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To: Minister Thembelani Waltermade Nxesi
Department of Employment and Labour
By email
NLMP@labour.gov.za

28 May 2022

Dear Hon Minister Nxesi,

WRITTEN COMMENTS ON THE DRAFT NATIONAL LABOUR MIGRATION POLICY AND EMPLOYMENT SERVICES AMENDMENT BILL, 2021

INTRODUCTION

1. We welcome the opportunity to make written comments on the Draft National Labour Migration Policy and the proposed amendments to the Employment Services Act, 2014, 'The Employment Services Amendment Bill, 2021'.

2. The Scalabrini Centre of Cape Town (SCCT) is a registered NPO that perceives migration as an opportunity and is committed to fostering integration between migrants, asylum seekers, refugees, and South Africans. Our mission is to welcome, to protect, to promote and integrate mobile populations in local society. In providing assistance to mobile populations, we advocate respect for human rights and use a holistic approach that considers all basic needs. The SCCT works with asylum seekers, refugees and other migrants on a daily basis with obstacles many face to meaningfully contributing to society. We draw on this experience, along with relevant and contemporary research on migration and economic development, to offer our input on the Draft National Labour Migration Policy for South Africa (DNLMP) and the Employment Services Amendment Bill, 2021 (hereafter 'the Bill').

3. In addition to these comments, we have instructed the firm Norton Rose Fulbright South Africa Inc to make comments on our behalf on whether the Act will withstand constitutional scrutiny should the Bill be enacted in its current form. Those comments are confined to the Bill's impact on the rights of those recognised as asylum seekers in terms of section 22 of the Refugees Act, 1998 (the Refugees Act) in South Africa and supplement our comments herein on the Bill and the DNLMP.

4. Our submission includes both general comments on migration, constitutional rights, and development, as well as specific substantive concerns with some of the proposals in the documents. Throughout the submission, we provide experiences from our offices to highlight how some of our concerns and the potential outcomes of the current Bill's proposals.

5. While we welcome the general thrust of the DNLMP for South Africa – to 'follow a rights-based approach to the protection of all workers'[1] – we are concerned that many of the policy proposals and proposed legislative amendments do not assist us in realising this goal and would require significant revision if it is to establish a rights-based approach to labour, protect workers, and pass constitutional muster.

GENERAL COMMENTS

Migration, work, and the 'need to adopt a much more progressive migration policy'

6. The SCCT welcomes the general thrust of the DNLMP and we are encouraged by the DNLMP's close reading of the National Development Plan (NDP) and its stance on migration, including *inter alia*:

    6.1. The NDP's diagnosis that '[i]f properly managed, migration can fill gaps in the labour market and contribute positively to South Africa's development [...] If poorly managed, however, the skills and potentials of migrants will be neglected. Migration will remain a source of conflict and tension, and migrants will be increasingly vulnerable, subject to continued abuse, exploitation and discrimination';

    6.2. The NDP's recommendation that 'South Africa will need to adopt a **much more progressive migration policy** in relation to skilled as well as unskilled migrants, and should better plan for rapid urbanisation' [emphasis added]; and

    6.3. Embracing a number of steps to facilitate migration such as improving data collection, countering xenophobia by conducting sustained campaigns, effectively addressing the rights, vulnerabilities and specific needs of migrants in South Africa.[2]

7. We are equally encouraged that recent research investigating migration and economic development within our region is cited within the DNLMP and that the Department of Employment and Labour (DEL) takes this evidence seriously. We wholeheartedly support the DEL's commitment to undertake campaigns and awareness-raising measures to sensitise key stakeholders to migrant rights, such as employers and the financial and banking sector, and we encourage the DEL to explore further how awareness-raising measures and advocacy measures can help realise the DNLMP's goals in a constructive and holistic manner.[3]

8. We believe one of the most critical components of reaching the aim of the DNLMP is through measures that result in a strengthened SADC region. We believe a key component of this is through the continued rollout of special visa arrangements for migrants from the SADC region, as proposed by the Department of Home Affairs (DHA) in the 2017 *White Paper on International Migration,* and we support the DEL's commitment to:

[1] DNLMP, p. 12.
[2] Ibid, pp.59-60.
[3] Ibid, pp. 94-5.

