being developed noticeably by three South African-owned banks namely; First National Bank; Nedbank; and Standard Lesotho Bank, which bought a 70%, share in the state-owned Lesotho Bank. The Lesotho Post Bank, which is government owned, and is the direct influence of Chinese involvement as

Standard Bank's decision to sell a 20 percent stake to the Industrial and Commercial Bank of China (ICBC) for US\$5 billion is believed to be China's biggest international

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127 Lesotho Labour Code Order, 1992 Order no 24 of 1992 Part XII – Employment of Non-Nationals. [www.ilo.org/dyn/natlex/docs](http://www.ilo.org/dyn/natlex/docs).

128 Lesotho Country Prolife, KPMG Africa Region 2012-2013 [kpmgafrica.com](http://kpmgafrica.com).

129 Lesotho ILO membership [www.ilo.org](http://www.ilo.org).

investment to date. ICBC-Standard Bank has set aside US\$1 billion to invest in African resources, while the new corporate strategy is expected to focus on brand acquisition, new technologies, advanced management processes, and market networks. ICBC is 70 percent owned by the Chinese government and is thus expected to drive a more geo-political corporate strategy in Africa, with less concern for margins.<sup>130</sup>

Chinese FDI was stimulated by trade privileges offered by the US such as the *Africa Growth Opportunity Act* (AGOA) which affects the textile and the clothing industry.<sup>131</sup> However, criticisms have been levelled against the character of foreign investment, and especially Chinese investment, attracted in recent years.<sup>132</sup>

By financing private Chinese companies in host countries like Lesotho, the PRC has expanded Chinese culture values and even foreign policies through the employment of the Chinese labour force which is partial to China's investment in Africa and specifically in the more southern region of SADC countries.<sup>133</sup>

## **2.7 SADC labour constitutional dispensation**

### *2.7.1 Introductory background*

International labour migration within the Southern Africa region is nothing new.<sup>134</sup> Labour law academics Olivier<sup>135</sup> and Rotberg<sup>136</sup> suggest that the development of labour law in particular non-citizen legislation, should be focused on the essence of immigration laws and practices in SADC, and based on the honouring of human rights and values. It is of great importance that governments in the region pre-determine their economic growth, stability and future regulative labour law development from an Africa perspective. These views illustrate the need for labour laws and foreign investment income related policies to be founded on ILO Decent Work principles, thus contributing to the growth of national economies, and ultimately, regional prosperity.

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130 Kabemba <http://www.osisa.org/books/regional/chinese-involvementsouth-africa>.

131 Lotjobo FDI Governance and Development 1-98.

132 *Lesotho News* Lesotho [www.gov.ls](http://www.gov.ls).

133 Yejoo "Chinese-led SEZs in Africa are they a driving force of China's soft power?" 1-31.

134 Crush 1997 [www.Queensu.ca/samp/transform/Crush.htm](http://www.Queensu.ca/samp/transform/Crush.htm).

135 Olivier 2011 *SADC Law Journal*

Olivier *Political and regulatory dimensions of access, portability and exclusion*

136 Rotberg China into Africa trade, aid and influence preface viii.

### 2.7.2 Constitutional labour related development in the region

The recent amendments to South African immigration laws and labour policies in Botswana and Lesotho focus on the effects of migration, through the tightening of controls and firmer monitoring of borders. SADC member states have immigration laws, labour laws and policies based on three fundamental principles namely:

- a) The sovereignty of the nation state.
- b) The integrity of national boundaries.
- c) The right to determine who may enter its national territory and to impose any conditions and obligations upon such persons.<sup>137</sup>

In Botswana and the other SADC countries, exercises are based on sovereignty as independent national states regulative statutes, regarding the entrance and activities of all non-citizens within its boundaries. As a result of difficult economic times and recovering from several recessions, Botswana, Namibia, South Africa and Lesotho as interlinked economical identities in the region, have been relying heavily on FDI. The successful attraction of foreign investment is essential for much needed sustainable economic growth, directly resulting in the creation of jobs, and thus boosting diverse sectors within the country.

Whereas global interactions, of which China's FDI has been a powerful engine in the economic development and technological change,<sup>138</sup> the question of socio-economic development must still be addressed. China's interests in infrastructure, aid and economic systems through the establishment of business, is mainly channelled by the monetary advancement of China's SEOs.<sup>139</sup> Chinese entrepreneurship demonstrates a path of establishing businesses in host countries, like Botswana, known for the creation of jobs for Chinese non-citizen labour force. Subsequently operating within this mind-set

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137 Williams "An overview of migration in the SADC region" 1-5.

138 Ortega and Peri "Migration, trade and income".

139 Rupp "Africa and China: Engaging postcolonial interdependencies" Chapter 4; Rotberg *China into Africa trade, aid and influence*.

is the reason why Chinese companies in the host country where they operate view the local inhabitants of that country as consumers rather than labourers.<sup>140</sup>

In November of 2006, 35 African heads of state gathered in Beijing for an event in celebrating of the extended growth of business relations with China. The focus on the volume of trade lacked the balancing of economic ties with the acceptance of Chinese nationals within the cultural and labour concept. Chinese investment and State assistance were very much welcomed, but there were tell tales of criticism suggesting that the Chinese have started to wear out their welcome in Africa.<sup>141</sup>

A central theme of FOCAC 2009 was the strengthening of civil society links between China and Africa, to parallel the governmental and business connections already made.<sup>142</sup>

Evidence of the above Chinese civil spectrum comprehensiveness, trade-based labour migration in the Southern Africa region was reinforced with the relevant social standards in societies of host country communities and SADC protocol. The close interaction between the individual countries' labour legislation and regional economic good governance has been the basis of serving the interests of all stakeholders in the region. SADC protocol and ILO labour migration and development, as the international labour standards, should be seen as the cornerstone in the link of domestic labour laws and Chinese migration.

The labour legislative dispensation of the SADC host countries, is affected through FDI and economic migration of Chinese nationals. Case law discussed in this study indicates that Chinese companies apply their understanding of labour laws in their knowledge of their domestic laws. A concise overview of the system of labour law development in China will assist in addressing the legal cultural gap of understanding conflicting legislative issues in the host countries domestic labour laws.

The following table is a comparative analysis indicating the key labour factors within the individual countries of the study.

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140 Rupp "Africa and China: Engaging postcolonial interdependencies" Chapter 4; Rotberg *China into Africa trade, aid and influence* 14, 42.

141 Negi 2008 African Geographical Review 41-63.

142 Marks [www.fahamu.org/downloads](http://www.fahamu.org/downloads).

**Table 2.2: Comparative analyses of key labour factor applicable in the following countries namely China, Botswana, Namibia, Lesotho and South Africa**

	<b>China</b>	<b>Botswana</b>	<b>Namibia</b>	<b>Lesotho</b>	<b>South Africa</b>
National Development strategy NDS		Vision 2016	Vision 2030	Vision 2020	Vision 2030
Government socio-economic situation	2008 New Labour Contract		2007 Labour Act		Immigration Regulations 2014
ILO Membership	1919, re-admitted 1971	1978	1978	1966	1994 Re-admitted, withdraw 1964
Ratification core ILO conventions	Yes	Yes	Yes	Yes	Yes
*DWCP	2013-2015	2011-2015	2010-2014	2012-2017	2010-2014
International membership AU	*FOCAC	Yes	Yes	Yes	Yes

\* DWCP Decent Work Country program

\* FOCAC China-Africa Corporation Forum as the platform established by China and friendly African countries for collective consultation and dialogue as a cooperation mechanism among developing countries.

## **2.8 Conclusion**

Labour law is a corner stone in the development of sustainable economic success in SADC, thus the knowledge of Chinese labour as an integral part of China's global economy has been highlighted in the African countries in this study. The employment of Chinese non-citizen nationals, mostly working on projects regarding Chinese investment, is regulated by the host country's individual domestic labour laws. Botswana and these SADC countries, have also introduced "codes of practice" governing a number of employment-related issues. The amendment to the South African *Immigration Act* shows the impact that legislation has on labour and work related permits for non-citizens entering the country. Non-citizen legislation shows that policy and legal framework in SADC tends to emphasise tightening of controls and the monitoring of borders. It is evident that the essence of immigration and employment

legislation will be the challenge of honouring human rights and values, specially finding common ground in the building of trust and mutual acceptance.

It is clear that a positive investment climate for the region within the clothing and textile industry requires the securing of FDI which will ensure the creation of jobs and income according to the principles for success of the Decent Work programmes of the individual country as per accepted ILO conventions.

China has dealt with massive economic, social and institutional reforms in the past decade. Such changes and reforms took place at a time when globalisation was intensifying through the rapid flourishing of international trade, international financial markets, capital flows and technology transfer. The structural adjustment was not only changing the industrial structure, but also the internal employment structure. The Chinese government had to test and adapt its active employment policies and improvement of these policies was only gradually upgraded to legislation.

Development is a process of finding long term solutions built on standard employment relationships and characteristic of decent work as defined by the ILO.

The vision for Botswana and the other SADC countries should be based on coherent regional economic policy benefits through the development of labour laws and employment practices. Chinese workers are a significant integral part of China's investment; therefore, the emphasis is placed on the incorporation of systematic and comprehensive "international" migration policies within the region. Protocol and good practices should constantly be put in place in the process of gaining international experience on related issues, however, adapted for national domestic circumstances within the host countries.

## Chapter 3: International influences on labour law developments in Botswana and targeted SADC countries

### 3.1 *International Labour Organisation*

#### 3.1.1 *Introduction*

The ILO was founded in 1919 as part of the treaty of Versailles that ended World War I and reflects on the belief that, universal and lasting peace can only be accomplished if based on social justice.<sup>143</sup> The ILO is the United Nations (hereafter referred to as UN) agency dealing with labour issues and in particular, international labour standards and decent work for all. Members of the ILO include 185 of the 193 UN member states.<sup>144</sup> China, Botswana, Namibia, South Africa and Lesotho are also members of the ILO,<sup>145</sup> of which Botswana is a substitute member.<sup>146</sup> Since 1919 the concerns for migration have been written into the ILO Constitution as it calls for the "protection of the interests of workers" when employed in countries other than their own.<sup>147</sup> The ILO has not stood still since its historical beginnings, but has innovatively responded to the dynamics of globalisation.<sup>148</sup>

The structure of the ILO consists of a Governing Body that decides the agenda of the International Labour Conference and who adopts the draft programme, sends them for submission at the Conference, elects the director-general, appoints commissions of inquiry and supervises the work of the International Labour Office.<sup>149</sup> The Governing Body consists of 28 government representatives; ten of those representatives are nations of 'chief industrial importance'. They are Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom and the United States<sup>150</sup> Note

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143 International Labour Organisation [www.ilo.org/public/.../declarations.htm](http://www.ilo.org/public/.../declarations.htm).

144 ILO [www.ijrcentre.org/universal...bodies.../international-labour-organisation/](http://www.ijrcentre.org/universal...bodies.../international-labour-organisation/).

145 Membership of the countries in this study to the ILO <http://www.ilo.org>.

146 ILO 2014-2017 <http://www.ilo.org>.

147 Report of the Director-General International Labour Conference 103rd Session, 2014 Report 1 (B) Fair Migration Setting an ILO agenda.

148 Implementing the Global Employment Agenda: Employment strategies in support of decent work, "Vision document", ILO 2006 <http://www.ilo.org/gea>.

149 The structure of the ILO [www.ilo.org](http://www.ilo.org).

150 ILO 2014-2017 [www.ilo.org](http://www.ilo.org).

that China is amongst these prominent countries and has a permanent seat. The primary goal of the ILO is to:

Contribute with member States, to achieve full and productive employment and decent work for all, including women and young people, a goal embedded in the ILO Declaration 2008 on Social Justice for a Fair Globalisation and which has now been widely adopted by the international community.<sup>151</sup>

An annual International labour Conference is held in June in Geneva, Switzerland. During this time conventions and recommendations are crafted and adopted. Each member state is allowed four representatives at the conference. At present there are 188 conventions and 199 recommendations adopted.<sup>152</sup> The conventions come into force when ratified by sufficient governments. At this stage it creates a legal obligation on ratifying nations to apply its provisions.<sup>153</sup> The governments are required to submit details of their compliance with the obligations of the convention that they have ratified. The International Labour Conference's Committee on the Application of Standards examines any alleged breaches of the international standards.

The ILO has a unique "tripartite" structure.<sup>154</sup> Initially the ILO functions were largely limited to setting the parameters of employer-employee relationships, thus regulating national labour markets to give protection to employees.<sup>155</sup> China has been in a position through global economic developments to relieve internal unemployment pressures by addressing unemployment and by creating migration opportunities for Chinese employees through the SOE investment system.

The *Philadelphia Declaration* includes a one-line paragraph: "Labour is not a commodity".<sup>156</sup> Today the ILO spreads standards around the world, lauding "tripartite

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151 Salazar-Xirinachs [http://www.ilo.org/public/english/bureau/dgo/download/dg\\_announce\\_en.pdf](http://www.ilo.org/public/english/bureau/dgo/download/dg_announce_en.pdf).

152 How International Labour Standards are created <http://www.ilo.org/global/standards/introduction>.

153 How International Labour Standards are created <http://www.ilo.org/global/standards/introduction>.

154 Rules of The Game for the Global Economy A brief introduction to International Labour Standards International Labour Office Switzerland revised edition 2009 Tripartite structure: ILO is the only tripartite U.N. agency with government, employer, and worker representatives. This tripartite structure makes the ILO a unique forum in which the governments, employers and employees as representatives of the economy, of its Member States can freely and openly debate and elaborate labour standards and policies.

155 Standing 2008 *Development and Change* 355-384.

156 The *Declaration of Philadelphia* was adopted at the 26th Conference of the International Labour Organisation in 1944 and was added as annex to the ILO's constitution. The declaration focussed on a series of key principles to embody the work of the ILO <http://uslegal.com/>.

structure” and helping so-called 'backward' countries to introduce legislation along lines developed in advanced countries.

Maupain<sup>157</sup> maintains that the ILO has kept pace with economic and social change in the world financial crisis of this last decade. He describes the four stages of the ILO's attempts to influence the dynamics of globalisation namely: the 1998 *Declaration on Fundamental Principles and Rights at Work*, "Decent Work" Strategy, World Commission on the Social Dimension of Globalisation, and the 2008 *Declaration on Social Justice for a Fair Globalisation*.

The ILO faces its own challenges in setting parameters of national labour markets. During the period of 1999-2009, the Social Dialogue Sector replaced the Industrial Relations Department of the ILO.<sup>158</sup> Standing states that this left structures intact while developing a rhetoric that is non-threatening to powerful interests while seeming to be on the side of the poor, vulnerable and disadvantaged. The 1999 ILO slogan around the world emphasised "decent work".<sup>159</sup>

### 3.1.2 ILO and labour law development from a Southern Africa perspective

The implementations of labour laws in Southern Africa, specifically the countries in this study, show a lack of uniformity in the application of labour laws. Every country interprets and applies its labour laws differently according to their national priorities. While some legal frameworks offer better working conditions, others do not, thereby subjecting employees, citizens and non-citizens, to various forms of labour exploitation.

The World Commission on Social Dimension was established by the ILO Governing Body in February of 2002:

in response to the fact that there did not appear to be a space within the multilateral system that would cover adequately and comprehensively the social dimension of the various aspects of globalization.<sup>160</sup>

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157 Maupain The future of the international labour organisation.

158 Standing 2010 *New Political Economy* 307-318.

159 Standing 2010 *New Political Economy* 307-318.

160 ILO and Globalisation [www.ilo.org/global](http://www.ilo.org/global).

Globalisation is the key factor regarding challenges within the ILO, regarding national labour law development and the decent work concept. National "domestic" labour laws should be the tool to advance the protection of worker rights within an ever changing socio-economic sphere in regulating labour law markets in the region. The challenge is the legislative protection of the worker, irrespective of nationality, within the limited scope of the national level, the particular host country in regard to economic development social status and political views.

