



# SIHMA

Scalabrini Institute for  
Human Mobility in Africa

## LABOUR-RELATED EXPERIENCES OF MIGRANTS AND REFUGEES IN SOUTH AFRICA

ICMC PROJECT «THE FUTURE OF WORK,  
LABOUR AFTER LAUDATO SI'»

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# THE FUTURE OF WORK, LABOUR AFTER LAUDATO SI'



The project "The Future of Work, Labour After Laudato Si'" is a global initiative that connects Catholic-inspired and other faith-based organizations in order to help promote and implement Pope Francis' encyclical Laudato Si' in areas related to work. The initiative brings together international, regional, state and local actors to improve global governance and lift up best practices on these issues. The International Catholic Migration Commission (ICMC) has led the research track for this project on issues of "Jobs, demography and migration." To that end, ICMC enlisted the Scalabrini Migration Study Centers (SMSCs) in New York, Manila, and Cape Town to examine the intersection of the future of work and labour through the lens of particular migration populations and from "person-centered" perspective. ICMC also commissioned a photo-journalism project to capture the faces and testimonies of persons directly experiencing labour migration, including migrants, their families, and their communities.

An integrative paper by the Center for Migration Studies of New York (CMS) examines the future of work, international migration, and the nexus between these two phenomena. It draws on human rights principles, international law and religious values, particularly from the Catholic tradition, to chart an ethical approach to the future for work and migration. The paper both documents the unacceptable living, working, and migration conditions of immense numbers of people around the world, and sets forth an optimistic vision of the future characterized by international cooperation and solidarity. The paper also offers guidelines, recommendations, and best practices that can promote "human-centered" migration and labour systems.

ICMC also commissioned three research projects on different populations of migrants and potential migrants -- two from the Scalabrini Migration Center (SMC) in Manila, and one from the Scalabrini Institute for Human Mobility in Africa (SIHMA) in Cape Town. The first SMC study assessed the experience of Filipino, Indonesian and Vietnamese fishers on Taiwanese commercial fishing vessels. The second SMC study examined initiatives to make agricultural careers a viable alternative to migration for young persons in the Philippines. The SIHMA study documented the employment and working conditions of migrants and refugees in Cape Town. This research also examined the drivers of migration and the experiences faced by migrants in South Africa, including nativist violence and resentment. All three studies highlighted the gap between just and humane policies, and current realities. The researchers also identified recurring trends and global patterns in international migration and migrant labour.



# INTRODUCTION

It is with satisfaction and pride that the Scalabrini Institute for Human Mobility in Africa publishes this report on the labour related experiences of migrants and refugees in South Africa, born from valued collaboration with ICMC to produce accurate research, data collection and analysis.

The findings and information drawn and recommendations borne out of the research are essential to improve the somewhat dire circumstances for migrants working or seeking to work in South Africa. The research exposes discrepancies between the legislative and policy frameworks and practice. Labour rights and the right to work, to feed and sustain oneself and one's family are fundamental to human existence, survival and inherent human dignity. Regrettably accessing the labour market is incredibly difficult and migrants who access it are largely employed in the informal sector or self-employed, making them particularly vulnerable and subject to a series of threats, exploitation and other harm, not the least of which are xenophobic practices and violence and abuse of female migrants in the labour sphere. This research along with other similar research refutes misleading, albeit broadly publicized, suggestions that migrant workers are taking job opportunities from the local populous and refutes the assertion that most migrants have irregular status intentionally for nefarious purposes. The reality is that failures in government documentation processes, corruption, xenophobia, internal backlogs and the like are responsible for irregular or undocumented status of most migrants from the study. This research will hopefully work towards influencing policy-making positively. It will help alert migrants and South Africans to migrants' rights and recourse to assist in ensuring equal access to employment and treatment of migrants employed and seeking employment. This is by enlarging the principle provided for by the legislative framework and ought to be applied correctly in practice so that justice prevails.

This research helps broaden the body of research in the area and provides detailed qualitative information on lived experiences of participants with respect to labour in the South African context. Migration is a constant and part of what makes us human and yet this research suggests that most experiences of migrants are dehumanising, degrading and abusive. This cannot and must not be allowed to continue and it is hoped that the research helps to illustrate the

current situation to support an improved future for work for migrants.

The research illustrates the living conditions and circumstances of migrants and the impact of work and labour policy on the circumstances of migrants including refugees and asylum seekers. Conditions are poor and circumstances appalling for most of the migrants and refugees in the study with poverty, exploitation and xenophobic victimisation being rife. Better experiences and circumstances ought to be experienced through the regularisation of documentation, improving language skills, especially English, and increased awareness of labour rights. Thus, education and improved government processing of documentation would go a long way towards ensuring fair labour practice, decreasing exploitation and ensuring better prospects of recourse for access to employment, employment experiences and/or compensation for unfair labour practices or unfair dismissal. Additionally, a fair labour environment would assist migrants to access basic services, live without constant fear particularly from xenophobics to promote dignified livelihoods.

In South Africa, all refugees and asylum seekers and some other categories of migrants have the right to work and migrants have far better and more progressive labour rights than most other countries in the Southern African region. However, in South Africa the reality is that policy and legislative shifts are eroding this position, and the practical application of the position has not been as progressive as appears from what is legislated.

In South Africa the high rate of unemployment and inequality, numerous dangers of working in the informal sector for migrants and ongoing xenophobia all present a picture of a negative and hostile environment with extensive and serious barriers to entry and sustainability of migrant labour. However, economic growth, greater employment opportunities and improvements in the work environment in the informal and formal sectors, education breaking down or reducing xenophobic behaviour and violence would give rise to an improved social environment for South Africans and migrants alike. For instance simple observations from the research like the brain drain to South Africa of highly skilled South Africans leaving the country to Europe or North America could be ameliorated for the benefit of all those in South Africa if the series of high barriers to entry for highly skilled migrant labour coming into the country were addressed.

Lastly these research findings and recommendations assist in identifying the need for and directing advocacy for the future of work. While xenophobia at all levels, a lack of compliance by the state with labour rights enhancing court judgements and lucrative exploitative labour practices are endemic in South Africa, research such as this is crucial to help expose the harm to the economy and development resulting from xenophobia, the lack of accountability and exploitative practices. This in turn provides an opportunity, through pressure from civil society, information sharing and training, to realise significant improvements.

This report seeks to inform researchers and academics in the sector, as well as experts working in the field at civil society level, especially the many NGOs involved in assisting migrant and refugee workers with their rights, be it for academic reasons or mere curiosity.

After all, what is most precious and significant and which reflects the vision and mission of our Institute is that among the many lines of writing, the abundance of figures, data and tables a voice emerges with strength and clarity. It is the voice of those who left their country for various reasons, seeking hospitality, safety and better living conditions for themselves and their loved ones. The lens of this report on the daily struggles and future hopes of these people validates the recommendations made within this report.

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James Chapman, SIHMA Project Manager

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# LABOUR-RELATED EXPERIENCES OF MIGRANTS AND REFUGEES IN SOUTH AFRICA

# 1. ABBREVIATIONS

APRM	African Union's Peer Review Mechanism
AU	African Union
CCMA	Commission for Conciliation, Mediation and Arbitration
CEM	Centro de Estudios Migratorios
CEMLA	Centro de Estudios Migratorios Latinoamericanos
CIEMI	Centre d'Information et d'Études sur les Migrations Internationales
CMS	Centre for Migration Studies of New York
COSATU	Congress of South African Trade Unions
CSER	Centro Studi Emigrazione Roma
DHA	Department of Home Affairs
DoL	Department of Labour
DRC	Democratic Republic of Congo
ICMC	International Catholic Migration Commission
IDI	In-depth Interview
ILO	International Labour Organization
IOM	International Organization for Migration
JLMP	Joint Labour Migration Program for Africa
MFPA	Migration Policy Framework of Africa
OAU	Organization of African Unity
REC	Regional Economic Community
RRO	Refugee Reception Office
SACCAWU	South Africa Commercial, Catering and Allied Workers Union
SADC	Southern African Development Community
SAMP	Southern African Migration Programme
SCA	Supreme Court of Appeal
SCRA	Standing Committee on Refugee Affairs
SIHMA	The Scalabrini Institute for Human Mobility in Africa
SIMN	Scalabrini International Migration Network
SMC	Scalabrini Migration Centre
QLFS	Quarterly Labour Force Survey
TEBA	The Employment Bureau of Africa
UN	United Nations
UNECA	United Nations Economic Commission for Africa
UNHCR	United Nations Refugee Agency
ZSP	Zimbabwean Special Dispensation Permit

# 2. RESEARCH CONCEPTUALIZATION AND FRAMEWORK

## 2.1 THE SCALABRINI INSTITUTE FOR HUMAN MOBILITY

The Scalabrini Institute for Human Mobility in Africa (SIHMA) is a research institute located in Cape Town. SIHMA is part of a broader global network, namely the Scalabrini International Migration Network (SIMN). The SIMN has six other established research centres around the globe. These research centres are the Centro Studi Emigrazione Roma (CSER), the Centre d'Information et d'Études sur les Migrations Internationales (CIEMI), the Centro de Estudios Migratorios Latinoamericanos (CEMLA), the Scalabrini Migration Centre (SMC), the Centre for Migration Studies of New York (CMS), and the Centro de Estudios Migratorios (CEM). These research centres are respectively located in Rome, Paris, Buenos Aires, Manila, New York, and Sao Paulo.<sup>1</sup>

The Network of the Scalabrinian Centres for Migration Studies are supported by the Missionaries of St. Charles-Scalabrinians, a Congregation of the Catholic Church devoted to the care of migrants, refugees and seafarers.

SIHMA's vision is of an Africa where the human rights of people on the move are ensured and their dignity protected. In working towards achieving this mission, the organization conducts and disseminates research that contributes to the understanding of human mobility and informs policies that ensure that the rights and dignity of migrants, asylum seekers and refugees in Africa are protected and actualized.<sup>2</sup>

## 2.2 PURPOSE OF THE RESEARCH ASSIGNMENT

In response to this commitment to the care of migrants and refugees, SIHMA was commissioned by ICMC this research study to understand the processes pertaining to the “employment and working conditions of migrants and refugees in Cape Town, South Africa”<sup>3</sup>

Specifically, the research had to “empirically examine”, (a) the labour-related experiences of migrants and refugees in Cape Town, (b) the drivers of their decisions to migrate, and (c) other experiences in their countries of origin, transit and final destination.

SIHMA defined the scope of this research assignment as follows: Utilize qualitative methods to<sup>4</sup>

- research the labour-related experiences of migrants and refugees in Cape Town;
- research the drivers of their decision to migrate;
- research migrant and refugee experiences in their countries of origin;
- research migrant and refugee experience in transit;
- research migrant and refugee experience in their final destination (i.e. in this case Cape Town South Africa);
- research and produce a brief overview of the (theoretical) legal protection afforded to migrant workers in South Africa;
- investigate the extent to which existing legal frameworks are effective or applied;

<sup>1</sup> <http://sihma.org.za/about-sihma/network/>

<sup>2</sup> <http://sihma.org.za/about-sihma/vision-mission/>

<sup>3</sup> Scalabrini Institute for Human Mobility in Africa. 14 August 2018. Call for proposals: Consultant on Migration and Labour. NGO Pulse.

<sup>4</sup> Scalabrini Institute for Human Mobility in Africa. 14 August 2018. Call for proposals: Consultant on Migration and Labour. NGO Pulse.

- research the working conditions of migrant workers who are, or who have been, employed in Cape Town, South Africa (i.e. decent work, family unity, respect of workers' rights, highlight labour rights violations, and identify the types of mistreatment of migrant workers).
- Generate ideas and make recommendations for the achievement of social progress and decent work for all.

An additional purpose of the research was to provide narrative content, through first person accounts, to the statistical and other data available on the labour-related and other experiences of migrants and refugees in South Africa. Qualitative research methods were considered best suited to achieve this.

## 2.3 BROADER INSTITUTIONAL CONTEXT

The SIHMA research project described above is a component of a five-year global project. The global project aims to provide Catholic inspired and faith-based organizations with the capacity to contribute jointly to the promotion and implementation of the Encyclical Letter "Laudato Si" in areas related to work. This includes capacity to dialogue with employers and worker organizations.<sup>5</sup>

The **Encyclical Letter "Laudato Si"** is a human rights-based missive by Pope Francis that describes the global status quo as one of economic, social and environmental crisis.<sup>6</sup> The Encyclical Letter "Laudato Si" seeks to build global harmony and support sustainable and integrated development based on a set of ethical values that promotes cooperation and communalism, and works against exclusion and individualism.<sup>7</sup>

The missive further focusses on the concept of "decent work", which is defined not in the narrow sense of workplace experience, but more broadly as a societal issue inclusive of all aspects of employment, social protection and human rights. The "Laudato Si" refers to "the need to protect employment" and affirms that "decent work" is a fundamental condition to promote human dignity, personal development, social inclusion and environmental sustainability<sup>8</sup>. The vision of decent work in the missive is one in which work is a human right, a necessary contributor to the common good, and a necessary condition for the achievement of fulfilment as a human being.<sup>9</sup>

The experiences of the estimated 150.3 million<sup>10</sup> migrant workers globally, characterized by exploitation, human trafficking, low quality of life, limited access to basic services, and difficulty accessing decent work, is a far cry from the vision of work contained in the "Laudato Si"<sup>11</sup>.

These experiences are also contradictory to the Catholic Church's person-centred position on migrants

<sup>5</sup> <http://futureofwork-labourafterlaudatosi.net/about-the-project/> - The future of work, Labour after Laudato Si.

<sup>6</sup> Bird A. B. 14 November 2018. 'Ethical perspectives on the future of work'. De L Rochefoucauld A & Marengi C. M. (Eds.). Rethinking Labour: Ethical Reflections on the Future of Work. The Caritas in Veritate Foundation of Working Papers. "*The City of God in the Palace of Nations*" accessed at [http://drive.google.com/file/d/1E39DuPKgbSGW4\\_rm\\_S68hQ76MHfg4reQ/view](http://drive.google.com/file/d/1E39DuPKgbSGW4_rm_S68hQ76MHfg4reQ/view)

<sup>7</sup> Giacomel M. & Verga G.M. 14 November 2018. 'Executive Summary'. De L Rochefoucauld A & Marengi C. M. (Eds.). Rethinking Labour: Ethical Reflections on the Future of Work. The Caritas in Veritate Foundation of Working Papers. "*The City of God in the Palace of Nations*" accessed at [http://drive.google.com/file/d/1E39DuPKgbSGW4\\_rm\\_S68hQ76MHfg4reQ/view](http://drive.google.com/file/d/1E39DuPKgbSGW4_rm_S68hQ76MHfg4reQ/view)

<sup>8</sup> Bird A. B. 14 November 2018. 'Ethical perspectives on the future of work'. De L Rochefoucauld A & Marengi C. M. (Eds.). Rethinking Labour: Ethical Reflections on the Future of Work. The Caritas in Veritate Foundation of Working Papers. "*The City of God in the Palace of Nations*" accessed at [http://drive.google.com/file/d/1E39DuPKgbSGW4\\_rm\\_S68hQ76MHfg4reQ/view](http://drive.google.com/file/d/1E39DuPKgbSGW4_rm_S68hQ76MHfg4reQ/view)

<sup>9</sup> Kerwin D. 14 November 2018. 'Migration and decent work conditions in countries of origin and destination'. De L Rochefoucauld A & Marengi C. M. (Eds.). Rethinking Labour: Ethical Reflections on the Future of Work. The Caritas in Veritate Foundation of Working Papers. "*The City of God in the Palace of Nations*" accessed at [http://drive.google.com/file/d/1E39DuPKgbSGW4\\_rm\\_S68hQ76MHfg4reQ/view](http://drive.google.com/file/d/1E39DuPKgbSGW4_rm_S68hQ76MHfg4reQ/view)

<sup>10</sup> Ibid.

<sup>11</sup> Kerwin D. 14 November 2018. 'Ethical perspectives on the future of work'. De L Rochefoucauld A & Marengi C. M. (Eds.). Rethinking Labour: Ethical Reflections on the Future of Work. The Caritas in Veritate Foundation of Working Papers. "*The City of God in the Palace of Nations*" accessed at [http://drive.google.com/file/d/1E39DuPKgbSGW4\\_rm\\_S68hQ76MHfg4reQ/view](http://drive.google.com/file/d/1E39DuPKgbSGW4_rm_S68hQ76MHfg4reQ/view)



**THIS RESEARCH STUDY WAS COMMISSIONED TO UNDERSTAND THE PROCESSES PERTAINING TO THE EMPLOYMENT AND WORKING CONDITIONS OF MIGRANTS AND REFUGEES IN CAPE TOWN, SOUTH AFRICA. SPECIFICALLY, THE RESEARCH HAD TO EMPIRICALLY EXAMINE THE LABOUR-RELATED EXPERIENCES OF MIGRANTS AND REFUGEES IN CAPE TOWN, THE DRIVERS OF THEIR DECISIONS TO MIGRATE, AND OTHER EXPERIENCES IN THEIR COUNTRIES OF ORIGIN, TRANSIT AND FINAL DESTINATION.**

and migration, which “teaches that states, systems and institutions must serve the human person” and promotes: (a) human flourishing in migrant communities of origin; (b) just and humane treatment of migrants in transit; and (c) the integration and full participation of migrants in whatever communities they ultimately settle.<sup>12</sup>

It was, therefore, argued in the design of the research assignment that the reflection on the future of work and the search for solutions to foster sustainable development, should consider the challenges faced by the multitude of migrants and refugees who are forced to leave their countries of origin.

**The global project:** On the global level, the larger (five-year) project seeks to contribute to the attainment of the Sustainable Development Goals, the International Labour Organisation’s (ILO) Centenary, and the Future of Work Initiative.

This larger project has three expected outcomes:<sup>13</sup>

- To develop a global church network that involves other faith partners, and facilitates knowledge exchanges among the members with a focus on the future of work.
- To develop the capacity of network members to produce research and reflections on labour in the context of “Laudato Si”.
- To build the capacity of network members to engage in public advocacy, raise awareness among communities and develop new initiatives on labour in the context of Laudato Si.

This SIHMA commissioned study on the employment and working conditions of migrants and refugees in Cape Town, South Africa, derives from outcome two above (i.e. research and reflection on labour after the Laudato Si).

Outcome two includes six parallel research tracks, all of which were developed to gather evidence of impact on the world of work and possible creative and innovative solutions to address some of the main crises. Ultimately, this should contribute to the achievement of the 2013 Agenda for Sustainable Development.

The six parallel research tracks are:<sup>14</sup>

- Jobs, ecology and environmental crisis.
- Jobs, violence and the link between social justice and peace.
- Jobs, demography and migration.
- Jobs, robotization and technology change.
- The future of enterprise and entrepreneurship after Laudato Si.
- Jobs creation innovations and changes in the context of Laudato Si.

This research assignment commissioned by SIHMA responds directly to parallel research track three. As per the contents of track three: “The current phenomenon of mass migration and refugee movements and its relationship to the future of work is influenced by many factors, including demographic changes in many so-called “Western” or “Northern”, or higher-income countries that witness progressive ageing of the population and seriously declining birth rates due to lower than traditional replacement levels. In

<sup>12</sup> Kerwin D. 14 November 2018. ‘Migration and decent work conditions in countries of origin and destination’. De L Rochefoucauld A & Marengi C. M. (Eds.). Rethinking Labour: Ethical Reflections on the Future of Work. The Caritas in Veritate Foundation of Working Papers. “*The City of God in the Palace of Nations*” accessed at [http://drive.google.com/file/d/1E39DuPKgbSGW4\\_rm\\_S68hQ76MHfg4reQ/view](http://drive.google.com/file/d/1E39DuPKgbSGW4_rm_S68hQ76MHfg4reQ/view)

<sup>13</sup> <http://futureofwork-labourafterlaudatosi.net/about-the-project/> - The future of work, Labour after Laudato Si.

<sup>14</sup> <http://futureofwork-labourafterlaudatosi.net/about-the-project/> - The future of work, Labour after Laudato Si.

addition, millions of migrants including refugees are forced to leave their countries of origin due to long-term structural violence; or so-called 'failed states', incapable of controlling violence or of providing basic infrastructure or minimal social protection and services; or due to religious, ethnic, racial, social and political persecution".<sup>15</sup>

Research in this track "aims to study, analyse, and disseminate the labour-related experiences of migrants and refugees, including the drivers of their decision to migrate and other experiences in their countries of origin, transit, destination, and of return to home country (when relevant, safe and voluntary), in the context of *Laudato Si* and other relevant Catholic Church teaching and traditions".<sup>16</sup> Track three is "led by the International Catholic Migration Commission (ICMC), which has worldwide experience in direct support for migrants and refugees, and in advocacy".<sup>17</sup>

## 2.4 DEFINITIONS

The following definitions were utilised in this research:

**Asylum Seeker:** As per the International Organization on Migration (IOM) and UNHCR an asylum seeker is an 'individual who is seeking international protection. In countries with individualized procedures, an asylum seeker is someone whose claim has not yet been finally decided on by the country in which he or she has submitted it. Not every asylum seeker will ultimately be recognized as a refugee, but every recognized refugee is initially an asylum seeker'.<sup>18</sup> The Refugees Act 30 of 1998 defines an asylum seeker as a person who is seeking recognition as a refugee in the Republic of South Africa". In the absence of a permit/visa or other system for low-skilled labour/ economic migrants entering South Africa, the category 'asylum seeker' in South Africa effectively includes labour/ economic migrants. According to the Department of Home Affairs, the "South African system considers all asylum seekers (asylum and economic migrants are presumptive refugees until their claims are adjudicated".<sup>19</sup> As noted elsewhere, this approach is a primary reason for the approximately 90% rejection rate and bottlenecks and inefficiencies in the system.

**Circular migration:** Defined by the IOM as: "The fluid movement of people between countries, including temporary or long-term movement which may be beneficial to all involved, if occurring voluntarily and linked to the labour needs of countries of origin and destination".<sup>20</sup>

**Forced migration:** Defined by the IOM as: "A migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, war, political instability, famine, or development projects)".<sup>21</sup>

**Internal migrants:** South African citizens who migrate from one area in South Africa to another area in South Africa. Internal migrants are excluded from this analysis.

**International migration:** This paper uses the Statistics South Africa definition of international migration where "international migration refers to movement from one country to another and involves the crossing

<sup>15</sup> Kerwin D. 14 November 2018. 'Migration and decent work conditions in countries of origin and destination'. De L Rochefoucauld A & Marengi C. M. (Eds.). *Rethinking Labour: Ethical Reflections on the Future of Work*. The Caritas in Veritate Foundation of Working Papers. "*The City of God in the Palace of Nations*" accessed at [http://drive.google.com/file/d/1E39DuPKgbSGW4\\_rm\\_S68hQ76MHfg4reQ/view](http://drive.google.com/file/d/1E39DuPKgbSGW4_rm_S68hQ76MHfg4reQ/view)

<sup>16</sup> Bird A. B. 14 November 2018. 'Ethical perspectives on the future of work'. De L Rochefoucauld A & Marengi C. M. (Eds.). *Rethinking Labour: Ethical Reflections on the Future of Work*. The Caritas in Veritate Foundation of Working Papers. "*The City of God in the Palace of Nations*" accessed at [http://drive.google.com/file/d/1E39DuPKgbSGW4\\_rm\\_S68hQ76MHfg4reQ/view](http://drive.google.com/file/d/1E39DuPKgbSGW4_rm_S68hQ76MHfg4reQ/view)

<sup>17</sup> <http://futureofwork-labourafterlaudatosi.net/about-the-project/> - The future of work, Labour after *Laudato Si*.

<sup>18</sup> United Nations High Commissioner for Refugees, Master Glossary of Terms (2006) accessed at <https://www.refworld.org/docid/42ce7d444.html> and also see <https://www.iom.int/key-migration-terms>.

<sup>19</sup> Department of Home Affairs. 2017. Asylum trends reports for January to December 2017. Chief Directorate Asylum Seeker Management. Immigration Services.

<sup>20</sup> <https://www.iom.int/key-migration-terms>

<sup>21</sup> <https://www.iom.int/key-migration-terms>

of national borders”<sup>22</sup> Although the definition includes immigration and emigration, this paper addresses only immigration to South Africa. The definition excludes internal migrants.

**International migrants:** As per the definition above, these are immigrants and migrants to South Africa. These may be documented or undocumented/ irregular.

**Irregular migration:** Defined by the IOM as “movement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries, it is entry, stay or work in a country without the necessary authorization or documents required under immigration regulations. From the perspective of the sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the administrative requirements for leaving the country”<sup>23</sup>

**Labour migration:** Labour migration is defined as immigration where employment is the primary purpose of the migration.<sup>24</sup> This report refers to labour migration in its broadest sense and includes those looking for work/ economic opportunities, as well as, those who are employed.

**Migrants:** In this paper, the term ‘migrants’ excludes ‘internal migrants’, but is otherwise used in its broadest sense to include all persons born in and out of South Africa to two parents that are not South African or permanent residents. It is inclusive of all documented or undocumented categories of migrants as per current and former South African legislation.

**Refugees:** A refugee is defined in the Geneva Convention Relating to the Status of Refugees Article 1(a) as “a person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

This definition was adopted and expanded upon with an additional definition as defined by the Organization of African Unity (OAU) “as any person compelled to leave his or her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country or origin or nationality”<sup>25</sup> In South Africa, a refugee is a person who has been granted asylum in terms of the Refugees Act 30 of 1998 for falling within the definition of a refugee which mirrors the above mentioned provisions.

**Spaza Shop:** Spaza shops are small, informal grocery shops that operate in low-income neighbourhoods and supply residents with basic food and household items.<sup>26</sup>

**Undocumented migrants:** This includes individuals who enter or stay with inappropriate, irregular or fraudulent documents, or without any documents, or whose documents have expired, if the expiry makes continued presence irregular.

<sup>22</sup> Statistics South Africa. 2015. Census 2011: Migration Dynamics in South Africa. Report 03-01-79. ISDN 978-0-621-44166-6.

<sup>23</sup> <https://www.iom.int/key-migration-terms>

<sup>24</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>25</sup> <https://www.iom.int/key-migration-terms>

<sup>26</sup> Gastrow V. 2018. ‘Problematizing the Foreign Shop: Justifications for restructuring the migrant spaza sector in South Africa’. SAMP Migration Policy Series 80. South African Migration Programme. International Migration Research Centre. Ontario. Canada.



# 3. METHODOLOGY

The methodology employed was prescribed by SIHMA and was exclusively qualitative. It included the following components.

## 3.1 SITUATIONAL ANALYSIS

The short situational analysis focused on the statistical and descriptive historical data available on the status quo of refugees and migrants (see definition) in South Africa. The situational analysis informed the development of the research instruments and created the framework for subsequent analysis.

## 3.2 LEGISLATIVE REVIEW

A short review of relevant international, national and local legislation, with emphasis on the applicability to the labour-related conditions and experiences of migrant workers/ employment seekers in South Africa, was completed. The legislative review informed the analysis and the recommendations included in this report. The review further ensured that the recommendations are aligned to what is legally and institutionally possible. This step in the methodology also specifically sought to answer the research question about the extent of legal protection afforded to migrants in South Africa (specifically pertaining to their ability to, and conditions of, work). The full review is included as an addendum.

## 3.3 DEVELOPMENT OF RESEARCH INSTRUMENTS

Four research instruments were developed for this assignment. Copies are available on request. These were:

- An in-depth interview (IDI) guide to inform interviews with internal and external stakeholders and subject experts (i.e. not migrants or refugees). The document was thematic, and the themes were aligned to the research objectives set out in the SIHMA TOR for this assignment. The themes were: expected outcomes of the research; drivers of migration; migrant and refugee experiences in their countries of origin; migrant and refugee experiences in transit; migrant and refugee experiences in Cape Town/South Africa; labour-related experiences of migrants and refugees in Cape Town; legislative and legal protection afforded to migrant workers in South Africa and implementation thereof; gendered experiences and implications; and recommendations. Various indicators were included under each theme. These were used to steer discussions to ensure that all necessary aspects were covered, but respondents were given considerable leeway in determining the focus of each discussion.
- A focus group discussion guide utilized to conduct three focus groups. The same focus group guide was used to conduct in-depth one-on-one interviews with migrants (broadly defined and inclusive of refugees and asylum seekers) and employers. The document utilized the same themes as the stakeholder interview guide, but the indicators were developed to elicit the lived experiences (i.e. personalized accounts) of respondents. Deviation from the document was allowed to facilitate the generation of new information.
- A demographic information sheet was administered and completed by all consenting migrants (broadly defined and inclusive of refugees and asylum seekers) participating in the research. This document sought to collect basic demographic info to build a baseline for analysis. It recorded gender, age, documentation status, employment status, employment sector, number of dependents, remittance practices, country of origin, length of stay in South Africa, highest level of education, relationship status, and social networks in South Africa. Given the small sample, this data is merely indicative and cannot be used for cross-tabulated or similar sub-category analysis.
- An informed consent form that complied to best practice standards for ethical applied social research was developed. The consent form was signed by all research participants from vulnerable groups. Internal and external stakeholders (i.e. the subject experts, academics, lawyers and civil soci-

ety representative interviewed) were informed of their rights but were not requested to sign consent forms. The consent form described the purpose and expected outcomes of the study. It set out the possible risks and advantages of participation and it emphasized the various rights of respondents including: the right to decline or cease (at any point) participation; the right not to answer questions; the right to ask questions; the right to see the resultant report; and the right to use a pseudonym. Anonymity was guaranteed.

## 3.4 DATA COLLECTION

### 3.4.1 STAKEHOLDER INTERVIEWS

Seventeen interviews were completed with internal and external stakeholders, subject experts and civil society representatives over the period November 2018 to January 2019. The individual participants are listed below, but to protect anonymity no particular statements are attributed to them in the report itself.

1. Mr. Sergio Carciotto, Associate Director at SIHMA.
2. Ms. Miranda Madikane, Director Scalabrini Centre Cape Town.
3. Fr Filippo Ferraro, Executive Director at SIHMA.
4. Ms. Gahlia Brogneri, Director Adonis Musati Project.
5. Mr. Godfrey Twaodzera, University of Cape Town.
6. Ms. Zoe Rodhe, International Organization for Migration South Africa.
7. Dr. Jinnah Zaheera, African Centre for Migration and Society.
8. Mr. Kudo Vanyoro, African Centre for Migration and Society.
9. Ms. Laura Freeman, ALPS Resilience.
10. Patricia Nyman, South Africa Commercial, Catering and Allied Workers Union (SACCAWU)
11. Ms. Sherylle Dass, Legal Resources Centre.
12. Prof. Robertson Tengeh, Cape Peninsula University of Technology.
13. Dr. Sarah Pugh, Specialist on Migration and Health and Independent Consultant.
14. Prof. Daniel Tevera, University of the Western Cape.
15. Mr. Isaiah Mombilo, Congolese Civil Society of South Africa.
16. Marike Keller, Sonke Gender Justice Migration Policy Specialist
17. Micheline Muzaneza, Sonke Gender Justice Migration Activist.

Some of the subject experts responded in their capacity as subject experts and in their capacity as migrants, but for the purposes of the analysis are counted only as subject experts.

Representatives from the following institutions were approached but declined, were unable, or failed to reply to requests to participate: The Consortium for Refugees and Migrants in South Africa; Refugee Rights Unit Cape Town/ UCT Law Clinic; Doctors Without Borders; Federation of Unions South Africa (FEDUSA); Migrant Workers Union of South Africa (MIWUSA); Additional representatives from the International Organization for Migration; Department of Labour, Cape Town Provincial Office; The Department of Home Affairs, Cape Town Refugee Reception Office; Department of Home Affairs, Cape Town, Immigration Inspection Office; Coordinating Body of Refugee and Migrant Communities; Human

Rights Watch; The Somali Association of South Africa; Africa Unite; Sex Workers Education and Advocacy Taskforce.

It is likely that the time of year negatively affected participation rates (some institutions were already closed or were about to close for the year). Others argued that the sector is over-researched and felt that they had already contributed to many similar research studies. Government representatives were entirely unresponsive.

### 3.4.2 EMPLOYER INTERVIEWS

Interviews were conducted with the following employers: (1) Owner of a plant-hire company in the construction sector active in Johannesburg and Cape Town, and (2) Owner of a franchised pub in Cape Town (hospitality sector).

These two discussions with employers pointed to the need for a larger, statistically representative, study of employers, particularly in the construction industry. The results of such a future study will likely benefit workers and employers in the South African construction industry.

### 3.4.3 'MIGRANT' INTERVIEWS

Face to face interviews were conducted with the following 15 'migrants' as set out below:

1. Male migrant from the DRC currently managing a non-governmental organization supporting Francophone migrants and refugees.
2. Male migrant from DRC working as a teacher.
3. Male migrant from DRC and qualified lawyer, currently unemployed.
4. Male migrant from DRC and qualified journalist, currently self-employed in low-skilled activities.
5. Male migrant from Zimbabwe working as an agricultural economist.
6. Male migrant from DRC and professional soldier, currently unemployed.
7. Male migrant from DRC with degree in chemical engineering, currently working "piece jobs".
8. Male migrant from DRC with post-graduate degree in philosophy, currently working as a security guard.
9. Male migrant from DRC and currently a scholar.
10. Male migrant from DRC and currently a student.
11. Female migrant from the DRC currently working as an activist in a women's rights non-governmental organization.
12. Female migrant from DRC and qualified nurse, currently unemployed.
13. Female migrant from DRC and qualified seamstress, currently unemployed.
14. Female migrant from DRC and qualified seamstress/ factory workers, currently unemployed.
15. Female migrant from Zimbabwe and qualified nurse, working as a taxi driver.

These interviews were conducted in safe and private locations (i.e. most in an office provided by the Congolese Civil Society of South Africa and the Scalabrini Centre in Cape Town, the remainder took place in participants' homes). These were one-on-one discussions that lasted, on average, 90 minutes. Respondents were candid and wanted to be heard. Many respondents came to the interviews prepared with photo-

graphs, audio recordings and other documentary evidence. All participants signed the informed consent forms described above. The interviews took place in English and French.

Two challenges were experienced during this phase of the data collection. The first pertains to the traumatic content of the discussions. Although all respondents positively assessed the experience of participating in the interviews, with many describing the interviews/ discussions as cathartic or therapeutic, and although the interviewers had extensive experience conducting interviews with victims of trauma and abuse, respondents were often emotionally overwhelmed or distressed. It is recommended that future studies involve mental health professionals to assist participants post-interview.

The second challenge derived from the justifiable request from the Scalabrini Centre in Cape Town who provided us with the office space for many of the interviews, to provide the participants interviewed on their premises with “incentives”. The “incentives” took the form of a “cash refund for travel costs incurred”. Given the destitution of the research participants interviewed at the Centre (and off-site thereafter), it was clear that these “reimbursements” were necessary. The respondents did not have the resources available to pay for transport to and from the centre. However, it is also likely that the provision of the incentives/ reimbursements biased the selection process (i.e. the most desperate or unemployed were likely to volunteer) and encouraged participation for reasons other than information sharing (i.e. not best practice in research). It was clear that once potential participants thought that there would be “payment for participation” they felt encouraged to participate and a line of potential interviewees formed. Some individuals left their children unattended, left work, or came straight after a 12-hour work-shift to participate in the study. For those reasons, it was decided not to turn anyone away. Consequently, one interviewer completed 12 interviews, lasting on average 90 minutes each, in a 19-hour day and night marathon session. It is possible that the quality of the last few interviews could have been compromised by interviewer fatigue.

### 3.4.4 FOCUS GROUPS

Three focus groups were conducted. These are described below.

**Focus Group 1: Domestic workers from Lesotho:** The first focus group was conducted in a shared living room at a hostel in Mofolo Soweto, Sunday 2 December 2018. The hostel is home to approximately 130 female migrants from Lesotho, all of whom are employed/ or seeking employment as domestic workers in South Africa. Their first point of arrival/ accommodation is the agency based in Soweto, from there they are placed/ recruited by employers throughout the country. The hostel/ agency was identified following a community scan and discussions with domestic workers with whom the research team had established relationships during a previous assignment. Permission for access was obtained from the agency in question.

This focus group was conducted by two senior facilitators and attended by 12 women from Lesotho, all of whom are employed as domestic workers in South Africa. The number of respondents was higher than the recommended number for a focus group and the room was exceedingly crowded, but respondents self-selected for participation and the informed decision was made to accommodate them. All respondents signed informed consent forms. The forms were translated into SeSotho.

Respondents were asked to complete the basic demographic and socio-economic data sheet, but declined. The content of the document was, however, covered during the subsequent discussion.

The discussion took place in SeSotho (mainly), English and Afrikaans. Translations were made in real time to ensure that all participants could follow the discussions. The session lasted 90 minutes. Respondents were candid and responsive.

No incentives for participation were provided to ensure that there was no breach of best practice protocols for ethical social research, but lunch was served to participants following the discussion.

**Focus Group 2: Owners of SMMEs and other self-employed migrants and refugees:** Recruitment for the second focus group was conducted by the Scalabrini Centre in Cape Town. The Centre also provided the venue and the catering. Participants for this focus group were selected on the basis of employment status (i.e. self-employed). Given the importance of the informal sector in the survival of migrants and

refugees, owners of SMMEs were recruited. A quota was set for female participants.

Participants included:

- A female migrant from Somalia and owner of a catering business.
- A female migrant from the DRC and owner of a sewing business.
- A female migrant from the DRC and owner for a hairdressing & beauty salon.
- A female migrant from Zimbabwe and owner of a childcare centre.
- A male migrant from the DRC and owner of a construction/ repairs company/ handyman/ plumbing company.
- A male migrant from the DRC and owner of tiling/ woodwork company/ electrical/ appliance repairs/ upholstery etc. company.

The group was facilitated by a senior facilitator and was conducted primarily in English. Some of the discussion took place in French. The session lasted approximately two hours and occurred on 8 December 2018.

Ten participants were expected to attend the session but only six arrived. The primary challenge encountered during this focus group was the domineering behaviour of male participants, who repeatedly interrupted female participants or talked over them. This had to be managed on a continual basis. Female participants were also hesitant to discuss their experiences of sexual abuse in the mixed group and recounted these events in person after the completion of the focus group. All respondents completed the basic demographic and socio-economic data sheet.

In the case of this focus group, there was no evidence that the payment of incentives affected the selection process or participant's decisions to participate as they were not aware that they would receive it.

**Focus Group 3: Migrants and refugees employed in the hospitality and construction sectors:** The third focus group took place on 8 December 2018, also at the Scalabrini Centre in Cape Town, which again took on the responsibility for the recruitment, venue and catering.

The session lasted an hour and was attended by six of the expected ten participants. The session was run by a senior facilitator and was conducted in English.

Participants who were employed in the hospitality and construction sectors (two of the key sectors employing migrants and refugees in Cape Town) were recruited. These two sectors are also among those on which the least information is available. The following six individuals participated:

- A female migrant from Zimbabwe, employed as a barista.
- A female migrant from DRC, who previously worked as a waitress, but was unemployed at the time of the interview.
- A female migrant from the DRC, employed part-time as a waitress.
- A male migrant from the DRC employed part-time in the construction and hospitality industry.
- A male migrant from Zimbabwe, employed as a barista.
- A male migrant from the DRC working in the construction industry.

All respondents completed the basic demographic and socio-economic data sheet. The participants in this session were mostly younger than 35. This may explain why male dominance was not encountered during this session. Participants received an incentive (in the form of reimbursement for travel costs) for their participation and lunch was served. There was no evidence that the incentive affected the selection

process or participant's decisions to participate as participants were unaware that they would receive it.

### 3.5 TOTAL SAMPLE OF RESPONDENTS INTERVIEWED

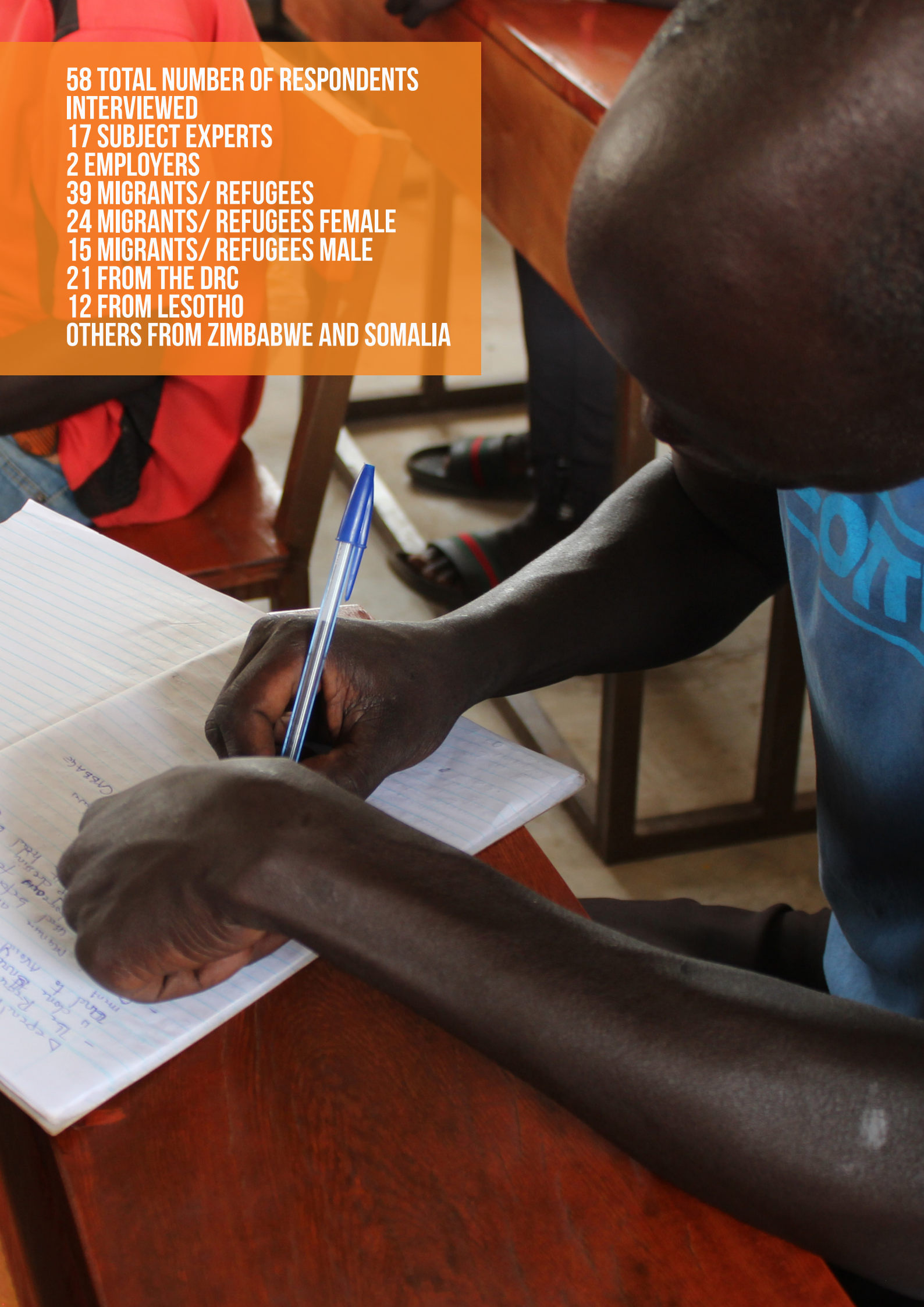
The total number of respondents interviewed for this qualitative study is 58. Of these, 17 were subject experts, two were employers and 39 were migrants/ refugees. The majority (24) of the migrants/ refugees interviewed were female, while the remaining 15 were male. The sample was biased towards the DRC (21 participants) and Lesotho (12) because of the convenience sampling strategy utilized.

### 3.6 LIMITATIONS OF THE RESEARCH METHODOLOGY

The following limitations and considerations apply:

- It is a qualitative study and although the sample size is substantial (58) it is not of sufficient size to generate representative data. The findings are essentially anecdotal/ indicative and should not be considered sufficient to inform policy or intervention development. However, the findings align with those of many others in the field, which indicates internal validity and reliability. The sample is also larger than for many often-quoted studies conducted by academic bodies in the sector.
- The time-period for data collection, November 2018 to January 2019 includes a holiday period in South Africa. This likely contributed to the unavailability of some participants (and in particular representatives of government departments).
- The sample size was determined by the resources available for this research. The result is a bias in selection and the omission of key groups of relevant participants such as greater numbers of employers, any employees in the agricultural or mining sectors, or migrants from Malawi, Angola, Eswatini and other key countries of origin.
- In Cape Town, convenience and snow-ball sampling was used to recruit/ identify respondents. This introduced the expected biases to the composition of the sample. For example, the fact that between a quarter to a third of respondents were recruited through the Congolese Civil Society of South Africa also introduced a "country of origin" bias to the sample.
- The convenience and snow-ball sampling method used in Cape Town resulted in the majority of migrants interviewed being forced migrants which is not consistent with national relative proportions of migrants.
- The payment of incentives, albeit justified in the situation, is not a best practice in applied social research. It promotes, inter alia, the social desirability bias in responses. It also encourages those who are most destitute or unemployed to participate introducing sampling biases.
- The unwillingness of government representatives to participate in the research is a key shortcoming of the process and likely introduces a critical bias in content.
- Mixed-gender focus groups run the risk of silencing the female voice and are not recommended.
- Debriefing sessions run by mental health professionals should be provided to research participants discussing traumatic lived events.
- Statistics South Africa in the 2011 Census recorded numbers of foreign born persons which provides an approximate figure for international migrants and these figures are regularly referred to in the study. The limitation of this figure is that as South Africa is a Jus Sanguinis country for determining nationality so persons born to foreign nationals in South Africa are also considered international migrants and persons born to one or more South African nationals or South African permanent residents outside of South Africa are South African nationals and thus not international migrants. This impacts on the accuracy of the figures of international migrants in certain sections of this study.

