

Apples and Oranges: Refugees' Right to Work versus Economic Migrants' Privilege to Work¹

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Abstract

The nationalistic and xenophobic movement Operation Dudula has been leading demonstrations throughout South Africa claiming that foreigners are taking South African jobs and that there are 'no wars in Africa' to warrant African immigrants' special treatment. This xenophobic movement blames immigrants (an umbrella term for immigrants, cross-border migrants, economic migrants, asylum seekers and refugees) for societal collapse and challenges the legality of their border crossings. The movement calls the immigrants 'criminals' and pressures domestic government officials to deny them the right to work. The conflation of economic migrants with asylum seekers continues in the South African landscape, confusing employers, the general public, and officials at the Department of Home Affairs (DHA). The notion that 'no foreigner must be employed ahead of a South African' is at the crux of the debates about immigrants' right to employment. Yet, there is not a clear demarcation between asylum seekers' right to work versus the economic migrants' privilege to work. This confusion of legal categories has led to apples and oranges debates in immigration law domestically and internationally. Through interviews with non-governmental (non-profit) organisations (NGOs/NPOs), employers, industry associations, government officials, and immigration attorneys, and an examination of international and domestic laws and norms, this paper suggests a reframing of how the right to work is analysed and how the employers respond.

Keywords: Right to work; refugees; immigrants; South Africa; employers; asylum seekers

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Introduction

Operation Dudula's xenophobic discourse blames migrants for much of the recent economic hardship in South Africa, and this became manifest in the 16 June 2021 Soweto march (Ho, 2022).³ The Operation Dudula movement has been leading nationalistic and afrophobic demonstrations throughout South Africa claiming that foreigners are taking South African jobs and that there are 'no wars in Africa' to warrant African immigrants' special treatment (Thebus, 2022). On 13 October 2022, a demonstration in front of the Cape Town Department of Education was publicised with an online circulated poster that read: 'No foreigner must be employed ahead of a South African' (Thebus, 2022). This was a challenge to the supposed hiring of foreign teachers over South African ones. Provincial Minister of Executive Committee (MEC) of Education David Maynier claimed the Dudula group 'was attempting to manufacture a fake crisis in an attempt to justify their xenophobia and disregard for human rights' (Thebus, 2022). Maynier said 'a mere 31 out of 33 652 teachers (0.09%) employed by the WCED [Western Cape Education Department] were foreign nationals' (Thebus, 2022). And the foreign teachers are employed in the math and sciences, subjects that have had a dearth of South African teachers. This notion that 'no foreigner must be employed ahead of a South African' is at the crux of the debates about immigrants' right to employment. The difference between an asylum seeker's right to work and an economic migrant's privilege to work is rooted in the immigrant's legal status (UNHCR, 2016).

Operation Dudula followers conflate the legal categories of asylum seekers and refugees with economic migrants. Lulamile Bavuma, Operation Dudula Western Cape deputy chairperson, stated:

We are ready to assist and accept Ukrainians currently, because we know there is a war in Ukraine. However, in these African countries there are no wars. People are just running out of their countries and in December they go back home and in January they're coming back as if they are living in another province. That is an insult to our people, citizens who are qualified but sitting at home who cannot find jobs (Thebus, 2022).

President Cyril Ramaphosa's economic reform program Operation Vulindlela, established in 2020, takes a different approach with the aim to review structural issues inhibiting South African economic growth. An August 2022 report specifically underscored the difficult nature of issuing work visas and the inability to bring skilled talent to South Africa as problems (Katzenellenbogen, 2023). According to the report, 'the majority of those who are unemployed are not highly skilled and are not competing for the same vacancies at the global talent South Africa should attract to close the skills gap' (Sidimba, 2023).

This tension between an asylum seeker's right to work and the country's need to utilise economic migrants holding a privilege to work hampers meaningful discussion. In order to begin a discussion on the bifurcated scholarship on immigrants' right to work, the author drew on legal scholars, sociologists, geographers, and practicing attorneys, seeking to document how the immigrant legal categories are used in practice and to understand why distinctions between them have collapsed. The academic literature is not unified offering opportunities to take an interdisciplinary and multilayered research approach.

