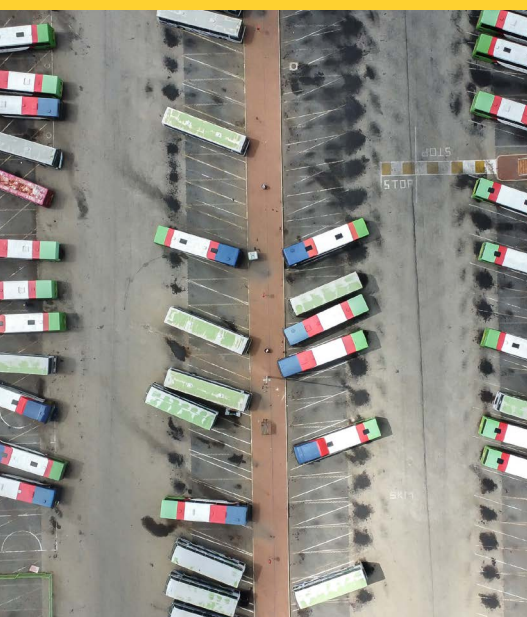


# SOUTH AFRICA COUNTRY STUDY: MIGRATION TRENDS, POLICY, IMPLEMENTATION, AND OUTCOMES

## MIGRATION GOVERNANCE REFORM IN AFRICA PROGRAM

### 3RD MIGRA REPORT



**n** **s** new south  
institute  
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# List of Abbreviations

<b>ANC</b>	African National Congress
<b>ATDF-ASA</b>	All-Truck Drivers Forum and Allied SA
<b>ATM</b>	African Transformation Movement
<b>AU</b>	African Union
<b>BLAs</b>	Bilateral Labour Migration agreements
<b>BMA</b>	Border Management Agency
<b>CAPES</b>	Confederation of Associations in the Private Employment Sector
<b>COPE</b>	Congress of the People
<b>COSATU</b>	Congress of South African Trade Unions
<b>DALRRD</b>	Department of Agriculture, Land Reform & Rural Development
<b>DEL</b>	Department of Employment and Labour
<b>DFFE</b>	Department of Forestry, Fisheries & the Environment
<b>DHA</b>	Department of Home Affairs
<b>DHET</b>	Department of Higher Education and Training
<b>DIRCO</b>	Department of International Relations and Cooperation
<b>DOH</b>	Department of Health
<b>DTIC</b>	Department of Trade, Industry and Competition
<b>DZP</b>	Dispensation of Zimbabweans Project
<b>EFF</b>	Economic Freedom Fighters
<b>ESB</b>	Employment Services Board
<b>EU</b>	European Union
<b>FIFA</b>	International Federation of Association Football
<b>IAA</b>	Immigration Amendment Act
<b>ILO</b>	International Labour Organisation
<b>IOM</b>	International Organisation for Migration
<b>LEP</b>	Lesotho Exemption Permit
<b>LHR</b>	Lawyers for Human Rights
<b>MIDSA</b>	Migration Dialogue for Southern Africa'
<b>MIGRA</b>	Migration Governance Reform in Africa
<b>NLMP</b>	National Labour Migration Policy
<b>OAU</b>	The Organisation of African Unity
<b>SADC</b>	Southern African Development Community
<b>SAMM</b>	Southern Africa Migration Management
<b>SC</b>	Senior Counsel
<b>SERT</b>	Single Entity Retrieval Tool
<b>TEBA</b>	The Employment Bureau of Africa
<b>UN</b>	United Nations
<b>UNDESA</b>	United Nations Department of Economic and Social Affairs
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>VFS</b>	Visa Facilitation Services
<b>WENELA</b>	Witwatersrand Native Labour Association
<b>ZEP</b>	Zimbabwean Exemption Permit
<b>ZSP</b>	Zimbabwe Special Dispensation Permit

# Executive Summary

South Africa has a complex history of migration and migration governance. In this paper historical trends are sketched including colonization, slavery, indentured and migrant labour, and recent waves of migration of asylum seekers and other refugees. Migrants currently make up about 4-5% of the population, but margins of error are great due to the quality of data for various reasons. Since the beginning of the 21st century inward migration accelerated mainly due to instability and poverty in some neighbouring countries.

The policy responses have been complex, but have historically discriminated between white migrants, sometimes skilled, who could expect naturalisation and citizenship and black migrants who were allowed to be oscillating migrant labourers but could expect no rights of citizenship.

After the democratic transition in 1994, policies and laws affecting citizens and migrants took account of humanitarian conventions and social and economic needs. In the wake of rising migration in the 21st century and very weak economic performance since 2009, immigration of poor people from the African continent has been a rising source of tension. The fact that refugees are not generally held in camps and that there have been no governmental efforts at inclusion has made it easier for politicians to mobilise anti-foreigner sentiment, both as a stick to beat government and as a government ploy to blame migrants for the failures of policy and practice.

Recent government policy reforms and proposals, including recent draft white papers proposed laws are critically examined and some suggestions are put forward that could reduce tensions and result in fairer outcomes for all.

# SOUTH AFRICA COUNTRY STUDY: MIGRATION TRENDS, POLICY, IMPLEMENTATION, AND OUTCOMES

A few African migrants strode forth perhaps 200 000 years ago to people the near East and Europe. Nowadays, Africans are still on the move, but mostly to other African countries. Contrary to Western anxiety about being flooded by Africans, most Africans who do migrate do so within their own continent and most of them are not refugees. Much has been written about the human rights of Africans fleeing to neighbouring countries to escape war or persecution or to seek a better life. Much less has been written about an equally pertinent issue: the policies and mechanisms which govern and facilitate or hinder intra-African migration.

This working paper is one in a series of eight case studies under the New South Institute's Migration Governance Reform in Africa (MIGRA) program. The purpose of the project is to identify viable policies and strategies that can facilitate the movement and settlement by Africans (and potentially by visitors) across African borders and to improve the quality of management of such migration. Enabling regular migration helps to lessen the pressure for irregular migration and contributes to the African economic, social, and cultural development in many ways.<sup>1</sup>

By 'viable' pathways we mean pathways that are practical, given the capabilities of state and supra-state institutions, and doable in the political and economic circumstances. By 'improving ease of movement', we mean introducing better processes, reducing the obstacles faced by Africans who seek to cross African borders (for example, passport and visa requirements), and finding effective ways for the receiving state and other stakeholders to include migrants socially. Ease of 'settlement' refers to the rights of the migrant to study, work, buy a home, and/or buy or start a business in the host state. By 'quality of management of migration', we mean the management systems for granting permission to

cross borders, for recording cross-border movement, and for exchanging relevant and accurate information about individuals who cross the border between the origin state and the destination state. By 'pathways', we mean the incremental, sporadic, or ambitious processes of reform that are undertaken by states domestically, bilaterally with other states, or multilaterally within a regional framework.

This paper, the South Africa case study, first sets out in some detail the history and circumstances of South Africa's migration governance, especially in respect of the rest of Africa. It draws some conclusions and makes broad-brush recommendations. It is a detailed report following, more or less, a structure set out in the introductory paper to this series titled 'Framing a study of African migration governance reform—Towards freer movement'. When the four country case studies and the four regional cases are complete, we will reflect on what we have learned from African experiences of migration governance reform and will make proposals on how to movement process forward.

## 1. **Economy and Population in South Africa**

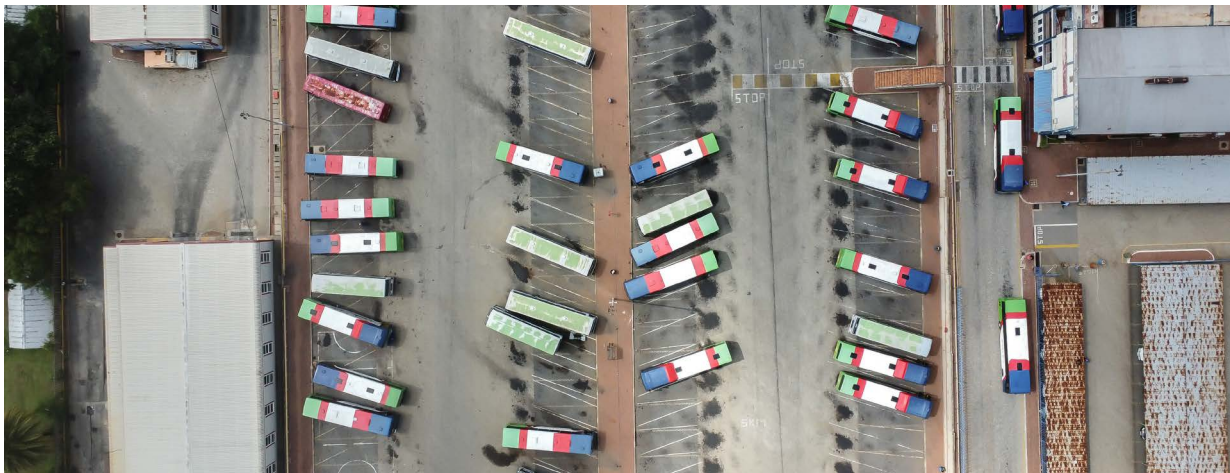
South Africa has experienced rapid immigration in recent decades despite its unusually low growth rate since the global financial crisis. If we use the official South Africa census numbers, the increase from 958 186 people born abroad living in South Africa in 2001<sup>2</sup> to 2 418 197 in 2021<sup>3</sup> was about 150%. Using United Nations Department of Economic and Social Affairs (UNDESA) data, the proportion of foreign born to locally born in 2020 was about 4.8%, up from about 2.1% of the population in 2000 and more than double.<sup>4</sup> Using the South African census data, the proportion of migrants to home-born in 2021 was about 3.9 percent, contrasting with 2.1 percent in 2001, nearly double.

<sup>1</sup> This is covered in more depth in Alan Hirsch, Framing a study of African migration governance reform—Towards freer movement Migration Governance Reform Program, New South Institute, 2023 <https://nsi.org.za/publications/migration-governance-reform-first-report/>

<sup>2</sup> StatsSA, Census 2001; Primary Tables South Africa p.14 accessed at [https://www.statssa.gov.za/census/census\\_2001/primary\\_tables/RSAPrimary.pdf](https://www.statssa.gov.za/census/census_2001/primary_tables/RSAPrimary.pdf) on 11-10-2023

<sup>3</sup> StatsSA, *Census 2022; South Africa at a Glance*, p.29 [https://census.statssa.gov.za/assets/documents/2022/Census2022\\_SA\\_at\\_a\\_Glance.pdf](https://census.statssa.gov.za/assets/documents/2022/Census2022_SA_at_a_Glance.pdf) accessed 11-10-2022

<sup>4</sup> Calculations by Michael Mutava based on UNDESA tables 2020



While the economy grew in per capita terms for the earlier part of this period, since 2013 per capita income has declined.<sup>5</sup> By per capita income we refer to domestic income divided by the total population, adjusted for inflation. It therefore is no surprise that while in the period until 2007 unemployment was in decline, more recently the unemployment rate has grown almost continuously. At its lowest point in the current century, unemployment stood at about 4 million people or 23% of the labour force, whereas by the third quarter of 2023, unemployment was approaching 8 million, and the rate of unemployment was 31.9%. Employment had grown, but more slowly than the labour force had.<sup>6</sup>

The total labour force in the third quarter of 2023 was about 24 594 000 people, of whom about 16 745 000 were employed and 7 849 000 were unemployed. But this does not tell the whole story. The labour force, in the South African system, is a subset of the population aged between 15 and 64, the 'working age population', which numbered around 40 886 000; more than 40% of the working age population was not actively seeking work, in other words 'were not in the labour force'.<sup>7</sup> The labour force participation rate was less than 60%, which is low by developed country standards but is close to the global median.<sup>8</sup>

Some in South Africa see the high rate of immigration as the cause of the high rate of unemployment. However, it would be more accurate to attribute the high rate of unemployment to the very low growth rate. The growth rate is poor by global standards, poor in comparison to other upper middle-income countries, poor by African standards, and is not the result of immigration. I explore the reasons for this elsewhere, but the causes include the legacy of apartheid and poor policy choices and policy implementation in the more recent period.<sup>9</sup>

While it sometimes is claimed that the immigration of low-skilled workers contributes to the high level of unemployment, two studies have argued that immigration has contributed to net job creation rather than to net unemployment. The ILO found that immigrants likely had a positive effect on South African economic growth, but 'at the sub-national level, the presence of immigrant workers has both negative effects (lower employment rates) and positive effects (higher incomes) for the native-born population.' The World Bank found that 'a one percent increase in the number of immigrants relative to the previous period raises local employment by 0.2 percent.'<sup>10</sup>

<sup>5</sup> World Bank data <https://data.worldbank.org/indicator/NY.GDP.PCAP.KD?locations=ZA> accessed 21-05-23

<sup>6</sup> StatsSA Statistical Release P0211 Quarterly Labour Force Survey Quarter 3: 2023, Table A, p.1 <https://www.statssa.gov.za/publications/P0211/P02113rdQuarter2023.pdf>; and Charles Adams and Derek Yu, 'Labour market trends in South Africa in 2009-2019: A lost decade?' *Stellenbosch Economic Working Papers: WP03/2022*, Table 1, p.6

<sup>7</sup> StatsSA Statistical Release P0211 Quarterly Labour Force Survey Quarter 3: 2023, Table A, p.1

<sup>8</sup> World Bank/ILO data sourced at <https://data.worldbank.org/indicator/SL.TLF.CACT.ZS> on 21-05-23

<sup>9</sup> Bhorat, H., Cassim, A., Hirsch, A. (2014) 'Policy Co-ordination and Growth Traps in a Middle-income Country Setting: The Case of South Africa' WIDER Working Paper 2014/155. Helsinki: UNU-WIDER. <https://doi.org/10.35188/UNU-WIDER/2014/876-6> <https://www.wider.unu.edu/publication/policy-co-ordination-and-growth-traps-middle-income-country-setting>; Alan Hirsch (2020) 'Fatal embrace: How relations between business and government help to explain South Africa's low-growth equilibrium', *South African Journal of International Affairs*, 27:4, 473-492, DOI: 10.1080/10220461.2020.1856180

<sup>10</sup> OECD/ILO (2018), *How Immigrants Contribute to South Africa's Economy*, OECD Publishing, Paris.

<http://dx.doi.org/10.1787/9789264085398-en> p.16; and World Bank, (2018) *Mixed Migration, Forced Displacement AND Job Outcomes in South Africa*, The World Bank Group, Washington, p.5

This paper will not explore whether the ILO and/ or World Bank's calculations are correct. This paper is about immigration policy and implementation, not the impact of immigration. For the vast number of unemployed people, however, the argument that some employment is generated by migrants is meaningless. Populist politicians have found it easy and convenient to use the threat of excessive migration as a tool for political mobilisation.

One pertinent question which arises is why has there been such a high rate of migration to South Africa during a period when its economic performance has been so poor? There are several possible reasons which will be discussed later in the paper. First the historical groundwork needs to be laid, then patterns or categories of migration, then policies and outcomes, after which the political economy issues will be considered.

## 2. Historical evolution of migration and related policies

Some consider South Africa to be 'the cradle of humankind'. This is inspired by archaeological findings in the region of Sterkfontein, north-west of Johannesburg, where antecedents of homo sapiens were found dating back 3.5 million years. Whether the area saw the first humans or that honour goes to East Africa, it is not disputed that people have lived in the region for many millennia. The oldest footprint of a homo sapiens discovered anywhere in the world was found on the southern shore of South Africa and was left about 153 000 years ago.<sup>11</sup>

Early in the first millennium of the modern era, people with farming skills settled in the eastern coastal areas of South Africa and gradually migrated toward inland valleys where they formed long-term settlements. Dense human settlements were established in the eastern South African coastal area and the interior during the first millennium, while hunter-gatherers and migrating pastoralists

had dispersed through Southern Africa much earlier.<sup>12</sup> Ongoing migrations from East Africa moving south continued until the 16th century.<sup>13</sup>

European explorers and traders began to visit the region from the 16th century and a Dutch settlement began in 1652 with the establishment of Cape Town as a 'refreshment centre' for sailors, traders and colonial enforcers sailing between Europe, Africa, and Asia. Almost 6 000 soldiers and sailors stopped off in in Table Bay every year and the Dutch refreshment station soon transformed into a port supplied by free settler farmers. Huguenots fleeing France arrived in the 1680s. By 1700 there were 3000 people settled in the Cape Town region 'of whom 40% were slaves imported from the Indian Ocean regions of modern-day Malaysia, Indonesia, Madagascar, Mauritius and Mozambique.'<sup>14</sup> 'The Cape was a slave economy. Between 1652 and 1808 the Cape (under British rule by the end of this period) imported an estimated 63 000 slaves.'<sup>15</sup> White immigrants continued to arrive including around 4 000 Britons, impoverished in the wake of the Napoleonic wars, who were settled in the Eastern Cape as a buffer against the Mfengu people.

Migration into South Africa accelerated during the last third of the 19th century with the discovery of diamonds and gold in the interior. Many came from Britain to seek their fortunes as part of a pattern of global European migration in the second half of the 19th century. By 1870, 50 000 diggers were working on what were called dry diggings in the diamond fields, of whom 20 000 or so were white and the rest black. As early as 1878, Tsonga men from the Gaza district in Mozambique made up 30% of the workforce on the diamond diggings, and there were also migrants from Basutoland (Lesotho) and Bechuanaland (Botswana), while the largest group of black mineworkers in this early period were Pedi who came from what is now the Limpopo region of South Africa.<sup>16</sup> Many were forced to migrate by the need to pay taxes, after conquest. Some early black migrants to the mining fields tried to compete as proprietors.

<sup>11</sup> Charles Helm and Andrew Carr, 'World's oldest *Homo sapiens* footprint identified on South Africa's Cape south coast', *The Conversation*, 23-03-23, <https://theconversation.com/worlds-oldest-homo-sapiens-footprint-identified-on-south-africas-cape-south-coast-205310> accessed 26-05-23

<sup>12</sup> 'Recent archaeological discoveries have revealed that pigment use, beads, engravings, and sophisticated stone and bone tools were already present in southern Africa 75,000 years ago', d'Erricoa, F, Lucinda Backwell, Paola Villaa, Ilaria Deganog, Jeannette J. Lucejkog, Marion K. Bamford, Thomas F. G. Higham, Maria Perla Colombini, and Peter B. Beaumont, 'Early evidence of San material culture represented by organic artifacts from Border Cave, South Africa' PNAS, 2012

<sup>13</sup> Lyndal Keeton and Stefan Schirmer, 'Migration and State formation in Pre-Colonial South Africa' In Michiel de Haas and Ewout Frankema, *Migration in Africa: Shifting Patterns of Mobility form the 19th to the 21st Century*, Routledge London and New York, p.113-115.