**58 TOTAL NUMBER OF RESPONDENTS  
INTERVIEWED  
17 SUBJECT EXPERTS  
2 EMPLOYERS  
39 MIGRANTS/ REFUGEES  
24 MIGRANTS/ REFUGEES FEMALE  
15 MIGRANTS/ REFUGEES MALE  
21 FROM THE DRC  
12 FROM LESOTHO  
OTHERS FROM ZIMBABWE AND SOMALIA**



# 4. SITUATIONAL ANALYSIS

## 4.1 A GLOBAL SNAPSHOT OF MIGRATION

International migration is a large-scale, growing, global phenomenon. In 2013, the United Nations estimated that the international migrant population stood at 232 million, of whom 96 million resided in developing countries.<sup>27</sup> By 2017, the estimate was 258 million and indications are that the number of international migrants will continue to increase.<sup>28</sup> Drivers of future migration include: demographic disparities between developing and developed countries, and the possible effect of the aging population in developed countries, compared to the working-age-dominant populations of the developing world (and Africa in particular); urbanization and the inability of governments to provide the resources and services required; and globalization and technology that facilitates cross-border social, economic and political ties.<sup>29</sup>

The United Nations Refugee Agency (UNHCR) states on its website (accessed in March 2019) that there are 68.5 million forcibly displaced people worldwide. Of these, 40 million are internally displaced, 25.4 million are refugees and 3.1 million are asylum seekers. Further, 85% of the world's displaced people live in developing countries.<sup>30</sup> There is also no indication that the number of individuals subject to forced migration will reduce given the current global prevalence of war, civil conflict, gross poverty, the effects of climate change and the prevalence of fragile or captured states.<sup>31</sup>

According to the ILO, the most vulnerable sub-categories of migrants include female migrant workers (especially those involved in domestic service), temporary and seasonal migrant workers, children, undocumented migrants, and victims of human trafficking.<sup>32</sup>

## 4.2 AFRICAN AND SUB-SAHARAN MIGRATION

As noted, most of the world's displaced people<sup>33</sup> are in, or from, developing countries. According to the World Bank, 30.6 million migrants were from African countries in 2011, and approximately half of these individuals (14 million) remained in Africa.<sup>34</sup> According to the International Labour Organisation, 30 million Africans moved out of their countries of origin in 2013, of these, 15 million (50%), remained in Africa.<sup>35</sup>

Approximately 16% of the total population of international migrants in Africa are refugees (although this figure is subject to change as political situations change in individual countries).<sup>36</sup> There is consensus in the

<sup>27</sup> Statistics South Africa. 2015. Census 2011: Migration Dynamics in South Africa. Report 03-01-79. ISDN 978-0-621-44166-6.

<sup>28</sup> Kerwin D. 14 November 2018. 'Migration and decent work conditions in countries of origin and destination'. De L Rochefoucauld A & Marengi C. M. (Eds.). Rethinking Labour: Ethical Reflections on the Future of Work. The Caritas in Veritate Foundation of Working Papers. "*The City of God in the Palace of Nations*" accessed at [http://drive.google.com/file/d/1E39DuPKgbSGW4\\_rm\\_S68hQ76MHfg4reQ/view](http://drive.google.com/file/d/1E39DuPKgbSGW4_rm_S68hQ76MHfg4reQ/view).

<sup>29</sup> Ibid

<sup>30</sup> <http://www.unhcr.org/>

<sup>31</sup> Kerwin D. 14 November 2018. 'Migration and decent work conditions in countries of origin and destination'. De L Rochefoucauld A & Marengi C. M. (Eds.). Rethinking Labour: Ethical Reflections on the Future of Work. The Caritas in Veritate Foundation of Working Papers. "*The City of God in the Palace of Nations*" accessed at [http://drive.google.com/file/d/1E39DuPKgbSGW4\\_rm\\_S68hQ76MHfg4reQ/view](http://drive.google.com/file/d/1E39DuPKgbSGW4_rm_S68hQ76MHfg4reQ/view).

<sup>32</sup> Mulugeta F. Dinbabo F. & Carciotto S. September 2015. 'International migration in sub-Saharan Africa: A call for a global research agenda'. Paper presented at HDCA conference titled Capabilities on the Move: Mobility and aspirations. Washington D.C. USA.

<sup>33</sup> As noted, displaced persons include political refugees, as well as, persons displaced by environmental, economic or other crises.

<sup>34</sup> Broussard N.H. 30 January 2018. 'Immigration and the labour market outcomes of natives in developing countries: A case study of South Africa'. Economic Development and Cultural Change. University of Chicago.

<sup>35</sup> International Labour Organization. The Joint Labour Migration Program for South Africa. [www.ilo.org](http://www.ilo.org)

<sup>36</sup> Mulugeta F. Dinbabo F. & Carciotto S. September 2015. 'International migration in sub-Saharan Africa: A call for a global research agenda'. Paper presented at HDCA conference titled Capabilities on the Move: Mobility and aspirations. Washington D.C. USA.



literature that most of the remaining migrants are labour migrants (i.e. migrants in search of economic/income-generating opportunities).

The sub-Saharan population is, and historically has been, a comparatively mobile population. World Bank data suggests that migration in the region is 65% intra-regional.<sup>37</sup> Migration flows are uneven and are to a large extent determined by changing levels of economic development and political stability. Until 2000, for example, Zimbabwe was a major destination for migrants but has since become one of the if not the largest source country.<sup>38</sup> South Africa's position as a major destination was acquired only in the post-1994 democratic period. Other changes include an arguable decline in "forced migration" in the preceding two decades and an increase in migration for economic reasons.<sup>39</sup> The extent to which migration for economic reasons is not also "forced" is debatable. Economic conditions in post 2008 Zimbabwe are a case in point.

Migration in the region is mostly overland, and characterized by temporary and circular migration with "migrants retaining their ties with home countries and communities" through relatively frequent visits to home countries, and "through formal and informal transfers of cash and goods in the form of remittances".<sup>40</sup> A household survey conducted by the Southern African Migration Programme (SAMP) found regular patterns of home visits, with 90% of the 4 647 migrants surveyed returning home at least once per year, 67% several times a year, and 30% once a month. The research for this assignment found similar visiting patterns among female migrant workers from Lesotho, but not among Congolese refugees and asylum seekers.

Various authors argue that an increasing number of international migrants in the region are female, and that the average age of a regional migrant is decreasing.<sup>41</sup> However, this situational review suggests that there is insufficient evidence to support the argument for the "feminization" of international migration, and some data point in a refutational direction. Although the number of persons applying for asylum status does not equal the number of persons entering or residing in the country, Department of Home Affairs statistics show a trend of male prevalence for the period 1998 to 2017, with 17 892 male applicants in 2017, compared to 6 282 female applicants.<sup>42</sup> Similarly, the dominant age group for international migrants has been the category 19 to 35 for the period 1998 to 2017.<sup>43</sup>

The region has reportedly also seen an increase in undocumented/ irregular/ informal migration. The majority of the participants in this research study were undocumented/ irregular. In many cases their irregular/ undocumented status was forced upon them (see section on findings).

## 4.3 A HISTORY OF MIGRATION IN SOUTH AFRICA

Pre-1994, immigrants/ migrants to South Africa were either from developed countries, or were brought into the country from neighbouring countries such as Lesotho, Malawi, Mozambique, Zimbabwe and Eswatini, as labourers to be employed and exploited primarily in the mining and agricultural sectors. In this period, migration to South Africa was regulated by the racist Aliens Control Act of 1991. During the 1960s and 70s, white immigrants were encouraged to immigrate to South Africa, while any African immigration would have been unlikely given the laws and apparatus of the apartheid state.

Not surprisingly the number of migrants from SADC and the rest of Africa increased in the post-apartheid period. Migrants were arguably attracted to South Africa because of its economic powerhouse status

<sup>37</sup> Mulugeta F. Dinbabo F. & Carciotto S. September 2015. 'International migration in sub-Saharan Africa: A call for a global research agenda'. Paper presented at HDCA conference titled Capabilities on the Move: Mobility and aspirations. Washington D.C. USA.

<sup>38</sup> Crush J., Dodson B., Williams V., Tevera. D. 2017. 'Harnessing migration for inclusive growth and development in Southern Africa'. Special Report. The Southern African Migration Program and UK Aid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Department of Home Affairs. 2017. Asylum trends reports for January to December 2017. Chief Directorate Asylum Seeker Management. Immigration Services.

<sup>43</sup> Ibid. This conclusion may be inaccurate as the number of minors under the age of 18 is not properly reflected within the Department of Home Affairs figures as most applications for asylum are only possible once a person reaches majority.

in the region, and because of its progressive human-rights framework. This progressivity is exemplified by the Bill of Rights in the Constitution (which includes socio-economic rights as human rights) and the 1998 Refugees Act (which gave refugees the right to work or study in the country). The consensus argument in the literature is that 1994 constituted a turning point, during which “labour migration” in the region “sharply shifted” from “demand driven influx control” to “supply driven diverse migration flows” characterized by “undocumented influx”.<sup>44</sup> Many have argued that the results of this change include: an increase in labour market competition; an increase in exploitation of workers; a decrease in employment opportunities particularly for South Africans, and a decrease in income for all workers.<sup>45</sup>

Southern African (labour) migration is closely tied to the mining industry. Until approximately 2000, workers from primarily neighbouring countries constituted about 50% of goldmine employees (i.e. 47% in 1990, 59% in 1998, 38% in 2006).<sup>46</sup> Numbers decreased following the Immigration Act of 2002, which introduced cumbersome corporate permits and the 2003 Mining Charter, which included the principle of phasing out “foreign” workers through the non-renewal of contracts.<sup>47</sup> By 2012, 75% of workers in the mining sector were South African according to the Employment Bureau of Africa (TEBA), and by 2013 only 23% of mineworkers were not South African.<sup>48</sup>

## 4.4 SOUTH AFRICA’S MIGRANT POPULATION

This section of the report provides an overview of the estimated number, origin, profile and documented status of migrants and refugees in South Africa. South Africa is a primary destination particularly for migrants from the Southern African region, but also for migrants of all document statuses/ types (i.e. tourists, students, business people, economic opportunity seekers, political refugees, displaced persons etc.). In fact, South Africa was ranked as the 6<sup>th</sup> highest migrant-receiving country globally in 2011, inter alia, receiving more migrants than Canada, the United Kingdom, and Australia.<sup>49</sup> In 2010, the World Bank reported that South Africa was the largest destination country for African migrants, following France and Cote d’Ivoire.<sup>50</sup>

### 4.4.1 NUMBER OF INTERNATIONAL MIGRANTS AND REFUGEES IN SOUTH AFRICA

Estimates on the number of migrants and refugees in South Africa show a general increase in documented and undocumented numbers. In 1990, the total number of legal **entries into South Africa stood at one million. This increased to 5.1 million in 1996 and 8.5 million in 2011.**<sup>51</sup> This does not account for undocumented entries, which research suggests accounts for a significant percentage of total migration.

Entering a country does not, however, equate with staying in a country (i.e. the number of entries recorded, minus the number of departures recorded, will give a more accurate indication of the number of migrants resident in South Africa, albeit still excluding undocumented entries). For example, it is estimat-

<sup>44</sup> Gallo-Mosala S. November 2008. ‘Introduction’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

<sup>45</sup> Ibid.

<sup>46</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>47</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris. Crush J., Dodson B., Williams V., Tevera. D. 2017. ‘Harnessing migration for inclusive growth and development in Southern Africa’. Special Report. The Southern African Migration Program and UK Aid.

<sup>48</sup> Crush J., Dodson B., Williams V., Tevera. D. 2017. ‘Harnessing migration for inclusive growth and development in Southern Africa’. Special Report. The Southern African Migration Program and UK Aid.

<sup>49</sup> Statistics South Africa. 2015. Census 2011: Migration Dynamics in South Africa. Report 03-01-79. ISDN 978-0-621-44166-6.

<sup>50</sup> Broussard N.H. 30 January 2018. ‘Immigration and the labour market outcomes of natives in developing countries: A case study of South Africa’. Economic Development and Cultural Change. University of Chicago.

<sup>51</sup> Dodson B & Crush J. October 2015. ‘Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region’. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland

ed that annual net immigration into South Africa for the period 2000 to 2010 was 247 000 per annum.<sup>52</sup> According to the United Nations, the respective figure for the period 1990 to 2000 was estimated at (on average) 96 000 per annum.<sup>53</sup>

Some of the data available on the number of foreign-born persons residing in South Africa is unreliable and/ or contradictory. Estimates range from 1.6 million by the Statistics South Africa Community survey in 2016, to 5 million by key media sources (e.g. New York Times) in 2017. The 2011 national census estimated that the number of foreign-born persons **residing in South Africa amounted to just under 2.2 million (or approximately 4% of the total population at the time)**.<sup>54</sup> This is inclusive of at least some of the undocumented population. The 2012 Statistics South African General Household Survey recorded similar figures. As noted, the 2016 Statistics South Africa Community Survey recorded 1.6 million foreign-born residents, but the agency itself cautioned against the finding and embarked upon a process to re-analyse the data. In 2015, the United Nations estimated that there were three million foreign-born residents in South Africa, but academics interviewed questioned UN methodologies. The consensus position among subject experts interviewed was that there are between one and three million foreign-born residents in South Africa, and that the most reliable statistics available are those from the 2011 census.

## 4.4.2 COUNTRIES OF ORIGIN/ SOURCE COUNTRIES FOR MIGRANTS AND REFUGEES IN SOUTH AFRICA

Determining countries of origin is time and type dependent. In other words, the dominant countries of origin will change as economic and political conditions on the continent change, and similarly, the likelihood that a migrant is documented/ undocumented when leaving their country of origin will be influenced by conditions in their countries of origin and the drivers of their migration.

In 2011, Statistics South Africa estimated that 75.3% of foreign-born persons resident in South Africa were from Africa (75.3%), of which 68% were from the SADC region, of which 45.5% were from Zimbabwe.<sup>55</sup> Furthermore, 8.2% were from Europe, 4.7% from Asia and 11% from unspecified countries of origin. The 68% from SADC comprised the following percentage per country of origin: 45.5% from Zimbabwe, 26.6% from Mozambique, 10.9% from Lesotho, 5.9% from Malawi, 1.7% from the Democratic Republic of Congo, 0.8% from Botswana, and 0.7% from Angola.<sup>56</sup>

According to the IOM, the number of migrants from the Horn of Africa to South Africa, particularly from Ethiopia and Somalia, increased post 2010.<sup>57</sup> This trend is also evident in 2017 asylum application statistics provided by the Department of Home Affairs.

Statistics from 2016 suggest an increase in the Africanization and the regionalization of migration to South Africa. In 2016, it was estimated that up to 90% of all migrants in South Africa were from the African continent (up from 75.3% in 2011).<sup>58</sup> Of these, an estimated 85% were from SADC countries (up from 68% in 2011 and 54% in 1994).<sup>59</sup> The 2016 data suggests a proportional decline in the number of migrants from Zimbabwe and developed countries, and an increase of migrants from the Democratic Republic of Congo. In 2016, Statistics South Africa provided the following breakdown of migrants presented in terms of percentage by country of origin: 39.6% from Zimbabwe, 20.2% from Mozambique, 11.1% from Lesotho, 5.4% from Malawi, 3.9% from the United Kingdom, 2.6% from Eswatini, 2.2% from the Democratic Republic of Congo, 2.1% from Namibia, 2.1% from Nigeria, 1.7% from India, 1.5% from Ethiopia, 1.3% from Zambia, 1% from Germany, 0.9% from Bangladesh, 0.8% from Pakistan, 0.8% from Somalia, 0.7%

<sup>52</sup> Statistics South Africa. 2015. Census 2011: Migration Dynamics in South Africa. Report 03-01-79. ISDN 978-0-621-44166-6

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Statistics South Africa. 2015. Census 2011: Migration Dynamics in South Africa. Report 03-01-79. ISDN 978-0-621-44166-6.

<sup>57</sup> Ibid.

<sup>58</sup> Mbiyozo A.N. 25 October 2018. 'Aligning South Africa's migration policies with its African visions'. Research Policy Brief. Institute for Security Studies.

<sup>59</sup> Ibid.

from Botswana, 0.7% from Congo, 0.7% from Portugal, and 0.6% from Ghana.<sup>60</sup>

Department of Home Affairs data for 2016 and 2017 demonstrate some changes in the countries of origin of asylum seekers. In 2016, the “top six” countries of origin for asylum seekers were Zimbabwe (7964), the Democratic Republic of Congo (5293), Ethiopia (4754), Nigeria (3276), Bangladesh (2834), Somalia (1643), and Malawi (1642). By 2017, Pakistan was on the list and Malawi not. In 2017, in rank order the countries of origin for asylum seekers were the DRC (4849), Zimbabwe (2927), Bangladesh (2926), Ethiopia (2871), Somalia (1932), Pakistan (1766) and Nigeria (1506).<sup>61</sup> Applicants were almost exclusively from Africa (18 649) and Asia (5516). Only 9 applications (in total) were received from asylum seekers from Europe, the Americas and the Caribbean.<sup>62</sup>

These changes should not be interpreted as trends. As noted, they reflect changing socio-economic and political conditions in countries of origin rather than factors inherent to South Africa.

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<sup>60</sup> Ibid.

<sup>61</sup> Department of Home Affairs. 2017. Asylum trends reports for January to December 2017. Chief Directorate Asylum Seeker Management. Immigration Services.

<sup>62</sup> Ibid.

### 4.4.3 DOCUMENTARY STATUS OF MIGRANTS AND REFUGEES IN SOUTH AFRICA

The exact number of **undocumented migrants** is unknown, but it is estimated that there were two million undocumented migrants in South Africa.<sup>63</sup> The Department of Home Affairs claimed in the White Paper that 15.6 million foreign arrivals were recorded in 2015, compared to 14.2 million departures, meaning 1.4 million people remained in South Africa.<sup>64</sup> No data is available on the documented or undocumented status of the 1.4 million, but it stands to reason that undocumented migrants constitute a large component. In fact, academic and research consensus is that informal/ irregular/ undocumented migration to South Africa (mostly from the SADC region, and mostly of low-skilled migrants) is increasing.<sup>65</sup>

There have been a few amnesties/ regularization processes for undocumented/ irregular or other migrants over the preceding two decades. In 1995, the South African government issued an amnesty for mine-workers (primarily from the SADC region) which gave permanent residence to approximately 51 000 mineworkers. Similar processes followed for SADC nationals in 1996, resulting in approximately 124 000 permanent residency permits, for Mozambicans in 1999/2000 resulting in approximately 82 000 amnesty grants, and for Angolan refugees through the Angolan Cessation Project leading to 2000 permanent residency permits. Following the 2007/8 crises in Zimbabwe and the influx of migrants and asylum seekers, a special dispensation was granted for Zimbabweans in 2009/10 in terms of which 242 731 permits were issued. A regularization process for Basotho people commenced in 2016, but uptake was comparatively low (48,000 applications were approved with far less applications than the 400,000 that were expected).<sup>66</sup> If the results from the focus group with Basotho women completed for this research is indicative, the low uptake resulted from two factors. First, ineffective information dissemination. None of the focus group respondents, nor the agency that facilitates their movement and employment had heard of formalization process. Second, inappropriate targeting. None of the focus group participants would have applied because their cross-border movement is currently not impeded, and they fear retribution or change if they increase their visibility.

Statistics for **refugees and asylum seekers** are possibly more accurate given the existence of an extensive (albeit flawed) documentation processes. In 2013, over 230 000 asylum seekers were awaiting a refugee status determination, one of the highest application rates in the world.<sup>67</sup>

The figures for asylum application per year are 222 000 in 2009<sup>68</sup>, 80 000 in 2012, 70 000 in 2013, 62 159 in 2015, 35 377 in 2016, and 24 174 in 2017.<sup>69</sup> Some authors have interpreted this as a decline in applications per year, but the time-frame they consider is too short to make valid inferences. For the period 1998 to 2017 (with due notice of the limitations of DHA data management), it is clear that the number of applications peaked in 2008 and 2009 (when rates were double or triple all other years in the series), but that application trends are otherwise stable. For example, 31 592 applications in 1999 compared to 24 174 applications in 2017. The spike in 2008/9 correlates with crisis in Zimbabwe and the subsequent amnesty process.

Applications, however, is only one indicator of the number of documented and undocumented migrants and refugees in the country. Another indicator is the number of people who are granted refugee status at

<sup>63</sup> Maunganidze O.A. 24 October 2018. 'The "illegal migrant" red herring'. Institute for Security Studies. Pretoria. South Africa

<sup>64</sup> Mbiyozo A.N. 25 October 2018. 'Aligning South Africa's migration policies with its African visions'. Research Policy Brief. Institute for Security Studies.

<sup>65</sup> Crush J., Dodson B., Williams V., Tevera. D. 2017. 'Harnessing migration for inclusive growth and development in Southern Africa'. Special Report. The Southern African Migration Program and UK Aid.

<sup>66</sup> OECD/ILO. 2018. 'How immigrants contribute to South Africa's economy'. OECD Publishing. Paris. Crush J., Dodson B., Williams V., Tevera. D. 2017. 'Harnessing migration for inclusive growth and development in Southern Africa'. Special Report. The Southern African Migration Program and UK Aid.

<sup>67</sup> Dodson B & Crush J. October 2015. 'Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region'. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.

<sup>68</sup> Ibid.

<sup>69</sup> Department of Home Affairs. 2017. Asylum trends reports for January to December 2017. Chief Directorate Asylum Seeker Management. Immigration Services.

the end of the adjudication process. In 2000, 15 063 persons were granted refugee status. The respective figure for 2012 was 65 210.<sup>70</sup> In 2017, only 2267 cases were approved.<sup>71</sup>

The data also shows, that even to an estimated 97 000 refugees.<sup>72</sup> Other categories of migrants include permanent residents, those with temporary residence visas and work permits, and foreign workers or labour migrants.

## 4.4.4 SOCIO-ECONOMIC PROFILE OF MIGRANTS AND REFUGEES IN SOUTH AFRICA

In 2011, Statistics South Africa estimated that 60% of foreign-born persons in South Africa were male. In 1990, 62% were male. As noted above, many authors<sup>73</sup> refer to the feminization of migration to South Africa, but these deductions are debatable given the inaccuracies in available data.

In 2011, an estimated 50% of migrants were household heads (i.e. had dependents to support). Of these, 27.3% were female heads of households.

South Africa's migrant population is comparatively young, and according to the UNHCR, South Africa hosts a high number of young people from the rest of sub-Saharan Africa.<sup>74</sup> Approximately 85.3% fell within what is defined as the "economically active" age group. The breakdown by age group in rank order was 3.5% under five, 4.8% between 5 and 14, 18.4% between 15 and 24, 34.3% between 25 and 34, and 17.5% between 35 and 44.<sup>75</sup>

Concerning the distribution by "race" group, Statistics South Africa records that in 2011, 71.6% of migrants were "black Africans", while "whites", "Asians" and so-called "coloureds" accounted for the remainder.<sup>76</sup>

Migrants and refugees (as per data from the 2011 Census) settle in the more urbanized and economically developed provinces of South Africa. The Statistics South Africa breakdown per province for foreign-born persons resident in South Africa was: 52% in Gauteng, 12% in the Western Cape, 8% in KwaZulu-Natal, 7% in Mpumalanga, 7% in Limpopo, 7% in North West, 3% in the Free State, 3% in the Eastern Cape, and 1% in the Northern Cape. There is a "racial" component to this, in terms of which "black Africans" are most likely to settle in Gauteng and less likely to settle in the Western Cape than some other provinces (i.e. 55% in Gauteng, 9% in Limpopo, 8% in North West, 8% in Mpumalanga, and 7.3% in the Western Cape). The proportionately high numbers in Limpopo, North West, and Mpumalanga may be for cultural, linguistic or proximity to country of origin reasons and/or be a reflection of the high number of migrants from the SADC region employed on farms and mines in the relevant provinces.<sup>77</sup> By contrast, 45.7%, 24.5% and 14.0% of "white" migrants settled in Gauteng, the Western Cape and KwaZulu-Natal. This is likely a reflection of their levels of education and resources.

<sup>70</sup> Dodson B & Crush J. October 2015. 'Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region'. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.

<sup>71</sup> Department of Home Affairs. 2017. Asylum trends reports for January to December 2017. Chief Directorate Asylum Seeker Management. Immigration Services.

<sup>72</sup> Broussard N.H. 30 January 2018. 'Immigration and the labour market outcomes of natives in developing countries: A case study of South Africa'. Economic Development and Cultural Change. University of Chicago

<sup>73</sup> For example, the OECD, the United Nations and Crush J., Dodson B., Williams V., Tevera. D. 2017. 'Harnessing migration for inclusive growth and development in Southern Africa'. Special Report. The Southern African Migration Program and UK Aid.

<sup>74</sup> Statistics South Africa. 2015. Census 2011: Migration Dynamics in South Africa. Report 03-01-79. ISDN 978-0-621-44166-6.

<sup>75</sup> Ibid.

<sup>76</sup> Statistics South Africa. 2015. Census 2011: Migration Dynamics in South Africa. Report 03-01-79. ISDN 978-0-621-44166-6.

<sup>77</sup> Ibid.

Generalizations should be avoided given the lack of homogeneity in the migrant and refugee population, but many migrants and refugees are highly educated and bring much needed skills to South Africa. The breakdown presented by Statistics South Africa based on the 2011 census is as follows: 16% of foreign-born persons had a tertiary qualification (migrants from North America, Latin America and Europe were over represented in this group – only 25% of Africans had a tertiary education compared to 62% of North Americans), 23% had completed secondary education, 39% had some secondary education, 18.7% had completed primary education, and 7% had no schooling. Only 10% of migrants from the SDAC region had tertiary qualifications (10.7% of women and 9.5% of men). With regard to SADC, the statistical differences are too small to conclude that female migrants from SADC are more educated than male migrants from SADC. However, the difference between the percentage of female migrants from other African countries with a tertiary education (30.3%), compared to men 23.9% is statistically significant.<sup>78</sup> There are educational differences by country of origin with 37.7% of Congolese migrants having tertiary education, compared to 20.7% from Zimbabwe, and 20.7% from other nationalities.<sup>79</sup>

The table below represents the education data from the 2012 Quarterly Labour Force Survey. As such it refers to the educational levels of the working age population/ labour force and not to overall population figures. This data suggests that foreign born workers are more likely to have no education, are on par with South Africans as far as primary education is concerned, are less likely to have completed secondary education, and are on par regarding tertiary education.

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<sup>78</sup> The figures presented are from Statistics South Africa Census 2011, but the inferences are not.

<sup>79</sup> Polzer T. November 2008. 'Migrant employment in Africa: New data from the Migrant Monitoring Project'. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town

Table 1: Level of education in labour force by place of birth<sup>80</sup>

	FOREIGN-BORN WORKERS	SOUTH AFRICANS WHO HAVE MIGRATED INTERNALLY	SOUTH AFRICANS WHO HAVE NOT MIGRATED INTERNALLY
NO-SCHOOLING	6%	2%	4%
INCOMPLETE PRIMARY	8%	7%	10%
PRIMARY COMPLETE	6%	5%	6%
INCOMPLETE SECONDARY	39%	39%	47%
SECONDARY COMPLETE	24%	29%	25%
TERTIARY EDUCATION	13%	17%	9%

Studies have shown that 28.7% of the migrants who seek assistance from NGOs have tertiary qualifications.<sup>81</sup> A 2006 survey of migrants in Johannesburg found that migrants were more likely (13.6%) to hold a tertiary qualification than their South African counterparts. They were also three times (2.9%) more likely to have post-graduate degrees than South Africans (1%).<sup>82</sup>

The skills and education that migrants bring to South Africa are not being optimally utilized. Although 1 in 10 of the migrants surveyed in Johannesburg in 2006 had worked as a doctor, nurse, lawyer or teacher in their country of origin, none were working in these professions in South Africa.<sup>83</sup>

## 4.5 PROFILE OF MIGRANTS AND REFUGEES IN THE SOUTH AFRICAN LABOUR FORCE

Whilst the previous section sought to describe the socio-economic and related profile of migrants and refugees in general, this section focusses on the foreign-born contingent of the South African labour force.

### 4.5.1 PREVALENCE

In 2011, South Africa's working age population stood at 35.4 million people and the labour force at 22 million.<sup>84</sup> According to Statistics South Africa's Quarterly Labour Force Survey (QLFS) for the third quarter of 2012, one in 25 (5%) of the South African working age-population was foreign born. At the time this amounted to 1.2 million people. In 1996, the estimate stood at 2.7%, in 2001 at 4.6%, 5.8% in 2007, and 6.5% in 2011, suggesting a post-democracy increase that has been sustained from the mid-2000s.<sup>85</sup>

It was estimated in 2012 that approximately 4% of the South African labour force were foreign-born (5% of males and 3% of females). Aligned to representation in the general population, 84% of the 4% were born in other African countries. Disaggregation by province suggest that 8% of the labour force in Gauteng was foreign-born in 2012, compared to 4% in the Western Cape.<sup>86</sup>

<sup>80</sup> Budlender D. 2014. 'Migration and employment in South Africa: Statistical analysis of the migration module in the Quarterly Labour Force Survey. Third quarter 2012. MiWORC Report 5. African Centre for Migration and Society.

<sup>81</sup> Gallo-Mosala S. November 2008. 'Introduction'. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

<sup>82</sup> Vigneswaran D. November 2008. 'The revolving door: Asylum seekers, access and employment in South Africa'. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town

<sup>83</sup> Ibid.

<sup>84</sup> OECD/ILO. 2018. 'How immigrants contribute to South Africa's economy'. OECD Publishing. Paris.

<sup>85</sup> The statistics are from Broussard N.H. 30 January 2018. 'Immigration and the labour market outcomes of natives in developing countries: A case study of South Africa'. Economic Development and Cultural Change. University of Chicago, but the interpretation of the statistics contradicts the interpretation contained in the article cited.

<sup>86</sup> Budlender D. 2014. 'Migration and employment in South Africa: Statistical analysis of the migration module in the Quarterly Labour Force Survey. Third quarter 2012. MiWORC Report 5. African Centre for Migration and Society.



The countries of origin of labour migrants have changed alongside the overall profile of migrants to South Africa. In 1996, 22% of foreign-born workers in the South African labour force were from Mozambique, 18% from the United Kingdom, and 14% from Zimbabwe. The respective figures for 2011 were 22%, 2% and 35%.<sup>87</sup>

At 2011, an estimated 38% of the foreign-born labour force was female.<sup>88</sup> The average age of a South African-born worker in the South African labour force was 35.6 years in 2011, while the average-age for a foreign-born worker was 34.8.<sup>89</sup>

## 4.5.2 EMPLOYMENT STATUS AND COMPOSITION OF THE LABOUR FORCE

In 2015, Statistics South Africa reported (based on the Census of 2011) that 63.1% of international migrants were employed, while 20.3% were not economically active, 13.9% were unemployed and 2.8% were discouraged work seekers. If these figures are correct, foreign-born persons are slightly more likely (on average) to be employed than South Africans (on average).<sup>90</sup>

The employment/ labour force participation rate among foreign-born “working age” workers also appears to be slightly higher than the employment rate among South African born “working age” workers, particularly when compared to “black” South Africans.

Table 2: Labour force participation by place of birth<sup>91</sup>

	SOUTH AFRICANS WHO HAVE NOT MIGRATED INTERNALLY	SOUTH AFRICANS WHO HAVE MIGRATED INTERNALLY	FOREIGN-BORN WORKERS
LABOUR FORCE PARTICIPATION	51%	75%	77%
EMPLOYMENT RATE	37%	58%	65%
OFFICIAL UNEMPLOYMENT RATE	27% (FOR BLACK SOUTH AFRICAN MEN IN 2011 30%, AND FOR BLACK SOUTH AFRICAN WOMEN 41%) <sup>92</sup>	22%	16% (FOR FOREIGN-BORN MEN 15% IN 2011) <sup>93</sup>
EXPANDED UNEMPLOYMENT RATE	36%	25%	19%

Because this study focuses on the labour-related experiences of migrants and refugees in the Western Cape it is important to point out that employment rates in the Western Cape (68%) are higher than the national average (58%), and official unemployment rates are lower, 16% compared to 22%.

Caution is required in interpreting the statistics above and blanket statements about the increased likeli-

<sup>87</sup> Broussard N.H. 30 January 2018. ‘Immigration and the labour market outcomes of natives in developing countries: A case study of South Africa’. Economic Development and Cultural Change. University of Chicago.

<sup>88</sup> Ibid.

<sup>89</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>90</sup> The figures presented are from Statistics South Africa Census 2011, but the inferences are not.

<sup>91</sup> Budlender D. 2014. ‘Migration and employment in South Africa: Statistical analysis of the migration module in the Quarterly Labour Force Survey. Third quarter 2012. MiWORC Report 5. African Centre for Migration and Society.

<sup>92</sup> Broussard N.H. 30 January 2018. ‘Immigration and the labour market outcomes of natives in developing countries: A case study of South Africa’. Economic Development and Cultural Change. University of Chicago.

<sup>93</sup> Ibid.

hood of foreign-born workers to be employed are deceiving. Peters et al<sup>94</sup> demonstrate that the likelihood of employment of migrants is affected by race and country of origin. Migrants/ immigrants from developed countries are more likely to secure employment than South Africans, but the inverse is true for migrants from, for example, west-African countries. Specifically, migrants from Angola, Cameroon, the Democratic Republic of Congo and Nigeria are less likely to be employed than South Africans (irrespective of their levels of skill or education).<sup>95</sup> A male immigrant from the United Kingdom has an 86% chance of getting a job in South Africa even with no education (compared to 41.2% for someone from the DRC), a 91% chance if he has some education, a 97,4% chance if he has an undergraduate degree, and a near 100% chance if he has a post-graduate degree.<sup>96</sup> The table below sets out the **chance of employment (i.e. not actual employment rates) per county of origin.**<sup>97</sup>

Table 3: Chances of accessing employment in South Arica by country of origin and education<sup>98</sup>

	NO-SCHOOLING	SOME EDUCATION	UNDERGRADUATE DEGREE	POST-GRADUATE DEGREE
EUROPE	91.6%	94.7%	98.5%	99.6%
INDIA	93.3%	95.8%	98.8%	99.7%
MOZAMBIQUE	87.1%	88.1%	97.6%	99.3%
NAMIBIA	82.2%	88.4%	96.6%	99%
LESOTHO	81.9%	88.2%	96.5%	99%
ZIMBABWE	81.7%	88.1%	96.5%	99%
BOTSWANA	79.8%	86.7%	96%	98.9%
<b>SOUTH AFRICA</b>	<b>76.9%</b>	<b>84.6%</b>	<b>95.3%</b>	<b>98.6%</b>
ANGOLA	68.4%	78.1%	93%	97.9%
NIGERIA	65.1%	75.5%	91.9%	97.6%
DR CONGO	41.2%	53.7%	81.1%	93.8%

Polzer T. 2008 refer to similar data that shows that Congolese migrants are more likely to be unemployed than other nationalities, with low rates of casual employment and part-time work. This despite the fact that they are also likely to be better educated, with 37.7% having a tertiary education.<sup>99</sup> Zimbabweans are also more likely to be unemployed, but are also more likely to engage in part-time or casual work.<sup>100</sup>

Furthermore, likelihood of employment in South Africa is still influenced by race so that the unemployment rate for black South Africans (see table 2) is much higher than for other “racial” groups in South Africa.

Another caveat is that the migrant population is not a random sample, and in some cases, entry into South Africa is predicated on already having access to secure employment (i.e. the sample of migrants is biased

<sup>94</sup> Peters A. C & Sundaram A. 2015. ‘Country of origin and employment prospects among immigrants and analysis of south-south and north-south migrants to South Africa’. Applied Economics Letter. Volume 22. Number 17. Pages 1415-1418. Routledge.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town

<sup>100</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town

to include a higher proportion of employed individuals than the general population).<sup>101</sup>

### 4.5.3 MIGRANT AND REFUGEE EMPLOYMENT BY SECTOR/INDUSTRY

This section of the report demonstrates that when employed, migrants tend to be in precarious or exploitative situations. More than a third are employed in the informal sector (approximately half of whom are domestic workers or gardeners), and many of those employed in the formal sector are in industries such as mining, agriculture, construction and hospitality that have been documented as exploitative, precarious, informal, dangerous, poorly compensated, and under-unionized, or where evidence demonstrates low-levels of employer compliance to labour legislation (e.g. agriculture<sup>102</sup>).

Census 2011 data indicated that 62.6% of employed migrants are employed in the formal sector, 17.2% in the informal sector, and 17.1% in private households (i.e. 34.3% are in the informal sector).<sup>103</sup> Data from the Labour Force Survey show a similar proportional breakdown (see table 4 below).

Table 4: Sector of work by place of birth<sup>104</sup>

	SOUTH AFRICANS WHO HAVE NOT MIGRATED INTERNALLY	SOUTH AFRICANS WHO HAVE MIGRATED INTERNALLY	FOREIGN-BORN WORKERS
FORMAL	71%	77%	50%
INFORMAL	16%	11%	33%
AGRICULTURE	5%	3%	6%
PRIVATE HOUSEHOLDS	8%	8%	11%

Aggregate figures should be interpreted with caution and are likely skewed by the performance of highly-skilled/resourced migrants from North and Latin America and Europe. For example, of the employed migrants active in the informal sector, 64.9% were from SADC, while nationals from SADC accounted for only 7.3% of those in formal employment. Inversely, 64.9% of the employed migrants in the formal sector were of European origin and accounted for less than 10% of those in the informal sector. Put differently, 80.6% of employed migrants from Europe were employed in the formal sector, 80.9% of North Americans, and 80.8% of those from the Caribbean and Latin America.<sup>105</sup>

Furthermore, foreign-born members of the South African labour force are twice as likely to be self-employed (i.e. own-account workers in terms of the categories of the Quarterly Labour Force Survey) indicating high levels of vulnerability and difficulty accessing formal employment. Specifically, 50% of foreign-born members of the South African labour force are self/informally employed, compared to 29% of South Africans who have not migrated internally, or to 22% of South Africans who have migrated internally.<sup>106</sup>

<sup>101</sup> Peters A. C & Sundaram A. 2015. 'Country of origin and employment prospects among immigrants and analysis of south-south and north-south migrants to South Africa.' Applied Economics Letter. Volume 22. Number 17. Pages 1415-1418. Routledge.

<sup>102</sup> Shabodien F. November 2008. 'Migrant labour in South African commercial agriculture'. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

<sup>103</sup> The figures presented are from Statistics South Africa Census 2011, but the inferences are not.

<sup>104</sup> Budlender D. 2014. 'Migration and employment in South Africa: Statistical analysis of the migration module in the Quarterly Labour Force Survey. Third quarter 2012. MiWOCR Report 5. African Centre for Migration and Society.

<sup>105</sup> Statistics South Africa. 2015. Census 2011: Migration Dynamics in South Africa. Report 03-01-79. ISDN 978-0-621-44166-6.

<sup>106</sup> Budlender D. 2014. 'Migration and employment in South Africa: Statistical analysis of the migration module in the Quarterly Labour Force Survey. Third quarter 2012. MiWOCR Report 5. African Centre for Migration and Society.

Some research has shown that nationality impacts the likelihood of self-employment. Migrants from Ghana, Nigeria, Rwanda, Burundi, Kenya Tanzania and Somalia are most likely to be self-employed, if they are employed.<sup>107</sup>

The table below demonstrates the overrepresentation of foreign-born workers in self-employment and private households, and the almost complete absence of foreign-born workers in the South African public service. Employment in private households include domestic work, gardening and child care.

Table 5: Percentage per “population group” per business category<sup>108</sup>

	SOUTH AFRICANS WHO HAVE NOT MIGRATED INTERNALLY	SOUTH AFRICANS WHO HAVE MIGRATED INTERNALLY	FOREIGN-BORN WORKERS
GOVERNMENT	17%	14%	3%
PARASTATALS	2%	3%	1%
PRIVATE ENTERPRISE	71%	73%	82%
NON-PROFIT	1%	1%	1%
PRIVATE HOUSEHOLD	9%	9%	12%

The table below demonstrates the over representation of foreign-born workers in trade, construction, agriculture and private households, and their under-representation in manufacturing, financial services and transport.

Table 6: Industry by place of birth<sup>109</sup>

INDUSTRY	SOUTH AFRICANS WHO HAVE NOT MIGRATED INTERNALLY	SOUTH AFRICANS WHO HAVE MIGRATED INTERNALLY	FOREIGN-BORN WORKERS
AGRICULTURE	5%	3%	6%
MINING	2%	4%	3%
MANUFACTURE	13%	13%	10%
UTILITIES	1%	1%	0%
CONSTRUCTION	8%	7%	12%
TRADE	22%	20%	30%
TRANSPORT	6%	6%	4%
FINANCIAL	13%	16%	10%
SERVICES	23%	22%	12%
PRIVATE HOUSEHOLDS	8%	8%	11%

<sup>107</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town

<sup>108</sup> Budlender D. 2014. ‘Migration and employment in South Africa: Statistical analysis pf the migration module in the Quarterly Labour Force Survey. Third quarter 2012. MiWORC Report 5. African Centre for Migration and Society.

<sup>109</sup> Ibid.

Industry distribution in 2007 was similar, with 23% of employed foreign-born workers working in the mining industry.<sup>110</sup> The table below shows the percentage of the labour force workers per industry (i.e. X % of employees in a sector was foreign born in 2007). The table demonstrates that the number of foreign-born workers increased in all industries for the period 2001 to 2007, and double in the mining sector. It should be noted that these figures are probably dated (lacking in accuracy in 2019), but they do demonstrate foreign-born worker prevalence in mining and to a lesser extent construction.

*Table 7: Percentage of foreign-born workers per industry in 2001 and 2007<sup>111</sup>*

	2001	2007
AGRICULTURE	4.33%	4.68%
MINING	11.68%	23.52%
MANUFACTURE	4.56%	4.91%
UTILITIES	3.82%	3.18%
CONSTRUCTION	6.47%	7.8%
TRADE	5.73%	5.86%
HOSPITALITY	5.65%	6.44%
TRANSPORT	3.89%	4.29%
FINANCIAL SERVICES	5.8%	5.62%
PUBLIC ADMINISTRATION	1.93%	2%
REAL ESTATE	6.4%	7.38%
EDUCATION	2.75%	2.99%
HEALTH	3.64%	3.89%
PRIVATE HOUSEHOLDS	4.58%	4.99%

A breakdown by occupation at first glance suggests that foreign-born workers are well represented in management echelons, but these figures are skewed by the fact that more than a tenth of those were actually the “managers” of their own informal businesses. In reality, foreign-born workers are under-represented in professional, technical and clerical occupations, and over represented in services/ sales and craft sectors.

<sup>110</sup> Broussard N.H. 30 January 2018. ‘Immigration and the labour market outcomes of natives in developing countries: A case study of South Africa’. Economic Development and Cultural Change. University of Chicago.

<sup>111</sup> Ibid.

Table 8: Occupation by place of birth<sup>112</sup>

OCCUPATION	SOUTH AFRICANS WHO HAVE NOT MIGRATED INTERNALLY	SOUTH AFRICANS WHO HAVE MIGRATED INTERNALLY	FOREIGN-BORN WORKERS
MANAGER	8%	9%	12%
PROFESSIONAL	6%	7%	5%
TECHNICAL/ ASSOCIATE PROFESSIONAL	12%	11%	7%
CLERICAL	11%	10%	4%
SERVICES OR SALES	15%	14%	17%
SKILLED AGRICULTURAL	1%	0%	1%
CRAFT AND RELATED	11%	13%	21%
OPERATORS (I.E. INDUSTRY)	8%	9%	5%
ELEMENTARY	23%	19%	21%
DOMESTIC WORK	6%	6%	7%

## 4.5.4 UNIONIZATION

The positions of vulnerability of foreign-born workers in the South African labour force referred to above are also demonstrated by the comparatively low levels of trade union membership (e.g. 30% of South African born workers are members of unions compared to 12% of foreign-born workers<sup>113</sup>, which means that foreign-born workers constitute only 2% of total union membership), and the fact that foreign born workers systematically have less access to employment benefits such as UIF, medical aid and retirement/pension funds.

Regarding the groups of foreign-born workers that formed the subject of this paper, a statistically representative study of domestic workers in Gauteng found that only 2% belonged to a trade union, even fewer had heard of the South African Domestic Service and Allied Workers Union, and only 20% said that they knew what the minimum wage for domestic workers was.<sup>114</sup> Only 10% of construction workers (overall) are unionized.<sup>115</sup> For migrants the figures are likely negligible. Unions fare better in the mining sector where large contingents of the working population continue to be foreign born.

Key unions in South Africa have public mandates that recognize the need to monitor the labour conditions of foreign workers, but for various reasons find it difficult to do so. COSATU, for example, claims to have a progressive formal stance on migration and many of its members, particularly in the mining sector, are migrants. SACCAWU has a similar position, and all workers in the country are welcome to join. SACCAWU has also actively built relationships with unions in the SADC region. The unions however do not record whether their members are foreign- or local-born. The consequence is that unions do not collect data on whether members are foreign-born or not, nor whether they are documented or not. Reliable data on foreign-born union membership rates are accordingly not available, but indications are that it is low.

<sup>112</sup> Budlender D. 2014. 'Migration and employment in South Africa: Statistical analysis of the migration module in the Quarterly Labour Force Survey. Third quarter 2012. MiWOCR Report 5. African Centre for Migration and Society.

<sup>113</sup> Ibid.

<sup>114</sup> Weideman M. July 2018. A Study on Women's Economic Empowerment in South Africa: Investigating unpaid and low-paid care work by focusing on domestic workers, women in the informal economy, and unemployed women in Gauteng. Oxfam South Africa. Johannesburg.

<sup>115</sup> Theodore N., Blaauw D., Pretorius A., Schench C. 2017. 'The socio-economic incorporation of immigrant and native-born day labourers in Tshwane, South Africa. International Migration. Volume 55 (1). ISSN 0020-7985.

According to representatives of both SACCAWU and COSATU, xenophobia among their South African members (but not among those in leadership) may dissuade foreign-born workers from becoming union members. Representatives from COSATU understood the xenophobia among members as a result of “a lack of understanding and the desperate socio-economic conditions [South African] members find themselves in”.<sup>116</sup>

Other reasons for low unionization rates include the inability of marginalized/ isolated groups like farm- and domestic workers to afford union membership, a lack of knowledge/ awareness of unions and related labour rights, short-term/ seasonal employment, the absence of employment contracts, employment in the informal sector or in (unmonitored/ unregulated) SMMEs, cultural prohibitions (i.e. among Somalian women), language barriers (i.e. for francophone migrants and refugees), and fear of arrest or deportation among undocumented migrants.

A few unions/ workers’ organizations have been established to specifically respond to the needs of migrant and refugee workers. These include the Migrant Workers Union of South African, based in Johannesburg, which according to respondents mostly represents Zimbabwean-born workers in the hospitality industry and has an established relationship with SACCAWU. The Migrant Workers Union (according to respondents) has only about 300 active members (but 4000 inactive members).