In June of 2008 the ILO adopted the Declaration on Social Justice for a Fair Globalisation as a reaffirmation of ILO values and expression of the ILO's mandate in the era of globalisation.<sup>161</sup>

The ILO's vision is to create uniformity in labour standards regarding national and international labour laws grounded in the principals of human dignity, decent work and socio-economic stability on national level.

Conversely from the research as discussed in the previous chapter, it is clear that Botswana and every other country referred to, have blue printed the countries' own characters or national identities to labour laws. However, the challenge and impact that labour law legislation should have on the totality of regulating non-citizen employment, within its borders, are the same.

Research on the ILO promotion of fair and stable globalisation shows that a variable measurement exists regarding the effective impact of these standards, depending on the individual countries' socio-economic environment, and institutional capacity then being faced with the need for FDI and economic growth.<sup>162</sup> Contributing to the dilemma is the question on the legislative input concerning the protection of Chinese nationals as non-citizen employees. Labour law development in China shows the cultural gap regarding educating workers in particular labour rights such as rights to freedom of association, collective bargaining and the right to take industrial action, because such labour disputes are mostly attended on a governmental level in China.

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161 ILO *Declaration on Social Justice for a Fair Globalization* adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008 [www.ilo.org](http://www.ilo.org).

162 Note discussions on difference in labour law development regarding the textile and clothing industry in Lesotho and South Africa. With specific reference to those employees with relative less bargaining power that are totally dependent on these jobs in order to have an income.

### 3.1.3 ILO and the "Ruggie" guidelines as international influences on migration

A further development to the ILO 2008 declaration was the introduction of the Ruggie guidelines as international influences on migration. Ruggie Rules is a refinement on a corporate level as a tool to ensure responsible global corporate practices to solve the relationships between businesses, governments, rights and law.

John Ruggie<sup>163</sup> developed the 'Guiding Principles on Business and Human Rights,' better known as the "Ruggie Rules". The Guiding Principles follow the three pillars of "Protect, Respect and Remedy" of a framework namely:

- a) the State Duty to Protect states that the State of Government should protect against human right abuses by third parties, which include business enterprises
- b) the Corporate Responsibility to Respect human rights which means the business enterprises should act with due care to avoid infringing on the rights of others with whom they are involved
- c) the need for greater Access to Remedy for the victims of business-related abuse.<sup>164</sup>

These rules propose a different approach for business accountability and human rights abuse,<sup>165</sup> in promoting a corporate culture respectful of human rights.<sup>166</sup>

## 3.2 SADC and migration

### 3.2.1 Introductory background

The Southern Africa Development Community was established in August 1992 in Windhoek, Namibia. It identified a need to mobilise own and international resources to promote the implementation of national, interstate and regional policies, programmes and projects within a framework for economic interaction.<sup>167</sup> Currently there is no overall

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163 John Gerard Ruggie, Berthold Beitz, Professor in Human Rights and International Affairs at the Kennedy School of Government at Harvard University.

164 Howard and Smith *John Ruggie's The Guiding Principles* 1-6. Ruggie Rules: - Is a business and human rights framework of "Protect, Respect and Remedy" Guiding Principles which outline how businesses should implement that UN Framework and how States should play a part in this. The Guiding Principles was presented before the UN Human Rights Council at its June 2011 session.

165 Aaronson and Higham 2013 *Human Rights Quarterly* 233-264.

166 See footnote 164.

167 The SADC Treaty was signed in 1992 and is the foundation document of SADC and sets forth the regional body's objectives Consolidated text of the treaty of the Southern African Development Community as amended March 12, 2010 Preamble 1.

regional policy framework to govern migrant labour in SADC. The SADC Treaty establishes the importance of cooperation among its member states, the community's institutions, as well as the processes for achieving its goals, and calls for its members to cooperate in areas that are necessary to promote regional development and integration. For instance, member states are required to coordinate, rationalise and harmonise their overall macro-economic strategies and policies. This is an indication that labour law harmonisation would be a welcome development within SADC.

The context of the consolidated text of the SADC treaty was amended, and article 24 of Chapter 8 reads as follows:

#### Article 24

1. Subject to the provisions of Article 6(1), Member States and SADC shall maintain good working relations and other forms of co-operation, and may enter into agreements with other states, regions and international organisations, whose objectives are compatible with the objectives of SADC and the provisions of this Treaty.
2. Conferences and other meetings may be held between Member States and other Governments and organisations associated with the development efforts of SADC to review policies and strategies, and evaluate the performance of SADC in the implementation of its programmes and projects, identify and agree on future plans of co-operations.<sup>168</sup>

The above article thus constitutionally provides for the incorporation of international law into that of national systems.<sup>169</sup>

### 3.2.2 SADC and migration and future policies

SADC Labour Migration Policy was announced in December of 2013.<sup>170</sup> It was drafted in accordance with the spirit of the overall SADC Treaty,<sup>171</sup> and whose main objectives

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168 Consolidated Text of the treaty of the Southern African Development Community, as amended, sourced from the SADC head office, Gaborone Botswana.

169 Nhlabatsi Consultancy Africa Intelligence (CAI) 12 September 2014

The focus of the above article is on working together and the role of labour law harmonisation in improving the living standards of the poor in a globalised Africa. Consultancy Africa Intelligence (CAI) is a South African-based research and strategy firm with a focus on social, health, political and economic trends and developments in Africa. Further information on relevant subjects could be researched on the website <http://www.consultancyafrica.com>.

170 Southern African Development Community Labour Migration Policy DRAFT December 2013 SADC/ELSJTSCM/1/2013/9.

were to achieve development, peace and security, economic growth and to alleviate poverty, through the enhancement of the standard and quality of life of the people of Southern Africa. These objectives would be realised through the support of the socially disadvantaged, regional integration, the building on democratic principles for the achievement of equitable and sustainable development. The Treaty aimed at progressive elimination of obstacles to free movement of capital and labour. The draft SADC labour migration policy calls for a more refined contribution in existing legal frameworks at regional, bilateral and national level, and international and regional legal instruments and obligations relating to migration and labour laws.<sup>172</sup>

Botswana and the SADC countries in this region dealt with Chinese migration on its own merits and the country's own economic opportunities.<sup>173</sup> The SADC Labour Migration Policy proposes the regional alignment within international frameworks regarding; labour migration, harmonised respective national and bilateral policies, working towards an inclusive labour migration regime that balances international frameworks within specifications of Southern African economies and labour market dynamics.<sup>174</sup>

The draft SADC Labour Migration Policy is clear on member states national sovereignty and that there is no devolution of power to any SADC or other supranational organ on issues of migration within the Community.<sup>175</sup> National sovereignty prevails over the governance of their immigration policies. This includes the right to decide who to admit and who to refuse entry into their country. Botswana, Namibia, South Africa and Lesotho have their own legal frameworks. Botswana and Lesotho have separate legislation for granting employment permits for foreigners and in South Africa they are only issued by the Ministries of Home Affairs.

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171 The concept is that of Professor John Ruggie as UN Secretary-General Special Representative on Business and Human Rights on the corporate duty to respect human rights, and will be elaborated on further in Chapter 3 under international instruments and the ILO.

172 Southern African Development Community Labour Migration Policy DRAFT December 2013 SADC/ELSJTSCM/1/2013/9.

173 Each individual country functioning under own sovereignty, in the proclamation of labour law legislation such as work permit and employment for non-citizen criteria, immigration, monitoring labour ministries and departments and enforcement.

174 Southern African Development Community Labour Migration Policy DRAFT December 2013 SADC/ELSJTSCM/1/2013/9 p.3 1-21.

175 Southern African Development Community Labour Migration Policy DRAFT December 2013 SADC/ELSJTSCM/1/2013/9 p.10 1-21.

The impact of state legislation and, more specifically labour legislation, is the device governments use to lay down standards and conventions in the workplace and to control industrial relations. The Migration Dialogue for Southern Africa (MIDSA), which was founded in November 2000, aims to assist SADC governments to respond to the AU Strategic Framework on Migration and AU Common Position on Migration and Development.<sup>176</sup>

The Southern Africa Development Community (SADC) labour Migration Policy DRAFT states

One of the key (non-binding) recommendations adopted by the 2010 MIDSA Ministerial Conference was to "enhance" migration management coordination, including, through the establishment of migration focal points in relevant ministries, agreement on common regional standard operating practices, including minimum standards for migrants, access to basic social services: capacity building; ongoing exchange of experiences and best practices, harmonised border management systems, and an integrated regional information management system.<sup>177</sup>

The SADC Secretariat labour migration workshop held in Johannesburg in August of 2013 discussed the tripartite structure in the region and considered the recommendations made to date.<sup>178</sup> SADC intra-regionally has the objective of strengthening economic performance, specifically referring to the countries in the region. The free movement of labour in SADC has potential economic benefits, particularly in addressing skill shortages and reducing the number of irregular migrants and non-citizens not adhering to labour legislation.<sup>179</sup> Botswana adopted the most open skills migration policy within SADC by facilitating the temporary employment of skilled personnel from other countries.<sup>180</sup> Research shows that South Africa's inclusion in the international platform of BRICS (Brazil, Russian Federation, India, China and South Africa), will have economic growth potential for other African countries in the region.

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176 <http://www.migrationdialogue.org/midsa>.

177 Southern Africa Development Community SADC labour Migration Policy DRAFT SADC/ELSJTSCM/1/2013/9.

178 Musabayana "Support towards strengthening the labour migration governance in the SADC region" 1-16.

179 Kitimbo "Is it time for open borders in Southern Africa?" 1-14.

180 Crush, Williams and Peberdy "Migration in Southern Africa" 1-40.

### 3.3 African Union (AU)

The African Union is a union of 54 African states of which only Morocco is not a member.<sup>181</sup> The AU was established on 26 May 2001 in Addis Ababa and launched the following year in South Africa and deals with several political and socio-economic related issues. The AU's strategy is to eradicate poverty in order to ensure a better standard of living for African people.<sup>182</sup> The African Union is based on a common vision of a united and strong Africa. Engagement with China has been formalised in that:

The Forum for Co-operation between Africa and China (FOCAC), which set out China's Africa Policy in 2006 and remains the main framework for the relationship, includes a reference to the African Union and regional groups but is not specific on China's support to these institutions. Some support has been provided for African-led peace and security initiatives, such as the Intergovernmental Authority on Development (IGAD) and the NEPAD. China has offered support for some African Union activities, and recently officials have shown a growing inclination to engage with Africa at a more multilateral level and support regional integration. Yet, China's engagement remains predominantly bilateral, with a strong focus on infrastructure development.<sup>183</sup>

The AU is built on a partnership between governments and all segments of civil society and the private sector, and thereby aims to strengthen solidarity and coherency among the peoples of Africa.<sup>184</sup> The economic future of Africa needs stability, accountability and transparency in the securing of Chinese investments and the individual host countries development. Looking at the objectives of the African Union:

To promote and defend African common positions on issues of interest to the continent and its peoples;

To promote sustainable development at the economic, social and cultural levels and the integration of African economies;

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181 Thabo Mbeki (9 July 2002). "Launch of the African Union, 9 July 2002: Address by the chairperson of the AU, President Thabo Mbeki". ABSA Stadium, Durban, South Africa: Africa-union.org. Africa Union <http://www.wikipedia.org/wiki/>.

182 *Accra Declaration* Assembly of the African Union 9th Ordinary Session in Accra, Ghana, 1–3 July 2007 and also mentioned in the Vice Chairperson Speech, at Special session of the labour and social affairs commission of the African Union Windhoek, Namibia 23-25 April 2014 Press release on 083/2014.

183 Regional co-ordination needed to embrace new giants Africa and its Emerging Partners (2011) African Economic Outlook 2014 [www.africaeconomicoutlook.org](http://www.africaeconomicoutlook.org).

184 *Accra Declaration* Assembly of the African Union 9th Ordinary Session in Accra, Ghana, 1–3 July 2007 Kane and Mbelle *Towards a people-driven African Union*.

To coordinate and harmonize the policies, between the existing and future regional economic communities.<sup>185</sup>

The challenges for members of the AU, particularly Botswana and those mentioned in this study, is to evaluate China's investment in Africa as an economic interest above goals of human rights, the rule of law and good governance. Western concerns have been raised that developments in the AU have been troubling in that little was realized by the advent of the above values in the organisation. African leaders have not shown themselves ready to embrace democratic governance and accountability fully, and the AU has been unwilling to defend democratic principles forcefully.<sup>186</sup>

The ultimate vision for the AU as Africa and regional integration would be to manage the impact of emerging partners such as the Chinese. Policies and structure should be put in place to take advantage of international development through FDI finance to ensure solidarity in Africa's economic health.<sup>187</sup> The AU is focused as per their strategic priorities states, on the employment creation, social protection and inclusive social dialogue anchored on International Labour Standards and migration and mobility as they impact on employment creation.<sup>188</sup> The building of the AU headquarters in Addis Ababa by a Chinese Construction Company, also shows the intensity of relations between China, and demonstrates China's rapidly changing role in Africa.<sup>189</sup>

### **3.4 Conclusion**

Chinese; international trade, foreign direct investment, and State assistance within Botswana and the targeted countries, shows that China has developed into a major partner in SADC and the bigger AU. It is international influences, such as that of SADC ILO and AU that impact on the interaction between trade, FDI and the Chinese characteristic migration, regarding the challenges to the development of domestic labour law in redefining individual countries economic policies.

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185 Regional co-ordination needed to embrace new giants Africa and it's Emerging Partners (2011) African Economic Outlook 2014 [www.africaeconomicoutlook.org](http://www.africaeconomicoutlook.org).

186 Isanga 2010 *Nw Interdisc L Rev* 175.

187 Towards a people-driven African-Union; current obstacles & new opportunities. African Network on Debt and Development, the Open Society Institute Africa Governance Monitoring and Advocacy Project, and Oxfam GB. January 2007 1-76.

188 Cottle 2014 *Global Labour Column* 1-4.

189 Lammich "China's Impact on Capacity Building in the African Union" 1-27.

The SADC labour Migration Policy DRAFT is a product of the SADC treaty, laying the foundation of cooperation among its member state, in the processes of achieving new sustainable economic and related goals. Labour law harmonisation; through migration management coordination, in all relevant ministries, on common regional standard operating practices, including minimum employment standards for migrants, access to basic social services in the proses of adhering to ILO labour standards for fair and stable globalisation.

SADC immigration policy and labour regulations are facing the arrival and growth of the Chinese non-citizen labour force. The Chinese are unconventional migrants, different to the historic SADC internal labour migration patterns. Conversely, most of the Chinese migrants to the region are international entrepreneurs and highly skilled labourers from China. Labour law will continuously develop, be re-assessed, ILO conventions and standards will be held, taking into consideration the challenges and the positive contribution these migrants could have on the local economy of host countries, but especially to the trade and FDI relationship between the host countries and the bigger Africa united under the AU.

## Chapter 4: Botswana's labour law regarding the employment of Chinese as non-citizens

### 4.1 Introduction

The Republic of Botswana became independent in 1966,<sup>190</sup> with a republican constitutional dispensation. Compared to South Africa, Botswana has the older constitution.<sup>191</sup> The country consists of 600,370 sq. km, of landlocked country,<sup>192</sup> its geopolitical situation and the fact that its total population is just over 2 million<sup>193</sup> motivates the country's caution in its foreign relations.<sup>194</sup> Only, 787,962 (68.3%) of the total estimated population, are economically active.<sup>195</sup> Botswana is the SADC success story of economic growth. In 1966 Botswana was one of the poorest countries in the world,<sup>196</sup> and recently Botswana has been reported as an upper middle income country with GDP per capita of about US\$7,500.<sup>197</sup>

Botswana's relationship with China commenced when President Seretse Khama, recognised the potential of the PRC (China)<sup>198</sup> and over-riding the objections of his Cabinet, ensured that Botswana voted in favour of the PRC taking the seat for China at the United Nations in 1971<sup>199</sup> China was well placed to provide diplomatic and political support to Botswana. Evidence of those small beginnings is that, during the seventies, Botswana's economy was summarised as:<sup>200</sup>

The limited capacity of the economy to generate income is imposing serious constraints on government finances. In recent years, current budgetary expenditure

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190 Dini, Quinn and Wohlgemuth 1970 *Staff Papers (International Monetary Fund)* 127-169.

