

The legacy of afrophobia and white supremacy in the plight of African migrants in South Africa

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SUMMARY

A state of disaster, is, by definition, aimed at addressing widespread natural and/or public health issues faced by society and although the COVID-19 pandemic has instigated a worldwide state of disaster, it cannot be said that the effects thereof have been equally felt throughout the world, particularly within South Africa. Singularly, the plight of African migrants has worsened with many of them facing various human rights violations through increased social marginalisation and political exclusions. The marginalisation of African migrants in particular also brings to attention the different manifestations of Afrophobia and how this has led to the territorial exclusion of African migrants. This article seeks to discuss the parallels between the plight of African migrants in South Africa and the manifested ideologies of Afrophobia and White supremacy and proposes transformative constitutionalism and structural reform as remedies to the prevailing issues faced by African migrants in South Africa.

1 Introduction

South African constitutionalism is founded on equality and egalitarianism with the state having made commitments to upholding human rights and protecting vulnerable individuals and groups within its territory.¹ These ideals have, however, not been realised as South Africa is experiencing one of the highest levels of inequality in the world with the majority of Black people in South Africa facing poverty, socio-economic setbacks, and political insecurity.² Although Black people remain on the unfavourable end of the inequality spectrum, a second layer of discrimination exists against Black migrants. The physical and restrictive effects of the COVID-19 pandemic have heightened this inequality with Black migrants disproportionately experiencing the detrimental effects of the pandemic when compared to their South African and White counterparts.³

1 Kibet and Fombad "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa" 2017 *AHRLJ* 348; Klare "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 153.

2 Leibbrandt 2021 "The Human Tragedy of South Africa's Inequality" 2021 <https://www.newframe.com/the-human-tragedy-of-south-africas-inequality/> (last accessed 2021-06-29); Ochonu "South African Afrophobia in Local and Continental Contexts" 2020 *J. of Modern African Studies* 501.

This article is divided into three parts and is comprised of both desk research and case study analysis as the chosen methodologies. The first part outlines the position of migrant rights in South Africa with reference to the challenges faced by refugees, asylum seekers, and labourers who have migrated to South Africa. These challenges are also discussed in the context of the marginalisation of immigrants in post-apartheid South Africa and how this, together with the effects of the COVID-19 pandemic has led to several human rights violations. Secondly, this article considers the effects of colonialism and apartheid on the plight of migrants and will, thereafter, briefly analyse the circumstances and conditions faced by Black South Africans in contrast to the lived experiences of their White counterparts. Finally, recommendations will be provided to address the human rights infringements faced by migrants in South Africa.

African migrants in South Africa, particularly refugees and asylum seekers, have, for a long time, experienced xenophobia in South Africa with the effects thereof being exacerbated by the COVID-19 pandemic. This act of discrimination and harm against African migrants is presented as not only a product of colonisation and apartheid but also of white supremacy as is evidenced by the disparate treatment of African migrants in comparison to White migrants. Notably, racism, a lack of political accountability, and the deterioration in social homophily between Africans have furthered Afrophobia in South Africa thus necessitating both a structural and psychological shift to effectively address these issues.

2 Migration and human rights: Analysing the exacerbated inequalities faced by migrants in South Africa

South Africa has a long history of cross-border and intra-regional migration and has, for many years, been considered the economic and social powerhouse of the African continent.⁴ In the past few years, however, South Africa has gained a reputation for being one of the most xenophobic countries in the region owing to the rise in political-economic exclusions and physical violence against African migrants.⁵

Currently, the reasons for migration can be categorised under four external factors, namely, political-legal, economic, social, and

3 Mukumbang, Ambe and Adebisi "Unspoken Inequality: How COVID-19 has Exacerbated Existing Vulnerabilities of Asylum-seekers, Refugees, and Undocumented Migrants in South Africa" 2020 *International Journal for Equity in Health* 3.

4 Mukumbang, Ambe and Adebisi 2020 *International Journal for Equity in Health* 2.

5 Ochonu 2020 *J. of Modern African Studies* 499; Tshishonga "The Impact of Xenophobia-Afrophobia on the Informal Economy in Durban CBD, South Africa" 2015 *The Journal for Transdisciplinary Research in Southern Africa* 163-164.

environmental factors. These factors outline the main challenges also experienced by South Africans with these experiences contributing either to the mass migration of South Africans or to increased tensions between South African citizens and migrants. This section addresses each of these external challenges faced by African migrants in South Africa.

2 1 Political-legal factors

Until 1994, the term “migrants” was mostly assigned to labour migrants in South Africa with only a few regulatory laws protecting refugees and asylum seekers.⁶ This has, however, changed as South Africa has since seen substantial flows of displaced persons seeking asylum.⁷ This subsection, therefore, covers the political and legal impediments that all migrants are subsequently faced with once having migrated to South Africa.

2 1 1 *Refugees and asylum seekers*

The rise in armed conflicts and socio-political instability has led to many being forced to flee and/or seek protection predominantly in vicinal states. The United Nations High Commissioner for Refugees defines refugees as persons with:

a well-founded fear of persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group. Most likely, they cannot return home or are afraid to do so. War and ethnic, tribal, and religious violence are leading causes of refugees fleeing their countries.⁸

This definition is similarly adopted by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention).⁹ Asylum seekers, on the other hand, are defined as persons who are in the process of requesting sanctuary and recognised refugee status.¹⁰

The African continent has, for decades, experienced mass human rights violations following colonisation and political tyranny.¹¹ In the late 1900s, South Africa saw an influx of asylum seekers from countries

6 Tati “The Immigration Issues in the Post-Apartheid South Africa: Discourses, Policies and Social Repercussions” 2008 *Espace populations sociétés* par 4.

7 Tati 2008 *Espace populations sociétés* par 6; Tshishonga 2015 *The Journal for Transdisciplinary Research in Southern Africa* 164.

