

27 May 2022



Norton Rose Fulbright South Africa Inc
9th Floor 117 on Strand
117 Strand Street
Cape Town 8001
South Africa

By Email: NLMP@labour.gov.za

Thembelani W. Nxesi
Minister of Employment and Labour

Tel +27 21 405 1200
Fax +27 21 418 6900
Private Bag X10 Roggebaai 8012
Docex 181 Cape Town
nortonrosefulbright.com

Direct line
+27 21 405 1249

Email
anneline.coetsee@nortonrosefulbright.com

Your reference **Our reference**
PBO2631

Dear Hon. Mr. T.W. Nxesi

Comment on Employment Services Amendment Bill, 2021

1 Introduction

- 1.1 We refer to the invitation for public comments on the *Employment Services Amendment Bill, 2021* (the **Bill**)¹ which seeks to amend the *Employment Services Act, 2014* (the **Act**).
- 1.2 We confirm that we are instructed by the Scalabrini Centre of Cape Town (**Scalabrini**) to make submissions on whether the Act will withstand constitutional scrutiny should the Bill be enacted in its current form. Our comments will be 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.
- 1.3 We understand that Scalabrini will provide further separate comment on the remainder of the Bill as well as the Draft National Labour Migration Policy, 2022 (the **NLM Policy**)².

2 Overview

- 2.1 These submissions will focus on clauses 1(e) and 5 of the Bill, which seek to amend section 1 of the Act and to insert sections 12A(2)(b) and 12B into the Act (the **impugned provisions**). We briefly outline the content of each clause below:
 - (1) Section 1 of the Act sets out the definitions for the words or phrases used therein. The Bill proposes the insertion of several new definitions including that of "asylum seeker"³, "refugee"⁴ and "the Refugees Act, 1998".
 - (2) The Bill also proposes an amendment to the definition of "foreign national"⁵. In particular, it now specifically excludes from that definition those persons recognised as refugees in terms of the Refugees Act. The consequence of this amendment is to grant refugees the same

¹ Published under Government Gazette No. 45962 on 28 February 2022

² We note that interested parties were invited to submit comments to the Department of Employment of Labour by 28 May 2022

³ Defined as "a person who is seeking recognition as a refugee in the Republic in accordance with the provisions of the Refugees Act"

⁴ Defined as "an individual who has been granted asylum in terms of section 24 of the Refugees Act"

⁵ Defined as "an individual who—

- (a) is not a South African citizen or does not have a permanent residence permit issued in terms of the Immigration Act; or
- (b) has not been granted recognition as a refugee in terms of the Refugees Act (underling being the amendment to the Act)

employment rights as citizens and permanent residents. Scalabrini welcomes and supports this limited amendment.

- (3) However, asylum seekers are not excluded from the definition of a foreign national and therefore will be treated on par with other work-seeking foreign nationals in the country.
- (4) A new section 12A, inserted by clause 5 of the Bill, replaces section 8 of the Act, which the Bill seeks to repeal. Of particular concern to Scalabrini is section 12A(2)(b) which would require an employer to “*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*”.
- (5) Clause 5 of the Bill inserts section 12B into the Act, which empowers the Minister, after the necessary consultation, and on notice, to specify a maximum quota for the employment of foreign nationals by employers in any sector. This includes the identification of any occupational category or nationality of the foreign national concerned.

2.2 In summary, the consequence of the amendments would be to include asylum seekers into the definition of foreign national and thereby subject such persons to the significant restrictions on employment contemplated by the Act as a whole, as well as any quotas that the Minister might decide to introduce.

2.3 In light of the status of the current asylum system in South Africa, the impugned provisions will have the following practical effect:

- (1) Asylum seekers will not be eligible for any employment position where a citizen, permanent resident or recognised refugee could be found to fill the role. The roles which will become unavailable to asylum seekers will effectively include all low skilled jobs and may include semi- and high-skilled positions as well.
- (2) Where a position is open to an asylum seeker as no citizen, permanent resident or recognised refugee has the requisite skills, they may nevertheless not be eligible if the relevant quota level has been reached.
- (3) The majority of asylum seekers will be unable to support themselves and their families whilst awaiting the final decision on their asylum application, which inevitably takes between 2 and 20 years⁶. As they are not eligible for social assistance grants from the State, asylum seekers will either starve or be compelled to leave South Africa, in search of another country to offer them asylum.
- (4) Effectively, South Africa will cease to be a refugee receiving country.