The Department of Labour has been ineffective in protecting or enforcing the labour rights of migrants and refugees.<sup>117</sup>

## 4.5.5 MIGRANTS AND REFUGEES IN SELF-EMPLOYMENT AND THE INFORMAL SECTOR

The current legislative framework, implementation strategies and economic context conspire to force a large portion of the documented and undocumented migrant population into the SMME and informal sector. The word “forced” is used because studies (including this one) have indicated that migrants and refugees accept employment in segments of the economy where labour standards are violated or participate in the informal sector because they are unable (legislatively and in practice) to access decent employment opportunities.<sup>118</sup> As policies and practices force more migrants and refugees into self-employment and the informal sector, a growing number of people depend on the sector for their survival. At the same time, government policies and practices are seeking to prohibit and reduce foreign-born participation in the informal sector. This is a recipe for increased destitution and socio-economic rights violations.

Legal restrictions include the fact that neither the 1995 White Paper on the Development and Promotion of Small Businesses, nor the 1996 National Small Business Act, acknowledge the concerns of migrants and refugees.<sup>119</sup> In 2012, some local and provincial governments (including in Limpopo) prevented foreign nationals from accessing business licenses.<sup>120</sup> In general, municipal street trading licensing and

<sup>116</sup> Govander P. November 2008. ‘Immigration and migrant workers: the need for a rights-based approach’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

<sup>117</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town

<sup>118</sup> Theodore N., Blaauw D., Pretorius A., Schench C. 2017. ‘The socio-economic incorporation of immigrant and native-born day labourers in Tshwane, South Africa. International Migration. Volume 55 (1). ISSN 0020-7985.

<sup>119</sup> Crush J., Skinner C. & Stulgaitas M. August 2017. ‘Benign neglect or active destruction? A critical analysis of refugee and informal sector policy and practice in South Africa. South African Human Mobility Review 3 (2). [http://sihma.org.za/wp-content/uploads/2017/09/1\\_Benign-Neglect-or-Active-Destruction.pdf](http://sihma.org.za/wp-content/uploads/2017/09/1_Benign-Neglect-or-Active-Destruction.pdf).

<sup>120</sup> Gastrow V. 2018. ‘Problematizing the Foreign Shop: Justifications for restructuring the migrant spaza sector in South Africa’. SAMP Migration Policy Series 80. South African Migration Programme. International Migration Research Centre. Ontario. Canada.

local economic development policies lack clarity on non-citizen rights, or actively exclude them.<sup>121</sup> In 2013, the Department of Trade and Industry (DTI) released a Draft Licensing Bill that was criticised for “criminalizing” the informal sector,<sup>122</sup> and called on all businesses in South Africa to possess licenses, thereby effectively excluding most migrants and refugees from participating in the informal sector.<sup>123</sup> The Bill was withdrawn only to be followed, in 2014, by the DTI’s National Informal Business Upliftment Strategy, which included “anti-migrant” sentiment and referred to “migrant takeover” of local businesses.<sup>124</sup> The strategy included measures to restrict migrants from operating small businesses.<sup>125</sup> These legislative measures culminated in the content of the Refugee Amendment Act, which according to Gastrow and others, possibly prohibits asylum seekers from operating small businesses in South Africa because the Act mentions only one category of employment, namely employment through an employer.<sup>126</sup>

In practice, government hostility toward the informal sector in general and migrants in particular, is demonstrated through, inter alia:

- The launch of “Operation Hardstick” by the Limpopo Provincial government in 2012, which has been described as a military style intervention targeting informal businesses, and which shut down over 600 businesses, detained shop-owners and declared that refugees and asylum seekers’ permits did not entitle them to own or run businesses.<sup>127</sup>
- The removal of 6 000 street traders by the City of Johannesburg in 2013.<sup>128</sup> Dubbed “operation clean sweep” the operation removed all traders regardless of nationality, who were then required to participate in a municipal re-registration process that attempted to limit access to South African citizens only.<sup>129</sup>
- The prohibition on migrant and refugee owned spaza shops in certain areas in Cape Town.<sup>130</sup>
- Periodic “street sweeps” in the City of Tshwane in areas where street trading is common, or where labourers stand in public spaces to access day/ piece jobs.<sup>131</sup>
- Statements by the Minister of Small Business Development that claimed that spaza-shops

<sup>121</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

<sup>122</sup> Crush J., Skinner C. & Stulgaitas M. August 2017. ‘Benign neglect or active destruction? A critical analysis of refugee and informal sector policy and practice in South Africa. South African Human Mobility Review 3 (2). [http://sihma.org.za/wp-content/uploads/2017/09/1\\_Benign-Neglect-or-Active-Destruction.pdf](http://sihma.org.za/wp-content/uploads/2017/09/1_Benign-Neglect-or-Active-Destruction.pdf)

<sup>123</sup> Gastrow V. 2018. ‘Problematizing the Foreign Shop: Justifications for restructuring the migrant spaza sector in South Africa’. SAMP Migration Policy Series 80. South African Migration Programme. International Migration Research Centre. Ontario. Canada.

<sup>124</sup> Crush J., Skinner C. & Stulgaitas M. August 2017. ‘Benign neglect or active destruction? A critical analysis of refugee and informal sector policy and practice in South Africa. South African Human Mobility Review 3 (2). [http://sihma.org.za/wp-content/uploads/2017/09/1\\_Benign-Neglect-or-Active-Destruction.pdf](http://sihma.org.za/wp-content/uploads/2017/09/1_Benign-Neglect-or-Active-Destruction.pdf)

<sup>125</sup> Gastrow V. 2018. ‘Problematizing the Foreign Shop: Justifications for restructuring the migrant spaza sector in South Africa’. SAMP Migration Policy Series 80. South African Migration Programme. International Migration Research Centre. Ontario. Canada.

<sup>126</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa.

<sup>127</sup> Crush J., Skinner C. & Stulgaitas M. August 2017. ‘Benign neglect or active destruction? A critical analysis of refugee and informal sector policy and practice in South Africa. South African Human Mobility Review 3 (2). [http://sihma.org.za/wp-content/uploads/2017/09/1\\_Benign-Neglect-or-Active-Destruction.pdf](http://sihma.org.za/wp-content/uploads/2017/09/1_Benign-Neglect-or-Active-Destruction.pdf)

<sup>128</sup> Crush J., Skinner C. & Stulgaitas M. August 2017. ‘Benign neglect or active destruction? A critical analysis of refugee and informal sector policy and practice in South Africa. South African Human Mobility Review 3 (2). [http://sihma.org.za/wp-content/uploads/2017/09/1\\_Benign-Neglect-or-Active-Destruction.pdf](http://sihma.org.za/wp-content/uploads/2017/09/1_Benign-Neglect-or-Active-Destruction.pdf)

<sup>129</sup> Peberdy S. 2016. ‘International Migrants in Johannesburg’s Informal Economy’. Southern African Migration Programme Migration Policy Series no. 71. Ontario. Canada. <http://samponline.org/migration-policy-series/>

<sup>130</sup> Crush J., Skinner C. & Stulgaitas M. August 2017. ‘Benign neglect or active destruction? A critical analysis of refugee and informal sector policy and practice in South Africa. South African Human Mobility Review 3 (2). [http://sihma.org.za/wp-content/uploads/2017/09/1\\_Benign-Neglect-or-Active-Destruction.pdf](http://sihma.org.za/wp-content/uploads/2017/09/1_Benign-Neglect-or-Active-Destruction.pdf)

<sup>131</sup> Theodore N., Blaauw D., Pretorius A., Schench C. 2017. ‘The socio-economic incorporation of immigrant and native-born day labourers in Tshwane, South Africa. International Migration. Volume 55 (1). ISSN 0020-7985.



owned by “foreigners” were putting South Africans out of business.<sup>132</sup> Similar hostile statements were made by the Minister of Police in 2011, the ANC in the Western Cape in 2012, and in 2016 by the then Premier of the North West.<sup>133</sup>

These policy and implementation approaches do not reduce migrant and refugee activity in one of the only economic sectors open to them, and upon which their survival depends. It merely increases vulnerability and criminalizes the kind of economic activity that could contribute to employment creation and economic growth in South Africa. The 2011 Census and 2012 Labour Force Quality of Life statistics on foreign-born worker activity in the informal sector provided above show that approximately half of the employed migrant population are self-employed, and approximately one third of employed migrants are in the informal sector (half of whom are in private households). In 2013, Crush et al. estimated that 20% of Zimbabwean immigrants in Cape Town were engaged in the informal economy. The Blaauw et al 2006 study in Tshwane found that half the day labourers in the city were from Zimbabwe.

The socio-economic, cultural and political context is also filled with challenges that prevent/ reduce success in the informal/ SMME sectors. These challenges are exacerbated for migrants and refugees. Exposure to crime and violence is one such challenge. A 2016 study on crime and violence focussing on spaza shops found that “running a spaza shop is extremely dangerous”. A spaza shop owner is 46 times more likely to be murdered than the national average. A Somali spaza shop owner is 100 times more likely to be murdered.<sup>134</sup> A study of 2000 informal businesses in the Western Cape and Limpopo, owned by either South Africans or refugees, found that 21% refugee business owners have been victims of attacks or assaults, compared to 4% of South Africans. The respective figures for police harassment and extortion were 19% and 6%, and for theft of income 38% compared to 19%.<sup>135</sup>

Small businesses owned by migrants and refugees have also been the target of some of the most violent and persistent spates of xenophobic attacks in the preceding decade. Several studies have highlighted the existence of xenophobia towards migrants in South Africa, and the antagonism towards migrant small business and shop owners in particular.<sup>136</sup>

In fact, xenophobic attacks have been cited by various South African government departments as the reason for the development and implementation of anti-informal sector/ anti-migrant policies and practices. In Cape Town, following xenophobic attacks on migrants and migrant shop keepers in Masi-phumelelo, Khayelitsha, Strand, Gugulethu, Philippi East and Kraaifontein in 2006, local authorities and police responded by adopting discriminatory interventions and attempting to curtail the business activities of migrants and refugees.<sup>137</sup> This included a report that proposed prohibitions on the opening of new migrant-owned shops in townships, and introducing restrictions on the overall number of migrant-owned shops in an area.<sup>138</sup> Violent attacks and murders also took place in Johannesburg in April 2015.<sup>139</sup>

Other challenges include inability to access South African financial services and credit and police harassment.

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<sup>132</sup> Gastrow V. 2018. ‘Problematizing the Foreign Shop: Justifications for restructuring the migrant spaza sector in South Africa.’ SAMP Migration Policy Series 80. South African Migration Programme. International Migration Research Centre. Ontario. Canada.

<sup>133</sup> Ibid.

<sup>134</sup> Piper L. & Charman A. January – April 2016. ‘Xenophobia, price competition, and violence in the spaza sector in South Africa.’ African Human Mobility Review. Volume 1 (2). <http://sihma.org.za/wp-content/uploads/2016/07/Piper-Charman.pdf>

<sup>135</sup> Crush J., Tawodzera G., McCordic C. & Ramachandran S. 2017. ‘Comparing refugees and South Africans in the Informal Sector.’ South Africa Migration Programme Policy Series no. 78. Ontario. Canada. <http://samponline.org/wp-content/uploads/2017/06/SAMP78.pdf>

<sup>136</sup> Gastrow V. 2018. ‘Problematizing the Foreign Shop: Justifications for restructuring the migrant spaza sector in South Africa.’ SAMP Migration Policy Series 80. South African Migration Programme. International Migration Research Centre. Ontario. Canada

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Peberdy S. 2016. ‘International Migrants in Johannesburg’s Informal Economy.’ Southern African Migration Programme Migration Policy Series no. 71. Ontario. Canada. <http://samponline.org/migration-policy-series/>

Despite these many barriers and challenges, research suggests continued success by migrant and refugee small-business and shop owners. Although the underlying reason for their success is probably that no alternative option for survival exists, researchers have identified factors that contribute to migrant and refugee successes in the informal sector.

Evidence for their “forced” participation in the informal sector include a study<sup>140</sup> that compared South African and foreign owned businesses in the Western Cape and Limpopo provinces. The study found that both groups were most likely motivated to participate in the informal sector by their need for economic survival (i.e. to earn money to meet their basic needs and/ or to support dependents). A 2014 study of 618 migrant-owned informal sector businesses in Johannesburg also found that their primary motivation was to survive and increase their financial security.<sup>141</sup>

However, there is also evidence of more altruistic motivations for participation. Refugees in the Cape Town and Limpopo study were also four times more likely to want to contribute to the development of the South African economy. Those in the Johannesburg study also scored high on the indicator for social capital and the desire to provide employment for others.<sup>142</sup>

The Cape Town and Limpopo study also revealed important differences between South Africans and migrants that may explain the perceived successes of migrants in the informal sector. Refugees were three times as likely to emphasize the importance of support from others in starting a business, were twice as likely to have the entrepreneurial qualities mentioned by the study, and were most likely to work in household product retail and personal services. Refugees were also more likely to keep business records, to sell goods at cheaper prices and to buy in bulk through partnerships or negotiations with suppliers. These may be the factors that contribute to migrant success despite the fact that South Africans have more business experience, and have been in business for longer.<sup>143</sup> The results from the Johannesburg study were similar, showing that only 5% of migrants had entrepreneurial experience before they came to South Africa.<sup>144</sup> South Africans work in sectors that require less “home-based” activities such as food retail, shoe repair, transport and guarding businesses.<sup>145</sup>

The Johannesburg study further found that 85% of migrant business owners used personal savings as their main source of start-up capital, while the remainder sourced funds from family and friends. As a rule, migrants are not able to access financial services in South Africa and only 1% of the Johannesburg sample reported access to bank loans. Most used start-up capital of less than R5 000.00.<sup>146</sup>

The anti-informal sector/ SMME approach is contrary to national economic and development policies and standard economic development theories. The consensus among national policy documents and many economists is that the informal/ SMME sector is key to job creation and economic growth in South Africa. The National Development Plan, for example, proposed the creation of 2.1 million jobs through the informal sector.<sup>147</sup> The Western Cape and Limpopo study<sup>148</sup> also found that almost 50% of

<sup>140</sup> Crush J., Tawodzera G., McCordic C. & Ramachandran S. 2017. ‘Comparing refugees and South Africans in the Informal Sector’. South Africa Migration Programme Policy Series no. 78. Ontario. Canada. <http://samponline.org/wp-content/uploads/2017/06/SAMP78.pdf>

<sup>141</sup> Peberdy S. 2016. ‘International Migrants in Johannesburg’s Informal Economy’. Southern African Migration Programme Migration Policy Series no. 71. Ontario. Canada. <http://samponline.org/migration-policy-series/>

<sup>142</sup> Ibid.

<sup>143</sup> Peberdy S. 2016. ‘International Migrants in Johannesburg’s Informal Economy’. Southern African Migration Programme Migration Policy Series no. 71. Ontario. Canada. <http://samponline.org/migration-policy-series/>

<sup>144</sup> Ibid.

<sup>145</sup> Crush J., Tawodzera G., McCordic C. & Ramachandran S. 2017. ‘Comparing refugees and South Africans in the Informal Sector’. South Africa Migration Programme Policy Series no. 78. Ontario. Canada. <http://samponline.org/wp-content/uploads/2017/06/SAMP78.pdf>

<sup>146</sup> Peberdy S. 2016. ‘International Migrants in Johannesburg’s Informal Economy’. Southern African Migration Programme Migration Policy Series no. 71. Ontario. Canada. <http://samponline.org/migration-policy-series/>

<sup>147</sup> Crush J., Skinner C. & Stulgaitas M. August 2017. ‘Benign neglect or active destruction? A critical analysis of refugee and informal sector policy and practice in South Africa. South African Human Mobility Review 3 (2). [http://sihma.org.za/wp-content/uploads/2017/09/1\\_Benign-Neglect-or-Active-Destruction.pdf](http://sihma.org.za/wp-content/uploads/2017/09/1_Benign-Neglect-or-Active-Destruction.pdf).

<sup>148</sup> Crush J., Tawodzera G., McCordic C. & Ramachandran S. 2017. ‘Comparing refugees and South Africans in the Informal Sector’. South Africa Migration Programme Policy Series no. 78. Ontario. Canada. <http://samponline.org/wp-content/uploads/2017/06/SAMP78.pdf>

refugee-owned informal sector businesses have paid employees, compared to 21% of those owned by South Africans. A study conducted among 131 Angolan migrants in Cape Town, found that 20% of the participants had their own businesses and slightly more than half of them employed South Africans (i.e. about 13 jobs were created).<sup>149</sup> The Johannesburg Study found that the 618 businesses studied employed 1 586 employees and that 503 (32%) of these were South Africans.<sup>150</sup>

Contributions are also made in other ways. The Western Cape and Limpopo study also found that refugee entrepreneurs were more likely to rent business premises and in the study sample, 60% paid rent to South African landlords, and a further 13% to local municipalities. By comparison, approximately half of the South African business owners operated their businesses rent free.<sup>151</sup> In Johannesburg, 31% of migrant business owners paid rent to South Africans.

The Johannesburg study also demonstrated that migrant-owned businesses were growing. Although almost 60% started businesses worth R5 000,00, 52% had increased their business value to R20 000,00 at the time of the research.<sup>152</sup>

Foreign-born business owners are therefore contributing to the economy by growing their businesses, generating employment, investing in the economy, renting business property, and paying operating licenses to local governments. It can, however, not be denied (and therefore it must be managed) that the influx of documented and undocumented migrants into the informal sector creates competition for South African business owners, and this contributes to xenophobia.

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<sup>149</sup> Scalabrini Institute for Human Mobility in Africa (SIHMA). April 2015. 'Cessation of the international protection of Angolan refugees in South Africa. Migration Policy Brief. Issue 1. Cape Town. South Africa. <http://sihma.org.za/>

<sup>150</sup> Peberdy S. 2016. 'International Migrants in Johannesburg's Informal Economy'. Southern African Migration Programme Migration Policy Series no. 71. Ontario. Canada. <http://samponline.org/migration-policy-series/>

<sup>151</sup> Crush J., Tawodzera G., McCordic C. & Ramachandran S. 2017. 'Comparing refugees and South Africans in the Informal Sector'. South Africa Migration Programme Policy Series no. 78. Ontario. Canada. <http://samponline.org/wp-content/uploads/2017/06/SAMP78.pdf>

<sup>152</sup> Peberdy S. 2016. 'International Migrants in Johannesburg's Informal Economy'. Southern African Migration Programme Migration Policy Series no. 71. Ontario. Canada. <http://samponline.org/migration-policy-series/>



## BOX 1: THE EFFECT OF MIGRANT LABOUR ON THE SOUTH AFRICAN ECONOMY AND EMPLOYMENT RATES:

Policy decisions, intervention design, government responses and advocacy on migration in South Africa are influenced to a large extent by the debate on whether migration has a positive/ negative/ no impact on the South African economy (i.e. on unemployment rates and wages). The data available on South Africa and the developing world is not sufficiently accurate or valid to answer this question definitively, but there is enough data to suggest which interventions and policy decisions are likely to contribute to the greater good.

There is empirical data to show that in developed countries, migration has a positive effect on employment and wages<sup>153</sup>. These findings do not seem to hold for developing countries, but they do suggest that a well-managed migration system could benefit the country economically.

<sup>153</sup> Maunganidze O.A. 24 October 2018. 'The "illegal migrant" red herring'. Institute for Security Studies. Pretoria. South Africa.

There is empirical evidence to show that migrants active in South Africa's informal sector are creating jobs and infusing money into local economies by inter alia paying rent.<sup>154</sup> A study conducted among 131 Angolan migrants in Cape Town, found that 20% of the participants had their own businesses and slightly more than half of them employed South Africans (i.e. about 13 jobs were created).<sup>155</sup> Policies and interventions that support foreign-born activity in the SMME sector are, therefore, recommended.

A report by the OECD claims that the "impact of immigration on gross domestic product per capita [in South Africa] is positive and the estimates from an econometric model show that immigrant workers may raise the income per capita by 5%".<sup>156</sup> This argument is based on econometric analysis of income statistics across two censuses which suggest that foreign-born workers account for 8.9 to 9.1% of the GDP, whilst their share of the employment sector is lower. However, the authors note that the economic activities of foreign-born workers are not recorded separately in the censuses, so their contribution was indirectly deduced.<sup>157</sup>

Further, the report argues that "immigrants have a positive net impact on the fiscal balance because they tend to pay more taxes".<sup>158</sup> The report does not also include a discussion on the methodology used to arrive at this conclusion. Nor does it explain to which tax paying groups foreign-born workers are being compared. The research completed for this assignment suggest that most foreign-born workers find it impossible to pay income tax, but would do so if they were given the opportunity. Everyone in South Africa pays tax in form of VAT.

There is empirical data demonstrating high skills levels among (in particular) the refugee community. There is also empirical evidence demonstrating that South Africa has a skills deficit in many areas of the economy and that young and skilled individuals are leaving the country in increasing numbers. Per illustration, in 2003, 1 011 skilled migrants entered South Africa, while 9 529 economically active and skilled South Africans left the country. These included 703 accountants, 693 medical personnel, 502 scientists and 547 engineers.<sup>159</sup> The 2016 Statistics South Africa survey shows that approximately 102 793 mostly young (22 – 30) skilled and educated South Africans left the country between 2006 and 2016. The figures also suggest that the trend of skilled emigration has increased with 8.8% of the total leaving in 2013, up to 11.1% in 2015, and up to 25.7% in 2016.<sup>160</sup> This suggests that policies aimed at attracting and assisting skilled migrants and refugees and incorporating them into the economy (i.e. teachers, nurses, medical doctors, engineers, scientists etc.) will have positive economic and social benefits for all.

There are also studies stating that migration has negative effects. Studies by Steinberg 2012, and Stern and Szalontai 2006, cited in Dodson et al 2015 found evidence that migration has a depressive effect on wages and employment for local non-immigrant labour.<sup>161</sup> One of the most comprehensive and methodologically sound studies was completed by Facchini et al in 2013<sup>162</sup> using census data from 1996, 2001 and 2007. It is likely that the inclusion of post 2008

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<sup>154</sup> Ibid.

<sup>155</sup> Scalabrini Institute for Human Mobility in Africa (SIHMA). April 2015. 'Cessation of the international protection of Angolan refugees in South Africa. Migration Policy Brief. Issue 1. Cape Town. South Africa. <http://sihma.org.za/>

<sup>156</sup> OECD/ILO. 2018. 'How immigrants contribute to South Africa's economy'. OECD Publishing. Paris.

<sup>157</sup> OECD/ILO. 2018. 'How immigrants contribute to South Africa's economy'. OECD Publishing. Paris.

<sup>158</sup> Ibid.

<sup>159</sup> Nshimbi C. C. & Fioramonti L. July 2013. 'A region without borders? Policy Framework for regional labour migrations towards South Africa'. MiWORC Report 1.

<sup>160</sup> Businessstech. 28 July 2016. This is who is leaving South Africa. <https://businessstech.co.za/news/government/131802/this-is-who-is-emigrating-from-south-africa-and-where-they-are-going/>

<sup>161</sup> Dodson B & Crush J. October 2015. 'Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region'. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.

<sup>162</sup> Facchini G., Mayda A. M. & Mendola M. 13 April 2013. 'South-south migration and the labour market: Evidence from South Africa'. *Journal of Economic Geography*. Volume 18. Issue 4. Pages 823–853. <https://doi.org/10.1093/jeg/lby010>.

data (i.e. post peak immigration from Zimbabwe, post the rapid downturn in the South African economy and post the global recession) would have changed the findings considerably, but as it stands it is one of the most comprehensive pieces of analysis available. It is also one of the few that focus on sub-Saharan Africa. Their key findings are:

At district level immigration has, on average, a large and negative impact on South Africans' employment rates (i.e., a 10% increase in migrants of a specific skill group results in a 7.2% decrease in the employment rates of South Africans).<sup>163</sup> The negative effect held true for employees and self-employed South Africans.<sup>164</sup>

The negative effect at district level was higher for medium to highly skilled South African workers, and white South Africans were more adversely affected by immigrant arrivals.<sup>165</sup> This suggests that migration contributes to transformation and restructuring of the racial economy of the past.

A 10% increase in immigrants with primary school education results in a 5.2% reduction in the employment rate for South Africans with a primary school education. The respective figure for individuals with a university degree is an 8.9% reduction.<sup>166</sup>

On a national level, increased immigration has an undetermined effect on the rates of employment of South African workers.

At a national level, increased immigration results in increased self-employment among South Africans. The data shows that increased migration have forced South Africans out of formal employment, and also to move to other geographic areas where fewer migrants are situated.

At a national level, increased immigration has a significantly negative effect on the incomes/ wages of South African workers.<sup>167</sup>

Research by Broussard 2017, which considered the unique characteristics of developing and middle-income countries, and which disaggregates the data by race, found that immigrant inflows decreased the employment to population ratios and total annual income of black South Africans in the formal sector.<sup>168</sup> The same negative effects did not take place in the informal sector. The study found the same intersectoral displacement cited in the Facchini study, but for black South Africans. The statistically significant results show that for black South Africans (male and female) the composition of the employed labour force shifted to the informal sector. The study also concluded that increased immigration has significant negative effects on South Africans and the South African labour market outcomes.<sup>169</sup>

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<sup>163</sup> Facchini G., Mayda A. M. & Mendola M. 13 April 2013. 'South-south migration and the labour market: Evidence from South Africa'. *Journal of Economic Geography*. Volume 18. Issue 4. Pages 823–853. <https://doi.org/10.1093/jeg/lby010>. Pg. 2

<sup>164</sup> Ibid. Pg.3

<sup>165</sup> Ibid. Pg. 4

<sup>166</sup> Ibid. Pg. 21

<sup>167</sup> Ibid. Pg. 19

<sup>168</sup> Broussard N.H. 30 January 2018. 'Immigration and the labour market outcomes of natives in developing countries: A case study of South Africa'. *Economic Development and Cultural Change*. University of Chicago.

<sup>169</sup> Ibid.

# 5. KEY LEGISLATION

This section of the report provides a brief overview of the international, regional and national legislative framework. Only key pieces of legislation are discussed in detail. A more comprehensive legislative framework is included in Addendum A.

## 5.1 INTERNATIONAL

There is an extensive international policy and legal framework that seeks to protect migrant and refugee rights, but it has a limited effect in the South African context. International declarations are not legally binding and nation states often fail to adhere to their contents. International conventions are legally binding and carry legal and political authority, but many are not ratified, or when they are, South Africa is not a signatory. The same limitations apply to the African and regional legislative framework.

International laws and policies, which call for (1) equal access to decent employment and fair working conditions for all (including migrants and refugees), (2) labour rights actualization (e.g. joining labour unions/ collective bargaining, healthy working conditions, equal/ decent pay, the abolition for forced- or child-labour, protection against abuse, employment contracts, regulated working hours/ leave, and protection from labour brokers), and (3) the development and implementation of related policies and legislation, include the Sustainable Development Goals, the Universal Declaration of Human Rights 1948, the ILO Migration for Employment Convention 97 of 1949 (not ratified by SA), the International Covenant of Economic, Social and Cultural Rights 1966 (ratified), ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975 (with particular application to undocumented migrants but not ratified by SA), the United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live of 1985, the United Nations Convention on the Protection of the Rights of All Migrant Workers and their Families 1990, which together with ILO Conventions 97 and 143, form the International Charter on Migration (not ratified),<sup>170</sup> the ILO Multilateral Framework on Labour Migration non-binding principles and guidelines 2006, the ILO Declaration on Fundamental Principles and Rights at Work, and the ILO Convention Concerning Decent Work for Domestic Workers 2011 (ratified).

International instruments protecting human rights including non-discrimination, social protection, cultural and political rights, gender equality, and freedom of movement for, inter alia, migrants and refugees include the Universal Declaration of Human Rights 1948, the United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live of 1985, the International Covenant on Civil and Political Rights 1996, the Global Compact for Safe, Orderly and Regular Migration 2018, and the Convention on the Elimination of All Forms of Discrimination Against Women (signatory).

International instruments specifically regulating the rights of refugees include the United Nations Convention Relating to the Status of Refugees of 1951 to which South Africa is a signatory, and the Global Compact for Safe, Orderly and Regular Migration 2018, which is non-binding.

## 5.2 AFRICAN

African instruments that collectively promote human rights, including the right to decent work, social protection, economic support, education, non-discrimination and freedom of movement include the 1981 African Charter on the Human and People's Rights (ratified), the African Union Plan of Action for the Promotion of Employment and Poverty Alleviation, the Migration Policy Framework for Africa of 2006 (binding), and the Joint Labour Migration Programme.

Instruments that specifically seek to protect or regulate the rights of refugees include the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (which

<sup>170</sup> Mulugeta F. Dinbabo F. & Carciotto S. September 2015. 'International migration in sub-Saharan Africa: A call for a global research agenda'. Paper presented at HDCA conference titled Capabilities on the Move: Mobility and aspirations. Washington D.C. USA.

does not mention the right to work).

Instruments that seek to promote regional development through cooperation, integration and freedom of movement include the Regional Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and other Academic Qualifications in Higher Education in the African States of 1981, the Treaty Establishing the African Economic Community (Abuja Treaty) 1991 and its two policy documents the Migration Policy Framework for Africa (legally binding) and the Joint Labour Migration Programme.

### 5.3 SOUTHERN AFRICA (REGIONAL)

The SADC Secretariat position appears to be towards free-movement and support for labour migration linked to economic development. The Secretariat has several policies and instruments to encourage free movement and regional protection of the rights of migrant workers. Examples include the Southern African Development Community Treaty of 1992, and the SADC (Draft protocol on the Free Movement of Persons in the South African Development Community of 1995 (not accepted by South Africa), the SADC Protocol on the Facilitation of Movement of Persons of 2005 (ratified by South Africa but not yet in effect due to low ratification rates), the SADC Code on Social Security of 2007/8, and the SADC Protocol on Employment and Labour 2014 (not in force). The extensive policy framework remains essentially unratified and unimplemented.

The position from individual SADC countries (notably South Africa, Namibia and Botswana) appears to be towards a preference for bilateral rather than regional instruments and agreements that consider migration from a security, rather than a developmental, perspective.<sup>171</sup> In the South African case the preference for bilateral agreements date back to the bilateral agreements to regulate and monitor migrant mineworkers to South Africa.

There are also regional instruments that seek to protect the social, political and socio-economic rights of migrants. These include the SADC Charter on Fundamental Social Rights of 2003, The SADC Code on Social Security of 2007 (non-binding) which seeks to provide social security to migrants, and the SADC Protocol on Employment and Labour of 2014.

The latter together with the SADC Regional Labour Migration Policy Framework also of 2014, inter alia, seeks to “strengthen protection of the rights of migrant workers”. It encourages member states to develop rights-based pro-labour and employment migration policies by 2019.

### 5.4 SOUTH AFRICA (NATIONAL)

As per Annual Reports in 2007 to 2010 the South African Department of Home Affairs bases its (im) migration policy on three pillars. These are: to link to regional development policies; a commitment to a human rights-based approach; and the sovereignty of South Africa in the fight against illegal migration and the promotion of border security.<sup>172</sup>

The pillars sound progressive, but subject-experts have argued that despite a policy content that is intended to “harness” the growth opportunities migration can present, the South African government “is prioritizing restrictive measures that disproportionately and negatively” affect African migrants.<sup>173</sup> These authors argue that im(migration) legislation does not constructively respond to the fact that many migrants to South Africa are low-skilled individuals from the SADC region in search of work/ economic opportunities.<sup>174</sup>

<sup>171</sup> Dodson B & Crush J. October 2015. ‘Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region’. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva, Switzerland. & Maunganidze O. A. December 2017. ‘Freedom of movement: unlocking Africa’s development potential’. Policy Brief. Institute for Security Studies. Pretoria, South Africa.

<sup>172</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>173</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies

<sup>174</sup> Ibid.



What follows are short descriptions, and in some cases an analysis of the key pieces of im(migration) and refugee legislation in South Africa.

**Aliens Control Act of 1991:** This Act was declared unconstitutional and has since been replaced by the Immigration Act of 2002 and the Immigration Amendment Act of 2004, but it remains an important piece of legislation because it served as the cornerstone of South African immigration policy throughout the 1990s and much of its restrictive approach is reflected in more current legislation.<sup>175</sup>

**Constitution of the Republic of South Africa Act 108 of 1996:** The Constitution, as the supreme law of the country, is the basis within which all legislation must be developed. It specifically states that “South Africa belongs to all who live in it, regardless of legal status or nationality”.

The Bill of Rights (chapter 2) guarantees traditional human rights, as well as, the progressive realization of socio-economic rights to **all** who live in South Africa. The Constitution is, therefore, understood to apply to refugees, asylum seekers and documented and undocumented migrants. Services include basic health care, education, housing, sufficient food and water and social security to those who are unable to support themselves or their families.

Of further importance is section 2.2 of the Bill of Rights which makes “fair labour practices” applicable to “everyone” in South Africa, irrespective of citizenship or legal status.<sup>176</sup> Further, section 23(1) stipulates that “**everyone** has the right to fair labour practices”.

**Refugees Act of 1998:** The Act has since been amended, but is important to discuss given its progressive and contradictory content. This Act came into force in 2000 and sought to formalize the asylum-seeking process in South Africa. It is recognized as one of the most progressive Acts in the world.<sup>177</sup> The progressivity of the Act, as with much of the South Africa legislation developed in the late 1990s, is the result of high levels of civil-society/ human rights activist participation in the its formulation.

The Act provides that refugees are entitled to “virtually the same rights as citizens”, excluding the right to vote. Asylum seekers are granted fewer rights, but are granted basic human rights such as access to basic health care, basic education for children, work and study.<sup>178</sup> Section 27 of the Refugees Act specifically grant refugees the right to seek employment in South Africa (except in the security industry as per Act 56 of 2001).

Various parties, including the government, have argued that the progressive nature of the Act has encouraged migration to South Africa and that the (debatable) increase in applications for asylum in recent years is a response to pull factors created by the Act (i.e. those granted asylum in South Africa were also granted access to education and the right to work).<sup>179</sup> The argument is that the asylum process serves “as a back door into the labour market”.<sup>180</sup> Data does show a rapid increase in applications for asylum in the 2000s.<sup>181</sup>

It should be noted that the so-called progressivity of the Act is not reflected in implementation, and this research demonstrates that in cases where migrants were attracted to South Africa by the rights the Act and the Constitution provide, they now find themselves trapped in conditions of severe deprivation and systematic human rights violation.

<sup>175</sup> Facchini G., Mayda A. M. & Mendola M. 13 April 2013. ‘South-south migration and the labour market: Evidence from South Africa’. *Journal of Economic Geography*. Volume 18. Issue 4. Pages 823–853. <https://doi.org/10.1093/jeg/lby010>

<sup>176</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project’. Gallo-Mosala S. (Ed). November 2008. *Migrants experiences within the South African Labour Market*. Scalabrini Centre of Cape Town.

<sup>177</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

<sup>178</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8

<sup>179</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>180</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>181</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

It is further necessary to point out that the right to work was not automatically granted to asylum seekers under the Refugees Act and that the conditions relating to work and study were to be determined by the Standing Committee for Refugee Affairs (SCRA). The SCRA at first placed a prohibition on the right to work and study for the first 180 days after an asylum seeker lodged an application. This was found unlawful by the Supreme Court of Appeal (SCA) which ruled that the right to work may not be arbitrarily denied and that refugees and asylum seekers have a right to wage-earning employment or self-employment.<sup>182</sup>

**Private Security Industry Regulation Act 56 of 2001:** The Act specifically prohibits refugees and asylum seekers from working in the private security industry.<sup>183</sup>

**Immigration Act 13 of 2002:** The Act covers conditions for entering South Africa for stays exceeding 90 days and for the purposes of taking up employment (i.e. including the conditions for temporary and permanent residence). In terms of section 27 (a) of the Act, a “foreigner” may be issued with permanent residence “upon receipt of an offer of permanent employment” subject to certain other conditions.<sup>184</sup> The Act also states that holders of legal residence in South Africa must not become a burden on the state and are therefore denied (legal/ documented) entry if they require social assistance.<sup>185</sup> The Act also does not permit entry to traders or job seekers. The Act can therefore be interpreted to discourage migration of low-skilled migrants.

**Immigration Amendment Act of 2004:** Regarding work, the two laws (i.e. Act 13 of 2002 above and the 2004 amendment) promote immigration of highly skilled individuals and investors. They introduce four categories of work permits (quota, general, exceptional skills and inter-company transfers) business permits and a variety of entry categories that do not allow foreigners to work.<sup>186</sup> In February 2003, the quota for work permits was set at 740 000 per annum. Yet, in 2011, only 35 000 work permits were allocated covering 53 occupations/ skills deemed scarce and critical.<sup>187</sup> It has also been noted that more work permits are being allocated to Europeans, Americans and Asians (i.e. not Africans).<sup>188</sup> As such, the OECD has argued that the Immigration Act of 2002 as amended is a continuation of the Aliens Control Act, which creates a “dual system of limited permanent high-skilled immigration and temporary lower-skilled migration, mainly through corporate permits”.<sup>189</sup>

Subject experts have argued that the recent amendments to the Act are regressive in that the amendments create additional categories of “undesirable persons”, deportation and legal action. The amendments erode the rights of asylum seekers and will exacerbate the challenges these individuals already face (see section on research findings). The amendments, inter alia, reduce the transit visas of asylum seekers from 14 to five days.

**Immigration Amendment Act 13 of 2011:** The Act reportedly aims to facilitate the free-movement of [certain categories] of people (i.e. highly skilled and resourced individuals) and goods, and an exchange of skills, by streamlining application processes for temporary visas, business and study permits, and related documents.<sup>190</sup> The Act does not facilitate the free-movement of low- or un-skilled workers. The Act provides for 13 types of temporary residence permits: visitors, study, treaty, work, business crew, medical treatment, relative’s, retired person, corporate, exchange, asylum transit and cross-border transit per-

<sup>182</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa.

<sup>183</sup> Ibid.

<sup>184</sup> Nshimbi C. C. & Fioramonti L. July 2013. ‘A region without borders? Policy Framework for regional labour migrations towards South Africa’. MiWORC Report 1.

<sup>185</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

<sup>186</sup> Facchini G., Mayda A. M. & Mendola M. 13 April 2013. ‘South-south migration and the labour market: Evidence from South Africa’. *Journal of Economic Geography*. Volume 18. Issue 4. Pages 823–853. <https://doi.org/10.1093/jeg/lby010>

<sup>187</sup> Ibid.

<sup>188</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>189</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>190</sup> Nshimbi C. C. & Fioramonti L. July 2013. ‘A region without borders? Policy Framework for regional labour migrations towards South Africa’. MiWORC Report 1.

mits.<sup>191</sup> The Act introduced a critical skills visa/permit, and a business visa/permit for foreigners who intend to establish a business of a certain size or invest in South Africa. It also stipulates that medical visas/permits can only be obtained in exceptional circumstances.<sup>192</sup> The Act further requires that all foreign nationals apply for visas/permits in person.

Regarding work permits, the Act includes four types; general, quota, intra-company and exceptional skills. A general work permit, is only considered in cases where employers can demonstrate that there is no South African with comparable qualifications and experience.<sup>193</sup> Corporate permits allow companies to source foreign labour and employ foreigners.

Regarding permanent residence, the Act stipulates that the spouses and children of South African citizens or permanent residents qualify for permanent residence, as do individuals who have invested large amounts of capital in the country.<sup>194</sup>

The Act also introduces amendments to the documentation management process to which asylum seekers are subjected. The Act reduces the number of days granted to asylum seekers to report to refugee reception offices closest to their port of entry.<sup>195</sup> (As the testimonies gathered during this research assignment demonstrate, these changes will make it impossible for many asylum seekers to comply with the legislation, and is therefore likely to increase the number of undocumented and unprotected migrants).

**The Social Assistance Act 13 of 2004:** The Act responds to the constitutional imperative that everyone has the right to have access to social security and appropriate social assistance, including if they are unable to support themselves or their dependents (within the available resources of the state). The act targets vulnerable groups in South Africa and regulates the types of social grants available to vulnerable groups in the country. However, in what appears to be an unconstitutional deviation, the Act explicitly restricts social grants (including the child support grant) to citizens. In 2012, access was extended to recognized refugees but not to other categories of migrants. The Foster Care Grant is open to foster parents of any formal legal status, including refugees.<sup>196</sup>

**White Paper on International Migration 2017:** The White Paper sets out to guide a comprehensive review of immigration legislation across eight areas: admissions and departures; residency and naturalization; international migrants with skills and capital; ties with South African expatriates; international migration within the African context; asylum seekers and refugees; integration processes for international migrants; and enforcement.<sup>197</sup>

According to the OECD, the 2017 White Paper marks a shift “to a greater emphasis on capturing the economic benefits” of migration.<sup>198</sup> The Paper presents a policy vision aligned to African realities and seeks “to harness the strategic potential of migration”.<sup>199</sup> The paper includes an entire chapter on managing migration in the African context. The chapter proposes various arguably progressive policies interventions. These include:<sup>200</sup>

- Offering visa regulation schemes to nationals of Zimbabwe, Mozambique, Malawi, Botswana, Namibia, Eswatini and Lesotho living in South Africa.
- Introducing SADC visa options for some economic migrants as an alternative to irregular means

<sup>191</sup> Ibid.

<sup>192</sup> Ibid

<sup>193</sup> Nshimbi C. C. & Fioramonti L. July 2013. ‘A region without borders? Policy Framework for regional labour migrations towards South Africa’. MiWORC Report 1.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

<sup>197</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies.

<sup>198</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>199</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies

<sup>200</sup> Ibid.

(these include work, trader and small business permits).

- Ensuring better enforcement of immigration and labour laws that target unscrupulous employers rather than individual migrants.

On the other hand, the White Paper proposes “asylum processing centres” that will operate at land borders to manage and reduce migrant flows, thereby also “reducing system costs”. The Department argues that “by reducing the incentive for abuse by economic migrants, the asylum system will be transparent and responsive. It will also reduce the cost of managing a large number of asylum seekers”.<sup>201</sup> Critics have argued that these will, in effect, be detention centres (notorious for human rights violations<sup>202</sup>), and that the South African government cannot afford construction of these centres (estimated at R298 million).<sup>203</sup>

**The Border Management Authority Act of 2017:** This law states as its purpose the protection of South Africa’s territorial integrity essentially by improving border security. The Department of Home Affairs is the primary implementing agent. The core implementation functions pertain to customs administration, policing, and management of the movement of persons.<sup>204</sup>

**The Refugees Amendment Act 11 of 2017:** Signed into law on the 14<sup>th</sup> of December 2017, the Act seeks to:

- “Amend and insert certain definitions;
- Include further provisions relating to disqualification from refugee status;
- To provide for integrity measures to combat fraud and corruption among staff members at the Refugee Reception Offices, the Standing Committee and the Refugee Appeals Authority;
- To omit provisions referring to the Status Determination Committee;
- To substitute certain provisions relating to the Refugee Appeals Authority;
- To provide for the re-establishment of the Standing Committee;
- To confer additional powers on the Director-General;
- To clarify the procedures relating to conditions attached to asylum seeker visas and abandonment of applications;
- To revise provisions relating to the review of asylum applications;
- To provide for the withdrawal of refugee status in respect of categories of refugees;
- To provide for additional offences and penalties;
- To provide for transitional provisions; and
- To provide for matters connected therewith.”<sup>205</sup>

In Parliament, the rationale given in support of the Act was to “tighten-up” existing legislation to address “abuse of the asylum system” and “corruption”, and ensuring “increased efficiency” in the relevant

<sup>201</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies. And Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa.

<sup>202</sup> In 2014 the South African Human Rights Commission released a report detailing on-going human rights abuses at the Department of Home Affairs Lindela Repatriation Centre. These included procedural violations, inhuman and unsafe conditions, violence and the unlawful detention of high numbers of people. Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies

<sup>203</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies

<sup>204</sup> Ibid.

<sup>205</sup> Government Gazette. 18 December 2017. Act. No. 11 of 2017: Refugees Amendment Act 2017. No. 41343. Cape Town

workforce.<sup>206</sup> These are all serious issues that require redress, and in many instances the Act legitimately attempts to do so. However, based on the findings of this research, many of the amendments are likely to achieve the exact opposite (i.e. by attempting to further reduce the rights, opportunities and livelihood strategies available to migrants and refugees the amendments are more likely to result in human rights violations or a humanitarian crises).

Regarding exclusions from refugee status, the following persons are excluded: persons guilty of war crimes, torture and related activities; persons who committed serious (non-political) crimes; and persons who have refugee status or protection in other countries. Of concern is that the following types of persons are also automatically excluded:

- A person who “has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identify card, passport, travel document, temporary residence visa or permanent residence permit”.<sup>207</sup> As the analysis from the findings of the research study will show, and as documented in various additional pieces of research<sup>208</sup>, asylum seekers, refugees and (undocumented) migrants in South Africa are often forced to use (i.e. survival depends on using) documentation “fraudulently”. This includes having to use someone else’s documentation to access emergency medical services, or the expiration of documentation due to an inability to get to/ or to receive timeous services at documentation renewal centres. The systemic flaws in the immigration system may mean that many/ most migrants/ refugees/ asylum seekers will at some point be in possession of “fraudulent” documents during their stay through force of circumstance.
- A person who has “entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, and fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry”; or “has failed to report to the Refugee Reception Office within five days of entering into the Republic as contemplated in section 21, in the absence of compelling reasons . . .”.<sup>209</sup> As the personal accounts that follow in the findings section of this report demonstrate, compliance to these requirements are literally impossible for individuals fleeing political conflicts and war.

Amendments to section 5 of Act 130 of 1998 (as amended by section 6 of Act 33 of 2008) are by and large aligned to international legislation and reasonable, but there are two key areas of concern. First, in terms of Section 6 (g) a person ceases to qualify for refugee status if “he or she has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residents or permanent residence permit”, which as previously noted is almost unavoidable for individuals who wish to survive given the poor functioning of the entire system and the prevalence of xenophobic attitudes among public officials and ordinary South Africans. Further, the Act gives the minister sweeping powers without introducing any checks or balances, or accountability measures. In terms of the new Act (h) “the Minister may issue an order to cease the recognition of the refugee status of any individual refugee or category of refugees, or to revoke such status”.<sup>210</sup>

The insertion of section 20A into Act 130 of 1998, which essentially seeks to respond to and reduce crime and corruption in the various arms, institutions and administrative processes of the asylum seeker/ refugee system is welcome and commendable, given the widespread and systemic problems described elsewhere in this report and in much of the literature on the subject. The measures are comprehensive and include investigations, access to personal information, and psychometric testing.<sup>211</sup>

<sup>206</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa.