³Dudula means to push away in isiZulu. <https://isizulu.net/>



To begin with, sociologist Lucy Mayblin, in looking at the United Kingdom (UK) in a comparable study, notes the 'sliding scale of privilege [whereby] some immigrants are able to obtain visas to work...relatively easily' (Mayblin, 2016: 192). Geographers Sophie Cranston and Karine Duplan elaborate on this notion to suggest that privilege in migration is organised around infrastructures such as governmental visa policies (Cranston and Duplan, 2023: 330). The norm that economic migrants have a privilege to work in a host country often becomes submerged in the discourse around the asylum seeker's right to work. Legal scholar Hugh Collins unpacks this conflation by saying the right to work has five limitations – imprecise meaning, impracticability, inconsistency, instrumentality, and the incoherent value of the right (Collins, 2014: 18-20).

In the South African case, asylum seekers and refugees have the right to work according to statutes, whereas economic migrants have the privilege to the right to work based on their work authorisation approval. How employers navigate these differences and how immigrants' employment affects the South African economy remain areas for further exploration. This paper begins a discussion of how this legal ambiguity leaves a burden to employers to fill both skilled and unskilled positions.

The article begins by situating the right to work for asylum seekers and migrants in the South African legal framework. The second section of the paper describes what employers face in hiring immigrants. The final section examines economic opportunities that asylum seekers and economic migrants bring to South Africa. The paper is rooted in qualitative research among the non-governmental (non-profit) organizations (NGOs/NPOs), and employers that work with immigrants. The project was approved by the Faculty of Law Research Ethics Committee at the University of Cape Town on 14 November 2022 (L100011NS -2022).

To explore the topic from an employer perspective, interviews were conducted with over twenty individuals throughout South Africa about their experiences in hiring and working with immigrants (using the term broadly and without differentiating the legal categories). A list of roughly 10 questions was prepared to guide hour long interviews with each person. Some interviews were 45 minutes long, and others lasted up to two hours. Given the evolving policy issues during the course of the research, the author followed up with the participants to double-check information and to verify their comments. The term 'correspondence' is used with the date to reference follow-up communications. Many of the participants asked to remain anonymous while others gave their permission to go on the record. The aim of the interviews was to elicit experiences of hiring immigrants whether of asylum seeker or economic migrant status. In terms of which industries overwhelmingly employ immigrants, many suggested the hospitality and tourist industries; however, none of the industry officials in these fields responded to be interviewed. The Western Cape also has a robust e-service driving industry with immigrant drivers; but the primary employer in this field did not respond to interview requests. Non-governmental (non-profit) organizations (NGOs/NPOs) were interviewed about their immigrant employment programs and various industries in the Western Cape of South Africa, immigration attorneys, employers, and Zimbabwean immigrants did come forward to share their experiences. The research revealed an element of fear about going 'on the record' to describe the toxicity created by Operation Dudula. Nevertheless, data regarding how many asylum seekers and economic migrants are successfully employed remains elusive.

Concurrent with research for this project, there have been developments to dismiss the Zimbabwean Exemption Permit (ZEP) program and delays in implementing changes. This has recently been punctuated with the August 2023 presidential elections in which President Emmerson Mnangagwa of the Zimbabwe African National Union – Patriotic Front (ZANU-PF) won a second term. In 2009, the Department of Home Affairs (DHA) introduced special permits that allowed Zimbabwean nationals to live and work in South Africa. The permit was originally called the Zimbabwean Special Dispensation Permit (ZSP) and was issued after a call to any Zimbabweans in the country, whether in South Africa legally or illegally, to come forward and regularise their stay. The ZSP expired in December 2017 and was replaced by the ZEP. The new ZEP program was due to expire in December 2021 after DHA Minister Aaron Motsoaledi decided not to renew the permit. He then extended the expiration deadline to 30 June 2023, which he later changed to December 2023.

On 28 June 2023, the Gauteng High Court in Pretoria ordered Motsoaledi not to arrest or issue deportation orders for ZEP holders (estimated to be over 178,000 individuals) after ruling that the minister's decision to terminate the permits was invalid, unlawful and unconstitutional. The court also ruled that ZEP holders must be allowed to leave or enter South Africa. The court further ordered that the permits be valid until June 2024. The court's opinion states that 'Motsoaledi violated the permit holders' constitutional right to dignity, life, equality, freedom and security' (Bhengu, 2023; *Suzman, CORMA vs. Min of Home Affairs*, 2023, paragraph 9.2:100). A DHA challenge to the High Court judgment on Zimbabwean permits was dismissed on 16 October 2023.