2.4 Read together the impugned provisions do not withstand constitutional muster, are contrary to the purpose of the Refugees Act and violate the country’s international law obligations.

2.5 This defect can be easily remedied by the amendment of the definition of “*foreign national*” to specifically exclude an asylum seeker who has been issued with a visa in terms of section 22 of the Refugees Act.

2.6 The remainder of these submissions will cover:

- (1) A brief overview of the asylum system in South Africa;
- (2) An analysis of the impugned provisions and the constitutionality thereof;
- (3) An analysis of South Africa’s obligations under international law; and

⁶ As we discuss in more detail below, the Constitutional Court and Supreme Court of Appeal have frequently recognized the systemic delays in processing asylum seeker applications by the Department of Home Affairs (the **DHA**). Moreover, the DHA has itself reported to the portfolio Committee that it faces severe backlogs in the processing of such applications (as well as associated reviews and appeals).

(4) Concluding remarks.

3 The asylum system in South Africa

The Process

- 3.1 The asylum system in South Africa is regulated by the Refugees Act and the *Refugees Regulations, 2018* (the **Refugees Regulations**).
- 3.2 Section 1 of the Refugees Act defines an asylum seeker as “*a person who is seeking recognition as a refugee in the Republic*” whilst a refugee is defined as a “*person who has been granted asylum*” in terms of the Refugees Act.⁷
- 3.3 It must be noted how the courts have distinguished between asylum seekers and refugees. Whilst the Refugees Act provides more concrete rights to refugees than to asylum seekers, the Constitutional Court has recognised that a person does not become a refugee merely because of recognition, one is recognised because he or she is a refugee.⁸ Asylum seekers are thus ‘presumptive refugees’.
- 3.4 Similarly, the United Nations Convention Relating to the Status of Refugees, 1951 (**UN Refugee Convention**) and the United Nations Protocol Relating to the Status of Refugees, 1967, (**UN Refugee Protocol**), as well as the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969 (**OAU Convention**)⁹, do not differentiate between *de jure* and *de facto* refugees, i.e. asylum seekers, when defining a refugee or assigning rights to refugees.¹⁰
- 3.5 The grounds for qualifying for asylum, and thus refugee status, are broad and include persons (as well as their spouses and dependents) who are forced to leave their country of origin due to either:
- (1) Persecution by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group¹¹; or
 - (2) External aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin.¹²
- 3.6 Asylum seekers assert a claim on the South African state for protection based on South Africa’s undertaking, at an international and local level, to welcome and host refugees within its borders.
- 3.7 Currently those seeking asylum within South Africa are to report to a Refugee Reception Office (**RRO**) with 5 days entry into South Africa.¹³ Once an application is received, the asylum seeker would have to undergo an interview with a Refugee Status Determination Officer (**RSDO**), who will then make a determination on their status as a refugee in terms of Section 24 of the Refugees Act.
- 3.8 If their application is rejected, the asylum seeker has the right to review the decision before the Standing Committee for Refugee Affairs (**SCRA**), or to appeal the decision before the Refugee Appeal Authority (the **RAA**), depending on the nature of the rejection. Should an asylum seeker not receive relief at the SCRA or RRA, they may approach the High Court for the review of this second decision. Asylum seekers have the right to remain in the Republic pending the finalisation of the application in all respects, and may not be subject to deportation whilst such proceedings remain pending.

⁷ Section 1 of the Refugees Act.

⁸ *Saidi* at para 34

⁹ Art 1 OAU Convention

¹⁰ Article 1 of the UN Refugee Convention, read with article 1 of the UN Refugee Protocol, defines a refugee as any person who “as a result of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [their] nationality and I unable or, owing to such fear, is unwilling to avail [themselves] of the protection of that country.” Article 1 of the OAU Convention incorporates this definition and includes reference to persons who have been compelled to leave their place of habitual residence as a result of “external aggression, occupation, foreign domination or events seriously disturbing public order”.

¹¹ Section 3(a) of the Refugees Act.

¹² Section 3(b) of the Refugees Act.