8.1. advocate for the ratification of international and regional (AU and SADC) instruments for the protection of migrant workers;

8.2. to 'review and amend existing bilateral labour agreements with SADC Member States with a view to align them with international standards of protection'; and

8.3. to increase engagement in the region on issues of labour rights, social security, and trade union cooperation.[4]

9. We believe this offers much to build from, and crucially proceeds from a starting point that views migration both as a resource and as a reality in our region. An approach from this perspective can provide South Africa with a platform to take the lead in creating a more harmonised and interconnected continent, where mobility is not seen as a problem but as a resource.

10. We are, however, concerned that a number of proposals diverge from the goal to establish a rights-based approach to the protection of all workers and other aspects of migration are misunderstood. We also believe this approach runs counter to other programmes focusing on inclusion such as the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance and pledges for its implementation.[5] We outline these broad concerns below relating to the rights of asylum seekers and refugees in the context of the South African asylum system, the realities of documentation (and its many permutations) in the current context, the potential unintended consequences of policy, and potential costs/benefits of increased regulation, and potential costs.

The right to dignity, the right to work, and the realities of a protracted asylum process

11. Asylum seekers and refugees possess the right to work under both legislation and jurisprudence. While some legislation seeks to limit this right, it is our view such limitations are unlawful. Further, the length of time it takes for a refugee to secure recognition of their status is lengthy, meaning excluding asylum seekers from conducting work would be extremely detrimental to this constitutionally recognised constituency. We will address this in more detail below.

12. South Africa's domestic policy governing refugee and asylum matters has been lauded for its progressive and rights-based protections. Chief among its assets is its emphasis on local integration and an urban refugee policy that maximises refugee potential in cultural, economic and social dimensions. In practice, it is beyond dispute that the system has not functioned as envisaged in several key areas. One of these is the

[4] Ibid, pp. 96-7.

[5] See: https://www.justice.gov.za/nap/index.html and on the 23rd and 24th of May 2022 there the Department of Justice and Constitutional Development in collaboration with other government departments, stakeholders and civil society organisations convened of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance +20, which was 20 years since, and in commemoration of, the World Conference in Durban in 2001. At the Conference in May there was an inter-ministerial and civil society pledge and recommitment to combat Racism, Racial Discrimination and Xenophobia and implement the National Action Plan and yet it appears this commitment and pledge runs contrary to a lot of the Bill and DNLMP proposed.

implementation of an efficient and fair Refugee Status Determination (RSD) process – the process by which a refugee's status is acknowledged by the state. This shortcoming means that individuals who lodge asylum claims are mired in a protracted determination process, lasting in some cases over fifteen years.[6] While such examples of 15 or more years as an asylum seeker are at the upper end of the scale, they are not uncommon outliers, and it is not disputed that the asylum process commonly takes years for applicants to navigate the process and receive refugee recognition.

13. To give an idea of the current context of the RSD process, the Department of Home Affairs (DHA) stated in an answer to the Parliamentary question NW1586 that as of December 2019, '60% of Section 22 permits have been active for more than five years based on the 2019-midyear statistics'.[7] The COVID-19 pandemic has also seen also the closure of Refugee Reception Offices for a period of over two years further burdening the system. At the time of writing, it is hard to predict how many undocumented asylum seekers there may be waiting to lodge asylum claims.[8] However, it is clear that the reality – as evidenced from the statistics since the asylum system has been in place – is that this process will not be concluded within a short time span in the near future. Even if the process becomes more efficient, the reality is that bona fide refugees are likely to have asylum seeker status for significant periods of time.

14. This reality is critical as it relates to the rights of those who fall under the legal category 'asylum seeker' and those of 'refugee'. The courts have confirmed a core principle of refugee law in that asylum seekers must be treated as presumptive refugees. In the case of *Saidi and Others v Minister of Home Affairs and Others* ('*Saidi*'), the Constitutional Court (CC) held 'a person does not become a refugee because of recognition, but is recognised because he or she is a refugee'.[9] The CC in the *Abore v Minister of Home Affairs* citing the CC case of *Ruta* v *Minister of Home Affairs*[10] elaborated that refugee protection under international and domestic law and protection applies to asylum seekers, stating that:

> the 1951 Convention protects both what it calls 'de facto refugees' (those who have not yet had their refugee status confirmed under domestic law) or asylum seekers, and 'de jure refugees' (those whose status has been determined as refugees). The protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure.[11]

[6] The SCCT has clients who have lodged applications in 2006 who have not yet received a final determination and thus remain 'asylum seekers' on 'temporary' visas / permits.
[7] https://pmg.org.za/committee-question/12936/ .
[8] Early reports about the re-opening of these facilities indicates massive confusion about procedures, processes and what services are rendered, resulting in many refugees being turned away without assistance. See T. Washinyira and K. Mutandiro 'Dozens turned away as refugee office reopens after two years', GroundUp, 3 May 2022, available at: https://www.groundup.org.za/article/dozens-were-turned-away-refugee-office-reopens-after-two-years/
[9] *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333, para 34.
[10] *Ruta v Minister of Home Affairs* (CCT02/18) [2018] ZACC 52, para 27.
[11] *Abore v Minister of Home Affairs* [2021] ZACC 50, para 42.