8 USA for UNHCR “What is a Refugee” <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/> (last accessed 2021-11-10).

9 Art I of the OAU Convention: Governing the Specific Aspects of Refugee Problems in Africa 10 September 1969, 1001 U.N.T.S. 45.

10 UNCHR Africa “Asylum-seekers” <https://www.unhcr.org/asylum-seekers.html> (last accessed 2021-11-10); Refugees Act 130 of 1998.

11 Beinart “Introduction: Political and Collective Violence in Southern African Historiography” 1992 *Political Violence in Southern Africa* 457; Crush “Migration in Southern Africa” 2005 *Global Commission on International Migration* 6.

including the Democratic Republic of Congo (DRC), Somalia, and Mozambique.¹²

For decades, the DRC has suffered wars and armed conflict, with the first Congo war having been incited in 1996.¹³ Following the armed conflict and widespread impunity in the DRC, South Africa saw an influx of 70 077 Congolese migrants in 2015.¹⁴ Similarly, more than 30 000 refugees and asylum seekers were provided asylum space by 2018 after almost one million Somalis were exiled and subsequently displaced from the Horn of Africa.¹⁵ In response to the cessation in 1992, many Mozambicans fled to South Africa, and although an estimated 70 000 refugees volunteered to be repatriated through the United Nation's High Commission for Refugees in 1998, over 150 000 refugees remained in South Africa as they were granted amnesty in 1995.¹⁶

Unfortunately, despite South Africa's progressive legislation on refugee protection, African migrants have been considered a "welcome sigh".¹⁷ This is because although the principle of *nonrefoulement* is mostly adhered to, the rights of refugees and asylum seekers are still restricted through legislation and the policies set out in South Africa.¹⁸

2.2 Legal and political limitations faced in South Africa

At face value, South Africa is presented as the continent's haven and opportunity epicentre. However, the country's legislation and policy directives have been criticised for being restrictive and discouraging.¹⁹ Legislation such as the Immigration Act outlines very selective requirements, thereby restricting migrants from obtaining visas or

12 Tati 2008 *Espace populations sociétés* para 10.

13 As above.

14 Flahaux and Schoumaker "Democratic Republic of the Congo: A Migration History Marked by Crises and Restrictions" 2016 <https://www.migrationpolicy.org/article/democratic-republic-congo-migration-history-marked-crises-and-restrictions> (last accessed 2021-07-07).

15 UNCHR "UNHCR Special Envoy for Somalia Commends South Africa for Generously Hosting Thousands of Somalis" 2018 <https://www.unhcr.org/news/stories/2018/2/5a8546334/unhcr-special-envoy-for-somalia-commends-south-africa-for-generously-hosting.html> (last accessed 2021-07-07).

16 Tati 2008 *Espace populations sociétés* para 10.

17 Cultural Survival Quarterly Magazine "Ethnicity and Refugees in South Africa" 1981 <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/ethnicity-and-refugees-africa> (last accessed 2021-07-06).

18 Khan and Rayner "Country Fiche South Africa" 2021 https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_South-Africa_Final_Pub.pdf pg 19 (last accessed 2021-07-06); Ochonu 2020 *J. of Modern African Studies* 512; Mbembe "Blacks From Elsewhere and the Right of Abode" 2019 Ruth First Lecture, Newframe <https://www.newframe.com/ruth-first-memorial-lecture-2019-achille-mbembe/> (last accessed 2021-07-29).

19 Khan and Rayner 2020 Country Fiche South Africa https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_South-Africa_Final_Pub.pdf 13 (last accessed 2021-07-06); Immigration Act 13 of 2002.

permanent residency.²⁰ Moreover, the process of applying for a visa is onerous and time-consuming, often resulting in applicants incurring unexpected fees during the process.²¹ Considering that most economic migrants are from poor African countries and therefore do not have the financial and scheduling capacity to accommodate these requirements, it can be said that immigration policies in South Africa are especially exclusionary to African migrants.²²

These restrictions are also placed on refugees and asylum seekers as the process of applying for refugee status, getting processed, and having one's information certified are also frustratingly onerous and lengthy.²³ Sometimes these procedures are abandoned in their entirety as a result of maladministration and office shutdowns. For example, despite the fact that the South African economy had already started opening up at the beginning of May 2020, all Refugee Reception Offices across the country have remained closed to new applications for over a year (at date of writing).²⁴ This is particularly concerning as the COVID-19 pandemic, and the socio-economic effects thereof have led to an escalation of human rights abuses across the continent with civilians in countries such as Zimbabwe and Nigeria facing torture and arrest for protesting the economic insecurities experienced during the pandemic.²⁵ These nationals who are now vulnerable to the pandemic, poverty, and a surge in violence, are now unable to seek protection and assistance from South Africa.