<sup>14</sup> Fourie, Johan, 'The Settlers of South Africa: Expanding Forces of the Economic Frontier', Chapter 7 in Michiel de Haas and Ewout Frankema, *Migration in Africa: Shifting Patterns of Mobility form the 19th to the 21st Century*, Routledge London and New York, p.137

<sup>15</sup> Ibid p.139

<sup>16</sup> Juif, Dacil 'Migration and Stabilisation: Mining Labor in the Belgian Congo, Northern Rhodesia and South Africa', Chapter 10 in Michiel de Haas and Ewout Frankema, *Migration in Africa: Shifting Patterns of Mobility form the 19th to the 21st Century*, Routledge London and New York, pp.203-206

<sup>17</sup> Ibid pp.206-209; Francis Wilson *Labour in the South African Gold Mines 1911-1969*, (African Studies, Series Number 6), Cambridge University Press, 2011 (originally published 1972)

When a recession hit the diamond fields in 1876, wages were cut and many black workers went home. In response to the crisis, the mine owners consolidated into oligopolistic companies which clubbed together to manage their labour relations. The mines became monopsonists through what became the Chamber of Mines. The Chamber managed recruitment and wage negotiations, while mine owners grabbed political power so that they could use poll taxes and the legal system to impel black migrants to work on the mines. This system of repression, which took its political form in segregation and, later, apartheid, was so effective that mine wages for black mineworkers declined over much of the 20th century, while white mineworkers' wages steadily improved, and their share of the labour force steadily declined.<sup>17</sup>

While South Africa was under British colonialism, the system of segregation which later evolved into apartheid was formed.<sup>18</sup> Under British dominion, between 1910 and 1961, apartheid matured, and simultaneously a complex system of racial discrimination between migrants solidified. Black migrants from neighbouring countries, working on the mines, lived in single-sex securitized compounds and had no rights, social, economic, or political. Nor could they ever expect to be granted permanent residence or naturalization. When their contracts ended, they had to return to Lesotho, Mozambique, Malawi or wherever, and neither the mining companies nor the South African state thought they had any legal obligations to them.

The first bilateral labour agreement, for Mozambique, which came into force in 1901 was signed by the Portuguese government and the Chamber of Mines's labour agency WENELA (later renamed TEBA).<sup>19</sup> At the height of the gold mining industry in 1970, there were 370 312 black workers on South Africa's mines of whom 105 169 came from within South Africa's borders. 265 143 came from other Southern African countries, mainly Mozambique, Lesotho and Malawi.<sup>20</sup>

The Admission of Persons to the Union Act of 1913 "empowered the Minister of the Interior to prohibit as immigrants 'any person or class of persons deemed by the Minister on economic grounds ... to be unsuited to the requirements of the Union or any particular Province thereof.'"<sup>21</sup> This law was used by the South African government to prohibit the immigration of people who were not white.<sup>22</sup>

The South African government favoured the immigration of white settlers from Europe. This had been true since the earliest white settlers and continued through most of the 20th century. The South African government was more particular than some other destination countries in seeking skilled white immigrants. Many Europeans seeing a better life and the colonial privileges of whiteness streamed south.<sup>23</sup> Others sought sanctuary from conflict.

After the Second World War and until the end of the 1960s, South Africa was seen as a kind of escape valve for Europe with waves of immigrants from its troubled parts. For example, in the decades after WWII, 8 million Britons emigrated, mostly to Commonwealth countries, including South Africa and Rhodesia. Both colonial governments 'sought to reinforce the racial hierarchy on which their minority regimes depended.'<sup>24</sup>

South Africa encouraged emigration by protestant whites to maintain the character of 'Christian nationalism' first through a quota in 1930 (in terms of the same Admission of Person Act that had banned the immigration of black people) and later through a prohibition in 1937. These laws first indirectly restricted the immigration of non-protestant whites and then explicitly excluded Jews among others.<sup>25</sup> Jews in Eastern Europe and Russia seeking refuge from discrimination fled to South Africa, among other countries, in considerable numbers in the late 19th and early 20th century, and in the 1930s more fled the rise of Nazi power. But, as in many other countries in that period, access to refuge was cut off at a critical moment.

<sup>17</sup> Ibid pp.206-209; Francis Wilson, *Labour in the South African Gold Mines 1911-1969*, (African Studies, Series Number 6), Cambridge University Press, 2011 (originally published 1972)

<sup>18</sup> David Welsh, *The Roots of Segregation: Native Policy in Colonial Natal, 1845-1910*, Oxford University Press, 1971.

<sup>19</sup> Prothero, R. Mansell. "Foreign Migrant Labour for South Africa." *The International Migration Review*, vol. 8, no. 3, 1974, pp. 383-94. JSTOR, <https://doi.org/10.2307/3002372>. Accessed 29 May 2023, p.384.

<sup>20</sup> Juif, Dacil 'Migration and Stabilisation: Mining Labor in the Belgian Congo, Northern Rhodesia and South Africa', Chapter 10 in Michiel de Haas and Ewout Frankema, *Migration in Africa: Shifting Patterns of Mobility from the 19th to the 21st Century*, Routledge London and New York, p.212, table 10.2

<sup>21</sup> John Dugard, *Human Rights and the South African Legal Order*, Princeton University Press, 1978, p.307 Elsewhere this law is referred to as the Immigrants Regulation Act of 1913 see Khangelani Moyo & Christine Botha, 'Refugee Policy as Infrastructure: The Gulf Between Policy Intent and Implementation for Refugees and Asylum Seekers in South Africa', in Pragna Rugunanan and Nomkhosi Xulu-Gama Eds *Migration in Southern Africa IMISCOE Regional Reader*, Springer, 2022

<sup>22</sup> South Africa, 'White Paper on International Migration—July 2017', Department of Home Affairs, p.9

<sup>23</sup> Smith, Jean P., *Settlers at the End of Empire: Race and the Politics of Migration in South Africa, Rhodesia and the United Kingdom*, Manchester University Press, 2022, p. 7

<sup>24</sup> Smith, Jean P., *Settlers at the End of Empire: Race and the Politics of Migration in South Africa, Rhodesia and the United Kingdom*, Manchester University Press, 2022, p. 5

<sup>25</sup> Daniel J. Elazar; Peter Medding *Jewish Community in Frontier Societies: Argentina, Australia, and South Africa*, Holmes & Meier, 1983

In summary, South Africa deployed discriminatory policies favouring the immigration of skilled, preferably protestant whites and did not allow the immigration of blacks. Yet, it effectively maintained what has been called a two-gate policy for migration of black Africans to South Africa, which still exists. While work-seeking migrants from other African countries are largely blocked from entering South Africa legally, especially if they are low-skilled, bilateral labour agreements continue to allow the entry of mineworkers from the region.<sup>26</sup> Successors to the original agreement between the Chamber of Mines and the Portuguese government in 1901, bilateral labour agreements were agreed between South Africa and five neighbours: Mozambique, Lesotho, Eswatini, Malawi and Botswana and remain in force.<sup>27</sup> These allow the temporary, circular migration of mineworkers between those countries and mines in South Africa. Especially in recent decades, the existence of this formal system did not inhibit the influx of many irregular migrants from the region, most of whom, if employed, were absorbed by the services sector in occupations such as security guards and domestic workers. According

to statistics from the ILO, 67% of all migrants employed in South Africa were in the services sector in 2019, with the remainder in 'industry' which includes mining, and in agriculture.<sup>28</sup>

As recently as 2000, of 230 687 mineworkers on South African mines only 99 575, or 43.2 percent, were South African. Large contingents of circulating migrants still came from Mozambique and Lesotho in particular.<sup>29</sup> In the 5 year period to 2012, of the 569 813 mineworkers (now mostly on platinum mines) just under 25 percent of mineworkers on South African mines came from outside South Africa, indicating a major shift in the employment pattern. (Note that mine employment in labour intensive mines fluctuates hugely in relation to commodity prices, and that this was facilitated by the contract labour system.) The two major foreign sources of mine labour remained Lesotho and Mozambique in the period 2008-2012, but there was a marked shift towards the employment of South Africans.<sup>30</sup> In 2018, a Mining Charter signed between the South African government and the Chamber of Mines entrenched a previous commitment to prioritising the employment of South African workers over foreign migrants.<sup>31</sup>



<sup>26</sup> Jonathan Crush, 'Covert Operations: Clandestine Migration, Temporary Work and Immigration Policy in South Africa' Southern African Migration Project, Institute for Democracy in South Africa, 1997, p.8

<sup>27</sup> Interview Sihle

<sup>28</sup> Michael Mutava, *An Analysis of Contemporary Trends and Patterns of Migration in Africa*, New South Institute MIGRA Working Paper Series, 2023, Figure 72. <https://nsi.org.za/publications/analysis-trends-patterns-migration-africa/>

<sup>29</sup> Juif, Dacil 'Migration and Stabilisation: Mining Labor in the Belgian Congo, Northern Rhodesia and South Africa', Chapter 10 in Michiel de Haas and Ewout Frankema, *Migration in Africa: Shifting Patterns of Mobility from the 19th to the 21st Century*, Routledge London and New York, p.212, table 10.2

<sup>30</sup> Ehrlich, R., Montgomery, A., Akugizibwe, P. et al. Public health implications of changing patterns of recruitment into the South African mining industry, 1973–2012: a database analysis. *BMC Public Health* 18, 93 (2018). <https://doi.org/10.1186/s12889-017-4640-x>, Table 5, p.6

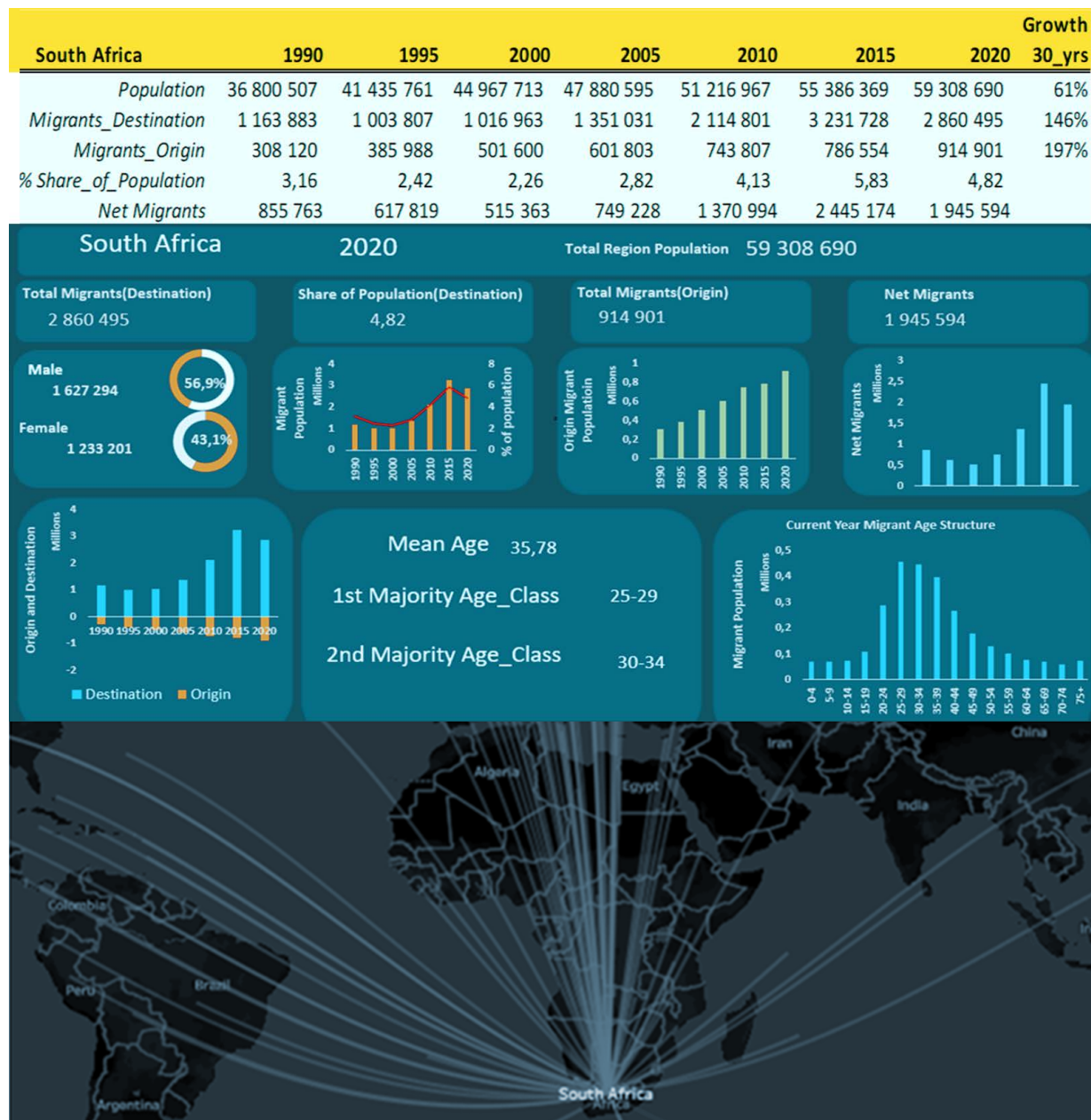
<sup>31</sup> Department of Employment and Labour (South Africa), 'Draft National Labour Policy for South Africa Feb 2022' p.18

### 3. Contemporary South African migration patterns and trends

There has been relatively large-scale African migration into South Africa in recent years outside of the scope of the bilateral labour agreements. South

Africa has the largest number of migrants of all the countries in Africa, but the percentage of migrants of the total population is second highest in Africa.<sup>32</sup>

**Table 1 South Africa Stocks, Population and Migrant to Population Percentage**



Source: Michael Mutava (2023) *An Analysis of Contemporary Trends and Patterns in Migration in Africa*, New South Institute MIGRA Working Paper 2. Calculations based on UNDESA tables 2020

<sup>32</sup> Michael Mutava (2023) *Contemporary Trends and Patterns in Migration in Africa*, New South Institute MIGRA Working Paper 2 calculations based on UNDESA tables 2020

Why was there such a large surge of migrants in the period before and after 2010? A critical component of the surge was the economic crisis in Zimbabwe which peaked in the period around 2008-2009. In 2008 the Zimbabwean inflation rate was estimated to be 79 000 000 000 percent per month.<sup>33</sup> There was also a political crisis, followed by a relatively brief government of national unity. Many Zimbabweans fled to South Africa as its largest neighbour. Between 2004 and 2008 the number of Zimbabweans annually entering South Africa legally, mostly ostensibly on holiday, rocketed from 558 095 to 1 248 043.<sup>34</sup> Zimbabweans continued to stream over the South African border in subsequent years, and it seems probable that many also entered during this period through irregular methods. The fact that these were political and economic refugees leaving because of extremely difficult conditions led the South African government, in agreement with Zimbabwe, to provide them with a series of temporary permits and extensions which allowed them to continue to work and live in South Africa until the end of December 2023. In 2023 there were approximately 178 000 Zimbabweans in South Africa on the special permit, plus their children born in South Africa.<sup>35</sup>

Until 2014, Zimbabweans who had moved to South Africa before or during 2009 because of conditions in Zimbabwe, were permitted to remain under the Dispensation of Zimbabweans Project (DZP) in terms of section 31(2)(b) of the Immigration Act 13 of 2002. In 2014, this was converted to the

Zimbabwe Special Dispensation Permit (ZSP). In 2017, the ZSP was withdrawn and replaced with a Zimbabwean Exemption Permit (ZEP) which allowed the same Zimbabweans to remain in South Africa under special permission until the end of 2021. Towards the end of 2021, South Africa announced that Zimbabweans who lived in South Africa under ZEP regulations would have until the end of 2022 to either apply for regular visas to remain in South Africa or to leave South Africa.<sup>36</sup> This was later extended to June 30, 2023, and subsequently to 31 December 2023.<sup>37</sup> Following an application to the courts and an appeal lost by the Minister of Home Affairs, this was extended to the end of June, 2024.<sup>38</sup>

Figure 2 shows that the age structure of the stock of people in South Africa who were born elsewhere is heavily weighted towards those of working age. The largest group by far are those between the ages of 20 and 49, and this pattern deepened in the period from 2010 onwards. This may reflect that in the Zimbabwean crisis some parents left children at school in Zimbabwe (where schools are more highly regarded than in South Africa) and that people beyond working age felt no compulsion to leave Zimbabwe during its economic crisis. The age structure of migrants also reflects the pervasiveness of contract migrant labour from Mozambique, Lesotho, and other countries. Finally, it would seem to confirm that South Africa is seen as an economic refuge, despite its stagnant economy in recent years.