15. The CC in the *Saidi* case further stated that in practice, this means that extending protections to asylum seekers during the adjudication process ensures that refugees are not denied crucial rights:

> She or he is not exposed to the possibility of **undue disruption of a life of human dignity**. That is, **a life of: enjoyment of employment opportunities**; having access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and **communing in ordinary human intercourse without undue state interference**. [emphasis added].[12]

16. As the South African refugee framework emphasises urban integration and a rights-based approach as opposed to a humanitarian or aid-oriented camp model, the right to work and fair labour practices are crucial components of the system. These rights have been clarified by the courts in the two key cases of *Minister of Home Affairs and Others* v *Watchenuka and Another* ('*Watchenuka*')[13] and the *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* ('*Limpopo Traders*'). [14]

    16.1. In *Watchenuka*, the Supreme Court of Appeal (SCA) held that the Refugees Act, which at the time did not allow for the automatic right to work but instead set out a system where an individual could only apply for that right if their claim had not been finalised within six months, impinged on the right to dignity of asylum seekers. The SCA held that the system as devised constituted a 'material invasion' of human dignity that could not be justified under the limitations clause of the Constitution. The SCA held that the right to dignity is a 'foundational value' of the Constitution and is

> the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights. The freedom to engage in productive work – even where that is not required in order to survive – is an important component of human dignity, for mankind is pre-eminently a social species with an instinct for meaningful association […].[15]

    Subsequent to and resulting from the case all asylum seeker permits/visas were endorsed the right to work on the direction of the Standing Committee for Refugee Affairs.

    16.2. The case is significant as it clarifies that the 'freedom to engage in productive work' is intrinsic to human dignity. Any policy or legislation that prohibits employment in circumstances where an individual like an asylum

[12] *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333, para 18.
[13] 010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003)
[14] *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others (*48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014).
[15] At paras 26-8

seeker has no other reasonable means of support is a material invasion of human dignity, and that this is not justifiable in terms of section 36 of the Constitution.

16.3. The *Limpopo Traders* case dealt with the issue of self-employment for asylum seekers and refugees. In that case, the SCA held that asylum seekers and refugees have the right to self-employment and to conduct work in the informal sector. Again, the ability to sustain oneself was held to be inextricably linked to the right to dignity, and the SCA held that there is no barrier to extend this principle into informal work and self-employment.

17. What this jurisprudence makes clear is that the right to dignity and the ability to sustain oneself are linked. This builds on an understanding of the intertwined nature of the rights in the Constitution as being 'inter-related and mutually supporting'.[16] The CC elaborated further that:

> There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.[17]

18. The jurisprudence sets out clear legal standards in relation to the rights of asylum seekers and refugees to conduct work and live meaningful, dignified lives. Legislation or policy that restricts these rights without regard to the right to dignity and the ability of individuals to support themselves, or that results in undue state interference to the realisation of core rights, will not pass constitutional muster.

19. A major concern with the Bill is that it does not adequately consider the context of the asylum process nor the rights of refugees.[18] This misunderstanding of the asylum system and the rights of refugees throughout the refugee status determination process has repercussions for many of the proposed amendments. This jurisprudence also makes it clear that if a policy or legislation has the practical effect of impinging on constitutional rights due to ineffective, unclear, protracted administrative processes and practices, this can amount to undue state interference with asylum seekers' ability to exercise their rights and would thus be unlawful.

20. We note here that it is hard to see how many of the Bill's proposals will not result in infringing the rights of asylum seekers and refugees, and we implore the DEL to ensure this is addressed.

The realities of documentation in South Africa

[16] Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00 [2000] ZACC 19, para 23.
[17] Ibid.
[18] As noted above asylum seekers are refugees as a matter of fact which is affirmed as a matter of law once they are granted formal recognition of refugee status.