191 Van Eck and Snyman 1999 [http://works.bepress.com/bruno\\_vaneck/1](http://works.bepress.com/bruno_vaneck/1).

192 Outline of Botswana [http://en.wikipedia.org/wiki/Outline\\_of](http://en.wikipedia.org/wiki/Outline_of).

193 Botswana Country Report October 2014 Published by The PRS Group, Inc. East Syracuse, New York USA.

194 Youngman "Strengthening Africa-China Relations: A Perspective from Botswana" 6.

195 Country Intelligence Report Botswana IHS Global Insight Report printed on 04 September 2012.

196 Zizhou "Linkages between Trade and Industrial Policies in Botswana" 1-48.

197 Botswana GDP per capita IMF World Economic Outlook database, October 2009.

198 Reference in this paper is made to the PRC as China as explained in paragraph 1.2.1 p 1 Botswana's diplomatic and economic relations are with China, because of the reason that before the period 1975 diplomatic relations with the Chinese included those with Taiwan, but since January 1975 when the Government of Botswana of that time adopted a one-China policy and the relations with Taiwan were terminated.

199 Youngman "Strengthening Africa-China Relations: A Perspective from Botswana" 6.

200 Dini, Quinn and Wohlgemuth 1970 *Staff Papers (International Monetary Fund)* 127-169.

has increased rapidly, following the construction of primary infrastructure and the creation of a government administration.

Good economic governance, legislative administration and a series of committed reform measures contributed to the country's current high economic freedom score, of 72 and World Rank of 27.<sup>201</sup> The international influence has been a key factor from the beginning; the International Development Association (IDA) provided finance for road infrastructure and economic development. Through the building of roads the land became more assessable. Non existing infrastructure and costly construction made the land more assessable and open to more economic exposure.<sup>202</sup>

In the early years, the main infrastructure consisted of the main transport system consisting of a single-track railway line across the eastern region going from north to south linking the South African and Zambian neighbours. In the 1980s the government of the People's Republic of China assisted with both financial and technical aid in the relaying of the mainline track with continuously welded rail on concreted sleepers.<sup>203</sup> It was in the same period, that the Chinese relationship with Botswana and Africa shifted towards economic co-operation based on common aims. After the death of Mao Zedong in 1976 Deng Xiaoping declared in 1978 China's pursuit of a policy of economic liberalisation and private investments, initially through "Special Economic Zones" which has now become a normal and regular feature of the Chinese economy.<sup>204</sup>

#### *4.1.1 Botswana's employment challenge*

Botswana has a constant high unemployment, thus creating an income inequality.<sup>205</sup> The government is running the current Tenth National Development Plan 2010-16 (NDP 10)<sup>206</sup> addressing the national economic strategy; with a focus on the country's trade and investment policies combined with education, training and productivity in the private sector in promoting foreign investment. Economic growth was due to the discovery of

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201 Botswana's economic freedom score <http://www.heritage.org/index/pdf/2014>.

202 Baah and Jauch Chinese investments in Africa.

203 Chinese assistance to the Botswana railways <http://www.botswanarailways.co.bw/timeline>.

204 Baah and Jauch Chinese investments in Africa.

205 Botswana Overview 2014 [www.worldbank.org](http://www.worldbank.org).

206 Botswana November 2013 Country review; NDP 10 is a long term plan incorporating the countries Vision 2016 under the theme "Accelerating Achievement of Vision 2016 Through NDP 10".

important deposits of diamonds, copper-nickel, copper, coal and brine, and the development of these prospects into large-scale mining operations.<sup>207</sup>

The Ministry of Trade and Industry is responsible for the policies and structure for the attraction of FDI. Subsequently Sino-Africa relations in the 1990s gained momentum due to Chinese involvement in the region's economic reform programmes.<sup>208</sup> Botswana adopted a set of active measures to overcome the 2008 recession and to hasten the pace of privatisation and diversification away from the mining sector in order to attract sustainable employment opportunities.<sup>209</sup> Botswana attracts FDI, because of its stable political and governmental administration, stable macro-economic policies, several trade agreements, and good labour relations.<sup>210</sup> This success has all contributed to the fact

The Policy Integration and Statistics Department pursues the ILO's decent work and fair globalization agenda from an integrated perspective.<sup>211</sup>

Botswana's economic and social development is thus closely linked with the actions of the government in perusing a tripartite system in the creation and sustaining of employment opportunities.

## **4.2 Botswana's "labour law and legislation"**<sup>212</sup>

### **4.2.1 Introduction**

Botswana's Labour laws are applicable to all employees and employers irrespective of nationality.<sup>213</sup> Labour law and legislation are regarded as in line with international

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207 Maipose "Institutional dynamics of sustained rapid economic growth with limited impact on poverty reduction" 4.

208 Van de Looy 2006 Africa and China: A Strategic Partnership 5.

209 The foreign investment climate in Botswana calls for foreign investors to be law-abiding, identify with Botswana's national principles and objectives, assist in the diversification of the economy, and share Botswana's commitment to maintenance of democratic, open and non-racial society.

210 Botswana Country Conditions climate for Investment and Trade Political risk services 1-Mar-2009 The PRS Group 2. Botswana Country Report 2009.

211 Siphambe "Growth and employment dynamics in Botswana" 1-37, "Botswana's economy and labour market: are there any lessons for SADC regional integration?" 2004 *Development Southern Africa* 353-364.

212 Labour Law referring to the broad range of legislative intervention in the labour market, to attempt to regulate matters including labour supply (for example, by immigration laws), labour quality (for example, by vocational training- skills development, localisation policy), employment conditions, (for example working hours, minimum wage laws) employee-employer relations, (contracts social responsibility and social security in sending country "China") enforcement and the incorporation of ILO standards court judgments.

standards as the country ratified 15 ILO Conventions inclusive of the 8 fundamental of core labour conventions.<sup>214</sup> ILO standards and conventions are incorporated as part of judgments in several labour related cases in the Industrial court of Botswana.<sup>215</sup> The UN's investment policy review for employment in Botswana confirmed this but indicated that workers may organise unions but there is little unionisation of the workforce and little collective bargaining or organised work stoppage.<sup>216</sup>

For the purpose of this study the focus is on the individual labour law contract, application of the necessary permits and labour related legislation concerning the employees' rights at work. Chinese non-citizen employment as interlinked to China's FDI,<sup>217</sup> mainly as Chinese owned or state influenced companies, has a specific set of challenges with regard to the social norms and minimum socially accepted conditions under which Chinese nationals are imported, and concerns socio-economic and legal aspects of the Botswana legislation.

#### 4.2.2 *Labour law sources of Botswana*

##### 4.2.2.1 Background

The sources of labour legislation, more specifically as regards non-citizens in Botswana can be summarised under the following:

1. Legislation – Botswana Constitution, Employment Act CAP 47:01, Workers Compensation Act 23 of 1998 Trade Unions and Employers Organisations Act, 2003, Employment of Non-Citizens Act CAP 47:02, Immigration Act (Act 3 of 2011) Trade Disputes Act, 2003 are most commonly used with the employment of Chinese non-citizens.
2. Industrial Court Decisions – the decisions of the court create case law.

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213 *Eunice Meyer v Futuristic (Pty) Ltd* IC 357/12 the applicant, Eunice Meyer a non-citizen, and had an employment contract and still valid work permit, she was awarded all employee benefits as per court ruling. This ruling is evident to the non-citizen employee's right to complain about employment issues and an access to justice. The court enforces the law on all employees regardless of citizenship.

214 Decent work country programme for Botswana hardcopy Ministry of Labour and social security head office Gaborone Botswana 42.

215 See case law discussion paragraph 4.3.

216 UNCTAD Investment policy review for Botswana 2003 *Employment* 32.

217 See cross reference p. 14 and p.42 on the subject matter.

3. Collective Agreements -These are contracts that deal with matters relating to the terms and conditions of employment (substantive matters) and dispute resolution procedures (procedural matters). It is according to section 37 of the *Trade Disputes Act* binding upon the parties to the agreement. Collective agreements are not commonly found between Chinese employees and their employers, because the Chinese non-citizen employments are mostly of short contractual bases and only for the completion of a tender.
4. Contract of employment - individual employment contracts are a prerequisite for the obtaining of the necessary work and residence permits for non-citizens.<sup>218</sup> According to the Botswana *Employment Act*, a "contract of employment" means an agreement, whether oral or in writing, expressed or implied, whereby one person agrees to work for a wage or other benefit, or both for his labour and to perform it under the orders of another person who agrees to hire it. Legislation requires that the probation period for so employed person to be in writing,<sup>219</sup> the employer should, therefore, notify the employee in writing the length of the probation period of his or her contract of employment.

In the case of *Kgosi v China Civil Engineering*<sup>220</sup> (Kgosi case) the Industrial court ruled on dismissal, during probationary period

(2) In the instant matter it was common cause that the employer did not notify the applicant of the length of the purported probationary period in writing before entering into the contract. The probationary period was therefore invalid.

The Kgosi case<sup>221</sup> illustrates the Chinese companies' understanding of Botswana's labour legislation. The legal/cultural gap is seen in the understanding and the implications of labour law regarding contract of employment as practiced in Botswana and that practiced in China. In particular the difference in probation and termination

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218 See application forms as annexure document to this chapter. It is a requirement to attach employment contract as one of the necessary documentation for submitting application to the labour offices.

219 S 20(3) of the *Employment Act* (Cap 47:01) stated that before entering into a contract of employment which was to be subject to a probationary period, the employer-to-be shall inform the employee-to-be in writing of the length of the probationary period.

220 2006 1 BLR 411 (IC).

221 The writer hereof represented China Civil Engineering at the Industrial Court.

clauses applicable in employment contracts in Botswana may be a source of misunderstanding.<sup>222</sup>

#### 4.2.2.2 Labour legislation

The principal source of law governing human rights protection in Botswana found in Chapter 2 of the Botswana Constitution, contains that it is generally regarded as the Bill of Rights and is entitled to 'Protection of fundamental rights and freedoms of the individual.'<sup>223</sup> Human rights and labour are based on a principle of non-discrimination and the endorsement of personal rights such as the right to life and dignity.

**Table 4.1: Rights recognised and protected in the Bill of Rights (Botswana)<sup>224</sup>**

<b>Rights</b>	<b>Section in the constitution</b>
Right of life	3(a), 4
Right to personal liberty and security of the person	3(a), 5
Right to privacy	3(c), 5
Protection from slavery and forced labour	6
Protection form inhuman treatment	7
Protection from deprivation of property	3(c), 8
Protection of law including right to fair hearing	3(a), 10
Freedom of conscience	3(b), 11
Freedom of expression	3(b), 12
Freedom of assembly and association	3(b), 13
Freedom of movement	14
Freedom from discrimination	3, 15

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222 Yang and Doh 2013 *African East-Asian Affairs* 65. The 1994 China's labour law stipulates in its article 19 (4): "The probation period shall be included in the term of a labour contract. If a labour contract only provides the term of probation, the probation shall be null and void and the term of the probation shall be treated as the term of the labour contract." and China's 2008 "Labour contract law" in order to prevent abuse of the probation period by some employers, as the basis of the Labour law also stated that: If the term of a labour contract is not less than three months but less than one year, the probation period shall not exceed one month.

223 Fombad and Quansah (eds) *Essays of the Law of Botswana* Chapter 1 15.

224 Fombad and Quansah (eds) *Essays of the Law of Botswana* Chapter 1 16.

*Employment Act CAP 47:02.* The *Employment Act* as amended lays down minimum conditions of employment for employees, whether citizen or expatriate, employed in the private and parastatal sectors. An expatriate employee should be in possession of a valid work permit.

*Worker's Compensation Act 23 of 1998* requires an employer to pay compensation to any employee who is incapacitated through a work-related injury or occupational disease. Employers are also required to take up an insurance policy to cover liability under the Act.

*Trade Unions and Employers Organisations Act, 2003*, as amended makes provision for and sets out the rules for three categories of organisation: trade unions, federations of trade unions and employers' organisations. A trade union is an organisation of employees with a minimum of 30 members, whose main aims are to regulate relations between employees and employers or employers' organisations, or between employers and employees. Registration with the Registrar of Trade Unions and Employers' Organisations is compulsory. No employer may make membership or non-membership of a trade union a condition of employment.

*Trade Disputes Act, 2003*, was promulgated to provide for settlement of trade disputes generally and for settlement of trade disputes in essential services and for the control and regulation of industrial action and related matters.

*Employment of Non-Citizens Act CAP 47:02.* The Act regulates the employment and other engagement in occupations for reward or profit of certain persons who are not citizens of Botswana and provides for incidental matters. The Act provides for categories of non-citizens that should hold permits and those that are exempted from holding such permits. Applications for work permits are considered by the Immigrants Selection Boards which are established in terms of the *Immigration Act*.

Section 4 of the *Employment of Non-Citizens Act*<sup>225</sup> (hereafter referred to as the *Non-Citizen Act*) regulates the employment of non-citizens. According to the Botswana labour legislation, non-citizen means a person other than<sup>226</sup>

- a) a citizen of Botswana; or
- b) a person or a member of a class of persons declared by regulations made under this Act not to be a non-citizen for the purposes of this Act.

The national policy on incomes, employment, prices and the profits and manpower development, training and localisation policy are regulatory to the above act and mandatory in all companies, irrespective of the employment of non-citizens or not. The Industrial Court provides an assessable and comprehensive adjudication of the countries labour laws, statues and regulations.

#### 4.2.2.2 Industrial Court

The Industrial Court of Botswana is both a court of law and a court of equity.<sup>227</sup> As a court of law, the Industrial Court acts like any other court in applying rules of common law and legislation, but as a court of equity

The court places a lot of emphasis upon fairness and reasonableness to both employer and employee.<sup>228</sup>

The Industrial Court was established, to settle trade disputes and further to secure and maintain good industrial relations in Botswana. The Court has been given discretionary powers in the Act<sup>229</sup> including:

- (a) Section 18 (6) of the Act provides that the Court shall regulate its own procedure and proceedings, as it considers fit.<sup>230</sup>

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225 Employment of Non-Citizens Act Chapter 47:02.

226 *Employment of Non-Citizens Act* Chapter 47:02 Interpretation clause.

227 *Mbayi v Wade Adams (Botswana) (Pty) Ltd* Case No. I.C. 30/94; *Jimson v Botswana Building Society* (2005) AHRLR 86 (BWIC 2003) paragraph 25 "It is for this reason that it is given the power to eschew legal technicalities and rules of evidence where there is not likely to be a miscarriage of justice (section 14 of the *Trade Disputes Act* (cap 48:02)).

228 Judge Dawie de Villiers', ruling as per the *Mbayi v Wade Adams (Botswana) (Pty) Ltd* Case No IC 30/94.

229 Trade Disputes Act 15 of 2004.

230 Trade Disputes Act 15 of 2004.

(b) Section 19(1) of the Act provides:

The Court shall not be bound by the rules of evidence or procedure in civil or criminal proceedings and may disregard any technical irregularity which does not and is not likely to result in a miscarriage of justice.<sup>231</sup>

(c) In terms of section 18(1)(d) of the Act, the Industrial Court can:

give all such directions and do all such things as may be necessary or expedient for the expeditious and just hearing and determination of any dispute before it.<sup>232</sup>

(d) In terms of section 18(1)(c) of the Act, the Court may:

refer any matter to an expert and, at its discretion, accept his report as evidence in the proceedings.<sup>233</sup>

(e) Section 18(5) of the Act further assists the Court in that, in its discretion, it may without any evidence having been led in regard thereto, take the following aspects into consideration when deciding a dispute:

In the exercise of its powers under this Act, the Court may take into consideration any existing code of industrial practice agreed between the Government, employers' organisations and trade unions, and any guidelines or directives relating to wage and salary levels, and any other terms and conditions of employment that may, from time to time, be issued by the Government.<sup>234</sup>

The principles underlying the national industrial relations code of good practice<sup>235</sup> are formulated in part A, paragraph 1.7.1. The principles underlying the Code read as follows:

Good industrial relations can only be built on mutual trust, confidence and respect for the different interests of employees and employers and the broader interests represented by Government.<sup>236</sup>

The Industrial Court has no inherent powers like the High Court. Section 17(1)<sup>237</sup> states the purpose of the Industrial Court constraining it to function within the ambit of the Act

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231 Trade Disputes Act 15 of 2004.