<sup>207</sup> Government Gazette. 18 December 2017. Act. No. 11 of 2017: Refugees Amendment Act 2017. No. 41343. Cape Town

<sup>208</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa.

<sup>209</sup> Government Gazette. 18 December 2017. Act. No. 11 of 2017: Refugees Amendment Act 2017. No. 41343. Cape Town

<sup>210</sup> Government Gazette. 18 December 2017. Act. No. 11 of 2017: Refugees Amendment Act 2017. No. 41343. Cape Town

<sup>211</sup> Ibid.

An important clause is the amendment of section 22 of Act 130 of 1998, as amended by section 15 of Act 33 of 2008. Section 22(1) which pertains to the asylum seeker visa states that “an asylum seeker whose application in terms of section 21(1) has not been adjudicated, is entitled to be issued with an asylum seeker visa, in the prescribed form, **allowing the applicant to sojourn in the Republic temporarily, subject to such conditions as may be imposed, which are not in conflict with the Constitution or international law**”.<sup>212</sup> This implies that all the human and socio-economic rights guaranteed by the Constitution, including the rights to work, self-employment, education and health as various court rulings (including the Supreme Court of Appeal (SCA)<sup>213</sup>) confirmed in the past, must remain applicable to asylum seekers awaiting status confirmation and to refugees. It can, therefore, be argued that paragraphs 6 to 11 of Section 22 of the Amended Act contravene the Constitution by imposing unjustifiable limitations on the rights of asylum seekers and refugees to work; and by imposing conditions and stipulations that asylum seekers and refugees will effectively find impossible to comply to. Specifically, the Act prohibits asylum seekers from working in South Africa while they await final determination of their refugee claim.<sup>214</sup> This process can take years to complete and effectively renders affected individuals destitute. In fact, South Africa “currently has one of the biggest asylum seeker backlogs in the world (backlog of 147 794 in 2017), with most asylum seekers waiting several years for processing”<sup>215</sup>

The arguably unconstitutional sections are:

- Section 22 (6): “An asylum seeker may be assessed to determine his or her ability to sustain himself or herself, and his or her dependents, either with or without the assistance of family or friends, for a period of at least four months.”<sup>216</sup>
- Section 22 (7): “If, after assessment, it is found that an asylum seeker is unable to sustain himself or herself and his or her dependents, as contemplated in subsection (6), that asylum seeker may be offered shelter and basic necessities provided by the UNHCT or any other charitable organization or person.”<sup>217</sup>
- Section 22 (8) “The right to work in the Republic may not be endorsed on the asylum seeker visa of any applicant who –
  - (a) is able to sustain himself or herself and his or her dependents as contemplated in subsection (6)
  - (b) is offered shelter and basic necessities by the UNHCR or any other charitable organization or person, as contemplated in subsection (7) or
  - (c) seeks to extend the right to work, after having failed to produce a letter of employment as contemplated in subsection (9): provided that such extension may be granted if a letter of employment is subsequently produced while the application in terms of section 21 is still pending.”<sup>218</sup>
- Section 22 (9) “In the event that the right to work or study is endorsed on the asylum seeker visa, the relevant employer, in the case of a right to work, and the relevant educational institution, as the case may be, in the prescribed form within a period of 14 days from the date of the asylum seeker taking up employment or being enrolled, as the case may be”<sup>219</sup>
- Section 22 (11) “The Director-General must revoke any rights to work as endorsed on an asylum seeker visa if the holder thereof is unable to prove that he or she is employed after a period of six months from the date on which such right was endorsed”<sup>220</sup>
- Gastrow and others<sup>221</sup> argue that the Act, by not mentioning any form of employment other than

<sup>212</sup> Ibid.

<sup>213</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa.

<sup>214</sup> Ibid.

<sup>215</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief 17. Institute for Security Studies.

<sup>216</sup> Government Gazette. 18 December 2017. Act. No. 11 of 2017: Refugees Amendment Act 2017. No. 41343.

Cape Town

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

<sup>221</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

through an employer, also prohibits asylum seekers from operating businesses in South Africa.<sup>222</sup> Given that the barriers to employment of asylum seekers in the formal economy are almost prohibitive (and that the Amended Act increases the barriers to employment), and given that the survival of many migrants, asylum seekers and refugees depend on their ability to self-generate income, this amendment too, will likely cause more destitution. It may also affect the South African economy, inter alia, through loss of employment opportunities and rental income for South Africans. Mbiyozo 2018 agrees that the Amended Act's general strategy will exacerbate the already precarious living and working conditions in which migrants and refugees find themselves. The amendment could trigger a bigger humanitarian crisis by relegating otherwise capable people who are willing to contribute to the development of South African society to a dependent status on a government, civil society and social structures that lack the capacity to provide adequate shelter and resources.<sup>223</sup>

In terms of Section 27, applications for permanent residence can now only be submitted after ten (as opposed to five years) of residence in South Africa (starting from the date asylum was granted).

Overall, the Amended Act, as various subject experts have argued seems to have the “implicit goal” “to make South Africa a significantly less desirable destination for asylum seekers.”<sup>224</sup> Specifically the legislation curtails the rights to asylum seekers to work and to access social protection in South Africa.<sup>225</sup> As a legal and policy expert stated during an interview: “*The government is openly xenophobic. This amendment will make the situation worse for everyone concerned. The consequences of things like not being able to work for the first four months, or having less than a week to get to a refugee office is designed to make people suffer. Nobody can comply*”.

**National Development Plan 2030:** The plan emphasizes the importance of attracting and supporting ‘high-value’/ highly skilled/ high net-worth im(migrants). The document also calls for the adoption of a “more progressive migration policy for skilled and unskilled workers”<sup>226</sup>

In sum, the literary consensus is that despite what was until the 2017 Amendment to the Refugees Act a progressive legislative framework theoretically aligned to a human rights-based approach and international human rights conventions, and with the exception of a number of amnesties discussed elsewhere in the report, implementation has been heavy-handed or “punitive.”<sup>227</sup> Most authors argue that the emphasis has been on arrest and deportation. The available statistics appear to support this view. Approximately 2.3 million people were deported in 2000, of which at least 98% were sent to other SADC countries.<sup>228</sup>

Further, existing legislation fails to effectively address or regulate the high levels of regional economic migration. Carciotto et al<sup>229</sup> argue that the problem stems from the Immigration Act 11 of 2002, which as indicated, “prioritizes highly skilled migration but does not provide accessible legal pathways for low- to mid-skilled migrants”. The consensus in the literature is that the failure to so do has resulted in the asylum seeker/ refugee system becoming the “de facto immigration option for many to attain legal status regardless of protection needs”<sup>230</sup>

<sup>222</sup> Gastrow V. 2018. ‘Problematizing the Foreign Shop: Justifications for restructuring the migrant spaza sector in South Africa.’ SAMP Migration Policy Series 80. South African Migration Programme. International Migration Research Centre. Ontario. Canada.

<sup>223</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions.’ Research Policy Brief. Institute for Security Studies

<sup>224</sup> Crush J., Skinner C. & Stulgaitis M. August 2017. ‘Benign neglect or active destruction? A critical analysis of refugee and informal sector policy and practice in South Africa. South African Human Mobility Review 3 (2). [http://sihma.org.za/wp-content/uploads/2017/09/1\\_Benign-Neglect-or-Active-Destruction.pdf](http://sihma.org.za/wp-content/uploads/2017/09/1_Benign-Neglect-or-Active-Destruction.pdf)

<sup>225</sup> Carciotto S., Gastrow V. & Johnson C. Not dated. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa.

<sup>226</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions.’ Research Policy Brief. Institute for Security Studies.

<sup>227</sup> Crush J., Dodson B., Williams V., Tevera. D. 2017. ‘Harnessing migration for inclusive growth and development in Southern Africa.’ Special Report. The Southern African Migration Program and UK Aid

<sup>228</sup> Ibid.

<sup>229</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

<sup>230</sup> Ibid.

## 5.4.1 LABOUR LEGISLATION

Legal experts, backed by Constitutional and labour court rulings argue that the labour related legislation summarized below apply to all workers (i.e. irrespective of legal/ documented status or nationality).<sup>231</sup>

**The Occupational Diseases in Mines and Works Act of 1973 and the Compensations for Occupational Injuries and Diseases Act of 1993: The Acts apply to employment-related injuries and diseases in the mining sector.**<sup>232</sup> They form part of a system of no-fault compensation for employees who are injured in accidents that arise out of, or in the course of, their employment, or who contract occupational diseases.<sup>233</sup> They are administered through the Compensation Fund of South Africa, but remain largely inaccessible to foreign born workers in the mining industry who travel, do not have bank accounts, or are not traceable.<sup>234</sup>

**Basic Conditions of Employment Act 1997:** The Basic Conditions of Employment legislates a set of legal minimum requirements for [decent] work for “all employees” in South Africa. The Act covers working hours, overtime, leave, termination of employment etc. In terms of section 1 of the Act, an employee is “any person, excluding and independent contractor, who works for another person or for the state and who receives, or is entitled to receive, remuneration”.

**Unemployment Insurance Act of 2001:** The Act covers workers and their dependents against temporary unemployment due to termination of service, illness, or birth or adoption of a child. Short-term migrant workers and undocumented migrant workers are not covered by the Act. In the case of short-term workers, because they are expected to return to their countries of origin at completion of their contracts/ internships/ learnerships.<sup>235</sup> This has a particularly negative affect on seasonal farm labourers, domestic workers, and short-term contracts in the construction industry.

**Labour Relations Act 2002 (as amended):** The Act gives effect to section 27 of the Constitution and applies equally to all members of the workforce. As such it seeks to: regulate the rights of trade unions; promote and facilitate collective bargaining at the workplace and at sectoral level; regulate the right to strike and the recourse to lockout in conformity with the Constitution; promote employee participation in decision-making through the establishment of workplace forums; provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration was established), and through independent alternative dispute resolution services accredited for that purpose; establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act; provide for a simplified procedure for the registration of trade unions and employers’ organizations, and to provide for their regulation to ensure democratic practices and proper financial control; and give effect to the public international law obligations of the Republic relating to labour relations. The Act stipulates in section 185 that “every” employee has the right not to be unfairly dismissed.

**Commission for Conciliation, Mediation and Arbitration:** The Commission for Conciliation, Mediation and Arbitration (CCMA) is a public body that hears labour disputes. In **2008**, the CCMA officially interpreted the Constitutional and Labour Law provisions on fair labour practices to apply to undocumented labour migrants.<sup>236</sup>

**Labour Court:** In **2008** the Labour Court confirmed the CCMA ruling in a case between a migrant and Discovery Health, by ruling that employers have the same duty of care to undocumented foreign employ-

<sup>231</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

<sup>232</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

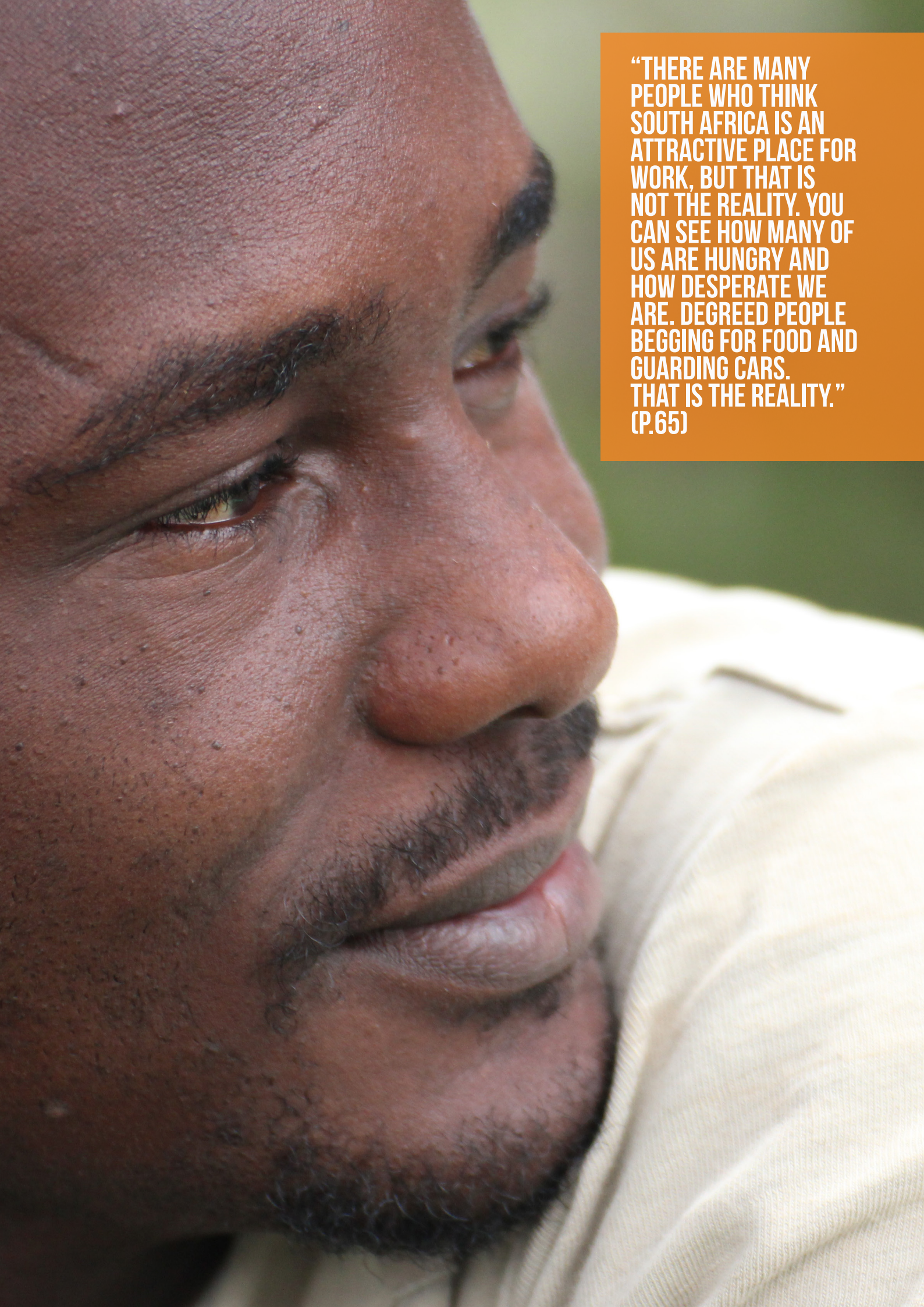
<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.





**“THERE ARE MANY PEOPLE WHO THINK SOUTH AFRICA IS AN ATTRACTIVE PLACE FOR WORK, BUT THAT IS NOT THE REALITY. YOU CAN SEE HOW MANY OF US ARE HUNGRY AND HOW DESPERATE WE ARE. DEGREED PEOPLE BEGGING FOR FOOD AND GUARDING CARS. THAT IS THE REALITY.”  
(P.65)**

ees as they have to South African citizens, and that employment contracts are valid irrespective of whether an employee is an undocumented migrant.<sup>237</sup> The Court thus confirmed that undocumented workers are to be regarded as employees for the purposes of the Labour Relations Act.<sup>238</sup>

**Employment Services Act:** In terms of the Act, employers may not employ anyone without a valid work permit.<sup>239</sup>

**Workman's Compensation:** Temporary Residents qualify for workman's compensation.<sup>240</sup>

The above discussion demonstrates that, in theory, migrants and refugees in South Africa are protected and their working conditions are regulated. However, as discussions in the remainder of this paper will demonstrate, migrants (particularly undocumented migrants) and refugees are afraid (with good reason) to approach government and related institutions and are effectively unable to access their rights.

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<sup>237</sup> Ibid.

<sup>238</sup> Griffin L. 2011. 'Unravelling Rights: 'Illegal' Migrant Domestic Workers in South Africa'. *South African Review of Sociology*, 42:2, 83-101, DOI: 10.1080/21528586.2011.582349

<sup>239</sup> Kiwanuka M., Jinnah Z. & Hartman-Pickerill B. November 2015. 'Getting the house in order: Foreign migrant workers in the domestic work sector in South Africa'. MiWORC Report 10

<sup>240</sup> Deacon B., Olivier M. & Beremauro R. June 2015. 'Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

# 6. RESEARCH FINDINGS

## 6.1 SUMMARY OF KEY FINDINGS

The results from the IDIs and focus groups with migrants and refugees are discussed below. Key findings include:

- Although available literature and subject experts emphasize economic opportunity, social relationships and other pull factors as drivers of migration to South Africa, the qualitative data generated in this study suggest that migration is a result of “push”, rather than “pull” factors. The most likely reason for migration among the research population was war and political turmoil.
  - Approximately half of the respondents interviewed fled life-threatening situations in conditions of war or political persecution. These individuals mostly fled to South Africa with limited planning and without resources. Entry into the country was mostly undocumented. Once in South Africa, they are lost in an inefficient and abusive system that prevents them from getting refugee status for up to a decade. During this period, they are victims of xenophobia and discrimination, they are exceedingly poor and vulnerable, their dignity is compromised, and they cannot access secure employment, adequate housing or basic services
- Many did cite the need to access livelihood opportunities as drivers of migration, but this was the result of poverty and the absence of other alternatives, rather than opportunistic or entrepreneurial behaviour.
  - Social networks and familial relationships were not found to be drivers of migration, although the establishment of such networks post arrival contributes to survival. If these results were representative of the overall migrant population, it would suggest that policy initiatives to reduce so-called “pull factors” are misdirected, and that initiatives aimed at regional development and peace would be more effective. It also suggests that supportive, rather than punitive, responses are required in South Africa.
  - Most research participants entered the country without the appropriate documentation or without following legislated processes. For some (i.e. the Basotho women) the migratory processes to follow are well-established and uneventful. For those escaping from war or political persecution, the experiences are harrowing, degrading, terrifying and traumatic. More so for women.
    - The migratory experience is different for women than for men for two key reasons. Men mostly migrate alone, and when they migrate with family members, they are accompanied by their partners/wives. None of the male participants migrated as single parents/ caregivers with small children. Many of the women did. Further women were far more likely to be victims of sexual violence or sextortion during the process.
  - For unskilled, low-skilled, undocumented migrants, refugees and asylum seekers life in South Africa is difficult and fraught with challenges. Migrants and refugees experience systematic human rights violations. Although the effect is less severe for skilled and formally employed migrants, they too experience bureaucratic nightmares, systematic discrimination, violence, xenophobia and difficulty accessing basic services.
    - Most research participants (irrespective of documentary status or income) cited persistent xenophobia as a constant source of fear and emotional distress. Many recounted incidents of violence, intimidation or abuse. Xenophobia takes place at all levels of society, in the streets, in schools, on public transport, in public spaces, and is also perpetrated by public officials including the police and the Department of Home Affairs.
    - Research respondents felt that country of origin and employment status (of the victims), and socio-economic status and racial profiles (of South African perpetrators) were factors that increased the likelihood of xenophobic incidents and attacks. Respondents felt they were more likely to be victims of xenophobia if they were employed, and more so if they owned their own businesses. These perceptions align to the empirical evidence provided in the literature review.
  - Research participants were generally able to access basic services like water, electricity and public transport. For some this was an improvement on conditions in countries of origin. As is the case for urban South Africans, the primary barriers to accessing basic services were poverty, unemployment and living in an informal area.

- Migrants and refugees struggle to access adequate housing. Most research participants find themselves in abysmal conditions characterized by exploitative rental arrangements, overcrowding and fear. For many, quality of life in their countries of origin was better (before the onset of the push factors that drove them out).
- Experiences with health officials and institutions are also negative, with xenophobic public officials refusing access. Other research studies have shown that discrimination against migrants and refugees in the health sector is systemic. Similar challenges pertain to schooling.
  - Few migrants and refugees send remittances to their countries of origin, and when they do, they do so inconsistently, and the amounts are negligible. Reasons include not having resources to spare and a policy induced inability to access financial services.
    - Working conditions were exploitative and degrading for most respondents, less so for those who are self-employed.
    - The barriers to decent work (whether as employees or a self-employed small business owners) include: difficulty accessing the required documentation, which results from inefficiency, xenophobia, abuse, and corruption at the Department of Home Affairs and a hostile and impractical legislative and policy environment; being excluded from financial institutions; language barriers; inefficiencies in degree and other qualification recognition processes; xenophobia, and discriminatory legislation.
- Migrants and refugees experience extensive abuse in their dealings with the Department of Home Affairs. Corruption is pervasive and many are forced to participate in corrupt practices or to accept abuse in order to survive. The asylum seeker process is detrimental to refugees who spend decades as asylum seekers waiting for adjudication of their applications. Confusion and inefficiencies in the process, coupled with a lack of knowledge among employers and a system which requires perpetual renewal of existing documentation impose prohibitive barriers to accessing/ maintaining employment or income-generating activities.
- Migrants and refugees cannot open bank accounts, which means they also cannot save money, send remittances safely, access credit or start-up capital from formal institutions, secure employment in the formal sector (where no-one pays cash), open clothing or other store accounts, or sign legitimate lease agreements.
- The migrants and refugees who are unable to speak any of the 11 official languages, and in particular English, are at a further disadvantage when trying to secure employment. A first step is (aside from the attempts to obtain the relevant documentation), therefore, to learn English. Some start their learning process at non-governmental organizations, while many teach themselves. Organizations who provide English lessons or translation services were considered invaluable by the migrants and refugees interviewed.
- Qualifications are not automatically recognized in South Africa. Copies (or at times originals) have to be submitted to the South African Qualifications Authority (SAQA) for assessment, verification and classification. This is a lengthy process. It is difficult for refugees who fled their homes with nothing and certainly did not carry their degrees with them, it is also difficult for impoverished individuals, who may not speak English, or have the resources to access SAQA offices.
- Further to the generalized xenophobia experienced, migrants and refugees in employment or who own their own businesses are the targets of specific types of attack. Individuals are forced to start their businesses in specific (mostly more affluent areas), and many are attacked and maltreated if they succeed in business or perform well at work. This has a negative effect on business growth and employment rates.
- Discriminatory legislation, including the Private Security Industry Regulation Act 56 of 2001, is preventing migrants and refugees from accessing some of the very few employment options previously available to them.
  - It is exceedingly difficult for migrants and refugees to access employment in the formal sector or wage-based employment in the informal sector of the South African economy. The factors that contribute to “success”/ survival include: targeted assistance from civil society organizations e; individual South Africans who provided employment opportunities or other assistance; social networks; and personal characteristics like determination, work ethic, ingenuity, humility and education.
    - Similarly, those individuals who, despite tremendous obstacles, have succeeded in starting and running micro enterprises listed the following as the factors that contributed to their success: hard work; desperation; ingenuity; personal sacrifice; assistance from certain South African communities; and social capital.

- Migrants and refugees interviewed are more likely to be employed in low-skilled jobs where they are vulnerable, exploitable/ exploited, payed minimum wages or less, or where labour legislation is flouted.
  - Many are pushed into informal employment.
  - Employment status is not correlated with educational achievement, but it is correlated with type of permit/ documentation. Permanent residents and those with work permits fare well and are more integrated. Refugees are worse off on all counts, but are in a better position than asylum seekers or undocumented migrants.
- Regarding rights awareness, although labour legislation in South Africa applies equally to migrants (documented and undocumented) and refugees, 40% of research participants were not aware of their labour or any other rights (and were therefore not able to access their rights). A further 40% were aware of their rights but because of fear were not able to actualize their rights. They feared xenophobic retaliation, loss of employment, and abusive or aggressive behaviour from public officials including the police.
  - The research also suggests widespread employer non-compliance with labour legislation, which in part stems from a lack of knowledge and the bureaucratic and other barriers to compliance.
- Being a woman exacerbates suffering and increased challenges in every aspect of the migrant and refugee experience. Additional trauma stem from sexual violence, the sex “trade”, sexism with the religious institutions from which they seek support, childcare responsibilities and dependency.

## 6.2 DRIVERS OF MIGRATION

Drivers of migration differ based on country of origin, conditions in respective recipient countries, and historical time-periods (i.e. socio-political/ conditions of the time). The following drivers of migration were identified based on the literature review and interviews with subject experts: economic factors; political turmoil and war; familial and social relationships; environmental degradation; access to infrastructure and resources; progressive laws as pull factors; accessibility; poverty; and human trafficking.

**Economic factors:** The literature and interviews with subject experts suggest that migration in Southern Africa is driven mostly by economic factors (i.e. people migrate to find work or to conduct trade, which includes regular cross-border traders in regulated and unregulated sectors).<sup>241</sup> As such they tend to argue that the majority of migrants to South Africa are “economic refugees” or “labour migrants”. As one academic explained: “*Over the last two decades, the drivers for migration to South Africa, in particular from the rest of Africa, were economic. The rest of Africa is not performing well economically and unemployment rates are exceedingly high. Currencies have no value. People come to this country as economic refugees*”. There is empirical data to support this position. A household survey of migrants in Cape Town and Johannesburg, for example, found that 90% of respondents listed “getting work” as one of their reasons for migrating.<sup>242</sup> Further, the quarterly labour force survey of 2012 estimated that 1.2 million people migrated to South Africa in the preceding five years. Their reasons for moving provided were (in rank order): to access secure employment opportunities (34%), to look for work (26%), to join family (28%), to access education (6%) and 6% cited “other” reasons.<sup>243</sup>

**Political turmoil and war:** Political turmoil and war are also drivers of migration. In recent years, political violence, repression and instability (mostly coupled with economic decline) have promoted migration from Cameroon, the Democratic Republic of Congo, Congo Brazzaville, the horn of Africa, and Zimbabwe into South Africa.<sup>244</sup> Zimbabwean migration increased steeply from 2007, when the Zimbabwean economy effectively collapsed.<sup>245</sup> A household survey of migrants in Cape Town and Johannesburg, for example, found that 11% of respondents were refugees and had fled situations of political turmoil.<sup>246</sup>

**Familial and social relationships:** The literature review further indicated that migration occurs for familial and relational reasons. According to Dodson et al. 2015, even the attempt to distinguish between individual and family migration is problematic, as “individual migration in the region is commonly undertaken as a family strategy”.<sup>247</sup> “People go where they have family. They follow other family members here and they settle where they have family”. A senior academic explained: “*The literature shows that the decision to migrate happens at family level – at the extended or nuclear family level. This leads to chain migration. A family will typically sponsor the migration of the most capable person to their country of choice. In many cases, only part of the family relocates, and part remains rooted in their country of origin. This is because people are smartly playing the odds. If things don’t work out, the migrants can always come back. This also results in cyclical movement over longer timeframes, people leave depending on shifting economies to*

<sup>241</sup> Maunganidze O. A. December 2017. ‘Freedom of movement: unlocking Africa’s development potential’. Policy Brief. Institute for Security Studies. Pretoria. South Africa. Dodson B & Crush J. October 2015. ‘Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region’. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland. Statistics South Africa. 2015. Census 2011: Migration Dynamics in South Africa. Report 03-01-79. ISDN 978-0-621-44166-6.

<sup>242</sup> Crush J. & Tawodzera. G. 2017. ‘South-south migration and urban food security: Zimbabwean migrants in South African cities’. International Migration. Volume 55 (4). International Organization for Migration

<sup>243</sup> Budlender D. 2014. ‘Migration and employment in South Africa: Statistical analysis of the migration module in the Quarterly Labour Force Survey. Third quarter 2012. MiWORC Report 5. African Centre for Migration and Society.

<sup>244</sup> Dodson B & Crush J. October 2015. ‘Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region’. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland. Statistics South Africa. 2015. Census 2011: Migration Dynamics in South Africa. Report 03-01-79. ISDN 978-0-621-44166-6.

<sup>245</sup> Ibid.

<sup>246</sup> Crush J. & Tawodzera. G. 2017. ‘South-south migration and urban food security: Zimbabwean migrants in South African cities’. International Migration. Volume 55 (4). International Organization for Migration.

<sup>247</sup> Dodson B & Crush J. October 2015. ‘Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region’. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.

*the countries with the best opportunities”. Or, as another subject expert argued, communities are established, which act as pull factors for further migration. “There are nationality-based clusters of migrants who tend to form social capital and that attracts chain migration”.*

**Environmental degradation:** A minority of authors identified environmental degradation and natural disasters as drivers of migration to South Africa.<sup>248</sup> A few of the academics interviewed pointed to the “consequences of climate change” and “droughts” as drivers of migration.

**Access to infrastructure and resources:** There is also literature to support the argument that lack of, or the likelihood to access infrastructure, basic services, health care and other social resources encourage migration to South Africa.<sup>249</sup>

**Progressive laws as pull factors:** Various government policies and papers have argued that some of the progressive laws the country had in the recent past (i.e. the Refugees Act prior to amendments), encouraged migration. These authors cite refugees and (formerly asylum seekers) rights to work and study, and the absence of refugee camps as pull factors. As one subject expert explained: *“South Africa is in a sense good for refugee groups because South Africa and Uganda are the only countries where refugee integration is the model. These two countries do not have refugee camps. That makes these countries a first choice for many”.*

**Poverty:** Poverty is a factor that underlies all the drivers listed above. It is likely that, with the exception of those fleeing war and political unrest, the majority of migrants to South Africa are driven (at least in part) by poverty. In the Johannesburg and Cape Town household surveys, for example, 44% of migrants cited hunger and food shortages as reasons for their decision to migrate to South Africa.<sup>250</sup>

**Accessibility:** African migration to South Africa is mostly overland, making South Africa more accessible to migrants from Africa than other continents are. As one academic explained: *“For many this is the final destination, for those of means, this is a transit point to Europe or America”.*

**Victims of human trafficking:** The International Organization for Migration deals extensively with human trafficking (either for cheap labour/ slavery or the sex industry). Although human trafficking falls outside the scope of this assignment it is worth noting, as a subject expert explained, that *“the number of people trafficked for sexual and labour exploitation is astounding. This includes women from almost everywhere, sold by their families or drug dealers or members of organized crime syndicates, fishermen from South East Asia, and factories in KwaZulu-Natal who literally buy slaves. It happens on farms too through so-called labour brokers”.* Or as another explained: *“It is so prevalent there is a human trafficking hotline and the hawks are involved in assisting us with this. It also happens that West Africans get South African women hooked on drugs and then use them to make pornography or sell them off in the sex trade. There are international syndicates buying thousands of women and girls”.* Human trafficking takes many forms and can form part of the migratory process itself. *“In our NGO you see that many times foreign shop keepers will bring in young women from their country, some are only 14-years old, and they use these girls to work for them in their businesses, but they withhold their travel documents so they can’t leave”.*

The results from the qualitative data collection process completed for this assignment largely align with the identified drivers of migration, but elevates the likelihood of migration as a result of political unrest or war. Broadly, the data shows that migration is a result of “push”, rather than “pull” factors. If these results were representative of the overall migrant population, this would suggest that policy initiatives to reduce so-called “pull factors” are misdirected, and that initiatives aimed at regional development and peace would be more effective. It also suggests that supportive, rather than punitive, responses are required in-country.

**Economic factors:** Only approximately 15 of the respondents interviewed came to South Africa to find work. Predictably the 12 female participants in the domestic workers’ focus group have all migrated to

<sup>248</sup> Statistics South Africa. 2015. Census 2011: Migration Dynamics in South Africa. Report 03-01-79. ISDN 978-0-621-44166-6.

<sup>249</sup> Statistics South Africa. 2015. Census 2011: Migration Dynamics in South Africa. Report 03-01-79. ISDN 978-0-621-44166-6.

<sup>250</sup> Crush J. & Tawodzera. G. 2017. ‘South-south migration and urban food security: Zimbabwean migrants in South African cities’. International Migration. Volume 55 (4). International Organization for Migration.

South Africa to access employment, given the absence of employment opportunities and extreme poverty in Lesotho. *“There is no work in Lesotho. Nothing. But your children must eat, so we come here to live like this, and we say thank you for the R100 a day”*. Most of the respondents who *“came here for work”* explained that their families remained in their respective countries of origin. The women from Lesotho reported that although some members of their extended families were living in South Africa, they had left their immediate families (i.e. children and partners) in Lesotho (i.e. their primary motivation was to access work and not familial or social relationships). Similarly, a young man from Zimbabwe explained: *“I came here to look for work. I am the oldest son and I have to take care of all the other children in the family who are still in Zimbabwe”*.

It also emerged from the interviews among this group of work seeking (and employed) migrants, that their “dreams” for improved socio-economic status through migration to, and employment in, South Africa, were shattered. Excluding the well-resourced respondents, who essentially entered the country through formal, regulated processes and by air, and who had employment contracts or similar in place, migrants and refugees face almost insurmountable barriers to accessing employment, and when they do, the conditions are often exploitative and contravene existing labour rights legislation. *“There are many people who think South Africa is an attractive place for work, but that is not the reality. You can see how many of us are hungry and how desperate we are. Degreed people begging for food and guarding cars. That is the reality”*.

What the accounts provided by respondents make clear is that migration for economic reasons is generally not “opportunistic” or motivated by attempts to “gain better employment opportunities”. Rather these are acts of desperation, like the Basotho mothers attempting to save their children from starvation. The term “economic refugees” is therefore, considered more applicable than labour migrant. *“When the Zimbabwean economy completely collapsed, I was 22 and I had two children. My children were not eating every day. Because my husband was the oldest son in the family, we also had to take care of the other family members, so my children had less to eat. My husband then went to Mozambique to get food and smuggle it across to Zimbabwe, but the soldiers at the border caught him and beat him very badly. When he recovered, we went to Botswana. I worked like a slave in somebody’s house and I could not see my children. We were all very thin. Then we got a chance to come here illegally, so we came”*.

**Political turmoil and war:** Approximately half of the respondents interviewed fled life-threatening situations in conditions of war or political persecution. These individuals mostly fled to South Africa with limited planning and without resources. Entry into the country was mostly undocumented. Once in South Africa, they are lost in an inefficient and abusive system that prevents them from getting refugee status for up to a decade. During this period, they are victims of xenophobia and discrimination, they are exceedingly poor and vulnerable, their dignity is compromised, and they cannot access secure employment, adequate housing or basic services. Some of their harrowing accounts include:

- *“It was the war in 2017. We were warned that the soldiers were coming to our house because my dad was a well-known politician. We knew we were going to be killed. My parents ran. I don’t know what happened to them. I also ran, but the soldiers raped me. Then I ran again when I could walk, and I found a way to come here”*.
- *“In that time in my country, terrible things became normal. My father was in prison and they were executing groups of people in prison every day. My father spoke the same language as one of the guards and befriended him. On the day they were going to execute him, the guard helped him escape. He went to the Congo Brazzaville from there. But because of him, they came for us and we had to run. Before we could get out my brother was also arrested. I got out, I thought I would be safe in South Africa, but here I don’t know when I wake up in the morning if I am going to survive the day”*.
- *It was the war. People in my village were being killed. I thought I could come here and survive because I am a qualified nurse. That didn’t work out.”*
- *“My husband was a soldier in the forest, a personal bodyguard to the big guy in the war, but then when things changed, he had to run. He came in 2005. If they find him, they will kill him. We can never go back. He escaped first. I followed on foot, with my two children, in 2006. All my family were killed in the war, I didn’t have anybody but him so I came. But now I have this baby with the heart operation and we have no work and no food. We can’t survive, but we can’t go back. What can I do? Tell me what can I do?”*
- *“I was a soldier. They took me to be a soldier when I was a boy. I was with the rebels. That means they*



*will kill me now if they find me. I have information they will want. When I got the chance I ran away. I left my wife and children.”*

- *“I came here alone. I left because of the war. I was living in the provinces, but they came and they destroyed everything. I lost everything. I had to run and leave everything. I saw my house burn. It was very terrible. I try not to think about it. I have not talked about it until you asked me now. I would like to go back, but it isn’t possible. My wife came three years later with my child.”*

- *“I was a missionary. I wanted to become a priest. I was part of a movement and I wrote articles. In Congo the government and the Catholic Church clashed. We were promoting human rights. We were banned. I was arrested. The magazine I wrote for was also banned. When I was released I moved to Lubumbashi to study medicine. I joined the student movement . . . wrote for the student paper . . . secret service came to arrest us . . . that night I escaped when three armed police came to our house accusing us of plotting against the government . . . .”*

- *“I came because of the war, but also because I loved this country from when I was a child. I used to watch the news about what was happening in the country and I would cry, and wanted to come to South Africa then to stop what was happening here. So I always loved the people of the country. Then my father worked for Mobuto as a normal government official and Kabila arrested him and took his pension away. My father was just a simple agricultural specialist. He had nothing to do with the military. We had a big farm, but they came to break our stuff. I tried to stop them, but they used a panga on my head. We knew if we stayed we would be killed. So we started leaving. When dad was released from prison we had lost the farm and all the equipment, and every two weeks they would come and arrest my dad again.”*

**Familial and social relationships:** Very few respondents cited social or familial relationships as their primary motivation for moving to South Africa. One such example includes: *“I left Somalia when I was 18. I fell in love with a Somali guy on the internet who was living in South Africa. So, I came here for love. I didn’t know when I came how difficult it would be, or how poor he was, but I am surviving, and we are married now”*.

As indicated in the previous section, women did follow their partners to South Africa, but not as their primary driver for migration. They would not have come if their husbands had simply been in South Africa to access employment and/or to send remittances home. They came because they were fleeing a war.

The male migrants who said they were in South Africa to find employment or economic opportunities came alone. Their families have not joined them. They also did not join family members already living in South Africa.

Similarly, the families of Basotho women did not follow them to South Africa, although Basotho networks have been established in South Africa for mutual assistance. The women described their inability to see their children more than a few times a year as source of perpetual grief.

Further, many migrants/ refugees said that they had left their country of origin after they had lost some, or all, of their family members. Several participants gave accounts of their loneliness. *“I fled the Congo when I was 15. I have been alone in South Africa for five years now. I think my mom is alive, but I don’t know where in the Congo she is. I also have an aunty in Zambia, the one I said I was staying with, but she is dying now, and I can’t get to her because I don’t have money, but I can’t get work because I don’t have papers”*. *“When I came here from Zimbabwe, I used a fraudulent Mozambican passport. I did not have any friends here and no plans. I knew nobody. I slept at the rubbish dump and worked at the robots. I also sold scrap metals I found on the dump”*. *“No, I don’t have any family from the Congo here. My partner is still in the Congo, she is not in danger there, so I have told her to stay. She is a teacher and a musician, but she will suffer if she comes here”*. *“My parents, brother and sisters are all in the Congo. I came with my husband, but he went back to the Congo, so I am alone with the children”*. *“I have nobody here. I am the only one from my family. Most are dead. My father is in the Congo. He is 80. When he goes it will just be my sister who is alive in the Congo. I can’t go back, I will get killed”*.

What the data suggests, therefore, is that social capital (i.e. community or nationality-based support) is a consequence, rather than a cause, of migration. Further, that migration for familial or social relationships is a secondary, not a primary, driver of migration.

**Progressive laws as pull factors:** Although this was never cited as a reason or motivating factor for migration by any of the interviewees, some did feel that progressive laws may have been a factor for migrants and refugees who did not participate in the study. Life in South Africa was considered safer than life in refugee camps. Refugee camps were described as dangerous and “life-threatening” places. *“One’s odds for survival are higher in South Africa than in the camps”*. *“It is true. I spoke to many people from the DRC and Somalia and they came here because they didn’t want to go to Kenya, or Tanzania, or Zimbabwe or Mozambique, because they know that there you have to go to the camps. Some of them have been in camps before. You are abused in the refugee camps. The other problem is that it is easy for political enemies to find you in the camps and kill you. Even some refugee camps are attacked. It is not like that in South Africa, where you can hide in the community”*.

**Access to education and basic services:** The majority of migrants and refugees interviewed did not migrate to South Africa to access education or other basic services. The few respondents who migrated to South Africa to access educational opportunities/ facilities or health services were comparatively well-off individuals and their entries were documented. For example, a 60-year old Congolese man with permanent residency and employed by a South African university explained: *“I flew to South Africa 24 years ago, with a medical permit arranged by the Embassy, to have a medical procedure – a corneal graft. The operation didn’t work, and I am blind in the eye now, but I stayed in South Africa. The climate and the bright sunshine and the malaria in the Congo made my eye pain much worse. The climate was better in South Africa. But also, my dad was on the protestant side in the war and he was poisoned in 1978 and they started targeting our family, so when I came my sister had already moved to France.*

An exception among the research participants was a young Zambian woman who had come to South African to study at a local university but who, as a result of the South African immigration system, now finds herself trapped in the country. *“I came here to finish my degree. I had a place at the University of Cape Town. When I came, I came straight to Cape Town, and then they told me I have to go to Musina to have my papers stamped or something. I did not have the money to travel to Musina and the office here was closed. So my permit wasn’t right, and they kicked me out of school, and now I can’t work or study and I don’t have money to go back”*.

**Other:** Although drivers of migration clearly overlap, and most are underscored by poverty, none of the other drivers of migration identified in the literature or by subject experts were mentioned by research participants. Research participants, did, however, identify drivers that are not included in the literature perused. These include personal trauma/ grief and inadvertent migration. Regarding personal trauma and grief: *“My parents and most of my family were murdered in the Zimbabwean wars of the 80s. Only my sister and I were left. [Sobs] I’m sorry. I can’t talk about this without crying. Then my sister died in the mess in Zimbabwe in 2000 and I just felt Zimbabwe was dead for me. Everyone was dead and all the industries had closed by then, I tried to work on farms but then the land nonsense started, so I thought I would come here and start my life over – a man of 45, who can’t talk without crying, and who is living on the streets!”*

Others had no intention of staying in South Africa but have been trapped here by circumstances beyond their control and a dysfunctional system. *“My story is like a nightmare. I never wanted to come to South Africa. It was not part of my dreams to be here. I had a repairs company in my country. My younger brother was working as a bouncer in South Africa. He was shot and stabbed, and he died. My family sent me here to come and collect his body for burial. I came here with all the documents. On the first day, I was going to meet with the people to arrange this, I was mugged by three guys with guns. They hurt me and they took everything I had. My passport, all my documents, all my money, my shoes, everything. I borrowed money to go to the Congolese Embassy in Pretoria, and I said, look for my records, I am here legally, I need to find my brother’s body and go home. I have a visa and a passport, you must have records, but they didn’t believe me and didn’t help me. You won’t believe it, now I am working as a bouncer where my brother was killed to get money to sort this out. And the people who killed my brother are coming after me too. It has been such a mess, but I am paying somebody for fake papers now, which I can use to go back, but I don’t have his body”*.

## 6.3 THE MIGRATORY PROCESS

Excluding the comparatively well-resourced research participants who entered South Africa with work, study, or medical permits, by air or on two-day bus trips costing about R2000, the migrants and refugees interviewed for this paper entered the country “illegally”. For some (i.e. the Basotho women) the migratory processes to follow are well-established and uneventful. For others, the experiences are harrowing, more so for women.

*Crossing the border between South Africa and Lesotho (in either direction) does not require “any visas or permits. What you need is about R1000.00 because there are several bribes you have to pay to get in or out. You usually pay R270 to the taxi driver who brings us in, and he pays the police a bribe if they stop us. Sometimes there are some other bribes to pay, especially with the police”. The system works well enough for domestic workers to visit their families three to four times per year, and the process is generally considered risk free. None of the women interviewed were concerned about arrests and none had experienced sexual exploitation or other abuse during the process.*

There are similar arrangements in place for migrants from other Southern African countries. *“There are busses going from towns in my country to Johannesburg and then to Cape Town. You pay the bus driver and he deals with border officials and then the whole bus just goes through. . . . You only pay the one amount to the driver and he sorts it out. It was very expensive. I could not speak English, but somebody else helped me”.*

*“I came through Zambia, Zimbabwe then Namibia. I lived in Zambia for three weeks, then two weeks in Zambia. In South Africa we came through the Kruger National Park. People helped us through. Then we got to Beitbridge in South Africa. Then we went to Johannesburg. We slept outside in a park. Then we took a train to Cape Town because people said there was more work in Cape Town”.*

*“We walked and we took a boat on the Congo river. Then we hitch-hiked because we didn’t have any money. Near the border we found a truck and they smuggled us over into South Africa.”*

*“The border was easy to cross. My brother knew a truck driver from Tanzania who travelled often. More than 200 trucks cross that border every day and they know the immigration officials. I came as a part of their team. At the border I did not know English. The driver dealt with the immigration officials. It is risky. You just got to hope you can trust these people”.*

For migrants and refugees from war-torn countries the migratory process is horrendous, degrading and terrifying. A few personal accounts follow.

*“We didn’t know how to get out of the country, and we were running for our lives, so it was illegal, but we just walked to the border. At the border they just said give us money. We gave them R150 each. Then they said to wait. At 2am, they put us in a car and drove somewhere, then they dropped us in a forest in the dark. There were two of us. We heard animals but it was so dark we could not see, so we just sat in the same place and waited until morning. Some guy approached us in the morning, he wanted more money. I gave him the last R40 I had hidden in my shoe because he was getting aggressive. He walked us to the Limpopo River. The water was low, but I was very afraid. There was another guy waiting on the other side of the river. He took us to the razor wire and the tar road. Then he just turned back. I crawled through the razor wire, but my husband got stuck and cut up. He told me to run, but I didn’t. I went back and I unplugged him. A truck of soldiers passed us. I was very scared. But they didn’t see us. We just walked along the path. It was so scared. We saw skeletons with clothes on, and dead people eaten by animals. We kept walking until we reached Musina. We didn’t even know where it was. We had no food and no money. We could not contact our family. I was afraid to ask anybody for anything. Then we found a market and all the people sleeping in the market at night were immigrants. We slept there, but the soldiers arrested us. They took us to a place where the immigration officer gave us a permit for two weeks and he said we must go to Cape Town. We still had no food or money. Then two Congolese guys talked to us and they took us to a church where they gave us food. I studied hotel management in London, and I managed a Holiday Inn in my country. But here I was begging truck drivers for lifts and sleeping in the gutters on the road. A truck driver took us to Johannesburg train station at 5am, but we didn’t have money for tickets, and everyone just avoided us. Everybody thought we were crazy trying*

*to go to Cape Town. So, we just slept at Park Station until we met a Rasta guy who showed us how to walk to Cape Town and gave us R30 for food. We bought oranges and sugar. Then we just walked for two nights and in the day. In the sun and in the rain. This was in 2004. Nobody stopped to help us. You could not hitch-hike. Then a family gave us a lift and a cooldrink. They dropped us and said we were not even near Bloemfontein yet. Then an ANC bus with only two passengers picked us up. The bus driver bought food for us and took us to Bloemfontein train station. Nobody at the station would help us. Then we walked to the police station and they gave us an affidavit. That is how we got on the train. We got to Cape Town then, but we didn't know how to find the Refugee Centre. We walked until we found it. Then we waited five days for our asylum papers. We slept at the Oriental Plaza. The street people were very friendly to us. They took us to shelter and they gave us food. For the next two weeks we slept in the street. They showed us how to bath where they wash the city dustbins. I had to bath because how could I look for a job in that state. It is impossible. Then we found a homeless shelter and my husband started working as a car guard. And I got a job washing dishes for R40. We still did not have enough money to eat or to turn back. And there were crazy dangerous people in the shelter. Then we got a shack in Philippi. It was better but there were guns and gangs."*

*"It was terrible. You will cry if I told you everything that happened. I never thought I would become a street thug, but I had to. I would starve. I had not eaten for days, what must I do?"*

The migratory experience is different for women for two key reasons. Based on the sample for this research men mostly migrate alone (without family members). When they migrate with family members, they are accompanied by their wives. None of the male participants migrated as single parents/ caregivers with small children. Many of the women did. Further, based on the accounts of the research participants (which may include under-reporting among men) women are far more likely (almost exclusively) to be victims of sexual violence or sextortion.