21. Many of the provisions of the Bill are built on the premise that individuals can easily and accurately determine the legality and rights of differently situated non-citizens. The practices of DHA officials vary across provinces, offices, and divisions resulting in a patchwork of visa-related documentation (such as stamps on expired permits, hand-written appointment notes with stamps, ATM-style receipt slips for appointments months in advance, irregular and error-ridden visas, as well as 'blocked' ID books). This was labelled a 'burgeoning culture of bureaucratic informality' 12 years ago, and it is now an institutionalised aspect of the DHA's migration management practices.[19] What it means practically is that employers and labour inspectors will encounter a variety of configurations of documentation, and clear-cut distinctions between 'legal' and 'illegal' may not be straight-forward.

22. The Covid-19 pandemic has further complicated the situation resulting in large numbers of non-citizens having 'expired' documentation but being protected by blanket extensions issued by the DHA. The pandemic also resulted in the DHA incurring more visa application backlogs, meaning more individuals are relying on application receipts for prolonged periods of time. This has further muddied already murky waters of legality in relation to immigration status. The headline of a recent article by *GroundUp* spells this out clearly: 'Chaotic Home Affairs system leaving immigrants living legally in SA undocumented', and the article details how DHA officials are denying individuals the ability to exercise their rights due to a misunderstanding of policy and documentation.[20]

Unintended consequences of policy

23. The SCCT is very concerned about the possibility of policy and legislation inadvertently promoting xenophobia or being 'hijacked' by unscrupulous actors. In *Limpopo Traders*, the SCA noted that the conduct of the authorities in Operation Hardstick, the operation that gave rise to the case that was conducted by the South African Police Services (SAPS) to shut down businesses that did not have the requisite trading permits, left one with 'the uneasy feeling that the stance adopted by the authorities in relation to the licensing of spaza shops and tuck shops was in order to induce foreign nationals who were destitute to leave our shores'. [21] This led the SCA to declare that when addressing matters relating to regulation of labour and the refugee system, the state '**must also guard against unwittingly fuelling xenophobia**'.[22]

24. This imperative is particularly prescient in our current context as we continue to recover from the Covid-19 pandemic. In recent years, migration has been increasingly scapegoated for a range of socio-economic challenges and commandeered by political parties and vigilante movements.[23] Within this highly-charged atmosphere, one

[19] D. Vigneswaran et al, 'Criminality or Monopoly? Informal Immigration Enforcement in South Africa'. *Journal of Southern African Studies* vol. 36.
[20] See for example T. Washinyira, 'Chaotic Home Affairs system leaving immigrants living legally in SA undocumented', 4 April 2022, at https://www.dailymaverick.co.za/article/2022-04-04-chaotic-home-affairs-system-leaving-immigrants-living-legally-in-sa-undocumented/
[21] Limpopo Traders, para 44.
[22] Ibid.
[23] See, J. Khumalo, 'Employment ministry condemns Malema's "dangerous" labour inspections as EFF leader digs in heels', News24, 20 January 2022, available at:

individual has already been brutally murdered, allegedly due at least in part to a lack of 'papers'.[24] The introduction of legislation lacking clarity in this atmosphere can dovetail all too easily with anti-migrant rhetoric which is unfortunately commonplace in the political and social spheres.[25] Most concerning is the very real possibility that it may, however unwittingly, result in some individuals or groups appropriating the legislation for their own parochial and often unlawful means. Already there is evidence of this occurring in relation to this Bill, with a leader of an anti-migrant movement stating the following in May 2022:

> 'But now we have learnt that the ministers have said that the local businesses are only for South Africans. The other thing is that even if you are legal in the country, if [you do not have] a scarce skill then you cannot be working. Now, it is illegal and legal immigrants. If you are legal here, you are not supposed to be working in a restaurant. Working in a restaurant doesn't require any special skill.'[26]

25. The quote above demonstrates how policy can result in unintended consequences, and it is extremely important this legislation protects the rights of all workers, citizen and non-citizen alike; that it is clear in the administrative requirements and systems it sets out; and that these systems do not infringe on Constitutional rights, and that they are practical and can be implemented within the South African context. It is incumbent on the DEL and parliament that any legislation in this area will help us in our shared goal of realising the society we all want to achieve.

Growing the South African economy or growing burdensome layers of regulation?