Situating South Africa

According to the South African Constitution of 1996 (Section 22), '[e]very citizen has the right to choose their trade, occupation, or profession freely' (Constitution, 1996: 2). However, the 'practice of a trade, occupation or profession may be regulated by law' (Constitution, 1996: 2). In 2003, the *Watchenuka* case confirmed the asylum seekers' right to work. The ruling wove together the right to work with the South African legal concept of human dignity (*Minister of Home Affairs and Others v Watchenuka and Others*, 2004, paragraphs 32-36). Narrowing the right to work, however, the Refugees Regulation confirms that the Standing Committee is empowered to determine 'the sectors within which an asylum seeker is not permitted to work or study' (5[3][a][ii] Refugees Act, 1998 [Act No. 130 of 1998] Refugees Regulations, 2018 [27 December 2019]: 5).

The Refugee Act came into force in January 2020, and it continues to monitor the asylum seekers' work and their employers. The Act provides for the rights of asylum seekers, but it does not include the right to work (Refugee Act 1998, updated 2020 section 27[A]: 29). A refugee with a section 24 (refugee status permit) does have the right to seek employment. By contrast, an asylum seeker (section 22 holder), while waiting for the outcome of the asylum application, does not automatically have permission to work in South Africa. The statute states that the Standing Committee for Refugee Affairs 'must in the event that an asylum seeker is permitted to work or study in the Republic, determine the period and conditions in terms of which such asylum seeker may work or study whilst awaiting the outcome of his or her application for asylum' (Refugee Act 1998, updated 2020 section 9C[1][b]: 15). Under section 22 of the Refugee Act, the asylum seeker must furnish a letter of employment 'within a period



of 14 days from the date of the asylum seeker taking up employment' (Refugee Act, 2020, section 22: 9).

The Refugee Act, Section 22, subsection 10 further elaborates that 'an employer...contemplated in subsection (9) who or which fails to comply with the duty imposed in that subsection, or fraudulently issues the letter contemplated in that subsection, is guilty of an offence and liable upon conviction to a fine not exceeding R20 000' (Refugee Act, 2020, section 22[10]: 25). Lastly, 'the Director-General must revoke any right to work as endorsed on an asylum seeker visa if the holder thereof is unable to prove that he or she is employed after a period of six months from the date on which such right was endorsed' (Refugee Act, 2020, section 22[11]: 25).

The Immigration Act 2002, as amended in May 2014, has two sections that address work for immigrants, not asylum seekers or refugees. Section 19(4) states that work visas can be granted to an individual 'possessing such skills or qualifications determined to be critical to the Republic' and this includes the person's immediate family (Section 19[4] substituted by section 12(d) of Act 13 of 2011). There are also provisions for an intra-company transfer work visa (Section 19[5] amended by section 6 of Act 3 of 2007). According to Section 38(2), 'an employer shall make a good faith effort to ascertain that no illegal foreigner is employed by him or her to ascertain the status or citizenship of those whom he or she employs'. If an employer does employ a foreigner, then the employer must keep the 'prescribed record' for two years after the foreign employee is terminated (Section 38, 4[a]). These stipulations have created confusion and dread in hiring foreigners.

As legal scholar Callixte Kavuro argues, 'it is apparent that there is a confusion regarding the applicability of the Immigration Act and the Refugees Act and employers are unable to draw a clear distinction between those two policies' (Kavuro, 2015: 248). The confusion is made worse by the belief that some economic migrants falsely claim to be refugees.

In July 2014, Deputy Minister of DHA Fatima Chohan asserted that 'many people who seek asylum in South Africa are actually economic migrants who use the asylum seeker process to avoid applying for a visa under the Immigration Act' seeming to suggest the desire to circumvent the law (Carciotto, Gastrow, and Johnson, 2018: 7 n30; DHA Chohan speech [2014]). The Minister's comments reflect a common misperception. During a follow-up interview, one of the immigration attorneys contributing to the research commented that,

I have met numerous asylum seekers and refugee permit holders with backgrounds as accountants, doctors, entrepreneurs, and more. Many have attempted to navigate the visa process, but due to frequent unjust denials and lack of funds to contest them legally, they hold onto their asylum or refugee status. Home Affairs' inability to effectively process visas and permits under the Immigration Act adds to the prevalence of such cases in the country. These individuals prioritize possessing any form of documentation over having none at all (Correspondence 28 August 2023).