<sup>33</sup> <https://www.bbc.co.uk/news/business-45523636>

<sup>34</sup> Jonathan Crush and Daniel Tevera, 'Exiting Zimbabwe', Chapter 1 in Jonathan Crush and Daniel Tevera, eds. *Zimbabwe's Exodus: Crisis, Migration, Survival*, SAMP and IDRC, Cape Town Ottawa 2010 Table 1.4, p.8

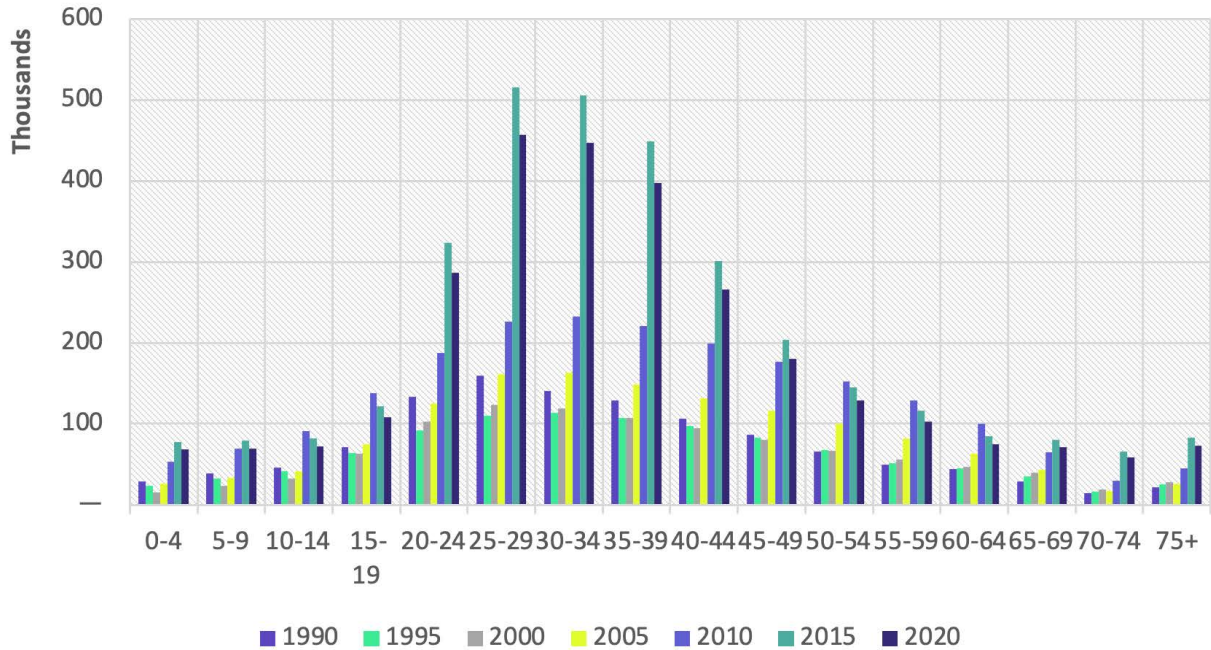
<sup>35</sup> The Helen Suzman Foundation's Heads of Argument, Case No: 32323/22 in The High Court of South Africa Gauteng Division, Pretoria, p.3

<sup>36</sup> The Helen Suzman Foundation's Heads of Argument, Case No: 32323/22 in The High Court of South Africa Gauteng Division, Pretoria

<sup>37</sup> Tariro Washinyira 'Home Affairs extends Zimbabwean Exemption Permits by further six months' *Daily Maverick*, June 8th, <https://www.dailymaverick.co.za/article/2023-06-08-home-affairs-extends-zimbabwean-exemption-permits-by-further-six-months/> accessed 09-06-23

<sup>38</sup> Franny Rabkin, 'Aaron Motsoaledi loses appeal bid on Zimbabwe exemption permits' *Business Live*, 17th October 2023, <https://www.businesslive.co.za/bd/national/2023-10-17-aaron-motsoaledi-loses-appeal-bid-on-zimbabwe-exemption-permits/>

**Figure 1 South Africa Age Structure of Immigrant Population**



Source: Michael Mutava (2023) calculations based on UNDESA tables 2020

Most of South Africa’s immigrants, around 1.85 million, come from the rest of Africa, as Figure 3 shows. Just over 1 million come from the rest of the world. In contrast, the majority of South Africa’s over 900 000 emigrants left the African continent, and only 92 845 emigrated to other countries in Africa.

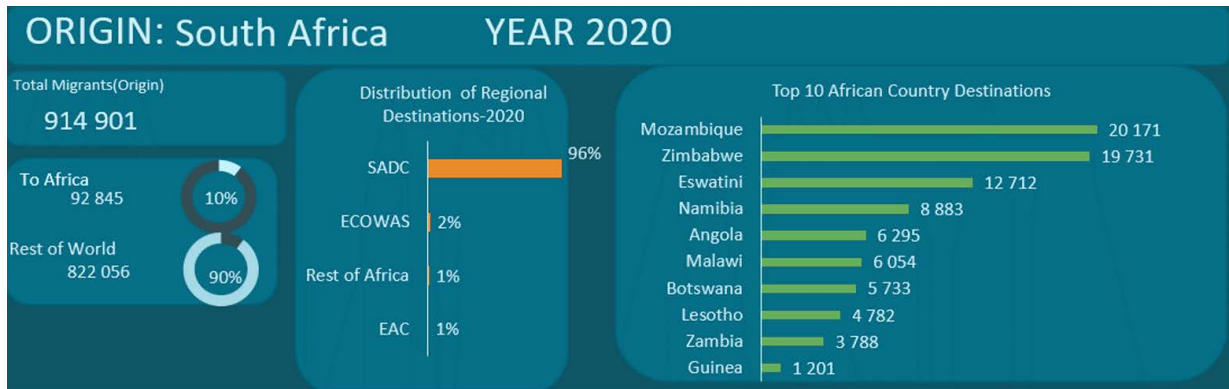
Most South African emigrants head for destinations outside of the African continent and those who do migrate within Africa are mostly found in neighbouring countries, as shown in Figure 4.

**Figure 2 Origin and Destination of South African Migrant Stocks in 2020**

<b>South Africa Immigrants</b>					
	<b>Stock</b>	<b>%</b>	<b>Africa Breakdown</b>	<b>Stock</b>	<b>%</b>
From Rest of World	1,010,078	35%	EAC	50,881	3%
From Africa	1,850,417	65%	ECOWAS	50,964	3%
<b>Total Immigrants</b>	<b>2,860,495</b>	<b>100%</b>	SADC	142,624	8%
			Rest of Africa	1,617,492	87%
			<b>Total Africa</b>	<b>1,861,961</b>	<b>100%</b>
<b>Emigrants</b>					
To Rest of World	822,056	90%	EAC	729	1%
To Africa	92,845	10%	ECOWAS	1,924	2%
<b>Total Emigrants</b>	<b>914,901</b>	<b>100%</b>	SADC	89,667	96%
			Rest of Africa	1,158	1%
			<b>Total Africa</b>	<b>93,478</b>	<b>100%</b>

Source: Michael Mutava (2023) calculations based on UNDESA tables 2020

Figure 3 South Africa as an origin of migrants (stock data)

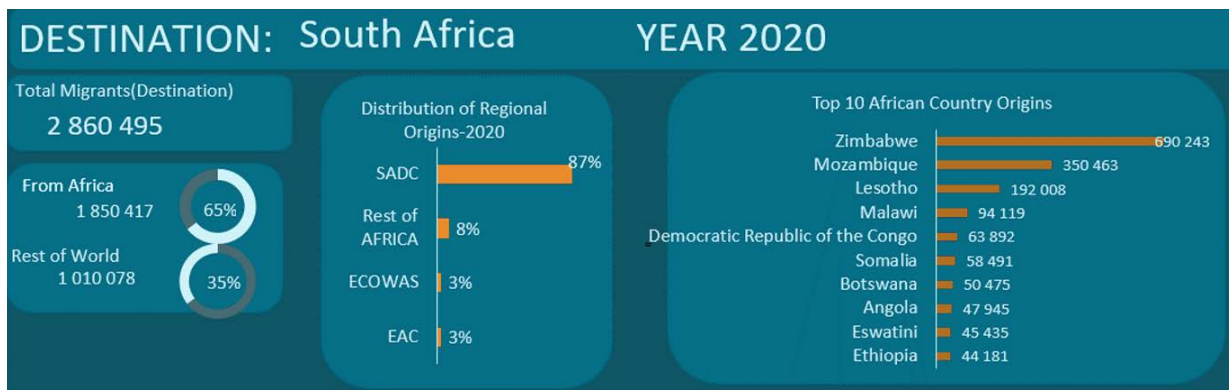


Source: Michael Mutava (2023) aggregations based on UNDESA tables 2020

The largest contingents of immigrants in South Africa come from Zimbabwe, Mozambique, and Lesotho, as Table 4 below shows. The

main African countries of destination for South African migrants are Mozambique, Zimbabwe, Eswatini, and Namibia.

Figure 4 South Africa as a destination for migrants (stock data)



Source: Michael Mutava aggregations based on UNDESA tables 2020

#### 4. Migration policy

##### 4.1 Institutional arrangements

The Department of Home Affairs (DHA) has been the lead department in migration issues in general and has dealt with the drafting of migration policy and legislation, as well as with the administration of border control and documentation verification. It has outsourced most of its front desk visa services to a private company since 2014.<sup>39</sup> The Department of Employment and Labour (DEL) is the custodian of labour migration and in 2021 presented a draft National Labour Migration Policy. The Department of Higher Education and Training (DHET) is responsible for the research work that results in a 'critical skills' approved immigrants list.

The Department of Trade, Industry and Competition (DTIC) is also involved in the determination of critical skills. The chief responsibility for cross-border relationships, also regarding the joint bilateral cross-border commission framework (which accommodates labour migration matters, too), is with the Department of International Relations and Cooperation (DIRCO). Border management itself falls under a new Border Management Authority that falls under the DHA and is intended to coordinate all services that are involved in border management, including customs and security. All the national departments responsible for immigration policy and implementation are members of an inter-ministerial committee which is intended to coordinate immigration policy development and implementation of immigration policy.

<sup>39</sup> South Africa 'Draft National Labour Migration Policy for South Africa', Department of Employment and Labour, South Africa, 2022, p.34

Social partners are also involved, via the National Economic Development and Labour Council (Nedlac). Nedlac is the vehicle by which government, labour, business and community organizations seek to cooperate on economic, labour and development issues and related challenges facing the country. Labour market policy constitutes one important area of Nedlac's work. Private recruitment agencies are voluntarily organized in the Confederation of Associations in the Private Employment Sector (CAPES).<sup>40</sup>

In addition to the executive of government and Parliament, the third official leg of South Africa's organs of sovereignty is the Constitutional Court which heads the court system and plays a considerable role in interpreting laws and measuring them against the constitution. The South African Constitution details the allocation of powers between the various organs of sovereignty—Parliament, the executive, and the Court, and between other organs of state—government departments, and the three spheres of government—national, provincial and local. The constitution contains a strong Bill of Rights. Since its establishment in terms of the new democratic constitution of 1996, the Court has played a role in judgements on various aspects of migration law and administration.

Migration policy is the responsibility of the national government. Historically, provincial governments and municipalities have played a very small role in either policy or implementation. In fact, one study notes that municipalities historically have had a bias against even planning for the impact of migration.<sup>41</sup> After the influx of the past two decades, cities and towns cannot afford to ignore the issue, but this paper will focus on national government as it has the sole constitutional responsibility for immigration policy.

#### **4.2 Immigration policy in democratic South Africa**

After South Africa's first democratic elections in 1994, the vision of the government was 'to reverse racially-based and exploitative laws and integrate South Africa into the SADC region, the African continent and the world.' But, by its own admission,

this process has been protracted.<sup>42</sup> A Green Paper on International Migration was drafted in 1997, followed by a White Paper in 1999, a Refugees Act adopted in 1998, and the first comprehensive Immigration Act in 2002. In the government's own words in a 2017 White Paper, the 2002 Act and its policy framework, which still apply today, were based on rules that 'in practice disadvantage Africans and favour immigrants from Europe and other developed regions over African countries.'<sup>43</sup> In so doing, the laws echo policies in the colonial and apartheid eras.

The 1997 Green Paper, noting that unauthorized immigration was undesirable, linked planned and efficient migration to economic growth but recommended the retention of the sovereign power to control migration. The 1996 Constitution provided a broad framework in the context of which the application of immigration law should respect human rights and administrative justice and should guarantee rights for all people affected by the South Africa state.<sup>44</sup>

The 2002 Immigration Act, (as revised) which replaced the Aliens Control Act of 1991 still applies though further revision is planned. It led to the establishment of an Immigration Services branch of the Department of Home Affairs, removed explicitly discriminatory elements from the law, and established a framework for the implementation of policy. The 2017 White Paper is critical of the 2002 law because on the one hand it is too liberal in not building security capacity into the system, but on the other hand it is too conservative in not locating South Africa as part of the African community of nations. '[T]here is no sense of South Africa being a state situated in SADC, which is one of the eight regional communities recognized by the African Union.'<sup>45</sup> The White Paper further notes a bias in the 2002 law towards people 'with high level skills or capital' and is critical of the deep-rooted restrictions which result in low to mid-skilled workers who work on farms and mines in particular, being forced to migrate under temporary Corporate Work Visas (in terms of the Bilateral labour Agreements).<sup>46</sup> In 2023, the BLAs remain in place and very little in the 2017 White Paper has been implemented. Indeed, the status of the 2017 White Paper was questioned in discussions with South African government officials.<sup>47</sup>

<sup>40</sup> IOM, 'Bilateral labour migration arrangements in two Southern African Development Community corridors', International Organisation for Migration, Geneva 2021, pp.9-10

<sup>41</sup> Loren B. Landau, Aurelia Segatti and Jean Pierre Misago 'Governing Migration & Urbanisation in South African Municipalities: Developing Approaches to Counter Poverty and Social Fragmentation

<sup>42</sup> South Africa, 'White Paper on International Migration—July 2017', Department of Home Affairs, p.10

<sup>43</sup> South Africa, 'White Paper on International Migration—July 2017', Department of Home Affairs, pp.9-10

<sup>44</sup> South Africa, 'White Paper on International Migration—July 2017', Department of Home Affairs, p.10

South Africa, 'White Paper on International Migration—July 2017', Department of Home Affairs, pp.10-11

<sup>45</sup> South Africa, 'White Paper on International Migration—July 2017', Department of Home Affairs, p.4

<sup>46</sup> South Africa, 'White Paper on International Migration—July 2017', Department of Home Affairs, p.4

<sup>47</sup> A senior government official questioned whether or not the 2017 White Paper on Immigration had been approved by Cabinet, but in the preface to the published version it is stated that the White Paper was adopted by Cabinet on 29 March, 2017.

The concern that there is prejudice against African migrants is widely perceived. A business leader interviewed said: 'There seems to be a differing view between immigration from Africa as against immigration from Europe and elsewhere .... when businesses talk to us, they seem to be having more progress in dealing with blockages and so on for people coming from parts of the world outside of Africa, not for those from Africa.'

In several places the White Paper notes the income differences between South Africa and its neighbours and argues that 'the gap in development between South Africa and other SADC states is much larger than differences between states in other regions [of Africa]'.<sup>49</sup> While it has been reluctant to commit to regional or continental free movement of persons programs, South Africa has implemented visa waivers for most of the SADC states and it made special, temporary arrangements for the large number of Zimbabweans and Lesotho citizens 'residing in South Africa irregularly'.<sup>50</sup>

Only two of the SADC states, the DRC and Comoros, do not yet have visa waivers with South Africa. A growing number of African states have visa-free agreements with South Africa including Cape Verde, Benin, Gabon, and Kenya, and an agreement with Ghana is said to be in the pipeline. Long-term multiple entry visas are now available for academics and businesspersons, including traders, and other frequent travellers from countries that require visas, and an e-visa system is promised soon.<sup>51</sup>

There are 12 types of temporary visas available, with two new ones—for business start-ups and remote work visas ('nomad working visas') currently being rolled out. There are also temporary and permanent residence waivers under the Immigration Act, and seven categories of permanent residence, including 'critical skills', refugees, and children or spouse of a permanent resident or South African citizen.<sup>52</sup>

One puzzle regarding migration policy is why the 2017 White Paper, which was adopted by Cabinet, was barely implemented. One interpretation of

the stasis is that in discussions following the white paper, the DHA and DEL agreed to split the issue of labour migration from the rest of immigration policy, leading to a pair of complementary policies.<sup>53</sup> The draft National Labour Migration Policy was published by the DEL in February 2022.

In November 2023 the South African government published a 'Draft White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa' for public consultation.<sup>54</sup> It proposes a rewrite of the laws on citizenship, immigration and refugee protection and an amalgamation of the three laws into one law. The draft law was not presented alongside the draft policy document.

Regarding immigration, some of the main proposals are to tighten border monitoring and security through the new Border Management Agency (BMA), to avoid the immigration of foreigners who will 'adversely impact on existing labour standards and expectation of SA workers', to establish an Immigration Advisory Board (elsewhere in the same document called 'Immigration Board') and to establish a new Immigration Division to add resources for the implementation of policy. These proposals are either already being implemented (as in the BMA), or vague. They do offer value for political rhetoric and could be deployed to defend the government in the general election forthcoming in 2024.<sup>55</sup>

Regarding citizenship, the draft white paper proposes that the national population register should distinguish between citizens and non-citizens and that the requirements for naturalisation to be made more stringent. In the view of the Minister of Home Affairs, it is too easy for foreign nationals and refugees to obtain permanent residence or citizenship and the path to citizenship will become more restrictive.<sup>56</sup>

The proposals for refugees are also exclusionary. They will be dealt with towards the end of the next section of the paper.

<sup>48</sup> CC, Interview, April 2023

<sup>49</sup> South Africa, 'White Paper on International Migration—July 2017', Department of Home Affairs, p.18

<sup>50</sup> South Africa, 'White Paper on International Migration—July 2017', Department of Home Affairs, p.18

<sup>51</sup> Department of Home Affairs, 'SA Perspective on International Migration: facilitation of movement and residency', presentation to UNECA Expert group Meeting, Nairobi, March 30, 2023.

<sup>52</sup> Department of Home Affairs, 'SA Perspective on International Migration: facilitation of movement and residency', presentation to UNECA Expert group Meeting, Nairobi, March 30, 2023 and interview with Home Affairs senior official, April 14, 2023.

<sup>53</sup> Interview with B & J, April 2023.

<sup>54</sup> Department of Home Affairs, 'Draft White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa' [https://www.gov.za/sites/default/files/gcis\\_document/202311/49690gon4061.pdf](https://www.gov.za/sites/default/files/gcis_document/202311/49690gon4061.pdf)

<sup>55</sup> Natasha Marrian, 'Is South Africa headed for an Immigration Election?' *Financial Mail*, November 23, 2023, <https://www.businesslive.co.za/fm/features/2023-11-16-is-south-africa-heading-for-an-immigration-election/>

<sup>56</sup> Department of Home Affairs, 'Draft White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa'

### 4.3 Refugees and asylum seekers

Between 1913 and 1991, there was no legal policy framework to address refugees and asylum seekers. So, the several hundred thousand Mozambican refugees of civil war who lived in South Africa from around 1980, were treated as illegal immigrants when they could not be located under migrant worker legislation. Eventually, after sustained pressure from the OAU and the UNHCR, 'a basic status determination process was adapted from the Passport Control Instruction No. 20 of 1993 contained in the Aliens' Control Act of 1991 to retrospectively recognise the status of the Mozambican refugees for a repatriation program.'<sup>57</sup> With the repatriation program not working well, in 1997 Mozambicans who had entered South Africa before 1992 were offered amnesty. Contract mineworkers who had been working for a period of at least 10 years, as well as citizens from the Southern African Development Community (SADC) region who could offer proof that they had been residing in South Africa for a minimum of 5 years, were also offered amnesty.<sup>58</sup> This also allowed for the regularisation of South Africans who had been living in neighbouring countries and adopted their nationality when they returned to South Africa after the democratic transition.

In 1998 South Africa adopted a Refugees Act. State legal advisors tried to make the law more restrictive, but, under pressure of lobbying, the law conformed to the international refugee protection mandates of the OAU and the UN, whose treaties on refugees South Africa had adopted three years earlier. The 1998 law included:

'progressive legislation for refugees and asylum seekers, extending the right to freedom of movement, basic human rights and security and self-sufficiency including education, employment

and other basic services such as healthcare, and rejected the practice of encampment....