26. The SCCT is concerned that the Bill is focused on increasing regulation which may be to the detriment of the economy and society, and therefore contrary to the DNLMP's overall aim. Recent research by the World Bank has found that immigration positively impacts the South African economy, with findings that one migrant worker generated roughly two jobs for citizens.[27] The report underscores how migration and employment it is not a zero-sum game but instead an issue of complementarity, with migrants contributing to local communities through providing accessible goods and services as well as providing employment opportunities. It is worth quoting the World Bank Director for Southern Africa's Paul Noumba Um on the study:

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https://www.news24.com/news24/southafrica/news/employment-ministry-condemns-malemas-dangerous-labour-inspections-as-eff-leader-digs-in-heels-20220120 and N. Majola, 'Operation Dudula members march through Durban's city centre', *GroundUp*, 11 April 2022, available at: https://www.groundup.org.za/article/operation-dudula-members-march-south-beach/.

[24] B. Mbhele, 'Seven men accused of murdering Zimbabwean Elvis Nyathi in Diepsloot back in dock', *Eyewitness News*, 24 April 2022, available at: https://ewn.co.za/2022/04/25/seven-men-accused-of-murdering-zimbabwean-elvis-nyathi-in-diepsloot-back-in-dock

[25] See for example C. Nebe, 'South Africa: New campaign reignites xenophobic rhetoric', Deutsche Welle, 15 April 2022, available at: https://www.dw.com/en/south-africa-new-campaign-reignites-xenophobic-rhetoric/a-61486487

[26] Quoted in P. Nombembe, 'Operation Dudula now targeting "both legal and illegal immigrants" ', *The Sunday Times*, 15 May 2022, available at: https://www.timeslive.co.za/news/south-africa/2022-05-15-operation-dudula-now-targeting-both-legal-and-illegal-immigrants/

[27] World Bank, 'Mixed Migration, Forced Displacement and Job Outcomes in South Africa', 2018, available at: https://www.worldbank.org/en/country/southafrica/publication/new-study-finds-immigrants-in-south-africa-generate-jobs-for-locals

> ‘This study provides strong empirical evidence on an issue that is a priority to the Government of South Africa – jobs … [w]e hope this analysis can inform policy that enhances the developmental opportunities for locals, migrants, refugees and the wider economy – while being cognizant of perceptions of locals.’

27. While this study is cited in the DNLMP, its findings appear to be disregarded in the substance of the provisions of the Bill. The removal of foreign nationals from particular sectors of the economy, or particular geographical regions, is unlikely to automatically result in job creation for citizens. On the contrary, it could very well be detrimental to our recovering and fragile economy. This has been the outcome of similar policies enacted elsewhere in the world, where exclusionary policies aimed at protecting employment opportunities for citizens were ineffective and instead are more known for gross human rights violations. We note here the experience of the United States when it sought to increase employment among citizens in a period of high unemployment. A study on this policy found that the US government policy of repatriating Mexican nationals (as well as Mexican-American citizens) to create jobs for citizens during a time of economic stress in the 1930s did not have ‘any expansionary effects on native employment’ but instead ‘had no effect on, or possibly depressed, employment and wages’. The policy did have severe negative social costs to the extent that the state of California passed the Apology Act for the 1930s Mexican Repatriation Program in 2005. This highlights the potential long-term impact of ill-conceived policies.[28]

28. Beyond potential unintended consequences within South Africa, we also note that this proposed legislation may have international and regional consequences as evidenced in the aftermath of previous xenophobic outbreaks.[29]

29. Again, we remain concerned that this proposal might have severe unintended consequences across society and implore the DEL to guard against such an outcome.

Costing

30. We note that the Bill has not been costed nor does the DNLMP address the issue of funding. We are concerned about this omission as the documents propose a range of new duties, obligations, and policy mechanisms. Should these proposals go into effect, they will further require interdepartmental planning, cooperation, and operations, particularly with the DHA, that will necessarily involve added costs.

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[28] See for example J. Lee et al, ‘The Employment Effects of Mexican Repatriations: Evidence from the 1930s’, National Bureau of Economic Research Working Paper 23885, 2017. The study found that the US government policy of repatriating Mexican nationals (as well as Mexican-American citizens) to create jobs for citizens during a time of economic stress in the 1930s did not have ‘any expansionary effects on native employment’ but instead ‘had no effect on, or possibly depressed, employment and wages’. The policy did

[29] See for example reports of protests against South African companies in the aftermath of xenophobic violence: ‘South Africans chased out of Mozambique’, News24, 17 April 2015, available at: https://www.news24.com/News24/South-Africans-chased-out-of-Mozambique-20150417; and K. Madisa, ‘MTN confirms attacks and closure of its outlets in Nigeria’, The Sowetan, 4 September 2019, available at: https://www.sowetanlive.co.za/news/south-africa/2019-09-04-mtn-confirms-attacks-and-closure-of-its-outlets-in-nigeria/.