Unfortunately, the means by which asylum seekers access permits also seems distressed and fraught with corruption.

From an international perspective, the 1951 Convention Relating to the Status of Refugees with the United Nations High Commissioner for Refugees (UNHCR) explicitly addresses the right to work in three of its articles. Article 17 states that refugees have the right to wage-

earning employment. However, the host country can calibrate its policy against the employment of nationals. Article 18 further states that refugees should be entitled to self-employment.

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies (Article 18, Refugee Convention, 1951: 22-23).

Article 19 mentions the role of liberal professions whereby:

Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practicing a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances (Article 19, Refugee Convention, 1951: 23).

Despite the breadth and appeal of the principles of the Convention, South African courts confront specific, local challenges, and conflicts. For example, the South African Free State High Court ruled on 2 August 2022 that legally trained foreign nationals are not to practice law (against Article 19). In a unanimous judgment written by Justice Zukisa Tshiqi, the court dismissed an appeal against a ruling by the Free State high court in September 2021 that found that section 24(2)(b) of the Legal Practice Act (LPA) was neither unconstitutional nor invalid (*Ferreira*, 2022).

Although the 1996 South African Constitution drew on many human rights instruments such as the International Labour Organisation's (ILO) right to work provisions, it also retains the authority of the government to limit immigrants' right to work. Article 1 of the ILO states, 'each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment'. And Article 2 of the ILO notes that, '[t]he said policy shall aim at ensuring that-- (a) there is work for all who are available for and seeking work...' (ILO Employment Policy Convention No 122 (adopted 9 July 1964, entered into force 15 July 1966). Another international protocol, International Covenant of Economic, Social and Cultural Rights (ICESCR), notes that parties 'recognize the right to work, 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' (Article 6). The human rights underpinnings of the South African Constitution are, however, tempered by its economic context which renders many of its provisions aspirational.

One of the key aspects of the ICESCR is the 'progressive realisation' standard whereby each state tries to achieve 'progressively the full realization of the rights recognized in the present Covenant' (ICESCR, Part 2 Article 2, Section 1). Some legal scholars have advocated for states to have the 'minimum core' obligations under the right to work. Catherine Costello and Colm O'Cinnéide characterize the right to work as a "composite right" to reflect its diverse and distinct aspects...with its concerns for both the freedom, accessibility and quality of work, [and] as the "right to decent work" (Costello and O'Cinnéide, 2021: 5). For them, this right cuts across the traditional bifurcation between civil and political, and socio-economic rights, and is also informed by core ILO labour standards. These standards focus on the articulation



of the right to work under the UN Convention of the Persons of Rights with Disabilities, which may have particular relevance relating to asylum seekers and refugees. Many refugees suffer from post-traumatic stress disorders (PTSD) and other physical ailments rooted in home country experiences forcing migration. The notion of progressive realisation has significance in South Africa and is the legal framing that supports the expansion of rights and the fulfilment of the country's democratic ambitions.

At a regional level, the African (Banjul) Charter of Human and Peoples' Rights 1986 with its socio-economic rights approach, recognises that '[e]very individual shall have the right to work under equitable and satisfactory conditions' (Article 15). There is, however, debate about whether asylum seekers and refugees are excluded from this protection (Costello and O'Cinnéide, 2021: 17). The African (Banjul) Charter ties article 12(3) that 'every individual shall have the right, when persecuted, to seek and obtain asylum in other countries under laws of those countries and international conventions' to Article 14(1) of the Universal Declaration of Human Rights that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. These ideas extend to other instruments including, for example, the Global Compact on Refugees (GCR). It states 'refugee self-reliance' as one of the four key objectives. Under Section 2.2, 'States and relevant stakeholders will contribute resources and expertise to promote economic opportunities, decent work, job creation and entrepreneurship programmes for host community members and refugees, including women, young adults, older persons and persons with disabilities' (Global Compact, 2018: 27).