The Act of 1998 contained the guiding principles protecting refugees and asylum seekers against refoulement, prosecution for irregular entry into the country, or deportation unless there was a threat to national security or "public order".<sup>59</sup>

The South African government sought to avoid establishing refugee camps, and established refugee offices in five major cities. In response to the sudden influx of Zimbabweans that began in 2008, a reception centre was also set up in Musina, near the main border crossing with Zimbabwe. When the Refugee Act was revised in 2008, it included the replacement of an "immigration permit" with "permanent resident status" after 5 years from the date when asylum was granted if there is reasonable certainty that the individual will remain a refugee indefinitely.<sup>60</sup> However, the policy of avoiding encampment, combined with a lack of integration or accommodation strategies for refugees, contributed to the perception among poor South Africans in cities and towns that immigrants were competing for social resources and jobs. While the establishment of a refugee reception office in Musina encouraged Zimbabweans to apply for refugee status, South Africa came to blame Zimbabweans for abusing refugee status and began to backtrack on its progressive refugee policies.<sup>61</sup>

The year 2009 saw the highest number of asylum applications – 223,324.<sup>62</sup> With a slight decline in 2010 with 180,637 new applications—the impact of the Zimbabwe shock was palpable.<sup>63</sup> Between 2009 and 2019, approximately 336,000 people received special dispensation permits. The Lesotho permit regime, known as the Lesotho Special Permit, was replaced by the Lesotho Exemption Permit (LEP) in 2019, while the Zimbabwean permit evolved into the Zimbabwe Exemption Permit (ZEP).

<sup>57</sup> Khangelani Moyo & Christine Botha, 'Refugee Policy as Infrastructure: The Gulf Between Policy Intent and Implementation for Refugees and Asylum Seekers in South Africa', in Pragna Rugunanan and Nomkhosi Xulu-Gama Eds *Migration in Southern Africa IMISCOE Regional Reader*, Springer, 2022, p.79

<sup>58</sup> Khangelani Moyo & Christine Botha, 'Refugee Policy as Infrastructure: The Gulf Between Policy Intent and Implementation for Refugees and Asylum Seekers in South Africa', in Pragna Rugunanan and Nomkhosi Xulu-Gama Eds *Migration in Southern Africa IMISCOE Regional Reader*, Springer, 2022, p.80

<sup>59</sup> Khangelani Moyo & Christine Botha, 'Refugee Policy as Infrastructure: The Gulf Between Policy Intent and Implementation for Refugees and Asylum Seekers in South Africa', in Pragna Rugunanan and Nomkhosi Xulu-Gama Eds *Migration in Southern Africa IMISCOE Regional Reader*, Springer, 2022, p.80

<sup>60</sup> Khangelani Moyo & Christine Botha, 'Refugee Policy as Infrastructure: The Gulf Between Policy Intent and Implementation for Refugees and Asylum Seekers in South Africa', in Pragna Rugunanan and Nomkhosi Xulu-Gama Eds *Migration in Southern Africa IMISCOE Regional Reader*, Springer, 2022, p.81

<sup>61</sup> Jonathan Crush, Caroline Skinner and Manal Stulgaitis, 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' Southern African Migration Programme, Waterloo, Ontario, 2017, p.10

<sup>62</sup> Khangelani Moyo & Christine Botha, 'Refugee Policy as Infrastructure: The Gulf Between Policy Intent and Implementation for Refugees and Asylum Seekers in South Africa', in Pragna Rugunanan and Nomkhosi Xulu-Gama Eds *Migration in Southern Africa IMISCOE Regional Reader*, Springer, 2022, p.82

<sup>63</sup> IOM, 'Bilateral labour migration arrangements in two Southern African Development Community corridors', International Organisation for Migration, Geneva 2021, p.9

One seemingly perverse step in response to the growing numbers of refugees was to close three of South Africa's refugee reception centres, in Cape Town, Johannesburg and Port Elizabeth, and to retain only three, in Pretoria, Musina and Durban. The tenor of the 2017 White Paper on Immigration Policy reflects the reaction to the impact of the flood of refugees and the social tension it contributed to.

In the face of legal challenges, and in a conscious shift away from the human rights principles that informed the 1998 Act, the Refugees Act was amended in 2017 to empower the Director General of Home Affairs to open or close refugee reception centres, and to require categories of refugees to apply at specified places. They had to apply within five days of entry or be subjected to severe penalties. One of the side-effects of narrowing access and raising the penalties has been to encourage the bribery of Home Affairs officials to allow applicants to jump queues and get certification. The right of asylum seekers to work and prospective rights to permanent residence were also reversed by the 2017 revision to the law.<sup>64</sup>

The shift away from an inclusive, human rights-based policy is even more evident in the proposal on refugees contained in the new Draft White Paper on Citizenship, Immigration and Refugee Protection.<sup>65</sup> The refugee policy has several elements including those mentioned here. Firstly, it is proposed to tighten up the regulation of asylum seeking and refugees—the stated intention is not to allow those without a genuine claim to get asylum status or to get pending status. It seems that the application for asylum would have to be made at the port of entry on arrival, and the decision would be made at that point. People who enter without declaring their intention to apply for refugee status, or who claim they were about to apply, who under current jurisprudence may receive pending asylum status, would not be allowed to apply for asylum and could be considered illegal immigrants.

Next it is proposed that South Africa exit key international conventions and re-enter them with reservations regarding sensitive areas such as rights to employment, education, social services and the principle of non-refoulement. The draft white paper argues that South Africa made a 'serious mistake' entering the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees without reservations in sensitive areas. It lists a host of countries from the UK and the USA to Zambia and Zimbabwe which applied reservations

on entry to the Convention and Protocol.

It argues that the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa qualifies the principle of non-refoulement, excluding people who entered countries illegally and that the OAU Convention (carried through to the African Union) should guide South Africa's approach. Non-refoulement is the principle that a county cannot send back refugees to a place which they fled if they face danger on return.

These changes in law would negate the South African jurisprudence which currently allows people to enter the country irregularly and not apply for refugees' status until they are detected, and still be considered to be pending asylum. The explicit purpose of this approach is also to distinguish between economic migrants and refugees. In addition, immigration authorities would apply the 'first safe country principle' for refugees—if asylum seekers passed through another safe country on their way to South Africa they could be sent back to that country.

This quite rigid approach would entail swift and fair decision-making systems at the points of entry and would require a dedicated immigration court to deal with appeals. The policy also requires of the law, the regulations and their application, that asylum must not be seen as a path to citizenship for adults or children born in SA.

The policy notes that implementation would require the strengthening of the quality of personnel in DHA, the staffing of an Immigration Court, efficient border posts, better prepared Refugee Status Determination Refugee Appeals Authority officers, and an effective Standing Committee for Refugee Affairs.

There are several reasons why this white paper might be seen as a combination of wishful thinking and political bluster. Firstly, it does not explain how the corruption and incompetence now rife in the permitting section of the DHA would be eliminated and how all the institutions, existing, emerging, and entirely new would be staffed with sufficient competent people. We note below that attempts so far to strengthen the institutions have largely failed. And, what makes the proposals even less credible is that the draft white paper entirely ignores and does not even mention the important report prepared under former Cabinet Secretary, Dr Cassius Lubisi, on how to repair and strengthen the permitting systems of the Department of Home Affairs. The Lubisi report is also described below.

<sup>64</sup> Jonathan Crush, Caroline Skinner and Manal Stulgaitis, 'Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy' Southern African Migration Programme, Waterloo, Ontario, 2017, pp.7-8

<sup>65</sup> Department of Home Affairs, 'Draft White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa' [https://www.gov.za/sites/default/files/gcis\\_document/202311/49690gon4061.pdf](https://www.gov.za/sites/default/files/gcis_document/202311/49690gon4061.pdf)

#### 4.4 Labour migration and employment policy

The Immigration Act of 2002 (Act 13) amended in 2004 by the Immigration Amendment Act (IAA) (Act 19) conceives of most labour migrants, including skilled migrants, as temporary residents or “sojourners.” Several different permit categories have been designed to facilitate the entry of “sojourners.” These include (a) four different categories of work permit (quota, general, exceptional skills and intra-company transfer), (b) corporate permits; (c) business permits; and (d) study and exchange permits, which allow limited work activity under highly restrictive conditions.<sup>66</sup> As already mentioned, new permits are planned for business start-ups and one for remote work visas (‘nomad working visas’).<sup>67</sup>

##### 4.4.1 Low skilled and circular migrating labour

South Africa has bilateral labour migration agreements (BLAs) with five countries in the region, mainly to provide a framework for the recruitment of temporary migrant workers for the mines in a practice stretching back well over 100 years. The current treaties were negotiated in the apartheid era and retained in the democratic era due to lobbying by the mine owners, through the Chamber of Mines.<sup>68</sup> One was concluded in the 1960s (Malawi) and three in the 1970s (Botswana, Eswatini and Lesotho). The remaining agreement, with Mozambique, was concluded in 1964, but had been preceded by a range of earlier agreements with the Portuguese colonial government regulating the provision of temporary labour from Mozambique, initially dating back to the nineteenth century.<sup>69</sup> The agreements cover recruitment, contracts, remittances and deferred pay exempting contract workers from being taxed in South Africa, documentation, unemployment insurance, length of agreements and permits. Labour offices established in South Africa may be responsible, inter alia, for “protecting the interests of workers,” registration of undocumented workers, transfer of money, providing information on conditions of employment, and consulting on the repatriation of destitute and sick workers.<sup>70</sup>

However, as the ‘Draft National Labour Migration Policy for South Africa’ noted in 2022, ‘The BLAs are

not aligned with good practice standards emanating from international guidelines, among others due to their inordinate deferred pay arrangements and weak protection of migrant workers’ rights and interests.’ South Africa has not ratified any of the key international conventions which apply to the rights and conditions of work of migrant workers.<sup>71</sup>

The Draft National Labour Migration Policy (NLMP) proposes that the BLAs should be modernised to conform to international standards when applied to relationships within the Southern Africa region and beyond, and they should be aligned with regional integration goals, as also argued in the 2017 White Paper on International Migration Policy. The NLMP also proposes sectoral BLAs, concluded by individual South African government departments, for example to procure professional migrants ‘to fill particular employment needs in a certain sector’ coordinated by the National Department of Employment and Labour (DEL).<sup>72</sup>

Corporate Permits, provided for in the 2002 Immigration Act, are “block” or “group” permit allocated to an employer rather than individual employees. Any industry, including mines, farms and construction companies, are eligible for such permits. In granting a corporate permit, Home Affairs must first consult with the DEL and DTIC to establish the number of foreign employees who should be hired under the permit. Management of the permit, including allocation of individual permits, becomes the responsibility of the employer.<sup>73</sup> In practice, brokers or agents which specialise in labour permits manage the acquisition and implementation of corporate permits for large numbers of expatriate employees.

While the corporate permit is convenient and provides a degree of certainty for employers and employees, usually over several years, there are concerns among employers about the process. The DEL has, apparently, been advising the DHA to reduce dependence on foreign contract workers in the agricultural sector, but employers and labour brokers complain that the DHA does not consult with the Department of Agriculture, Land Reform and Rural Development when advising on farmworkers.<sup>74</sup> This contrasts with regular consultation with the DTIC on employment in manufacturing and services.

<sup>66</sup> Crush and Williams p.49

<sup>67</sup> Department of Home Affairs, ‘SA Perspective on International Migration: facilitation of movement and residency’, presentation to UNECA Expert group Meeting, Nairobi, March 30, 2023 and interview with Home Affairs senior official, April 14, 2023.

<sup>68</sup> Crush and Williams p.55

<sup>69</sup> IOM, ‘Bilateral labour migration arrangements in two Southern African Development Community corridors’, International Organisation for Migration, Geneva 2021, p.7

<sup>70</sup> Crush and Williams pp.54-55

<sup>71</sup> South Africa ‘Draft National Labour Migration Policy for South Africa’, Department of Employment and Labour, South Africa, 2022, p.44

<sup>72</sup> South Africa ‘Draft National Labour Migration Policy for South Africa’, Department of Employment and Labour, South Africa, 2022, pp.31-33

<sup>73</sup> Crush and Williams p.51

<sup>74</sup> Interview with two labour consultants April 12, 2023

#### 4.4.2 Skilled employment policies

Recent policy documents, although not yet finalised in law, reflect the position of the South African government on migration and employment. In the 2022 draft National Labour Migration Policy (NLMP), the DEL set out its views on migration and employment policy. Some of these policies were included in a bill called the National Labour Migration Policy and Employment Services Amendment Bill. Both had been long in the pipeline.

The NLMP embraces the 2012 National Development Plan's<sup>75</sup> proposal to adopt "a more open approach to skilled immigration to expand the supply of high skills in the short term, in a manner that obviates displacement of South Africans."<sup>76</sup> In 2014 a Critical Skills List was introduced, by the Minister for Home Affairs, which targets people with certain skills and occupations for facilitated immigration and permanent residence.<sup>77</sup> Though the 2017 White Paper on International Migration had proposed replacing the critical skills list with the introduction of a points-based system, where education and skills would be quantified and would not be limited to certain narrowly identified skills or occupations, the critical skills list system has been retained and a revised list was issued in February 2022, followed by a further revision in October 2023.<sup>78</sup>

The compilation of the latest critical skills list took place after an investigation into skills shortages commissioned by the Department of Higher Education and Training (DHET). An opaque process apparently including four departments (Home Affairs, Employment and Labour, Higher Education and Training, and Trade, Industry and Competition) the Minister of Home Affairs resulted in a list in February 2022. The list diverged in certain significant respects from the recommendations coming out of the DHET reports, but it was not clear how those decisions to deviate were made. After anomalies in the list were pointed out to

him, the Minister of Home Affairs expanded the list to include a wider range of health occupations and health sector educators. Thirty-nine health professions and specialities were included among the 140 skills categories such as certain managerial, engineering, science, commercial, and information technology categories.

There will never be consensus about such a list which inevitably includes some skills that are neither critical nor scarce and excludes some which are both critical and scarce. There is no real-time labour market information system, and the government prefers not to rely on market signals. One specific concern about the list raised in an interview with a labour consultant is that skills are defined in a very formal way; this results in, for example, key skilled agricultural workers who don't have formal qualifications not being included in the list.<sup>79</sup> There were at least two amendments to the list issued in 2022 after various representations, demonstrating that the list is a product both of research and opaque lobbying and negotiations.

The commitment to a points system contained in the 2017 immigration white paper was intended to address the weaknesses of a list system. The points system would reward the level of education, skills and experience of a candidate for immigration rather than their presence on a specific list. It would assume that highly skilled people of working age would not migrate to a country if there were no suitable employment opportunities. As the 2017 White Paper put it: 'A points-based system, sometimes combined with a critical skills list or quotas, is used to respond flexibly to demand in other countries to facilitate the proactive recruitment and retention of migrants with skills.... The advantage of a points -based system is that it is transparent and can be used strategically and flexibly in response to changing situations and needs.'<sup>80</sup> The concern with transparency reflects an unvoiced fear of the link between opaque systems and corruption and is intended to take decision-making out of the hands of administrative officials.

<sup>75</sup> <https://www.gov.za/issues/national-development-plan-2030> accessed 08-06-23

<sup>76</sup> South Africa 'Draft National Labour Migration Policy for South Africa', Department of Employment and Labour, South Africa, 2022, p.60

<sup>77</sup> South Africa, 'Skills or Qualifications Determined to be Critical for the Republic of South Africa in Relation to an Application for Critical Skills Visa or Permanent Residence Permit' *Government Gazette* 37716, 03 June 2014

<sup>78</sup> Department of Home Affairs, Critical Skills List, Government Gazette No. 49402, 03 October 2023) <http://www.dha.gov.za/index.php/notices/1512-critical-skills-list-checklist> accessed 20-11-23

<sup>79</sup> Interview B & J, April, 2023

<sup>80</sup> South Africa, 'White Paper on International Migration—July 2017', Department of Home Affairs, p.46

In the NMLP, the DEL indicated that it ‘concurs fully with the DHA that “stronger enforcement of labour and migration laws is critical to ensure that citizens are not disadvantaged by employers paying economic migrants lower wages.” Irregular migration is likely to decrease if employers’ compliance with immigration and labour laws increases. In other words, the focus should be on unscrupulous employers rather than individual migrants, because it is their hiring practices which act as a pull factor for irregular migration (DHA, 2017:57). It planned to achieve this by making employers responsible for ensuring that there is no discrimination.<sup>81</sup> A new mechanism, to ensure that employers responsible for ensuring that migrants were legal and were not discriminated against, was to combine the roles of labour inspectors and immigration inspectors and to have them share the responsibility for immigration and employment policy at the workplace. It also included a new distinction in the law between citizens and permanent residents by removing the reference to permanent residents from the preferential grouping.<sup>82</sup>

An amendment to the Employment Services Act currently under discussion requires employers to ‘ascertain that the foreign national is entitled to work in the Republic’ and ‘satisfy themselves that there are no persons in the Republic other than foreign Nationals, with the requisite skills to fill the vacancy, before recruiting a foreign national to occupy such a vacancy’. Employers are also required to ensure that the conditions of employment which apply to the foreign national are not inferior to those which would be provided for a South African citizen, and a ‘skills transfer plan’ is also required.<sup>83</sup>

In addition, it is planned to introduce quotas for the employment of foreign nationals. Quotas, signalled in the same draft law issued on behalf of the Minister of Employment and Labour, would indicate a maximum proportion or number (this is not clear) of foreign nationals by sector and/or occupational

category and could be determined at a nation or regional level. The Minister would act after consulting with the Employment Services Board, which is a high-level board representing labour market stakeholders. Small employers (undefined) could be exempt, and where foreign nationals with critical skills were required, the quota could be exceeded.

<sup>84</sup> A further proposal is that labour inspectors could be empowered to enforce the Immigration Act, which could be in contravention of Article 3 of the Labour Inspection Convention of the ILO according to some critics of the Bill.<sup>85</sup> The absence of an explanation of the processes by which quotas would be determined and revised from time to time is a concern—the process is sensitive and critical.