31. The SCCT is concerned that underfunded policy and legislation, particularly when dealing with complex and emotive issues, is almost guaranteed to be ineffective and will certainly give rise to our concerns listed above in relation to inadvertently promoting xenophobia, fostering conditions for corruption, and adding administrative burdens to our economy. We therefore highlight the need for the DNLMP and the Bill's real financial and material costs to be explored and debated in a transparent manner.

SPECIFIC COMMENTS

32. In this section, we set out our comments on specific aspects of the Bill concerning definitions, the obligations placed on employers, punitive mechanisms, skills transfers, the establishment of a Quota system, and the powers of Labour Inspectors.

Comments on proposed amendment to definition of foreign national

33. The Bill proposes to redefine a 'foreign national' as an individual who is not a South African citizen, a permanent resident or 'has not been granted recognition as a refugee in terms of the Refugees Act'. While we support the inclusion of recognised refugees, not being considered as foreign nationals in terms of the Bill, as outlined above, this definition fails to consider case law outlining asylum seeker rights and their specific position within the context of South Africa's refugee system. The proposed definition would impact many asylum seekers who have bona fide refugee claims but are mired in the DHA's inefficient adjudication process. The definition is thus wrong in law and fails to consider the on-the-ground realities of the asylum process.

34. Similarly, there are other vulnerable migrants that ought not to be treated as foreign nations. For instance, cross border migrants who are survivor of human trafficking. Such survivors who are crucial witnesses for the State in combatting the Trafficking in Persons would fall under the definition of foreign nationals and would be subject to the Bill's application if enacted in its current form

35. The SCCT recommends the insertion of asylum seekers, recognised refugees, cross border migrant survivors of human trafficking and other vulnerable migrants as those that do not constitute foreign nationals for the purposes of the bill and act once brought into force.

Comments on the obligation of an employer in determining legal status in the employment of foreign nationals

36. Clause 12A(2)(a) states that any person who employs a foreign national must ***'ascertain that the foreign national is entitled to work in the Republic and is entitled to perform the work in which they are employed'.***

37. The wording of the section is vague. It is suggested that the Immigration Act provides guidance in relation to determinations over a person's legal status and right to work. Section 38(2) of the Immigration Act states an employer ***'shall make a good faith***

effort to ascertain that no illegal foreigner is employed by him or to ascertain the status or citizenship of those whom he or she employs'.

38. Section 38(3) of the Immigration Act further outlines procedures to address those employers found to be unlawfully employing a foreigner, including consideration of whether the employer undertook a good faith effort to verify status, and provides for more strict compliance for those persons or organisations that employ more than five employees or that have been found guilty of a prior offence.

39. Our concern is that the lack of clarity surrounding the documentation issued to foreign nationals by the DHA, coupled with punitive legislation, may result in employers becoming de facto immigration inspectors performing immigration control initiatives without being equipped with the resources or ability to verify documents effectively.

40. In recent months, the Employment Access Programme (EAP) at the SCCT has encountered a number of issues in this regard which are illustrative. Late last year, the DHA announced it would not renew Zimbabwean Exemption Permits (ZEP), a programme by which some 180,000 individuals had been issued visas to conduct work since 2010. Despite an announcement by DHA that there would be a one year grace period given ZEP holders, and that they retained all rights associated with their now-expired permits, a number of issues have arisen. The EAP has encountered situations where employers fired ZEP holders for being 'illegal foreigners' and other cases where, despite meeting the job criteria, were not hired for positions due to perceptions of their 'illegal' status. Similar scenarios have played out in regards to expired asylum and refugee permits/visas due to the Covid-19 lockdown, and we submit such a confusing and dynamic context makes this proposed provision difficult to implement.

41. It is submitted that the current Bill should align with the Immigration Act and ensure employers undertake a 'good faith' effort to determine legality of an applicant. Such a wording would fall under the Bill and DNLMP's aim of establishing a 'rights-based' labour policy that would ensure employers conduct due diligence in hiring foreign nationals and would also protect the rights of workers.

