

Summary

South Africa's vibrant and diverse economy is a powerful draw for Africans from other countries migrating in search of work. But the chance of earning a wage can come with a price: If undocumented, foreign migrants are liable to be arrested, detained, and deported in circumstances and under conditions that flout South Africa's own laws. And as highlighted by the situation in Limpopo and Mpumalanga provinces, both documented and undocumented foreign farm workers may have their rights under South Africa's basic employment law protections violated by employers in ways ranging from wage exploitation to uncompensated workplace injury, and from appalling housing conditions to workplace violence.

Human Rights Watch has conducted research on the situation and experiences of migrant workers around the globe. Its research demonstrates that migrant workers, whether documented or undocumented, are particularly vulnerable to human rights abuses. Such abuses can be the result of many different factors including inadequate legal protections, illegal actions of unscrupulous employers or state officials, and lack of state capacity or political will to enforce legal protections and to hold abusive employers and officials to account. The focus of this report is principally the situation of Zimbabweans and Mozambicans in South Africa's Limpopo and Mpumalanga provinces.

Human Rights Watch believes that in South Africa migrants are regularly subject to human rights violations when they are deported, and that South Africa's Immigration Act 2002 is routinely violated. Human Rights Watch researchers spoke with several witnesses who reported that when apprehending suspected undocumented foreigners, police, immigration, and military personnel had assaulted them and extorted money. In one case, a border military patrol failed to prevent the rape of an undocumented migrant whom they had arrested. Unaccompanied child migrants detained by South African officials are held in police cells with adults, contrary to both domestic

and international standards relating to the detention of minors. Deportees allege that police on deportation trains sometimes assault and extort money from them, and have even thrown deportees—who believe they have bought their freedom—off moving trains to their death. Immigration policy provides that foreign migrants facing deportation should be allowed to collect their unpaid wages, savings, and personal possessions, but in practice this seldom occurs.

On the farms of Limpopo and Mpumalanga provinces, many farmers who produce on a large-scale for export or for the domestic market use only documented workers. This leaves farm owners whose market contributions and labor forces are much smaller as the principal employers of undocumented workers. But documented or not, workers experience abuse and exploitation: While many large-scale farmers do adhere to the basic conditions of employment law, other farmers openly disregard the minimum wage, do not pay overtime, sick leave, or annual leave, and make unlawful deductions from workers' wages. Existing legislation also creates disincentives for employers to provide housing for workers. Farm workers are still too often the victims of violence by employers and other farm staff, which the workers may be unwilling to report for fear of losing their jobs.

Many employers do not claim state compensation to be passed on to farm workers who are injured at work, and when they do, the practice whereby payments can only be made into a bank account creates a barrier for foreign workers (who normally are unable to have accounts) to receive compensation settlements.

Although the aspect of the report covering abuse in employment focuses on the human rights situation of foreign migrant workers on farms in Limpopo and Mpumalanga provinces, it also provides one of the first assessments of employment conditions on farms since the introduction of a minimum wage in 2003. Its findings also suggest that South African farm workers suffer a similar lack of legal protection as foreign farm workers regarding basic employment conditions.

Failures by the government to ensure respect for international human rights law and South African immigration and employment laws, as well as certain deficiencies in those South African laws, result in the infringement of rights that migrants, documented and undocumented, should enjoy under international law and that are also protected by the Constitution of South Africa. These rights include, among others, the right to personal freedom, liberty and security, to appropriate conditions of detention, and to fair conditions or practices of work. The South African government should ensure that state officials abide by the procedures for arrest, detention, and deportation in its immigration law. The government should also create a system that permits migrants to report abuses of their human rights; require labor inspectors to produce public reports documenting the number of inspections they conduct, complaints they investigate, and compliance orders they issue to employers for violations of employment law; and investigate and punish state officials and employers who violate the law. The government should remove obstacles to enable migrant workers to access the workers' compensation to which they are legally entitled. Human Rights Watch calls on the government of South Africa to offset practical disincentives for farmers to provide housing by developing a housing policy for farm workers.

Human Rights Watch also calls on the government of South Africa to amend its immigration law to include enforceable rights for undocumented migrants to obtain their wages and possessions in the event that they are deported. The government is urged to become a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and to incorporate its provisions in domestic law.

The report is based on research on Zimbabweans in Limpopo province in late April and early May 2006, and in Beitbridge, Zimbabwe, in October 2006, and research on Mozambicans in Mpumalanga and Limpopo provinces in September and October 2006. Historically, Zimbabweans have been the main migrant laborers on farms in the far north of Limpopo province and Mozambicans in southern Limpopo and the border areas of Mpumalanga. Our

objective was to research the human rights situation of foreign migrants and ascertain the extent to which state officials were respecting the protections afforded to them in the immigration law and employers were complying with employment laws for farm workers, and in particular for foreign farm workers.