As a women's rights activist working with migrant women in South Africa recounted: *"It is almost a given that women have to sleep with the truck drivers that bring them into the country. Some fall pregnant and then do not have access to abortion services or psychosocial assistance in South Africa. Many babies are born nine months after arrival. Abortion is also a taboo in some cultures. Imagine the trauma of all that".* Another reported *"In that process of travelling from Cape Town to Musina or wherever you have to go to get papers and register yourself, women are so abused. We run a support group and we hear all these stories. Women walk with their children, and are picked up by men in cars. The men say they want to help and then women are in a situation for days where they have to give sex."*

Personal accounts include:

*"Coming here with my kid was very frightening. There were soldiers and police everywhere and the bad things are worse if you are a woman. We saw a lot of killing and raping at night. I heard other women screaming 'help, help, help me' in the night, but who is going to help them? I was not going to help. I was afraid and I had to think of my child".*

*"I was raped when we were running, but the trucks picked us up in Lubumbashi and took us to Zambia and then to Zimbabwe. When I got to South Africa, I didn't have money and I didn't know where I was or what to do. It was like that for ten days. Then I met some Congolese people in Johannesburg, and they told me to go to Cape Town and paid for the train ticket. They told me to go to Muizenberg when I got to Cape Town where I could find other Congolese people who would help me. They let me sleep in a small corner in a house".*

*"I came with my two kids. They were 6 years and 3 years old. I had to carry them. It was not easy. We came with a bus first, but then we walked through a forest with wild animals. My daughter was in an accident – hit and run. I didn't know the laws or the county. Her face is disfigured now. My husband sent people to fetch us in Johannesburg. We came straight to Cape Town. I was scared".*

## 6.3.1 WHY CAPE TOWN?

Respondents were also asked why they settled in Cape Town (i.e. in the focus area of this study). As the preceding discussions and personal accounts suggest, locating in Cape Town was an arbitrary decision for most respondents. Others had come to join their husbands or families, but the husbands or families had also settled in Cape Town due to the unpredictable nature of the migratory process, or lack of knowledge of the geography and economic sectors of South Africa. Once settled, they are very reluctant (or find it impossible) to move. Most had never left Cape Town, nor been to any other South African city, excepting times spent travelling to Cape Town or a few days' in transit in Johannesburg or Musina.

Subject experts, academics and activists, however, believed that there were systematic and considered factors that influenced settlement in Cape Town. They viewed this process as more elective than is the case for the research participants, and possibly most migrants and refugees.

One academic believed migrants move to Cape Town because administrative and police capacity in the city of Cape Town is lower than in Johannesburg. *“I think people move to Cape Town because they are less likely to be stopped by authorities. Cape Town is seen as a sanctuary city, where if you don't break the law you can stay under the radar quite easily. There is a much higher volume of migrants in Gauteng due to the provincial proximity to Zimbabwe and North Africa, so authorities are, or seem, harsher. Certainly, authorities in Cape Town have less resources to deal with migrants”.*

Most non-migrant respondents believed that Cape Town was chosen as a destination because the hospitality and tourism industries are likely sectors for employment. This may be true, but none of the respondents interviewed for this study had considered employment in these sectors as a reason for settling in Cape Town.

Most non-migrant respondents also believed that Cape Town was chosen as a destination because the migrants and refugees were uniting with family members or linking to known social networks. The interviews suggest that this is rarely the case.

Some believed migrants and refugees chose Cape Town because they perceived it to be safer, either in terms of lower crime rates or fewer instances of xenophobia, but there was also no evidence of this based on the interviews completed for this study.

## 6.4 LIFE IN SOUTH AFRICA

For unskilled, low-skilled, undocumented migrants, refugees and asylum seekers life in South Africa is difficult and fraught with challenges. Migrants and refugees experience systematic human rights violations. Although the effect is less severe for skilled and formally employed migrants, they too experience bureaucratic nightmares, systematic discrimination, violence, xenophobia and difficulty accessing basic services.

### 6.4.1 XENOPHOBIA

A brief literature review reveals widespread xenophobia in South Africa. High-profile outbreaks of xenophobic violence such as those in 2008 and 2015 are not isolated events, and reflect prevalent anti-migrant sentiments. A national survey of South African attitudes in 2010, for example, found that: 90% of respondents felt that there were too many foreigners living in South Africa; 36% believed that immigration should be entirely prohibited; 62% supported a policy of deportation for anyone not contributing economically to South Africa; 27% felt that all migrants should be deported, even if they were in the country legally, 11% would be prepared to use violence themselves to prevent a foreigner from moving into their neighbourhood; 20% believed that the majority of foreign nationals were in the country illegally; 60% felt that migrants were taking jobs from citizens, only 38% believed refugees warranted protection; and more than half thought that irregular migrants did not deserve even basic legal rights and police protection.<sup>251</sup>

251 Dodson B & Crush J. October 2015. 'Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region'. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.





**“WE NEED TO BE INTEGRATED INTO SOUTH AFRICAN SOCIETY. WE DON'T NEED TO FEEL LIKE ALIENS ALL THE TIME. I AM HERE, I AM QUALIFIED, I CAN CONTRIBUTE WITHOUT TAKING ANYBODY'S JOB, I CAN BE HIRED BASED ON SKILLS AND MAKE A CONTRIBUTION TO THIS COUNTRY. I AM NOT A BEGGAR. WHY MAKE ME A BEGGAR WHEN I CAN DO POSITIVE THINGS. WE LOVE THIS COUNTRY AND WE CAN CONTRIBUTE TO THIS COUNTRY.” (P. 103)**

The Basotho women interviewed did not consider xenophobia a key issue in their lives and one former lawyer from the DRC said that he had never directly experienced xenophobia. The Basotho women explained that South Africans tended to think of Lesotho as part of South Africa, that the two countries share languages, and that most of them belong to extended families that have straddled the two countries for generations. The former lawyer explained that he was well integrated into South African society. He has a long-term relationship with a South African woman and has been accepted by her family. He has been the victim of various violent attacks on trains and in the city centre, but he understands these to have been criminally, rather than “racially”, motivated.

All the other research participants (irrespective of documentary status or income) cited persistent xenophobia as a constant source of fear and emotional distress. Many recounted incidents of violence, intimidation or abuse.

*“In the church people are fine, but outside many people are rude. They call you names, and you keep quiet because you are scared”. “I am not happy here because this country is racist. They don’t like us”. “They will kill us. Life is not valued in South Africa. They will shoot you for R1. They insult us on the taxis. They tell us we are here to destroy their country. At school my daughter was stabbed because she was a migrant. This is a terrible memory. My daughter is still always afraid”. “I am very scared in South Africa”. “She sent me videos of xenophobic attacks and people being murdered”. “People say things like, I will show you. They can kill you anytime. Nobody in South Africa will help”. “We suffer here. They have robbed my children. I have been stabbed three times. There is no safety for us here”.*

Xenophobia takes place at all levels of society, in the streets, in schools, on public transport, in public spaces, and is perpetrated by public officials including the police and the Department of Home Affairs (as discussed elsewhere).

*“When we lived with South African people, they talk to you as if only South Africans are human beings. She made us feel like we are nothing”. “Even if you go to the police, they only speak isiXhosa and talk to the South Africans”. “When I was applying for jobs I went to the police to certify my qualifications, just to get a police stamp actually, but they treated me with so much disrespect! If something goes wrong I can’t go to the police, because they treated me so badly, so where can we go? The government says we can go the police, the hospitals and home affairs, but in reality it is very different. The police are as corrupt as everyone”.*

*“In school they just used to make fun of our accents, but then in 2011 I was very afraid because people came to the school yard saying they were looking for foreigners, but I was born here so I am not really a foreigner am I? They said we must not come to school for a while, and we were very traumatized then because it was still primary school, but now we just outgrew it.”*

*“I tell you I do not feel safe. I have to travel on the train on Saturday and Sundays and it is not safe. I have been robbed with guns many times. I try not to work at night, we lock ourselves in at night and don’t go out. It is not safe for us. My children are scared to go to the shops. And as a mother when it comes time for the children to come home from school you stress and think ‘has something happened’ until they are home. In 2008, the children were threatened in school and they could not go to school for many days. The kids are still afraid to go to school and we are all afraid of the trains”.*

Research respondents felt that country of origin and employment status (of the victims), and socio-economic status and racial profiles (of South African perpetrators) were factors that increased the likelihood of xenophobic incidents and attacks.

Respondents felt they were more likely to be victims of xenophobia if they were employed, and more so if they owned their own businesses. These perceptions align to the empirical evidence provided in the literature review.

Regarding employment status: *“I came to South Africa because the pastures looked greener. The pastures are not greener because we are treated like lions. They are scared of us. They say we are coming to take their jobs. But I am working as a Barista and that is a job South Africans didn’t want anyway”.*



*“The will kill you if you start your own business and you do well. And the police won’t help you either”.*

Regarding the profile of South Africans, migrants and refugees feel safer in areas that are inhabited predominantly by “white” or so-called “coloured” South Africans (a legacy of the Group Areas Act). They also feel safer in wealthier suburbs. This was particularly true for francophone participants who because of language barriers find integration more difficult. *“Whites and coloureds are not xenophobic . . . they will protect you.”*

Research participants explained that they secure accommodation in these areas, even if it is unaffordable (and as a result over-crowded) because it is safer. *“For us, xenophobia is an ongoing thing. It left us marked. The situation is like this, if you want to survive financially you have to live in the township, but if you want to stay alive, you have to stay in the suburbs where you pay R4 000.00 for a room. We are now four people sharing that room because we can’t afford it. We are safe there, but we work just to live in that small room, but if you go somewhere else you will die. That is the mark that xenophobia leaves, the consequences continue. I am too scared to go into the township. Even the other day my brother was attacked in the townships for his phone! For us we think safety is the first thing. People think South Africa is a safe county because it is a democracy and you can express yourself, but when you have been here you know that the country is not safe”.*

*“For our school we have to stay in the suburbs now because in the other schools it isn’t safe. You don’t see the ubuntu people always talk about in South Africa, but there are some townships where people will protect you, but even then, it is where people earn above the minimum wage. It is like the more education or money people have, the more open-minded they are”.*

*“I love this country. It is beautiful. The weather is great. I love teaching the children. The main challenge I have is with the black community. They reject me because I can’t speak any of the bantu languages. It was worse in the beginning and people would refuse to speak to me in English. They will always use the vernacular. I have since learned to speak Zulu and now I understand what people are saying. My wife has been insulted and pushed out of taxis. My daughter as well.”*

Even when basic assistance or services are required, some will seek help from “racial” groups they perceive as less likely to be abusive. *“Even in a bank, I will look for a white or a coloured person to help me. Black South Africans will treat me like shit . . . “For us, we don’t have safety and the police will not help is”.*

Participants tended to describe migrants from their own country of origin as most likely to be victims of Xenophobic attacks. According to a Zimbabwean-born respondent, *“they hate Zimbabweans the most”*. A Congolese refugee explained: *“South Africans have this thing in them to react violently to refugees, especially from the Congo”*. These personalized perceptions are probably an indication of the widespread experience of xenophobia.

Others were keen to point out that generalizations were dangerous and that many South Africans, of all types, were kind and helpful. This indicates a level of integration. *“My landlord is isiXhosa and he is like a father to me. He loves my little boy”*. *“Some South Africans are very good, there are people who give us electricity and toys for the kids, and they visit us and help us. But there are others who will insult you in front of your kids”*.

Research participants also had recommendations for responding to and eliminating xenophobia and related violence. Many can be grouped into the category of civic education (i.e. educating South Africans on their pan-African identity and the colonial origin of borders; educating South Africans on the role other African states played in the struggle against apartheid; educating South Africans on the ways in which migrants and refugees could benefit the South African economy/ the contributions they are making; and facilitating interaction and knowledge/ experience sharing among different groupings in South Africa to promote tolerance and understanding. Others emphasised the irresponsible behaviour and utterances of South African leaders and politicians and advocated accountability measures.

*“I don’t know why the South African government is so hostile, because during apartheid many South Africans were running to our countries and we helped them. We even helped with the war. People in SADC are the same people, why do we need expensive visas, and why do they treat us like aliens? I think the South African*

*education is very bad. South Africans are not educated. They don't know the history of Africa and the history of Africa in the liberation struggle. The older people who still know this stuff are less xenophobic, but young people in South Africa do not understand history. I knew about South Africa and South African politics before I came here. I know about most other African countries, but South Africans you talk to them, they have never even heard of other African countries and they don't travel, and they don't want to learn. These people are closed and afraid and when they know a little, they confuse it, so they will think all migrants belong to Boko Haram or something”.*

*“When I talk to the other kids in school, I realise they don't know history. I think it will help if you have programs that showcase the history of borders in Africa. Show in the programs that colonialization brought in the borders and now we are going at each other, but it doesn't make sense. We can play these programs in school and also to educate older people. For the older people maybe have workshops that explain to them about other African countries. And teenagers are exposed to social media a lot so we can promote more unification on social media platforms. That will be beneficial for the youth. And you know what else, I have seen with my parents, desperation breeds innovation so we foreigners can also teach South Africans a lot of things and then we can all try to understand each other.”*

*“The thing is, South Africa is a young country, just about 25 years old really, following the end of Apartheid. It is not like France, and Johannesburg is not like Paris. In Paris many people are Arabic or Chinese in origin, but they are French people. They become French people, and everyone sees and treats them as French people. The South African mentality is still one of difference and separation. People don't invest in integration and promoting similarly. They do the opposite. It would help if South Africans were encouraged or assisted to travel. South Africans are very insular. This is why I take the school kids on an overseas tour every year. They need exposure to the rest of the world. They think small, they think local, and they don't see how they fit into the international world. My learners can't even tell you what the capital cities of countries like Australia and Brazil are! And these are privileged children. The insularity starts young”.*

## **6.4.2 ACCESSING SERVICES (HEALTH AND HOUSING)**

The respondents were generally able to access basic services like water, electricity and public transport. In some cases, this is an improvement on the conditions in the countries of origin. *“In South Africa we have electricity. That is good. You don't have that in Congo”.* As is the case for most South Africans in urban areas, the primary barriers to accessing water, electricity and public transport are unemployment, poverty and living in an informal area.

Respondents experienced considerable difficulty accessing adequate housing. This is the result of xenophobia, poverty, unemployment and systemic barriers to accessing the immigration documentation necessary to open bank accounts or enter into lease agreements.

On the “upper-end of the socio-economic scale” for this study, a teacher (formerly from the DRC) who now has a permanent residence permit, and who has been employed as a teacher in South Africa for 20 years, recently managed to acquire a house, which he had to purchase cash, given the reluctance of banking institutions to provide credit. For the undocumented, low-skilled and other migrants, and asylum seekers and refugees who participated in this research, living conditions and housing are abysmal.

The Basotho women interviewed sometimes live 12 to 20 women per bedroom in a hostel/ compound in Soweto provided by the agency that assists with their placement as domestic workers. There are no beds and no windows. The rooms are suffocating and hot. To sleep, the women squeeze into the room and find a space on the floor. *“We can't go to sleep at the same time you see”.*

As indicated in the section on xenophobia, certain migrant groups are forced to access housing in wealthier areas they cannot afford, leading to overcrowding. The rental payments they report suggest that they are being exploited by the landowners. The accounts also demonstrate that for many, their living conditions are far worse in South Africa than they were in their country of origin. *“The place we stayed in Congo was better. It was our house. In South Africa the condition we stay in is not good. We stay in a place with other people we don't know, and they don't clean. I am also scared for my kids”.* *“We rent a small house with other*

families in the suburbs because it is too dangerous in the townships. We pay R4000 for our room and the kids all sleep in the lounge. Our family has three kids”. “Where I live, we have a flat with two bedrooms that we share with another family. There are eight people living there . . . yes, we have water and electricity . . . but it was much better in the Congo, but I don’t know about now, I hear people are suffering more there now. I don’t have contact with anyone in the DRC because everyone I knew passed away”.

“We live in a flat with three bedrooms. Our whole family – there are six of us – stay in the one bedroom. I work at night, so we sleep at different times. The other two rooms we sub-let to other families to survive. We cannot stay alone. The rental is R8000 for the flat. The township is cheaper but there is no safety. Even in Maitland we don’t go out after 6pm. You will be stabbed for your phone. We only go out in the day. I work in long street so I finish work at three so I can walk home before it gets dark. If I stay late because I think I will get a tip, I sleep in a club to be safe. I don’t walk”.

“Life in the Congo before the war was much better than here. Although we didn’t have electricity, we had a nice kitchen and bathroom. We were living in a village and we knew everybody. I was much happier there than here. I had my family around me then. But I lost my father and brother since then. They stayed in the Congo and they were killed”.

“Oh my God, my living conditions are terrible. I was a journalist living a normal life, now I’m a car guard sharing rooms with people I don’t know and sleeping on the train”.

Because rental agreements are verbal, and given the vulnerability of many migrants and refugees, landlords / slumlords are reportedly unresponsive to request for repairs, force female tenants to engage in sexual acts, and arrange arbitrary evictions.

Accessing public health services is also a continuous struggle. Respondents were aware that poor South Africans also experience difficulty accessing quality health services in South Africa, but there was consensus that the situation is exacerbated for migrants and refugees, and in particular for people who cannot speak English (e.g. migrants/ refugees from Somalia and the DRC). As a sector activist explained: “You have to realize that the South African public health system doesn’t really work. People lack skills and service is poor, but migrants struggle because of language barriers, which causes fighting and misunderstandings, and there are also many xenophobic people in the health sector who just don’t want to help people from other countries.” A 2017 survey of Zimbabwean migrants had similar findings. The authors concluded that “in addition to medical xenophobia, systematic discrimination against migrants in the public health system means higher health care costs for migrants.”<sup>252</sup>

Other access barriers that apply specifically to migrants/ refugees include a lack of legal knowledge/ awareness on the part of public health officials (i.e. who are not aware of migrants’/ refugees’ rights to health-care). As a sector expert explained: “The matter is complicated. That is why the UNHCR has programs to train health personnel on refugee rights, because asylum seekers and refugees have the same health rights as poor South African citizens, but other categories, like people with study or work permits who are working, they have to pay. But you find health officials who don’t know the difference between a tourist and a refugee. And it gets worse than that, because the migrants don’t know what their rights are either, so they get turned away when they shouldn’t”.

There were different barriers to access to health services for migrants employed in exploitative sectors of the economy (e.g. domestic workers). The domestic workers/ Basotho women found it difficult to access clinics because they were not given any time off by their employers to do so, because they could not afford the transport costs to get there, because clinics often had drug stock outs (particularly of the ARVs on which their lives effectively depend), because clinic hours are inflexible and they often close in the early afternoon or open late, and because they cannot afford the fees that are sometimes charged before assistance is provided or medicine dispensed. These are all challenges that poor South Africans/ domestic workers also face.

Accessing ARVs and Sexual Reproductive Health Services is particularly difficult. “To get ARVs you have

<sup>252</sup> Crush J. & Tawodzera. G. 2017. ‘South-south migration and urban food security: Zimbabwean migrants in South African cities’. International Migration. Volume 55 (4). International Organization for Migration

to have permits, but we can't get permits because of the system, so we can't get it". A sector expert explained that all, including undocumented migrants have the right to receive ARVs, but that neither public health officials nor foreign-born persons seeking assistance are aware of this.

Respondents also reported negligence. Husband: *"I finally found work as a car-guard. From a soldier to a car-guard, but then my last son came. My wife gave birth to him at Somerset Hospital, but they pulled the baby out wrong and he was breathing wrong and they left water inside the baby's lungs"*. Wife: *"And they wouldn't help us. My baby was sick, I was still sick and my husband was sick from stress. They said we must go to the Red Cross hospital"*. Husband: *"We did not have any money for transport, so we walked to the Red Cross hospital"*. Wife: *"They said the baby had a heart problem and must get an operation, but they didn't want to help us, so we came to the Scalabrini Centre. They told us we have rights as refugees and that the hospital must help us. I showed you the picture of our other child who is also disabled?"* Husband: *"Then we went back to Red Cross and the opened my baby from chest to navel. I would run to the hospital to save the money then sit with him, then run to work, then back to the hospital. I didn't sleep. My heart was so sore. They gave us medicine for two years. . . . He can play and walk now"*.

Despite these barriers, research participants found ways to access health services when required.

An option open to all was bribery. Research participants reported widespread corruption in the health sector, which sometimes results in extortion (i.e. having to pay R3 000,00 for a legitimate birth certificate), but at other times (if one has the resources required to pay a bribe) ensures access to necessary health care.

Well-resourced migrants/ refugees (i.e. who have the resources to travel to a different city to receive medical assistance) seek out foreign-born doctors that they trust and whom they believe will provide quality services. *"There is a Congolese doctor at a hospital in Pretoria. I just always go there. He is a competent surgeon and a good friend. If I tried to get help from South African doctors it just wouldn't happen, or it would take months or even years"*.

Low-skilled, undocumented, unemployed migrants and refugees use false documents, or assertiveness and persistence in order to access the public health services to which they have a constitutional right. *"Look, when they see these asylum papers, they won't help you. Even the refugee papers, they won't help you. So, what must I do? I borrow my friends ID document so that they can help my child"*.

*"One day my child had a very high temperature. It was dangerous and I went to the clinic for help. There was nobody there and they said they were closed. I showed them their own sign which said that they were open until 4pm and it was only 3pm. Nobody would help me. I told them I could read English and I know my rights. They just treated me like a stupid person. I thought, well then, I will go the full Congolese they want to see, because I must get help for my child. I went mad! So mad. The head nurse or someone came running, and when I explained she was very angry with the rest of the staff and said the baby could have died. She helped us"*.

Similar challenges pertain to schooling. Studies have found migrants with children are often denied access to state schools, which means that they have to access very expensive private schools<sup>253</sup> that are unaffordable to most. School fees, even at public schools, were unaffordable for all but the three formally employed research participants. South Africa is one of only three African countries that continue to charge for basic education. *"It is very difficult for us in South Africa. What is my child's future? Where will they study? How will they survive? We don't know."* *"My daughter is going to grade 12 next year. I don't have enough money to pay for school. I was a car-guard and a security guard, but now they say there is a new law and the companies are not hiring us anymore, and I am still waiting for my refugee papers. I just pray to God. At least they won't kick her out as long as I keep taking money to them"*. *"The school fees are R6000 per year in the public schools, we cannot afford that. My children are unhappy and hungry"*. *"School-fees are a serious problem. Children don't even eat, how can they afford to go to school? If the parents don't have papers, they can't get work, and if they can't get work the kids can eat or go to school"*.

Participants also noted the poor quality of education in public schools. Some migrants are trying to address this in their communities by tutoring migrant and refugee children. *"The children are not performing*

<sup>253</sup> Crush J. & Tawodzera. G. 2017. 'South-south migration and urban food security: Zimbabwean migrants in South African cities'. International Migration. Volume 55 (4). International Organization for Migration

at school, so I started giving extra lessons in the community. There are also guys at the Congolese Society who help the young people with this. I thought maybe it was a language issue, but when I started tutoring these young people, I realized the South African teachers were just not qualified or didn't care about teaching. The youth improved quickly with the extra lessons". "One of the reasons I started this organization [the CCSSA] was because it was obvious there was a problem with the education system in South Africa. Children were going to school, but they still could not do basic maths. We now have volunteer tutors here to help them".

### 6.4.3 REMITTANCES

Remittances are viewed by many authors as a positive consequence of migration in the sense that "intra-regional migration is significant in sustaining households' basic livelihoods in the SADC region".<sup>254</sup>

According to the World Bank remittances constitute a relatively high proportion of the GDP of Lesotho<sup>255</sup> and play an important role in household survival as it constitutes the largest contribution to household budgets in migrant sending households.<sup>256</sup> Remittances also facilitated household survival in Zimbabwe in the period 2000 to 2010.<sup>257</sup>

Nationally representative data on remittance flows and usage at household level in five SADC countries showed that 85% of migrant-sending households reported receiving remittances<sup>258</sup>, but this data is likely skewed by internal migration and the spatial legacy and related economic consequences of the apartheid state's Bantustan system. Further data collected by the World Bank<sup>259</sup>, but which only records remittances through formal channels indicate that:

- The major remittance sending countries in 2014 were South Africa (i.e. US\$639 million leaving the country through formal channels in one year), Zimbabwe (US\$50 million), Botswana (US\$ 48 million), and Malawi and Mozambique at US\$ 31 million each.<sup>260</sup> It could be argued that capital outflows such as these benefit recipient countries but are detrimental to the South African economy.
- The major recipients were Zimbabwe (no data), Lesotho (US\$426 million), Mozambique (US\$128 million, Botswana (US\$41 million), Tanzania (US\$ 40 million), Zambia (US\$37 million), Malawi (US\$30 million) and Eswatini (US\$23 million).<sup>261</sup> This suggests that South Africa plays an important role in poverty alleviation in the region. Remittance corridors are mostly from South Africa.<sup>262</sup>

The impact of remittances remains survivalist in the sense that the resources are either in the form of food, or are spent on necessities like food, housing and fuel. In rarer cases on health and education.<sup>263</sup> The remittances are not used to invest or generate capital. A 2017 Survey of migration conducted in Botswana,

<sup>254</sup> Dodson B & Crush J. October 2015. 'Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region.' Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.

<sup>255</sup> Ibid.

<sup>256</sup> Nalane L.J., Lipam A. C. & Crush, J. 2012. 'The remittances framework in Lesotho: Assessment of policies and programmes promoting the multiplier effect'. ACP Observatory on Migration 2012. IOM and UNFPA.

<sup>257</sup> Dodson B & Crush J. October 2015. 'Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region.' Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland

<sup>258</sup> Ibid.

<sup>259</sup> These points are all copied from Dodson B & Crush J. October 2015. 'Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region.' Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland, who quote the World Bank and FinMark figures.

<sup>260</sup> Dodson B & Crush J. October 2015. 'Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region.' Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland

<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

<sup>263</sup> Nalane L.J., Lipam A. C. & Crush, J. 2012. 'The remittances framework in Lesotho: Assessment of policies and programmes promoting the multiplier effect'. ACP Observatory on Migration 2012. IOM and UNFPA. Dodson B & Crush J. October 2015. 'Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region.' Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.

Malawi, Lesotho, Mozambique, Eswatini and Zimbabwe with a sample of 1 900 labour migrants showed that between 90 and 95% of respondents considered remittances important for household survival. Of those who received remittances, 68% received cash and 33% received goods.<sup>264</sup>

This study suggests that few migrants and refugees send remittances to their countries of origin, and when they do send remittances this happens inconsistently, and the amounts are negligible. Many of the migrants and refugees interviewed had no family left alive to send remittances to, others were unemployed or underemployed and too financially desperate to have resources to spare. The fact that migrants and refugees cannot open bank accounts also prevents them from sending or receiving remittances. They must send cash with other people, which is a high-risk transfer strategy. It was essentially the 12 domestic workers and about six small business owners who sent remittances to family members in their countries of origin. Two did so on a monthly basis and sent approximately 50% of their minimal income, the others sent money when they could. The domestic workers took home whatever cash they had left at the end of an employment period/ during a holiday period, making them vulnerable to muggings and extortion.

## 6.5 WORKING IN SOUTH AFRICA: BARRIERS TO EMPLOYMENT/ SELF-EMPLOYMENT

Most of the research participants were selected to participate in this study because they are employed (mostly in low-paying and exploitative sectors of the South African economy), or because they have their own small businesses. Their personal accounts serve to provide insight into the various employment processes and conditions experienced by migrants and refugees in South Africa.

### 6.5.1 BARRIERS TO EMPLOYMENT/ SELF-EMPLOYMENT

The barriers to decent work (as employees or as small-business owners) include difficulty accessing the required documentation; exclusion from financial institutions; language barriers; xenophobia; systematic difficulties getting degrees and qualifications recognized, and discriminatory legislation.

#### 6.5.1.1 ACCESSING THE REQUIRED DOCUMENTATION

*“The paper is the big problem . . . the paper makes it so that in South Africa, we are in an open jail”.*

The asylum seeker/ refugee system is overwhelmed, dysfunctional, corrupt, characterized by poor service delivery, and designed in a Kafkaesque manner that prevents compliance or access to legitimate documentation. The negative effect it has on people in the system is exacerbated by poor communication and information dissemination, a lack of knowledge among recently arrived migrants and refugees about how, where and for which documents to apply, and the fact that labour/economic migrants are lumped into the asylum seeker system adding to the inefficiencies and the bottlenecks described below.

The inefficiencies of the system and the obstacles asylum seekers and refugees describe are reflected in official statistics. Department of Home Affairs (DHA) statistics show that in 2017, 92% of decided asylum applications (25 713) were rejected and only 8.8% (2267) were approved. At Musina, only 23 out of 45 144 applications were approved (a 99% rejection rate).<sup>265</sup>

**Poor service delivery:** All the respondents in this study experienced poor service delivery from the Department of Home Affairs.

*“Home Affairs? Oh my God! We go there at 5am and you still stand until 3pm. The one that is supposed to help you will be rude and chatting on her phone, but if you say something, they just throw away the paper, and they reject you, and then you will have to go to court and you must pay, but you have no money. So you stand there. If it is raining or in the sun, you just stand there. This happens every six months, and now they*

<sup>264</sup> Crush J. & Caesar M. March 2017. ‘Food remittances: rural-urban linkages and food security in Africa’ Working Paper. IIED’s Human Settlements Group. United Kingdom. <http://samponline.org/samp-special-reports/>.

<sup>265</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

say we must go more often”.

*“Home Affairs is stressing. . . it can take two weeks of going every day and standing there from 4am . . . there will be 70 people ahead of you already, but they maybe help 10 people that day. They don’t care if you are there with babies or the children”.*

The situation was worsened by the closure of Refugee Reception Offices (RROs) in 2011. In 2009, there were five RROs situated in major urban centres of South Africa notably Johannesburg, Pretoria, Durban, Port Elizabeth and Musina. In 2011, the PROs in Johannesburg, Port Elizabeth and Cape Town were closed, reducing national capacity by half, creating an administrative nightmare as files had to be moved to other offices and making it even more difficult for individuals to apply for or renew permits. The closures were subsequently ruled unlawful by a court of law, but the Cape Town RRO remains closed.<sup>266</sup>

These RROs are the institutional points of contact between the South African government and foreign-born individuals requiring immigration and related documentation.<sup>267</sup> All applications, interviews, issuing of permits, permit renewals and other administrative assistance take place at the RROs. Having entered the country through a “legal port of entry” individuals have a limited number of days to report to a designated RRO. As the accounts in the section on the migratory process demonstrate, this requirement is absurd.

Upon application, (if successful) an asylum permit is issued. These permits are valid for between one and six months, during which time “asylum seekers” are legally allowed to be in the country.<sup>268</sup> During this period, they wait for asylum adjudication. At some point, a Refugee Status Determination Officer will grant refugee status or not. If rejected, the asylum seeker must leave the country or can appeal the decision through the Refugee Appeal Board.<sup>269</sup> Asylum seekers can also approach the High Court.<sup>270</sup>

The asylum adjudication process, however, can take up to ten years (or more by some accounts). During this period, asylum seekers have to report back to the same RRO on a monthly, three-monthly or six-monthly basis (depending on what is specified on the permit) to renew the document. *“I have been waiting ten years for my refugee papers, working as a car guard. Being a car guard is not a nice job. I am tired and abused, but without the refugee paper – you need the refugee paper to get real work”.* *“I have been an asylum seeker for eleven years now”.*

Poor service delivery and system inefficiencies have negative effects on employment and quality of life. With travel time, and the under-capacitation and other challenges at the RROs, asylum permit renewal takes approximately one week at a time, during which persons are away from their dependents and jobs/businesses. With the closure of three RROs the travel time and costs escalated for many asylum seekers and other migrants in the process. Having to spend a week or more attempting to renew your permit on a monthly or three-monthly basis does not bode well for continued employment as employers either don’t understand the reasons for the long absences, or cannot afford to hire (as per the interviews with employers in the construction sector) people who are not reliably present given the deadline driven nature of the business. *“This thing is also a big problem for nurses and doctors. The country needs them, there is a brain drain, but the permit for asylum seekers says you must go renew it ever three to six months. Nobody wants to employ a doctor or a nurse that is away that often and when you get a temporary job, it is very difficult to hold onto it, if you have to take leave all the time and you don’t even know how many days of leave you are going to need. You can’t get a job with a permit, but even if you do, you can’t keep the job.”*

*“My permit used to be for four years, now it is three months, I am afraid I will lose my job. Also, I am required to travel for my job, but I can’t travel with the permit”.*

*“No, employers don’t accept or understand asylum papers. They will only look at permanent resident status, but not even the children who are born here get permanent resident status. Employers do not want people*

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<sup>266</sup> Ibid.  
<sup>267</sup> Ibid.  
<sup>268</sup> Ibid.  
<sup>269</sup> Ibid.  
<sup>270</sup> Ibid.

*who have to renew permits every three months. Is worse, because you can only renew your permit at the place where you did it the first time you came into the country, so that means I must get money and time to travel to Musina every three months. For five years now. You can't believe this is your life now. It is a week's leave. Employers don't like that. And man, if you don't get there, then you are illegal forever, then what do you do?"*

The permits (even when issued) also prevent employment in other ways. For example, the permits do not have the same number of digits a South African ID number has, which makes the completion of online forms near impossible, and it makes banks, employers and other creditors suspicious. Furthermore, it is a piece of paper and therefore appears old, crumpled and dirty within days. *"We look like we have begging forms when we are trying to apply for professional jobs. Who is going to consider you if you stand there with this old piece of crumpled paper with an ink stamp from home affairs on it?"* *"Also, I can tell you because I am a migrant and I work in this sector, employers do not know the law. It doesn't help that you get some piece of paper and the law says you have the right to work, employers want to see a green ID".*

There is also evidence that the **poor service delivery is intentional**. Respondents spoke of officials who systematically withhold permits or issue faulty permits, the use of unlawful and arbitrary measures and requests to reduce the number of permits granted in a day, and deliberately slow service to reduce the number of permits granted/ or persons assisted per day. Studies have confirmed this. A 2012 survey found that only one third of asylum seekers were issued with permits on the first day they reported to a RRO, and on average, three visits are required per permit.<sup>271</sup> There is also empirical evidence and cases of litigation (e.g. requests for section 23 transit permits<sup>272</sup>) to support respondent's reports about officials introducing arbitrary measures to prevent the issuance of permits.

*"Home Affairs! The people who work there come to work late and they walk so slowly. They walk slow on purpose so that they take three hours to help two people, but we have to stand there from 3am, and then they look at us like we are nothing".*

In many cases "poor service delivery" is a euphemism for **ongoing and systemic abuse** fuelled by xenophobia. Most respondents interviewed for this assignment reported violence and/ or other abuse, which echo similar research findings in previous studies.<sup>273</sup>

*"Home Affairs people are abusive. They don't treat us like human beings. They make pregnant women stand there for days and they call us "poes" and tell as to "voetsek".*

*"They are all bad, Pretoria yes, but in Cape Town once, the police came to home affairs, but before that they blocked the road to Chinatown. People were running because they don't have papers that is why they are there, to get papers, but they don't have papers. The Mozambicans don't have any papers and the Malawians also don't have papers. They don't have problems like a war like us, so they have no protection. They came because of bad social and economic conditions so they have to run, because they will be beaten and arrested, but they couldn't run, because they closed the roads before they came".*

*"I go with my mom when she goes. I have seen that they treat the men and women different. They are more violent with the men. People sleep outside for many nights so when they open the gates people run to get to the front of the line for that day. That day the security guards were hitting the men with crowbars. They didn't hit the women. They said 'this line will move forward when you go back to you own country'. . . . Yes, I was afraid, but my mother said we must stay behind her".*

Respondents also reported **widespread corruption at the Department of Home Affairs**. Without exception, respondents have either been complicit in (mostly through a lack of choice) or exposed to, repeated incidents of corruption when dealing with the Department of Home Affairs.

<sup>271</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

<sup>272</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

<sup>273</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa



As a well-travelled subject expert and activist explained: *“I have seen corruption, plenty of it in my own country and around the world, but here, the extent of corruption (linked to the Department of Home Affairs and the Police) it is phenomenally high. The corruption in South Africa is so pervasive it occurs at every level. Migrants and refugees have no trust in the system and have given up on justice. They just do what they need to do to survive. And all of this corruption results from this inefficient asylum system where they don’t have a different visa for workers from SADC or something like that”*.

*“I can tell you Home Affairs in Pretoria is just criminal. We had to get into physical fights there to defend ourselves and all they would give us are fake papers we had to pay for. We didn’t want that. And they won’t give you an appointment, they make you sleep outside there for days until they feel like maybe helping you”*.

*“Hey, but if you have money to throw around and pay you can get any papers you want. Permanent residence is about R50 000.00.” “People pay R10 000 for papers they want, Pretoria is very bad for that and they also do not treat people well. They call you names and they are very corrupt. They know without papers you will just sit around and die, and so they will do that”*.

*“If you want papers, any papers, you have to be corrupt”*.

There is enough empirical evidence available to corroborate the reports on widespread corruption.

Evidence includes:

- The high numbers of litigation cases brought against the DHA (1 232 immigration and 1 900 asylum litigation cases in 2016/17 alone).<sup>274</sup> Judges who have overturned some of these rejections are quoted as referring to cases/officials as “incompetent”, “deplorable”, and “showing blatant disregard for the law, dereliction of duty and bad faith”<sup>275</sup>
- The DHA estimated that 85% of its employees participate in corrupt practices that include “*inconsistent and obtuse application of immigration policies, such that even lawyers and government officials struggle to interpret and apply them*”.<sup>276</sup>
- Carciotto et al refer to “the most substantial study on corruption in the asylum system”, which found “corruption prevalent at all levels of the asylum process, with one third of respondents reporting that they have experienced corruption at a RRO”.<sup>277</sup>
- “A 2015 research report completed for Parliament found that no transit permits had been issued in the previous six months at the Musina/ Beitbridge port of entry despite it being the busiest port of entry in the country”.<sup>278</sup>

It is important to note that corruption is widespread, and that refugees and migrants experience it in their interactions with the South African public service in general, including in interactions with officials from the Departments of Health and Education, the South African Police Services and municipal officials. *“At the hospital you have to fight or pay a bribe to get a birth certificate and when you go to register your child at home affairs, you have to pay another bribe”*. *“And they don’t register the child as South African, not even if you are a permanent resident, or the father or mother is South African.”* *“They would not register my child without a bribe, I had not money, so my South African friend went to register my child as her child with her name. Now the child has a passport”*.

The challenges in accessing documentation make it near impossible to comply. The result is a continuous increase in undocumented migrants. Asylum seekers are forced either to engage in “illegal activities” or to seek relief from the judicial system, which in many instances have ruled in favour of migrant/ asylum seeker/ refugee rights actualization, and in particular, in favour of their right to work (see legislative review).

<sup>274</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies

<sup>275</sup> Ibid.

<sup>276</sup> Ibid.

<sup>277</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

<sup>278</sup> Ibid.

## 6.5.1.2 INABILITY TO ACCESS FINANCIAL INSTITUTIONS

Asylum seekers, refugees, labour migrants, migrants on study permits and undocumented migrants all reported difficulties in opening bank accounts. Undocumented migrants can only open bank accounts fraudulently. Without a bank account, one cannot safely save money, access formal employment (no formal establishment pays cash), or open a clothing or other store account.

Migrants and refugees can also not obtain credit or start-up capital from formal financial institutions. They have to rely on social networks or save the money (in cash given the absence of bank accounts) to start a small business.

*“No, the banks won’t loan you money. It is not easy as a foreign national. Banks won’t loan you money without an ID or an ID number even if you have all the right papers. Everything passes, but then with the ID number the banks can’t loan us money, so we work with what we have. The capital we have to save, so it takes FOREVER to start something and you don’t have time to relax. We have time for work and God, and to make peace with the people around you so that you can live another day”.*

*“I employ five people in my salon, 3 are hairdressers. I am an asylum seeker, but I did manage to register my business. I think God helped me. I even have a SARS number. The bank stills says no! Even with business registration and SARS number they still say no bank account. Now how can I show my business finances to SARS without bank accounts? Does that make sense? I went to Nedbank, ABSA and First National and they all refused to open an account. They say I must go to the Department of Home Affairs to get permission for a bank account. Imagine trying that! [People laugh]. But I tell you, I went to Home Affairs and God came with me. I show them everything. Five years of business documents. Everything. What did they say? They say I must apply for a business permit and a bank account in my own country! I showed them my SARS payments and my rental payments. I say I am a refugee, I have refugee papers, I cannot go back to my own country. What do they say? They say then I must bring R5 million to get a permit. R5 million! [More laughing and head shaking]. This country is crazy”.*

*“First National Bank used to open accounts for asylum seekers but that stopped in 2017/8. ABSA never did. Nedbank did long ago but they also stopped. What happens is you have to keep all your cash with you? Then the police come to where you live and they find all your cash and say you are a drug dealer so they take your money”.*

*“Yes, I hear now nobody can get an account. In 2006, you could open an account if you had a work permit, so fortunately I opened my bank account then. My friends say you can’t open an account now even with a job at the university and a work permit”.*

Academics have argued that the increased difficulties migrants are experiencing in accessing financial services and opening bank accounts stem from the 2017 Refugees Amendment Act, which has resulted in major banks refusing to open accounts for refugees and asylum seekers.<sup>279</sup> It is reported that refugees who were able to open accounts have repeatedly seen their accounts frozen due to changes in documentation or the failure of the Department of Home Affairs to respond to verification requests.<sup>280</sup>

The results of this exclusionary and punitive approach are: missed opportunities for capital accumulation in a country with capital shortages, a savings deficit and tax under-collection; the promotion of opportunistic crime as individuals are required to store their cash in the insecure and dangerous accommodation they are forced to accept; and forcing illegality as individuals have no option other than to circumvent legislation.

*“I am not a criminal. We like this country. We are strong, we are ready, and we want to work. But in South Africa, I don’t know if it is the government or the people, but they don’t like foreigners. We can work, but we need to eat and pay school fees, so we need capital to start a business, but you can’t even get a bank account*

<sup>279</sup> Crush J., Skinner C. & Stulgaitas M. August 2017. ‘Benign neglect or active destruction? A critical analysis of refugee and informal sector policy and practice in South Africa. South African Human Mobility Review 3 (2). [http://sihma.org.za/wp-content/uploads/2017/09/1\\_Benign-Neglect-or-Active-Destruction.pdf](http://sihma.org.za/wp-content/uploads/2017/09/1_Benign-Neglect-or-Active-Destruction.pdf)

<sup>280</sup> Ibid.

*to save money! I'm not even talking about loaning money from a bank. So, what must I do? I pay someone R200 to open a bank account for me. The account is not in my name so she can take the money, but so far it was good to trust her”.*

### **6.5.1.3 LANGUAGE BARRIERS**

Migrants and refugees who arrive in South Africa and are unable to speak any of the 11 official languages, and in particular English, are at a further disadvantage when searching for employment. A first step is, therefore, to learn English. Some start their learning process at non-governmental organizations, while many teach themselves. Organizations who provide English lessons or translation services were considered invaluable by the migrants and refugees interviewed.

*“When I came here I could not speak English, which I need for a job. In those days, before they changed the law Congolese could get work in security, so I became a security guard and I would spend the 12 hours at night learning English”.*

*“I learned English in the church here. I could not speak English when I got here but I had to learn. I studied. South Africans help you, they don't laugh if you speak badly. I also saved money to go and learn English and I have a basic certificate in English now. The more I talk to people, the more I learn from people.”*

*“I just learned English on the street, just by talking to people when I am working as a car guard”.*

*“When I came here, the first challenge was to learn English . . . I did not do an English course . . . I leaned with books and the radio and talking to people. Each day I tried to have an argument with someone because then they would keep talking to me and I would learn. I also had help from the smart children who live next door. They taught me English and connected with me”.*

### **6.5.1.4 NON-RECOGNITION OF QUALIFICATIONS AND INEFFICIENCIES IN THE SYSTEM**

African (and presumably other international) qualifications are not automatically recognized in South Africa. Copies (or at times originals) have to be submitted to the South African Qualifications Authority (SAQA) for assessment, verification and classification. This is a lengthy process. It is difficult for refugees who fled their homes with nothing and certainly did not carry their degrees with them, it is also difficult for impoverished individuals, who may not speak English, to access SAQA offices, or to gain information on the necessary steps. Respondents who have managed to get their qualifications recognized were either individuals who entered the country with jobs at South African universities and had work permits, or who received assistance from civil society organizations. Qualified professionals find it equally difficult to register with the requisite professional bodies in South Africa.