Comments on the obligation that employers must 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 vacancy'

42. Clause 12A(2)(b) is not only vague how such a search might be done, it would add a further administrative burden to employers and would exclude significant numbers of low-skilled migrants who would have difficulty demonstrating they possess skills that a South African would lack. Further, complex and confusing requirements are likely to harm economic activity and restrict the rights of non-nationals through bureaucratic default. The lack of clarity regarding which businesses may be subjected to this subsection is concerning. As it is written, it appears that a small to medium-sized employer would be required to undertake a national search for any position regardless of the skills required.

43. The standard proposed, namely that an employer must 'satisfy themselves that there are no persons in the Republic, other than foreign nationals' is an impossible standard to comply with in any meaningful way. Equally concerning is how it would undermine the NLMP's emphasis on regional integration and increasing avenues for legal migration. In this sense, the Bill contradicts the NLMP's policy aims and this should be reconciled.

44. The experience of the EAP at the SCCT is again illustrative of the possible complications. The EAP engages with employers through its Job Placement Project, and in particular SMMEs, around the recruitment of staff. Many have limited resources and capacity to source candidates locally, and usually use sites such as Gumtree.co.za to advertise. This is because their need is usually urgent but also due to limited resources and such sites provide a convenient option to attract qualified candidates. Most employers are not hiring candidates based on what the nationality of the employee is or what type of ID they hold, as long as they have the valid documentation; they are looking for reliable candidates who have the relevant skills to perform the required tasks. Should they be required to comply with an administratively burdensome system, productivity will be lost, employers outputs frustrated, and job seekers will face further obstacles to securing employment.

Comments on Skills transfers

45. Clause 12(A)(2)(c) of the Bill proposes that any person who employs a foreign national must 'prepare a skills transfer plan in respect of any position in which a foreign national is employed.'

46. In principle we agree that skills transfers, upskilling, and knowledge transfer is positive for all individuals involved. However, legislating that every foreign national employed must have a skills transfer plan is an unnecessary burden on employers and creates the odd situation where a foreign national would make themselves redundant. In some sectors, this makes little practical sense, and in practice we do not foresee much positive benefit from such legislation.

47. The SCCT submits that there are more efficient means to address this issue that do not involve legislation or burdensome regulations. One example are the business courses run by Somali entrepreneurs in the Western Cape which provide a platform for meaningful engagement between citizens and non-citizens.[30] Such interactions are critical for not only a grass-roots 'skills transfer' mechanism but also for increasing understanding and reducing xenophobic attitudes.[31] We are certain there are other worthy initiatives across the country that we could support and learn from.

48. The SCCT therefore recommends that this aspect of the Bill be removed and that the DEL supports other means to achieve this important task.

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[30] B. Payi, 'Somali entrepreneurs propose win-win dialogue', *Weekend Argus*, 8 September 2019, available at: https://www.iol.co.za/news/south-africa/western-cape/somali-entrepreneurs-propose-win-win-dialogue-32580280

[31] See the SCCT's short documentary film *Spaza* which details Somali life in South Africa, how they approach their businesses, their business skills courses, and the learning outcomes of these courses. Available at: https://www.youtube.com/watch?v=hGRBblL8i5c&t=10s

Comments on the introduction of Quotas for employment of foreign nationals

49. The Bill proposes to establish a Quota system through 12B(1) which states that 'The Minister, after consulting the Board, may, by notice in the *Gazette*, specify a maximum quota for the employment of foreign nationals in any sector.' We are concerned that a quota system would effectively make employment impossible for many foreign nationals, resulting in a system that would violate their right to dignity as outlined above in paragraphs 11 - 20. It would also undercut the aims of the DNLMP to create a more equitable and rights-based environment for employment. We have further concerns that enforcing such a Quota system may lead to increased inefficiencies in job creation as well as increase the possibilities for corruption.

50. Much of the specifics of the proposed Quota system are left to be determined by regulations, published by the Minister, which is welcomed given its importance. However, it is our view that the potential economic, social and political costs of a Quota system far outweigh any positive gains and we therefore recommend this aspect of the Bill be removed.

51. Should the Quota system remain in the Bill clause 12B(5) states that the Minister must take into account

    (a) the purpose of the Act, as set out in section 2(1)(h);
    (b) the availability of the requisite skills, including critical skills, among South African citizens, permanent residents or refugees who are available to work in the sector; or
    (c) the Republic's obligations to permit foreign nationals to work in terms of any international agreement, which is binding upon the Republic in terms of section 231 of the Constitution.

    In terms of subsection (a) the purpose of the act must be considered which is to **facilitate** and as the bill adds to facilitate and regulate 'the employment of foreign nationals in the South African economy…' We submit that the introduction of quotas goes directly against the facilitation of foreign nationals despite this being the purpose of the legislation.