¹³ Section 21(1)(a) Refugees Act

- 3.9 Should the impugned provisions operate as law for some time, it is probable that South Africa will no longer be considered a refugee-receiving country. Current asylum seekers in the country will in all likelihood need to be resettled to other countries.
- 3.10 The provisions will operate in a way which violates the principle of *non-refoulement*. This principle is deeply enshrined in our law, as was recently confirmed by the Constitutional Court in *Abore*¹⁴ and is codified locally in section 2 of the Refugees Act. This principle applies across all other legislation and laws passed. It is all encompassing and must be protected at all costs. Put simply, no asylum seeker may be forced to return to their country of origin where they might become subject to the abuses described in paragraph 3.5 above.
- 3.11 Asylum seekers have access to the rights contained in the Constitution in so far as those rights apply to them.¹⁵ Additionally, certain asylum seekers may be granted the right to seek employment as endorsed on their visa.¹⁶ In practice, such right to seek employment is seldom withheld.
- 3.12 We stress that the asylum system in South Africa is not unique. It accords with the principles adopted by most jurisdictions, precisely because most jurisdictions are bound by their obligations at international law. Accordingly, any legislation or government policy that does not harmonise with this system is liable to be found wanting.

The inherent and systemic delays in the process

- 3.13 Although asylum status is intended to be temporary in nature, in practice, asylum seekers can wait up to 20 years to finally receive formal recognition as a refugee. During this time genuine refugees retain the status of asylum seeker in law.
- 3.14 Evidence of the delays in the asylum process can be found in numerous court cases brought against the Department of Home Affairs, including: *Kiliko and Others v Minister of Home Affairs, Intercap Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others, Minister of Home Affairs and Others v Somali Association of South Africa and Another*, and *Scalabrini Centre, Cape Towns and Another v Minister of Home Affairs and Others*.¹⁷
- 3.15 There are various reason for the systemic delays, including:
- (1) Under capacitated functionaries including: RROs, the RAA and SCRA;
 - (2) Extremely short visa extension periods of one to three months;
 - (3) Corruption;
 - (4) Delays by asylum seekers in renewing their visas as a result of the burdensome and impractical renewal process which requires asylum seekers to:
 - (a) attend RROs in person every few months in order to obtain a visa renewal;
 - (b) travel to far destinations every few months in order to attend the particular RRO that has their physical file;
 - (c) frequently take off work or from their studies for more than one day as the excessively long queues mean that not all asylum seekers at an RRO on a particular day can be attended to; and
 - (d) only attend on certain days where an interpreter is available.

¹⁴ *Abore v Minister of Home Affairs and Another* [2021] ZACC 50

¹⁵ Section 27A(b) & (c) Refugees Act

¹⁶ Regulation 12 Refugee Regulations

¹⁷ *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C), particularly at paras 10 and 25; *Intercap Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others* 2010 (5) SA 367 (WCC) at paras 21 – 24; *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 (3) SA 545 (SCA) at paras 25 and 29; *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* [2017] ZASCA 126; [2017] 4 All SA 686 (SCA) at paras 45 – 46. See also *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others* 2010 (8) BCLR 785 (WCC); [2010] 4 All SA 414 (WCC) at paras 71 – 72;

- 3.16 Scalabrini understands that, at present, asylum seekers are able to renew their visas online and the current extension period has been increased to one year. There are current developments from the Department of Home Affairs to reduce the backlog in partnership with the United Nations High Commissioner on Refugees.¹⁸ It remains to be seen how this system may ameliorate the exorbitant delays. For now, there is no real indication that asylum seeker applications will be expedited.
- 3.17 The National State of Disaster coincided with the implementation of the latest amendments to the Refugees Act. However, the RROs were closed down for the entire period of the National State of Disaster, bar for a new online system which was developed for the renewal of already existing permits and visas. To the best of Scalabrini's knowledge, during this time no new applications for asylum could be processed nor were determinations of refugee status made.
- 3.18 It must be noted that civil society organisations, such as Scalabrini, have discovered that the majority of new asylum applications are rejected immediately.¹⁹ The appeals of these decisions result in further delays in acquiring status. In fact, it is apparent from data provided by the Department of Home Affairs itself, that the inability of the RRAs to timeously process appeals is the most significant reason for the delay in finalising refugee status.
- 3.19 Whilst awaiting their status determination, many asylum seekers seek work in order to support themselves and their families as they do not qualify to receive social assistance from the state. Only recently were asylum seekers granted the right to apply for the COVID-19 relief permit, and then only due to court action.²⁰

