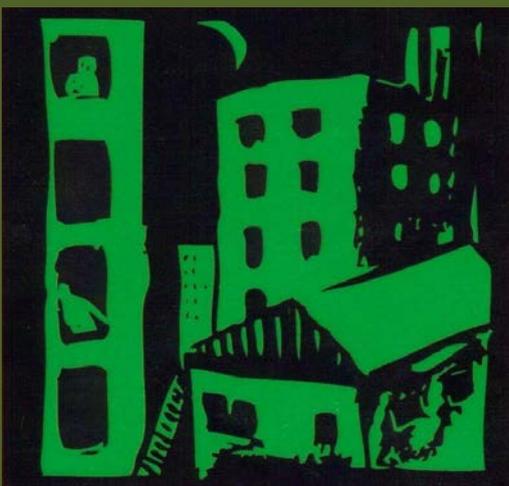


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Refugees and asylum seekers: Barriers to accessing South Africa's labour market

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1 INTRODUCTION

The employment of those who are seeking or granted asylum in South Africa is very challenging. The challenges range from ill-sentiment towards non-citizens to legal and procedural barriers, such as, measures that are taken by different role players to protect citizens with regards to accessing the labour market. Worth mentioning is the inability of some employers and professional councils to distinguish between the Refugees Act¹ and the Immigration Act.² These dynamics have restricted refugees' and asylum seekers' employment opportunities. In this situation, the skills that the refugees and asylum seekers

¹ Act 130 of 1998, as amended by the Refugees Amendment Act 33 of 2008 and the Refugees Amendment Act 12 of 2011 (the Refugees Act).

² Act 13 of 2002, as amended by the Immigration Amendment Act 13 of 2011 (the Immigration Act).

bring with them are not potentially contributing to the South African economy. These refugee skills or human capital which Jacobsen refers to as “refugee resources” or “refugee economic assets”,³ have not been accessed and controlled by South Africa to its own benefit, as will be illustrated in this article.

The situation is such, regardless of a refugee’s right to work being guaranteed by the Refugees Act,⁴ which gives substance to the 1951 Convention Relating to the Status of Refugees (the Refugee Convention)⁵ and its Protocol.⁶ The latter recommends that a host State accords to refugees lawfully staying in a host country:

- (a) “the most favourable treatment” accorded to foreign nationals in the same circumstances, as regards the right to engage in wage earning employment;⁷ and
- (b) “treatment as favourable as possible and, in any event, not less favourable” than that accorded to foreign nationals generally in the same circumstances, as regards the right to engage in self-employment;⁸ or the right to practise a liberal profession.⁹

Moreover, it requires a host State to give sympathetic consideration to incorporating the rights of all refugees in respect of wage earning employment within those of citizens.¹⁰ With regard to restrictive measures imposed on non-citizens for the protection of the national labour market, the Refugee Convention states that such measures shall not apply to a refugee, who either (1) has completed three years’ residence in the country, or (2) is married to a citizen, or (3) is a parent to one or more children possessing the nationality of a host country.¹¹ This suggests that measures that are taken to protect the national labour market “should not apply in all their severity” to refugees who fall within these categories.¹² Unlike the Refugee Convention, the right to work postulated in the Refugees Act is unqualified. Section 27(f) of the Refugees Act merely states that a refugee is entitled “to seek employment” and does not stipulate any further requirement that should be complied with.¹³ This legal position may have been driven by the non-humanitarian assistance, self-settlement and integration approach

³ Jacobsen K “Can refugees benefit the state? Refugee resources and African statebuilding” (2002) 40 *The Journal of Modern African Studies* 577 at 578.

⁴ S 27(f) of the Refugees Act provides that “a refugee is entitled to seek employment.”

⁵ General Assembly, Res 429(V) of 14 December 1950: Ch. 3.

⁶ The 1967 Protocol Relating to the Status of Refugees, General Assembly, Res 2198 (XXI) of 16 December 1967.