Collectively, international protocols together with South African statutes provide asylum seekers and refugees the right to work. However, this right does not extend to economic migrants which calls into question issues of fairness and how the right to work is practiced.

How asylum seeker rights and economic migrant rights to work are practiced

The 2020 mid-year population estimates published by Statistics South Africa indicates that there are 3.9 million migrants in South Africa (Stats South Africa, 2020; Dawood, 2021). According to UNICEF's latest data snapshot of migrant and displaced children in Africa, it is estimated that more than 642,000 migrant or displaced children currently live in South Africa (UNICEF, 2021; Dawood, 2021). The UN High Commissioner for Refugees (UNHCR) Data Finder in 2020 indicated that South Africa hosted 255,200 forcibly displaced persons with 76,800 recognized as refugees and 173,500 enumerated as asylum seekers (Moyo, 2021: 10). Zimbabwe is the most common country of origin accounting for roughly 24 percent of all immigrants in South Africa (Southern African Development Community [SADC] and UN Population Division 2020, Moyo, 2021: 2). Significant numbers of refugees and asylum seekers in 2020 were from Ethiopia (25 percent), Democratic Republic of Congo (23 percent), Somalia (11 percent), Bangladesh (10 percent) and Zimbabwe (6 percent) (Moyo, 2021: 4-5).

As noted earlier, the evolving ZEP situation framed conversations about the right to work during the research that began in December 2022 and extended through August 2023. One of the 'prominent narratives [that has]...also persisted in public discourse is the notion that the asylum system has been abused by migrants who are actually coming to seek work. Public discourse also conflates asylum seekers with unauthorized immigrants' (Moyo, 2021: 5). The South African government's concern about low-skilled or unskilled economic migrants coming from other African countries is seen as threatening economic stability and national sovereignty, as Operation Dudula espouses.

Over the course of the research, the author conducted over twenty interviews and subsequent communications. Of three immigration NPOs based in Cape Town, two responded to be interviewed and the third one declined to participate. According to information online, the Scalabrini Centre near the Department of Home Affairs (DHA) in Cape Town runs an 'Employment Access' programme. The programme offers employment support and resources, skills training and assistance in the evaluation of certification to foreign clients who have a tertiary degree. The Adonis Musati Project (AMP) based in Wynberg, Cape Town had a 'Businesses Aided Through Livelihoods Project' that assisted 114 people in 2020. The 'Livelihoods' Project in 2021 offered small business training, including digitisation, small business emergency grants and provisioning, and skills training.

In speaking with two Congolese refugees from one NPO, they expressed a mix of gratitude to be in South Africa, and frustration associated with the process of obtaining legal immigrant papers. A refugee from Kinshasa stressed how much South Africa offers because a refugee can get health care and a waiver of school fees. For her, the goal is to change the mindset of people, educate people and overcome adversity (Interview 5 December 2022). Another refugee from South Kivu felt the inability to get asylum seeker permits was hampering refugees from getting work. He also noted that employers do not want to hire people for 30 or 60 days to then have them return to DHA to regulate their status (Interview 5 December 2022).

A ZEP holder shared that many employers (especially small businesses) do not ask for documents because they assume Zimbabweans have the ZEPs. He also noted that the Zimbabwean government doesn't 'want them [migrants in South Africa] back because they will vote for the opposition', and this would de-stabilise the current government (21 February 2023). When asked about whether returning to Zimbabwe is a possibility, he said he would rather relocate to another country than return. He did eventually relocate to the UK due to not 'feeling safe in South Africa because of xenophobia' (Interview 21 February 2023). He believes xenophobia will increase in South Africa, and it is important for him to feel safe, especially as a parent to his new-born daughter (Interview 21 February 2023).

One issue that came up in several of the interviews was the belief that employers are not informed about documents. There is a lack of understanding about the time limits and that asylum seekers will automatically be forced to leave South Africa versus renewing their permits. One immigration attorney suggested employer trainings around hiring asylum seekers and refugees would be helpful (Interview 9 May 2023).