The nature of asylum seekers

- 3.20 It is important at this stage to consider the circumstances of asylum seekers who have fled their country of origin.
- (1) Such persons have been forced to flee their country of origin and to enter an adoptive country where they will have very few support systems.
 - (2) In South Africa, asylum seekers will receive no support from the state.
 - (3) They will typically enter the country with little more than the clothes on their backs and will be dependent upon an opportunity to generate an income through employment.
 - (4) Whilst many asylum seekers are qualified to perform a range of occupations, they will typically be forced to seek employment in lower skilled work, self- or informal-employment.
 - (5) They will often be exposed to xenophobia and a general failure by the South African public and South African institutions to appreciate the rights accorded by the Refugees Act.
 - (6) In the event that asylum seekers are compelled to return to their countries of origin, it is likely that they will be subject to severe prejudice, including summary detention, rape and torture.
- 3.21 From the above it is clear that asylum seekers are a particularly vulnerable group, distinguishable from other foreign nationals entering South Africa and seeking work. In particular, they are not 'economic migrants' who have entered South Africa in order to seek better opportunities at the expense of South African citizens.

¹⁸ As per the UNHCR website accessed at <https://help.unhcr.org/southafrica/2022/04/14/appeals-backlog-project/> as well as an parliamentary answer from the Minister of Home Affairs to Ms LL van der Merwe on 8 March 2022 – NW447, accessed at: <https://pmg.org.za/committee-question/17912/>

¹⁹ Amnesty International (29 October 2019) *South Africa: Failing asylum system is exacerbating xenophobia* accessed at <https://www.amnesty.org/en/latest/news/2019/10/south-africa-failing-asylum-system-is-exacerbating-xenophobia/#:~:text=The%20report%20found%20that%20poor,reviews%20%E2%80%93%20around%20an%20estimated%20190%2C000>. An Amnest International Report found that there was a 96% rejection rate as at 2019.

²⁰ *Scalabrini Centre of Cape Town and Another v Minister of Social Development and Others* (22808/2020) [2020] ZAGPPHC 308; 2021 (1) SA 553 (GP) (18 June 2020)

4 The Constitutionality of the impugned provisions

Introduction

- 4.1 It is submitted that the impugned provisions violate the Constitution in two ways. First, by infringing the rights of asylum seekers to dignity and the right to life, and second, by impeding the state's international obligations.
- 4.2 Below we will first address the infringement of Constitutional rights and thereafter address whether the infringement is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. We will then address the impact of the provisions on South Africa's international obligations in regard to asylum seekers.

Infringement of constitutional rights

- 4.3 The purpose of the proposed amendments, as a whole, is to impose a blanket ban on the employment of foreign nationals, inclusive of asylum seekers. This much is made clear by amended section 12A(1) which states:

"No person may employ a foreign national to work within the territory of the Republic of South Africa"

- 4.4 This blanket prohibition is subject to a number of exceptions, the import of which are to require South African employers²¹ to demonstrate, before employing a foreign national, that no other person is available to perform the role in question. This is self-evidently an onerous, if not impossible task. In particular, it excludes the employment of foreign nationals, inclusive of asylum seekers, in lower skilled positions.
- 4.5 Read together the impugned provisions first require an employer to ensure that a citizen, permanent resident or refugee cannot fill the vacancy, thus prioritising these persons over any other foreign national.
- 4.6 The exclusion of an incredibly vulnerable group such as asylum seekers from this prioritisation can have drastic impacts on their ability to secure work and sustain themselves and their families. Secondly, the maximum quota for foreign nationals may have the impact of discouraging the employment of an incredibly vulnerable category of persons, who often have fled their country of origin in dire and traumatic circumstances, leaving all that they once had behind.
- 4.7 As is further explained below, the substance of the impugned provisions impacts their rights to human dignity and life as provided for in the Constitution.

Is the infringement reasonable and justifiable in terms of section 36 of the Constitution?

- 4.8 Section 36 of the Constitution requires the following factors to be taken into account when determining whether a limitation is reasonable and justifiable:
- (1) The nature of the right;
 - (2) The importance of the purpose of the limitation;
 - (3) Nature and extent of the limitation;
 - (4) The relation between the limitation and its purpose; and
 - (5) Less restrictive means to achieve the purpose.
- 4.9 Each factor will be discussed individually below.

- (1) Nature of the right:

²¹ The fact that it is the employer that must justify the need to employ a foreign national is significant as it effectively prevents the prospective asylum seeker employee from advancing the matter.