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- 20 IBN Immigration Solutions "A General Introduction to Immigration Law and Policy in South Africa" 2020 <https://www.lexology.com/library/detail.aspx?g=0821fe7b-cf09-41ad-bb6a-4cfa7dc3fdd2> (last accessed 2021-07-07); Immigration Act 13 of 2002 ss 9, 29, 30 and 31.
- 21 Matema "South Africa's Policy on Migrants is Inadequate and at Odds with the Freedom Charter" 2021 <https://mg.co.za/opinion/2021-05-27-south-africas-policy-on-migrants-is-inadequate-and-at-odds-with-the-freedom-charter/> (last accessed 2021-07-07); Mbembe "Blacks From Elsewhere and the Right of Abode" 2019 Ruth First Lecture, Newframe <https://www.newframe.com/ruth-first-memorial-lecture-2019-achille-mbembe/> (last accessed 2021-07-29)
- 22 Matema "South Africa's policy on migrants is inadequate and at odds with the Freedom Charter" 2021 <https://mg.co.za/opinion/2021-05-27-south-africas-policy-on-migrants-is-inadequate-and-at-odds-with-the-freedom-charter/> (last accessed 2021-07-07); Mbembe "Blacks From Elsewhere and the Right of Abode" 2019 Ruth First Lecture, Newframe <https://www.newframe.com/ruth-first-memorial-lecture-2019-achille-mbembe/> (last accessed 2021-07-29).
- 23 See Department of Home Affairs "Refugee Status and Asylum" 2021 <http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum> (last accessed 2021-07-20) where the Department of Home Affairs indicates that applications usually take around six months to be processed and approved.
- 24 Kavuro "Ongoing Closure of Reception Offices Leaves Refugees and Asylum Seekers in Undocumented Limbo" 2021 <https://www.dailymaverick.co.za/opinionista/2021-02-10-ongoing-closure-of-reception-offices-leaves-refugees-and-asylum-seekers-in-undocumented-limbo/> (last accessed 2021-07-07).
- 25 Segun "Human Rights Abuses Escalate in Africa During the Pandemic" 2021 <https://www.hrw.org/news/2021/01/18/human-rights-abuses-escalate-africa-during-pandemic> (last accessed 2021-07-07).

Even after being granted asylum in South Africa, the rights of persons who have been granted asylum are also infringed upon significantly as asylum seekers no longer have an automatic right to education and work. According to the Refugees Amendment Act, the right to work in particular will be “endorsed” subject to an extensive evaluation process determining whether the applicant is able to support themselves.²⁶ This is in contravention of the 1951 Refugee Convention which obliges states to ensure that refugees are granted “the most favourable treatment” concerning their right to engage in self-employment, wage-earning employment, and liberal professionalism.²⁷ In addition to the onerous nature of the process itself, asylum seekers also face the possibility of paying hefty fines if they do not provide the Department of Home Affairs with proof of employment within two weeks of having their right to work endorsed.²⁸ This provision not only violates asylum seekers’ right to equality but also infringes on their right to dignity as one’s engagement in productive and meaningful work contributes significantly to one’s self-esteem and self-worth.²⁹

2 2 1 *Economic factors*

For decades, employment opportunities in South Africa have been scarce and almost inaccessible to migrants.³⁰ As a result, many migrants have either opened their own businesses or have resorted to taking on menial and/or labour-intensive jobs.³¹ Many of these shops contribute significantly to the communities wherein they operate, with many

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- 26 S 15(1) of the Refugees Amendment Act 33 of 2008; Scalabrini Centre of Cape Town “Teach Yourself: The Refugees Amendment Act Explained” <https://www.scalabrini.org.za/news/teach-yourself-the-refugees-amendment-act-explained/> (last accessed 2021-07-07).
- 27 UNCHR Africa “Asylum-seekers” <https://www.unhcr.org/asylum-seekers.html> (last accessed 2021-11-10); Refugees Act 130 of 1998. The right to work is also entrenched under the Universal Declaration of Human Rights which forms part of international customary law. See Art 23 of the Universal Declaration of Human Rights, 10 December 1948, 217 A (III), and Kavuro “Refugees and Asylum seekers: Barriers to Accessing South Africa’s Labour Market” 2015 *Law, Democracy and Development* 235.
- 28 Scalabrini Centre of Cape Town “Teach Yourself: The Refugees Amendment Act Explained” <https://www.scalabrini.org.za/news/teach-yourself-the-refugees-amendment-act-explained/> (last accessed 2021-07-07).
- 29 S 15(1) of the Refugees Amendment Act; Scalabrini Centre of Cape Town “Teach Yourself: The Refugees Amendment Act Explained” <https://www.scalabrini.org.za/news/teach-yourself-the-refugees-amendment-act-explained/> (last accessed 2021-07-07); *Minister of Home Affairs and Others v Watchenuka and Others* 2004 1 All SA 21 (SCA) paras 27-28.
- 30 Kavuro 2015 *Law, Democracy Development* 260; Mukambang, Ambe and Adebiji 2020 *International Journal for Equity in Health* 2.
- 31 ACMS Fact Sheet “Fact Sheet On Foreign Workers in South Africa: Overview Based On Statistics South Africa Data (2012-2017)” 2020 <http://www.migration.org.za/wp-content/uploads/2020/05/Fact-Sheet-On-Foreign-Workers-In-South-Africa-Overview-Based-On-Statistics-South-Africa-Data-2012-2017.pdf> (last accessed 2021-11-10).

migrant-owned businesses operating mostly within townships.³² These employment prospects have contributed to the surge in xenophobic violence against shop owners and other migrants, predominately those who live in townships.³³ Many of these attackers would claim that the shop owners and labourers are “stealing their jobs” despite the fact that many South Africans also receive employment through migrant business owners.³⁴ It can therefore be argued that the economic restrictions on migrants are two-fold as they are faced with unemployment as well as the risk of harm and violence in the event that they seek employment.

The COVID-19 pandemic has, in many ways, devastated the South African economy with the brunt of lockdown restrictions being felt by small businesses. Although economic relief measures were introduced to businesses and individuals, many of these were to the exclusion of migrants within the country.³⁵ In March 2020 when the lockdown regulations were first communicated, Small Business Development Minister Khumbudzo Ntshavheni announced that only South African-owned spaza shops and small businesses would be allowed to operate during the level 5 lockdown.³⁶ She further stated that only “quality products” must be sold during this time, implying that spaza shops owned by migrants were somewhat inferior in that regard.³⁷ Although all spaza shops were subsequently opened on 6 April 2020, the economic loss and assumptions made regarding migrant-owned spaza shops had already caused a significant amount of damage.³⁸

In addition to the restrictions placed on economic migrants and refugees, asylum seekers have also been financially excluded during the COVID-19 pandemic. Applications for emergency relief grants in 2020 were not extended to asylum seekers and were only extended to include refugees.³⁹ Although the High Court has since overturned this decision, the initial exclusion of asylum seekers is indicative of the government’s

32 Moyo and Zanker “The Corona Virus and Migration Governance in South Africa: Business as Usual?” 2020 *Africa Spectrum* 106.