232 Trade Disputes Act 15 of 2004.

233 Trade Disputes Act 15 of 2004.

234 S 18(6) of the *Trade Disputes Act* 15 of 2004.

235 National Industrial relations Code of Good Practice. Hard copy State Press Gaborone. Aims to provide practical guidelines on the day to day implementation of fair labour practices and the promotion of good industrial and human relations at the workplace.

236 National Industrial relations *Code of Good Practice* Part A para 1.7.1.

237 Trade Disputes Act 15 of 2004.

and other applicable Acts. Conversely the then Judge President made a ruling in the case of *Jimson v Botswana Building Society*.<sup>238</sup>

It is significant that section 17(1) states the purpose of the Industrial Court as 'settling trade disputes' and not 'deciding trade disputes'. It seems to me that settling a dispute is a wider power than deciding the dispute. The former implies an arbitral or mediatory rather than an adjudicatory role for the tribunal on which the jurisdiction is conferred. It is not performing the task of a court, such as the High Court, in a civil case. The expression also means that the tribunals empowered to settle disputes have power to take things into its own hands, and not sit back just to observe one party best the other. This is confirmed by section 19 ... which frees the Industrial Court from being bound by the rules of evidence or procedure in civil and criminal proceedings, and gives power to the Court to disregard technical irregularities which do not or are unlikely to result in miscarriage of justice.

The Act, however, only provides the framework of the Court's powers. Provided the court remains within that framework exercised its powers within the discursion given to it according the rule of law and applying the principles of fairness and equity. In so doing the Court implements well established ILO principles of fairness and reasonableness, thus sitting as a court of equity. These principles are found in various ILO documents. The Court sets out in its judgements the principles which it deems applicable to industrial relations in Botswana.<sup>239</sup>

### **4.3 International instruments as source of law and equity for the Industrial Court**

#### *4.3.1 Introduction*

The ILO conventions and international labour standards are used by judges, lawyers, labour inspectors and trade unionists to ensure that workers' rights are respected. Courts do not infrequently apply the provisions of a ratified Convention directly in resolving a dispute, or else they draw on ILO standards, whether binding or not, as a source when applying domestic law.

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238 *Jimson v Botswana Building Society* (2005) AHRLR 86 (BWIC 2003), paragraph 25.

239 Stiftung Digitale Bibliothek Evaluation of key aspects of the industrial Dispute Resolution process <http://www.library.fec.de/fulltext/bureros/botswana>.

Understanding the cultural legal differences,<sup>240</sup> as previously discussed, can be helpful in ensuring that Chinese Investment in Africa at large and in Botswana in particular are fostered in an environment of peace, security and social justice.<sup>241</sup>

#### 4.3.2 *Applying international law as sources within Botswana's domestic legislation*

In Botswana, national legislation does not explicitly require that there be grounds for dismissal. However, as a court of equity, the Court was able to assert that, to be valid, dismissal must be based on legitimate grounds. The Court regularly refers to the ILO Termination of Employment Convention, 1982 (No. 158), although this Convention has not been ratified by Botswana and is, therefore, not incorporated in national legislation and is not formally part of Botswana domestic law. As appears clearly from several of its judgements, Industrial Court considers that ILO Conventions and Recommendations express the rules of natural justice or equity, which the Court applies. A good example is that according to the ILO Termination of Employment Convention C 158 of 1982, the termination of a contract of employment must be substantively and procedurally fair.<sup>242</sup> China and Botswana are active members in the ILO and both currently participate in the regulatory and decent work strategies for the individual countries.<sup>243</sup>

According to section 20(3) of Botswana's employment law, before entering into a contract of employment, which provides for a probationary period, the prospective employer shall inform the prospective employee in writing of the length of the probationary period. In the Kgosi case it was common cause that the employer did not notify the applicant of the length of the purported probationary period in writing before entering into the contract. The probationary period was, therefore, invalid. No disciplinary enquiry was convened before the applicant's dismissal and his dismissal

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240 See p 47 reference to the Kgosi case footnote 188 and 189.

241 Yang and Doh 2013 *African East-Asian Affairs* 50-71.

242 *Termination of Employment Convention* 158 of 1982 [www.ilo.org](http://www.ilo.org).

243 Decent Work Country Programmes (DWCPs) are the main cooperation framework through which the ILO provides support to its member countries. They allow the ILO's own overriding strategic goal – the promotion of Decent Work for All – to be aligned with the national social and economic development priorities of different countries, so helping individual states move towards making decent work a reality in ways that are appropriate for them.

Decent work country programme for Botswana 2011-2015 Memorandum of Understanding between the International Labour Organisation and The Government of Botswana hardcopy.

Decent work country programme for China 2013-2015.

was accordingly procedurally unfair. The reason given for the termination of the applicant's employment was unsuitability and failure to comply with lawful instructions to draw up a standard contract of employment. The respondent had reason to summarily terminate the applicant's employment without notice and the applicant's dismissal had accordingly been substantively fair.<sup>244</sup>

Industrial relations in China, (see Chapter 3), have been located in an economy dominated by state-owned enterprises, it is only after the 1980 reforms and the more recent 2008 reforms that we saw a transformation in the labour market in which employees can be hired freely without state organs demanding so.

The question is can the ILO unique tripartite structure thus bring together Governments, workers' and employers' organisations, be utilised to promote social dialogue and be an acceptable platform for bridging legal and cultural differences within the Chinese business sectors and governments of the host countries within which they operate?

#### 4.3.3 *Non-citizens employment*

The employment of non-citizens requires the issuing of the necessary permits by the Office of the Ministry of Labour and social affairs submitting to the Commissioner of Labour at the Department of Labour offices in the town where such person will be employed.<sup>245</sup> The current Botswana *Immigration Act* of 2010 deals with the procedure for applying for work and residence permits, both permits are applied for at the same time. This legislation concerns the employment of all non-citizen employment and would include the employment of the Chinese as non-citizens.

Foreign investor's employment as entrepreneur or director in a registered company also requires an application for the necessary permits. It should be mentioned that the Minister may exempt any person or every member of any class of persons specified in section 4(1) from having a work permit in terms of section 5, subject to the condition that

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244 Yang and Doh 2013 *African East-Asian Affairs* 50-71.

245 Head office, the Ministry of Labour and social affairs. See previous discussion footnote 87 for the criteria when granting such permits.

he or she holds a certificate of exemption issued to him under the Employment of Non-Citizens.<sup>246</sup>

Work permits for self-employed non-citizens have the same labour market test but, obviously, without training and localization conditions attached. Work and residence permits are granted for a period of 2 years and may be subject to renewal on the same conditions.<sup>247</sup> Some foreign investors believe the skills development requirement for localisation is implemented too rigidly and without regard to sound commercial requirements for employing non-citizen staff.<sup>248</sup> Nevertheless, there is a feeling in some government circles that labour market tests are not exacting enough, given the citizen-empowerment objectives of Vision 2016.

There is an increase in the employment of non-citizens without the necessary documentation.<sup>249</sup> The Labour Department has acknowledged delays may occur from time to time, in the processing of work permits and is investigating computerization, increasing penalties and contracting out certain services.<sup>250</sup> The Department of Labour and Social Security does not publish data on its handling of applications and the work and residence permit policy is complicated by the substantial economic migration to Botswana from neighbouring countries experiencing hardship.

Botswana has a very strict policy on the deportation of illegal migrants. The Department of Immigration regularly deports illegal migrants, but would not confirm the numbers estimated to be in Botswana.<sup>251</sup> Subsequently the general belief is that economic migrant obtaining work and residence permits by purporting to be investors and that the licence approvals system is not sufficiently rigorous. The following two issues; pressure for further localization of the workforce and pressures of economic migration, have become unduly linked in official attitudes. There is a feeling that foreign investment has

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246 *Employment of Non-Citizens Act* Chapter 47:02 s 10 subsection (1).

247 *Employment of Non-Citizens Act* Chapter 47:02 s 5(1)

248 Investment Climate Statement – Botswana 2013 US Department of State, Bureau of economic and business affairs [www.state.gov/e/eb/rls/othr/ics/2013/204607.htm](http://www.state.gov/e/eb/rls/othr/ics/2013/204607.htm).

249 See footnote 86, 88.

250 Investment Climate Statement – Botswana 2013 US Department of State, Bureau of economic and business affairs [www.state.gov/e/eb/rls/othr/ics/2013/204607.htm](http://www.state.gov/e/eb/rls/othr/ics/2013/204607.htm).

251 Van Eck and Snyman 1999 [http://works.bepress.com/bruno\\_vaneck/1](http://works.bepress.com/bruno_vaneck/1).

become a channel for legitimising economic migration.<sup>252</sup> It is recommended that policy on the issue of work and residence permits be reviewed.

Botswana nationals are given training and opportunities for employment advancement, as an integral part of Vision 2016. Research indicates that, although government has a good educational system supporting the challenging needs of the country; training has been mainly focused on public sector needs. Subsequently due recognition is not given to the speed at which the Botswana economy is growing, challenging training in specific skills and work experience in the private sector. However, evidence shows that Botswana is not unduly reliant on foreign workers at the expense of citizens.

Non-citizens are equal before the courts and tribunals and are entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.<sup>253</sup> The protection of human rights and additional rights such as in Article 25<sup>254</sup> specifically, individual employment rights are protected. Botswana abides by these principals, nationals and non-citizens employment rights have been upheld by the Industrial Court which include, among other things, remuneration and other conditions of work (such as overtime, paid holidays and the termination of the employment of work).

In the case of *Eunice Meyer v Futuristic (Pty) Ltd*<sup>255</sup> (hereafter referred to as the Eunice Meyer-case), the applicant Eunice Meyer, a non-citizen, and the matter was awarded all employee benefits as per employment legislation. The ruling is indicative of the fact that the courts are only there to enforce the law on all employees regardless of citizenship. Thus illustrating that, registered foreign companies are allowed to employ key expatriate personnel, both managerial and specialist positions as needed to establish operations in Botswana, provided the requisite skills are not locally available.<sup>256</sup> In the case of *Molefi v Blue Blends Investment (Pty) Ltd*<sup>257</sup> also referred to as the Blue blend case the applicant was employed without a work permit. In the Blue blend-case employment of a non-citizen without the necessary work permit does not constitute an enforceable

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252 Migration and Development: Mutual Benefits? Proceedings of the 4<sup>th</sup> AFD-EUDN Conference, 2006.

253 Weissbrodt The human rights of non-citizens 18-38.

254 International Convention on Migrant Workers [www.ilo.org](http://www.ilo.org).

255 *Eunice Meyer v Futuristic* IC 357/12.

256 Employment of Non-Citizens Act Chapter 47:02 s 5(1).

257 See also footnote 80.

employment contract. The applicant alleged unlawful dismissal and claimed through the Industrial Court compensation, leave pay and notice pay. The importance of the case is the outcome and the Court's addressing of the Respondents raised point in limine that

The applicant, being a non-citizen who was employed without a work permit, could not sue on an illegal contract. It argued, therefore, that the contract was unenforceable.

Chinese non-citizen labour force is usually employed in a large group, and mainly by Construction Company's completing for large government tender projects. Since 2006 relations between Botswana and China have intensified and shown greater significance in Botswana national life, but these good levels of governmental interaction have taken a turn for the worst. In 2010, Botswana formally condemned China's vote in the UN Security Council on the conflict in Syria.<sup>258</sup> Botswana government departments voiced their dissatisfaction with aspects of relations with China. The Ministry of Trade and Industry emphasised the strict implementation of legislation with direct effect on Chinese non-citizen employment as employees of entrepreneurs in the country. Botswana's foreign investment does not consist of a stand-alone foreign direct investment law.<sup>259</sup>

The *Trade Act* 2003, also reserves the following activities for Botswana citizens, but joint ventures up to 49% foreign participation (or otherwise subject to approval by the Minister of Industry and Trade). The activities under this reservation are:

Auctioneers, bookshops, boutiques, car wash, cleaning services, curio shops, department stores, distributors, dry cleaning, fresh produce, funeral parlours, furniture shops, general clothing, general dealers, hair dressers, hardware, hire services, laundromats, motor dealers, petrol filling stations, restaurants, supermarkets/chain stores, take-away restaurants, wholesale, and workshops.

It also includes specific types of government construction projects under a certain dollar amount, certain activities related to road and railway construction and maintenance, and certain types of manufacturing activities including the production of furniture for schools, welding, and bricklaying. Impact of these changes is that many Chinese shops will have

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258 Youngman "Strengthening Africa-China Relations: A Perspective from Botswana".

259 SACU-Botswana WT/TPR/S/222/BWA on [www.tralac.org](http://www.tralac.org).

to close.<sup>260</sup> A recent article<sup>261</sup> reported renewed relations between the two countries, and continuous exploring of economic investment and assistance opportunities.

The position in Botswana could be usefully explained compared to those countries that record foreign workers by place of birth, rather than citizenship, as Botswana citizenship is comparatively difficult to obtain. Australia, Canada and the United States have far higher proportions of foreign-born workers in the labour force than does Botswana in its work force and a number of other major OECD countries have similar proportions of non-citizens in their labour force, even though many foreign-born workers are likely to have been granted citizenship.

**Table 4.2: Table assessment non-citizen work permit application Point System  
Ministry of Labour and Social Affairs<sup>262</sup>**

<b>Eligibility Requirements</b>	<b>Points</b>	<b>Scores</b>	<b>Remarks</b>
English/Setswana Language	10		
Competency	10		
Educational Qualifications	15		
Degree, professional qualification or equivalent	15		
Diploma, technical qualification or equivalent	10		
Employer justification	25		
Employer justification	25		
Scare skills	30		
In scare skills list	30		
Relevant Work Experience (years)	40		
≤ 5 years	10		
6 -10 years	15		
11- 20 years	30		
≥ 21 years	40		
MAXIMIUM POINTS	120		
PASS MARK (50%)	60		

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260 Changes in law renewal of trade licenses.

261 Anon *The Voice* 8.

262 Official document Ministry of Labour and Home Affairs Head office, Gaborone, Botswana.

#### 4.3.4 Globalisation effect and economic impact on the labour-element of the country

The impact of an economic global world makes the necessity of global governance regarding socio-economic issues more apparent. Global governance should be undertaken by interaction of all the nations throughout their political, economic and legislative international support, such as that of international agencies like the ILO. Chinese FDI has been a common denominator for economic development in Botswana and as per other countries in the region.<sup>263</sup>

The universal perception is that global economics should be linked to Labour law and International human rights law for the establishment of an accepted standard of governance with regard to the protection and promotion of *human dignity*. *China is signatory to the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR)*.<sup>264</sup> The labour rights are subject to article 6-8 concerning the right to work, the right of everyone to just and favourable working conditions and the recognition of the right of workers to form and join trade unions.<sup>265</sup> States, and the governments that represent them, have the obligation to act to assure that everyone has an adequate standard of living.<sup>266</sup> Should this be understood to mean everyone everywhere, inclusive of Chinese nationals or local individuals in Chinese companies or the Chinese State working in host countries?

Rondinelli defines globalisation as:<sup>267</sup>

Globalisation is the movement towards greater interaction, integration, and interdependence among people and organisations across national borders – it transforms the spatial organisation of social relations and transactions, generating transcontinental or interregional networks of interaction and the exercise of power.

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263 Van der Lugt *et al* "Assessing China's Role in Foreign Direct Investment in Southern Africa".