- (a) Dignity
- (i) The right to human dignity is afforded to all in the Constitution and is a foundational value of the Constitution. It is a standalone right in section 10 of the Constitution.
- (ii) The right to dignity is intertwined with the right to life and cannot be enjoyed without the fulfilment of the later right.
- (b) Life
- (i) The right to life is a universally accepted right and is enshrined in section 11 of the Constitution.
- (c) The above rights are afforded to all persons within South Africa, regardless of their status, citizenship or nationality.
- (d) The ability to work is intrinsically aligned with the above two rights, such that being barred from seeking employment and a meaningful wage prevents the fulfilment of these rights.
- (i) Prior to the amendments to the Refugees Act, asylum seekers received the same automatic right to work as recognised refugees receive. In its current form, section 22 provides conditions upon which the right to work may be endorsed on the visa as well as obligations on an employer of an asylum seeker to produce a letter of employment to the Department of Home Affairs 14 days after employment.²² Section 22(2) of the Refugees Act, nullifies any previous visa issued to an asylum seeker in terms of *the Immigration Act, 2002 (Immigration Act)*. It must be noted that objections have been raised to the removal of the automatic right to work in respect of asylum seekers. Nonetheless, in the majority of cases, Scalabrini has noted that asylum seekers have been granted the right to work, and the issue thus appears to be essentially academic.
- (ii) Both the Constitutional Court and the Supreme Court of Appeal have recognised that the ability to work is an integral part of a person's right to life and human dignity.²³ This is particularly the case where employment is the only form of subsistence available to an asylum seeker. For that reason, the state may not preclude a genuine asylum seeker from seeking such employment.²⁴ In *Watchenuka*, the court held that a blanket ban which prevents all asylum seekers from seeking employment was invalid and unlawful for this very reason.²⁵
- (iii) Section 233 of the Constitution requires that all legislation is interpreted so that it is consistent with international law. The Refugees Act is expressly required to be interpreted and applied in a manner consistent with the UN Convention and Protocol.²⁶ Further, the right to work in terms of the Refugees Convention can be found in articles 17 to 19.
- (e) The inability to sustain oneself through meaningful, decent work has a significant adverse effect on asylum seekers' dignity. We say this for the following reasons:
- (i) The Constitutional Court has recognised that the freedom to engage in productive work is a core part of human dignity, self-esteem and self-worth.²⁷

²² Sections 22(6) – (10) Refugees Act

²³ *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (7) BCLR 856 (CC); 2018 (4) SA 333 (CC) (**Saidi**) at para 18, *Minister of Home Affairs and Others v Watchenuka and Others* 1 All SA 21 (SCA) (**Watchenuka**) at paras 27 and 33.

²⁴ *Watchenuka*

²⁵ *ibid*

²⁶ Section 1A Refugees Act

²⁷ *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (7) BCLR 856 (CC); 2018 (4) SA 333 (CC) (**Saidi**) at para 18, *Minister of Home Affairs and Others v Watchenuka and Others* 1 All SA 21 (SCA) (**Watchenuka**) at paras 27 and 33.

- (ii) A restriction on work is “a restriction upon his or her ability to live without positive humiliation and degradation. For it is not disputed that this country, unlike some other countries that receive refugees, offers no State support to applicants for asylum.”²⁸
 - (iii) And, “the deprivation of the freedom to work assumes a different dimension when it threatens positively to degrade rather than merely to inhibit the realisation of the potential for self-fulfilment.”²⁹
 - (f) In summary, the impugned provisions, in limiting the right to work, will significantly limit the rights to dignity and life, if not render them completely nugatory.
- (2) Importance of the purpose of the limitation:
- (a) The apparent purpose of proposed section 12A is to create a regime where citizens, permanent residents and refugees are expressly preferred in the labour market over foreign nationals, thereby increasing employment within the country for non-foreign nationals.
 - (b) The apparent purpose of proposed section 12B is to limit the number of foreign nationals (other than permanent residents and refugees) in employment in particular sectors, job categories and regions.
 - (c) More generally, the Bill provides that its purpose is to regulate the employment of foreign nationals in South Africa in a matter consistent with the objects of the Act, the Immigration Act and the Refugees Act.
 - (d) In contrast, the Act itself emphasises the need to protect vulnerable persons. Thus the preamble of the Act provides that it seeks “to promote the employment of young work seekers and other vulnerable persons”. Section 2 provides that the purpose of the Act is to “facilitate the employment of work seekers, in particular vulnerable work seekers”³⁰. Notably, section 1 defines a work seekers as “any person who is looking for work” and does not differentiate between categories of persons in its definition.
 - (e) The Immigration Act provides in its preamble, amongst other points, that its purpose is to set in place a new system of immigration control which ensures that:
 - “(d) economic growth is promoted through the employment of needed foreign labour, foreign investment is facilitated, the entry of exceptionally skilled or qualified people is enabled, skilled human resources are increased, academic exchanges within the Southern African Development Community is facilitated and tourism is promoted;
 - ...
 - (l) immigration control is performed within the highest applicable standards of human rights protection;
 - (m) xenophobia is prevented and countered;
 - (n) a human rights based culture of enforcement is promoted;
 - (o) the international obligations of the Republic are complied with; and
 - (p) civil society is educated on the rights of foreigners and refugees.”