33 Moyo and Zanker 2020 *Africa Spectrum* 106.

34 As above. Notably, South Africans are often employed by migrant business owners to accommodate any language barriers for consumers who do not speak English. See also The World Bank (2018) “New Study Finds Immigrants in South Africa Generate Jobs for Locals” 2018 <https://www.worldbank.org/en/country/southafrica/publication/new-study-finds-immigrants-in-south-africa-generate-jobs-for-locals> (last accessed 2021-07-06).

35 Mukambang, Ambe and Adebisi 2020 *International Journal for Equity in Health* 4.

36 Moyo and Zanker 2020 *Africa Spectrum* 106.

37 As above.

38 Mukambang, Ambe and Adebisi 2020 *Africa Spectrum* 106.

39 Mukambang, Ambe and Adebisi 2020 *International Journal for Equity in Health* 7; Bornman and Oatway “South Africa: Migrants Excluded From Government Food Aid” 2020 <https://allafrica.com/stories/202005130663.html> (last accessed 2021-07-29).

dismissive actions and policies towards migrants as a vulnerable group within the country.⁴⁰

2 3 Social and environmental factors

2 3 1 Public services and the COVID-19 vaccine rollout

Migrants are often faced with financial circumstances that are so unfavourable that life in South Africa would be otherwise safer or more opportune.⁴¹ Unfortunately, the social and environmental circumstances faced by migrants in South Africa are often times just as discouraging. Regarding accommodation, many refugees and economic migrants live in informal or self-built houses in informal settlements or townships.⁴² These houses are often overcrowded and lack amenities such as electricity and running water. These conditions are not only uncomfortable, but they also place migrants at a greater risk of contracting COVID-19 as recommendations such as social distancing and regular hand washing are almost impossible to follow.⁴³

Since the beginning of the pandemic, the greatest objective set has been to develop and administer enough vaccines to ensure herd immunity in each country. Although the vaccine registration process has been made easier and more accessible for South African citizens, these accommodations only magnify the disparities in the inclusion of migrants in the vaccine rollout.⁴⁴ The continuing occurrence of vaccine nationalisation has been blamed for the inequities regarding vaccine distribution and although Western and First World countries are at fault for instigating this global predicament, the effects thereof have led to implicit manifestations of vaccine nationalisation where South African citizens have been prioritised over refugees and asylum seekers despite their residence and occupation within the country's territory.⁴⁵ Although they are not directly excluded from receiving vaccines within the country, the requirement of state-issued documentation has excluded

40 *Scalabrini Centre of Cape Town v Minister of Social Development* 2021 1 SA 553 (GP) par 42.

41 Tati 2008 *Espace populations sociétés* par 10.

42 Mukambang, Ambe and Adebisi 2020 *International Journal for Equity in Health* 4.

43 Mutambara, Crankshaw and Freedman "Assessing the Impacts of COVID-19 on Women Refugees in South Africa" 2021 *Journal of Refugee Studies* 2.

44 The Electronic Vaccination Data System, which is the official online platform for vaccination self-registrations, allows individuals to register in any of the eleven official languages. Further, walk-ins are also accepted for eligible persons who may otherwise be unable to access the internet or the necessary network services. See Director General Health Republic of South Africa "National Department of Health Policy Guidance to Vaccination Sites Circular June 01/4 2021".

45 Lagman "Vaccine Nationalism: A Predicament in Ending the COVID-19 Pandemic" 2021 *Journal of Public Health* 375. Lagman defines vaccine nationalisation as "the prioritization of the domestic needs of the country in an outlay of others".

many refugees and asylum seekers from the vaccine registration and distribution processes.

In January 2021, Health Minister Zweli Mkhize announced the country's vaccine rollout plan and stated that the country "does not have the capacity to assist undocumented foreign nationals".⁴⁶ To further aggravate the situation, Acting Health Minister Mmamoloko Kubayi-Ngubane stated the following in response to concerns regarding the vaccination of eligible individuals who do not possess state-issued documentation:

We follow the laws of the country. So you have to be a documented person in the country. If you are undocumented it means you are illegal in the country. So it's a different case. We have a responsibility to those who are known to the state, by the state.⁴⁷

This statement was made almost a year after the closure of the Refugee Offices and the temporary closure of the Department of Home Affairs which led to a backlog of applications.⁴⁸ This, together with the exclusion of undocumented migrants disregards the circumstances precluding migrants from becoming documented and therefore leaves undocumented migrants in a position where they are indubitably excluded from receiving the COVID-19 vaccine with no active measures being taken to remedy the matter.⁴⁹ These exclusions also invalidate any considerations made to protect the country and its citizens as herd immunity can only be reached where a significant majority of the country is vaccinated.⁵⁰ Moreover, the state's failure to effect measures ensuring that all persons within its territory receive the vaccine not only amounts to an infringement of the state's positive duty to ensure the protection of the socio-economic rights of all persons within South Africa, but also directly violates individual and collective rights to health care services and emergency medical treatment for the elderly and those with comorbidities.⁵¹

46 Masipa, Ndelela and Baduza "South Africa: Excluding Foreign Nationals Undermines the Vaccine Rollout" 2021 <https://allafrica.com/stories/202107020647.html> (last accessed 2021-07-06).