In a country with unemployment considerably exceeding 30 percent it is understandable that nationals would be preferred for employment opportunities. In the first quarter of 2023, young people aged 15-24 and 25-34 had the highest unemployment rates, at 62.1% and 40.7% respectively. Around 3.7 million (36,1%) out of 10.2 million young people aged 15-24 were not in employment, education, or training.<sup>86</sup> Yet, these proposals do represent a shift towards a nationalist, protectionist stance regarding employment policy and may conflict with the Constitution or interpretations thereof.<sup>87</sup>

The process of issuing visas and work permits has also been a matter of great concern for business and tourism operators. A senior business leader complained: ‘from a process and regulatory point of view, they make it extremely difficult. So, for visa processing and permits, that’s becoming increasingly difficult. And a lot of employers are expressing frustration about that. Not just [employees] from Africa...’ Efforts have been made to respond to these concerns. ‘So, there has been some progress, but it’s progress on the basis of accelerating issues every now and then, such a scurry of activity, but they do not deal with impact [of visa backlogs] systemically.’<sup>88</sup>

<sup>81</sup> South Africa ‘Draft National Labour Migration Policy for South Africa’, Department of Employment and Labour, South Africa, 2022, p.61, emphasis in the NLMP.

<sup>82</sup> South Africa ‘Employment Services Act, No 4, of 2014 Draft National Labour Migration Policy and Employment Services Amendment Bill’ *Government Gazette*, No. 45962, 28 February 2022, 2 (h) (iii) p.10

<sup>83</sup> South Africa ‘Employment Services Act, No 4, of 2014 Draft National Labour Migration Policy and Employment Services Amendment Bill’ *Government Gazette*, No. 45962, 28 February 2022, 12A. (2) p.13

<sup>84</sup> South Africa ‘Employment Services Act, No 4, of 2014 Draft National Labour Migration Policy and Employment Services Amendment Bill’ *Government Gazette*, No. 45962, 28 February 2022, 12B. p.14-16

<sup>85</sup> Mulesa Lumina, Yvonne Erasmus and Sharon Ekambaram ‘The impact of South Africa’s employment law reform on the right to work of non-citizens’, Oxford Human Rights Hub’, Oct 5, 2022, <https://ohrh.law.ox.ac.uk/the-impact-of-south-africas-employment-law-reform-on-the-right-to-work-of-non-citizens/> accessed 09-06-23

<sup>86</sup> Statistics South Africa, *Quarterly Labour Force Survey (QLFS)*, Quarter 1 of 2023, 16 May 2023

<sup>87</sup> Mulesa Lumina, Yvonne Erasmus and Sharon Ekambaram ‘The impact of South Africa’s employment law reform on the right to work of non-citizens’, Oxford Human Rights Hub’, Oct 5, 2022, <https://ohrh.law.ox.ac.uk/the-impact-of-south-africas-employment-law-reform-on-the-right-to-work-of-non-citizens/> accessed 09-06-23

<sup>88</sup> Interview senior business leader 11 April 2023

#### 4.5 Governance issues in the immigration system

An authority on migration has noted that in response to rising numbers of irregular migrants, and 'where most industrial democracies have to struggle to provide adequate employment for existing populations of low skilled citizens.... Appearing to crack down on illegal immigration through deporting undocumented migrants, by building walls and stricter border checks is increasingly regarded by governments as essential for safeguarding support and winning elections.' The same text notes that several countries around the world have carried out quite draconian measures such as 'mass expulsions of foreign workers ... building fences and walls along borders ... severe punishments for illegal entrants ... and sanctions against employers.' South Africa is included in the small group of countries identified with the use of many of these measures.<sup>89</sup>

South Africa may well be an archetypal case of a country which finds it almost impossible to implement migration policy because the circumstances are difficult, and the policies are too often unrealistic. South Africa has battled to manage the implementation of immigration policies effectively. As political pressure grew and the regulatory environment tightened, the inability of the Department of Home Affairs to manage the situation became more and more evident.

The primary concern is the efficiency and predictability of the services to issue visas and permits. Regarding the issuance of business visas for example, a senior business representative says '...from a process and regulatory point of view, they make it extremely difficult. So, for visa processing and processing, that's becoming increasingly difficult. And a lot of employers are expressing frustration about that.'<sup>90</sup> Shortages of staff at frontline services such as ports of entry and DHA public facing offices are also concerns.

In 2021, the Minister of Home Affairs, Dr Aaron Motsoaledi, who had been lauded as health

minister when the fight against HIV/AIDS in South Africa turned the corner, frustrated by the poor performance of his home affairs department, appointed a ministerial committee to investigate the mishandling of the system of permitting for visas, permanent residence, and naturalization. This was in response to a public outcry sparked by the discovery that fraudster pastor Shepherd Bushiri and his wife Mary had been granted permanent residence and South African citizenship even though they had no right to either. The terms of reference were to investigate the implementation of the permit system, in terms of the Immigration Act, between 2004 and 2020. Strikingly, the terms of reference mentioned, among other concerns, 'foreign pastors and prophets' for investigation.<sup>91</sup>

The investigation came about after 14 members of the permit section of the department had signed a petition demanding that the Counter-Corruption Unit should cease investigating 'their errors'. The need to reform the system was evident and the committee was appointed, led by the former Secretary of Cabinet and Director General of the Presidency, Dr Cassius Lubisi. Lubisi had served throughout the notorious Presidency of Jacob Zuma but emerged unscathed by any rumour of corruption or questionable behaviour. He was joined on the committee by a small but expert group of people, some with experience and skills in forensic investigation.

The headline finding was that 36 647 applications for visas, permits or status over the 16-year period under investigation used fraudulent documentation. Of these, 880 were approved and 288 were pending. 4 160 of the fraudulent applications were first rejected, and then accepted after reconsideration. Countries most highly represented in respect of the origin of the fraudulent applicants were Nigeria, Pakistan, Bangladesh, and India.<sup>92</sup> The fact that, in the administration of the permit system, 'all applications were manually processed, finalized and approved with minimal to no electronic capability' is equally notable. The lack of capabilities in the department is clearly shown in these findings.<sup>93</sup>

<sup>89</sup> Hein de Haas, Stephen Castles and Mark Miller, *The Age of Migration*, 6th edition, 2020, p.363

<sup>90</sup> Interview senior business organisation leader, Johannesburg, 11 April 2023

<sup>91</sup> South Africa, Department of Home Affairs, 'Report of the Review by the Ministerial Committee on the Issuance of Permits and Visas' Ministry of Home Affairs, 10 June, 2022, p.29

<sup>92</sup> South Africa, Department of Home Affairs, 'Report of the Review by the Ministerial Committee on the Issuance of Permits and Visas' Ministry of Home Affairs, 10 June, 2022 p.21

<sup>93</sup> South Africa, Department of Home Affairs, 'Report of the Review by the Ministerial Committee on the Issuance of Permits and Visas' Ministry of Home Affairs, 10 June, 2022, p.31

An earlier reform was to centralise the approval process in head office, in Pretoria, while the documents were still collected in the provinces. Another was to remove the function of the DHA in approving immigration practitioners (fixers not lawyers), but this did not diminish the activities of these intermediaries. After experiencing the huge demands of the FIFA World Cup in 2010, and the unprecedented challenge of dealing with the Zimbabwean exodus of the period shortly before and after 2008, the DHA proposed several other reforms including the personal appearance of applicants and the use of biometric identification. It appointed a front-end service provider, VFS, which was required to establish 11 visa application centres in various cities and towns. The VFS centres were now the single channel for all the front-end activities of permit processing, but the decision-making processes remained in Pretoria at the DHA.<sup>93</sup>

None of these reforms noticeably reduced inefficiency, the degree of incompetence or corruption. The committee found that the systems that had been replaced were still being used illegally from time to time and that the outcomes of such activities were suspicious. It found cases where applications were processed in zero days, and it found visa expiry dates issued beyond the legal limit.<sup>94</sup> The committee found an extremely high level of disjuncture between the naturalization database of the DHA and the population registration database which falls under the same department. It found that the V-list which designates undesirable immigrants was ‘fatally flawed due to incomplete and missing crucial data’. It found cases where files had been inserted illegally into the information system—a process that would require ‘a highly skilled IT user with administrator rights to execute’.<sup>95</sup> Even the introduction of the VFS at the front end of the application process did not inhibit various forms of bribery and corruption, made easier by the fact that decision making had been centralized in the DHA in Pretoria in 2009. The ministerial committee found multiple cases of ‘forum-shopping’ by applicants—the same

applicant putting through applications for a range of unrelated permits in the hope that one of them would get through. They found that the DHA did not have systems that could identify multiple applications by the same person, so the committee of enquiry had to develop such a system to link such applications, even if spellings were slightly wrong or passport numbers differed. They called this system the Single Entity Retrieval Tool, or SERT.<sup>97</sup>

The complete catalogue of serious issues in the system found by the ministerial committee, which includes many instances of incompetence and at least as many instances of corruption and fraud, is too long to include in this paper. When the Helen Suzman Foundation and others contested the end-date of the Zimbabwean Exemption Permit, one of the strongest grounds in its case was the argument that backlogs and inefficiencies in the DHA would prevent the department from being able to deal with permit applications by ZEP holders fairly and expeditiously.<sup>98</sup>

There are many instances of incompetence, fraud, bribery, or deception by officials described and widely reported, beyond the committee’s report. In a recent recorded incident, the Minister of Home Affairs told the Constitutional Court that he had not been aware of documents filed in his name in response to an application to the court to enforce a decision the court had made six years previously. In 2017 the court had required the DHA to amend legislation concerning the detention of suspected irregular migrants within three years.<sup>99</sup>

The court had ordered that sections 34 1(b) and (d) of the Immigration Act were invalid because they authorised the administrative detention of undocumented foreigners for the purposes of deportation. These sections allow detention to be extended from 30 days to 90 days or a maximum of 120 days. When the department had not acted to amend the law three years after the original decision, Lawyers for Human Rights (LHR) took the case to court. Documents submitted to the court in the minister’s name had tried to explain the delay.

<sup>93</sup> South Africa, Department of Home Affairs, ‘Report of the Review by the Ministerial Committee on the Issuance of Permits and Visas’ Ministry of Home Affairs, 10 June, 2022, p.31

<sup>94</sup> South Africa, Department of Home Affairs, ‘Report of the Review by the Ministerial Committee on the Issuance of Permits and Visas’ Ministry of Home Affairs, 10 June, 2022, p.32

<sup>95</sup> South Africa, Department of Home Affairs, ‘Report of the Review by the Ministerial Committee on the Issuance of Permits and Visas’ Ministry of Home Affairs, 10 June, 2022, p.42

<sup>96</sup> South Africa, Department of Home Affairs, ‘Report of the Review by the Ministerial Committee on the Issuance of Permits and Visas’ Ministry of Home Affairs, 10 June, 2022, p.53

<sup>97</sup> South Africa, Department of Home Affairs, ‘Report of the Review by the Ministerial Committee on the Issuance of Permits and Visas’ Ministry of Home Affairs, 10 June, 2022, p.38

<sup>98</sup> Helen Suzman Foundation, ‘The Helen Suzman Foundation’s Heads of Argument’ in the matter between the HSF and the Minister and Director General of Home Affairs, and the President of the Republic of South Africa, Case No. 32323/22 in the High Court of South Africa, Gauteng Division, Pretoria.

<sup>99</sup> There are many examples in the media, many of which I have collected, but I have chosen to present one example.

After reading an article in the Daily Maverick, an electronic newspaper, on the failure of the DHA to amend the law to reduce the period of detention and about a counter-application submitted by the department, the minister describes how he 'was shaking with anger as I knew that I had not instructed Mr Mike Bofilatos SC to launch any application in the Constitutional Court on my behalf and the DHA.' Minister Motsoaledi said government officials had "a cavalier and contemptuous attitude towards court orders.... When I took the reins as minister of home affairs, I found this attitude prevalent in the DHA." Motsoaledi said he took steps on October 2020 to develop a "communications protocol" which deals with compliance with court orders and the consequences for the failure to comply. "The deputy directors-general are required to ensure that court orders are complied with." Motsoaledi was unaware that the department had launched an ex parte application at the Gauteng Division of the High Court and the ConCourt, failing to include LHR, which had brought the initial case to court. He launched an investigation into how the application had been authorised and revoked the mandate of the State Attorney and the advocate tasked with the brief.<sup>100</sup>

"I would like to take this opportunity to extend my sincere apology to the Chief Justice, all judges of the high court and Constitutional Court, the President of South Africa, minister of finance, LHR [Lawyers for Human Rights] and its legal representatives and the people of South Africa for the mess created by officials of the Department of Home Affairs," said Minister Motsoaledi.<sup>101</sup> The Department of Home Affairs is dysfunctional, beyond the law, and plagued with deception. This case also demonstrates prejudice within the institution, which has its roots in the Apartheid era, against migrants from elsewhere in Africa. The admission by the minister that he doesn't know or have control of the department after four years at the helm suggests that any reforms of the institution which have been attempted have had little effect. A senior representative of the business community,

when asked whether the permitting and visa issuing system had improved since the Lubisi report simply replied 'No.'<sup>102</sup> When asked whether the permitting system, the location of much of the corruption, fraud and incompetence, had improved since the suspension and in some cases conviction of the officials responsible Lubisi was doubtful. The austerity policies of the government were preventing the DHA from hiring sufficient new staff to take the place of those who had been removed, processes were still too slow, and backlogs had not shrunk. Under the current austerity regime, departments cannot replace employees below senior management level after they leave for whatever reason. Reflecting this, the DHA issued another extension for applicants for long-term visas or waivers on 30 March 2023. 'The decision means that long term visa or waiver applicants are permitted to legally remain in the country until 31 December 2023, pending the finalisation of their applications.'<sup>103</sup>

## 5. Other reforms and policy proposals

### 5.1 Reforms on the table

There are several initiatives for reform in immigration policy and practice in South Africa.

The first derives from the report of the ministerial committee investigation which made two main proposals. The DHA should further interrogate 25 separate areas of process dysfunction and fraud and it should mandate:

'an independent multidisciplinary task team of a firm of attorneys, forensic investigators, analysts, and system experts to fully investigate all the anomalies, fraudulent applications, corrupt activities, systemic irregularities and maladministration and to make appropriate recommendation for criminal prosecution, disciplinary action, removal from the system, recalling of visas, and the tracing of offending foreign nationals for deportation.'<sup>104</sup>

<sup>100</sup> Dianne Hawker, 'Minister Motsoaledi apologises to South Africa for 'the mess created' by his department' *Daily Maverick*, 15-06-23, <https://www.dailymaverick.co.za/article/2023-06-15-minister-motsoaledi-apologises-to-south-africa-for-the-mess-created-by-his-department/> accessed 15-06-23

<sup>101</sup> Dianne Hawker, 'Minister Motsoaledi apologises to South Africa for 'the mess created' by his department' *Daily Maverick*, 15-06-23, <https://www.dailymaverick.co.za/article/2023-06-15-minister-motsoaledi-apologises-to-south-africa-for-the-mess-created-by-his-department/> accessed 15-06-23

<sup>102</sup> Interview BUSA official, 11 April, 2023.

<sup>103</sup> DHA, Media Statement 30 March, 2023, 'The Department of Home Affairs extends the blanket concession to 31 December 2023 for long-term visa or waiver applicants who are awaiting outcomes of their applications' <http://www.dha.gov.za/index.php/statements-speeches/1661-the-department-of-home-affairs-extends-the-blanket-concession-to-31-december-2023-for-long-term-visa-or-waiver-applicants-who-are-awaiting-outcomes-of-their-applications> accessed 18 July 2023

<sup>104</sup> South Africa, Department of Home Affairs, 'Report of the Review by the Ministerial Committee on the Issuance of Permits and Visas' Ministry of Home Affairs, 10 June, 2022, p.235

<sup>105</sup> South Africa, Department of Home Affairs, 'Report of the Review by the Ministerial Committee on the Issuance of Permits and Visas' Ministry of Home Affairs, 10 June, 2022, p.240

The other recommendation was that the fragmented set of systems and databases be integrated into a single interoperable system and that an artificial intelligence capability be introduced to recognize suspicious patterns in the data.<sup>105</sup> It is not evident whether or not progress has been made yet in respect of either project.

Related to these proposed reforms is the idea put forward by a senior DHA official that the key to the successful elimination of corruption would be to remove as far as possible any discretion, and therefore decision-making powers from junior and mid-level officials in government—the example he mentioned was the introduction of a points system for skilled migrants.

Another set of reforms derives from the establishment of the Border Management Agency which entails the transfer of 'five key operational functions of immigration, health, agriculture, environmental and access control at the 72 ports of entry across the Country. These functions emanated from 4 Government Departments, namely Department of Home Affairs (DHA), Department of Agriculture, Land Reform & Rural Development (DALRRD), Department of Health (DOH) & Department of Forestry, Fisheries & the Environment (DFFE).<sup>106</sup> Staff were to be reallocated to the agency too, away from their government departments. This is intended to facilitate the integration of services for greater efficiency, but as implementation began only in April 2023, at a few pilot sites, it is too soon to judge the impact of the reform.

Operation Vulindlela is a group of analytical advisors within the office of President Ramaphosa that seeks to drive critical reforms in key areas. The five areas of focus have included electricity, freight transport, water and sanitation, digital access, and 'a visa regime that attracts skills and grows tourism'. ANC struggle hero and former director general of Home Affairs, Mavuso Msimang, led the visa project which produced an analytical report

and recommendations.<sup>107</sup> Key areas of intervention identified by Operation Vulindlela have been:

- Streamline documentation requirements and adjudication processes;
- Modernise IT systems and introduce automation;
- Expand human resources capacity in the Immigration Services Branch;
- Upgrade the Employment Services South Africa database (for jobseekers);
- Update the Critical Skills List more frequently;
- Introduce a trusted employer scheme (to speed up verification processes).

The recommended actions overlap in several respects with recommendations of the Ministerial Committee. While Operation Vulindlela has graded all these actions as completed (the decisions have been made and implementation is under way), several will take several years before their success or otherwise can be assessed. It is not yet clear that, considering South Africa's currently austere budgetary circumstances, funds have been allocated or will be allocated in sufficient quantity to address these issues soon.

## 5.2 New policies for migration and employment?

The government is in the process of reforming its approach to immigration policy and implementation across a broad front. According to senior officials, one of the reasons that the 2017 White Paper was not implemented in most respects was that the inter-ministerial committee on immigration had decided that a clearer distinction was needed between the DHA as the custodian of immigration policy and operations and the DEL as the department responsible for employment policy and operations. The DEL acted relatively quickly producing the National Labour Migration Policy for South Africa draft white paper<sup>108</sup> and the Employment Services Amendment bill, both of which have already been discussed in this paper, but neither of which have yet been approved or enacted.