52. Clause 12B(5)(b) required that the Minister must take into account 'the availability of the requisite skills, including critical skills, among South African citizens, permanent residents or refugees who are available to work in the sector…' Cognisance of asylum seekers skills, survivors of human trafficking and other vulnerable migrants should also be considered as should the critical, high or essential skills of foreign nationals, particularly those currently in employment. There are a number of critically skilled foreign nationals who are working and crucial to South Africa's economy and similarly a number of highly skilled in fields such as engineering who are highly skilled and important for economic development albeit that they may not meet the recently increased critical skills thresholds and lastly essential workers who are foreign nationals including teachers, nurses and social workers who are part of the very fabric of South African society and must be considered by the minister. Hence we submit 12B(5)(b) should read

'the availability of the requisite skills, including critical, *high or essential* skills, among South African citizens, permanent residents [or], refugees, asylum seekers, survivors of trafficking or other vulnerable migrants who are available to work in the sector and the presence of critical high and essential skills in foreign nationals currently working in the sector'

This also in line with the Employment Services Act 4 of 2014 section 7(1) which provides for the Minister, after consulting, establishing '*schemes to minimise the retrenchment of employees*' including foreign nationals in employment.

53. Clause 12B(5)(c) states that the Minister must take into account **'the Republic's obligations to permit foreign nationals to work in terms of any international agreement, which is binding upon the Republic in terms of section 231 of the Constitution.'** We recommend this be amended to include reference to Constitutional rights and domestic law obligations as below:

> the Republic's obligations to permit foreign nationals to work in terms of any domestic legislation or international agreement, which is binding upon the Republic in terms of section 231 of the Constitution, and in line with the fundamental rights of foreign nationals as contained in the Constitution.'

Comments on fines under the Bill and the authorisation of labour inspectors to exercise powers in terms of the Immigration Act

54. The proposed amendments to subsection 49(2) seek to increase fines from R50,000 to R100,000 and to amend the section to make such fines applicable to any 'person' as opposed to 'employer'.

55. The SCCT is concerned that the widening of scope may result in migrants being the target of fines. As outlined above in paragraphs 21 - 22, documentation issued by the DHA often lacks clarity regarding rights and validity. The SCCT submits that fining individuals for conducting work lawfully or even if unlawfully, would be misguided and impinge on the fundamental right to dignity. If this is the intent of the Bill, the SCCT does not believe it will pass constitutional muster. If not, we recommend that the Bill be more specific as to liability regarding fines limiting it to employers as in the original act.

56. Clause 49(5) of the Bill proposes that Minister and the Minister of Home Affairs may conclude an agreement in which labour inspectors may enforce provisions of section 38 of the Immigration Act as identified in that agreement. Our concern with the proposed amendment centres on the potential conflict inherent in bestowing such powers on labour inspectors between their core function to protect workers' rights and carrying out immigration enforcement powers which should rather falls under the mandate of immigration officials. As with our concerns around the Quota system and the problematic aspects of enforcement, an extra layer of bureaucracy may open up more avenues for corruption. And as referenced above, the inconsistency of documentation and variable practices make deciphering documentation a complex task. It is worth noting here that civil claims due to unlawful immigration enforcement actions by DHA officials are significant; a 2013 report found that at the time claims

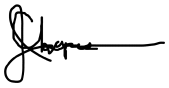
against Immigration Affairs total R503.3 million,[32] highlighting potential financial ramifications of administrative action that result in damage claims.

57. We recommend that this aspect of the Bill be removed and that the Immigration Act is implemented by DHA officials who are better situated to determine an individual's legal status in a more efficient and lawful manner.

CONCLUDING REMARKS

58. In summary, it is our submission that both documents require significant revision. We remain extremely concerned about the possibility of severe negative consequences across the economy, society and throughout the region if the proposed policies signed into law and implemented. We encourage the DEL to explore more constructive avenues for job creation and development than developing policies that exclude members of our society. We thank the DEL for the opportunity to provide our insight on these important issues.

Submissions of the Scalabrini Centre of Cape Town,



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[32] G. Mthembu-Salter et al, Counting the cost of securitising South Africa's immigration regime, 2014, p. 11, available at: https://opendocs.ids.ac.uk/opendocs/handle/20.500.12413/14832. See also: R. Amit, B*reaking the law, breaking the bank: The cost of Home Affairs' illegal detention practices*, 2012, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274018.