47 GovernmentZA "Acting Health Minister Briefs the Media on the Progress of efforts in the Fight against COVID-19" 2021 https://youtu.be/_XeqKPGKmIg (last accessed 2021-07-27); Vearey, Gandar, Walker, de Gruchy, Hassan, Mofokeng, Mahlangu, Maple, Venter and Ekambaram "Leave No One Behind: We Must Urgently Address Vaccination of Undocumented Migrants and Asylum Seekers" 2021 <https://www.dailymaverick.co.za/article/2021-07-26-leave-no-one-behind-we-must-urgently-address-vaccination-of-undocumented-migrants-and-asylum-seekers/> (last accessed 2021-07-27).

48 Moyo and Zanker 2020 *Africa Spectrum* 103.

49 Vearey, de Gruchy and Maple "Global Health (security), Immigration Governance and Covid-19 in South(ern) Africa: An Evolving Research Agenda" 2021 *Journal of Migration and Health* 4.

50 As above 5; Moyo and Zanker 2020 *Africa Spectrum* 101.

51 Liebenberg "South Africa's Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?" 2002 *Law, Democracy and Development* 171; Constitution of the Republic of South Africa, 1996 S27(1)-(3).

3 Xenophobic attacks and gender-based violence

As mentioned above, the economic hardships faced have instigated much of the animosity and exclusions against migrants in South Africa. Subsequent to the country's economic fallout in 2020, a group of South Africans under the "Put South Africa First" movement held protests demanding that migrants leave the country on account of them "taking away their jobs".⁵² This movement not only proposed that the government employ invasive measures such as citizenship audits and migrant service fees, but also spread falsehoods that migrants are child traffickers and drug dealers thus endangering their lives.

In turning to the link between xenophobia and gender-based violence, it is noted that poor migrant women have been subjected to the most harm as they suffer from both xenophobia and gender-based violence.⁵³ It has also been difficult for them to access support from the government and police as they fear either being further harassed or deported on account of them being undocumented especially when many migrant statuses are "in limbo" owing to the shutdown of Refugee Offices.⁵⁴

This lack of protection also leaves many migrant women, particularly refugees and asylum seekers, vulnerable to domestic abuse from their partners.⁵⁵ One woman from the DRC stated the following regarding the abuse that she and her children endured during the hard lockdown period in 2020:

No cigarettes, no beer, the men became more violent and they would beat the children in the house. They were more violent because of this lockdown. It was a big problem for us, especially for those with men who smoke.⁵⁶

Disturbingly, many migrant women would, however, consider this private abuse as the lesser evil to the public violence or deportation that they may otherwise face should they choose to report their partners.⁵⁷ Another woman from the DRC outlined this position when questioned on why she is unable to leave her abusive partner:

52 Masudi "In the Midst of the Pandemic, Anti-foreigner Sentiment has Flourished" <https://minorityrights.org/trends2021/south-africa/> (last accessed 2021-07-28).

53 Moyo and Zanker 2020 *Africa Spectrum* 106.

54 Kavuro "Ongoing Closure of Reception Offices Leaves Refugees and Asylum Seekers in Undocumented Limbo" 2021 <https://www.dailymaverick.co.za/opinionista/2021-02-10-ongoing-closure-of-reception-offices-leaves-refugees-and-asylum-seekers-in-undocumented-limbo/> (last accessed 2021-07-07).

55 Mutambara, Crankshaw and Freedman 2021 *Journal of Refugee Studies* 9; Freedman, Crankshaw and Mutambara "Sexual and Reproductive Health of Asylum Seeking and Refugee Women in South Africa: Understanding the Determinants of Vulnerability" 2020 *Sexual and Reproductive Health Matters* 328.

56 Mutambara, Crankshaw and Freedman 2021 *Journal of Refugee Studies* 9.

57 Mutambara Crankshaw and Freedman 2021 *Journal of Refugee Studies* 9-10.

Where would I go? We just had to stay in the house together because of lockdown. If I left where would I go and stay with the children? With what money was I going to manage to pay rent for another space? That is why I said it's something that affected us women psychologically.⁵⁸

When considering the violence and abuse suffered by migrant women, it comes as no surprise that a significant decline in their physical and mental health has been reported during the COVID-19 pandemic.⁵⁹ Moreover, the fear of contracting the disease and not being able to care for or be in contact with their children has left many migrant women in a state of uncertainty and despair.⁶⁰

Although the COVID-19 pandemic has exacerbated the inequalities faced by poor Black people in South Africa, it is evident that xenophobia, Afrophobia, and the exclusionary effects thereof have left Black migrants in a compounded state of despair. Over the years, the acknowledgment of xenophobia and the effects thereof have been recognised throughout the country, however, very little has been done to amend the sector-based and institutional curtailments placed on migrants in South Africa. It is thus recommended that, firstly, section 22 of the Refugees Amendment Act should be amended insofar as it requires that asylum seekers' rights to work and study become subject to an endorsement by the Department of Home Affairs.⁶¹ Secondly, and with consideration of the decision made in the *Scalabrini* judgment, at least one fully functional Refugee Reception Office must remain open in each municipal area.⁶² Lastly, social and business grants should be awarded to everyone meeting the eligibility requirements for these grants. This recommendation is partly contingent on the first two requirements being met as an established refugee status with accompanying documentation that would simplify the application process for established social and business grants.

The outlined human rights violations have tormented African migrants since the late 1990s and recognising the emergence of Afrophobia may assist in drawing a link between the experiences faced by Black migrants in South Africa and South African immigrants. The next section will outline the history and circumstances contributing to xenophobia in South Africa and will discuss the role of colonisation and apartheid in the social and institutional inequities present today.

58 As above 10.

59 As above 9-10; Mulu and Mbanza "COVID-19 and its Effects on the Lives and Livelihoods of Congolese Female Asylum Seekers and Refugees in the City of Cape Town" 2021 *AHMR* 35-36.