For many of the asylum seekers, the process to make a DHA appointment keeps evolving. At the end of June 2023, the DHA announced that a 'request for asylum will need to be made in person, and you will need to bring your asylum transit visa or passport or any supporting document' (Correspondence 18 August 2023). The nearest Refugee Reception office will receive foreign nationals on specific days of the week intended for language accommodation. For instance, on Mondays, Tuesdays and Fridays, French, Lingala, and Swahili speakers are to be available for those from the Democratic Republic of Congo (DRC). On Mondays, Zimbabweans can be served with Shona speakers and on Tuesdays, there should be Ndebele speakers. The DHA notice also makes it clear that 'applications for asylum [are] free' seeming to imply that asylum seekers have been misled in the past.



With DHA offices closed to all asylum seekers from March 2020 to May 2022, there is a substantial backlog of asylum seekers wishing to regularise their status (Interviews 9 May 2023 and 18 August 2023). (After over a decade of legal battles, the Cape Town Refugee Reception Office opened in Epping in May 2023.) During this time when people are waiting for their asylum seeker appointments, they sometimes get arrested for being undocumented. Furthermore, an asylum seeker who is waiting for an appointment date is not authorised to work in South Africa until such time that they receive a valid asylum seeker permit in terms of Section 22 (Correspondence 22 May 2023).

For refugee and asylum seekers whose permits lapsed prior to the COVID lockdown, they were instructed to make an online application and were then provided with an appointment date to attend the Refugee Reception Office. Thereafter, due to the expired permit, they were taken through the fines process. With the inability to make a DHA appointment between March 2020 and May 2022, many asylum seekers' permits expired. When they finally have gone into the DHA for appointments, they have been told that they must go to the police and obtain a docket number to pay the fine for an expired permit. If the asylum seeker does pay the fine, it is seen as a 'admission of guilt' and a criminal offense. When a future employer asks for the asylum seeker's criminal record, this will be shown and will often cause an employer to not want to employ the asylum seeker. The injustice that the DHA was not open to process the permit is not explained in the criminal record. And most asylum seekers and refugees are not aware that they will get a criminal record from paying a fine (Interview 18 August 2023).

This asylum seeker and refugee precarity with respect to being able to legally work leads to confusion for the employers. Employers want to know if someone with an asylum seeker permit can work legally. If an employer calls the UCT Refugee Clinic, the answer would be 'yes', and then the Clinic gives the employer the number of the DHA manager to call to verify the permit. As of the time of this writing, the Cape Town DHA manager was known to respond to calls and work with immigration attorneys (Interview 18 August 2023).

Interviews with both a former Chamber of Commerce member and the Labour Attorney and Shadow Minister of the Democratic Alliance, Michael Bagraim, suggested that employers might fear labour union responses and retaliation of hiring immigrants. The employers feel the need to 'look over their shoulder' with respect to hiring immigrants, and that Chamber members 'don't talk about it' (Interview 2 February 2023). The inability to openly discuss the need and desire to hire immigrants—both skilled and unskilled—has frustrated employers.

As Bagraim has penned, 'the unhealthy relationship between the trade union movement and governing party, the African National Congress (ANC), is part of the problem (i.e. tackling unemployment)' (Bagraim, 18 December 2022). He continues that the informal sector has absorbed much of the unemployable; yet, this sector is stifled in South Africa, as compared to its African neighbours (Bagraim, 18 December 2022). He believes that 'for each foreigner with a scarce skill, it is probably correct to say three locals will accompany them in obtaining employment' (Bagraim, 27 July 2022). Bagraim suggests that 'instead of encouraging xenophobic behaviour we should encourage the transfer of skills and growth in our manufacturing sector' (Bagraim, 27 July 2022). He argued that regulations be structured whereby foreign workers with the skills train South Africans at no cost to the government and enhance the economy.

In his private practice, Bagraim described various scenarios whereby his South African clients have lost valuable business because of the overly stringent and slow processing of visas. He gave the story of a client losing his South African welder and finding a Congolese person without papers. The client asked him 'what should we do?' (Interview 13 February 2023). Bagraim had to advise the client not to hire the Congolese welder because it was a criminal offense; the client could be targeted and never again eligible to get a government contract. Bagraim also helped the client 'outsource' the work by going across the border to Botswana for cheaper labour. This not only caused South African clients to wait longer, but it is 'killing the economy' (Interview 13 February 2023). Bagraim shared a similar story of a farmer of Angora goats. The farmer had trained Lesotho workers for over 20 years and was about to lose them to immigration regulation changes. The client told Bagraim that 'it would threaten and be the end of his business' because he could not train South Africans. Another situation that Bagraim noted was a client who owned an ethnic restaurant and was going to pay minimum wage for a 6 AM to 1 PM shift. The restaurant owner needed 12 staff members. However, the owner indicated 'not one South African was willing to do the job' and said 'never mind, I can't do the hours'. The foreigners reportedly said they 'would do whatever it takes'. The owner rhetorically asked: 'How do I run a restaurant?' (Interview 13 February 2023).