<sup>105</sup> South Africa, Department of Home Affairs, 'Report of the Review by the Ministerial Committee on the Issuance of Permits and Visas' Ministry of Home Affairs, 10 June, 2022, p.240

<sup>106</sup> JOINT STATEMENT: Border Management Authority (BMA) & Public Service Co-ordinating Bargaining Council (PSCBC) Details, Published: 12 April 2023 <http://www.dha.gov.za/index.php/statements-speeches/1664-joint-statement-border-management-authority-bma-public-service-co-ordinating-bargaining-council-pscbc> accessed July 18, 2023

<sup>107</sup> Operation Vulindlela, 'Report of the Work Visa Review', National Treasury, Foreword dated 2022, published 2023.

<sup>108</sup> South Africa 'Draft National Labour Migration Policy for South Africa', Department of Employment and Labour, South Africa, 2022

There are numerous proposals in the National Labour Migration Policy published by the Minister of Employment and Labour in February 2022, but two of its recommendations were cherry-picked for the draft Employment Services amendment bill published in the same month. They were both designed to discourage the employment of migrants. The first was the proposal to impose quotas, mentioned earlier. Quotas would allow a maximum proportion of migrants (not South Africans or permanent residents) to work in different parts of the economy, determined sector by sector by the Minister in consultation with the Employment Services Board. The ESB is a small group of senior stakeholders in the sector appointed by the Minister, and when interviewed some do not appear to have a clear idea of on what basis these quotas would be established.<sup>110</sup>

Some stakeholders were doubtful that the quotas would or could be properly monitored and controlled.<sup>111</sup> A labour leader noted, with reservations, that unions generally supported the idea of quotas: ‘...we welcomed the discussion. We wouldn’t necessarily be married to the numbers, but I think we welcome the discussion with an attempt to say what can be the right balance, you know, because you can’t just close the borders....’<sup>112</sup> But he doubted that the government had the enforcement capability to implement quotas. Business had a similar view: ‘... it makes sense to look at it in sectors and I think in principle business isn’t objecting to the idea of quotas. In some ways, the principle makes sense. But you’ve got to be based on credible labour market data.’<sup>113</sup> None interviewed believed that the process of determining quotas had been clarified yet.

The second element of the bill was the extension of employment standards across all sectors with the intention of preventing the exploitation of irregular or otherwise vulnerable migrant workers. Again, some stakeholders were sceptical about the ability or commitment of the labour inspectorate to enforce such a law.<sup>114</sup>

Worker representatives are gloomy regarding the maintenance of legislated employment standards and the protection of local workers against illegal undercutting through the employment of undocumented migrants. A senior trade unionist interviewed complained of several dimensions of corruption in the governance of migrants. Workers bribe officials to get documentation and employers bribe officials to overlook transgressions of the Basic Conditions of Employment Act and other regulations. While he was heartened at the suspensions and prosecutions, he was sceptical that simply increasing the number of labour inspectors would change anything.<sup>115</sup> A business consultant on labour and immigration echoed these views: ‘the borders are so porous.... They kind of lose track of [migrant workers] and it goes back to that whole issue of inspection and enforcement. And I don’t believe it’s about number of inspectors....’<sup>116</sup>

The DHA was expected, in addition to the establishment of the Border Management Authority, to publish a new immigration draft white paper, and proposed legislative amendments. A senior official in DHA mentioned that the department intended to return to the proposals for a points system for their new white paper which was expected to be published in mid-2023. The concern was to remove discretion and to simplify processes, which would also reduce the chances of corruption in the system, and to provide greater flexibility so that the labour market could respond to market signals. In the absence of reliable real-time labour market information to inform a responsive critical skills list, this was a more sensible approach.

In November 2023 when the Draft White Paper on Citizenship, Immigration and Refugee Protection was released it contained no reference to replacement of the critical skills list system with a points system.<sup>117</sup> There was no explanation of this decision in the draft white paper, but it is possible that the ruling party felt that a points system would be too difficult to explain to voters in the forthcoming national elections.

<sup>110</sup> Interview with business representative on the Employment Services Board, 13 April 2023.

<sup>111</sup> Interviews, April 2023.

<sup>112</sup> Interview labour leader, 11 April, 2023

<sup>113</sup> Interview business leader, 13 April, 2023

<sup>114</sup> Interview senior trade union official, 11 April 2023

<sup>115</sup> Interview, Senior Cosatu OFFICIAL, 11 April 2023.

<sup>116</sup> Interview, Labour Consultant, 13 April 2023

<sup>117</sup> Department of Home Affairs, ‘Draft White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa’ [https://www.gov.za/sites/default/files/gcis\\_document/202311/49690gon4061.pdf](https://www.gov.za/sites/default/files/gcis_document/202311/49690gon4061.pdf)

### 5.3 Labour Migration Regulation reform

Though it does not seem to be a priority in the South African government, there is reference in the National Labour Migration white paper to the need to improve the bilateral labour (migration<sup>118</sup>) agreements, or BLAs, with five labour supply countries in the region:

The DEL will work closely with DIRCO to review and amend existing bilateral labour agreements with SADC Member States with a view to aligning them to international standards of protection, as promoted in ILO Recommendation No. 86 Annex and to minimum standards favourable to workers<sup>119</sup>

An official in the DEL talked about using the Kenya-Qatar BLA as a possible model. This would improve the very protectionist form of the current BLAs which have not been fundamentally improved since the 1960s and 70s when they were drafted but would still fall far short of the standards embodied in agreements such as the Canadian Temporary Foreign Worker Program which allows multi-year contracts and extensive rights while the employee is in Canada.<sup>120</sup> Indeed the Kenya-Qatar agreement has come under criticism in the Kenya parliament and in a report of the ILO.<sup>121</sup> The Southern Africa office of the ILO saw the more modern Uganda-Saudi Arabia BLA as an appropriate model for South Africa to consider—this has more protections for workers in regard to salary deductions and issues of welfare and rights.<sup>122</sup> So, while rising to the level of the Kenya agreement would be an improvement on the BLAs for foreign temporary contract workers in South Africa, it would not be a hugely ambitious improvement.

Temporary migrant workers from other countries working in South Africa are recruited under large volume corporate visa arrangements which are provided for in section 21 of the 2002 Immigration

Act.<sup>123</sup> These visas can remain valid for several years and allow multiple entry and exit. While the Act requires employers to set aside funds, a financial guarantee, to protect the migrants and pay for their return home, if necessary, it provides no additional rights or protections for the contracted workers. The regulations require that at least 60% of the employees of the firms concerned must be South Africans or permanent residents.<sup>124</sup> So, it appears that South Africa already has a quota system.

Nevertheless, a senior business leader notes that what South Africa has is not ultimately viable. '... we need policies that balance the interest of employers, local and foreign workers and the countries from which the migrants are coming that balance the interests of all—we don't have policies which work in this way.'<sup>125</sup>

## 6. Regional engagements and role of International Organisations

### 6.1 SADC treaties on the movement of persons

The Southern African Development Community was formed in 1992. SADC marked a shift from what began as an anticolonial alliance of decolonised Southern African states in 1980, known as the Southern African Development Coordinating Conference, towards a regional structure predicated on developmental cooperation. SADC currently has 16 members. In 1995 SADC adopted a Draft Protocol on the Free Movement of People. It targeted the introduction of free regional movement for SADC citizens over a 10-year period. The protocol would confer on SADC citizens the right to free entry, residence, and establishment of oneself in the territory of another member state. Due to resistance to the formulation of the draft protocol from South Africa, Namibia, and Botswana (the richest countries per capita in the region) it was never implemented.<sup>126</sup>

<sup>118</sup> These agreements are sometime referred to as bilateral labour agreements (BLAs) and at other times as bilateral labour migration agreements (BLMAs).

<sup>119</sup> South Africa 'Draft National Labour Migration Policy for South Africa', Department of Employment and Labour, South Africa, 2022, p.97

<sup>120</sup> <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers.html> accessed 20 July 2023

<sup>121</sup> IOM, *Bilateral Labour Migration Agreements (BLMAs) Rapid Assessment of the Southern Corridor (Ethiopia - Kenya - Tanzania - South Africa)*, IOM, Nairobi, 2021 noted in regard to the Kenya Qatar BLMA, 'There are not sufficient mechanisms to ensure adherence to migrant protections and correct implementation of provisions within the BLAs' p.28 and The Star, Kenya 16 November, 2022, <https://www.the-star.co.ke/news/realtime/2022-11-16-kenya-reviewing-labour-agreements-with-gulf-countries/> accessed 20 July 2023

<sup>122</sup> <https://www.monitor.co.ug/uganda/news/national/inside-uganda-saudi-labour-export-deal-4180368> accessed 20 July 2023

<sup>123</sup> Immigration Act 2002, Section 20

<sup>124</sup> Immigration Regulations Section 21(2) courtesy of Bev Jahn, senior labour consultant.

<sup>125</sup> Interview senior business leader 11 April 2023

<sup>126</sup> C.C. Nshimbi and L. Fioramonti, 'The Will to Integrate: South Africa's Responses to Regional Migration from the SADC Region,' *African Development Review*, 26, (2014): 56.

South Africa's position was bluntly stated by then Home Affairs Minister Mangosuthu Buthelezi: 'South Africa is faced with another threat and that is the SADC ideology of free movement of people, free trade and freedom to choose where you live or work. Free movement of people spells disaster for our country.'<sup>127</sup>

The irony of South Africa's position was that its wealth had been built in significant part by migrant workers from surrounding countries who had never been allowed to settle.<sup>128</sup> Similar to the apartheid period, South Africa continued to rely on bilateral treaties with its neighbours rather than subordinating itself to a regional treaty.<sup>129</sup>

South Africa, as the regional powerhouse, exercises its hegemony in resisting multilateral freer movement protocols where it would have to give up considerable sovereignty, often supported by other relatively wealthy countries including Botswana and Namibia, and sometimes by other neighbouring states that are relatively dependent on South Africa. Economically, South Africa dominates SADC with nearly 60% of regional GDP. Angola is next at around 18%.<sup>130</sup> Botswana, Namibia, and especially Lesotho and Eswatini, are dependent on revenue from the Southern African Customs Union which is collected by the South African Revenue Service. Its formula provides a subsidy from South Africa to the other members of the customs union.<sup>131</sup>

In 2005, the 1995 draft protocol was counterposed with a Protocol on the Facilitation of the Movement of People which was signed by 13 states but only ratified by six. The Facilitation Protocol addressed 'facilitation of movement' in contrast to the 'free movement of persons'. It aims to progressively eliminate obstacles to the movement of SADC citizens within the territories

of member states. It provides SADC citizens visa-free entry into second SADC countries, for lawful purposes and for a maximum period of three months, and in keeping with the laws of the member state they are entering.<sup>132</sup> Unlike the earlier SADC Free Movement Protocol, the Facilitation Protocol made visa-free travel, residence and establishment rights subject to domestic legislation, and encouraged member states to develop bilateral agreements for the free movement of persons. It promotes the prevalence of sovereignty and indicates a preference for security management through bilateral agreements and national laws. As only six SADC members—Botswana, Lesotho, Mozambique, South Africa, Eswatini, and Zambia—have ratified the Facilitation Protocol it is not in force because it has not reached the required SADC minimum of two-thirds of ratifications.<sup>133</sup>

## 6.2 The African Union, the IOM and the ILO

The African Economic Community Treaty, commonly known as the Abuja Treaty, came into force in 1994. Article 4(2)(i) of that treaty provides for the free movement of persons, rights of residence, and rights of establishment by Africans across the borders of AU member states. The Constitutive Act of the African Union (AU) in 2001 carried over the mandate from the OAU, and in 2006 in Bangui, a Migration Policy Framework for Africa was endorsed by AU members – this framework also included the right to gainful employment across African borders. The African Union Free Movement of Persons protocol was adopted at the annual summit of the African Union in Addis Ababa, in January 2018. The protocol was signed by 32 countries but, in more than five years since its 'adoption', only four countries have ratified the treaty.<sup>134</sup>

<sup>127</sup> V.T. Amadi, 'Facilitating Interregional Trade through the Movement of People in the Southern African Development Community' (LLD Thesis, University of the Western Cape, 2019), p.111

<sup>128</sup> J. Oucho and J. Crush, 'Contra Free Movement: South Africa and the SADC Migration Protocols,' *Africa Today*, 48, no. 3 (2001): 139–58

<sup>129</sup> C.C. Nshimbi and L. Fioramonti, 'The Will to Integrate: South Africa's Responses to Regional Migration from the SADC Region,' *African Development Review*, 26, (2014), p.60

<sup>130</sup> African Development Bank, *Southern Africa Economic Outlook 2019*, (Abidjan: AfDB, 2019), 4.

<sup>131</sup> T. Chidede, *Revenue sharing in the Southern African Customs Union (SACU)* TralacBlog, 2018 <https://www.tralac.org/blog/article/13808-revenue-sharing-in-the-southern-africancustoms-union-sacu.html>

<sup>132</sup> C.C. Nshimbi and L. Fioramonti, 'The Will to Integrate: South Africa's Responses to Regional Migration from the SADC Region,' *African Development Review*, 26, (2014), p.60

<sup>133</sup> V.T. Amadi, 'Facilitating Interregional Trade through the Movement of People in the Southern African Development Community' (LLD Thesis, University of the Western Cape, 2019), p.142

<sup>134</sup> Alan Hirsch (2021): 'The African Union's Free Movement of Persons Protocol: Why has it faltered and how can its objectives be achieved?', *South African Journal of International Affairs*, DOI: 10.1080/10220461.2021.200778

A South African Department of Home Affairs memorandum found online sets out the South African position against signing or ratifying the protocol. It indicates that its stance is in accordance with the SADC position that the AU FMP Protocol can only be implemented when certain conditions are met:

...Implementation of the free movement of persons and the Africa Passport are complex and should be informed by the following preconditions:

- (a) existence of peace, security and stability in the continent;
- (b) convergence amongst countries with a view to reduce economic imbalances between Member States;
- (c) phased approach to free movement of persons;
- (d) effective civil registration systems;
- (e) reliable movement control systems;
- (f) machine readable passports compliant to international standards;
- (g) bilateral return agreements;
- (h) African Union legal instruments on extradition;
- (i) African Union legal instrument on legal mutual assistance;
- (j) African Union framework on African Passport and its relationship with free movement of persons;
- (k) interface of Movement Control systems with INTERPOL (red notice system) and individual Member States prohibition/undesirable person's lists and the UN warning lists; and
- (l) compatibility of ICT systems at Ports of Entries to facilitate exchange of information.<sup>135</sup>

The document notes that the South Africa cabinet adopted this 'SADC Common Position'.

A critical reading of this position notes that while a) and b) are unrealistic ideals and c) is already the case in the AU FMP Protocol, the remaining 'preconditions' articulate the concern for suitable migration management systems that have preoccupied other regional FMP initiatives in Africa.

The memorandum also reports that, in an AU member state meeting in Accra before the 2018 summit, there was broader discomfort about the AU Commission view that both the FMP Protocol and the FMP Roadmap were to be adopted at a summit of the AU. South Africa was supported in opposing the simultaneous endorsement of the roadmap, an implementation plan 'which would come into effect immediately in member states after adoption', by Egypt, Tunisia, Algeria, Kenya, and Uganda.<sup>136</sup>

South Africa had submitted through its embassy in Accra a semi-formal note proposing the inclusion of 'enablers or preconditions' in phase one of the implementation plan. The memo claims that South Africa was supported by Egypt and Algeria in arguing that 'it was imperative to enhance civil registration, establish integrated border management systems, enter into bilateral return agreements and strengthen law enforcement at a national level before the right of entry and abolition of visas could be implemented'.<sup>137</sup>

While South Africa abstained from participating in the FMP Protocol, it continues to participate in AU discussions regarding the freer movement of persons. Interviews with key South African stakeholders suggest that the business community and the trade unions have not opposed, and appear to support, the government's reluctance to participate in multilateral treaties on the movement of persons.

The International Organisation for Migration (IOM) and the International Labour Organisation (ILO) try to encourage migration policy reform and regional cooperation for migration within the region. The IOM holds an annual consultative multi-stakeholder meeting under the auspices of 'The Migration Dialogue for Southern Africa' (MIDSA) which may improve mutual understanding in the region but has not achieved much concretely recently, according to its website.<sup>139</sup> The ILO has a four-year EU-funded program called Southern Africa Migration Management (SAMM) Project which ends in December 2023. In South Africa one of its main activities has been educational—to educate communities about the facts of migration and to discourage the othering of migrants. While this is

<sup>135</sup> South Africa, Department of Home Affairs, 'South African Position on the Implementation of the African Union (AU) Agenda 2063 as it Relates to Migration, Regional Integration and Africa Passport,' 2017 [https://pmg.org.za/files/171128BREFILING\\_NOTES.docx](https://pmg.org.za/files/171128BREFILING_NOTES.docx) accessed 23/06/20 p.3-4

<sup>136</sup> South Africa, Department of Home Affairs, 'South African Position on the Implementation of the African Union (AU) Agenda 2063 as it Relates to Migration, Regional Integration and Africa Passport,' 2017 [https://pmg.org.za/files/171128BREFILING\\_NOTES.docx](https://pmg.org.za/files/171128BREFILING_NOTES.docx) accessed 23/06/20, p.6

<sup>137</sup> South Africa, Department of Home Affairs, 'South African Position on the Implementation of the African Union (AU) Agenda 2063 as it Relates to Migration, Regional Integration and Africa Passport,' 2017 [https://pmg.org.za/files/171128BREFILING\\_NOTES.docx](https://pmg.org.za/files/171128BREFILING_NOTES.docx) accessed 23-06-2020, p.7

<sup>138</sup> Interviews Johannesburg and Pretoria, April 2023.

<sup>139</sup> <https://www.iom.int/migration-dialogue-southern-africa-midsa> accessed 22-07-23 and interview in Pretoria 14-04-23

an impressive initiative, its impact is limited.<sup>140</sup> Both organisations have had some significant influence on policy documents of the South African government through providing research that supports policy processes. Two examples are the 2017 White Paper on International Immigration and the 2022 draft paper on 'National Labour Migration Policy'.<sup>141</sup>

The UNHCR also has expertise on migration but is mainly concerned with ensuring that asylum seekers and refugees are treated fairly. Its Southern Africa office, serving nine countries in the region, is in Pretoria. The UNHCR recently reported that the nine countries together host approximately 260,521 people of concern to UNHCR, and that South Africa hosts most of them, 250,250.<sup>142</sup>

## 7. Reflections on policy and implementation

In this section of the paper we apply a filter for understanding migration policy in practice suggested by de Haas and colleagues. A 'discursive gap' is a gap between political rhetoric and actual policy, an 'implementation gap' is the gap between policy and practice, and an 'effectiveness gap' is the gap between practice and expected outcomes. Political parties and governments often make promises about immigration which they are unable to keep and perhaps unwilling to keep due to the likely negative economic consequences of drastic measures. The 'gap' filter helps to separate reality from wishful thinking and false promises.