*“When I came here, I was a fully qualified electrical engineer but they did not recognize my qualifications, then I did another two qualifications in South Africa, but I still could not get work because of my papers, and my wife was fighting with me about this, so I started my own business”.*

*“I came to South Africa because of the war, I thought I would have a better life. I was a qualified nurse in the Congo. If you are qualified in the Congo, you get a job. It is not like that in South Africa. They give jobs to people with no qualifications. I came with copies of my qualifications, but they would not take them. I had to renew my asylum permit every six months. I tried to study to get the right qualifications but they would not give me a study permit. I took my qualifications to SAQA to get them recognized. I had to write another exam, and I did, and I passed. Then they said I still couldn't work as a nurse because I needed a different permit. So I was living in very horrible circumstances. Then I did a care-giver qualification . . . and an internship for six months. I did get one job, but I was so over qualified for it. Then I got a job at the place I studied, but they didn't pay me for months. . . . I could not pay my rent and lost my home. Also I was not working every day, just when there was a patient. So I came to Scalabrini and did the beading course, just to survive. I did beading just to survive . . . then I did not have a place to stay even. It was the worst. . . . I did well at Scalabrini and*

*I started teaching others beading so I earned enough for transport and food. . . we are now staying three in one room. Sometimes I feel, why did I study so much just to end up like this? . . . I have been waiting for my asylum status for six years now! South Africa is short of nurses, but they don't want to employ me because I don't have legal status, but they also won't give me legal status. . . If I go back to the Congo I will get killed. I am just stuck! [Weeping]."*

*"The main things are the documents to study and work. And to recognize our qualifications. We want to give our best to this country. I know my job. I am a nurse and I am a good nurse. I want to help and do my job. But they won't open the door for me."*

*"There is a problem with our qualifications. Most people from the Congo have degrees and certifications but they are not recognized in South Africa. My sister is a qualified nurse, but she is working as a security guard. She even volunteered as a nurse to just work in what she knows, but they never gave her a job and she needs money"*

*"You wonder – what is wrong with the administration in South Africa – here you have all these highly skilled refugees who want to help and work and can help this country – teachers, nurses, lawyers – but they say no, because their system doesn't distinguish"*

### **6.5.1.5 XENOPHOBIA**

Further to the generalized xenophobia experienced, migrants and refugees in employment or who own their own businesses are the targets of specific types of attack.

As with housing, individuals are forced to start their business in formerly "white"/ more affluent areas. *"The problem is the community. I can't start a creche in Salt River where it is needed because the community will attack you if you do well, or they will report you to the police if you are not registered or for other reasons they can think of". "My biggest challenge is also the community. When I do well, they attack me and do things like cause trouble with my landlord"*

Business owners also run into trouble when they try to employ, or partner with, South Africans. They claim that South African law requires them to "employ 60% South African". This makes already vulnerable individuals more vulnerable. *"I don't have papers, so when I employ South African guys it is a problem with the law because I can't do the legal things I must for them, and also they can report me when they feel like it". "In the salon, we tried to rent out spaces to other hairdressers, but they were so hostile and threatening to my wife, I had to stop it. Now she is alone in the salon". "I employed guys from Zim and from South Africa in the furniture business, and then the South Africans reported the Zim guys". "I really want to grow my business and employ locals, but the last time I did that, they threatened to report me and then just took my business, and I had to start over. I lost everything"*

Xenophobic attitudes are not only preventing businesses from succeeding and growing, the attitudes are also preventing employment creation. *"I can expand my business. There are women from Malawi in the township who want to learn sewing and I can teach them and then grow the business, so I wanted to put my workshop in the township there, but they said if I did that they will shut down my shop and take my stuff on the first day. I want to help but the community prevents me from doing anything"*

### **6.5.1.6 OTHER DISCRIMINATORY LEGISLATION**

Discriminatory legislation, including the Private Security Industry Regulation Act 56 of 2001, are preventing migrants and refugees from accessing some of the very few employment options previously available to them.

*"I used to work as a security guard. Those are not good jobs but it was easy for us to get jobs in the sector because we were soldiers, but then they changed the law and they said foreign nationals can work in the security sector anymore, so I have no work since then"*

*"In Parow, most of the security guards were foreigners. Then they fired all the foreigners because of the new"*

law which said they must hire mostly South Africans. The bosses still prefer the foreigners because we work hard. South Africans only want comfortable jobs”.

## 6.5.2 ACCESSING EMPLOYMENT (AND THE FACTORS THAT CONTRIBUTE TO SUCCESS)

Those individuals who were employed, either in the formal or informal economy, were asked to describe the process through which they gained employment. Their responses demonstrate both how incredibly difficult it is for this group of people to access wage/ salaried employment in South Africa, as well as, how extraordinarily hard-working, innovative and determined they (by necessity) are.

Different “categories” of migrants also have different processes/ experiences. The Basotho women are recruited or approached by the “placement agency” that houses them in SA. They pay a fee to the agency, which places them in private homes in SA.

The experiences of the labour migrants and refugees interviewed are less structured. The factors that contributed to their “success”/ survival include: targeted assistance from civil society organizations, churches and soup kitchens; individual South Africans who provided employment opportunities or other assistance; social networks; and personal characteristics including determination, work ethic, ingenuity, humility and education. The personal accounts below demonstrate the latter.

*“By the time I got to Cape Town I was hungry, and I had no money, and nobody was interested in my papers or even in talking to me, so I started standing at the robots and asking for work. Someone said I should go to the Scalabrini Centre because they help people like me. I went there and . . . they trained me for two weeks to be a barista. They also trained me on how to write my CV. They could help me apply for many jobs because I had papers then. I went for so many interviews. Sometimes four a day. I messed up in the beginning because I had no experience, but the one coffee shop called me and said I should come in again and show them how I make a cup of coffee. I did it and I got the job.”*

*“I started looking for a job the day I got here. I just walked from place to place. Then some white guy said I can make pizza in his restaurant in Sea Point, so I did, but he would not tell me what he was going to pay me. I worked every day for a week and at the end of the week he gave me R88. I said to him, I have pride and that I will never come back. Then he asked me to stay on, but I told him he had disrespected me. Then I kept looking for a job, then I got a job as a security guard, and I knew I had to be good at this job if I wanted to get something better, so I got good at catching thieves. I even risked my life going for a gangster, I just grabbed the guy. Since that day, he is actually a good friend of mine. They said that if you could catch a thief you would get a R500 bonus, but I never got the R500. Also I had fake papers. That was the only way I could get work, with the fake papers, but I felt bad about it. Then I told the owner of the place that I had fake papers, but he didn't fire me, he said it was ok. Then I saw the Spur was looking for people, but the guy said I could not do it because I could not speak good English. They said there were 20 people writing a test in two days from now, so I could try. I studied for the two days and I did the best in the test. I got 90% so the Spur said they would keep me. After 3 months I was the top waiter in all the Spurs in the Western Cape. I worked so hard. I worked like an animal. I took no breaks, not even tea-time. I worked there for five years then I got a job in a 5-star restaurant. But I lost that job when I still didn't get my refugee papers. Then I started my own business.”*

*“As I told you, I studied chemical science, but after struggling in South Africa for so long and not eating, I had to make another plan. I went and did plumbing and electrician and other courses like that, but it doesn't even help to have the CV, I don't even take it with me. I just needed the skills and the will. I go to the construction sites. If there are other Congolese working there, it is easier to get in and to speak to the foreman. If not, I make another plan. I take any work on the sites, cleaning, sweeping, general worker, engineer, electrician, whatever it is they say they need, because I can do it. When I am there, I demonstrate that I can do other things and I get promoted. And once people know you, they take you again, and you get a network. Sometimes in the beginning I just waited around sites. It is for small construction companies who are sub-contracted by big companies, so they often get guys working for them who don't know what they are doing. So, I was hanging around the one site for example, and I saw this guy who did not know how to use the equipment safely, and I*

*warned him and the foreman, but they didn't listen, and the blade came lose and he cut his fingers off. I helped get the guy treated and then just volunteered to carry on with his work, so I worked on that site. And then I did their plumbing also, and then I became the foreman because I had all these skills. I can even do the technical stuff now, because I did a course in optic fibre for R7000 recently, but construction is very hard physical work and I am very tired. I hope the technical work will be less tiring. I am lucky because I learn quickly."*

As 38-year old male, with a BA Philosophy, a diploma in project management, and a post-graduate diploma in medical science, explained that he is currently working a 12-hour shift as a security guard (7 nights per week) in order to survive financially. In the day he volunteers as an English teacher to other migrants and refugees; takes on advocacy roles (i.e. speaking at conferences; hosting events to promote integration etc.) both without compensation) provides extra lessons in history and accounting for the children of migrants and refugees who are struggling in school: sends out CVs and applies for work more aligned to his skill level; and studies to get additional qualifications that may make him more employable. He also tries to give French lessons to South Africans but has not yet found an interested client. He has offered to work as a translator, but because he does not have the required documentation no formal institution will provide him with an opportunity. His tenacity is captured in the following statement: *"Yes, it is very difficult, but I will not give up! I will fight. I will keep improving myself and I will keep trying, but for now security patrols are my reality . . . No, I don't sleep. Today I came from work for this interview because they said we might also get something to eat. I slept for the 30 minutes on the train here. Sometimes I don't sleep for weeks. I have to help the Congolese Society because it is run by one man and he can't do it alone. Yesterday I slept for six hours, that was good! . . . The worst part? That people think I am stupid because I am a security guard, and then they are surprised when I speak. I am not dumb, I am highly educated, but people treat me like I'm stupid or like I don't exist"*.


*"In the Congo I was a qualified seamstress. I could not get a job in South Africa because I could not speak English. I went to ARESTA and did a two weeks course in English. Then I got a job in a factory and I learned the rest of my English there. I went to all the factories asking for work and one factory the woman put me on a machine and then gave me the job. In the South African clothing industry you need a red card to work, I didn't have one, but my boss was nice. She employed me and then helped me register for the red card, so I worked for two years before I got the card."*

*"I had my Honours degree in teaching when I came here for the operation, and then when I stayed here after the operation, I had to make a plan. I went to hotels in Hillbrow and Braamfontein, places like that, and got a job as a bouncer. I was big and scary looking 20 years ago! I still had my passport and permit and so I applied for other jobs. I also registered to do my masters at Wits. I got an interview at Wits and was appointed as an assistant, I was promoted a few months later, and then I became a lecturer. I stayed for 13 years and then I got employed by the school I am with now and have been for about seven years. For me it was easy. I was an experienced teacher and all these people wanted from me was to prove that I could teach. But it is not easy for the other Congolese people I know."*

### **6.5.3 SUCCEEDING IN SMALL BUSINESSES**

Those individuals who had despite the tremendous obstacles succeeded in establishing and supporting themselves with small businesses, mostly in the informal economy, were asked what the contributing factors for their success were. The factors they identified included hard work, desperation, ingenuity, personal sacrifice, assistance from particular South African communities, and social capital. Personal stories are repeated here in considerable detail to demonstrate this.

*"I think I succeeded because I worked so hard. I don't sleep. At night I sew my bags, and in the day I walk around and sell the bags. I am so tired, if I stop talking, I will fall asleep. You have to do this, even if you don't want to. It is not easy. I also succeeded because I love my work. I tried a lot. I was a teacher before I came here, but they said they did not accept my qualification and I have to go back to university for another four years. That was too expensive, so I did small courses like home-care, child-care and quite a lot of other things. I love sewing and fashion and then I got an opportunity to study in design college and I managed to buy myself a small machine. I started my business in my home. Then the Scalabrini group gave me a chance to do sewing facilitation here, and I was still doing my business from the house. I am managing – slowly. Yeah, so you have*

A woman wearing a vibrant red headwrap is focused on her work in a garment factory. In the foreground, a hand uses bright red-handled scissors to cut a piece of dark fabric. To the left, a white garment with gold-colored patterns is being measured with a white tape measure. The scene is brightly lit, highlighting the textures of the fabrics and the concentration of the worker.

**“WE DON’T KNOW WHAT WE ARE  
SUPPOSED TO BE PAID, SO WE WILL  
JUST TAKE ANY AMOUNT THAT A SOUTH  
AFRICAN WILL PROBABLY REFUSE. WE JUST  
TAKE ANYTHING WE ARE SO DESPERATE”  
(P.94)**

*to love what you do and not sleep.”*

*“It was not easy, I did not have my papers, but I was in this position, and I am a business woman and I had a vision. It was my passion to have the salon”.*

*“I’m still struggling, but I worked two jobs, in the day in a furniture upholstery business and at night as a manager in a restaurant. I saved my money and bought my own tools to start a business. Before that I also did part-time jobs. . . Now I have a contract and a computer. First I did not get contracts because of the permits. Then I started getting work with the whites in Somerset West. Plumbing work and tiling, and electricity and welding. I would just arrive at places where I knew they were looking for people. The first guy asked me, what is your company and I said “. . .” because I can do all the jobs, you only have to hire my company. He asked about permits and I said, ‘it is not the permit who is going to do the work’. I also had references. I also went to places where I heard other contractors had made mistakes, in one place they chopped a pipe and then I offered to fix the problem and that way I got known”.*

*“I have not succeeded the way I want to yet, but what I did was to think: here I am in this situation. I am a Somali woman, Somali woman don’t work and don’t know those things, but what is it that I can do? And I thought, I know how to cook. I did not have any papers, but then I saw there were other Somalis working in town and I went home and made take-away meals and I went back to town and I sold it, and that is how we live”.*

*“I am running a day-care centre in . . . It was always my passion to work with kids. When I came to South Africa, I started as a domestic worker in the Brooklyn area. I have studied hotel management at the London School and I was the human resources manager for Holiday Inn before I came here. So I started running a creche in Brooklyn. I went to the salons where women go and gossip and I told them what I do, and about the creche. I created a fake school because I didn’t have the creche then. I learned about the education system by being a member of the School Governing Board at my child’s school. That is how I knew. The challenge was that I could not register the business with my asylum paper. Actually, I still have to register the business and my permit must be renewed again. If I try and register the school, I may lose it so I’m too scared to try that. The people who bring their children know me and they know I am not registered and why. I told you I can’t run the school in Salt River because of the community there, so it is also true to say I am succeeding because of the white people in this area who support me”.*

Social capital (i.e. community support structures) was key to the success of some individuals. *“In the Somali community we help each other with everything. We rent places so when new people come here, they have a place to stay at first. It is expensive but we do that because if you went through a lot of suffering you want to help people because you know what it is like to go through pain. If a Somali is new in the country, we will help the person succeed. Good things are always started by people who have suffered”.*

Although other respondents expressed admiration for the Somali approach (*“That is so beautiful”*) and despite clear evidence of mutual support among the Congolese interviewed, research participants felt that the social capital aspect was strongest for Somali people and far less evident among migrants from the SADC region whom they described as more likely to be competitive. *“The Somalis are fantastic, but us Africans we do not help each other like that . . . Even good friends can be competitive”.*

Nevertheless, it appears that high levels of social capital among certain migrant communities, act as a protective / survival enhancing factor. Other studies have similarly demonstrated high levels of social capital. A survey of Zimbabwean migrants in South African cities in 2017<sup>281</sup> found that although households were very poor and food-deprived, “they still shared food amongst themselves, suggesting a marked degree of migrant solidarity and social capital”. This study also found that migrants were combining households in order to share resources, costs and responsibilities.

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<sup>281</sup> Crush J. & Tawodzera. G. 2017. ‘South-south migration and urban food security: Zimbabwean migrants in South African cities’. International Migration. Volume 55 (4). International Organization for Migration.



## 6.6 CONDITIONS OF EMPLOYMENT

It is not possible to generalize based on the small sample of respondents interviewed, but the findings align to the data presented in the situational analysis. Migrants and refugees are more likely to be employed in low-skilled jobs, where they are vulnerable, exploitable/ exploited, payed minimum or below minimum wages, or where labour legislation is flouted. Many/ most are pushed into self-employment. Success does not appear to be related to qualifications, but it is directly related to the type of permit or documentation. Permanent residents and those with work permits are better off than refugees, who in turn, are better off than asylum seekers and undocumented migrants. Migrants and refugees reportedly tend to be employed in the agricultural, construction, hospitality and domestic work sectors.

### 6.6.1 HIGH-SKILLED MIGRANTS AND REFUGEES EMPLOYED IN THE FORMAL SECTOR

Some of the academics and subject experts interviewed were foreign-born workers, and as indicated, two of the research respondents were employed in tertiary institutions (and one subsequently at a private school). Exploitation, discrimination and incidents of xenophobia are less frequent and less severe for this group, but they were all still affected. Foreign-born teachers, for example, were able to secure employment but they remain on contract (even after 13 years) and do not, therefore, qualify for ordinary company benefits like contributions to pensions funds and medical aids. Their tenure is, therefore, also always insecure. They are not promoted, and are paid lower salaries than their counterparts with less experience or fewer qualifications. There were also reports of teachers in South African schools experiencing racism and xenophobia from pupils and colleagues.

### 6.6.2 MIGRANTS AND REFUGEES IN THE HOSPITALITY INDUSTRY

Deacon et al 2015<sup>282</sup> point out that although the hospitality industry is one of the major contributors to the South African GDP, little statistical data is available on the numbers and impact of foreign-born workers in the sector. Research completed in the hospitality sector in Durban (but which is not representative of national employment profiles) found that most foreign-born research participants were from Zimbabwe. Other groups included migrants from the DRC, Kenya, Mauritius and Mexico.<sup>283</sup> Participants interviewed for this research and working in the hospitality industry were from Zimbabwe, Malawi and the DRC.

Qualitative research studies of unrepresentative samples of employers in the sector have suggested a preference for employing foreign-born workers based on what employers described as commendable work ethic, excellent language skills, and generally higher levels of education and experience. The preference may also stem from the willingness of foreign-born workers to work for lower wages or accept inferior working conditions. Research participants echoed this sentiment. *“My boss likes us Zimbabweans more than the South Africans, but when he shows it, it causes stress for us”*. *“Employers prefer foreigners because they know they can pay us less because they can use our being foreign against us. I am so desperate, I will work for R15, I have no choice. No South African will do that. But for me it is better to have a piece of bread than nothing. I agree also that we are very hard workers, but they are also exploiting us”*. *“Yes, employers think we are good workers and that they can pay us less. You do whatever because otherwise you can’t survive”*.

The sector can serve as an entry point into the South African economy and some respondents were able to use the skills, experience and education to move from dishwasher to hotel manager in a period of between one to two years.

<sup>282</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

<sup>283</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

However, the sector also facilitates vulnerability and exploitation. As Deacon et al 2015 argue<sup>284</sup>, several conditions of employment in the sector contribute to this. Employees in the sector often receive very low or no salaries and are completely dependent on tips. It is therefore necessary to work long hours and double shifts to earn enough. Employment is often short-term, sans contracts, flexible, casual, part-time or student based. Workers do not generally have access to UIF or other social protection. *“Yes, they like us because foreigners work 12-hour shifts, and because we are not nationals, we don’t get national holidays. I have been in hospitality for seven years, I have never had leave. There is no union, and I can tell you, nobody will help us with the boss. Employers exploit us because they know we have to take it. You have a family to support and you have to pay rent, so it means you must take any work and any pay you can get, no matter you are qualified. That is how you get exploitation”.*

The industry has a very high worker turnover rate. Young women are prevalent in the sector and are exposed to various dangers from employers and patrons, and when utilizing public transport or walking late at night (see section on gender below for more information).

Vulnerability and the likelihood of exploitation increases for undocumented migrants. Respondents recounted multiple examples of discrimination (e.g. placement, promotion, levels of responsibility and inequitable pay). As a young woman working in a restaurant in Cape Town explained: *“At work, there are three South Africans, and the rest of us are from Zimbabwe and the DRC. We are not treated the same. We were employed at the same time, and we get paid the same, but I have to do the work at the bar and the washing up. The South Africans just stand around. We foreigners do all the work. But it is income and we need it, and everybody knows it, so we do everything. But I see it as a way to develop my personal ability and building myself and my mind.”*

They also spoke of multiple experiences of xenophobia. Xenophobic attacks and insults were most likely to come from co-workers. The following is the experience of a young man working in a well-known coffee shop: *“The South Africans get the senior positions, but that is better, because when you get promoted as a foreigner the South Africans attack and insult you. The black South Africans in the shop treated me so badly after my promotion they had to transfer me to another shop where they only employ foreigners now. We work in the corporate outlets only”.* *“Yes, when I was promoted the other staff started speaking only isiXhosa and made me do all the things they didn’t want to do and they chased me away from the front bar where you get tips”.*

Research participants experienced employers as less xenophobic. *“I was working for a company, the bosses were treating me very nice, they were assisting me and when it was late they walked me home. I have heard that there are bad bosses in South Africa, but I have not met any”.*

As with the other sectors discussed in the report, unionization rates are low.<sup>285</sup>

### 6.6.3 MIGRANTS AND REFUGEES IN THE CONSTRUCTION SECTOR

The construction sector can be divided into the large-scale formal sector which is dominated by approximately seven large construction companies, the smaller-scale formal sector which consists of smaller construction companies and service providers that are often sub-contractors to the larger companies, and the informal sector, which involves the day labour in smaller construction firms and in private homes.

Construction firms employ a core of skilled construction workers working in relatively secure employment. Then there is a layer of casual or temporary workers hired on short-term contracts, largely as general workers. Accurate figures are hard to obtain, but it is possible that up to half of all the short-term workers

<sup>284</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

<sup>285</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

in the construction sector were foreign in 2008.<sup>286</sup> It is further estimated that the informal sector may account for 32% of employment in the construction sector and that a large proportion of these workers are from the SADC region.<sup>287</sup>

Exploitation in informal employment is said to be similar to what happens in the other industries discussed. Exploitation in the formal sector, occurs through labour brokers who recruit and place workers, absolving larger companies from compliance to relevant labour legislation.<sup>288</sup> According to academics researching the sector, this often takes the form of “working gangs/ teams” who are temporarily, and without documentation, brought into the country to perform specific functions (e.g. installing fibre-optic cabling).

Subcontractors represent a point of entry for migrants, but like labour brokers, can circumvent labour legislation. Migrants, therefore, do not receive contracts, and payment is variable and not guaranteed. Further employers take advantage of migrants’ vulnerable status and (according to academics and subject experts interviewed) pay them less than they pay South Africans. Research participants employed in the construction sector in Cape Town disagreed with this. “No, in the construction sector everybody knows that the wage is when you start. Everybody gets paid the same”. Employers interviewed echoed this: “There are standard wages for set tasks and positions. The country you were born it does not affect your wage. Day labourers will get less than full-time employees overall, maybe that is perceived as a difference, but it doesn’t have anything to do with where you were born”.

Rates of unionization in the sector is low overall, with only 10% construction workers are unionized.<sup>289</sup>

Employers interviewed said that they prefer employing migrants but are hesitant to do so because of punitive measures on the part of the Department of Labour. “We get inspections from the Labour Department and then we have to pay fines. It is also difficult because injuries are common, and we can’t register the illegal guys for workers compensation. That is a problem because we cannot carry those costs. The other problem is that these guys disappear for a week at a time to renew permits and sometimes this is every month or every three months and one cannot rely on such an erratic labour force when you are working to deadlines”.

## 6.6.4 MIGRANTS AND REFUGEES IN THE AGRICULTURAL SECTOR

The commercial agricultural sector in South Africa owes its success to the cheap labour it was able to obtain through apartheid policies, internal migration created by the Bantustan system, and the legislative and other measures undertaken by the apartheid state to secure cheap migrant labour from neighbouring countries.<sup>290</sup>

Indications are that exploitative labour relations continue in 2019, but there has been a shift from permanent/ longer-term employment with accommodation, to seasonal work and the utilization of labour brokers. This shift stems in part from the global economic downturn, and in part from farmers’ response to legislation introduced in the late 1990s that sought to protect the rights of farm workers and labour tenants to the land on which they worked and lived. Two key pieces of legislation designed to protect labour tenants and farmworkers and increase their tenure security, ironically resulted in increased evictions in the period prior to promulgation. The Acts also dissuaded farmers who feared losing their land to farm workers and tenants from hiring full-time employees thereafter. The two Acts were the Extension of Tenure Security Act and the Labour Tenants Regulation Act.<sup>291</sup>

<sup>286</sup> Cottle E. November 2008. ‘Vulnerable workers in the construction sector and the 2010 World Cup’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

<sup>287</sup> Theodore N., Blaauw D., Pretorius A., Schench C. 2017. ‘The socio-economic incorporation of immigrant and native-born day labourers in Tshwane, South Africa. International Migration. Volume 55 (1). ISSN 0020-7985.

<sup>288</sup> Theodore N., Blaauw D., Pretorius A., Schench C. 2017. ‘The socio-economic incorporation of immigrant and native-born day labourers in Tshwane, South Africa. International Migration. Volume 55 (1). ISSN 0020-7985.

<sup>289</sup> Ibid.

<sup>290</sup> Weideman M. 2004. Land reform, equity and growth in South Africa: A comparative analysis. PHD. University of the Witwatersrand.

<sup>291</sup> Ibid.

None of the research migrants and refugees interviewed for this assignment had ever worked in the agricultural sector, but some of the non-migrant interviewees were subject experts. Their accounts and additional research suggest that foreign nationals still comprise a large component of the labour force on South African farms. Statistically representative studies have found that large numbers of migrants from the SADC region, particularly from Mozambique into Mpumalanga, still cross the border to seek short-term, seasonal work on farms in South Africa.<sup>292</sup> Subject experts were also aware of arrangement between farmer and immigration officers in Zimbabwe, in terms of which workers are brought into the country (undocumented) for seasonal work. Similar arrangements for short-term labour were reported for Lesotho and Swaziland.

There is also evidence for abuse and exploitation on farms. Various studies, including investigations by the South African Human Rights Commission, have found human and labour rights violations on South African farms.<sup>293</sup> This includes employers denying workers/ migrants their basic labour rights, employers engaging in exploitative labour practices such as low pay, withholding wages, imposing excessively long working hours, providing poor accommodation and not mitigating against dangerous working conditions.<sup>294</sup> In a number of extreme cases abuse and murder have been documented.<sup>295</sup> As is the case with other vulnerable sectors of the economy, abuse is often unreported because migrants fear deportation or unemployment. Activist lawyers reported cases where migrants and refugees were paid lower wages than South Africans, in a context where farmers preferred employing migrants and refugees precisely because they could “get away with” paying less.

The casualization of farm labour described above has increased the vulnerability and job-insecurity of farm workers. Contract workers and seasonal workers (as in other similar sectors) have no benefits such as medical aid, pension, UIF, maternity leave, employment contracts, or event job security. They are also often recruited through labour brokers who do not adhere to labour legislation.<sup>296</sup> Subject experts explained that farmers utilize labour brokers to access temporary employees precisely because this enables them to contravene/ or not comply with existing labour laws. Their contracts are with the labour brokers and they are not responsible for the treatment or payment the seasonal workers received. *“There were cases we were dealing with – about four years ago – there were farmers who would send trucks over the border. They would pay labour brokers to fill their trucks with whatever people and bring them across the border. Some would get work, some not. They were employed on a daily basis, they didn’t even get seasonal contracts, so the lowest wages possible per day were paid to the most desperate people.”* *“There were also cases reported to us where when it came to the day that farmers had to pay workers after the harvest, they just called the police and reported them for being undocumented. Those workers were never paid. Police have told me there are certain times of the year where this happens a lot”*.

As is the case with other marginalized/ possibly exploitative employment sectors unionization rates are low. Unions and movements appear to form around local incidents and issues (e.g. the emergence of a worker's union acting against labour brokers in De Doorns in the Western Cape in 2014/15), and a union for migrant workers in Tzaneen. Seasonal workers (i.e. undocumented migrants) are not likely to have the time, money, opportunity or inclination to join local unions.

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<sup>292</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWOCR Paper 8.

<sup>293</sup> Weideman M. 2004. Land reform, equity and growth in South Africa: A comparative analysis. PHD. University of the Witwatersrand.

<sup>294</sup> Crush J., Dodson B., Williams V., Tevera. D. 2017. ‘Harnessing migration for inclusive growth and development in Southern Africa’. Special Report. The Southern African Migration Program and UK Aid

<sup>295</sup> Weideman M. 2004. Land reform, equity and growth in South Africa: A comparative analysis. PHD. University of the Witwatersrand.

<sup>296</sup> Shabodien F. November 2008. ‘Migrant labour in South African commercial agriculture’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town

## 6.6.5 MIGRANTS AND REFUGEES IN DAY LABOUR/ PIECE JOBS

Migrants and refugees also work as day labourers in the construction and agricultural sectors and in private households. This category of informal employment refers to the men and women who stand on street corners hoping to be hired for a day. As with other informal and short-term contracts, day labourers are unprotected and vulnerable. They are often exploited, underpaid, or subject to other labour and human rights violations.<sup>297</sup> They are paid in cash and generally do not have employment or social protection benefits of any kind.<sup>298</sup> Individuals in the sector live a hand to mouth. Desperation results in the acceptance of essentially slave wages. Day labourers work mostly in private homes as gardeners, maintenance persons, or home re(construction) and repairs. They also work in the construction (mostly small contractors) and agricultural (mostly seasonal) sectors.<sup>299</sup>

For the purposes of this research, car guards, the default source of employment for research participants, is included in this category. Without exception this was described as an unpleasant, degrading and dangerous job, which generates approximately R200 per day. *“And if you don’t earn enough, you can’t take transport to an area where there are a lot of cars the next day, then you have to walk, but if I walk to Long street, it takes hours, so when I get there, there are only three hours left to work, and then I can’t earn enough again. Everything is so difficult since I came here”.*

## 6.6.6 MIGRANTS AND REFUGEES IN DOMESTIC WORK

As discussed, there are indications that female migration, independent female migration, and female labour migration are increasing. The statistics from the Quarterly Labour Force Survey 2012 further demonstrate that many of these women find employment in private homes as domestic workers, care workers and child minders. Lesotho is the country of origin for the many “foreign-born” domestic workers in South Africa. It is for this reason that the research for this assignment included a focus group with Basotho women working as domestic workers in South Africa. Other countries of origin include Zimbabwe and Malawi.

Various studies have demonstrated that these women work in exploitative conditions and that the rather extensive labour rights framework, that includes national conventions and domestic legislation is not reaching/ protecting this particularly vulnerable category of workers.<sup>300</sup> Migrant women work in the sector because the barriers to entry are lower than for formal employment.<sup>301</sup>

The most recent (and statistically representative) study on domestic work in Gauteng was completed under the auspices of Oxfam South Africa in 2018.<sup>302</sup> The study did not distinguish between the countries of origin of the approximately 400 domestic workers interviewed. Given the 2012 Labour Force Survey data which shows that migrants are more likely to be involved in domestic worker (50% of international migrants compared to 30% of non-migrants regardless of educational status),<sup>303</sup> it is likely that a reasonable

<sup>297</sup> Crush J., Dodson B., Williams V., Tevera. D. 2017. ‘Harnessing migration for inclusive growth and development in Southern Africa.’ Special Report. The Southern African Migration Program and UK Aid

<sup>298</sup> Theodore N., Blaauw D., Pretorius A., Schench C. 2017. ‘The socio-economic incorporation of immigrant and native-born day labourers in Tshwane, South Africa. International Migration. Volume 55 (1). ISSN 0020-7985.

<sup>299</sup> Ibid.

<sup>300</sup> Griffin L. 2011. ‘Unravelling Rights: ‘Illegal’ Migrant Domestic Workers in South Africa.’ South African Review of Sociology, 42:2, 83-101, DOI: 10.1080/21528586.2011.582349. Weideman M. July 2018. A Study on Women’s Economic Empowerment in South Africa: Investigating unpaid and low-paid care work by focusing on domestic workers, women in the informal economy, and unemployed women in Gauteng. Oxfam South Africa. Johannesburg. Kiwanuka M., Jinnah Z. & Hartman-Pickerill B. November 2015. ‘Getting the house in order: Foreign migrant workers in the domestic work sector in South Africa.’ MiWOCR Report 10

<sup>301</sup> Kiwanuka M., Jinnah Z. & Hartman-Pickerill B. November 2015. ‘Getting the house in order: Foreign migrant workers in the domestic work sector in South Africa.’ MiWOCR Report 10

<sup>302</sup> Weideman M. July 2018. A Study on Women’s Economic Empowerment in South Africa: Investigating unpaid and low-paid care work by focusing on domestic workers, women in the informal economy, and unemployed women in Gauteng. Oxfam South Africa. Johannesburg.

<sup>303</sup> Kiwanuka M., Jinnah Z. & Hartman-Pickerill B. November 2015. ‘Getting the house in order: Foreign migrant workers in the domestic work sector in South Africa.’ MiWOCR Report 10.

percentage of the overall sample would have been labour migrants.

The Oxfam study<sup>304</sup> found that the domestic work sector is highly exploitative with close to zero compliance to applicable labour legislation. These findings apply to all domestic workers, but it is possible that these harsh conditions are exacerbated in the case of foreign-born domestic workers.

The Oxfam study<sup>305</sup> inter alia found that:

- Most domestic workers were from female-headed households and approximately 50% did not have male partners.
- Young women are less likely to be employed as domestic workers. Approximately 34% of the domestic workers interviewed were in their 30s, 30% in their 40s, 19% in their 50s, and 4% in their 60s.
- Educational levels were low; 1% never went to school, 19% spent “some time” in primary school, 54% attended secondary school but never completed it, whilst approximately 23% completed grade 12/ matric. Approximately 4% had completed some tertiary education. The respondents with tertiary education were all from Zimbabwe.
- 9% of study participants had been domestic workers for less than a year, 34% had worked as domestic workers for between two and five years, 35% for between six and ten years, and a further 31% for more than ten years (many of these for more than 20 years). Time spent in employment correlated to age, which suggests that it is a career without prospects or upward mobility.
- The majority (63%) of domestic workers had only one employer, while the remainder worked for two or more employers.
- Employers do not comply to the Basic Conditions of Employment Act, nor to related labour legislation. Only 14% of respondents got a salary slip every month, only 14% said that they were registered for UIF (and therefore maternity leave), only 13% had an employment contract, and only 25% had paid leave.<sup>306</sup> None of the focus group participants (Basotho migrant workers) had employment contracts.
- The majority (82%) of domestic workers are paid per month. The respective percentages per week and per day are 6% and 9%.
- Monthly salaries range from R800 to R5700, and the average salary for domestic workers in Gauteng is R2403.00. Transport costs, to and from work, are considered necessary expenses to access and maintain employment. Excluding the women who live at their places of employment, or who live in informal settlements in order to walk to work or significantly reduce travel costs, the average domestic worker spends R549.00 per month on travel to and from work (the range is from about R50 per month to R2 000.00 per month). If this is deducted from the average monthly salary, the effective average monthly income is only **R1857.00 (R92.70 per day)**. **15% of employers regularly fail to pay, and only 40% of respondents got an annual salary increase.**<sup>307</sup>
- There are some minor mitigating factors such as employers providing lunches, and a minority of employers helping with children’s education. Specifically, 80% provide lunch, 8% assist with contributions towards employees’ children’s education, 7% contribute towards employee medical costs, 5% are contributing towards employee retirement funds/ savings, 7% have paid for skills development or education for their employees, 48% extend financial help in times of crisis, 54% give gifts from time to time, 50% pay annual bonuses, 40% give annual increases, 21% provide transport money in addition to salaries, and 27% provide accommodation.<sup>308</sup>

<sup>304</sup> Weideman M. July 2018. A Study on Women’s Economic Empowerment in South Africa: Investigating unpaid and low-paid care work by focusing on domestic workers, women in the informal economy, and unemployed women in Gauteng. Oxfam South Africa. Johannesburg.

<sup>305</sup> Ibid.

<sup>306</sup> Weideman M. July 2018. A Study on Women’s Economic Empowerment in South Africa: Investigating unpaid and low-paid care work by focusing on domestic workers, women in the informal economy, and unemployed women in Gauteng. Oxfam South Africa. Johannesburg.

<sup>307</sup> Ibid.

<sup>308</sup> Ibid.

- Furthermore, approximately 58% of the domestic workers interviewed send part of their small income to family members on a regular basis. Of these, 13% send money to family members in urban areas of South Africa, 20% send money to family members in rural areas in South Africa, and 29% send money to family members in other countries.
- Almost half of the domestic workers in Gauteng are tenure insecure. Their accommodation is either tied to their employment, or they live in informal settlements, backyards and rooms for which they have no formal agreements or legal protection. Approximately 26% of respondents live permanently at their places of employment. Although this is by no means always the case, live-in positions do increase domestic workers' vulnerability and decrease their negotiation power as their accommodation is tied to their employment. It is not surprising then, that some of the most exploitative cases recorded during the research occurred in these settings. Low wages (for example R1 500.00 per month for 7 days per week = about R50 per day) are justified on the basis that accommodation is provided. Many of these women are prevented from spending time with their own families and are forced to work hours that are illegal and exploitative. Migrants from Zimbabwe and Lesotho, who do not have social support networks in South Africa are particularly susceptible to these terms of employment.<sup>309</sup>
- Approximately 66% of women are paid in cash, and only 57% have bank accounts with formal financial institutions. This means that approximately half of the domestic workers interviewed are not able to provide evidence of regular income/ income statements and will therefore not be able to access loans or credit from formal or reputable institutions.<sup>310</sup> Foreign born domestic workers, who do not have Identity Documents, or work permits are not able to open bank accounts at all.<sup>311</sup>
- A study of domestic workers in Mpumalanga found that migrant domestic workers were subject to particular types of abuse. Respondents in the Mpumalanga study<sup>312</sup> as well as focus group participants reported employers who unlawfully detained them by confiscating passports or permits, or who destroyed legal permits and then reported them to relevant authorities to avoid payments.

Indications are that many or most foreign-born domestic workers (and in particular those from Lesotho) are undocumented migrants.<sup>313</sup> Similarly, all 12 focus group participants reported that they were undocumented or crossed the border "illegally" several times per year. Their undocumented status increases their vulnerability and their fear of interacting with the agents of the South African state (i.e. the Department of Labour, the CCMA, the SAPS, and unions).<sup>314</sup> As is the case for many undocumented migrants, these women perceived their "illegality" as an indication that they have no rights or protection, making them more susceptible to exploitation. They were not aware that they are protected by South African labour legislation or the Bill of Rights.

A Mpumalanga study, which included a sample of less than 20 foreign-born domestic workers and is therefore only anecdotal, found that the women fear deportation and that this further increases their vulnerability. Data from the focus group with the women from Lesotho (also anecdotal given the sample size) suggest that the fear is less around deportation, but about losing employment.

Union representation is close to zero. Only 2% of domestic workers in Gauteng belonged to a trade union, even fewer had heard of the South African Domestic Service and Allied Workers Union, and only 20% said

<sup>309</sup> Ibid.

<sup>310</sup> Weideman M. July 2018. A Study on Women's Economic Empowerment in South Africa: Investigating unpaid and low-paid care work by focusing on domestic workers, women in the informal economy, and unemployed women in Gauteng. Oxfam South Africa. Johannesburg

<sup>311</sup> Griffin L. 2011. 'Unravelling Rights: 'Illegal' Migrant Domestic Workers in South Africa.' *South African Review of Sociology*, 42:2, 83-101, DOI: 10.1080/21528586.2011.582349

<sup>312</sup> Kiwanuka M., Jinnah Z. & Hartman-Pickerill B. November 2015. 'Getting the house in order: Foreign migrant workers in the domestic work sector in South Africa.' MiWORC Report 10.

<sup>313</sup> Griffin L. 2011. 'Unravelling Rights: 'Illegal' Migrant Domestic Workers in South Africa.' *South African Review of Sociology*, 42:2, 83-101, DOI: 10.1080/21528586.2011.582349

<sup>314</sup> Focus group data. See also Griffin L. 2011. 'Unravelling Rights: 'Illegal' Migrant Domestic Workers in South Africa.' *South African Review of Sociology*, 42:2, 83-101, DOI: 10.1080/21528586.2011.582349.

that they knew what the minimum wage for domestic workers was.<sup>315</sup> The Mpumalanga found similarly low rates of rights awareness among domestic workers.<sup>316</sup> None of the women who participated in the focus group were union members. Respondents cited unaffordability and lack of knowledge as the two primary reasons for not joining a union.

Although this sector is essentially unprotected and unregulated it is interesting to note that there are transnational networks of recruitment and migration, informal / unregulated agencies, familial relationships, and other actors that operate in the sector. This involves “work and travel being arranged in advance for a fee by contractors in South Africa” who recruit from particular villages.<sup>317</sup> The women who participated in the focus group for this study were part of a similar arrangement.

## 6.7 RIGHTS-AWARENESS AND RIGHTS ACTUALIZATION (SOCIO-ECONOMIC AND LABOUR RIGHTS)

The findings from the interviews align to those from the situational analysis and other studies conducted in the sector. Subject experts interviewed agreed that all labour legislation applies/ should apply to migrant workers (documented or undocumented), but emphasized that those with work permits had a far better chance of holding employers accountable. There was also consensus that employers tended not to adhere to labour legislation when it came to migrants and refugees, and that employers in the construction, hospitality, domestic work, and farming sectors, were particularly likely to contravene the Basic Conditions of Employment and Labour Relations Acts. Interviews with employers, union representatives and previous studies in the domestic work sector suggest that employer non-compliance sometimes stems from a lack of knowledge, or the bureaucratic and related barriers to compliance.

Approximately half of the respondents for this study had no awareness of their rights in South Africa (i.e. neither of their constitutionally guaranteed human and socio-economic rights, nor of their rights as employees). The Basotho women assumed they had “no rights in the country because we are not South African”. They expressed surprise when the applicability of the Basic Conditions of Employment Act (i.e. work hours, leave, sick leave) and their right to approach the CCMA for unfair dismissal was discussed. They had heard of the Unemployment Insurance Fund and minimum wage legislation but thought they were excluded from this protection. They had never heard of a union for domestic workers.

Approximately 40% of the respondents had some awareness of their rights, but were unable to actualize their rights for fear of xenophobic retaliation, loss of employment, or abuse / aggressive/ unhelpful behaviour from public officials. As a 17-year-old explained: “We know human rights apply, but we aren’t able to access it. We know the law exists, but we can’t access it. Without legal papers anything happens, like last month we were evicted without notice”. Or as a legal expert explained: “All South African labour legislation applies to migrants – common law, contractual relationships, even verbal contracts and even if the migrant is illegal, the Basic Conditions of Employment, the LRA, the right to strike and to join a union, fair dismissal – all of this applies. Even UIF, if they contribute, they are entitled, but in reality, it doesn’t happen. You can’t actually get your UIF because the system only takes South African ID numbers, and the undocumented migrants want to stay under the radar because they are afraid, so they don’t use the law that protects them. The ID thing is also a problem in getting money from the Workman’s Compensation fund, when people are actually entitled to it. People are just too afraid of deportation and unemployment, so they don’t use these laws”.

Respondents had no to limited trust in the police or other public institutions that should, in theory, protect them. “The problem is, if someone from South Africa exploits you, we see how South Africans react if you say something, and we are scared. It doesn’t help to know your rights. Where do you run?”

<sup>315</sup> Weideman M. July 2018. A Study on Women’s Economic Empowerment in South Africa: Investigating unpaid and low-paid care work by focusing on domestic workers, women in the informal economy, and unemployed women in Gauteng. Oxfam South Africa. Johannesburg.

<sup>316</sup> Kiwanuka M., Jinnah Z. & Hartman-Pickerill B. November 2015. ‘Getting the house in order: Foreign migrant workers in the domestic work sector in South Africa.’ MiWOCR Report 10

<sup>317</sup> Kiwanuka M., Jinnah Z. & Hartman-Pickerill B. November 2015. ‘Getting the house in order: Foreign migrant workers in the domestic work sector in South Africa.’ MiWOCR Report 10



Migrants and refugees in low-skilled employment or who are employed in informal sectors of the economy do not have the resources required to actualize their rights. They cannot afford to join trade unions, much less pay for legal assistance. As a trade union representative explained: *“People are generally not aware of their labour rights, but even if they were, their material conditions prevent them from actualizing their rights”*.

Respondents with some knowledge of the relevant legislation also argued (like subject experts) that despite intermittent rhetoric to the contrary, legislation is punitive/ becoming more punitive and that the South African government’s underlying *“attitude to migrants is hostile. They say something else, but in reality, they and their laws are against us”*.

Some respondents had accessed the services of the CCMA, and pro-bono lawyers and civil society organizations active in the sector. These experiences were rarely positive. *“Us foreigners don’t know our rights. When we go to the labour court, we are treated different. The way the CCMA treated our case, I just got fed-up and hopeless, they were just wasting our time”*. Union representatives explained that CCMA cases involving migrants often fail because migrants are unwilling to divulge personal information like their names for fear of prosecution or dismissal. As a result, the cases do not get finalized and the Commission cannot issue an order.

For both groups (i.e. those who have none, and those who have some rights awareness), their inability to access these rights increases their vulnerability. *“We also don’t know what we are supposed to be paid, so we will just take any amount that a South African will probably refuse. We just take anything we are so desperate.”*

A small group, less than 10% were actively engaging in promoting migrant and refugee rights in South Africa. These individuals have approached, or work with, inter alia, the Zimbabwe Exile Forum who assists in applying for permits or challenging rulings; the Legal Resources Centre and the University of the Western Cape, ARESTA, the Scalabrini Centre, the Access to Justice Law Clinic, and the Congolese Civil Society of South Africa. The law clinics in the Western Cape reportedly work mainly on cases of unfair dismissal (for documented and undocumented migrants), and have also done extensive work pertaining to seasonal agricultural workers.

One of the founding reasons for the CCSSA was the understanding that migrants and refugees were often not aware of their rights and did not understand the bureaucratic requirements of the immigration/ asylum seeker system. This increased their vulnerability, levels of exploitation, and ill-treatment/ lack of performance on the part of the Department of Home Affairs. The CCSSA now relies on a group of volunteers to assist others in these matters. They are overwhelmed and under capacitated, but they have engaged successfully on, inter alia, matters of police brutality, failure on the part of specific policemen or units to protect migrants and refugees, illegal evictions by councils, failure of councils to provide basic services, and extortion by landlords. They have also made submissions to Parliament. *“With one police brutality case we eventually had to deal with IPID and submit things to Parliament before anybody started taking action. We were the ones who got the witness statement, but then the police in Upington tried to kill the witness, and we protected the witness. Eventually the guilty policeman went to prison. We do these things because they are important, but there are many issues and it means we do not have private lives anymore. We just do this work for the community. We need help with this.”* *“I get calls 24/7. It is hectic. The phone rings at 3am, and I wonder, what now?”* *“I have a small business that my daughter and I survive on, but now the shop is mostly closed because I am dealing with this, so my daughter does not have enough to eat some days. And when I can buy a packet of rice, I have to share it with the people who need it more. I feel terrible for my daughter. I wished I could have taken her out for her birthday”*.

Not surprisingly, migrants and refugees with higher levels of education, or who are employed in the formal sector, or on study permits have a much better awareness and knowledge of their rights. Undocumented migrants, refugees (who generally did not plan to come to South Africa) and low-skilled individuals are much less likely to have a rights awareness, or to attempt to actualize their rights.

The consensus recommendation or request from participants was for a large-scale rights awareness campaign to educate both foreign-born and South-African born residents of the rights of migrants and refu-

gees. Labour layers interviewed explained that increasing rights knowledge could directly benefit individuals who may not otherwise be aware that employers can be fined or imprisoned for contravening the Immigration Act (which makes it less likely that they will report an employee, and which will encourage them to settle disputes amicably), or that employers of domestic workers are accountable to the CCMA.