264 Implementation of the International Covenant on Civil and Political Rights in Kazakhstan A Parallel NGO Submission by Human Rights in China June 3, 2011 1-24. [tbinternet.ohchr.org/Treaties/CCPR/SharedDocuments](http://tbinternet.ohchr.org/Treaties/CCPR/SharedDocuments).

265 Resolutions adopted on the reports of the Third Committee International Covenant on Economic, Social and Cultural Rights ANNEX to the ICESCR Preamble the State Parties to the present Covenant p.49 <http://www.law.georgetown.edu>.

266 Resolutions adopted on the reports of the Third Committee International Covenant on Economic, Social and Cultural Rights ANNEX to the ICESCR Preamble The State Parties to the present Covenant p.49 <http://www.law.georgetown.edu>.

267 Rondinelli and Heffron Globalization and Change in Asia.

The Chinese national policy of economic investment and the employment of Chinese nationals in the Botswana labour law framework are regulatory Chinese companies operating within this multinational economic sector. In between this framework the imported Chinese labour force's daily lives are impacted by the challenges of great economic development and coherent with social and political ties. Botswana as the rest of Southern region employs Chinese non-citizens and is challenged to accommodate a different labour market into its own applying international labour rights and standards.

Professor Kalula<sup>268</sup> highlights the link between labour market regulation and social protection because of the fact that labour law is an instrument of social policy. The dimension of social security is not the aim of this study but thoughts on it as an aspect of labour element are definitely worth noting especially considering the huge volumes of Chinese and other Asian non-citizen employees in SADC. It is also the opinion of the authors that:

Social security coverage is extremely insufficient particularly in the developing countries. It is recorded that whereas in the industrialised nations more than 90 per cent of the population is covered by various forms of state or market-organised social security systems, in Saharan Africa and South Asia only 0% to 10% of the active population are covered by social security schemes.<sup>269</sup>

Harris<sup>270</sup> holds the view that Chinese labour formed an integral part of the mass migration of people in the international era of industrial capitalism and in particular, in developing colonial economies Chinese workers are viewed mostly 'as objects'. The effect of this stereotyping denied the Chinese any individuality making them both faceless and nameless accessories to the various host societies and consequently the respective national histories.<sup>271</sup> Changing times call for global labour law or comparative international labour law shaped and developed by a new economic order. Explaining that when this new economic order reaches the standard we have set for our domestic

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268 Professor Kalula teaches Employment law and Social security at UCT and is Director of the Institute of Development and Labour Law and Chair of the South African Employment Conditions Commission.

269 Olivier, Masabo and Kalula "Informality, employment and social protection" 1-25.

270 Professor Karen Harris, full professor in the Department of Historical and Heritage Studies and director of the archives at the University of Pretoria.

271 Harris 2006 *Historia* 177-197.

systems; it would ensure a decent level of social justice for workers and social peace for employers.<sup>272</sup>

The idea of employment of Chinese non-citizens in the Botswana environment is both simple and powerful. The mixture of economics and human rights, into an Eastern culture which happens to be a successful market model has a powerful impact on simple principles. The Chinese view labour as understanding the bigger picture in powerful words "the power of norms versus the norms of power". China initiated globalisation and makes the benefits their own. They embrace the challenges to establish "little Chinas" wherever they are in the world. True to being Chinese there is a union of religion, laws, mores, and manners amongst the Chinese. In explaining this paradox about the Chinese the best are the words of very old writings as:

Chinese legislators...They have wanted the people to be both submissive and tranquil, and hardworking and industrious. Because of the nature of the climate and the terrain, their life is precarious; one secures one's life there only by dint of industry and work.<sup>273</sup>

China has shown great interest in Africa.<sup>274</sup> The economy and labour component of globalisation has led to the establishment of global markets and challenges for all industry including the labour market to remain competitive in these new markets. The past two decades initially the Chinese government itself invested in government assistant projects such as building of infrastructure in the developing of Botswana. Botswana's economy is growing and is more stable on the African continent.<sup>275</sup> The country has over the years been already reported as politically stable, enjoying a functioning democracy, a rarity in Africa and enjoying economic stability as by many proclaimed as the "best managed economy in Africa".<sup>276</sup> It is clear that the country is moving forward and exploiting global markets and international migration benefiting from entrepreneurship and fresh ideas.

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272 Arthurs 2006 Globalization and the future of labour law 51-74.

273 Cohler, Miller and Stone *The spirit of the laws* 198.

274 Taylor China's new role in Africa.

275 United Nations: Conference on Trade and Development: Investment Policy Review on Botswana (UNCTAD) 2003 report.

276 Dale *Botswana's search for autonomy in southern Africa* 3 states that Botswana as the "best managed economy in Africa"; see also Acemoglu, Johnson and Robinson *An African success story: Botswana* 1 on <http://economics.mit.edu/files/284>. Botswana's success story is contributed to the fact that "the basic system of law and contract worked reasonably well".

Botswana has promoted international investment, the influence thereof in economic growth, job creation and skill development resulting in the rise of the living standards of all its inhabitants.<sup>277</sup> The pillars of security in a sustainable investable economy are that non-citizens have equal protection and recognition before the law<sup>278</sup> and the country has high standards of adherence to the rule of law.<sup>279</sup> Fair and impartial court judgements in employment and industrial relations are enforced in Botswana courts.

#### *4.3.5 Employment of non-citizens under the conditions of economic and social progress in Botswana*

Botswana is a member of the UN, and they have a close working relationship with offices in the capital Gaborone. The United Nation Charter,<sup>280</sup> Article1:

...to achieve international cooperation, in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

This is a general application, but in the wording of Article 55 of the UN Charter has a more economical reference and is applicable to non-citizens living in Botswana:

Article 55 of the Charter requires that the United Nations promote conditions of economic and social progress and development; solutions of international economic, social, health and related problems; and international cultural and educational cooperation; and universal respect for human rights without discrimination.<sup>281</sup>

As part of the global economy, Africa (Botswana) cannot afford to play an insignificant role in global markets and global competition.<sup>282</sup> The 2008 IAABD conference, dealt with issues related to African business and development from local as well as global

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277 Solomon 2011 *Journal of the Southern African Institute of Mining and Metallurgy* 484 confirms the concept well-grounded, as 'Botswana has a clear sectorial development plan already expressed in its long term vision for the country as documented in the "Towards Prosperity for All" (Botswana Presidential Task Group in 1997).

278 Human Rights Committee, General Comment 15, "The Position of Aliens under the Covenant" (Twenty-seventh session, 1986), available in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (1994), UN Doc HRI/GEN/1/Rev.1 at 18 par 1.

279 Fombad and Quansah (eds) *Essays of the Law of Botswana* Chapter 1 The protection of human rights in Botswana: an overview of the regulatory framework.

280 *Charter of the United Nations* 26 June 1945 entered into force on the 24th of October 1945.

281 Weissbrodt *The human rights of non-citizens* 33.

282 Sigué "Global and Local Dynamics in African Business and Development".

perspectives.<sup>283</sup> By regulation non-citizen employment, in accordance with international standards, employment opportunities so created should be consistent in good governance and sound legal protection of human rights. The communication and language challenges of the Chinese labour force, employed in Botswana and the other SADC countries, have a negative influence on protection of their human rights. Knowledge of the Chinese language should be emphasised, for it makes the protection, enforcement and assessment of labour laws directed to the individual Chinese employee easier. Higher score points as currently on the government assessment point system should be allocated to language skills in obtaining a non-citizen work permit.<sup>284</sup> See Table 4.2.

#### 4.3.5.1 The right to work principle and the adherence of human rights of migrants

The international law and the international human rights law is a set of universal rules and norms dealing with the protection of fundamental human rights and consists of a number of international documents for example treaties, ILO conventions and ILO standards. As previously discussed, ILO conventions are ratified by member countries. Botswana, China, South African and most SADC countries are members of more specific conventions ratified related to labour and socio-economic issues and were discussed in Chapter 2.

The historical development of the rights of non-citizens can be found in the 18<sup>th</sup> century Friendship, Commerce, and Navigation (FNC) bilateral treaties. Such treaties between States provided protection of personal welfare, right of permanent settlement, free access to courts, freedom of religion and worship and admission to trade and industry.<sup>285</sup> The world is in an area of general rights-consciousness, Botswana cannot ignore human rights principles recognised and accepted as minimum standards in international and regional instruments. The African Union (AU) of which Botswana, South Africa Zambia, Namibia Lesotho and several other countries are members identified the need to address human rights in democracies and got governance of all its

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283 Sigué "Global and Local Dynamics in African Business and Development".

284 Table assessment non-citizen work permit application Point System Ministry of Labour and Social Welfare Head office Gaborone work permit requirements information.

285 Weissbrodt The human rights of non-citizens 18-38.

members. From ancient times to the present, there has been a rowing but still fragmentary international legal consensus concerning the human rights of non-citizens.<sup>286</sup> Human rights are especially visible in the face of labour issues and the protection of the workforces' fundamental rights such as the right to work, freedom of association, claims descent legal protection, entitlements and value of continuous stability in a sustainable economy. Chapter 2 of the Botswana Constitution consisting of 17 sections, generally regarded as the Bill of Rights, is titled 'Protection of fundamental rights and freedoms of the individual'.

#### 4.3.5.2 Chinese entrepreneurship<sup>287</sup> and constructive contribution in future for the country

The Botswana Government is committed to promote new industries as emphasized/reflected in the National Development Plan 9 for the period (2003/2008) and the follow-up continuation National Development Plan nr 10. The efforts and end result lead to the realisation of Vision 2016; sustainable and diversified development through competitiveness in global markets. The Government is focused on the importance of diversification from the mainly mining industry.

Botswana has shown strong movement and openness towards globalisation, liberalisation of the economy and the adherence of international labour standards. These efforts effectively broaden and strengthen the foundation for accelerated diversification and development of the private sector with the help of foreign investment such as the Chinese. The influence of China's investment in infrastructure in the country made the employment of Chinese non-citizens in the construction and labour intense industry a more competitive choice. The regulation of these workplaces falls under the national (Botswana) labour and employment laws,<sup>288</sup> as stable democratic government

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286 Weissbrodt The human rights of non-citizens 18-38.

287 Yueh "China's entrepreneurs" 18 - "not much was known about these entrepreneurs, but the emerging picture is one of a group of individuals who are able to navigate China's uncertain institutional terrain and find opportunities in the world's potentially most significant market. Their foray into overseas markets is as inevitable as the rise of China; Sigué "Global and Local Dynamics in African Business and Development"; Spring and Jiao "China in Africa: African views of Chinese entrepreneurship" 55.

288 Craig and Lynk 2006 Globalization and the future of labour law 2.

allowing its citizens and non-citizen business people to generate income and work in the freest African government influence and regulated environment possible.

Botswana's labour laws, employment legislation and judicial systems, are testimony of a transparent, low corruptive environment. The Labour Department enforces strict obedience to the labour laws and regulations in the country. There have been reports in the media where the department acted against Chinese non-citizen employees without the necessary work permits. In reaction the office of the Ambassador to PRC complained and said that there was a need to recruit non-citizen staff, to fill skills gaps not available locally, and he expressed his frustration of the policy and administrative bottlenecks in acquiring and finalising necessary documentation such as permits. A national board acts as an appeals tribunal and most of its decisions are subject to further appeal to the Minister. Substantial delays in the processing of applications could take place due to red tape and may lead to frustration. There are definite indications of deterioration in the Botswana China relations as written by Youngman, professor at UB, it is also evident from the Chinese community, that it has become much more difficult to obtain visas for Botswana since early 2013.

**ANNEXURE A: IMMIGRATIONS ACT – APPLICATION FOR RESIDENCE PERMIT (FORM 16) see page 89.**

## **Chapter 5: Lessons and legislative development, within Botswana, Namibia, South Africa and Lesotho related to the employment of non-citizen nationals**

### **5.1 Introduction**

Globalisation, Chinese FDI, and the simultaneous increased Chinese non-citizen employment in Chinese multinational corporations are contributing factors in the development of labour law in Botswana, and countries like Namibia, South Africa and Lesotho. The purpose of the chapter is to highlight how the labour law in each jurisdiction has responded, or intends doing so on account of the employment of non-citizens, especially Chinese Nationals within each countries' territory.

Chinese investment and economic policies impact on the, historical strategic role values and principles within labour law development regarding domestic national legislation.<sup>289</sup> Knowledge of the characteristic unity of China's economic policies and its labour law development,<sup>290</sup> offer valuable insight for Botswana and the other host countries in the region pursuing global strategy.

The employment of Chinese non-citizen workers in the countries of this study, meant regulations under individual countries domestic legislation, exclusive of statues and regulations in that of the host country.<sup>291</sup>

### **5.2 Lessons learned from within Botswana, regarding the employment relation of non-citizens.**

Botswana is in the process of changing from an exporter of labour to an importer of labour. This changing migration profile has been described by Lefko-Everett as:

The buoyancy of the national economy has been the principal driver behind this transition from migrant sending to migrant receiving, with consistent increases in GDP averaging 6.1 percent annually from 1966-1994/5, making Botswana among the

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289 A Comparative Study of Minimum Employment Conditions in the Southern African Development Community (SADC) [www.consawu.co.za](http://www.consawu.co.za).

290 See Chapters 2 and 3 on Chinese labour law development.

291 Relevant immigration and employment legislation of the different host countries are applicable.

fastest-growing economies in the world. Hence, the country's self-styled moniker, the 'Gem of Africa'.<sup>292</sup>

The country's NDP10 and Vision 2016<sup>293</sup> as previously discussed has also had an effect on changing migration profile, more and more citizens are educated and skilled, the creation of employment opportunities more difficult in an ever competitive global economic market.

The influx of non-citizens in the domestic labour market seems to have brought about, more restrictive immigration policies and court rulings. The Industrial court ruling in the Blue blend-case,<sup>294</sup> the pre-condition for the constitutional rights of the existence of a valid work permit, affects the non-citizens right to be employed in the country.

The constitutional values have been regularly upheld and the Industrial courts have consistently treated employees and non-citizen employees alike. Discussion in the judgment is evidence to the country's adherence to the rule of law, but constitutes the Industrial courts practicing labour law, as a court of fairness and equality to the employer and non-citizen employee party's alike. See the Eunice Meyer-case,<sup>295</sup> and non-citizen employee with an employment contract and receiving the full protection as employee in the country. In both these cases as other non-citizens in employment relations have access to justice the system in all dispute resolution processes.

Botswana as country upholds human rights and principles irrespective of citizenship. In a recent decision of the High Court these values have been extended to included free medical treatment to non-citizen prisoners. On the 18th of March 2014 the High Court in Gaborone, Botswana issued an order, ordering the Botswana government to provide HIV treatment to all non-citizens prisoners, there as they were previously expected to pay for the HIV treatment themselves.

The order will have to be immediately implemented by government and will ensure that the government meets its obligations under the Botswana Constitution and under international and regional law," said Priti Patel, Deputy Director of the Southern Africa Litigation Centre (SALC), which has been assisting in the matter. "More importantly, it

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292 Lefko-Everett 2004 <http://www.migrationinformation.org/Profiles/display.cfm>.

293 See footnote 205 and discussions.

294 See footnote 87, 273.

295 See footnote 212 and 271.

shows that the government has no legitimate justification for putting prisoners' lives at serious risk by denying them HIV treatment.<sup>296</sup>

The country upholds the principals of human rights and values human dignity, in general and within the scope of labour law development. Court cases discussed throughout the study are witness to the level of respect and constant respect for justice and the law.

### **5.3 Lessons learned from within Namibia, regarding the employment relation of non-citizens**

Although the relationship between Namibia and China started off on a political base<sup>297</sup> Namibia has succeeded in creating a favourable investment environment for China in the process of economic development. China's FDI contributes towards Namibia's Vision 2030 for the county. Such foreign investment and the employment of the Chinese labour force brings with it capital technology and skills needed for economic sustainable development.<sup>298</sup>

Chinese employment within the construction and Chinese trading companies has contributed directly to the significant increase in the number of Chinese nationals in Namibia. The employment of Chinese as the labour force in these companies has proven to be a very important approach and success of the Chinese investment model. The Chinese model of investment combines economic growth objectives and foreign policy on the basis of trade and investment and even extending to financial assistance and aid.<sup>299</sup> Growing grass root concerns confirm that Chinese employment leads to multiple challenges in the Namibian labour law.