60 Mutambara, Crankshaw and Freedman 2021 *Journal of Refugee Studies* 9-10.

61 Refugees Amendment Act 11 of 2017.

62 *Scalabrini Centre of Cape Town v Minister of Home Affairs* (1107/2016) [2017] ZASCA 126 (29 September 2017) para 69.

4 Allies today, enemies tomorrow: The circumstances of migrants before and after South Africa's constitutional dispensation

The previous section addressed the inequalities faced by migrants in South Africa with marginalisation and xenophobic attacks being some of the greatest injustices faced by migrants in the country. This section explores the social and political dynamics that existed between Black South Africans and other Africans across the continent during colonisation and will juxtapose these dynamics with those present during apartheid as well as after 1994.

4 1 Colonisation and apartheid

In addition to economic exploitation and land displacement, British imperialists were also driven by perpetuating Eurocentrism in every colony.⁶³ As a result, one of the objectives sought during colonisation was to disillusion Black South Africans by severing their continental ties with other Africans that, at the time, formed a significant part of Black self-legitimation and social homophily.⁶⁴ This was done firstly by limiting the movement of Black South Africans inside the colonial enclaves.⁶⁵ Additionally, Black South Africans were denied any resources that would facilitate any form of intellectual interaction and mobilisation between themselves and other Black Africans across the continent.⁶⁶

Black leaders and pan-Africanists rejected the White rhetoric and viewed the marginalisation of Black South Africans as an attack on all Black people, calling on all Africans to remain united.⁶⁷ Even with the rise in nationalism, Ochonu notes that the perspectives presented by proud Zulu nationalists, for example, would recognise the shared Black African's experience and would reach out to the Black community as a whole.⁶⁸

Whilst Black South Africans were isolated and segregated during colonisation, a common level of [mis]treatment was still enforced against all Black people. The social and cultural divide between Black South Africans and other African groups was seen predominantly during

63 Modiri "Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence" 2018 *SAJHR* 311.

64 Ochonu "South African Afrophobia in Local and Continental Contexts" 2020 *J. of Modern African Studies* 505.

65 As above.

66 As above.

67 As above 506.

68 As above.

apartheid when migrants were favoured over Black South Africans.⁶⁹ Certain limited spaces were opened to Black labourers from neighbouring countries such as Malawi, Lesotho, and Swaziland.⁷⁰ These labour migrants were considered as “cheap labour” and were thereby made to compete with Black South Africans within those very restricted spaces.⁷¹

Additionally, Black economic migrants were also considered as better educated and therefore more desirable to fulfil the apartheid government’s self-interests.⁷² Notably, these acts were strategically made as Black South Africans were kept uneducated through laws such as the Bantu Education Act, thereby purposefully creating animosity through the perceived inferiority of Black South Africans.⁷³

As a result, tensions began to rise between different African groups. Ethnic differences were highlighted and later formalised, and Black Africans who were initially encouraged by Black South Africans to move and mobilise within the country were now considered “foreigners” and “aliens” within a region of their own continent.⁷⁴

4 2 Xenophobia in democratic South Africa

Although migrants have experienced marginalisation on one or more grounds, xenophobic attacks only began to rise in 1999.⁷⁵ This rise in xenophobia is not only indicative of the government’s failure to promote equality and an equal distribution of resources but also highlights the long-lasting effects of colonisation-apartheid on the social dynamics between South Africans and African migrants.

4 2 1 *Xenophobia as a tool to gain political support*

Although xenophobia is defined as an extreme hatred towards non-nationals, it must be noted that exclusions and attacks in South Africa have only been directed at Black African migrants.⁷⁶ Afrophobia has

69 As above 513; Tshishonga “The Impact of Xenophobia-Afrophobia on the Informal Economy in Durban CBD, South Africa” 2015 *The Journal for Transdisciplinary Research in Southern Africa* 165; Koenane and Maphunye “Afrophobia, Moral and Political Disguises: *Sepa leholo ke la moeti*” 2015 *Td: The Journal for Transdisciplinary Research in Southern Africa* 89.

70 Ochonu 2020 *J. of Modern African Studies* 512.

71 As above 513; Koenane and Maphunye 2015 *Td: The Journal for Transdisciplinary Research in Southern Africa* 84.

72 Ochonu 2020 *J. of Modern African Studies* 513.

73 As above.

74 Ochonu 2020 *J. of Modern African Studies* 507; Koenane and Maphunye 2015 *Td: The Journal for Transdisciplinary Research in Southern Africa* 89; Koenane “Xenophobic Attacks in South Africa - An Ethical Response: Have We Lost the Underlying Spirit of Ubuntu?” 2013 *International Journal of Science, Commerce and Humanities* 106.

75 Handmaker “No Easy Walk: Advancing Refugee Protection in South Africa” 2001 *IU Press* 104-105.

76 Tshishonga 2015 *The Journal for Transdisciplinary Research in Southern Africa* 165.

been construed as a subconscious response to Black self-hatred but in addition to this, it has also been used as a tool by Black politicians to regain the support of discouraged South Africans. The African National Congress (ANC), in particular, has made several unfulfilled promises and has subsequently faced political disadvantages and a decline in voter confidence.⁷⁷

Notably, xenophobic violence saw an upsurge during the presidency of Jacob Zuma.⁷⁸ African migrants were depicted as the reason for high unemployment levels within the Black community and were scapegoated for the rise in crime levels where the police failed to act with due diligence.⁷⁹ Moreover, the Zuma campaign and presidency were founded on an ethno-nationalist base together with the Inkatha Freedom Party (IFP) to regain the trust of Zulu supporters.⁸⁰ The IFP furthered the xenophobic rhetoric to vindicate the ANC from allegations of corruption and maladministration. This rhetoric has since been used as a scapegoating mechanism against African migrants and has been used across political divides. Notably, other leading political parties including the Democratic Alliance and the Congress of the People (COPE) have raised anti-African sentiments claiming that African migrants have threatened the country's safety, and have also called for undocumented migrants to "go back to where they came from".⁸¹