²⁸ Watchenuka at para 32

²⁹ Ibid.

³⁰ Section 2(1)(f) of the Employment Services Act, 2014

- (f) The Refugees Act's primary purpose is to put a framework in place in order to uphold the State's commitment to the right of *non-refoulement*, which has been codified in section 2 of the Refugees Act.
 - (g) The NLM Policy provides further elaboration for the purpose of the inclusion of quotas for the employment of foreign nationals. It provides that there is an apparent higher percentage of migrant workers in the informal sector than the formal sector, resulting in competition with South Africans seeking employment in the informal sector.³¹ It suggests that the imposition of a quota will limit that competition and protect job opportunities for local workers.³²
 - (h) South Africa has a high rate of unemployment and measures aimed at increasing employment within the country are important and must be carefully considered. They ought not however to be supported where the harm caused by those measures is disproportionate to the benefit arising, or where simply no proven benefit can be identified.
- (3) Nature and extent of the limitation:
- (a) The limitation has far-reaching and severe consequences for asylum seekers in South Africa.
 - (b) In substance, the impugned provisions would operate to prevent asylum seekers from accessing employment and sustaining themselves at all. We say this for the following reasons:
 - (i) Section 22(8) of the Refugees Act provides that an asylum seeker visa may not be endorsed with the right to work if the asylum seeker is able to sustain him/herself in a number of manners. The Refugees Act thus presupposes that an asylum seeker who has been given the right to work is unable to sustain him/herself in any other manner, such as through a family or a charitable organisation.³³
 - (ii) Unlike other foreign nationals, asylum seekers in South Africa cannot return home or select an alternate destination should they not find employment in South Africa for the following reasons:
 - (A) By definition, asylum seekers cannot return to their home country as they may face persecution, torture and death.
 - (B) Asylum seekers cannot freely travel to alternative destinations as, in most cases, they will not have travel documents having fled from persecution. Even if they do have travel documentation, many countries will not accept an asylum seeker who has resided in an alternate country of asylum for some time. Further, in leaving the country an asylum seeker would risk the abandonment of their claim in terms of section 22(12)³⁴ of the Refugees Act or an eventual rejection of their claim as unfounded, by appearing to seek the protection of another country³⁵.
 - (iii) The majority of asylum seekers in South Africa are employed in low skilled employment for some time and do not necessarily have access to scarce skills roles. This is for a number of reasons:

³¹ NLMP at Page 36

³² NLMP at Page 82 and 85

³³ See the test applied at section 22 (6) to (8) of the Refugees Act. As is warned at para 32 of *Watchanyuka* and in the The Michigan Guidelines on the Right to Work (2010) 31 *Michigan Journal of International Law* at 295 (**Michigan Guidelines**)

³⁴ Kindly note that this provision is currently being challenged in the Western Cape High Court under case number: 5441/2020 – *Scalabrini Centre of Cape Town and Another / Minister of Home Affairs & Others* and this section is temporarily not operational.

³⁵ Section 4(1)(d) Refugees Act provides that an asylum seeker does not qualify for refugee status if an RSDO has reason to believe that they enjoy the protection of any other country in which they are a recognized refugee, resident or citizen.