Amadhila has expressed the view that:

Namibia's current practice in attracting investment from and trade with China has had the effect of compromising the country's labour laws. Local construction companies

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296 News Release: Botswana Government ordered to provide HIV treatment to non-citizen prisoners 18 March, 2014 [www.southernafricalitigationcentre.org/2014/03/18/news-release-botswana-government](http://www.southernafricalitigationcentre.org/2014/03/18/news-release-botswana-government).

297 Official relations between China and Namibia began in the early 1960s. China diplomatically and militarily supported Namibia and the South West Africa People's Party (SWAPO) in the country's liberation struggle.

298 Vision 2030: A vision for Namibia [www.namibiahc.org.uk](http://www.namibiahc.org.uk).

299 Adisu, Sharkey and Okoroafo 2010 International Journal of Business and Management 3-9.

and trade unions blame the government for not forcing Chinese construction companies to comply with Namibian labour laws.<sup>300</sup>

Shoutly state's:

The preference to hire Chinese nationals and long hours of work expected by Chinese managers is causing conflict with local labour laws and cultures. In addition, company practices lead to discontent in communities who perceive that Chinese companies are not contributing enough to increase local employment and strengthen the local economy.<sup>301</sup>

The Namibian government has acted and formulated and implemented techniques to increase Namibian local labour participation. Examples of these actions are in the fishing industry there are lower quota fees being paid by Namibian based companies and the US department executive summary of Namibia mentions the requirement in the mining industry to show commitment to empower previously disadvantaged Namibians.<sup>302</sup>

Chinese employees in Namibia fall under the Labour legislation. Amendments to the Act in 2012 have special regulations and implications for the protection of employee rights.

The Labour Amendment Act of 2012 introduced strict regulations with respect to the use of temporary workers. Essentially temporary workers must receive compensation and benefits equal to that of non-temporary workers.<sup>303</sup>

Although no literature or study material could be found specifying the nature of short term Chinese contract workers contractual company obligations, it is assumed that the Chinese labour force imported for the completion of smaller tenders are temporarily employed by the Namibian-Chinese company only till the work on the project is completed.

#### **5.4 Lessons learned from within South Africa, regarding the employment relation of non-citizens**

Since 2006 China has emerged as superpower and shown radical economic advancement towards China's integration into the international trade and investment

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300 Amadhila 2012 African East-Asian Affairs 1-29.

301 Adisu, Sharkey and Okoroafo 2010 International Journal of Business and Management 3-9.

302 US Department of State: 2014 *Investment Climate Statement Namibia* June 2014 1-12.

303 US Department of State: 2014 *Investment Climate Statement Namibia* June 2014 1-12.

markets.<sup>304</sup> Although China's FDI into the country contributes to economic growth and a larger Chinese labour force, strict labour laws in South Africa provide structures and policies provide a framework for good relationships and ultimate economic growth and sustainability.<sup>305</sup> Such partnerships to economic development are promised to be on the base of "win-win"<sup>306</sup> cooperation, which includes the legislative labour development, to reaffirm that South Africa has mutually beneficial employment regulation outcomes with the Chinese as per the statement of the former President Thabo Mbeki indicating the way forward saying that:

an unequal relationship" between Africa and China. Africa needs to ensure a mutually beneficial outcome in its dealings with China, and build local capacity to meet the challenges posed by this burgeoning relationship.<sup>307</sup>

China-South Africa partnership has been strengthened by the signing of the *Beijing Declaration* by President Zuma and President Hu Jintao in August 2010.<sup>308</sup> The declaration consists of a comprehensive strategic partnership agreement stipulating amongst others China's commitment to enhance the South African manufacturing industry:

China, in this spirit, will encourage its enterprises to increase investment in South Africa's manufacturing industry and promote the creation of value-adding activities in close proximity to the source of raw materials, says the declaration.<sup>309</sup>

It is in this manufactory industry where trade with China greatly influences the size and structure of South African manufacturing and its capacity to create jobs.<sup>310</sup> The lessons from the actions of the labour department regarding disputing trade unions, enforcement of employment rights, on the issue of minimum wage,<sup>311</sup> to act firmly against cost of China's FDI that has, arguably forced acceptable labour standards into a competitive

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304 Chetty Mail & Guardian 9 February 2013.

305 Huang and Ren "A study on the employment effect of Chinese investment in South Africa".

306 The term "win-win" often used by the Chinese referring to mutually beneficial scenario or economic development.

307 Shelton and Kabemba Southern Africa Resource Watch.

308 Xinhua News Agency 24 August 2010 <http://xinhuanet.com/english2010/china/>.

309 Hong'e *Xinhua News Agency* 2010 <http://news.xinhuanet.com/english2010/china/2010-08-24> China and South Africa signed comprehensive strategic partnership in recognition of the growth in bilateral agreements between the two countries and outlined 38 cooperation agreements within..

310 Edwards and Jenkins 2013 [www.safpi.org](http://www.safpi.org).

311 Coan 2011 *The Witness* [www.witness.co.za](http://www.witness.co.za).

downward spiral.<sup>312</sup> These issues emphasise the challenges for an overall compatibility or integration of labour and labour development in a pre-dominantly economical world.

The impact that different cultures have on ethics and the manner in which this affects business is of particular importance. The unique culture and history of China have resulted in organisational behaviour that does not readily fit Western management models.<sup>313</sup>

South Africa economy, as a country experiences high unemployment, labour laws and the enforcement thereof in the manufacturing section have been impacted by Chinese investment and the potential of job creation.<sup>314</sup>

As with the recent amendments to the *Immigration Act*, South Africa will practice a more restrictive policy regarding non-citizen employment. Conversely to last-mentioned the constitutional ruling in the Khosa case, see Chapter 2, could be seen as an extension of socio-economic benefits as part of non-citizen's employment rights.

### **5.5 Impact of Chinese and lessons from non-citizen employment in Lesotho**

The impact of Chinese investment and the employment of Chinese non-citizens in Lesotho, as in the rest of the region, is the instrument of Chinese state orientated influence. During the 2014 conference, Africa-China's advancing mutual understanding through multi-disciplinary research conference, Sall<sup>315</sup> called for more research programmes with the focus on Africa-China relations and stated his consideration that:

We cannot really say we have fully understood how China's growing and multifaceted engagement with Africa is impacting on African societies, economies, cultures and politics and on Africa's development prospects in the medium and long term.<sup>316</sup>

Academics and authors are in agreement that globalisation has effectively expanded international markets or extra-market access, to China.<sup>317</sup> This exposure is part of

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312 Hon *et al* "Evaluating China's FOCAC commitments to Africa and mapping the way ahead".

313 Horwitz *et al* 2005 *S Af J Bus Manage* 29-40.

314 Edwards and Jenkins 2013 [www.safpi.org](http://www.safpi.org).

315 Sall "Goodwill message from CODESRIA".

316 Sall "Goodwill message from CODESRIA".

317 Park "Chinese migration in Africa"; Chintu and Williamson 2013 [iveybusinessjournal.com/topics/global-business/](http://iveybusinessjournal.com/topics/global-business/); Niikondo and Coetzee *Perceptions on the impact of Chinese businesses in Namibia*. The impact of the Beijing Consensus 2006 resulting in China expanding extra-market asses.

China's larger domestic development strategy and Chinese non-citizen labour market.<sup>318</sup> The clothing factories closed down by the South African Department of Labour were considered a good Chinese investment for Lesotho.

Mr Oelz, the Peter Blond CEO, says the move to Lesotho has paid off. He says the company has saved more than \$5 million a year from the move. Instead of scaling back, Peter Blond has been able to increase production from its new home.<sup>319</sup>

A Lesotho government official, Makhoalibe of the Lesotho National Development Corporation stressed the point that the relocation of these factories would be an advantage in job creation to the country, but did mention that although the country has lower cost structures than South Africa, the factories will have to meet Lesotho's minimum wage standards.<sup>320</sup>

The textile industry has its success closely linked to the benefits and trade preferences gained through the *African Growth and Opportunity Act* (AGOA). The act is the legislation regulating the commercial relationship between the US and Africa.<sup>321</sup> Chinese owned factories like those that relocated to Lesotho employ workers to produce clothing for export to the U.S. on a duty free preferential basis allowing the industry to grow and develop. If not renewed the AGOA trade preferences which expires in 2015 will affect China FDI through Chinese investors in Lesotho. The possibility exists that Chinese textile and clothing companies will most likely again relocate from Lesotho upon the withdrawal of the privileged access to the US markets.<sup>322</sup> The reality of this opportunity based development is captured in the words of a Mosotho (local Lesotho person) entrepreneur when he said

In Lesotho we changed AGOA from being the African Growth and Opportunity Act... into the Asian Growth and Opportunity Act. The Asians came to develop in Lesotho. The Asians came to grow. The Africans have not grown in Lesotho.<sup>323</sup>

In today's economically difficult times the attraction of China's FDI for the immediate economic relief for employment and possible skill transfer seems to be a short term

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318 Eisenman 2012 Journal of Contemporary China 793-810.

319 Maylie and Gross 2011 online www.wsj.com.

320 Bloomberg 2011 <http://www.bloomberg.com/news/2011-03-15/lesotho-mulls-investment-from>.

321 Kimenyi and Lewis 2013 www.afdb.org.

322 Manoeli "Lesotho after AGOA From textile booms to sustainable development" 1-20.

323 Manoeli "Lesotho after AGOA From textile booms to sustainable development" 4.

vision. Botswana, Namibia, South Africa and Lesotho engagement with Chinese investment and paired with Chinese non-citizen employment should carefully assert themselves on the merits of each economic opportunity and its long term value for the country. The challenge for these SADC countries is to engage with China in constructive ways, and to establish a real win-win scenario to ensure domestic labour legislation adherence in the quest for economic development. The aim should always be the promotion of growth and progress towards achieving the Millennium Development Goals (MDG) for Africa through the building of global sustainable partnerships for development.<sup>324</sup>

### **5.6 Lessons from Chinese investment and non-citizen employment within a SADC perspective**

Lessons from within a SADC perspective have been in the constant challenges in the legislation for minimum employment conditions. Legislation, for instance, applicable in the textile industry regarding the Minimum wages of the workers in South Africa has forced factories to close. Namibia's Labour Regulations legislation protects the rights of temporary workers and in Botswana deals with the basic conditions of employment, implying the minimum employment conditions as per Chapter 47 of the *Employment Act*.

Focusing on the employment contract the Blue blend-case in Botswana ruling that it could not enforce an illegal contract, has highlighted the importance of incorporating all the labour dispensations and the economic policy and procedures regarding foreign investment in achieving unilateral effective relationships.

Within the stronghold of the China-Africa partnership, it becomes necessary to apply the law in determining the employee, when dealing with the Chinese non-citizen employment. In most SADC countries, the employee, as a natural person is the one described as the person doing the work.<sup>325</sup> Chinese relations with SADC have been significantly more focused since the formation of the Forum on China-Africa business

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324 Achieving the Millennium Development Goals in Africa High-level meeting on Africa's development needs UN New York 22 September 2008 [www.un.org/AR](http://www.un.org/AR).

325 Botswana's Employment Act, Namibia's Labour Regulations Act, South Africa's Basic Conditions of Employment Act.

(FOCAC), functioning on a ministerial level and driven by the vision to cooperation based on equality, consultation, consensus, friendship, partnership and mutual benefit, between the different states.<sup>326</sup>

The Chinese use of FOCAC, as from its establishment in 2000, has resulted in a deepening of China's economic development in SADC through a mixture of aid, such as low interest loans infrastructure investment projects and part of the research in this study, increased the number of Chinese non-citizen employees and economic benefits towards the SADC countries under discussion. During the 2006 FOCAC agreement China indicated a renewed interest in expanding FDI to Africa,<sup>327</sup> which led to SADC institutional structures adopting the *Windhoek Declaration*,<sup>328</sup> as policy document pertaining to SADC's cooperation with its International Cooperation Partners (ICP) in the same year.<sup>329</sup> The restructuring process and adoption of the Declaration was more the result of consolidating the cooperation with existing ICP's than the developing cooperation with new ICP's such as China,<sup>330</sup> effectively making the Chinese more part of decision making.

Still from knowing the Chinese success and Chinese labour force contribution to China's labour law development we know little about the Chinese migrant. It is clear that the international economic migration has thus reshaped the face of the world and established new multi-ethnic societies as reminders of the human urge to seek a better life elsewhere.<sup>331</sup> These Chinese migrations to Africa have accelerated and intensified China-African activities and interactions, and relations with African host societies.<sup>332</sup>

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326 Euka 2010 *Pakistan Journal of Social Sciences* 201-218. Characteristics of FOCAC The FOCAC is a platform established by China and friendly African countries for collective consultation and dialogue and a cooperation mechanism between the developing countries, which falls into the category of South-South cooperation. Also available at <http://www.focac.org>.

327 Brea China's New Scramble for Africa American.com <http://www.american.com/archive/2006>.

328 *Windhoek Declaration* 2006 [www.sadc.int](http://www.sadc.int). The declaration was adopted on 27 April 2006 in Namibia. The declaration put a new SADC/ICP partnership in place which will guide corporation between SADC and ICP outlining overall objectives, commitments and structure for effective dialogue as key areas of cooperation.

329 Hon *et al* "Evaluating China's FOCAC commitments to Africa and mapping the way ahead" 169.

330 Hon *et al* "Evaluating China's FOCAC commitments to Africa and mapping the way ahead" 69.

331 Keeley International migration.

332 Park "Chinese migration in Africa" 1-20.

The basis of a common strategy for Chinese increased involvement in Africa is still very illusive.<sup>333</sup> Finding the common factor within China-Africa agreements that is compatible with the objectives of SADC objectives will be the real win-win as so often referred to by the Chinese. Professor Kaunda<sup>334</sup> holds the opinion that there is no reason to amend the SADC Treaty to accommodate SADC relations with China, as it is applicable within the scope and implementation of SADC treaties, principals, and beliefs that, Article 24 of the treaty covers the scope of such interactions:<sup>335</sup>

Article 24 states that the ...Member States and SADC shall maintain good working relations and other forms of cooperation, and may enter into agreements with other states, regional and international organisations, whose objectives are compatible with the objectives of SADC.<sup>336</sup>

Lessons learnt from within the region should lay the foundation in facing the challenge for these SADC countries finding a possible common strategy for the SADC Secretariat<sup>337</sup> towards China that is both politically and economically mutually beneficial.

Hitherto, China's Ambassadors to the respective SADC member states have not engaged to any significant extent with SADC as an organisation. Thus, to date Chinese engagement with the SADC Secretariat engagement has mostly been in the form of *ad hoc* responses to tenders by private Chinese companies.<sup>338</sup>

Revealed development in this regard was the appointment of the Chinese ambassador to Botswana as China's representative to SADC in 2005 and is still the case.<sup>339</sup> Currently during the 34th SADC Summit in August of 2014, the Regional Evaluation Framework was established and it is set to have a regional monitoring function

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333 Taylor China's new role in Africa 1.

334 Professor Kaunda Senior Programme Officer: Research, Policy and Strategy Development, SADC Secretariat keynote address on the SADC's Relations with China and the role for research in policy development Africa-China Advancing mutual understanding through multi-disciplinary research Conference 2014 Gaborone Botswana.

335 Email communication with Professor Kaunda, African-Chinese research for this research on the 16 June 2014.

336 Consolidated text of the treaty of the Southern Africa Development Community, as amended March 12, 2010.

337 SADC Secretariat SADC towards a common future. Is the principal executive institute of SADC and has its headquarters in Gaborone Botswana. It is responsible for the strategic planning, co-ordination and management of SADC programmes, the implementation of decisions of SADC policy and institutions such as the Summit, the Troikas and the Council of Ministers. [www.sadc.int/about-sadc-institutions/secretariat/](http://www.sadc.int/about-sadc-institutions/secretariat/).