Other immigration attorneys expressed concern about the role of Operation Dudula changing the immigration landscape. One attorney, in particular, felt that local gangs are 'opportunistic' using xenophobia to extort money from spaza shops in Khayelitsha, Belville, and Mitchells Plain. The gangs target Somalians, Ethiopians, and Pakistanis for protection money, demanding payments between R30 to R40,000 a month or threatening to target the shop with vulnerability to loot (Interview 19 May 2023). There were also reported incidents of the South African Police Services (SAPS) walking around the shops in Philippi and Khayelitsha and asking for protection money at the end-of-year, seemingly in need to make their quotas (See Gastrow, 2021).

Operation Dudula has created a fearful environment for small employers. They fear that they could be targeted and threatened. This aspect of xenophobia has not been fully analysed for its implications of how small employers' fear maps to unemployment trends and the hampering of the South African economy.

Economic Opportunities and Operation Vulindlela

One of the core issues surrounding immigrants' right to work (including asylum seekers/refugees and economic migrants) is whether they are in fact taking jobs that would otherwise be filled by native-born South Africans. Followers of Operation Dudula complain that foreigners undermine native South Africans. To the extent that the right to work is protected within South Africa for citizens, and separately as the human right in international conventions, Operation Dudula has created an 'us (i.e. South Africans)' vs. 'them (i.e. foreign nationals)' framework which excludes many from human dignity.

To better understand the landscape of opportunities, economist Derek Yu examined South African data to analyse the role of immigration and emigration in the South African economy. According to his analysis of census data, he found that decisions to emigrate were rooted in the household-level by the head and spouse (Yu, 2022: 20). Yu also found that 'nearly 70% of immigrants employed worked in the tertiary sector' such as wholesale and retail trade, private



households, and finance (Yu, 2022: 25). He ultimately concluded that ‘immigrants to South Africa also experienced better outcomes than natives, as they were slightly more educated, enjoyed a higher labour force participation rate (LFPR) and lower unemployment probability, despite them being relatively less likely to work in the formal sector and tertiary sector, compared with the native employed’ (Yu, 2022: 32). What Yu’s research reveals is how economic migrants (along with the asylum seekers and refugees) find economic spaces in South Africa. In this context, President Cyril Ramaphosa launched Operation Vulindlela in 2020. The Operation has as one of its aims to push the DHA toward better efficiency, and transparency, and to stem unemployment and xenophobia.

A 2018 OECD/ILO report provided an economic analysis of immigrants’ contribution to the South African economy. In particular, the OECD/ILO authors found no negative effects on employment at the national level (OECD/ILO, 2018: 23). Their findings suggest that the apples and oranges debate over asylum seekers’ right to work and economic migrants’ privilege to work is separate from domestic unemployment. Moreover, they claimed that the contribution of immigrant workers to GDP in 2011 was estimated to ‘be close to 9%’, thereby, showing ‘immigrant workers mak[ing] a significant contribution to the South African economy’ (OECD/ILO, 2018: 24, 32).

The August 2022 Operation Vulindlela report builds on the OECD report and notes that foreign-born skilled workers needed for short-term skill shortages and needing a work visa do not compete with those who compose ‘approximately 90% of the unemployed population’ (Operation Vulindlela, 2022: 9). As of 2021, DHA reported that only 16,100 critical skills visas had been granted since 2016 (Vulindlela, 2022: 10). What the report found was that ‘between 2015 and 2021, the number of rejected visa applications was over 68% (Vulindlela, 2022: 14). Between 2014 and 2021, only 25,298 visas have been approved across the considered visa types (Vulindlela, 2022: 14). The inability to process skilled worker visas and address the economic migrants in South Africa creates systemic vulnerability to corruption. A 2016 study found that the average asking price for an illegally obtained but legal work visa was on average R8,000, while the prices could vary from R2,000 to R30,000 (Alfaro-Velcamp, McLaughlin, Brognieri, Skade, Shaw, 2017: 11).