- (A) Asylum seekers have not chosen South Africa for work opportunities and have not had the opportunity to comply with the regulatory environment, having fled from their country involuntarily based on circumstances outside their control.
 - (B) On entering South Africa an asylum seeker will often have to learn to speak another language before they will be able to access further training or employment.
 - (C) Where the asylum seeker is qualified, they will need to go through the process to have this qualification recognised by the South African Qualifications Authority (**SAQA**), before they can work in a skilled role. Many asylum seekers flee their countries of origin with very little other than the clothes on their back, and thus do not always have all the relevant documentation to evidence their qualification. This can result in delays in having their qualifications recognised.
- (iv) As can be inferred from the Bili's purpose and the available evidence, in South Africa's current socio-economic context many citizens, permanent residents and refugees do not have employment. Accordingly, it is highly probable that for the foreseeable future there will always be individuals from one of these three groups that will be preferred above an asylum seeker in all low skilled work.
- (c) Accordingly, asylum seeker in South Africa will be left destitute by not being able to sustain themselves, not being able to leave the country and not being able to find employment as a result of the impugned provisions.
 - (d) Limiting asylum seekers ability to secure any type of employment compounds the fear, persecution and trauma already faced in fleeing their countries of origin.³⁶
 - (e) As noted above, it is generally accepted that asylum seekers are presumptive refugees and thus ought to be accorded the same rights as those recognised as refugees.
 - (f) The provisions may have the impact of increasing the risk of xenophobia towards asylum seekers, as has been warned against by the courts.³⁷ The restriction of the rights and entitlements of asylum seekers would set them as a class apart from other persons.
 - (g) As the provisions would further restrict the ability of asylum seekers to obtain employment, this may have the impact of decreasing the chance of voluntary repatriation, where it may be possible.³⁸ This would risk a continued pressure on the asylum system and immigration services, which has struggled to accommodate all asylum seekers in South Africa.
- (4) Relationship between the limitation and its intended purpose:
- (a) As above, it appears that the intention behind the impugned provisions is to give more opportunities to South Africans in low skilled jobs, however even the NLM Policy indicates that foreign nationals are a small portion of the work force and do not negatively impact the South African Labour Market.³⁹

³⁶ Michigan Guidelines at 295.

³⁷ *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 122 and 143; *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), para 44. The most recent of xenophobic attacks occurred in April 2022, from which the African Commission called on the state to take appropriate measure to end such violent attacks – see <https://www.achpr.org/pressrelease/detail?id=630>

³⁸ Michigan Guidelines at 296.

³⁹ NLMF at 17

- (b) As at 18 March 2020, only 188 269 asylum seekers were in South Africa⁴⁰ as compared to the 7.9 million persons who are currently unemployed.⁴¹ The NLM Policy states that there are a higher amount of foreign nationals employed in the low skilled sector than citizens, however no source is provided for this statement.⁴²
 - (c) Additionally, the NLM Policy states that there are reliability concerns with the data itself, however, notwithstanding this it states that quotas would serve its intended purpose.⁴³ No data or evidence is provided for the amount of asylum seekers who apparently take up low sector work.
 - (d) The NLM Policy additionally makes plain that one of the main priorities for South Africa in terms of its international and regional commitments is to improve conditions of all migrant workers and their families, fight xenophobia and any forms of inhuman treatment of migrant workers.⁴⁴ The effect of the impugned provisions would be to contradict this policy priority and risk the livelihoods of the majority of asylum seekers.
 - (e) As provided above not all asylum seekers are provided the right to work and many face significant barriers in securing work when this right is provided. Limiting their employment abilities does not protect a very vulnerable group, nor would it guarantee any substantial increase in opportunities to South Africans in the low skilled sector.
 - (f) Notwithstanding the above, the Act as well as the Refugees Act and Immigration Act commit the state to protect vulnerable groups in the execution of the legislation. The impugned provisions remove protection from asylum seekers, a particularly vulnerable group. Therefore it does not appear that there is a significant relation between the limitation and the intended purpose of the provisions and the Act.
 - (g) To summarise, there is no evidence whatsoever that the enactment of the impugned provisions would achieve the State's intended purpose, namely the reduction of unemployment, particularly in less skilled positions.
- (5) Less restrictive means:
- (a) The purpose of preventing foreign nationals from securing employment ahead of citizens, permanent residents and refugees can be achieved through less restrictive means.
 - (b) Expressly excluding asylum seekers from the definition of 'foreign nationals' in the Act would ensure that foreign nationals who are refugees, even though they may temporarily bear the status of asylum seeker, retain the right to work, whilst limiting the employment of other foreign nationals.
 - (c) The purpose of preventing foreign nationals from accessing the rights applicable to refugees before a determination has been made on their application for asylum, can be addressed by processing applications for asylum (and the related appeals and reviews) more speedily.⁴⁵ The Department of Home Affairs has already committed to

⁴⁰ NW202 (18 March 2020) accessed at <https://pmg.org.za/committee-question/13290/>

⁴¹ StatsSa Media release "Quarterly Labour Force Survey (QLFS) – Q4:2021 (29 March 2022) accessed at <http://www.statssa.gov.za/publications/P0211/Media%20release%20QLFS%20Q4%202021.pdf>