In Limpopo, Human Rights Watch conducted 43 interviews with farmers and farm workers north of the Soutpansberg around Weipe and Tshipise, and south of the Soutpansberg around Levubu and Vivo; 31 interviews with immigration, military, and police officials, and Zimbabweans awaiting deportation at police stations in Makhado and Musina (the busiest detention center for Zimbabweans in Limpopo); 13 interviews with undocumented Zimbabweans, usually walking on the road en route to Johannesburg; and lawyers (invariably farmers themselves) who advise other farmers on how to comply with the immigration and employment laws. Two local nongovernmental organizations (NGOs), Nkuzi Development Association and Musina Legal Advice Office, provided research assistance.

Human Rights Watch and Nkuzi Development Association also spent several days at the International Organization for Migration (IOM) reception center in Beitbridge in October 2006. The center provides humanitarian assistance for Zimbabweans deported from South Africa. At the center we talked to IOM staff members to learn more about the operation of the center and to 27 deportees (some of whom had been working not in Limpopo and Mpumalanga but in other locations in South Africa, and who are nevertheless featured in this report) to learn about their treatment during arrest, detention, and deportation, and their employment conditions if they had had jobs.

In Mpumalanga Human Rights Watch worked with the Forced Migration Studies Programme of the University of the Witwatersrand and Nkuzi Development Association, and received assistance from TRAC-Mpumalanga and Masisukumeni Women's Crisis Center. We interviewed in total over 100 people in Mpumalanga. Our interviewees included nine foreign nationals in detention at Komatipoort (the busiest detention center for Mozambicans in Mpumalanga); the only foreign national in detention at Nelspruit; and seven

police and immigration officials at Nelspruit, Komatipoort, and Lebombo border post, several of whom were interviewed on multiple occasions. In Nelspruit we also interviewed the Mozambican Department of Labor's sub-delegate, a Food and Agricultural Workers' Union official, a labor inspector in the Department of Labour, and a staff member at the Mozambican recruitment agency Agencia Algos. We concentrated our interviews with 17 farmers or managers and 75 farm workers around Hoedspruit in southern Limpopo, and Hazyview, Kiepersol, and Komatipoort in eastern Mpumalanga.

The names of farmers, farms, and foreign migrants, and on occasion of state officials, are not used, chiefly in the interests of protecting the security of individuals concerned. Many individuals were the victims or alleged victims of multiple human rights abuses by state officials or employers. By withholding names, the report does not, however, reveal the extent to which the same individuals are often the victims or alleged victims of multiple abuses.

A variety of terms are used in legal and other documents to refer to foreign migrants who lack legal status. We use the terminology in South Africa's immigration law, "illegal foreigner," to refer to foreign migrants who enter South Africa without the documents required by the immigration law. Other foreign migrants, and in particular many Mozambicans, hold passports or emergency travel documents that give them the right to reside legally in South Africa. However, the right to be in the country is distinct from the right to work in the country. Mozambicans who are legally in South Africa in terms of the immigration law may be working illegally. Where relevant and known, the work and immigration status of foreign migrants is noted. Otherwise, we use the general term "undocumented migrants" to refer to foreign migrants who lack the legal permission to work or the legal permission to be in the country.

Recommendations

To the Government of South Africa

- The Department of Home Affairs, the South African Police Service, and the Department of Defense should ensure that the correct procedures for arrest, detention, and deportation as set out in the immigration law are consistently followed by state officials. Measures should include improved training of officials in the law and legal procedures; the introduction of a system for undocumented migrants to report on officials who engage in unlawful practices; more rigorous investigation; and prosecution and disciplining of those officials who are found to have committed violations of the laws. In particular:
 - The Department of Home Affairs, the South African Police Service, and the Department of Defense should investigate allegations that officials participating in arrests and deportations have been involved in assaults on foreign nationals, and all incidents in which deportees have allegedly been forced to jump from moving trains, and initiate prosecutions where possible.
 - The Department of Home Affairs and the South African Police Service should ensure that the practice of detaining minors with adults in violation of constitutional and international legal provisions ceases.
 - The Department of Home Affairs and the South African Police Service should improve their internal monitoring of abuses by officials, and include in their annual reports information on the results of their internal monitoring procedures, including how many officials they discipline for abuses relating to foreign migrants, the nature of the abuses, and the kind of disciplinary measures imposed.
- The Department of Home Affairs should formalize and publicize its immigration policy to permit undocumented workers access to their

unpaid wages, savings, and personal belongings in the event that they are deported.

- The Department of Home Affairs should amend the immigration law to make it an offense for state officials not to give receipts when they take documents and other items from suspected “illegal foreigners.”
- The Department of Home Affairs should develop policy regarding the use of independent oversight mechanisms in immigration detention facilities such as the Judicial Inspectorate of Prisons.
- The Department of Home Affairs should ensure that the detention and deportation procedures at the proposed new immigration detention facility near Musina in Limpopo province developed by the South African Police Service comply with the provisions of Section 34 of the Immigration Act.
- The Minister of Home Affairs should develop the terms and conditions for granting permanent residence status as contemplated by section 31(2)(b) of the Immigration Act for migrants or categories of migrants, including asylum seekers and refugees, for whom special circumstances exist, as in the case of former Mozambican refugees who have failed to obtain permanent residence status during the previous regularization program.
- The Department of Social Development should collaborate with the Department of Home Affairs and the South African Police Service in ensuring that the practice of detaining minors with adults ceases.
- The Department of Labour should ensure that all workers in an employment relationship, whether documented or undocumented, benefit from the provisions relating to conditions of employment as set out in South African employment law, and that these provisions are consistently enforced.
- The Department of Labour should consider introducing a cheaper corporate permit for farmers with small labor forces to offset the current high cost of corporate permits for farmers who only hire small numbers of workers and to encourage the documentation of small workforces.