Political instability and maladministration in South Africa have facilitated the scapegoating of migrants through the government's nationalist ideologies.⁸² Notably, however, the brunt of these nationalist ideations is felt by Black migrants with White migrants rarely being subjected to xenophobic violence and/or discrimination.⁸³ It is thus evident that xenophobia in South Africa transgresses far beyond the fear or deep dislike of non-nationals and is rather fuelled by racism and the competing interests of Black people within the informal sector.⁸⁴ Afrophobia is resultant of a legacy of colonisation and a racialised apartheid regime that used the so-called 'divide and rule' tactic as a tool

77 Ochonu 2020 *J. of Modern African Studies* 515.

78 As above 500.

79 As above.

80 As above.

81 Chigumadzi "Afrophobia is Growing in South Africa. Why? Its leaders are feeding it" 2019 <https://africanarguments.org/2019/10/afrophobia-is-growing-in-south-africa-why-its-leaders-are-feeding-it/> (last accessed 2021-07-29).

82 Ochonu 2020 *J. of Modern African Studies* 500.

83 This is often due to the preconception that the role of white immigrants in South Africa can only aid in the development of the country's economy with them often times being considered as "tourists" or "investors" as opposed to foreigners. See Mngomezulu & Dube "Lost in Translation: A Critical Analysis of Xenophobia in South Africa" 2019 *JoAUS* 73 & 78.

84 Khoza, Masehele and Mukonza "The 'Butterfly Effects' that Emerged to Xenophobic Outbreaks in South Africa: Xenophobia, A Timeless Boom" 2021 *African Journal of Peace and Conflict Studies* 104; Ejoke and Anni "A Historical and Theoretical Analysis of Xenophobia in South Africa" 2017 *JGIDA* 179.

to discourage any form of organisation against the government's oppressive regime.⁸⁵ Currently, the oppression faced mostly by Black South Africans is that of unemployment, systemic poverty, and an overall deprivation of socio-economic rights with the divide facilitated through the government's scapegoating of African migrants – consequently furthering Afrophobia in the country.⁸⁶ This then leads to the second issue, namely that of insecurity in the informal sector where migrants are regarded as the impediment to Black South Africans accessing jobs in an already underinvested and under-resourced employment sector.⁸⁷

5 Conclusion

This paper outlined the current plight of African migrants in South Africa and the role of Afrophobia in furthering the harm and discrimination effected against Black migrants, particularly refugees and asylum seekers from vicinal African countries. Xenophobia and Afrophobia are not only found and experienced in South Africa and this paper has highlighted how white supremacy and separationist theories have contributed to the widespread perpetuation of Afrophobia. To remedy the abovementioned issues faced by African migrants, some recommendations are proposed.

5.1 Transformative constitutionalism

From the abovementioned discussion, it is clear that the implications of Afrophobia are widespread and have led to the violation of various human rights for African migrants. Albertyn notes that both the state's legal and institutional infrastructure must be improved to ensure the protection of migrant rights in South Africa, thus necessitating the promotion of substantive equality through transformative constitutionalism.⁸⁸ The concept of transformative constitutionalism is often met with diverse understanding as it is integrated to discuss the different perceptions of the role of constitutionalism in establishing a democratic and socially harmonious society.⁸⁹

One of the perceptions of constitutionalism is premised on legal idealism and is known as the “liberal” or “orthodox” approach to

85 Ekambaram “Foreign Nationals are the ‘Non Whites’ of the Democratic Dispensation” in Satgar (ed) *Racism After Apartheid* (2019) 221. Although this tactic was initially used to disengage various minority and tribal groups in South Africa, it has since been used to further the ‘othering’ of African migrants under the guise of promoting nationalism. See also Koenane and Maphunye 2015 *Td: The Journal for Transdisciplinary Research in Southern Africa* 89.

86 Khoza, Masehele and Mukonza 2021 *African Journal of Peace and Conflict Studies* 108.

87 Ejoke and Anni 2017 *JGIDA* 179.

88 Albertyn “Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice” 2018 *SAJHR* 441.

89 Sibanda “Not Purpose-made - Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty” 2011 *Stellenbosch L. Rev* 484.

constitutionalism.⁹⁰ This approach posits a peaceful and congruous transition to our current democracy and holds that, through the Constitution and the judiciary, South Africa is able to enjoy political transformation and a multi-representative democracy.⁹¹ Although this perception does seem transformative at face value, Sibanda notes that this approach is not transformative as it fails to consider political and socio-economic change within the ambit of constitutionalism.⁹²

South Africa's political framework and constitutional dispensation were founded on the incongruous agreements made between unaccountable repressionists and transitional idealists.⁹³ Therefore, although it is acknowledged that the majority of the socio-economic and political issues faced within the country are attributed to present factors such as corruption and maladministration, it must also be noted that these factors also magnify the continuing instabilities caused by colonialism and apartheid.⁹⁴

Transitional legal idealism conceptualises the idea of pursuing justice and social harmony primarily through the application of law.⁹⁵ Although transitional idealism does acknowledge the importance of politics in achieving this harmony, significant reliance is placed on judicial remedy with a utopian perspective given to the Constitution.⁹⁶ Madlingozi notes that this perspective, which is mainly rooted in White "social justice civility" often proposes adjudication and litigation for political problems that could otherwise be solved through political processes.⁹⁷ This reliance is especially concerning when considering that in addition to the South African Constitution being modernist and Eurocentric, the legal system in South Africa remains complicated, time-consuming, and expensive.⁹⁸ Therefore, the legal systems become inaccessible to migrants on both substantive and procedural grounds, thereby making legal idealism a notable impediment to justice for migrants in South Africa.