⁴² NLMP at 36

⁴³ NLMP at 39

⁴⁴ NLMP at 83

⁴⁵ The Constitutional Court has advocated for this stance, as seen in *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), para 44 reads:

"When, during argument before us, we enquired of counsel what was to happen to destitute asylum seekers and refugees, no answer was forthcoming. There appeared to be some suggestion that, regrettably, some persons might be left to their destitution. This attitude is unacceptable and contrary to constitutional values. The frustration experienced by the authorities as they deal with a burgeoning asylum seeker and refugee population must not blind them to their constitutional and international obligations. It must especially not be allowed to diminish their humanity. The authorities must also guard against unwittingly fuelling xenophobia. In the present case, one is left with the uneasy feeling that the stance adopted by the

doing so with the assistance of the UNHCR, as provided above. Once foreign nationals know that asylum applications are finalised within a matter of months, the incentive to apply for asylum in order to obtain preferential economic rights becomes less attractive or falls away altogether.

- (d) In summary, the State's goal of reducing unemployment for non-foreign nationals may be achieved as effectively by employing strategies other than the impugned provisions.

Conclusion in respect of the infringement of the Bill of Rights

- 4.10 It is accordingly our submission that the impugned provisions limit an asylum seeker's constitutional rights to dignity and life.
- 4.11 Secondly, the impugned provisions would constitute an impermissible limitation of those rights as the impugned provisions would not be a limitation that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
- 4.12 For these reasons, it is our considered view that that the impugned provisions would not bear scrutiny by the Constitutional Court and ought to be abandoned for that reason.

The impugned provisions infringe South Africa's international and regional obligations

- 4.13 The impugned provisions additionally would also operate to infringe South Africa's international obligations, as stipulated below.
- 4.14 UN Refugees Convention
- (1) As is already provided and made clear above, the operation of the impugned provisions may result in forcing asylum seekers to return to their country of origin and thus infringes on the international obligation of *non-refoulement*.
- (2) Furthermore, the Convention provides for the right to work in the following articles:
- (a) Article 17: wage earning employment;
- (b) Article 18: self-employment; and
- (c) Article 19: employment in the "liberal professions" (typically those requiring academic qualification).
- (3) The impugned provisions would thus contravene South Africa's obligations under the Convention.
- 4.15 Universal Declaration of Human Rights
- (1) South Africa is a signatory to the United Nations Universal Declaration of Human Rights, 1948 (**Universal Declaration of Human Rights**). Notably article 23 of the Universal Declaration of Human Rights provides that all persons have "*the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment*".
- (2) The impugned provisions infringe on the above right in respect of asylum seekers by limiting their access to employment opportunities.
- 4.16 African Charter on Human and Peoples' Rights

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. The answer to the frustration experienced by the respondents, and in particular by the third respondent's department, is to facilitate and expedite applications for refugee status."

- (1) South Africa is a signatory and has ratified the African Charter on Human Rights. Of particular relevance is article 15, which provides the right to work to every individual, under equitable and satisfactory conditions and for equal pay of equal work. This obligation cannot be upheld if the impugned provisions remain in their current form.

4.17 International Covenant on Economic, Social and Cultural Rights (**ICESCR**)

- (1) South Africa is a signatory of the ICESCR and has ratified its obligations. Article 6 of the ICESCR provides an obligation on states to recognise the right to work for all people, which *"includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."*
- (2) Article 6 does not distinguish between citizens and foreign nationals and would thus be of application to asylum seekers.

4.18 In summary, the impugned provisions would place South Africa in contravention its obligations under international law and would accordingly be found to be unconstitutional.

5 Conclusion

- 5.1 For all of the reasons set out above, we are of the view that the limitation of the rights of asylum seekers to employment are not sustainable and, if ultimately passed, would not pass constitutional muster.
- 5.2 The proposed amendments infringe the constitutional rights of asylum seekers to dignity and life, and are moreover not limitations that could be said to be reasonable and justifiable in an open and democratic society. The amendments are moreover wholly disproportionate and indeed disconnected with the problem of unemployment that the state seeks to address.
- 5.3 Our client thanks the Honourable Minister for the opportunity to set out its submissions in respect of the Bill. Our client remains available to discuss any aspects of these submissions further.

Yours faithfully



Jason Whyte, Director
Laura Macfarlane, Senior Associate
Anneline Coetsee, Associate Designate
Norton Rose Fulbright South Africa Inc