338 Hon *et al* "Evaluating China's FOCAC commitments to Africa and mapping the way ahead" 186.

339 Tianran Interview: Sino-Africa friendship deeply rooted among people: envoy 28 October 2014 ShanghaiDaily.com [www.shanghaidaily.com](http://www.shanghaidaily.com).

regarding labour, employment policies and ILO core conventions. This action will ensure social and human development of citizens and non-citizens within the MDGs.<sup>340</sup>

### **5.7 Chinese employment and possible lessons from ILO**

The influence of the ILO within the member countries under discussion has been visible. The ILO has actively endeavoured to provide guidance by recommending improvements in the regulation of employment and the advising on the global impact thereof.<sup>341</sup> In accordance with the ILO's DWCP, African countries and governments should value the standard and livelihoods of all the inheritance of the land in order to gain the real theoretical potential of high FDI inflow.<sup>342</sup> Globalisation and the mobility of foreign labour such as the Chinese labour force are subsequently synonymous with the attraction of FDI for developing countries in the Southern region. In 2011 it was estimated that 750,000 Chinese workers and 900 Chinese companies had moved into Africa.<sup>343</sup>

Botswana responded, during the ILO conference proceedings of the 102<sup>nd</sup> Session, through the address by the Minister of Labour and Home Affairs (Mr Batshu) who said:

[M]y delegation strongly endorses the discussions of the strategic objective of social dialogue under the ILO Declaration on Social Justice for a Fair Globalisation. Social dialogue is one of the founding principles of the ILO. The ILO derives its strength from tripartism and social dialogue.<sup>344</sup>

Botswana made good its pledge in 2014 recording that:

Freedom of association and the right of workers and employers to organise were preconditions for meaningful social dialogue and collective bargaining that progress

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340 34th SADC Summit, SADC Strategy for Economic Transformation: Leveraging the Region's Diverse Resources for Sustainable Economic and Social Development through Beneficiation and Value Addition 1-72.

341 ILO DWCP currently on-going in Botswana, Namibia, South Africa and Lesotho.

342 Report of the Director-General The Decent Work Agenda in Africa 2007-2015 Eleventh African Regional Meeting Addis Ababa, April 2007 1-76.

343 Keynote address 6TH African Region Congress of the International Labour and Employment Relations Association (ILERA) Lagos, Nigeria 24-28 January 2011 Global trends in employment relations in Africa: Implications for global competitiveness 1-30.

344 ILO Provisional Record 102<sup>nd</sup> Session, Geneva June 2013 Mr Batshu Minister of Labour and Home Affairs, Botswana address p.22 [www.ilo.org](http://www.ilo.org).

has been made towards compliance and that these efforts bore testimony to the Government's commitment.<sup>345</sup>

ILO principles and Ruggie guidelines call for tripartite involvement in all of the member states to ensure the long term benefit of economic growth and development is the creation of decent work for all inclusive of non-citizens.<sup>346</sup> As global labour law is being shaped in this new economic order, the ultimate goal is to influence the standard practised in domestic labour systems positively. The aim for Botswana should be to ensure a decent level of social justice for all workers and social peace for employers. In the end employment is not only about earning an income, it is a condition for decent life, for the country's inhabitants fulfilling the ILO vision and global ultimate achievement.<sup>347</sup>

Although the ILO underlines domestic legislation on the protection of worker rights, the Chinese labour force working in host countries does not participate in the membership of trade unions. The reason for this is to attribute to the fact that union membership and collective bargaining are relatively new concepts in China, therefore, also are foreign to Chinese nationals working in host countries. The Chinese labour force in Africa, for example, is the case of the South Africa textile industry and Lesotho, that did not become members of the local unions.

A further reason for the hesitation in joining trade unions and committing to collective bargaining could be linked to what has been described as "The Spirit of the Law" and that the Chinese nation's work ethic is governed by "manners".<sup>348</sup> However, individual Chinese workers have complained and expressed their concerns to the labour department in Selebi-Phikwe, Botswana.<sup>349</sup>

The consequences of the hesitation in using these measures contributes to poor working conditions of Chinese nationals in host countries, such as unpaid overtime

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345 NORMLEX Observation (CAS) adopted 2014, published 103<sup>rd</sup> ILC session 2014.

346 Tripartite constituents – ILO [www.ilo.org/global/about](http://www.ilo.org/global/about).

347 ILO –UN in Brussels [www.unbrussels.org/agencies/ilo.html](http://www.unbrussels.org/agencies/ilo.html).

348 Cohler, Miller and Stone *The spirit of the laws* 310.

349 See Botswana domestic labour environment paragraph 4.4.3.

discrimination in employment, and the absence of health and safety precautions. McCallum record that<sup>350</sup>

Many EPZs (Export processing zone) import labour and/or hire internal migrants, who are not offered formal contracts, not covered by any existing labour law, face harsher penalties for unionisation drivers and earn less money than native workers.<sup>351</sup>

Although further research is required regarding the relationship between labour standards and successful implementation of market-based policies in relation to the peculiarities of the Chinese development model, it could be said that Chinese historic mores and manners discourage compliance with the labour law of host countries.

In accordance with the ILO's DWCP, African countries and governments should value the standard and livelihoods of all the inheritance of the land in order to gain the real theoretical potential of high FDI inflow.<sup>352</sup>

## **5.8 Conclusion**

The relationship between China-Africa as in these SADC countries has evolved over the past decade, led by China's integration into the international trade and its establishment as industrial power. Chinese government seeks infrastructure development as government and encourages Chinese entrepreneurs to explore these and other investment opportunities and to setup business in the Africa countries under discussion.

Domestic labour laws such as the Namibian labour legislation protect employment that is of temporary nature, such as, work contracts in Chinese related projects. In South African and Lesotho, AGOA preference export bases trade investment benefits are exploited by Chinese owned textile factories in the Newcastle area. These Chinese factory owners did not meet the labour legislation regarding legal minimum wages requirements, resulting in a legal battle ground and intervention from government.

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350 McCallum "Export processing zones: Comparative data from China, Honduras, Nicaragua and South Africa" 1-30.

351 McCallum "Export processing zones: Comparative data from China, Honduras, Nicaragua and South Africa" 1-30.

352 Report of the Director-General The Decent Work Agenda in Africa 2007-2015 Eleventh African Regional Meeting Addis Ababa, April 2007 1-76.

Such Chinese factories hold a dual disadvantage to the local employment in host countries. The employment of the Chinese labour force in Chinese owned factories operating in South Africa and Lesotho has been an essential approach in the success of the Chinese investment model. Because of extended trading partners in China, these local businesses import cheap made-in-China goods detrimental to the manufacturing industry in the host country and consequently leading to a rise in unemployment.

For sustainable economic progress, the China-Africa economic development relationship should be the copy and paste of China's FDI within ILO principals for the economic reform needs and development within the specific SADC country. It is of utmost importance to grasp fully the dimensions of Chinese perceived development for Africa. The Chinese model of investment could be asserted on the combination of the following; economic growth objectives as in job creation, foreign policy by the Chinese government go-out strategy, and lastly as basis of trade and investment, the establishment of Chinese owned companies in host countries. These three pillars could be seen as the coherent multi-layer relation of Chinese economic control.

Domestic Labour laws', consisting of Immigration and Employment legislation, as a non-political but economic inspired tool, shapes, regulates and enforces compliance through court rulings. Adherence to the rule of law will evaluate effective economic policy regarding non-citizen employment and migration of foreign nationals such as that of the Chinese in such countries in the research. SADC as an integral developing region will benefit from focusing of the economic need to harmonise labour laws. As part of the bigger African Union a clear and unified economic development policy is needed, in terms of how to relate to China. In the process of developing further social, economic and political ties with China, the actions of African leaders necessitate the timeous development of a coherent and structured plan to promote the interests of Africans.

## **Chapter 6: Recommendations and Conclusion**

### **6.1 *Problem Statement***

The research has focused on examining the Botswana labour laws and constitutional dispensation regarding the employment of non-citizens, with special reference to Chinese nationals, and whether any lessons can be learned from within SADC, more specifically South Africa, Namibia, Lesotho and the ILO. The focus has also been on answering the question of the development of labour law and how these labour legislations and relevant statutes regulate the employment of non-citizens seen within the broader context of Chinese-Africa partnership.

The legislative challenge of the internal employment of non-citizens within the region has a historical legacy. The recent inclusion of socio-economic benefits for certain categories of non-citizens employees in the South African labour law contest is a clear indication of the impact of the ILO's goals, of labour standards and decent work, regarding fair and stable globalisation.

Botswana and all of the targeted countries in the study are sovereign States. Their constitutional dispensation and all labour related legislation are as per the countries discretion. The broader implications of the creation of employment opportunities, (inclusive of non-citizen employment), through the attraction of citizens should be within the internationally accepted framework of the DWCP, ILO Conventions and standards. The development of domestic labour laws in each of the countries, especially the immigration and basic minimum conditions of employment legislation, has indicated to have the potential to be the extension of that country's economic policy decisions to attract FDI. Foreign investment and the subsequent increase of the employment of foreign nationals should be governed in achieving long term sustainable economic development. It is clearly of great importance then, that values and principals within these labour laws and the development thereof should, therefore, not be compromised.

Literature on China's economic stronghold through its investment growth potential for developing countries, such as in Botswana and other SADC region in this study, has the tendency to focus on the monetary aspects and gains. With reference to discussions in the Botswana Voice Newspaper, the Chinese claim the bright future for the country, and

(others alike) in receiving Chinese special skills contributions as Chinese contractors cost less, but have quality which helps Botswana save massive development funds.

Research in this study has indicated the need of knowledge of China's compelled unity between its economic growth, development of labour laws, and the employment of these Chinese nationals in the ultimate achievement in the protection of employment rights in host countries according to ILO standards. The Chinese multi-layered China model of investment could be asserted on the combination of the following three aspects; economic growth objectives (such as job creation), foreign policy by the Chinese government's globalisation strategy, and lastly, the operational basis for trade and investment established by Chinese owned companies in host countries. Therefore, Botswana, Namibia, South Africa and Lesotho, SADC and the bigger AU subsequently experience the Chinese non-citizen labour force as the main constituent signifying the close relationship between China's FDI and Africa partnership in economic development.

China's growth and establishment as an industrial leading force on the labour front, has been its ability to adapt through labour influential integration and the development of labour laws, resulting in the individual Chinese workers contributing towards a nation's exploitation of international trade and investment markets. Critical to this economic transformation is China's success legislative employment and the creation of employment opportunities for its massive population when making investments in Africa and operating within the borders of African host countries.

Research has shown that the gap knowledge and development of labour laws within the countries domestic laws; e.g. the interaction of immigration stipulations, work permit regulations and pre requirements, and protection of employment rights of non-citizens resulted in inspirational court rulings as discussed. The employment of non-citizens and the increase of Chinese non-citizen employment cooperative strategy for industrial and economic development will highlight and explore workers socio-economic rights and protection.

## **6.2 Position in Botswana**

Researching the current labour legislation regarding the employment of non-citizens in Botswana, the labour law and statutes of the country have been highlighted as study material referring to Chapter 4. The question posed at the beginning of the study, about various legislative processes, these processes include the existence of a work permit and subsequently the need for a contract of employment for a non-citizen employee. The Botswana's domestic labour law does not differentiate in the protection of citizens and non-citizens, all inclusive of Chinese non-citizens can enjoy protection under the law as an employee. Following this, Botswana labour laws and the different components thereof, determine the rights of the employee. These include the *Employment Act*, and more specifically the *Non-citizen Employment Act*, as well as the requirements and incorporation of the Immigration legislation which governs and regulates the obtaining of work and residence permits for non-citizens. As discussed, Industrial Court cases reveal that the courts enforce all labour legislation for all "employees", regardless of citizenship.

Botswana's characteristic economic success has been linked to the adherence to the strong rule of law. The country's legislation and economic governance within the region has impeccable influence in today's contemporary China-Botswana relations. The national labour law remains the primary legal structure for promoting fair employment practices, for enabling non-citizen workers representation, for regulating the reconcilable differences between employers and employees, and for diminishing the patterns of discrimination and protection of employment rights. Botswana nation's focus on education and the improvement of local skills, and input of non-citizen employment in the countries development progress for a better future, has thus far been successful in the development of a sustainable economic growth.

## **6.3 Position in targeted SADC countries, SADC and the ILO**

### **6.3.1 Namibia**

Chinese nationals employed in Namibia are facilitated through Chinese public and private companies registered in Namibia. Legislation regulating labour in the country and the compliance thereof are closely linked to the vital role these cooperation have in

the Namibian economy. The complexity of the legal position is the lack of the systematic consistent and transparent data, and the non-complaining factor of such Chinese non-citizen workers to the relevant government institutions. Information of the breach of Labour laws in the Chinese owned companies is when local employees complain of extended working hours and overtime disputes with such employers.

The influence of China state investment demands greater input of the Namibian authorities to protect the fundamental labour rights of local and Chinese nationalities at the work place. The government has amended the Labour laws for example the Labour hire and the Namibian constitution court case as discussed previously. It could be said that the Namibian, through labour legislation and constitutional commitment has the concerns and wellbeing of employees by setting minimum standards for such companies to adhere to.

The challenge is to strike a balance between the protection of worker rights and workers form unfair labour practices and the implementation and enforcement of the necessary legislation effectively in all foreign companies.

### 6.3.2 *South Africa*

The first employment of Chinese non-citizens in South Africa, within the mining industry is well recorded. The increased number of Chinese employment in South Africa has been noticed since the 2001 period, noticeably the time when China joined the WTO. The research has shown that the growing trade relationship between South Africa and China has implications for the growth and composition of Chinese non-citizen employment. The labour ministry in conjunction with the Immigration Department of the Foreign Affairs Ministry has the ability to regulate non-citizen employment within the framework of the national interests. The current *Immigration Act* as amended will greatly influence the entering of more specifically skilled non-citizen workers.

The current Chinese migrational flow is a direct result of China's economic expansion, and the initiatives of the Chinese government for economic reform needs as for South Africa. South Africa is now being part of BRICS and has witnessed many Chinese firms operating in key resource sectors of the South African economy. The extending China relation includes Chinese non-citizens as employees, and influences the local labour

markets. Regulating and evaluating this enlarged Chinese migration highlights the pressure on policymakers to find a balance between labour law and economic reform policies, and the possible positive benefits that China's long term economic inputs could have.

The South African labour department addressed the domestic manufacturing capacity and labour protection law within the textile industry, by enforcing adherence to local labour standards regarding basic minimum wage. The government's argument for keeping to strict legislation rules, which heavily impacted the welfare of the local labour force in job losses, is preventing a downward spiral in labour standards as influenced by China's FDI towards the industry. Only after closing down of the affected Newcastle factories for non-compliance with the standards set by labour legislation, the need for appropriate and timeous policy intervention suggested the need to balance the benefits of FDI and job creation.

### *6.3.3 Lesotho*

The above referred to labour legislative implementation has impacted other SADC countries, and then these Chinese owned factories relocated to Lesotho. Lesotho has a more accommodating minimum basic wage requirement, resulting in merely displacing a problem within a bigger problem. Lesotho's local economic sector in general is small and the influence of the Chinese companies entering for instance the manufacturing industry was met with controversy. The impact and effectiveness of AGOA in increasing Lesotho's non-citizen employment was eminent with the relocation of South African closed down clothing and textile factories to Lesotho. The economic stimulation and benefits of AGOA and eagerness of the Lesotho government to accommodate entirely foreign owned factories could be short lived, as indicated the AGOA scheduled expires next year in 2015. Labour legislation as key instrument in trade is needed for continuous economic growth, and not just simply the boosting of investment through Chinese FDI.

### *6.3.4 SADC as organisation*

The competition between the countries in the region to attract China's FDI should, therefore, be guided by the SADC treaty promoting corporation within the region. During the 34th SADC Summit proceedings, held in August of 2014, the organisation has established the Regional Evaluation Framework. This organisational development will thus monitor labour on a regional level and this action will have an impact on employment policies and the adherence to ILO conventions in ensuring social and human development of citizens and non-citizens for long term sustainable economic growth not just for the individual country, but for whole SADC region in achieving the MDGs.