## 6.8 GENDER

Being a woman exacerbates suffering and increases challenges in every aspect of the migrant or refugee life/ experience.

As the personal accounts provided demonstrate, the migratory process (i.e. fleeing war and traveling to South Africa) was harrowing for many, and yet it was worse for the women. Women, some of whom had already experienced sexual violence or who were fleeing because they had been victims of the systematic rape that often characterizes war, had the extra burden of childcare (e.g. literally carrying their children across countries) and were often victims of sexual assault, rape, and sextortion.

Those who migrated for “economic reasons” were also not spared these torments and abuse. As noted, many had to accept sexual assault from truck drivers and border officials, others were trafficked and forced into sex work.

Given their vulnerabilities, it comes as no surprise that migrant women are over represented among sex worker groups. A 2010 survey of female sex workers in Johannesburg, Rustenburg and Cape Town found that 46% of the women were migrants.

Gender-based violence doesn't stop there. Women are also subjected to gender-based and sexual violence from partners, fathers, brothers, sons, public officials, friends, strangers, employers, medical officials, and religious leaders. An activist working with migrant communities in Johannesburg and Cape Town South Africa reported very high rates of GBV. Her organization runs weekly workshops and conducts home visits in an attempt to reduce prevalence and assist affected families. They also assist women to access the health services they require (i.e. treatment of STDs, STIs, ARVs, counselling).

*“The big difference? It is more difficult to be a woman. We are always scared when we walk around, all women are scared. There is a lot of violence. That way that men look at us, that makes us scared to walk around. You know what your rights are but you are scared to answer because you don't know what is going to happen when you do”.*

*“As a woman, I feel like I have no rights. Because you can't ask a man for help, not even my husband. If I asked for money for the children, I have to sleep with him. With men nothing is for free. And now that I am not married anymore it is worse. Men don't respect me at all. They make me feel like I am not a human being anymore. Like I don't belong to their world, I am just for sleeping with”.*

Migrant women have very little support. Research participants explained that they do not trust South African police officers and will therefore not report sexual assault, rape or domestic violence. This lack of trust in the police was also reported by activists and union representatives active in gender rights in migrant and other labour communities. Women fear further abuse, arrest or deportation. Those who cannot speak a South African language can also not approach the police as no translators are available. They also do not know what their rights as women (or migrants or refugees) are. Male partners are also physically capable of preventing women from seeking help. Women who are not integrated into society can also not approach social workers, or religious leaders as South African women often do. They cannot afford legal representation, and they do not have family members in the country to whom they can go for assistance. There were also reports (from subject experts and union representatives) of undocumented migrants and refugees being turned away from shelters for victims of GBV because of their foreign national status. Two women recounted xenophobic attacks in shelters. As earlier reported, health officials also often fail to assist or discriminate against foreign-born individuals.

Sexual and gender-based violence are acute traumas that bring about life-long and wide-ranging physical

and psychological health complications that also impact on children. It triggers multi-generational cycles of mental illness and suffering.

Further, the female migrants who travel with, or follow their partners, often have lower levels of education than their male partners, or are encouraged to stay at home (many cultures reportedly have patriarchal attitudes to women working). *“It is a bit different now, but in the past, it was not for Congolese ladies to work. Ladies were more supposed to be housewives and take care of the children”.*

Consequently, these women lack economic independence, are less likely to learn to speak English, and tend to be less integrated into South African communities. These vulnerable and dependent women are at the mercy of male partners who can, and often do, abandon them. Research respondents explained that men often marry South African women to access the relevant documentation, but then abandon their partners for the South African wife. Others return to their countries of origin, leaving women and children stranded. Undocumented female migrants and asylum seekers cannot access the child support grant. *“The government needs to listen to us [women]. We do not have an opportunity to speak. A lot of women are abandoned here and they face problems. They don’t know how to go back, some can’t go back. I asked a woman for money, she said her husband passed away and she had six children. They were dying of hunger so she had to abandon her children. She sent the children to various friends. That made me think of abandoning my own children.”*

Even women who are gainfully employed in the formal economy can be left stranded and destitute. *“I was working as a seamstress in the factory. My boss was a great woman and she was my friend. We were staying in this flat on the third floor. My husband was away often because he said he was helping white people who work in the Congo. I was eight months pregnant. Then somebody came to tell me that my husband had taken another wife in the Congo and he was not coming back for us. I collapsed and fell down the stairs. They took me to hospital. I was in a coma for six days from hitting my head and my back was hurt so I was in a wheelchair from pain after that. The hospital just gave me Panado but one year later I was still in the chair from pain, then they did an MRI and found that my spine is broken. So they had to operate . . . and then I had physical therapy to learn to walk again . . . and I went back to work. . . . I survived because people at Scalabrini and the CCSSA gave me food, clothes and school fees. CCSSA still help me . . . at work the pain got worse and worse. My boss told me to go home. I never heard from my husband again. He never helped . . . I couldn’t work anymore. My boss helps, she still brings groceries for us, but it was not working so in November they took all our stuff and kicked me and the kids out of where we live. . . we have no place to stay now and the hospital says I need another operation . . . and I am on a waiting list, so that can happen anytime. If the operation doesn’t succeed, I will be paralyzed . . . Who will take care of my children when I am in hospital? . . . Even if it succeeds they say I can’t be a seamstress anymore because I can’t sit for long . . . I want to kill myself and my children because I don’t want to live like this . . . I don’t know where to go . . . . I have three children . . . ”*

Female migrants also tend to be concentrated in highly exploitative sectors such as sex “work”, domestic work, the agricultural sector, and the hospitality industry. In addition to the exploitation and vulnerabilities experienced by migrants and refugees interviewed, women also reported being sexually trafficked, forced into the sex “industry”, or being sexually abused or raped at work. *“I fear for my daughters, so many of the young women now are forced into prostitution by drug-lords and criminals. They just take them. I cried in Berea, these young women were everywhere and they seem destroyed”.* The results from a statistically representative study of domestic workers in Gauteng found that at least three percent of women were physically abused by their employers, 7% were aware of employers that were sexually abusing or harassing domestic workers, and 17% were verbally abused by their employers.<sup>318</sup> Union representatives interviewed reported that there were high staff turnover rates among young women in the hospitality industry as a result of sexual harassment from employers, co-workers and customers and that a large number of cases the union takes on in the industry pertain to sexual harassment. Nevertheless, women, and migrant and refugee women in particular, are afraid to take-up such cases. Union representatives were also aware of the dangers women in the hospitality sector faced when walking home late at night, or on public transport.

In addition to facing all the barriers to entry to formal and self-employment discussed above, women also

<sup>318</sup> Weideman M. July 2018. A Study on Women’s Economic Empowerment in South Africa: Investigating unpaid and low-paid care work by focusing on domestic workers, women in the informal economy, and unemployed women in Gauteng. Oxfam South Africa. Johannesburg.



## DRIVERS FOR MIGRATION (INTERVIEWS)

20 POLITICAL TURMOIL/WAR

15 ECONOMIC DRIVERS

2 FAMILIAL TIES

2 ACCESS TO EDUCATION/SERVICES



## RIGHTS-AWARENESS/ RIGHTS ACTUALIZATION

14% OF RESPONDENTS WERE ACTIVELY ENGAGED IN PROMOTING RIGHTS

47% WERE NOT AWARE OF THEIR LABOUR OR OTHER RIGHTS

39% WERE AWARE BUT AFRAID TO ACTUALIZE THEIR RIGHTS

THIS LAST GROUP FEARS XENOPHOBIC RETALIATION, LOSS OF EMPLOYMENT, AND ABUSIVE BEHAVIOUR FROM PUBLIC OFFICIALS AND THE POLICE.



## ASYLUM SEEKER APPLICATIONS IN 2017

(DATA SA DEPARTMENT OF HOME AFFAIRS)

27,980 TOTAL APPLICATIONS

25,713 REJECTED

2,267 APPROVED



## REMITTANCES FROM SOUTH AFRICA

(DATA WORLD BANK)

IN 2010 1,353 MILLION \$

IN 2015 98 MILLION \$

IN 2018 1,097 MILLION \$

face the challenges associated misogyny (i.e. objectification and the emphasis on appearance rather than person), pregnancy, health care, and child care. *“I used to work in a salon, and I worked hard and I had clients, but then they said when I was older that they can only have beautiful women in the salon. It is the same everywhere, the work is for young women. No older women in salons or restaurants”. “I worked in a salon from 8am to 8pm, but then when the child came, I could not work those hours and I lost the job”.*

# 7. RECOMMENDATIONS

## 7.1 REVISE THE IMMIGRATION SYSTEM AND ITS LEGISLATIVE FRAMEWORK AS FOLLOWS:

- **Introduce a visa or permit system for low-skilled workers from the SADC region** that falls outside of the current asylum seeker process. This will improve the plight of refugees, reduce bottlenecks in the current asylum seeker system, reduce corruption and human rights abuses at entry points and within the DHA, reduce the labour and related exploitation of labour migrants, and mitigating the negative effect migration may have on overall wages, employment rates and conditions of work. *“Yes, if we have permits for domestic workers or for women from Lesotho, there won’t be corruption because we will have papers that show we are proud workers, but now there is only bribes. . . . Yes, if there was domestic worker permits we could get even children to schools and send money through banks . . . yes, and save money – not so many bribes!”*

- **Develop legislation and policies that encourage migrants and refugees to start and operate SMMEs with a view to promoting economic growth and responding to the high youth unemployment rate in South Africa.** This requires abandoning all current efforts, policies and legislation to discourage migrant and refugee activity in the informal sector, as well as, in establishing and operating SMMEs. Migrants and refugees should rather be supported in the creation of SMMEs, an approach that aligns to national laws and policies such as the Constitution and National Development Plan. In this regard, migrants and refugees should be able to open bank accounts and register with the South African Receiver of Revenue. Limitations can be placed on capital movement out of the country and quotas (linked to business turnover) can be set for the employment of young South Africans. This approach will improve the living and working conditions of migrants and refugees, without impacting on the South African unemployment rate and it will also stop the current trends in terms of which South Africans are pushed into the informal sector as a result of migration. It will grow the economy through added income for the Receiver, through employment creation, through skills transfer and by increasing savings (i.e. if there is a limit placed on capital outflows). *“We are not criminals. We are human beings with knowledge, we need integration. We are here and we can develop the country. Just give us the right papers and make us equal”*.

- **Introduce temporary (e.g. four-year visas) or permanent visas for skilled migrants such as teachers, nurses and doctors, or expand the critical skills categories in terms of which skilled worker permits are issued.** As with the other recommendations this will simplify the current immigration and asylum seeker processes, it will reduce the suffering experienced by individuals who are willing and able to make a contribution to the South African society and economy, and it will mitigate the effects of the brain drain and skills deficit South African is experiencing in key sectors such as education and health care, which, in turn, will contribute to economic growth, and a multi-generational improvement in living conditions as child health and education improves. This will also reduce the competition from skilled migrants in the low-skilled sectors of the South African economy. *“We need to be integrated into South African society. We don’t need to feel like aliens all the time. I am here, I am qualified, I can contribute without taking anybody’s job. I can be hired based on skill and make a contribution to this country. I am not a beggar. Why make me a beggar when I can do positive things. We love this country and we can contribute to this country”*.

- For this condition to obtain, **more efficient standards and systems for qualifications recognition should be set in place.** For example, following the development of a set of appropriate criteria and investigation of curricula and standards, qualifications from certain universities or relevant tertiary institutions could be recognized automatically in South Africa and/ or, clear courses designed to develop other skills required in the South African context. This will involve engagements with SAQA at a policy and organizational level, in which civil society organizations and academia can play an important role.

- At a minimum, the **following sections of the Refugees Amendment Act 11 of 2017 should**

**be revised or amended:** the exclusion of persons who have committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residents permit; the exclusion of persons who have entered the country through an undesignated entry point; section 6 (g) which imposes unnecessary criteria for refugee status; section 27; and all references limiting employment or self-employment. Further the Act should be revised to remain internally consistent with the requirement in section 22 of the Act, as amended by section 15 of Act 33, which allows applicants to sojourn the country temporarily subject to conditions that are **not in conflict with the constitution or international law**. The sections that require revision in this regard are section 22 (6), 22 (7), 22 (8), 22 (9), and 22 (11).

- **The Department of Home Affairs must be compelled through advocacy and high-profile pressure to comply to court and other legal orders** to reopen RROs, resolve current backlogs (perhaps through amnesties for persons from countries clearly affected by political turmoil and war) and to address inefficiency, abuse and corruption in the current asylum seeker system. This is a role CSOs can play.

## 7.2 IMPROVE CONDITIONS OF WORK FOR ALL WORKERS IN EXPLOITATIVE OR UNREGULATED SECTORS IN THE SOUTH AFRICAN ECONOMY

The data shows that migrants and refugees are concentrated in the unregulated and most exploitative sectors of the South African economy, including work in private homes (domestic work, gardeners, piece jobs), the construction sector (piece jobs, sub-contracting, smaller companies), the hospitality industry, the sex “industry”, and agriculture. Research suggests, however, that these sectors of the economy are equally exploitative of South African workers, and since expert consensus is that labour laws apply equally to all workers, it makes sense to **ensure the implementation of labour legislation for all workers in marginalized/ exploitative sectors of the economy**. This is a role that the Department of Labour should fulfil, but civil society organizations can play a role in advocacy and holding the Department of Labour accountable, and in conducting valid and reliable research on the conditions of employment in these sectors.

The emphasis of such initiatives should be **promoting employer compliance** which can be encouraged in three ways: (1) imposing penalties and having a few high-profile criminal cases against exploitative employers; (2) rights-based education among employers, particularly in private homes, who lack knowledge of the relevant labour and related legislation, and (3) improving current cumbersome bureaucratic processes to assist employers in complying with labour legislation (e.g. registering employees for UIF, standardised on-line payslips, etc.).

Civil society organizations can play a role in assisting, capacitating and holding accountable the Department of Labour, but can also engage in national and local **rights-awareness campaigns directed at all employees in vulnerable sectors** to increase their ability to actualize their rights. Organizations who are already doing this work could collaborate to have a larger impact.

**Unions should play a more active role in representing and supporting workers in vulnerable sectors.** This will require that bigger and better resourced unions take on the causes of the groups of workers, and may also require the introduction of subsidized or reduced membership rates for workers from these sectors. Existing unions should work at reaching their target constituencies and disseminating information more effectively. Many core unions are essentially unknown among their target constituencies. Unions should also improve their data collection and record keeping systems so that they can measure membership and understand who they represent, what their needs are, and what interventions are most urgently required. Unions should also engage in information campaigns among members to reduce xenophobia and towards the development of mutually beneficial strategies to prevent the possible depression of wages and employment rates that migration can have on low-skilled sectors of the economy when exploitation is allowed.

## 7.3 CONDUCT QUALITY RESEARCH FOR EVIDENCE-INFORMED POLICY AND LEGISLATURE DEVELOPMENT

The research conducted for this assignment suggests that much of the available information (excluding perhaps what is generated by the DHA) is anecdotal (i.e. the preference seems to be for qualitative research among sub-groups and using sample sizes that are too small to generate generalizable or reliable conclusions). The research design, conclusions and recommendations are often determined by political or ideological positions and are not empirical. However, the success of interventions and legislation depends in large part on the extent to which interventions respond to real challenges and barriers. To do so, valid, reliable, replicable and statistically representative studies are required. This role can be fulfilled by the research and academic organizations already active in the sector.

## 7.4 CONTINUE WITH, AND INTRODUCE ADDITIONAL, INTERVENTIONS TO IMPROVE THE QUALITY OF LIFE OF MIGRANTS AND REFUGEES IN SOUTH AFRICA

This set of recommendations are essentially for civil society organizations.

- Existing programs such as English courses, targeted skills development, assistance accessing employment, obtaining recognition for qualifications, social support and counselling are invaluable and should continue.
- Development and provide youth development and support services. *“First generation South African children (who are not classified South African) who have never been to the countries of origin of their parents, who are stateless, who are treated as foreigners, who are not foreigners, who have been to South African schools but are still victims of xenophobia. What future do they have? . . . They are caught in cycles of deprivation and violence that leave no options open to them other than drugs, crime and violence. Unless we intervene and do something for this lost generation”. “We have genius kids, but they are shattered and destroyed by the South African system. We need to guide them, we need to develop these clever young people so that they can benefit Africa as a whole”.*
- Develop large- and small-scale, national and local, knowledge and experience sharing initiatives to promote integration and reduce xenophobia. This could include mainstream and social media advertising, local platforms, or national events.
- Develop history or educational curricula aimed at adults and young learners emphasizing South Africa as an African country and focussing on the historical and political links between African countries and identities.
- Assist migrant and refugee groups with existing business plans to open skills training centres.
- Provide additional skills training and draw on the skills-sets migrants already have. Steer away from sexist/ traditional skills development for female migrants. *“Us women, we are more than seamstresses and cooks”.*
- Provide transitional accommodation for new arrivals or in extreme cases.
- Provide shelters for victims of GBV and their children.

## 7.5 PROVIDE REPATRIATION AND REINTEGRATION SERVICES WHERE POSSIBLE

**Building on the IOM model, provide repatriation assistance to those who can or want to return to their countries of origin.** Many of the research participants interviewed do not wish to be in South Africa, but some are unable to return due to a lack of finances, fear of ill treatment, a lack of knowledge, and the absence of social support systems and employment opportunities in countries of origin. *“My wife sold*



*everything we had in the Congo so that we could get the money to flee and come here. We thought we would be safe here. Everything is gone now. We are hungry and poor. I am a car guard. I want to go back as soon as I can, but if I go now, I will get killed". "People do not feel welcome here, nobody would stay if they didn't have to." Many labour migrants come here but their expectations are not met, they hardly manage to survive and the never send remittances back, but then then can't leave again. Or as a representative of a legal organization active in the sector explained: "Most of our clients want to go back, pending improvement in their own countries, but many have been here a very long time and their children were born and grew-up here, they would struggle going to a country they don't know, but the older generation want to return."*

The IOM has a unit that specifically assists in willing repatriation. Individuals who are "stuck" in SA for various reasons (e.g. expired documentation, abandonment, medical trauma, age, escape from sexual slavery or human trafficking or labour exploitation, and insufficient resources to return) are assisted. The service includes approaching relevant embassies, applying for passports, and reintegration services in countries of origin (including assistance securing employment and tracing families). The approach has been piloted by the IOM and is according to them, successful, humane, and more economically feasible than refugee camps and punitive deportation.

# 8. ADDENDUM A: LEGISLATIVE FRAMEWORK

The brief legislative framework is organized into four categories: international, African, southern African (i.e. regional) and South African (i.e. national). The framework is not comprehensive and focusses on the labour-related aspects of identified laws, policies, conventions and related documentation. Much of the analysis is secondary (i.e. the original documents have not been analysed). The section should thus be considered indicative.

## 8.1 INTERNATIONAL

The discussion below demonstrates the existence of an extensive international framework to protect migrant and refugee rights. The extent to which the international framework protects, or has a positive effect on the ability of migrants and refugees to actualize their human rights, is questionable. International declarations are not legally binding and nation states often fail to adhere to their contents. International conventions are legally binding and carry legal and political authority, but many are not ratified, or when they are, South Africa is not a signatory. The same limitations apply to the regional legislative framework.

**Sustainable Development Goals:** The Sustainable Development Goals (SDGs) call for sustainable economic growth, and full and productive employment and decent work for all.<sup>319</sup> Target 8.3 speaks to the need to support and facilitate productive activities, decent job creation, creativity and innovation, and the growth of microenterprises through access to financial services.<sup>320</sup> Given their universal application it can be deduced that the target of decent work for all applies also to migrants and refugees.

**Universal Declaration of Human Rights 1948:** Article 13 of the Declaration states that “everyone has the right to leave any country, including his own, and to return to his country”. This suggests that all categories of documented and undocumented migrants (i.e. refugees, asylum, seekers, entrepreneurs, students etc.), and irrespective also of the drivers for migration, have a right to emigrate.<sup>321</sup> Article 23 relates to the right to work and fair working conditions of employment.<sup>322</sup> In terms of article 23: (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (4) Everyone has the right to form and to join trade unions for the protection of his/her interests.<sup>323</sup>

**ILO Migration for Employment Convention 97 of 1949:** This convention specially attempts to regulate the employment of migrant workers, but South Africa has not ratified this Convention.<sup>324</sup>

**United Nations Convention Relating to the Status of Refugees 1951 (as amended in 1967):** South Africa has ratified this convention, which protects the rights of refugees specifically (i.e. not labour or un-

<sup>319</sup> Kerwin D. Not dated. ‘Migration and decent work conditions in countries of origin and destination.’ De L Rochefoucauld A & Marengi C. M. (Eds.). *Rethinking Labour: Ethical Reflections on the Future of Work*. The Caritas in Veritate Foundation of Working Papers. “*The City of God in the Palace of Nations*” accessed at [http://drive.google.com/file/d/1E39DuPKgbSGW4\\_rm\\_S68hQ76MHfg4reQ/view](http://drive.google.com/file/d/1E39DuPKgbSGW4_rm_S68hQ76MHfg4reQ/view).

<sup>320</sup> Ibid.

<sup>321</sup> Mulugeta F. Dinbabo F. & Carciotto S. September 2015. ‘International migration in sub-Saharan Africa: A call for a global research agenda.’ Paper presented at HDCA conference titled Capabilities on the Move: Mobility and aspirations. Washington D.C. USA.

<sup>322</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project.’ Gallo-Mosala S. (Ed). November 2008. *Migrants experiences within the South African Labour Market*. Scalabrini Centre of Cape Town.

<sup>323</sup> [http://www.claiminghumanrights.org/udhr\\_article\\_23.html](http://www.claiminghumanrights.org/udhr_article_23.html)

<sup>324</sup> Nshimbi C. C. & Fioramonti L. July 2013. ‘A region without borders? Policy Framework for regional labour migrations towards South Africa.’ MiWORC Report 1.

documented migrants). Importantly, the Convention accords refugees the right to work.<sup>325</sup> In terms of the convention, once an individual is recognized as a refugee s/he maintains that status unless/ until they fall within the terms of the cessation clauses. Under article C of the Convention, refugee status may cease either through the actions of the refugee (as per paragraphs 1 to 4), or by fundamental changes in the objective circumstances of the country of origin (as per paragraphs 5 and 6).<sup>326</sup> In terms of this Convention, therefore, South Africa is legally obligated to afford the right to work to refugees.

**International Covenant of Economic, Social and Cultural Rights 1966:** South Africa has ratified this Covenant. Although the document does not specifically refer to migrant workers and refugees, article seven of the Covenant provides for the right to work and fair conditions of employment **for everyone**.<sup>327</sup> These rights and conditions include: (a) Remuneration which provides all workers, as a minimum, with (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.<sup>328</sup>

**ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975:** This ILO convention deals specifically with migrant workers. Like Convention 97, it seeks to safeguard migrant worker rights and regulate or control illegal employment of migrants to eliminate abuse.<sup>329</sup> The Convention specifically focusses on irregular or undocumented migrants and extends the mentioned protections to these groups.<sup>330</sup> South Africa has, however, not ratified this Convention.<sup>331</sup>

**United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live 1985:** In addition to guarantees basic political and liberal human rights, article 8 of the declaration (which is not binding) addresses the right to work and fair working conditions<sup>332</sup> but only for “aliens lawfully residing in the territory of a State”. As such the article provides extensive labour related rights to document migrants, but leaves undocumented migrants unprotected. The rights afforded to legal/ documented migrants include: (a) The right to safe and healthy working conditions, to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (b) The right to join trade unions and other organizations or associations of their choice and to participate in their activities. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary, in a democratic society, in the interests of national security or public order or for the protection of the rights and freedoms of others; and (c) The right to health protection, medical care, social security, social services, education, rest and leisure, provided that they fulfil the requirements under the relevant regulations for participation and that undue strain is not placed on the resources of the State.<sup>333</sup>

<sup>325</sup> Ibid.

<sup>326</sup> Scalabrini Institute for Human Mobility in Africa (SIHMA). April 2015. ‘Cessation of the international protection of Angolan refugees in South Africa. Migration Policy Brief. Issue 1. Cape Town. South Africa. <http://sihma.org.za/>

<sup>327</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

<sup>328</sup> <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

<sup>329</sup> Mulugeta F. Dinbabo F. & Carciotto S. September 2015. ‘International migration in sub-Saharan Africa: A call for a global research agenda’. Paper presented at HDCA conference titled Capabilities on the Move: Mobility and aspirations. Washington D.C. USA.

<sup>330</sup> Nshimbi C. C. & Fioramonti L. July 2013. ‘A region without borders? Policy Framework for regional labour migrations towards South Africa’. MiWORC Report 1.

<sup>331</sup> Ibid.

<sup>332</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

<sup>333</sup> <http://www.un.org/documents/ga/res/40/a40r144.htm>

**United Nations Convention on the Protection of the Rights of All Migrant Workers and their Families 1990:** This Convention, together with ILO Conventions 97 and 143, form the **International Charter on Migration**.<sup>334</sup> At 2015, the only SADC members to have ratified this convention were Lesotho, Madagascar, Mozambique and Seychelles. Given the age of the protocol, it stands to reason it will never come into effect. The lack of ratification is arguably unfortunate, as the convention accords “certain fundamental rights to all migrants, regardless of their legal status, and some additional rights to documented migrants”.<sup>335</sup> The Convention also, inter alia, undertakes not to discriminate against migrant workers, uphold migrants’ human rights, and introduce measures to end clandestine migration.<sup>336</sup>

**International Covenant on Civil and Political Rights 1996:** The Charter recognizes the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace.<sup>337</sup> The Charter further promotes the ideal of free human beings enjoying cultural and political freedoms and living free of fear.<sup>338</sup> As such the Charter guarantees a wide range of civil and political rights to individuals within the territory of a nation state. In terms of article 2, this should include documented and undocumented migrants. Article 2 states that: “Each State Party to the present Covenant undertakes to respect and to ensure to **all individuals within its territory** and subject to its jurisdiction the rights recognized in the present Covenant, **without distinction of any kind**, such as race, colour, sex, language, religion, political or other opinion, **national or social origin, property, birth or other status**.”<sup>339</sup>

**ILO Multilateral Framework on Labour Migration non-binding principles and guidelines 2006:** The framework provides best practice guidelines on labour migration policy, derived from relevant international instruments and a global review of labour migration policies and practices of ILO constituents.<sup>340</sup> Principle 8, which deals with the protection of migrant workers states: “The human rights of all migrant workers, regardless of their status, should be promoted and protected. In particular, all migrant workers should benefit from the principles and rights in 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, which are reflected in the eight fundamental ILO Conventions and the relevant United Nations human rights Convention”.<sup>341</sup>

**ILO Declaration on Fundamental Principles and Rights at Work:** This declaration is based on eight conventions that make human rights at work explicit. The declaration includes four categories of rights: freedom of association and the right to collective bargaining; the abolition of forced labour; equality and non-discrimination in employment and occupation; and the elimination of child labour.<sup>342</sup>

**ILO Convention Concerning Decent Work for Domestic Workers 2011:** South Africa ratified this important convention in 2013.<sup>343</sup> The convention recognizes that domestic workers are equal to other workers and brings this under-valued, exploited and vulnerable group of mostly female workers into the ambit of the international labour standards system.<sup>344</sup>

<sup>334</sup> Mulugeta F. Dinbabo F. & Carciotto S. September 2015. ‘International migration in sub-Saharan Africa: A call for a global research agenda’. Paper presented at HDCA conference titled Capabilities on the Move: Mobility and aspirations. Washington D.C. USA.

<sup>335</sup> Dodson B & Crush J. October 2015. ‘Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region’. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.

<sup>336</sup> Nshimbi C. C. & Fioramonti L. July 2013. ‘A region without borders? Policy Framework for regional labour migrations towards South Africa’. MiWORC Report 1.

<sup>337</sup> <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>338</sup> <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>339</sup> <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>340</sup> Mulugeta F. Dinbabo F. & Carciotto S. September 2015. ‘International migration in sub-Saharan Africa: A call for a global research agenda’. Paper presented at HDCA conference titled Capabilities on the Move: Mobility and aspirations. Washington D.C. USA

<sup>341</sup> Ibid.

<sup>342</sup> Ibid.

<sup>343</sup> Dodson B & Crush J. October 2015. ‘Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region’. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.

<sup>344</sup> International Labour Office (ILO). 2011. Decent Work for Domestic Workers Convention 198 and Recommendation 201.

The recommended rights for domestic workers and actions by governments provided in the Convention are quoted extensively below. This demonstrates the extent to which South Africa is failing, in implementation rather than in policy development, in achieving these outcomes.

In terms of Article 1 of the Convention each member shall take measures to respect, promote and realize the fundamental principles and rights of domestic workers at work. These include: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.<sup>345</sup> South Africa complies to conditions b and c in terms of existing policy and legislation, but not in terms of implementation or the lived realities of domestic workers. South Africa has not succeeded in the elimination of discrimination related to domestic employment. Although domestic workers have the legal right to participate in collective bargaining and a relevant union exists, domestic workers remain ununionized.<sup>346</sup> Prohibitive barriers to participation (e.g. isolation, lack of information, unaffordability) are preventing domestic workers from actualizing this right.

In terms of Article 5<sup>347</sup>, each member shall take measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence. The results from this research show that more decisive action is required in South Africa in this regard.

In terms of article 6, each member shall take measures to ensure that domestic workers, like workers generally, enjoy fair terms of employment as well as decent working conditions and, if they reside in the household, decent living conditions that respect their privacy.<sup>348</sup> South Africa fails in this regard, as the legislation and minimum wages for domestic workers differ (are less) than those for other workers, and domestic workers are not protected at their places of employment.

In terms of article 7, each member shall take measures to ensure that domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner and preferably, where possible, through written contracts in accordance with national laws, regulations or collective agreements, in particular: (a) the name and address of the employer and of the worker; (b) the address of the usual workplace or workplaces; (c) the starting date and, where the contract is for a specified period of time, its duration; (d) the type of work to be performed; (e) the remuneration, method of calculation and periodicity of payments; (f) the normal hours of work; (g) paid annual leave, and daily and weekly rest periods; (h) the provision of food and accommodation, if applicable; (i) the period of probation or trial period, if applicable; (j) the terms of repatriation, if applicable; and (k) terms and conditions relating to the termination of employment, including any period of notice by either the domestic worker or the employer.<sup>349</sup> None of the conditions set in article 7 are met in South Africa.<sup>350</sup>

Article 10<sup>351</sup> states that each member shall take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work. It specifically states that weekly rest shall be at least 24 consecutive hours and that periods during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls shall be regarded as hours of work to the extent determined by national laws, regulations or collective agreements, or any other means consistent with national practice. South Africa does not

<sup>345</sup> Ibid.

<sup>346</sup> Weideman M. July 2018. A Study on Women's Economic Empowerment in South Africa: Investigating unpaid and low-paid care work by focusing on domestic workers, women in the informal economy, and unemployed women in Gauteng. Oxfam South Africa. Johannesburg

<sup>347</sup> International Labour Office (ILO). 2011. Decent Work for Domestic Workers Convention 198 and Recommendation 201

<sup>348</sup> Ibid.

<sup>349</sup> Ibid.

<sup>350</sup> Weideman M. July 2018. A Study on Women's Economic Empowerment in South Africa: Investigating unpaid and low-paid care work by focusing on domestic workers, women in the informal economy, and unemployed women in Gauteng. Oxfam South Africa. Johannesburg.

<sup>351</sup> International Labour Office (ILO). 2011. Decent Work for Domestic Workers Convention 198 and Recommendation 201

comply to the requirements of article 10.<sup>352</sup>

Similarly, the research results show that South Africa is not complying to the requirements of article 12 which states that (a) Domestic workers shall be paid at regular intervals at least once a month, and (b) National laws, regulations, collective agreements or arbitration awards may provide for the payment of a limited proportion of the remuneration of domestic workers in the form of payments in kind that are not less favourable than those generally applicable to other categories of workers, provided that measures are taken to ensure that such payments in kind are agreed to by the worker, are for the personal use and benefit of the worker, and that the monetary value attributed to them is fair and reasonable.<sup>353</sup>

Similarly, in drawing a distinction between domestic workers and other workers in terms of which domestic workers are legally paid a lower minimum wage in South Africa than other categories of workers, South Africa contravenes Article 14, which stipulates that (a) each member shall take appropriate measures, in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity.

Research shows<sup>354</sup> that the South African government is not affording domestic workers, including migrant domestic workers with the protection required in article 15 which specifically requires effective protection against exploitative employment agencies and other abusive practices. In this regard article 15 calls on state parties (and it is recommended that the South African government adhere) to (a) determine the conditions governing the operation of private employment agencies recruiting or placing domestic workers, in accordance with national laws, regulations and practice; (b) ensure that adequate machinery and procedures exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies in relation to domestic workers; (c) adopt all necessary and appropriate measures, within its jurisdiction and, where appropriate, in collaboration with other members, to provide adequate protection for and prevent abuses of domestic workers recruited or placed in its territory by private employment agencies. These shall include laws or regulations that specify the respective obligations of the private employment agency and the household towards the domestic worker and provide for penalties, including prohibition of those private employment agencies that engage in fraudulent practices and abuses; (d) consider, where domestic workers are recruited in one country for work in another, concluding bilateral, regional or multilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment; and (e) take measures to ensure that fees charged by private employment agencies are not deducted from the remuneration of domestic workers.

Article 16 calls on member states to ensure, in accordance with national laws, regulations and practice, that all domestic workers have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally.<sup>355</sup>

Article 17 can serve as a recommendation for the way forward for the South African government and states that: (1) Each member shall establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers. (2) Each member shall develop and implement measures for labour inspection, enforcement and penalties with due regard for the special characteristics of domestic work, in accordance with national laws and regulations. And, (3) in so far as compatible with national laws and regulations, such measures shall specify the conditions under which access to household premises may be granted, having due respect for privacy.<sup>356</sup>

<sup>352</sup> Weideman M. July 2018. A Study on Women's Economic Empowerment in South Africa: Investigating unpaid and low-paid care work by focusing on domestic workers, women in the informal economy, and unemployed women in Gauteng. Oxfam South Africa. Johannesburg.

<sup>353</sup> International Labour Office (ILO). 2011. Decent Work for Domestic Workers Convention 198 and Recommendation 201.

<sup>354</sup> Weideman M. July 2018. A Study on Women's Economic Empowerment in South Africa: Investigating unpaid and low-paid care work by focusing on domestic workers, women in the informal economy, and unemployed women in Gauteng. Oxfam South Africa. Johannesburg.

<sup>355</sup> International Labour Office (ILO). 2011. Decent Work for Domestic Workers Convention 198 and Recommendation 201

<sup>356</sup> Ibid.



**“THERE IS NO WORK IN LESOTHO. NOTHING. BUT YOUR CHILDREN MUST EAT, SO WE COME HERE TO LIVE LIKE THIS AND WE SAY THANK YOU FOR THE R100 A DAY.” (P.65)**

**Global Compact for Safe, Orderly and Regular Migration 2018:** The compact is a non-binding agreement which, inter alia, calls on countries to “discourage and abolish the utilization of migrant holding camps or processing centres (or whatever names they are called), as they are de facto detention centres and a serious violation of the human rights of migrants, regardless of their status”.<sup>357</sup> Recent legislative amendments in South Africa, such as the 2017 White Paper on Migration and the Refugees Amendment Act 2017 are developing in opposition to the intent of the global compact by suggesting the introduction of holding camps (or similar) in South Africa.

**Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).** The Convention signed by the UN General Assembly in 1979, serves as an international bill of rights for women. CEDAW defines discrimination against women as including “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or mollifying the recognition, enjoyment or exercise by women, irrespective of marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, and civil field”.<sup>358</sup>

The Convention maps out an action-oriented agenda for governments to end all forms of gender discrimination. The signatories of the Convention (South Africa included) committed, inter alia, to undertake the following steps to end discrimination:

- Incorporate the principle of equality of men and women in their legal systems and to do away with all discriminatory laws against women. Further, to adopt laws that protect the rights of women (article 3).
- Establish tribunals and other public institutions to address discrimination against women and ensure legal consequence.
- Eliminate all forms of discrimination against women by persons, organizations or enterprises.
- Refrain from engaging in any act or practice of discrimination against women and ensure that public authorities and institutions act in conformity with this obligation.
- Take the necessary steps to change or abolish existing laws, regulations, customs and practices that promote discrimination against women.
- Retract all national provisions which constitute discrimination against women.

The Convention sought to create an enabling environment to realize the fundamental goal of equality between men and women by ensuring that women have equality of opportunity and equality before the law. The Convention also guarantees women the right to vote, stand for election and to access education, health, and employment. The Convention affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. States were further tasked to take appropriate measures against all forms of human trafficking and the exploitation of women.<sup>359</sup>

Article 13, which requires state parties to eliminate discrimination against women in areas of economic and social life, including the right to bank loans, mortgages and other forms of financial credit is of particular relevance.<sup>360</sup>

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357 Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies.

358 Budlender, D. 2008. “The Statistical Evidence on Care and Non-Care Work across Six Countries.” Geneva: UNRISD

359 <http://www.un.org/womenwatch/daw/cedaw/>

360 Ibid.



## 8.2 AFRICAN

**Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1969:** Despite being a convention on the rights of refugees, the document does not mention the right to work or to any other socio-economic goods or services.<sup>361</sup>

**African Charter on Human and People's Rights 1981:** Adopted by the (then) Organization for African Unity, the charter aims to establish a framework for the promotion and protection of human rights on the African continent. The most relevant articles 12(2) and 15 respectively state that "every individual shall have the right to leave any country including his own, and to return to his country", and that "every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work".<sup>362</sup> South Africa has ratified this Charter and is therefore obligated to comply.<sup>363</sup>

**African Union Plan of Action for the Promotion of Employment and Poverty Alleviation:** The plan includes migrants within its definition of vulnerable groups<sup>364</sup>, from which one can infer that all statements referring to vulnerable groups apply equally to migrants. Such statements include the objective of the plan, which is "to ensure that employment and poverty alleviation programmes and policies are targeting vulnerable groups and that their participation in the development, implementation and evaluation processes are promoted at all levels". Migrants are therefore also included in the Plan's stated strategies, notably: (i) involving vulnerable groups in national policy making particularly those on employment creation and poverty alleviation; and (ii) equality of opportunity. Two of the Plan's recommendations also apply to migrants: (v) Provide financial resources and support services to income generation programs and projects for vulnerable groups; and (vi.) Empowerment through education, skills training, entrepreneurship, involvement and participation of vulnerable groups.<sup>365</sup>

**Regional Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and other Academic Qualifications in Higher Education in the African States 1981:** The convention aims to: (1) strengthen and promote inter-regional and international cooperation in the field of recognition of qualifications; (2) put in place standardised quality assurance and accreditation mechanisms; (3) encourage and promote the widest and most effective possible use of human resources available in Africa, and of the diaspora, in order to speed up the development of African countries and to limit the African brain-drain; (4) facilitate the exchange and greater mobility of students, teachers and researchers of the continent and the diaspora, by recognizing qualifications delivered by other parties in order to pursue higher education; (5) improve information exchange on the continent; and (6) contribute to harmonization of qualifications as aligned to international trends.<sup>366</sup> These are all measures that would increase the positive contribution skilled African migrants could make to the South African economy, but South Africa has not yet ratified the Convention.

**Treaty Establishing the African Economic Community (Abuja Treaty) 1991:** This was reportedly the first framework of the (then) Organization of African Unity that included free movement of people and capital as key pillars. The Treaty, which is binding, calls on member states to establish the right of residence for citizens of other member states and to strengthen labour exchanges between countries. Article 71 (e) calls for the cross-member employment of skilled people to facilitate economic growth and regional integration.<sup>367</sup> The Treaty is articulated in two AU policy documents; notably the **Migration Policy Framework for Africa and the African Common Position on Migration and Development, and in initiatives**

<sup>361</sup> Polzer T. November 2008. 'Migrant employment in Africa: New data from the Migrant Monitoring Project'. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

<sup>362</sup> Mulugeta F. Dinbabo F. & Carciotto S. September 2015. 'International migration in sub-Saharan Africa: A call for a global research agenda'. Paper presented at HDCA conference titled Capabilities on the Move: Mobility and aspirations. Washington D.C. USA.

<sup>363</sup> Nshimbi C. C. & Fioramonti L. July 2013. 'A region without borders? Policy Framework for regional labour migrations towards South Africa'. MiWORC Report 1.

<sup>364</sup> African Union. Plan of Action for Promotion of Employment and Poverty Alleviation.

<sup>365</sup> African Union. Plan of Action for Promotion of Employment and Poverty Alleviation.

<sup>366</sup> [http://portal.unesco.org/en/ev.php-URL\\_ID=49282&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=49282&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>367</sup> Maungandze O. A. December 2017. 'Freedom of movement: unlocking Africa's development potential'. Policy Brief. Institute for Security Studies. Pretoria. South Africa.

such as the **Joint Labour Migration Programme**.

**Migration Policy Framework for Africa (MFPA) 2006:** The MPFA, which is not legally binding, “invites states to incorporate provisions from ILO Conventions 97 and 143 and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families into national legislation, as well as, to promote respect for and protection of the rights of labour migrants including combating discrimination and xenophobia through, inter alia, civic education and awareness raising activities”.<sup>368</sup> The MFPA further states that: “Ensuring the effective protection of the human rights of migrants is a fundamental component of a comprehensive and balanced migration management system . . . Safeguarding the human rights of migrants implies the effective application of norms enshrined in human rights instruments of general applicability, as well as, the ratification and enforcement of instruments specifically relevant to the treatment of migrants”.<sup>369</sup>

**Joint Labour Migration Programme (JLMP):** This 2015 initiative articulates the AU’s position on labour migration. This initiative is supported by the International Labour Organization (ILO), the International Organization on Migration (IOM), and the United Nations Economic Commission for Africa (UNECA), but is not legally binding.<sup>370</sup> The JLMP seeks to strengthen effective governance of labour migration and to promote decent work. According to the ILO, it also seeks to protect the rights of migrant workers and promote the portability of skills and fair recruitment practices.<sup>371</sup>

## 8.3 SOUTHERN AFRICA (REGIONAL)

Although there are protocols, regional agreements and policies pertaining to migration, and labour migration in particular, in the other African Regional Economic Communities (RECs), only those pertaining to the Southern African Development Community (SADC) are discussed in this paper.

The SADC Secretariat position appears to be towards free-movement and support for labour migration linked to economic development. The Secretariat has several policies and instruments to encourage the regional protection and rights of migrant workers. The extensive policy framework remains essentially unratified and unimplemented.

The position from individual SADC countries (notably South Africa, Namibia and Botswana) appears to be towards a preference for bilateral rather than regional instruments and agreements that consider migration from a security, rather than a developmental, perspective.<sup>372</sup> In the South African case the preference for bilateral agreements date back to the bilateral agreements to regulate and monitor migrant mineworkers to South Africa.

**Southern African Development Community Treaty 1992:** This Treaty established the South African Development Community in 1992. Article 5(2)(d) of the treaty states that the region shall “develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour . . . among member states”.<sup>373</sup> There is little evidence that the South African government has attempted to do so, outside of special dispensations for particular migrant groups and bilateral agreements to facilitate (cheap) labour exchanges.

<sup>368</sup> Mulugeta F. Dinbabo F. & Carciotto S. September 2015. ‘International migration in sub-Saharan Africa: A call for a global research agenda’. Paper presented at HDCA conference titled Capabilities on the Move: Mobility and aspirations. Washington D.C. USA.

<sup>369</sup> Ibid.

<sup>370</sup> Maunganidze O.A. 24 October 2018. ‘The “illegal migrant” red herring’. Institute for Security Studies. Pretoria. South Africa.

<sup>371</sup> International Labour Organization. The Joint Labour Migration Program for South Africa. [www.ilo.org](http://www.ilo.org)

<sup>372</sup> Dodson B & Crush J. October 2015. ‘Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region’. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland. & Maunganidze O. A. December 2017. ‘Freedom of movement: unlocking Africa’s development potential’. Policy Brief. Institute for Security Studies. Pretoria. South Africa.

<sup>373</sup> Dodson B & Crush J. October 2015. ‘Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region’. Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.

**SADC Charter on Fundamental Social Rights 2003:** The Charter “imposes an obligation on SADC member states to provide an enabling environment for workers and those outside the labour market to have access to adequate social protection and sufficient resources”.<sup>374</sup> It includes a commitment to the protection of worker’s rights in the region (Articles 10 and 15), although it is less clear that these actually apply to migrant workers. In fact, the Charter never explicitly refers to migrants.<sup>375</sup>

**SADC (Draft) Protocol on the Free Movement of Persons in the South African Development Community 1995, and the SADC Protocol on the Facilitation of Movement of Persons 2005:** The 1995 draft had proposed a region in which SADC citizens could “enter freely the territory of a member state for the purpose of seeking employment”.<sup>376</sup> Reportedly as a result of “fierce resistance” from South Africa, Namibia and Botswana, the proposal was abandoned.<sup>377</sup> It was later replaced by the 2005 Protocol. The 2005 Protocol had (at 2014) been ratified by only six SADC members (Botswana, Mozambique, South Africa, Swaziland and Zambia), short of the two-thirds majority required for it to come into effect.<sup>378</sup> Reported obstacles to ratification include fears about the impact of migration in a region characterized by extreme economic inequalities between countries.<sup>379</sup>

If it were ratified, the Protocol would, inter alia, allow “entry, with lawful purpose, without visa into another member state for a maximum of 90 days, permanent and temporary residence in the territory of another state, and establishing oneself and working within the territory of another state”.<sup>380</sup> Section 2.1 (c) of the Protocol “seeks to promote labour policies, practices and measures that facilitate labour mobility, remove distortion of labour markets, enhance industrial harmony, and increase productivity in SADC member states”.<sup>381</sup> Articles 18 and 19 gives citizens of member states the rights to (a) establish themselves in another member state, and (b) exercise an economic activity and profession either as an employee or a self-employed person.<sup>382</sup>

**SADC Code on Social Security 2007/8:** This Code (in article 17) stipulates that: member states should progressively reduce migration controls; that member states should introduce national legislation and engage in bi- and multi-lateral arrangements to coordinate migration; and that undocumented migrants should enjoy basic minimum protection (article 17.2). Article 17.1 declares that all legally employed immigrants are entitled to the same forms of social security as citizens.<sup>383</sup> As with many of the other international and regional instruments, this Code is not binding and there is little evidence of implementation. South Africa is perhaps unique in the sense that its policies and legislative framework, as least as it pertains to asylum seekers and refugees, does provide some social security and related measures, and does not (yet)

<sup>374</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWOCR Paper 8.