When considering the human rights infringements and abuses experienced by migrants in South Africa, it must be noted that access to judicial relief is not only arduous but in fact, forms part of the

90 Sibanda 2011 *Stellenbosch L. Rev* 484.

91 As above.

92 As above.

93 South African History Online "A history of the South African Constitution 1910-1996" 2011 <https://www.sahistory.org.za/article/history-south-african-constitution-1910-1996> (last accessed 2022-12-12).

94 Modiri 2018 *SAJHR* 303.

95 Benyera "Idealist or Realist Transitional Justice: Which Way for Zimbabwe?" 2015 *European Journal of Social Science* 200-201.

96 Benyera 2015 *European Journal of Social Science* 200-201.

97 Madlingozi "Social Justice in a Time of Neoapartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" 2017 *Stellenbosch L. Rev* 144; Benyera 2015 *European Journal of Social Science* 201.

98 Modiri 2018 *SAJHR* 306.

fundamental rights restricted to them as a vulnerable group in society. In this way, the flaws of transformative constitutionalism which can be seen as political and social reform still remain dependent on the transformative interpretations of the courts.⁹⁹ To address these procedural limitations, Sibanda proposes that increased efforts are placed on promoting a decentralised democracy that employs a bottom-up approach during decision-making processes.¹⁰⁰

It must also, however, be noted that substantive limitations to transformative constitutionalism also exist for migrants, and therefore, although transformative judicial reform is advised as a matter of urgency, it is also noted that particularistic political and social remedies, outside of approaching the courts, may be better suited to addressing the human rights infringements faced by migrants.

5 2 Structural reform

Afrophobia has been individualised as those who do not actively discriminate or facilitate attacks against African migrants neither work towards curbing the ongoing attacks nor do they acknowledge the structural and institutional 'attacks' that do exist and work against African migrants.¹⁰¹ It is thus proposed that, as a point of departure, collective responsibility must be taken by states, generally, and South Africans, specifically, to challenge the tangible and intangible legacies of colonisation and apartheid in South Africa's case. Existing policies and legislation furthering this discrimination must be amended with consideration and adherence to international instruments such as the UNDHR, OAU Refugee Convention, and the ICCPR.¹⁰² In addressing the intangible legacies of colonisation and apartheid, education through intervention programmes, workshops, and media campaigns should be prioritised as a mechanism necessary to not only curb xenophobia in South Africa, but to also undo the harmful perceptions and ideologies taught through colonist pedagogy.¹⁰³ Similarly to how the segregation of Africans began on a philosophical level, a similar approach must be taken as the first step to undoing the damage of South African nationalism and tribalism.

Much of the hate towards African migrants and the consequent xenophobic attacks are displaced as the issue lies in the government's failure to allocate resources and employ mechanisms to address unemployment and the lack of protection within the informal sector. It is also recommended that South Africans mobilise to hold government institutions accountable for their corruption and maladministration.¹⁰⁴

99 Sibanda 2011 *Stellenbosch L. Rev* 493.

100 As above 498.

101 Koenane and Maphunye 2015 *Td: The Journal for Transdisciplinary Research in Southern Africa* 96

102 As above.

103 Ejoke and Anni 2017 *JGIDA* 180-181.

104 Ekambaram 231.

The scapegoating of African migrants not only detracts from the country's unemployment crisis but also furthers the harm experienced by South African women and children who are most affected by the government's maladministration.¹⁰⁵

The Constitution places an express duty on the government to ensure the realisation of socio-economic rights. This position was made clear in *Grootboom* where the Constitutional Court noted that the provision of socio-economic rights must be read together with the setting of the Constitution as a whole, thereby obligating the government to always remain cognisant of individual and collective rights to dignity, freedom, and equality.¹⁰⁶ The state has just as much a positive duty to address the poverty, homelessness, and violence faced by migrants in South Africa as it does to address similar issues faced by South African citizens.¹⁰⁷ In addition to resource allocation, consideration must also be given to the development and amendment of existing policies and legislation including those regulating law enforcement's approach and response to xenophobic behaviour and attacks within the country.¹⁰⁸

When considering the human rights infringements and abuses experienced by migrants in South Africa, it must be noted that access to judicial relief is not only arduous but in fact, forms part of the fundamental rights restricted to them as a vulnerable group in society.¹⁰⁹ To address these procedural limitations, Sibanda proposes that increased efforts are placed on promoting a decentralised democracy that employs a bottom-up approach during decision-making processes.¹¹⁰ The importance of civil societies and social programmes can, therefore, not be overstated as their involvement has assisted greatly in addressing the gaps created by government-led social schemes.¹¹¹ The African Diasporas Forum has, for example, facilitated the distribution of food parcels, during the county's various lockdowns, to all persons across the country with no questions asked on individuals' nationality or whether or not they meet the "means test" requirements.¹¹²

Finally, as posited by Sur, societies and cultural homogeneity can exist and prosper in a globalised world. It must always be remembered that

105 As above.

106 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23-24.

107 Langa "The Role of the Constitution in the Struggle against Poverty" 2011 *Stellenbosch L.Rev* 450; *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 8.

108 Khoza, Masehele and Mukonza 2021 *African Journal of Peace and Conflict Studies* 116.

109 Sibanda 2011 *Stellenbosch L. Rev* 493.

110 As above 498.

111 Langa 2011 *Stellenbosch L.Rev* 449.

112 Matsuma "African Diaspora Forum Pleads for Food Parcel Donations for Migrants" 2020 <https://www.iol.co.za/the-star/news/african-diaspora-forum-pleads-for-food-parcel-donations-for-migrants-47345930> (last accessed 2021-07-30).

the challenges faced by Black migrants in South Africa are the same challenges faced by Black South African migrants in other states. Therefore, a call for solidarity is proposed to not only combat the socio-economic and political harms faced within the continent but to also collectively address the marginalisation of Africans outside of the continent.