### 6.3.5 ILO

Global influences and especially economic fundamentalism has shaped and given deeper dimension to each of these SADC country's concepts of legislation and constitutionalism. The emphasis is greatly on the role of the state then monitoring, adjudicating and enforcing legislation in general and with regard to ILO conventions, standards and guidelines. Labour right protection and the protection of the distinctive character of employment contract have been discussed in Botswana case law in Chapter 4. Chinese investment and Chinese foreign policy has challenged Botswana, Namibia, South Africa and Lesotho's institutional and regulatory mechanisms regarding labour legislation of non-citizens based on fundamental employment rights and need for the individual countries to development with a Chinese input.

Chinese investment has facilitated a fundamental role in filling financial and technological gaps, Chinese corporations, since the 2008 economic crises became a much needed link for economic development. The ILO conventions and recommendations are vital in the construction of uniformity in labour principles when facing the challenges of Chinese FDI operating in some weaker SADC labour regulating governances.

Labour law and domestic labour legislation are globally influencing the ILO calls for a Global Jobs Pact, thus emphasizing the need for "coordinated global policy options" to protect and increase jobs through "sustainable enterprises" as well as the building and maintaining of social protection systems. In fact, the ILO comparative surveys and recommendations per country on social conditions, human right effects on employment,

impact on the choice of technology and training by multinationals and local companies as annually discussed in Geneva. Botswana's membership and close working relations with the ILO is emphasised in the current running DWCP 2011-2015 as per the study discussion.

The ILO thus provides an authoritative framework for these member countries of this research as a tool to facilitate the legality within the constant need for economic policy development and addressing unemployment and poverty. By using the Ruggie guidelines, the operational and legal consequences of Chinese aid and loans for infrastructure investment on labour legislation and regulation in host countries, could be mitigated. It is recommended that through the adoption of economic policies that ensure the respect of human fundamental rights, challenges over the impact of increased Chinese migration to the region could be overcome and the positive contribution FDI can be made to achieve the MDG sustained growth and employment creation needs, be met.

#### **6.4 *Lessons to be learned***

Although relationship between China-Africa as in these SADC countries has evolved over the past decade, in order to have a mutually beneficial China-SADC countries labour relationship, it will require modifications in China's corporate engagement with Africa. China's quest in Africa infrastructure development with a Chinese labour force has placed the emphasis on Botswana, and the targeted countries of the study, to address the uniform economic issues, such as unemployment and lack of a skilled local workforce, the need for governments to govern and regulated FDI investments through national industrial policies and DWCP programmes.

Chinese FDI as part of the proses of globalisation provides immense opportunities to accelerate developmental goals for sustainable economic progress in the different host countries. The establishment of a Regional Evaluation Framework as set out by the 34th SADC Summit in August 2014 is highly recommendable. The acknowledgment of pro-active monitoring of labour, employment policies and ILO core conventions, will encourage economic reform that in effect will ensure social and human development of citizens and non-citizens as per the MDGs.

The good governance of labour statutes in accordance with ILO standards within these countries, contributes to the framework of good international socio-economic relationships. Labour legislation based on timeous interventions and coordination of all involved stakeholders, such as in a tripartite system have the potential for competitiveness benefits in the maintaining and creation of job opportunities as witnessed in the textile and clothing sectors. This experience illustrates the need for high level diplomacy and sincere commitment between the SADC national governments and China.

Labour law is a corner stone in the development of sustainable economic success in this SADC region and includes the right to work principle for citizens and non-citizens with special adherence to human rights of migrants, and in regard to this study, Chinese non-citizen employment as part of the economy. The development of labour law is an important regulative instrument in the economic development of the individual host countries. The employment of Chinese, non-citizen nationals, mostly working on projects regarding Chinese investment, is regulated by the host countries individual domestic labour laws. The implementations of labour laws in Southern Africa, specifically the countries in this study, show a lack of uniformity in the application of labour laws. Every country interprets and applies its labour laws differently according to their national priorities.

## **6.5 Summarising**

From a labour legislative perspective, research has shown that Botswana economic policy evaluates the Chinese non-citizen employment and Botswana-Chinese relationship, for the contribution it makes to the country's socio-economic development needs.

Currently the Botswana's low level of corruption and efficient legal framework for settling disputes and challenging regulations in the country has contributed to the country's global competitiveness high ranking. Thus, it could be said that the country's economy reform has shown strength in the national laws, the control and regulation, conversely, acting within the global economy, an openness to learn lessons could impact welfare and regulation of its ever growing Chinese non-citizen labour force.

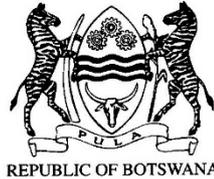
As explained from Botswana's pre constitutional order, and particularly the system of parliamentary sovereignty, no clear provisions have been made in either the Constitution of Botswana or any other piece of legislation that clearly defines the status of international law in domestic law. The Appeal Court's ruling in the Dow case, is that a constitution is a unique document and should, therefore, be interpreted liberally and generously. This liberal and generous interpretation includes the consideration of international law as interpretation aid and has been used as such in Botswana labour case judgments. See special reference to Industrial Court case law as highlighted throughout the research.

Finally the way forward in this relationship between, global (Chinese) economic FDI, interaction with Botswana's economic growth, and the right to labour legislative development within the framework of international accepted standards promoted much needed sustainable economy growth in these challenging times.

It should be summarised that; domestic legislation interaction with labour market should positively impact the working environment and employment of citizen and non-citizen alike within the broader engagement in international initiatives to promote transparency, sustainability, justice and social responsibility is the accomplishment of sustainable economic growth.

Taking note of lessons learned from within SADC and ILO principles in Botswana's labour law development could impact labour legislative progress to be the corner stone for sustainable economic development built on the foundation of regional economic growth and long-term prospective. In the realisation of economic prosperity and mutual benefits in its China partnership, Chinese non-citizen labour should be acknowledgment by all stakeholders on the fundamental truth, and human right principal that labour is not a commodity but a human component.

# ANNEXURE A: IMMIGRATIONS ACT – APPLICATION FOR RESIDENCE PERMIT (FORM 16)



## **IMMIGRATION ACT** (CAP 25:02)

**FORM 16**

### APPLICATION FOR RESIDENCE PERMIT (Sec 19 and reg 15)

#### **NOTES AND INSTRUCTIONS**

1. This form shall be completed in English and the contents thereof declared before a Commissioner of Oaths.
2. This form need not be completed by the spouse or children under the age of 18 years of a person in possession of a residence permit or applying for a residence permit unless the Immigrants Selection Board so requires.
3. Dependants who are not persons covered by paragraph 2 above are required to apply separately if they wish to stay in Botswana and their applications should be supported by the person(s) upon whom they will depend while in Botswana.
4. The following documents shall be attached to the application-
  - (a) Two identical passport size photographs of each person (taken at the time of his application) on which his features are clearly and correctly depicted. One photograph to be certified on the reverse side by a Commissioner of Oaths.
  - (b) A birth certificate or a certified copy thereof in respect of each applicant. If the applicant is unable to provide such proof of birth, a statement setting out the reasons must be attached.
  - (c) If married, a marriage certificate or a certified copy thereof. If the applicant is unable to provide such proof of marriage, a statement setting out the reasons must be attached.
  - (d) If legally separated or divorced, a copy of the court in question certified as being correct by an official of the court which made it.
  - (e) A medical report for each applicant in the form set out in the Schedule.
  - (f) In the case of an employee, certified copies of the applicant's certificates and references or testimonials.



9. (a) Present nationality (state name of country) .....
- (b) Previous nationality (state name of country) .....
10. (a) Present postal address (in full) .....
- (d) Residential address ..... Plot number .....
- Street name ..... Village/Town .....
11. Languages applicant is able to read and write .....
12. (a) Countries and places of residence during the last 10 years .....
- .....
- (b) Have you ever travelled on the passports of any of those countries? If so, give particulars:
- .....
- .....
- .....
13. Date of arrival in Botswana .....
14. Place of entry into Botswana .....
15. (a) Full name of spouse .....
- (b) Place and date of birth of spouse .....
- (c) Countries and places of residence of spouse during the last 10 years
- .....
- .....
- .....
- Is your spouse applying for residence in Botswana?
- .....

16. Particulars of children under the age of 18 years, by any marriage or adoption.

NAME	AGE	MALE/FEMALE	Whether applying for residence	
			YES	NO

17. Have you or those accompanying you ever been ordered to leave or prohibited from entering Botswana or any other country?

If so, give particulars .....

.....

.....

18. Have you or those accompanying you ever been sentenced in any country to any period of imprisonment either without the option or in default of payment of a fine (whether or not such imprisonment or such fine was suspended), or to any sentence for an offence involving violence, dishonesty or the non-payment of any tax or duty? If so, give particulars:

.....

.....

.....

.....

19. Give reasons for applying for a permit:.....

.....

.....

20. State the period for which a permit is sought: .....
21. Do you propose to take up employment or engage for reward any business, profession or other occupation in Botswana?

If yes, please complete application for work permit and attach to this form once you have completed it.

**PART 11**

Applicants who fall under these categories should refer to the requirement list attached to this form.

1. If you do not propose to take up paid employment or engage for reward in any business, profession or other occupation in Botswana, what are your reasons for applying for residence permit? tick the appropriate box.

Dependant	Student	Immigrant
Volunteer	Missionary	

If any other please specify .....

2. If applying for renewal give details of existing permit/s

	Work permit	Residence permit
(a) PERMIT NUMBER	.....	.....
(b) DATE OF ISSUE	.....	.....
(c) PLACE OF ISSUE	.....	.....
(d) DATE OF EXPIRY	.....	.....

3. State how you intend to support yourself and your dependants (if any).  
Give full details supported by documentary proof:

.....

**PART III**

I ..... Declare that the information furnished by me in this application is true and correct.

Date: ..... Signature: .....

Declared before me at ..... this .....

Day of ..... 201..... time: .....

.....  
*Commissioner of Oaths*

**FOR OFFICIAL USE ONLY**

**IMMIGRATION**

Fee of: ..... Collected by: .....

General Receipt No: ..... Dated: .....

**LABOUR**

Fee of: ..... Collected by: .....

General Receipt No: ..... Dated: .....

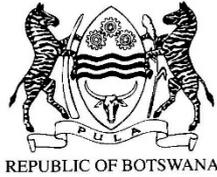
Comments and recommendations: .....

.....

.....

Signature: ..... Designation: .....

Date: .....



REPUBLIC OF BOTSWANA

APPLICATION FOR WORK PERMIT

EMPLOYMENT OF NON-CITIZENS ACT
CAP 47:02
Section 5 (1) and reg. 2

Form 1

NOTES AND INSTRUCTIONS

- 1. This form shall be completed in English and the contents thereof declared before a Commissioner of Oaths.
2. The following documents shall be attached to the application-
(a) Two identical passport size photographs of each person (taken at the time of his application) on which his features are clearly and correctly depicted. One photograph to be certified on the reverse side by a Commissioner of Oaths.
(b) in the case of an employee, certified copies of the applicant's certificates and references or testimonials and proof of efforts to recruit citizens;
(c) in the case of investor/self employed person, certified copies of the company's certificate of incorporation, applicant's share certificate and proof of investment;
(d) such other documents as in the special circumstances of the applicant are required to be attached/provided; and
(c) applications for renewals should be submitted six (6) months before the expiry of the permit. The original permits should accompany the application.

NB: Any application not accompanied by all required documents is incomplete and will not be accepted. However, where the applicant for this permit is also applying for, or has applied for, a residence permit, and has supplied all documents required to be submitted with the application for the work permit, he need not provide those documents which he has already supplied, which are also required for this application.

PART I

To be completed by employee

- 1. If applying for renewal of work permit give details of existing permit
(a) Permit number .....
(b) Issued on (date) .....
(c) Place of issue .....
(d) Expiry date .....
2. State the job that has been offered to you.
.....
.....
3. Do you have a Degree, Diploma or Certificate?
Yes/No Please specify



**PART II**

To be completed by the employer

1. (a) Full business name and address .....  
.....  
.....  
(b) Telephone No. ....  
(c) Fax No. ....  
(d) Type of goods or services provided by the business  
.....  
.....
2. Details of position to be filled by applicant  
(a) Job title .....  
(b) Job description.....  
.....  
.....
3. Remuneration  
(a) Basic pay .....  
(b) Inducement allowance .....  
(c) Settlement allowance .....  
(d) Housing allowance .....  
(e) Water/electricity subsidy .....  
(f) Transport subsidy .....  
(g) Bonus .....  
(h) Education allowance .....  
(i) Leave expenses .....  
(j) Medical Aid .....  
(k) Pension .....  
(l) Gratuity .....  
Others .....
4. Period for which permit is sought .....  
(a) Has the vacancy been advertised? Yes/No  
(b) If yes, please attach copy of advertisement.
6. Have you furnished the Commissioner of Labour with your manpower development,  
training and localization program?  
Yes/No. If no, please explain  
.....  
.....

**PART II**

To be completed by the employer

- 1. (a) Full business name and address .....  
.....  
.....  
(b) Telephone No. ....  
(c) Fax No. ....  
(d) Type of goods or services provided by the business  
.....  
.....
- 2. Details of position to be filled by applicant  
(a) Job title .....  
(b) Job description.....  
.....  
.....
- 3. Remuneration  
(a) Basic pay .....  
(b) Inducement allowance .....  
(c) Settlement allowance .....  
(d) Housing allowance .....  
(e) Water/electricity subsidy .....  
(f) Transport subsidy .....  
(g) Bonus .....  
(h) Education allowance .....  
(i) Leave expenses .....  
(j) Medical Aid .....  
(k) Pension .....  
(l) Gratuity .....  
Others .....
- 4. Period for which permit is sought .....  
(a) Has the vacancy been advertised? Yes/No  
(b) If yes, please attach copy of advertisement.
- 6. Have you furnished the Commissioner of Labour with your manpower development, training and localization program?  
Yes/No. If no, please explain  
.....  
.....

7. (a) Details of trainees

Name of Trainee	Educational qualifications	Job experience

- (b) Name of trainee most likely to take over  
 (i) at the expiry of the permit .....  
 (ii) in the long term .....  
 (iii) date of localization .....

8. State the time required to have the trainee fully trained .....

9. In case of renewal briefly and factually state reasons why trainee cannot take over  
 .....  
 .....

10. What are your main difficulties in securing local recruitment for this post  
 .....  
 .....

11. Have you made enquiries with Labour Department on the availability of a suitable citizen for the job you are offering to a non-citizen?  
 .....

12. State number of locals or Botswana citizens in your establishment .....  
 I .....declare that the information furnished by me  
 in this application is true and correct.

Date: ..... Signature: .....

Position: .....

Declared before me at .....this ..... day .....

of .....201 .....time: .....

.....

*Commissioner of Oaths*

**PART III**

To be completed by investors

1. If applying for renewal of work permit give details of existing permit

- (a) Permits number:
- (b) Place of issue:
- (c) Date of issue:
- (d) Expiry date:

Work Permit	Residence Permit
.....	.....
.....	.....
.....	.....
.....	.....

2. Name of company: ..... Tel No. ....

Fax: .....

3. Location of company/business (i.e. plot no. and town/village name)

.....

4. Attach proof of capital investment in the company/business

5. What services/products does your company provide .....

6. Capacity in which you will be employed .....

7. (a) Will you draw a salary? Yes/No

(b) If yes state salary per annum .....

(c) If no explain why .....

I ..... declare that the information furnished by me in this application is true and correct.

Date: ..... Signature: .....

Declared before me at ..... this ..... day of ..... 201 ..... time: .....

.....  
*Commissioner of Oaths*

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IMMIGRATION

Fee of ..... collected by .....

General Receipt No. .... Dated: .....

LABOUR

Fee of ..... collected by .....

General Receipt No. .... Dated: .....

Comments and recommendations: .....

Signature: ..... Designation: .....

Date: .....

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