### 7.1 Discursive gap

The gap between rhetoric and policy on migration is wide in South Africa, as it is in many other countries in these times.<sup>144</sup> In South Africa's case this is fortunate. Political leaders and even senior government officials have made public statements that exhibit hostility to foreigners, especially foreign Africans. We will discuss the views expressed by elites in more detail below. Fortunately, policies have mostly been more moderate.

Populist opposition groupings have stoked the fires of anti-foreigner sentiment to win support. One disturbing example was the countrywide campaign

of burning of long-distance trucks driven by non-South Africans on highways which was apparently the initiative of a truckdrivers' association, supporters of former president Zuma, and the xenophobic civic grouping Operation Dlodula. According to a crime intelligence report leaked to journalists and not denied, 'South African drivers were let go, while foreign drivers' trucks were burnt'. The report also read: 'The movement demands that government remove all foreign national truck drivers from the road freight industry with immediate effect'. The truck drivers also demanded a 15% wage increase.<sup>145</sup> This was the anniversary of a wave of anti-foreigner violence that hit the country in July 2021, and was also seen to be driven, in part, by populist politicians.

Extremist views are not reflected in the policies of government, which have already been outlined above. Instead, there is a degree of ambivalence in government policy. The 2017 White Paper on International Migration and the 2022 draft policy paper ('green paper') on Labour Migration have strong commitments to human rights and fairness, often reflecting international treaties and the influence of international organisations such as the ILO and the IOM, but also contain some policies that are strongly protectionist of legal residents or, more narrowly, citizens. These policies have drifted from a strong human rights orientation, true in many policies in the first decade or so of government, towards a stance more protective of citizens and the resources of the state.

### 7.2 Implementation gap

The gap between policies and implementation is very large. Many of the key elements of the 2017 white paper have never been implemented to the point that some government officials seem to think that the white paper was not adopted by the cabinet as policy, whereas it was on 29 March 2017. The National Policy on Labour Migration which was gazetted in February 2022 has not been finally endorsed by cabinet and the legislation that accompanied it has not yet been finalised by parliament.<sup>146</sup> While the Department of Home Affairs conducted its investigations into corruption quite promptly, the thorough report produced by

<sup>141</sup> South Africa, 'White Paper on International Migration—July 2017', Department of Home Affairs South Africa and 'Draft National Labour Migration Policy for South Africa', Department of Employment and Labour, South Africa, 2022

<sup>142</sup> UNHCR South Africa, <https://www.unhcr.org/countries/south-africa> accessed 05-08-2023

<sup>143</sup> Hein de Haas et al, 'International Migration: Trends, Determinants, and Policy Effects' *Population and Development Review* 45(4): 885–922 (December 2019), Figure 6, p. 902

<sup>144</sup> Alan Hirsch, 'Zimbabwean migrants: South Africa's anti-immigrant sentiments are hindering policy reform' *The Conversation Africa*, 21 July 2023 <https://theconversation.com/zimbabwean-migrants-south-africas-anti-immigrant-sentiments-are-hindering-policy-reform-209884> accessed 25 July 2023

<sup>145</sup> Abram Mashego, Sizwe Sama Yende and Dimakatso Leshoro 'Burning trucks linked to Zuma and Operation Dudula' *City Press*, 16 July, 2023.

<sup>146</sup> This is clearly stated in the foreword to the white paper by the Minister South Africa, 'White Paper on International Migration—July 2017', Department of Home Affairs, p.iii

the Lubisi committee has evidently not yet been implemented. The new Draft White Paper on Citizenship, Immigration and Refugee Protection was not accompanied by legislation that would make its often quite vague proposals clearer and it does not refer to the proposals of the Lubisi investigation.<sup>147</sup> The implementation gap reflects both capacity issues in government stemming from human resource and financial deficits, and the difficult political arena where migration-related policies are vulnerable to attack by parties, factions, and many others. Court papers submitted by the Minister of Home Affairs regarding a legal action by the department he had not authorised shows that the capacity of the DHA to have a coherent policy and implementation process remains extremely limited.

### **7.3 Efficacy gap**

The efficacy gap is mixed. Some key processes such as improvements in the quality of the passport and its management processes, and in the implementation of the border management authority, as well as progress on reform of the visa system and bilateral agreements show that some reforms are possible. The impact of these reforms on travel-related industries seems to be beneficial and co-operation on improving visas for key personnel for business is making progress. But in general, the efficacy gap is large. Immigration levels have been high, labour inspectors are evidently largely not doing their jobs in maintaining labour standards and inhibiting the employment of irregular migrants, and the perception of experts and stakeholders, as discussed earlier, is that permitting systems have not improved. Backlogs in permitting processes are enormous, and the Minister of Home Affairs has frequently had to grant temporary waivers for permit applicants awaiting responses.

## **8. Perceptions and Rhetoric**

### **8.1 Perceptions/attitudes of citizens**

Analysis from the 2021 round of the South African Social Attitudes Survey by the Human Sciences

Research Council found that most South Africans see foreign nationals as a threat.<sup>148</sup> In three surveys conducted between 1999 and 2010, the South African Migration Project found that the majority of South Africans interviewed consistently held negative attitudes towards foreign migrants. More than half of the South Africans surveyed associated migrants with crime, using up resources such as housing, electricity and water, and with taking jobs. Negative attitudes were particularly directed towards 'irregular migrants', refugees and asylum seekers, and migrants from the rest of Africa. South African attitudes towards economic migrants was more negative than all others in a range of other developing countries and developed countries identified.<sup>149</sup> A survey undertaken in 2015 found that the acceptance of migrants was greater for South Africans than the world average.<sup>150</sup> Another survey found that of 36 African countries surveyed, South Africans ranked 23 out of 36 countries in their attitude towards free movement within the region (southern Africa in the case of South Africa).<sup>151</sup> Overall, surveys suggest that South African attitudes towards foreign migrants are less favourable than most but with some qualifications.

Recently, Ringisai Chikohomero undertook an in-depth study of attitudes towards migrants in two urban settlements in Gauteng province (the economic centre of South Africa). Atteridgeville is an old established black township in Pretoria, and Diepsloot is a large settlement north of Johannesburg that originated more recently from spontaneous informal settlement. The two settlements between them represent a good cross-section of poor and middle class black South Africans living in predominantly black urban settlements. Chikohomero engaged with 12 focus groups and 14 key informant interviewees for a total of 160 participants. This is valuable and meaningful qualitative research on two settlements representing urban society in predominantly black townships. Many better off black South Africans in Gauteng have moved into formerly whites-only suburbs or new housing estates.

<sup>147</sup> Department of Home Affairs, 'Draft White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa' [https://www.gov.za/sites/default/files/gcis\\_document/202311/49690gon4061.pdf](https://www.gov.za/sites/default/files/gcis_document/202311/49690gon4061.pdf) <sup>148</sup> Steve, Gordon, 'Xenophobia is on the rise in South Africa: scholars weigh in on the migrant question' *The Conversation*, 14-04-2022, <https://theconversation.com/xenophobia-is-on-the-rise-in-south-africa-scholars-weigh-in-on-the-migrant-question-181288> accessed 22-04-2022

<sup>149</sup> Jonathan Crush and Sujata Ramachandran, 'Doing Business with Xenophobia' in Jonathan Crush, Abel Chikanda & Caroline Skinner (eds) *Mean Streets Migration, Xenophobia and Informality in South Africa*, SAMP, 2015

<sup>150</sup> IOM, Migration Data Portal, [https://www.migrationdataportal.org/dashboard/compareindicators?c=710&i=9256&i=9254&r=2&s=18&t=2015\\_2015](https://www.migrationdataportal.org/dashboard/compareindicators?c=710&i=9256&i=9254&r=2&s=18&t=2015_2015)

<sup>151</sup> Beth Elise Whitaker 'Border proximity and attitudes toward free movement in Africa', *Afrobarometer Working Paper No. 200*, June 2023 <https://www.afrobarometer.org/wp-content/uploads/2023/06/WP200-Border-proximity-and-attitudes-toward-free-movement-in-Africa-Whitaker-Afrobarometer-19June23.pdf> accessed 31-07-2023

Chikohomero found that 'most of the local participants said that foreign-born migrants must leave the country. This is not because they don't like them but because they feel squeezed out of the job market by the foreign-born migrants, as they steal jobs meant for locals.'<sup>152</sup> He notes that 'at no point did any participant express violent anti-migrant sentiments. The conversations centred on lack of access, on deprivation and on increasing poverty.'<sup>153</sup>

Some locals, especially young people, Chikohomero found, accepted that migrants were not solely or excessively responsible for crime though the popular wisdom was that they were. Young South Africans resented migrants working for lower wages than they were prepared to accept and felt that undocumented migrants should be repatriated. They felt that the labour department were not doing their job monitoring the employment of illegal migrants at illegally low wages because they had been bribed. Especially in Atteridgeville, the long-established township, young people were less prejudiced against foreigners than older people, and blamed government for poor access to training and work opportunities; 'The elderly were more conservative and carried more anti-migrant sentiments than the youth.'<sup>154</sup> Young people also criticised the government for not making more of an effort to integrate migrants with local communities.

Chikohomero does not try to explain the difference between younger and older people and between the communities of Diepsloot and Atteridgeville. I would postulate that young people in Atteridgeville, the relatively more affluent and settled community, were likely the most educated among those interviewed, and were less likely to subscribe to simplistic notions.

## **8.2 Perceptions/attitudes of migrants (different categories)**

Other than Chikohomero's recent study I could uncover little of value on the attitudes of migrants in South Africa at an ethnographic level. Migrants admitted that they were prepared to work under conditions unacceptable to nationals and understood that this was grounds for resentment.

Some migrants said they understood that this resentment was a product of structural conditions of high unemployment and poverty.<sup>155</sup>

Chikohomero found that migrants in Atteridgeville and Diepsloot were resentful of negative attitudes towards them and felt that the characterisation of migrants as crime-prone was unfair. Some migrants said that 'Nigerians are the leading drug dealers in the community and must be ousted by the community for the sake of safety and peaceful coexistence between the other [law-abiding] migrant groups and residents in the community.' However,

'Some migrant participants said that such cohesion still exists in Diepsloot, with residents making their back rooms available to migrant lessees and the economy in Diepsloot being accommodating for migrants to open and operate businesses.... (C)onflict and division arose only when there was the commission of a crime, which the community generally attributed to the presence of migrants in the community.'<sup>156</sup>

While they felt relationships were worse than they had been in the past, some migrants felt that there was a possibility of finding more common ground with nationals if the issue of crime was addressed. Some migrants recommended community-based initiatives with community leaders to promote cohesion between migrants and nationals.<sup>157</sup>

One study of Ethiopian elites in South Africa showed that they coped through a sense of multiple identity—on the one hand they formed their own groupings and associations, but on the other hand they also portrayed themselves as pan-Africanists—'we are all Africans'. These dual or multiple identities lived side by side and enabled them to survive and often thrive. Studies of second-generation migrant children show a mixture of othering and acceptance which seemed to depend on social and economic circumstances.<sup>158</sup>

What all the studies show, however, is that efforts to integrate migrants are sparse in South Africa and are not seen as a priority by governments at any level.

<sup>152</sup> Ringisai Chikohomero 'Understanding conflict between locals and migrants in SA: Case studies in Atteridgeville and Diepsloot', ISS, Johannesburg 2023 p.11

<sup>153</sup> Ringisai Chikohomero 'Understanding conflict between locals and migrants in SA: Case studies in Atteridgeville and Diepsloot', ISS, Johannesburg 2023 p.14

<sup>154</sup> Ringisai Chikohomero 'Understanding conflict between locals and migrants in SA: Case studies in Atteridgeville and Diepsloot', ISS, Johannesburg 2023 p.11

<sup>155</sup> Ringisai Chikohomero 'Understanding conflict between locals and migrants in SA: Case studies in Atteridgeville and Diepsloot', ISS, Johannesburg 2023 p.13

<sup>156</sup> Ringisai Chikohomero 'Understanding conflict between locals and migrants in SA: Case studies in Atteridgeville and Diepsloot', ISS, Johannesburg 2023 p.13

<sup>157</sup> Ringisai Chikohomero 'Understanding conflict between locals and migrants in SA: Case studies in Atteridgeville and Diepsloot', ISS, Johannesburg 2023 p.14

<sup>158</sup> These papers are found in Pragna Rugunanan and Nomkhosi Xulu-Gama (eds), *Migration in Southern Africa*, Pringer, Switzerland, 2022

### 8.3 Attitudes of elites and opinion formers

In the preparation for the 2019 general elections all the political parties demonstrated either through 'dog whistle' code or raw statements that they supported the interests of South African citizens above those of other people living in the country. Both the ANC and the Democratic Alliance called for higher border fences. The ANC deputy minister of police claimed that 80% of the city of Johannesburg was controlled by foreigners. A mayor of Johannesburg who leads a national political party talked about "our people" and "those people" (the foreigners) who make South Africa into a "lawless society." The EFF questioned whether those born outside the country can even be trusted as 'proper South Africans'. And '[w] hile speaking about their plans to run a coalition government on the national level ... the Democratic Alliance, COPE and the right-wing Freedom Front Plus promised to place foreigners (presumably refugees and asylum-seekers) in camps rather than letting them roam free in South African cities.<sup>159</sup>

Prominent political leaders such as the ANC's Jeff Radebe have blamed unemployment on the 'monopoly' enjoyed by foreigners in retail trade.<sup>160</sup> Home Affairs minister Aaron Motsoaledi accused the Helen Suzman Foundation of using the legal system to undermine South Africa's sovereignty when it took to court to defend some Afghans who had entered the country on misleading visas. He said government would challenge the court order which required his department to process the applications rather than refuse them entry. "There's a belief you can go to SA and do whatever you want at any time you want, and the constitution and legal system of the country will allow you to do so," he told eNCA.<sup>161</sup> "If I bring many people here with all this crime that is going around and the Taliban is really looking for these people..."<sup>162</sup>

It is typical of mainstream South African political parties to be sensitive to opening themselves to

accusations of anti-foreigner sentiment—their official policies are mostly liberal and humanitarian—but they clearly believe that if they do not show some preference for native South Africans, they make themselves politically vulnerable.

An investigation into social media patterns and networks undertaken by the investigative journalism group AmaBhungane found that the most persistent purveyors of more extreme types of populist anti-foreigner sentiments were a group of grassroots groupings, some political entrepreneurs and three political parties, the ATM, ActionSA and the Patriotic Alliance. These sentiments were also associated from time to time with the populist faction of the ANC and their figurehead, ex-President Zuma. Around periods of anti-foreigner violence such as riots in July 2021, these groupings create on social media a kind of anti-foreigner echo-chamber which draws in the discontented. In addition to foreigners, they also snipe at President Ramaphosa's dominant faction of the ANC and at the largest opposition party, the centre-right Democratic Alliance.<sup>163</sup>

In their fear of being outflanked on the populist left and right, the centrist political parties sometimes air views and promote policies that are nationalist in relation to foreign migrants, much as has been the case in some other parts of the world including the UK, France, and other European countries, for example.

It is still more concerning when dog-whistling extends to government spokespeople. The Department of International Relations and Co-Operation's head of public diplomacy Clayson Monyela said the country needed to urgently review and tighten its immigration laws after the Pretoria high court ruled 22 Afghan asylum seekers could apply for asylum transit visas. 'They're not vetted (background and agenda unknown). They arrived at Beitbridge accompanied by American citizens. Lawyers had already written to home affairs (reportedly briefed by an American-based NGO).'<sup>164</sup>

<sup>159</sup> Savo Heleta, 'Xenophobia and party politics in South Africa' in *Africa is a Country*, 27-08-2018 <https://africasacountry.com/2018/08/xenophobia-trumps-ubuntu-in-south-african-politics> accessed 22-08-2022

<sup>160</sup> Ringisai Chikohomero 'Understanding conflict between locals and migrants in SA: Case studies in Atteridgeville and Diepsloot', ISS, Johannesburg 2023 p.5

<sup>161</sup> Unathi Nkanjeni, "We need to urgently tighten our immigration laws": Clayson Monyela on Afghan asylum seekers debacle", *TimesLive* <https://www.timeslive.co.za/news/south-africa/2023-03-03-we-need-to-urgently-tighten-our-immigration-laws-clayson-monyela-on-afghan-asylum-seekers-debacle/> accessed 03-03-2023

<sup>162</sup> ENCA, 'Home Affairs unhappy with Afghan asylum seeker court ruling'<https://www.enca.com/news/home-affairs-unhappy-about-afghan-asylum-seeker-court-ruling> Accessed 22-02-23

<sup>163</sup> amaBhungane, Who is behind South Africa's Xenophobic Nationalism, News24 29-04-2022 <https://www.news24.com/news24/opinions/analysis/analysis-who-is-behind-south-africas-xenophobic-nationalism-20220429> accessed 29-04-2022

<sup>164</sup> Unathi Nkanjeni, "We need to urgently tighten our immigration laws": Clayson Monyela on Afghan asylum seekers debacle", *TimesLive*, 03-03-2023 <https://www.timeslive.co.za/news/south-africa/2023-03-03-we-need-to-urgently-tighten-our-immigration-laws-clayson-monyela-on-afghan-asylum-seekers-debacle/> accessed 03-03-2023

While business is loath to make a strong stand on the issue of migration in general, they have argued in specific cases where foreign employees were needed. One example is long-distance truck drivers who have become a flashpoint of anti-foreigner sentiment. Foreign employees were needed and granted visas due to a shortage of senior code 14 drivers (vehicles over 16 000 kilograms). The business community would like the government to explain the situation to South Africans though they are unlikely to make a public issue of it except in specific cases.<sup>166</sup>

Labour organisations and their members similarly are unlikely to speak out loudly on the issue of anti-foreigner attitudes but COSATU did pass a motion critical of xenophobia in one of its national conferences, and has been known to assist foreign workers in the face of violent attacks.<sup>167</sup> Its leaders believe that the failure of government to police the exploitation of undocumented migrants leads to anger amongst those workers who are entitled to seek employment by law. They would tend to make a distinction between documented and undocumented migrants.<sup>168</sup>

## 9. Political economy of migration

### 9.1 Why so much migration?

In UNDESA data it is estimated that between 2000 and 2020 the number of people living in South Africa who were not born there increased from 1 million to 2.9 million. So, accepting that migration data is not very accurate at the best of times and that 2020 as the first year of COVID-19 is not a good basis for comparison, the increase from about 1 million to about 3 million people amounted to a 200% increase in migrant stock over a roughly 20-year period. If we use the official South Africa census numbers, the increase from 958 186 people born abroad living in South Africa in 2001<sup>169</sup> to 2 418 197 in

2022<sup>170</sup> was about 150%.<sup>171</sup> Using the UN data, the proportion of foreign born to locally born in 2020 was about 4.8%, up from about 2.1% of the population in 2000, more than double. Using the South African census data, the proportion of migrants to home-born was in 2021 was about 3.9%, contrasting with 2.1% in 2001, nearly double. By comparison, in the USA, for example, 35 million people were foreign-born residents in 2000, rising to 51 million in 2019. While 51 million at nearly 16% of the total population is high, the increase was less than 50% over this period. In Germany the increase from 9 to 13 million over this period was also less than 50%. The rate of increase in Australia and New Zealand, countries of immigration, was similar. A 150-200% increase in two decades of the foreign-born to local ratio in South Africa would be fairly large by global standards.