Under Operation Vulindlela, former Director-General of Home Affairs Mavuso Msimang is working closely with the current DHA administration to undertake a comprehensive review of the work visa system. The implementation plan outlines fundamental changes to the work visa system, including 1) a simplified process for qualifying companies, including large investors, regional head offices and firms in strategic sectors, to obtain work visas for skilled personnel; 2) a streamlined application requirements to ease the administrative burden of visa applications; 3) establishment of a points-based system of critical skills; 4) the creation of new visa categories for remote workers and start-ups (*Operation Vulindlela, August 2022: 35-36*).

Following the release of the Vulindlela report, journalist Jonathan Katzenellenbogen reported that the system for issuing visas to foreigners ‘is a disaster, and requires a complete overhaul’ (**Katzenellenbogen, 2022**). Not only does it take an average of six months to complete the work visa process, but ‘from submission to approval or rejection, the time to process an intracompany visa can take anywhere between 4 and 12 weeks, for a general work visa up to 48 weeks, and for a critical skills visa, about 22 weeks’ (Katzenellenbogen, 2022).

According to Katzenellenbogen, the current system does not provide adequate flexibility, given the dynamic nature of skills needed in the economy. One immigration attorney concurs,

Notably, stricter immigration rules in recent years have made it hard for many foreigners to work or run businesses in South Africa. This situation has coincided with more unemployment among local South Africans, though it might not be a direct cause. Before a law change in 2014, many foreigners owned businesses in South Africa, hired local workers, and obtained business visas. But after the change, a lot of these foreign-owned small businesses had to close because they lacked proper paperwork or couldn't bring their overseas staff to assist in managing the business and training the South African staff (Correspondence 28 August 2023).

This has meant that South Africa is increasingly losing opportunities and business.

Conclusion

Specifying the right to work according to immigrant legal categories helps to highlight the unresolved nature of the human rights attached to the right to work. As noted earlier, Collins' five limitations inherent to the right to work further render meaningful analyses that separate refugee and asylum seeker rights as mandated in the Refugee Convention from the privilege to work among economic migrants more difficult.

Furthermore, the role of progressive realisation becomes critical in distinguishing between the right to have work (as permission) and the right to have work (substantive) as it undergirds much of South African development and transformation. As Collins asserts, 'in the case of the right to work, the duty of governments may be limited to the progressive realisation of the positive right to a job by taking measures that support full employment, whereas for employers the duty may be confined to prohibitions against unjustified discrimination in hiring practices' (Collins, 2014: 25).

The employers' inability to clearly map South African immigration mandates to hiring practices gives the issue immediate and practical expression. One recommendation could be adopting a non-immigrant classification for agricultural work. For a comparative example, in the United States, there are H-2A visas for temporary, seasonal work. This is often used for agricultural workers and for a three year period (U.S. Citizenship and Immigration Services [USCIS], 2023, *H-2A Temporary Agricultural Workers*). Another type of visa is the H-2B visa for non-immigrants with the provision that there are not enough US workers with the qualification and skills to do the work. One critical employer condition is that US worker wages will not be adversely affected. H-2B visas are used for landscapers, construction workers, hotel staff, loggers, amusement park workers, and lifeguards and are capped at 66,000 every fiscal year (USCIS, 2023, *H2B Visa: Temporary Non- Agricultural Workers*). Like the H-2A visas, holders of this visa can work for a three year period. South Africa, like the US, has employment demands that are not commensurate with the population's skillsets and training. If economic migrants have more visa options, such as an agricultural visa or sector specific visa, then the burden on the asylum seeker and refugee system could be ameliorated.

President Cyril Ramaphosa has not successfully confronted the challenge to reconcile asylum seekers and refugees' rights to work and the economic migrants' privilege to work. Rather, he tries to appeal to a shared African history narrative, and in 2022, claimed 'We are, as South Africans, a friendly and hospitable people and it is inconsistent with our values to be



xenophobic,' (Citizen Reporter, 14 September 2022). Yet, the South African disenfranchised and unemployed population does not accept this narrative, and Operation Dudula continues to foster the xenophobic vitriol.

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