- The Department of Labour should review, in consultation with farmers, the housing provisions in the Sectoral Determination for the Farm Worker Sector to ensure that this legal provision is not creating a disincentive for farmers to provide housing for farm workers, and if it is, to develop and put in place a remedy.
- The Department of Labour should fill all vacancies for labor inspectors and require labor inspectors to produce public reports with statistics on the numbers of farms they visited, employers and employees whom they interviewed about conditions of employment, violations identified, and employers' compliance and follow-up actions in cases of employers' non-compliance.
- The Department of Labour should create incentives for nongovernmental organizations to assist with independent monitoring of labor laws.
- The Department of Labour should develop a mass public information campaign to educate farm workers and employers about farm workers' rights and the penalties for committing abuse. The information should be disseminated in the languages spoken by farm workers and farmers.
- The Department of Labour should ensure that the right of workers (whether documented or undocumented) injured on duty to receive workers' compensation is enforced, including by imposing penalties on employers who fail to report work-related accidents or violate other aspects of the workers' compensation law.
- The Department of Labour should create and publicize accessible complaints mechanisms for farm workers to report problems such as violence, unpaid wages, or poor working conditions, including hotlines, support for nongovernmental organizations that assist farm workers, and helpdesks at locations frequented by farm workers.
- The government of South Africa should ratify the International Covenant on Economic, Social and Cultural Rights signed in 1994.
- The government of South African should sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and amend domestic laws accordingly.

To the Parliament of South Africa

- Members of Parliament and the Parliamentary Portfolio Committee on Labour should pressure the executive to enforce legal protections for foreign migrants.
- Members of Parliament and the Parliamentary Portfolio Committees should ensure that they adequately oversee the functioning of the line ministries that have responsibilities for foreign migrants and farm workers, both foreign and South African. The Portfolio Committee on Labour should ensure that labor inspectors are regularly inspecting farms and issuing the appropriate documents and citations. The Safety and Security Portfolio Committee and the Home Affairs Portfolio Committee should ensure that arrest, detention, and deportation processes comply with the law.
- Members of Parliament and the Parliamentary Portfolio Committee on Labour should urge the executive to introduce an amendment to the immigration law to enable foreign workers to collect their unpaid wages, possessions, and savings prior to deportation, and propose legislation to encourage the provision of housing for farm workers.
- Members of Parliament should urge the executive to sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and to ratify the International Covenant on Economic, Social and Cultural Rights and the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides for the establishment of independent monitoring bodies with a mandate to visit all places of detention.

To Trade Unions

- Trade unions representing farm workers should establish a presence or increase their visibility in rural areas, expand their efforts to educate all farm workers—including foreign migrants—on their rights, and promote all farm workers’ interests.
- The Congress of South African Trade Unions should lobby the government to sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and to ratify the International Covenant on Economic, Social and Cultural Rights.

To Civil Society

- Civil society should extend its legal services and monitoring to rural areas and work for the protection of all foreign migrants, including farm workers, regardless of nationality.

To Farmer Associations

- Farmer associations should monitor their members to ensure compliance with labor and immigration law.

To Independent Bodies

- The Human Rights Commission and the Commission for Gender Equality should regularly monitor and report on human rights abuses in the farm sector.
- The Legal Aid Board should play a more active role in providing legal services to all farm workers, including foreign migrants.

To the Governments of Zimbabwe and Mozambique

- The embassies/high commissions and foreign ministries of Zimbabwe and Mozambique should prioritize increased protections for migrant workers in South Africa through bilateral diplomacy and increased cooperation with other labor-sending countries. They should conduct

information campaigns on workers' rights; create services for workers reporting abuse, including access to legal aid; and track and make publicly available data on the number of migrant workers and reported cases of abuse.

To International Donors

- International donors should provide funding for services for deportees or migrants who are abused in South Africa, support civil society groups in South Africa that promote, monitor, and seek to protect the rights of foreign migrants, and support governmental or civil society public information campaigns on the rights of foreign migrants in South Africa.

To International Organizations

- The International Organization for Migration should urge the governments of Zimbabwe and South Africa to facilitate legal migration by removing current obstacles to Zimbabweans obtaining passports and visas to visit South Africa.
- The UNHCR should collaborate with the International Organization for Migration in Beitbridge to ensure that those who have sought asylum in South Africa are provided protection and the opportunity to return to South Africa.