Why has there been a sharp increase in migration to South Africa in recent years? As shown earlier in this paper, South Africa had a long history of temporary labour migration, supplying labour to the mines and to other labour-intensive industries such as farming. From the 1970s, but more so in recent years, the government has encouraged mine-owners and farmers to draw their labour from South Africa rather than from neighbouring countries such as Lesotho, Malawi and Mozambique. As sources of income were cut off for regular temporary migrants, it seems likely that some were tempted to find other sources of employment and income in South Africa formally or informally. The historically major reservoirs of labour for South Africa are also the poorest countries in Southern Africa.

Many of the countries of the region are dependent on South Africa not only as a source of employment, but also as an investor and as a provider of markets for goods and services. The SADC region is very unbalanced economically.

<sup>166</sup> Interview Business representatives, 13-04-2023

<sup>167</sup> Mondli Hlatshwayo, 'Research Report on COSATU'S Responses to Xenophobia' University of Johannesburg, Centre for Sociological Research, undated (2010?), [https://www.atlanticphilanthropies.org/wp-content/uploads/2010/07/8\\_Cosat\\_u\\_c.pdf](https://www.atlanticphilanthropies.org/wp-content/uploads/2010/07/8_Cosat_u_c.pdf) accessed 08-02-2023

<sup>168</sup> Interview, senior trade union representative, 11-04-2023

<sup>169</sup> StatsSA, Census 2001; Primary Tables South Africa p.14 accessed at [https://www.statssa.gov.za/census/census\\_2001/primary\\_tables/RSAPrimary.pdf](https://www.statssa.gov.za/census/census_2001/primary_tables/RSAPrimary.pdf) on 11-10-2023

<sup>170</sup> StatsSA, Census 2022; South Africa at a Glance, p.29 [https://census.statssa.gov.za/assets/documents/2022/Census2022\\_SA\\_at\\_a\\_Glance.pdf](https://census.statssa.gov.za/assets/documents/2022/Census2022_SA_at_a_Glance.pdf) accessed 11-10-2022

<sup>171</sup> Correspondence with a senior official at StatsSA (Diego Iturralde) kindly shared with me by Duma Gqubule, journalist, suggests that the number of foreign born people living in South Africa in 2022 is likely underestimated as a considerable number of foreign nationals probably reported themselves as nationals as a result of fear of discrimination.

Compared with countries in the region which are significant sources of migrants, South Africa is a relatively wealthy country. Mozambique had a per capita income of \$577 in 2021, barely 8% of South Africa's per capita income of \$7055 in the same year. The DRC and Malawi are almost as poor relative to South Africa as Mozambique.<sup>172</sup> This is very similar to the ratio between the United States and the poorest countries of Latin America.<sup>173</sup> Though Botswana is a neighbour with a higher per capita income than South Africa, it is very tiny in comparative economic terms—in 2021 the South African economy was 24 times larger than the Botswana economy.

A major factor driving immigration was the prevalence of political and economic shocks in other countries in the Southern African region. Zimbabwe, as discussed earlier, generated a broad stream of refugees, economic and political, to South Africa.

The provision of social services and support in South Africa is relatively good by regional standards. Education and health care are free for the poor and though the standards of schooling and health care are not excellent, they are improving.<sup>174</sup> Migrant children, of various statuses, have rights to education in South Africa.<sup>175</sup> Social transfers are very significant. According to the World Bank, at '3.3% of GDP and 15.4% of total government spending the cost of South Africa's social assistance system is relatively high compared to the average of other upper middle-income countries.' It is also very effective.<sup>176</sup> The South African constitution extends a wide range of rights to migrants 'Section 9 of the Constitution prohibits discrimination against anyone on one or more grounds including amongst others, race, colour, ethnic or social origin and birth'.<sup>177</sup> The rule of law and the independent court system in South Africa offers protection in many ways, underpinned by South Africa's legislative alignment since the 1990s to humanitarian international conventions.

An incentive for migration to South Africa which overlaps with others mentioned is access to employment. Being a relatively large and sophisticated economy South Africa attracts skilled

workers from other parts of Africa and elsewhere. It also attracts lower skilled workers, either in regular contracts or those who find irregular ways to enter the country. Even though employment, especially of undocumented migrants, can be under exploitative terms, these opportunities may be preferable to circumstances at origin, especially when combined with other rights.

Afrobarometer surveys in 2016 and 2018 showed that the two countries in Africa with the greatest proportion of people preparing to leave were South Africa's neighbours, Lesotho and Zimbabwe. Whereas on average only 29% of Africans contemplating emigration were planning to migrate within their region, in Southern Africa the proportion was 51%.<sup>178</sup> This seems to reflect the attractiveness of South Africa as a migration destination and the strong social ties and information networks in the region.

## 9.2 Migration support and opposition

The interest of businesses in migration has already been discussed. Business lobbies in a discreet way both for key skills, as well as for lower skilled migrants in certain sectors. One business interviewee said that one should not underestimate the value of the acquired skills of some workers in apparently low skilled industries, such as farming, and the desire of employers to maintain relationships with such employees over the longer term.<sup>179</sup>

Migrants also get support from various non-governmental organisations in the human rights sphere or specifically catering to migrants, refugees, and asylum seekers in various ways. Organisations such as The Black Sash, Lawyers for Human Rights, and the Helen Suzman Foundation use the constitution and the courts to defend the rights of migrants. Various refugee protection organisations, churches and church-based institutions provide refuge sustenance and sometimes advocacy. Government has been critical of NGOs, accusing them of being foreign-linked or -funded and using the protections of the constitution, laws, and treaties, to advance the interests of migrants.

<sup>172</sup> World Bank data <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=A9> accessed 21-05-23

<sup>173</sup> World Bank <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=ZJ-US> accessed 21-05-23

<sup>174</sup> Nick Spaull, 'SA education is not the worst in the world', Business Day, <https://www.businesslive.co.za/bd/opinion/2023-07-28-nic-spaull-sa-education-is-not-the-worst-in-the-world/>, accessed 28-07-2023

<sup>175</sup> Kaajal Ramjathan-Keogh, Chapter 6: The rights of refugees and migrant workers in *Basic Education Rights Handbook – Education Rights in South Africa* Section 27, 2017, <http://section27.org.za/wp-content/uploads/2017/02/Chapter-6.pdf>

<sup>176</sup> World Bank, 'South Africa Social Assistance Programs and Systems Review', 2021, <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/238611633430611402/south-africa-social-assistance-programs-and-systems-review>

<sup>177</sup> South African Human Rights Commission, 'Migration-Non-Nationals' undated pamphlet, <https://www.sahrc.org.za/home/21/files/FINAL%20Non-Nationals%20Educational%20Booklet.pdf>

<sup>178</sup> Josephine Appiah-Nyamekye Sanny, Camilla Rocca and Ines Schultes, "'Update-ing' the Narrative about African Migration", Mo Ibrahim Foundation and Africa Barometer, undated (2020?), <https://mo.ibrahim.foundation/sites/default/files/2020-05/update-ing-the-narrative-about-african-migration.pdf> accessed 22-05-2022

<sup>179</sup> Interview Labour Consultant, 13-04-2023

Trade unions are concerned about unfair competition from undocumented migrants or uncontrolled migration, and, like business, they support the proposed regulation of the number of foreign workers by a quota system. More ominous are organisations such as Operation Dudula and the All-Truck Drivers Forum and Allied SA (ATDF-ASA).<sup>180</sup> In some areas, foreign shopkeepers have been targeted, possibly in part because they compete successfully with existing businesses.<sup>181</sup> In many of these cases local political entrepreneurs may be taking advantage of tensions too. Operation Dudula recently registered as a political party.<sup>182</sup>

### 9.3 Migration narratives and alternatives

Debates about anti-foreigner sentiment in South Africa include whether it constitutes xenophobia and whether it is aimed at all migrants or only at undocumented migrants from Africa ('Afrophobia'), but there is no dispute that the anti-foreigner narrative is widely evident in South Africa.

While the anti-foreigner narrative blames many social and economic ills mistakenly or maliciously on immigrants, the counter narrative is also sometimes simplistic or shrill. While the World Bank and ILO reports found impact of immigration on South Africa is positive in developmental terms, or neutral at worst,<sup>183</sup> what is often ignored by liberal commentators is that the nearly 8 million unemployed are not the direct beneficiaries of migration. Showing that the net benefit is positive does not negate the experience of millions who do not benefit and who see migrants as competitors for limited resources. The economic liberal sometimes raises the temperature of the debate. For instance, the *Financial Mail* labelled the Minister of Employment and Labour Thulas Nxesi, "dopey Nxesi", because of his advocacy for quotas which give preference to South African citizens in unskilled jobs, and blamed unemployment on ANC policies.<sup>184</sup> Workable alternatives to nationalist, exclusionary policies are seldom offered by liberal commentators.

Finding a sensible way forward is not at all simple. Migration policies are inescapably compromises between competing and conflicting interests. Often, the outcome is a set of policies with multiple objectives, some of which appear to be or are inherently contradictory. This is almost inevitable in the liberal democratic state which tends to be open to trade investment and migration for competitive growth, but also needs to protect the rights of citizens and legal residents. As those rights become more significant and more expensive, the 'liberal paradox' can become more severe.<sup>185</sup> In circumstances of poor economic growth, high unemployment and poverty, and a high rate of immigration, such as South Africa since 2008, this paradox becomes more evident.

### 10. Conclusions

Let us explore some of the proposals which have been put forward. Firstly, there is the potential of camps. South Africa took the decision not to establish camps to house all refugees and asylum seekers and rather to try to integrate them into society where possible.<sup>186</sup> Camps such as the Lindela Repatriation Centre were intended for undocumented migrants of yet undetermined legal status, who do not have the resources to find their own accommodation.<sup>187</sup> Some think that placing undocumented migrants whose status has not yet been determined or who are awaiting deportation in camps would act as a deterrent and would make detection and deportation easier. However, such a policy would be much more expensive for the state, currently in dire financial straits, and would also create new flashpoints. Yet, to continue with the no-camps policy, government at all levels must pay far more attention to preparing host communities so that they will accommodate refugees more comfortably. Government, national, provincial and local, needs to ensure that the potential negative impact of refugees on education and health facilities and the environment is mitigated or minimized.<sup>188</sup>

<sup>183</sup> OECD/ILO (2018), *How Immigrants Contribute to South Africa's Economy*, OECD Publishing, Paris.

<http://dx.doi.org/10.1787/9789264085398-en> p.16; and World Bank, (2018) *Mixed Migration, Forced Displacement and Job Outcomes in South Africa*, The World Bank Group, Washington

<sup>184</sup> *Financial Mail* 'Editorial: Dopey Nxesi is the problem, not business'

<https://www.businesslive.co.za/fm/opinion/editorial/2022-09-14-editorial-dopey-nxesi-is-the-problem-not-business/> accessed 14-09-2022

<sup>185</sup> H de Haas, S Castles and MJ Miller, *The Age of Migration: International Population Movement in the Modern World*, 6th Edition 2020, Reprinted by Bloomsbury Academic in 2022, p. 253

<sup>186</sup> Khangelani Moyo & Christine Botha, 'Refugee Policy as Infrastructure: The Gulf Between Policy Intent and Implementation for Refugees and Asylum Seekers in South Africa', in Pragna Rugunanan and Nomkhosi Xulu-Gama Eds *Migration in Southern Africa IMISCOE Regional Reader*, Springer, Switzerland, 2022

<sup>187</sup> Anthony Kaziboni, 'The Lindela Repatriation Centre, 1996-2014. Applying theory to the practice of human rights violations' *South African Crime Quarterly*, December 2018, <http://dx.doi.org/10.17159/2413-3108/2018/i66a5623>

<sup>188</sup> Craig Loschman, 'Taking Stock of the Evidence on the Consequences of Hosting refugees in the Global South' in Glenn Rayp, Ise Ruysen & Katrin Marchand (eds), *Regional Integration and Migration Governance in the Global South*, Springer, Switzerland, 2020

Another, more imminent proposal is the imposition of quotas across the various economic sectors in agreement with employer organisations and monitored by companies. This policy has been negotiated with the private sector and with trade unions and will give citizens some degree of comfort that their interests are being protected. But there are many unanswered questions—how exactly would those quotas be determined, and how frequently would they be reviewed? Also, how effective are policies which rely on management of quotas by employers and the possible sanctioning of employers? In the US it was found that employer surveillance regarding the employment of irregular migrants is very difficult to implement. In 1999, the government decided to suspend employer sanctions and the next year the largest American trade union federation, the AFL-CIO, withdrew its support of employer sanctions.<sup>189</sup> An additional concern in the South African case is the evident susceptibility of labour inspectors to persuasion by employers and employees.

The unreliability of labour inspectors leads to reservations regarding the use of labour standards to inhibit the migration and employment of low-skilled workers outside of the legal system. If labour inspectors were reliable and effective, maintaining labour standards at levels set by the various laws and statutory bodies in South Africa might be a good way to discourage the inflow of irregular migrants. The main incentive to employ irregular migrant workers is that they are exploitable due to their vulnerability and will accept wages and working conditions inferior to the reasonably good standards set in South Africa. The South African labour market is large and complex and diligence of labour inspectors is currently, evidently, limited.

Part of the reason for reforming immigration rules as set out in the various recent policy papers is to reduce the opportunities for corruption and fraud. Unifying the information management system on migrants as is proposed by the Lubisi report for the Department of Home Affairs would make it more difficult for home affairs and consular officials to bend the system for their own interests. Creating a single Border Management Authority was intended to reduce the complexities of border management and the opportunities for manipulating the system, and if the systems are improved as proposed, could help to improve border governance. Shifting the criteria for skilled immigrants to rules that are

less open to interpretation and manipulation is another possible way of shoring up the system against corruption. Swift and decisive action against those found guilty of corruption could help too. Many of these constructive proposals, policies and actions seem to be hamstrung by the fiscal constraints that currently restrict the capacity of the South African state to reform and renew itself.

Unfortunately, the recently published Draft White Paper on Citizenship, Immigration and Refugee Protection<sup>190</sup> makes no reference to the proposals of the Lubisi investigation. Instead, it proposes a sharp tightening of rules for immigration, citizenship, and refugees. In the absence of eliminating corruption and mismanagement in government, particularly in the Department of Home Affairs, these new rules are more likely to encourage immigrants to bend and break rules, than to stop them immigrating.

At least one measure under discussion should not be greatly hampered by short-term financial constraints. The Department of Labour has proposed that the Bilateral Labour Agreements with five southern African states should be reformed both with respect to the issue of human rights but also to make them work more effectively in the broader interests of the country. The current BLAs 'were concluded in a previous political dispensation, primarily with a view to provide "cheap labour" to South African mines and partly also South African farms, with little regard to the protection needed by the migrant workers.'<sup>191</sup> Other limitations of existing BLAs include tax elements and provisions for deferred pay. Return and repatriation provisions in current BLAs are designed to remove unwanted workers without regard to their re-integration. Social security portability and related issues are missing, health and safety guarantees are largely absent.<sup>192</sup>

The Department of Employment and Labour considers the BLAs archaic and would like to replace them with more modern Memoranda of Understanding. Several new MOUs have been concluded by the South African government with governments in Southern Africa, often including social security issues, compensation in respect of occupational injuries and diseases and pension portability; occupational safety and health; and public employment services. But the BLAs (which are legally binding instruments, unlike MOUs) have not been replaced.

<sup>189</sup> H de Haas, S Castles and MJ Miller, *The Age of Migration: International Population Movement in the Modern World*, 6th Edition 2020, Reprinted by Bloomsbury Academic in 2022, p. 253

<sup>190</sup> Department of Home Affairs, 'Draft White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa' [https://www.gov.za/sites/default/files/gcis\\_document/202311/49690gon4061.pdf](https://www.gov.za/sites/default/files/gcis_document/202311/49690gon4061.pdf)

<sup>191</sup> ILO/IOM, 'Tool for the Assessment of Bilateral Labour Migration Agreements Pilot-tested in the African region' ILO & IOM, undated (recent), p.8

<sup>192</sup> ILO/IOM, 'Tool for the Assessment of Bilateral Labour Migration Agreements Pilot-tested in the African region' ILO & IOM, undated (recent), p.8

The ILO and IOM recommended that instead of MOUs, the current BLAs should be broadly revised and brought in line with global standards. This would be more respectful of the needs of the origin country, as well as the destination country. The revision of BLAs could be seen as an opportunity for South Africa to develop instruments which are more suitable both for employee rights and recourse (without a path to citizenship), and for employers, in respect of being able to development long-term relationships with foreign contract employees. This could also bring greater stability, certainty, and security. If such a system were developed it might lead to people from neighbouring countries who would otherwise have been irregular economic migrants rather going through regular channels. The main drawback of such a policy could be that smaller and/or unethical employers might have an even greater incentive to defy the rules and exploit vulnerable irregular migrants.

It is quite evident that reducing tensions over migration in the region cannot be done solely through unilateral measures and a set of bilateral arrangements. There is clearly a need for stronger regional arrangements that include provisions for the management of cross-border employment. The failure of the Southern African Development Community to find common ground on migration policy, addressing the concerns of both the richer migration destination and the poorer migration origin countries, is one of the reasons that migration tensions are so great. Migration policies and regional development policies need to be complementary. While it would be impossible to replicate the regional development funds provided by the EU to its poorer members under the Cohesion Policy<sup>193</sup> in Southern Africa, it would be possible to have a more sustained and better planned and financed development program in SADC. This could support a migration management coordination program that reduces tensions in the region. We will explore this issue in greater detail in a later paper in this series.

<sup>193</sup> EU, Key achievements of Regional Policy 2014-2020 [https://ec.europa.eu/regional\\_policy/policy/what/key-achievements\\_en](https://ec.europa.eu/regional_policy/policy/what/key-achievements_en)

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