<sup>375</sup> Dodson B & Crush J. October 2015. ‘Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region.’ Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.

<sup>376</sup> Mulugeta F. Dinbabo F. & Carciotto S. September 2015. ‘International migration in sub-Saharan Africa: A call for a global research agenda.’ Paper presented at HDCA conference titled Capabilities on the Move: Mobility and aspirations. Washington D.C. USA.

<sup>377</sup> Ibid.

<sup>378</sup> Dodson B & Crush J. October 2015. ‘Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region.’ Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.

<sup>379</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWOCR Paper 8.

<sup>380</sup> Dodson B & Crush J. October 2015. ‘Migration governance and migrant rights in the Southern African Development Community: Attempts at harmonization in a disharmonious region.’ Research Paper 2015-3. United Nations Research Institute for Social Development. Geneva. Switzerland.

<sup>381</sup> Nshimbi C. C. & Fioramonti L. July 2013. ‘A region without borders? Policy Framework for regional labour migrations towards South Africa.’ MiWOCR Report 1.

<sup>382</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project.’ Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

<sup>383</sup> Crush J., Dodson B., Williams V., Tevera. D. 2017. ‘Harnessing migration for inclusive growth and development in Southern Africa.’ Special Report. The Southern African Migration Program and UK Aid

place these individuals in “refugee camps”<sup>384</sup> Developments suggested in the 2017 White Paper on Migration and the 2017 Refugees Amendment Act, however, suggest that South Africa is moving away from its past progressive policy stance.

**SADC Protocol on Employment and Labour 2014:** Article 19 of this Protocol stipulates that states should endeavour to: (a) strengthen mechanisms to combat smuggling and human trafficking; (b) ensure that fundamental rights are accorded to non-citizens; (c) adopt measures to provide for the special needs of migrant women, children and youth; (d) adopt a regional migration policy in accordance with international conventions to ensure the protection of rights of migrants; and (e) adopt measures to facilitate the co-ordination and portability of social security benefits for migrants (likely through the adoption of appropriate bilateral and multi-lateral agreements providing for equality of treatment of non-citizens and following the directions provided in article 19 (f)).<sup>385</sup> An insufficient number of states have ratified the protocol so it is not yet in force.

**SADC Regional Labour Migration Policy Framework 2014:** The Framework, inter alia, seeks to “strengthen protection of the rights of migrant workers”. It encourages member states to develop rights-based migration policies by 2019. The Framework addresses the various labour-related challenges identified by participants in this research study, notably; issues of abuse, labour brokers, human trafficking, non-compliance with labour legislation on the part of employers, low union membership rates/ representation, and social projection for migrant workers. The extensive rights contained in the Framework, however, apply primarily to migrants in formal employment and not to undocumented migrant workers or migrants in self-employment.<sup>386</sup> The Framework is also not binding.

## 8.4 SOUTH AFRICA (NATIONAL)

As per Annual Reports in 2007 to 2010 the South African Department of Home Affairs bases its (im) migration policy on three pillars. These are: to link to regional development policies; a commitment to a human rights-based approach; and the sovereignty of South Africa in the fight against illegal migration and the promotion of border security.<sup>387</sup>

The pillars sound progressive, but subject-experts have argued that despite a policy content that is intended to “harness” the growth opportunities migration can present, the South African government “is prioritizing restrictive measures that disproportionately and negatively” affect African migrants.<sup>388</sup> These authors argue that im(migration) legislation does not constructively respond to the fact that many migrants to South Africa are low-skilled individuals from the SADC region in search of work/ economic opportunities.<sup>389</sup>

What follows are short descriptions, and in some cases an analysis of the key pieces of im(migration) and refugee legislation in South Africa.

**Aliens Control Act of 1991:** This Act was declared unconstitutional and has since been replaced by the Immigration Act of 2002 and the Immigration Amendment Act of 2004, but it remains an important piece of legislation because it served as the cornerstone of South African immigration policy throughout the 1990s and much of its restrictive approach is reflected in more current legislation. It was originally drafted

<sup>384</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

<sup>385</sup> Crush J., Dodson B., Williams V., Tevera. D. 2017. ‘Harnessing migration for inclusive growth and development in Southern Africa.’ Special Report. The Southern African Migration Program and UK Aid. And Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

<sup>386</sup> Crush J., Dodson B., Williams V., Tevera. D. 2017. ‘Harnessing migration for inclusive growth and development in Southern Africa.’ Special Report. The Southern African Migration Program and UK Aid.

<sup>387</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>388</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies

<sup>389</sup> Ibid.

to simplify immigration laws enacted after 1937.<sup>390</sup>

**Constitution of the Republic of South Africa Act 108 of 1996:** The Constitution, as the supreme law of the country, is the basis within which all legislation must be developed. It emphasizes accountability and compliance to the rule of law for all public administrations. It specifically states (as derived from the values contained in the Freedom Charter) that “South Africa belongs to all who live in it, regardless of legal status or nationality”.

The Constitution further provides a progressive rights framework as illustrated by the Bill of Rights. The Bill of Rights (chapter 2) requires that services must be provided impartially, fairly and equitably. Services include basic health care, education, housing, sufficient food and water and social security to those who are unable to support themselves or their families.

The Bill of Rights guarantees traditional human rights, as well as, the progressive realization of socio-economic rights to all who live in South Africa. The Constitution is, therefore, understood to apply to refugees, asylum seekers and documented and undocumented migrants. Of further importance is section 2.2 of the Bill of Rights which makes “fair labour practices” applicable to “everyone” in South Africa, irrespective of citizenship or legal status.<sup>391</sup> Further, section 23(1) stipulates that “everyone has the right to fair labour practices”.

**Refugees Act of 1998:** The Act has since been amended, but is important to discuss given its progressive and contradictory content. This Act came into force in 2000 and sought to formalize the asylum-seeking process in South Africa. It is recognized as one of the most progressive Acts in the world.<sup>392</sup> The progressivity of the Act, as with much of the South Africa legislation developed in the late 1990s, is the result of high levels of civil-society/ human rights activist participation in the its formulation.

The Act provides that refugees are entitled to “virtually the same rights as citizens”, excluding the right to vote. Asylum seekers are granted fewer rights, but are granted basic human rights such as access to basic health care, basic education for children, work and study.<sup>393</sup> Section 27 of the Refugees Act specifically grant refugees the right to seek employment in South Africa (except in the security industry as per Act 56 of 2001).

Various parties, including the government, have argued that the progressive nature of the Act has encouraged migration to South Africa and that the (debatable) increase in applications for asylum in recent years is a response to pull factors created by the Act (i.e. those granted asylum in South Africa were also granted access to education and the right to work).<sup>394</sup> The argument is that the asylum process serves “as a back door into the labour market”.<sup>395</sup> Data does show a rapid increase in applications for asylum in the 2000s.<sup>396</sup>

It should be noted that the so-called progressivity of the Act is not reflected in implementation, and this research demonstrates that in cases where migrants were attracted to South Africa by the rights the Act and the Constitution provide, they now find themselves trapped in conditions of severe deprivation and systematic human rights violation.

It is further necessary to point out that the right to work was not automatically granted to asylum seekers under the Refugees Act and that the conditions relating to work and study were to be determined by the Standing Committee for Refugee Affairs (SCRA). The SCRA at first placed a prohibition on the right to

<sup>390</sup> Facchini G., Mayda A. M. & Mendola M. 13 April 2013. ‘South-south migration and the labour market: Evidence from South Africa’. *Journal of Economic Geography*. Volume 18. Issue 4. Pages 823–853. <https://doi.org/10.1093/jeg/lby010>

<sup>391</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project’. Gallo-Mosala S. (Ed). November 2008. *Migrants experiences within the South African Labour Market*. Scalabrini Centre of Cape Town.

<sup>392</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC’. MiWORC Paper 8.

<sup>393</sup> Ibid.

<sup>394</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>395</sup> Ibid.

<sup>396</sup> Ibid.

work and study for the first 180 days after an asylum seeker lodged an application. This was found unlawful by the Supreme Court of Appeal (SCA) which ruled that the right to work may not be arbitrarily denied and that refugees and asylum seekers have a right to wage-earning employment or self-employment.<sup>397</sup>

**Private Security Industry Regulation Act 56 of 2001:** The Act specifically prohibits refugees and asylum seekers from working in the private security industry.<sup>398</sup>

**Immigration Act 13 of 2002:** The Act covers conditions for entering South Africa for stays exceeding 90 days and for the purposes of taking up employment (i.e. including the conditions for temporary and permanent residence). In terms of section 27 (a) of the Act, a “foreigner” may be issued with permanent residence “upon receipt of an offer of permanent employment” subject to certain other conditions.<sup>399</sup> The Act also states that holders of legal residence in South Africa must not become a burden on the state and are therefore denied (legal/ documented) entry if they require social assistance.<sup>400</sup> The Act also does not permit entry to traders or job seekers. The Act can therefore be interpreted to discourage migration of low-skilled migrants.

**Immigration Amendment Act of 2004: Regarding work, the two laws (i.e. Act 13 of 2002 above and the 2004 amendment) promote immigration of highly skilled individuals and investors. They introduce four categories of work permits (quota, general, exceptional skills and inter-company transfers) business permits and a variety of entry categories that do not allow foreigners to work.**<sup>401</sup> In February 2003, the quota for work permits was set at 740 000 per annum. Yet, in 2011, only 35 000 work permits were allocated covering 53 occupations/ skills deemed scarce and critical.<sup>402</sup> It has also been noted that more work permits are being allocated to Europeans, Americans and Asians (i.e. not Africans).<sup>403</sup> As such, the OECD has argued that the Immigration Act of 2002 as amended is a continuation of the Aliens Control Act, which creates a “dual system of limited permanent high-skilled immigration and temporary lower-skilled migration, mainly through corporate permits”.<sup>404</sup>

Subject experts have argued that the recent amendments to the Act are regressive in that the amendments create additional categories of “undesirable persons”, deportation and legal action. The amendments erode the rights of asylum seekers and will exacerbate the challenges these individuals already face (see section on research findings). The amendments, inter alia, reduce the transit visas of asylum seekers from 14 to five days.

**Immigration Amendment Act 13 of 2011:** The Act reportedly aims to facilitate the free-movement of [certain categories] of people (i.e. highly skilled and resourced individuals) and goods, and an exchange of skills, by streamlining application processes for temporary visas, business and study permits, and related documents.<sup>405</sup> The Act does not facilitate the free-movement of low- or un-skilled workers. The Act provides for 13 types of temporary residence permits: visitors, study, treaty, work, business crew, medical treatment, relative’s, retired person, corporate, exchange, asylum transit and cross-border transit permits.<sup>406</sup> The Act introduced a critical skills visa/permit, and a business visa/permit for foreigners who intend to establish a business of a certain size or invest in South Africa. It also stipulates that medical visas/

<sup>397</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

<sup>398</sup> Ibid.

<sup>399</sup> Nshimbi C. C. & Fioramonti L. July 2013. ‘A region without borders? Policy Framework for regional labour migrations towards South Africa’. MiWORC Report 1.

<sup>400</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

<sup>401</sup> Facchini G., Mayda A. M. & Mendola M. 13 April 2013. ‘South-south migration and the labour market: Evidence from South Africa’. *Journal of Economic Geography*. Volume 18. Issue 4. Pages 823–853. <https://doi.org/10.1093/jeg/lby010>

<sup>402</sup> Ibid.

<sup>403</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>404</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>405</sup> Nshimbi C. C. & Fioramonti L. July 2013. ‘A region without borders? Policy Framework for regional labour migrations towards South Africa’. MiWORC Report 1.

<sup>406</sup> Ibid.

permits can only be obtained in exceptional circumstances.<sup>407</sup> The Act further requires that all foreign nationals apply for visas/ permits in person.

Regarding work permits, the Act includes four types; general, quota, intra-company and exceptional skills. A general work permit, is only considered in cases where employers can demonstrate that there is no South African with comparable qualifications and experience.<sup>408</sup> Corporate permits allow companies to source foreign labour and employ foreigners.

Regarding permanent residence, the Act stipulates that the spouses and children of South African citizens or permanent residents qualify for permanent residence, as do individuals who have invested large amounts of capital in the country.<sup>409</sup>

The Act also introduces amendments to the documentation management process to which asylum seekers are subjected. The Act reduces the number of days granted to asylum seekers to report to refugee reception offices closest to their port of entry.<sup>410</sup> (As the testimonies gathered during this research assignment demonstrate, these changes will make it impossible for many asylum seekers to comply with the legislation, and is therefore likely to increase the number of undocumented and unprotected migrants).

**The Social Assistance Act 13 of 2004:** The Act responds to the constitutional imperative that everyone has the right to have access to social security and appropriate social assistance, including if they are unable to support themselves or their dependents (within the available resources of the state). The Act, therefore, regulates one of the government’s key strategies for combating abject poverty and hunger i.e. the Social Assistance Programme. The act targets vulnerable groups in South Africa and regulates the types of social grants available to vulnerable groups in the country. However, in what appears to be an unconstitutional deviation, the Act explicitly restricts social grants (including the child support grant) to citizens. In 2012, access was extended to recognized refugees but not to other categories of migrants. The Foster Care Grant is open to foster parents of any formal legal status, including refugees.<sup>411</sup>

The table below provides a summary of the social assistance migrants (broadly defined) had access to in South Africa in 2011:<sup>412</sup>

FORM OF SOCIAL ASSISTANCE	CATEGORIES WITH ACCESS	EXCLUDED CATEGORIES
OLD AGE PENSION	CITIZENS, PERMANENT RESIDENTS, TEMPORARY RESIDENTS	REFUGEES, ASYLUM SEEKERS, UNDOCUMENTED MIGRANTS
UNEMPLOYED INSURANCE FUND	CITIZENS, PERMANENT RESIDENTS, REFUGEES	TEMPORARY RESIDENTS, ASYLUM SEEKERS, UNDOCUMENTED MIGRANTS
BASIC HEALTH CARE	ALL	UNDOCUMENTED MIGRANTS EXPERIENCE EXCESSIVE CHALLENGES IN ACCESSING THESE SERVICES.
HOUSING	CITIZENS, PERMANENT RESIDENTS, ASYLUM SEEKERS	TEMPORARY RESIDENTS, REFUGEES, UNDOCUMENTED MIGRANTS
PUBLIC SCHOOLS	CITIZENS, PERMANENT RESIDENTS, REFUGEES, ASYLUM SEEKERS	TEMPORARY RESIDENTS, UNDOCUMENTED MIGRANTS

**Green Paper on International Migration 2016:** The Green Paper set out to “find a solution for the documentation of migrants from the Southern African Development Community with lower level skills” (i.e. the group that post 1994, accounts for this highest number of Department of Home Affairs deportations).<sup>413</sup>

<sup>407</sup> Ibid.

<sup>408</sup> Ibid.

<sup>409</sup> Ibid.

<sup>410</sup> Ibid.

<sup>411</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWOCR Paper 8.

<sup>412</sup> All this data from Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWOCR Paper 8.

<sup>413</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

The Green Paper could be considered progressive to the extent that the document described well-managed migration as potentially beneficial to South Africa. The paper argued for the development of an immigration policy that:<sup>414</sup>

- Is underpinned by the Constitution Act 108 of 1996 and the National Development Plan for 2030;
- Contributes to national interests such as national security;
- Has an African orientation;
- Contributes to nation building and social cohesion by giving South Africa a competitive edge in a knowledge-based global economy.
- Enables South Africans living abroad to contribute to national development priorities as valuable sources of skills, capital and connections.
- Actively strengthens international efforts in building bilateral and multilateral partnership to promote and implement good practices, the principle of shared and collective responsibility and co-operation.

The Green Paper further identified seven areas in which policy reform was required. These were:<sup>415</sup>

- Existing policies did not include a risk-based approach and did not consider international best practice.
- Existing policies included a bias towards mechanical compliance to formal residence and naturalization requirements, rather than managing international migration strategically.
- Existing policies did not adequately manage highly-skilled or high net-worth international migration.
- The existing policy framework was not holistic or integrated.
- Existing policies were inadequate in terms of processes to integrate migrants into South African society.
- Existing policies gave inadequate consideration to historical and geopolitical migration patterns in Africa.

**White Paper on International Migration 2017:** The White Paper sets out to guide a comprehensive review of immigration legislation across eight areas: admissions and departures; residency and naturalization; international migrants with skills and capital; ties with South African expatriates; international migration within the African context; asylum seekers and refugees; integration processes for international migrants; and enforcement.<sup>416</sup>

According to the OECD, the 2017 White Paper marks a shift “to a greater emphasis on capturing the economic benefits” of migration.<sup>417</sup> The Paper presents a policy vision aligned to African realities and seeks “to harness the strategic potential of migration”.<sup>418</sup> The paper includes an entire chapter on managing migration in the African context. The chapter proposes various arguably progressive policies interventions. These include:<sup>419</sup>

- Offering visa regulation schemes to nationals of Zimbabwe, Mozambique, Malawi, Botswana, Namibia, Swaziland and Lesotho living in South Africa.

<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

<sup>416</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies.

<sup>417</sup> OECD/ILO. 2018. ‘How immigrants contribute to South Africa’s economy’. OECD Publishing. Paris.

<sup>418</sup> Ibid.

<sup>419</sup> Ibid.



- Introducing Southern African Development Community visa options for some economic migrants as an alternative to irregular means (these include work, trader and small business permits).
- Ensuring better enforcement of immigration and labour laws that target unscrupulous employers rather than individual migrants.

On the other hand, the White Paper also proposes “asylum processing centres” that will operate at land borders to manage and reduce migrant flows, thereby also “reducing system costs”. The Department argues that “by reducing the incentive for abuse by economic migrants, the asylum system will be transparent and responsive. It will also reduce the cost of managing a large number of asylum seekers”.<sup>420</sup> Critics have argued that these will, in effect, be detention centres (notorious for human rights violations<sup>421</sup>), and that the South African government cannot afford construction of these centres (estimated at R298 million).<sup>422</sup>

**The Border Management Authority Act of 2017:** Preceded by the Border Management Authority Bill of 2016, this law states as its purpose the protection of South Africa’s territorial integrity essentially by improving border security. The Department of Home Affairs is the primary implementing agent. The core implementation functions pertain to customs administration, policing, and management of the movement of persons.<sup>423</sup>

**The Refugees Amendment Act 11 of 2017:** Signed into law on the 14<sup>th</sup> of December 2017, the Act seeks to:

- “Amend and insert certain definitions;
- Include further provisions relating to disqualification from refugee status;
- To provide for integrity measures to combat fraud and corruption among staff members at the Refugee Reception Offices, the Standing Committee and the Refugee Appeals Authority;
- To omit provisions referring to the Status Determination Committee;
- To substitute certain provisions relating to the Refugee Appeals Authority;
- To provide for the re-establishment of the Standing Committee;
- To confer additional powers on the Director-General;
- To clarify the procedures relating to conditions attached to asylum seeker visas and abandonment of applications;
- To revise provisions relating to the review of asylum applications;
- To provide for the withdrawal of refugee status in respect of categories of refugees;
- To provide for additional offences and penalties;
- To provide for transitional provisions; and
- To provide for matters connected therewith.”<sup>424</sup>

In Parliament, the rationale given in support of the Act was to “tighten-up” existing legislation to ad-

<sup>420</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies. And Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

<sup>421</sup> In 2014 the South African Human Rights Commission released a report detailing on-going human rights abuses at the Department of Home Affairs Lindela Repatriation Centre. These included procedural violations, inhuman and unsafe conditions, violence and the unlawful detention of high numbers of people. Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies

<sup>422</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies

<sup>423</sup> Ibid.

<sup>424</sup> Government Gazette. 18 December 2017. Act. No. 11 of 2017: Refugees Amendment Act 2017. No. 41343. Cape Town

dress “abuse of the asylum system” and “corruption”, and ensuring “increased efficiency” in the relevant workforce.<sup>425</sup> These are all serious issues that require redress, and in many instances the Act legitimately attempts to do so. However, based on the findings of this research, many of the amendments are likely to achieve the exact opposite (i.e. by attempting to further reduce the rights, opportunities and livelihood strategies available to migrants and refugees the amendments are more likely to result in human rights violations or a humanitarian crises).

Important definitional changes include changing asylum seeker permit to asylum seeker visa, including expansive definitions of dependents and marriage, and their inclusion into applications.

Regarding exclusions from refugee status, the following persons are excluded: persons guilty of war crimes, torture and related activities; persons who committed serious (non-political) crimes; and persons who have refugee status or protection in other countries. Of concern is that the following types of persons are also automatically excluded:

- A person who “has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identify card, passport, travel document, temporary residence visa or permanent residence permit”.<sup>426</sup> As the analysis from the findings of the research study will show, and as documented in various additional pieces of research<sup>427</sup>, asylum seekers, refugees and (undocumented) migrants in South Africa are often forced to use (i.e. their or their families’ survival depends on using) documentation “fraudulently”. This includes having to use someone else’s documentation to access emergency medical attention, or the expiration of documentation due to an inability to get to/ or to receive timeous services at documentation renewal centres. The systemic flaws in the entire immigration system may mean that many/ most migrants/ refugees/ asylum seekers will at some point be in possession of “fraudulent” documents during their stay through force of circumstance.
- A person who has “entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, and fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry”; or “has failed to report to the Refugee Reception Office within five days of entering into the Republic as contemplated in section 21, in the absence of compelling reasons . . .”.<sup>428</sup> As the personal accounts that follow in the findings section of this report demonstrate, compliance to these requirements are literally impossible for individuals fleeing political conflicts and war.

Amendments to section 5 of Act 130 of 1998 (as amended by section 6 of Act 33 of 2008) are by and large aligned to international legislation and reasonable, but there are two key areas of concern. First, in terms of Section 6 (g) a person ceases to qualify for refugee status if “he or she has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residents or permanent residence permit”, which as previously noted is almost unavoidable for individuals who wish to survive given the poor functioning of the entire system and the prevalence of xenophobic attitudes among public officials and ordinary South Africans. Further, the Act gives the minister sweeping powers without introducing any checks or balances, or accountability measures. In terms of the new Act (h) “the Minister may issue an order to cease the recognition of the refugee status of any individual refugee or category of refugees, or to revoke such status”.<sup>429</sup>

The insertion of section 20A into Act 130 of 1998, which essentially seeks to respond to and reduce crime and corruption in the various arms, institutions and administrative processes of the asylum seeker/ refugee system is welcome and commendable, given the widespread and systemic problems described elsewhere in this report and in much of the literature on the subject. The measures are comprehensive and

<sup>425</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

<sup>426</sup> Government Gazette. 18 December 2017. Act. No. 11 of 2017: Refugees Amendment Act 2017. No. 41343. Cape Town

<sup>427</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

<sup>428</sup> Government Gazette. 18 December 2017. Act. No. 11 of 2017: Refugees Amendment Act 2017. No. 41343. Cape Town

<sup>429</sup> Ibid.

include investigations, access to personal information, and psychometric testing.<sup>430</sup>

An important clause is the amendment of section 22 of Act 130 of 1998, as amended by section 15 of Act 33 of 2008. Section 22(1) which pertains to the asylum seeker visa states that “an asylum seeker whose application in terms of section 21(1) has not been adjudicated, is entitled to be issued with an asylum seeker visa, in the prescribed form, **allowing the applicant to sojourn in the Republic temporarily, subject to such conditions as may be imposed, which are not in conflict with the Constitution or international law**”.<sup>431</sup> This implies that all the human and socio-economic rights guaranteed by the Constitution and contained in the Refugees Act of 1998, including the rights to work, self-employment, education and health as various court rulings (including the Supreme Court of Appeal (SCA)<sup>432</sup>) confirmed in the past, must remain applicable to asylum seekers awaiting status confirmation and to refugees. It can, therefore, be argued that paragraphs 6 to 11 of Section 22 of the Amended Act contravene the Constitution by imposing unjustifiable limitations on the rights of asylum seekers and refugees to work; and by imposing conditions and stipulations that asylum seekers and refugees will effectively find impossible to comply to. Specifically, the Act prohibits asylum seekers from working in South Africa while they await final determination of their refugee claim.<sup>433</sup> This process can take years to complete and effectively renders affected individuals destitute. In fact, South Africa “currently has one of the biggest asylum seeker backlogs in the world (backlog of 147 794 in 2017), with most asylum seekers waiting several years for processing”.<sup>434</sup>

The arguably unconstitutional sections are:

- Section 22 (6): “An asylum seeker may be assessed to determine his or her ability to sustain himself or herself, and his or her dependents, either with or without the assistance of family or friends, for a period of at least four months.”<sup>435</sup>
- Section 22 (7): “If, after assessment, it is found that an asylum seeker is unable to sustain himself or herself and his or her dependents, as contemplated in subsection (6), that asylum seeker may be offered shelter and basic necessities provided by the UNHCT or any other charitable organization or person.”<sup>436</sup>
- Section 22 (8) “The right to work in the Republic may not be endorsed on the asylum seeker visa of any applicant who –
  - (a) is able to sustain himself or herself and his or her dependents as contemplated in subsection (6)
  - (b) is offered shelter and basic necessities by the UNHCR or any other charitable organization or person, as contemplated in subsection (7) or
  - (c) seeks to extend the right to work, after having failed to produce a letter of employment as contemplated in subsection (9): provided that such extension may be granted if a letter of employment is subsequently produced while the application in terms of section 21 is still pending.”<sup>437</sup>
- Section 22 (9) “In the event that the right to work or study is endorsed on the asylum seeker visa, the relevant employer, in the case of a right to work, and the relevant educational institution, as the case may be, in the prescribed form within a period of 14 days from the date of the asylum seeker

<sup>430</sup> Government Gazette. 18 December 2017. Act. No. 11 of 2017: Refugees Amendment Act 2017. No. 41343. Cape Town

<sup>431</sup> Ibid.

<sup>432</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

<sup>433</sup> Ibid.

<sup>434</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief 17. Institute for Security Studies.

<sup>435</sup> Government Gazette. 18 December 2017. Act. No. 11 of 2017: Refugees Amendment Act 2017. No. 41343. Cape Town

<sup>436</sup> Ibid

<sup>437</sup> Government Gazette. 18 December 2017. Act. No. 11 of 2017: Refugees Amendment Act 2017. No. 41343. Cape Town

taking up employment of being enrolled, as the case may be”<sup>438</sup>

- Section 22 (11) “The Director-General must revoke any rights to work as endorsed on an asylum seeker visa if the holder thereof is unable to prove that he or she is employed after a period of six months from the date on which such right was endorsed”.<sup>439</sup>

- Gastrow and others<sup>440</sup> argue that the Act, by not mentioning any form of employment other than through an employer, also prohibits asylum seekers from operating businesses in South Africa.<sup>441</sup> Given that the barriers to employment of asylum seekers in the formal economy are almost prohibitive (and that the Amended Act increases the barriers to employment), and given that the survival of many migrants, asylum seekers and refugees depend on their ability to self-generate income, this amendment too, will likely cause more destitution. It may also affect the South African economy, inter alia, through loss of employment opportunities and rental income for South Africans. Mbiyozo 2018 agrees that the Amended Act’s general strategy will exacerbate the already precarious living and working conditions in which migrants and refugees find themselves. The amendment could trigger a bigger humanitarian crisis by relegating otherwise capable people who are willing to contribute to the development of South African society to a dependent status on a government, civil society and social structures that lack the capacity to provide adequate shelter and resources.<sup>442</sup>

In terms of Section 27, applications for permanent residence can now only be submitted after ten (as opposed to five years) of residence in South Africa (starting from the date asylum was granted).

Overall, the Amended Act, as various subject experts have argued seems to have the “implicit goal” “to make South Africa a significantly less desirable destination for asylum seekers”.<sup>443</sup> Specifically the legislation curtails the rights to asylum seekers to work and to access social protection in South Africa.<sup>444</sup> As a legal and policy expert stated during an interview: “*The government is openly xenophobic. This amendment will make the situation worse for everyone concerned. The consequences of things like not being able to work for the first four months, or having less than a week to get to a refugee office is designed to make people suffer. Nobody can comply*”.

**National Development Plan 2030:** The plan emphasizes the importance of attracting and supporting ‘high-value’/ highly skilled/ high net-worth im(migrants). The document also calls for the adoption of a “more progressive migration policy for skilled and unskilled workers”.<sup>445</sup>

In sum, the literary consensus is that despite what was until the 2017 Amendment to the Refugees Act a progressive legislative framework theoretically aligned to a human rights-based approach and international human rights conventions, and with the exception of a number of amnesties discussed elsewhere in the report, implementation has been heavy-handed or “punitive”.<sup>446</sup> Most authors argue that the emphasis has been on arrest and deportation. The available statistics appear to support this view. Approximately 2.3 million people were deported in 2000, of which at least 98% were sent to other SADC countries.<sup>447</sup>

<sup>438</sup> Ibid.

<sup>439</sup> Ibid.

<sup>440</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

<sup>441</sup> Gastrow V. 2018. ‘Problematizing the Foreign Shop: Justifications for restructuring the migrant spaza sector in South Africa.’ SAMP Migration Policy Series 80. South African Migration Programme. International Migration Research Centre. Ontario. Canada.

<sup>442</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies

<sup>443</sup> Crush J., Skinner C. & Stulgaitas M. August 2017. ‘Benign neglect or active destruction? A critical analysis of refugee and informal sector policy and practice in South Africa. South African Human Mobility Review 3 (2). [http://sihma.org.za/wp-content/uploads/2017/09/1\\_Benign-Neglect-or-Active-Destruction.pdf](http://sihma.org.za/wp-content/uploads/2017/09/1_Benign-Neglect-or-Active-Destruction.pdf)

<sup>444</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

<sup>445</sup> Mbiyozo A.N. 25 October 2018. ‘Aligning South Africa’s migration policies with its African visions’. Research Policy Brief. Institute for Security Studies.

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<sup>447</sup> Ibid.

Further, existing legislation fails to effectively address or regulate the high levels of regional economic migration. Carciotto et al<sup>448</sup> argue that the problem stems from the Immigration Act 11 of 2002, which as indicated, “prioritizes highly skilled migration but does not provide accessible legal pathways for low- to mid-skilled migrants”. The consensus in the literature is that the failure to do so has resulted in the asylum seeker/ refugee system becoming the “de facto immigration option for many to attain legal status regardless of protection needs”.<sup>449</sup>

## 8.4.1 LABOUR LEGISLATION

Legal experts, backed by Constitutional and labour court rulings argue that the labour related legislation summarized below apply to all workers (i.e. irrespective of legal/ documented status or nationality).<sup>450</sup>

**The Occupational Diseases in Mines and Works Act of 1973 and The Compensation for Occupational Injuries and Diseases Act of 1993:** The Acts apply to employment-related injuries and diseases in the mining sector.<sup>451</sup> They form part of a system of no-fault compensation for employees who are injured in accidents that arise out of, or in the course of, their employment, or who contract occupational diseases.<sup>452</sup> They are administered through the Compensation Fund of South Africa, but remains largely inaccessible to foreign born workers in the mining industry who travel, do not have bank accounts, or are not traceable.<sup>453</sup>

**Basic Conditions of Employment Act 1997:** The Basic Conditions of Employment legislates a set of legal minimum requirements for [decent] work for “all employees” in South Africa. The Act covers working hours, overtime, leave, termination of employment etc. In terms of section 1 of the Act, an employee is “any person, excluding and independent contractor, who works for another person or for the state and who receives, or is entitled to receive, remuneration”.

**Unemployment Insurance Act of 2001:** The Act covers workers and their dependents against temporary unemployment due to termination of service, illness, or birth or adoption of a child. Short-term migrant workers and undocumented migrant workers are not covered by the Act. In the case of short-term workers, because they are expected to return to their countries of origin at completion of their contracts/ internships/ learnerships.<sup>454</sup> This has a particularly negative affect on seasonal farm labourers, domestic workers, and short-term contracts in the construction industry.

**Labour Relations Act 2002 (as amended):** The Act gives effect to section 27 of the Constitution and applies equally to all members of the workforce. As such it seeks to:

- regulate the rights of trade unions;
- promote and facilitate collective bargaining at the workplace and at sectoral level;
- regulate the right to strike and the recourse to lockout in conformity with the Constitution;
- promote employee participation in decision-making through the establishment of workplace forums;
- provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration)

<sup>448</sup> Carciotto S., Gastrow V. & Johnson C. 2019. Manufacturing illegality: The Impact of curtailing asylum seekers right to work in South Africa. Scalabrini Institute for Human Mobility in Africa

<sup>449</sup> Ibid

<sup>450</sup> Polzer T. November 2008. ‘Migrant employment in Africa: New data from the Migrant Monitoring Project’. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

<sup>451</sup> Deacon B., Olivier M. & Beremauro R. June 2015. ‘Social Security and Social Protection of Migrants in South Africa and SADC. MiWORC Paper 8.

<sup>452</sup> Ibid.

<sup>453</sup> Ibid.

<sup>454</sup> Ibid.

tration was established), and through independent alternative dispute resolution services accredited for that purpose;

- establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;
- provide for a simplified procedure for the registration of trade unions and employers' organizations, and to provide for their regulation to ensure democratic practices and proper financial control;
- give effect to the public international law obligations of the Republic relating to labour relations;
- amend and repeal certain laws relating to labour relations; and
- provide for incidental matters.

The Act stipulates in section 185 that “every” employee has the right not to be unfairly dismissed.

**Commission for Conciliation, Mediation and Arbitration:** The Commission for Conciliation, Mediation and Arbitration (CCMA) is a public body that hears labour disputes. In 2008, the CCMA officially interpreted the Constitutional and Labour Law provisions on fair labour practices to apply to undocumented labour migrants.<sup>455</sup>

**Labour Court:** In 2008 the Labour Court confirmed the CCMA ruling in a case between a migrant and Discovery Health, by ruling that employers have the same duty of care to undocumented foreign employees as they have to South African citizens, and that employment contracts are valid irrespective of whether an employee is an undocumented migrant.<sup>456</sup> The Court thus confirmed that undocumented workers are to be regarded as employees for the purposes of the Labour Relations Act.<sup>457</sup>

**Employment Equity Act 55 of 1998 as amended:** The purpose of the Act is to achieve equity in the workplace, by (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination, including by sex or gender; and (2) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups to ensure their equitable representation in all occupational categories and levels in the workforce. Migrants are not considered a disadvantaged group in terms of the Act.

The Equality Report 2017/18 of the Human Rights Commission, which looks at rights-based, radical socio-economic transformation and identifies special measures to expediate transformation include an entire section on the requirement to transform the unequal South African labour market. The report advocated for socio-economic need within vulnerable groups to be considered in the application of the Employment Equity Act, but even this “human rights” report stops short of explicitly identifying migrants and refugees as a vulnerable group in the context of employment equity. In fact, the report does not address the labour experiences of migrants.<sup>458</sup>

**Employment Services Act:** In terms of the Act, employers may not employ anyone without a valid work permit.<sup>459</sup>

**Workman's Compensation:** Temporary Residents qualify for workman's compensation.<sup>460</sup>

<sup>455</sup> Polzer T. November 2008. 'Migrant employment in Africa: New data from the Migrant Monitoring Project'. Gallo-Mosala S. (Ed). November 2008. Migrants experiences within the South African Labour Market. Scalabrini Centre of Cape Town.

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<sup>457</sup> Griffin L. 2011. 'Unravelling Rights: 'Illegal' Migrant Domestic Workers in South Africa'. South African Review of Sociology, 42:2, 83-101, DOI: 10.1080/21528586.2011.582349

<sup>458</sup> South African Human Rights Commission. 2018. 'Achieving substantive economic equality through rights-based radical socio-economic transformation', Equality Report 2017/18.

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The above discussion demonstrates that, in theory, migrants and refugees in South Africa are protected and their working conditions are regulated. However, as discussions in the remainder of this paper will demonstrate, migrants (particularly undocumented migrants) and refugees are afraid (with good reason) to approach government and related institutions and are effectively unable to access their rights.

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## OTHER CONTRIBUTIONS FROM THE ICMC PROJECT "THE FUTURE OF WORK, LABOUR AFTER LAUDATO SI"

### 1. "INTERNATIONAL MIGRATION AND WORK: CHARTING AN ETHICAL APPROACH TO THE FUTURE"

**Donald Kerwin, Center for Migration Studies**

This paper explores the future of work, international migration, and the intersection of the two at a time of rapid change, uncertainty and disruption for migrants, laborers, their families and communities. It draws on human rights principles, international law and religious values, particularly from the Catholic tradition, to chart an ethical approach to the governance of these timeless phenomena.

What does the future hold? Under one dystopian scenario, the future of work will be characterized by massive job loss due to automation, robotics and artificial intelligence. Politicians and business leaders will characterize the resulting human displacement as an unavoidable “disruption” and byproduct of change. However, euphemisms will poorly mask the loss of livelihood, self-esteem, and a central marker of identity for countless persons, particularly the poor and vulnerable. Technological advances will decimate families, communities and entire ways of life. For many, stable work will become a thing of the past and technology an instrument of marginalization and discrimination. Algorithms will be used “perpetuate gender bias”, pit workers against each other, and squeeze the maximum productivity from them for the minimum compensation. The “inappropriate use” and “weak governance” of algorithms will lead to “biases, errors and malicious acts.” (Albinson, Krishna, and Chu 2018). Large swaths of the world’s citizens will become (at best) the unhappy dependents of states and global elites.

The future of migration seems equally daunting. Current trends suggest that the number of international migrants will continue to rise due to job displacement, violence, natural disaster, and states that cannot or will not meet their fundamental responsibilities. If the past is prologue, unscrupulous politicians and

media sources will also continue to blame migrants for the economic and cultural displacement of their constituents, xenophobia will increase, and migrants will encounter hostility in host communities. Natives will criticize their governments and institutions for failing to protect their interests and needs, and migrant laborers will be caught in the middle. How to chart a different path for the future?

The paper begins by examining the challenges facing low-income and vulnerable migrants who struggle for decent work, are the most likely to lose their jobs, and are “the least equipped to seize new job opportunities” (ILO 2019, 18). It then presents an ethical, person-centered vision of migration and work, rooted in human rights principles, international law, and Catholic social teaching. The paper also draws on the Global Compact on Safe, Orderly and Regular Migration (GCM), the Global Compact on Refugees (GCR), and the Holy See’s Twenty Action Points for the Global Compacts. It ends with a series of recommendations that seek to bring this vision to fruition.

You can find the article at <https://cmsny.org/publications/kerwin-future-of-work/>.

## 2. RESEARCH FROM SMC, MANILA

The Scalabrini Migration Center in Manila (Philippines) conducted two studies as part of “**The Future of Work, Labour After Laudato Si**” global initiative.

### “OUT AT SEA, OUT OF SIGHT: SOUTHEAST ASIAN FISHERMEN ON TAIWANESE FISHING VESSELS”

This study focused on the **recruitment, working conditions and access to support of Southeast Asian fishermen working on Taiwanese fishing vessels**. Data for the study came from interviews with fishermen from the Philippines, Indonesia and Vietnam.

The working conditions of fishermen pointed to elements of trafficking. Cooperation between origin countries and Taiwan is an imperative to promote the protection of migrant fishermen.

Taiwanese fishing vessels are increasingly relying on migrant fishermen coming from Indonesia, the Philippines and Vietnam. This study compared the three groups of fishermen in terms of the recruitment process, their working and living conditions, their access to support and assistance, and based on these findings, offered recommendations to promote the fishermen’s protection.

Broadly speaking, fishermen engaged in domestic fishing are better protected than those in distant water fishing. Cooperation between the origin countries and Taiwan, the involvement of other stakeholders in

Fishing vessels docked in Keelung Port, Taiwan. (Photo: SMC)





JR Perlas will continue organic farming started and nurtured by his father, Ernesto. (Photo: SMC)

vessel and labor inspection, and the ratification of Convention No. 188, Work in Fishing Convention, are among the study’s recommendations. This research was conducted between August 2018 and April 2019.

**“SOWING HOPE: AGRICULTURE AS AN ALTERNATIVE TO MIGRATION FOR YOUNG FILIPINOS?”**

The other study explored **the prospects of agriculture as an alternative to international labor migration among young Filipinos.**

Although young Filipinos are retreating from farming, the study found interesting initiatives to attract and retain young people in agriculture, and young innovators who are involved in linking farmers to capital and markets and advocacy.

Building on earlier findings suggesting the vast potentials of agriculture to promote rural development, this research explored how agriculture may be an option to international labor migration for young Filipinos. In keeping with global trends, young Filipinos are also retreating from agriculture.

Part 1 of the study reviewed the policies and programs aimed at attracting and/or retaining young Filipinos in agriculture; many programs focused on training.

Part 2 of the study highlighted young Filipinos involved in agriculture as innovators, introducing new ideas and new practices through initiatives such as organic farming, linking farmers with markets through Community Shared Agriculture, linking farmers with a community of investors, and including the youth voice in policy-making.

Agriculture is more than farming; a broader vision of agriculture suggests many spaces for young Filipinos to fill in and to contribute in various roles and capacities. The research was conducted between July 2018 and April 2019.

The Scalabrini Migration Center (SMC) was established in the Philippines in 1987.

It is a research organization dedicated to the study of international migration and the promotion of understanding the multi-faceted dimensions of migration in the Asia-Pacific region.

The center aims to inform migration and public policies and to foster solidarity with migrants and stakeholders, with the end goal of promoting the rights and dignity of migrants and building inclusive societies.

You can find the reports at <https://smc.org.ph/>.

# NETWORK OF SCALABRINI STUDY CENTRES



## CEMLA, Buenos Aires

Centro de Estudios Migratorios Latinoamericanos, established in 1985 in Buenos Aires (Argentina)  
[www.cemla.com](http://www.cemla.com)

## CSER, Rome

Centro Studi Emigrazione Roma, established in 1964 in Rome (Italy)  
[www.cser.it](http://www.cser.it)

## CIEMI, Paris

Centre d'Information et d'Études sur les Migrations Internationales, established in 1971 in Paris (France)  
[www.ciemi.org](http://www.ciemi.org)

## CEM, Sao Paulo

Centro de Estudos Migratorios, established in 1985 in Sao Paulo (Brazil)  
[www.missaonspaz.org](http://www.missaonspaz.org)

## CMS, New York

Center for Migration Studies of New York, established in 1969 in New York (USA)  
[www.cmsny.org](http://www.cmsny.org)

## SMC, Manila

Scalabrini Migration Center, established in 1987 in Manila (Philippines)  
[www.smc.org.ph](http://www.smc.org.ph)



The Scalabrini International Migration Network (SIMN) is an umbrella organization established in 2007 by the Congregation of the Missionaries of Saint Charles, Scalabrinians. SIMN encompasses more than 250 grassroots Scalabrini entities that serve and advocate for the dignity and rights of migrants, refugees, internally displaced people, and seafarers around the world. SIMN fulfils its mission through an extensive network of think tanks, social service centres, shelters, senior centres, orphanages, medical clinics, kindergartens, schools, employment centres, and cultural centres. SIMN works closely with other entities at the local, national, and international levels, promoting comprehensive service programs and advocating for the dignity and rights of migrants and their families.



The Federation of Scalabrini Centers for Migration Studies unites seven centres across the world, each devoted to research and advocacy on migration. Located in New York, Paris, Rome, Basel, São Paulo, Buenos Aires, and Manila, these centres monitor the development of international migration. All of them are organized with similar departments, including a program dedicated to research, another dedicated to specialized publications—including periodicals, monographs and academic papers—as well as programmes dedicated to documentation, conferences, and other educational activities.



# SIHMA SCALABRINI INSTITUTE FOR HUMAN MOBILITY IN AFRICA



The **Scalabrini Institute for Human Mobility in Africa** (SIHMA) was established in Cape Town, South Africa, in 2014.

Our **Vision** is an Africa where the human rights of people on the move are ensured and their dignity is promoted.

Our **Mission** is to conduct and disseminate research that contributes to the understanding of human mobility and informs policies that ensure the rights and dignity of migrants, asylum seekers and refugees in Africa.

We disseminate the findings of our research through our Journal **AHMR** (African Human Mobility Review), social media and our website [www.sihma.org.za](http://www.sihma.org.za).

## WHAT THEY SAY ABOUT US

*In recent years the focus of the traumas around the refugee and migrant experiences has been largely seen through its impacts on and narratives emerging from Europe and North America. Sadly the clamor on those continents has rendered **the vast movement of people in Africa** almost invisible and silent.*

*It is estimated that at least 26% of all people on the move internationally, move in and through the vast expanses of the African continent. Some set the figure much higher. Whatever the percentages, each statistic represents a person with individual hopes and dreams, in addition to their anxieties and fears, legacies of danger and vulnerability.*

*As with every vulnerable group, any desire to accompany such people, to give substance to their dreams and sustain their hope demands a thorough understanding of their realities.*

*SIHMA stands amongst the few institutions in Africa that seeks **to understand the multiple dynamics that contribute to such accompaniment**, speaks into those diverse situations, and honour the values embedded in the noble protocols and policies which govern this universe.*

*SIHMA is committed to providing a thorough intellectual grounding, through sound analysis and the development of a rights-based praxis and pointed advocacy for displaced persons.*

*Without such research and without developing life-giving synergies, the entire accompaniment process would be faulty and soulless.*

*Thus, SIHMA provides **a vital service to understanding the realities of the vulnerable people on the move** and developing paths beyond the pathologies that often ensnare them. This is an exceptionally valuable service.*

*SIHMA also brings to the table a powerful wisdom drawn from the deep wells of its faith foundation. In a moment of history so distorted by cheap populism and sound bites, faith provides **another way of seeing issues**, another means of enriching the mind, and of expanding the heart so that we, who are honored to be part of SIHMA's ministry, can give public significance to our private beliefs.*

*I think of SIHMA as **a laboratory** for new and creative ways of crafting life-giving environments, a platform for multidisciplinary conversations in this contested domain and an energy for doing advocacy that allows the continent, in the poignant words of the Nobel laureate Chief Albert Luthuli, 'to be a home for all.'*

*SIHMA is already a microcosm of this shared home and **a place where study is at the service of growth into a fuller humanity**.*

*When I think of SIHMA and the populations it serves, I often think of Shakespeares' words that 'we know what we are but we know not what we may be.'*

*SIHMA dreams and works strenuously to accompany people into being the best person they can be.*

Peter John Pearson, CPLO Director

# MANY THANKS TO

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# PEOPLE BEHIND THE FIGURES