⁷ Art 17(1) of the Refugee Convention.

⁸ Art 18 of the Refugee Convention.

⁹ Art 19(1) of the Refugee Convention.

¹⁰ Art 17(3) of the Refugee Convention.

¹¹ Art 17(2) of the Refugee Convention.

¹² Edwards A “Gainful employment” in Zimmermann A (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: a commentary* (New York: Oxford University Press 2011) at 954.

¹³ S 27(f) of the Refugees Act 130 of 1998.

adopted by South Africa towards the legal treatment of refugees and asylum seekers.¹⁴ In terms of this approach, they are expected to integrate themselves into South African society and to support themselves and their families.¹⁵ Therefore, the right to earn a living is an integral aspect of the refugees' existence and living a decent life.

In fact, work will enable them to be productive and to participate fully in their host community, thereby lifting themselves out of poverty, increasing their wellbeing, protecting themselves against market related economic shocks, or, alternatively, restoring their dignity. Nelson and Dorsey argue that there is a *nexus* between human rights and development,¹⁶ and Eide demonstrates how human rights are a vehicle to social and economic development if they are respected, protected, and promoted.¹⁷ This is the context in which the refugees' right to work and the utilization of refugee resources will be discussed.

Within the human rights paradigm, this article explores some of the barriers, faced by refugees and asylum seekers in accessing South Africa's labour market. These obstacles are analysed through the lens of the rights based approach which considers human development as a human right.¹⁸ This approach is preferred because of how it responds to the problems related to deprivation, vulnerability, or poverty. The problems related to the dynamics of these disadvantages are resolved "through the establishment and enforcement of rights that entitle the poor and marginalised people to a fair share of society's resources".¹⁹

Based on this notion, the article is structured as follows: first (in section 2), the article looks at the right to work in the international context and how international law frames it. This is discussed in order to illustrate the rationale behind the entrenchment of the right to work in various human rights instruments and its importance in social development and, in particular, its value to refugee livelihood. In this section, a clear distinction is made between a refugee (or an asylum seeker) and an economic migrant. The regulation of their access to employment is discussed in depth. Next (in section 3), the article discusses the substantive equality measures and their importance in social transformation. The discussion is aimed at exemplifying how the employment equity measures severely impact on refugees' and asylum-seekers' right to work. In so doing, a distinction between formal and substantive equality is outlined in relation to

¹⁴ South Africa does not offer material support to refugees and asylum seekers. See *Minister of Home Affairs and others v Watchenuka and others* [2004] 1 All SA 21 (SCA) at para 32 (the *Watchenuka* case (2004)).

¹⁵ The refugee regime policy is self-sufficiency and self-settlement oriented. See *Lawyers for Human Rights Policy shifts in the South African asylum system: evidence and implications* (Pretoria: The African Centre for Migration & Society 2013) at 6, 10, 16, 35 and 58 and *CorMSA Protecting Refugees, Asylum-Seekers and Immigrants* (Johannesburg: CorMSA 2009) at 106.

¹⁶ Nelson PJ & Dorsey E "At the nexus of human rights and development: new methods and strategies of global NGOs" (2003) 3 *World Development* 2013.

¹⁷ Eide A "Human rights requirement to social and economic development" (1996) 21 *Food Policy* at 23.

¹⁸ Eide (1996) at 23. See too Nelson (2003) at 2013-2016.

¹⁹ Nyamu-Musembi C "Towards an actor oriented perspective on human rights" in Kaber N (ed) *Inclusive citizenship and expressions* (London & New York: Zed Books 2005) at 43.

employment, and the threat that the substantive measures pose to a refugee's right to work is underlined. This is followed (in section 4) by a discussion of the main factors that impede refugees' and asylum seekers' access to the labour market, including problems related to registration with the professional councils. Finally (in section 5), the article concludes by arguing that the protection of a previously disadvantaged group's interests should not be used to overlook South Africa's duty to observe refugees' basic rights, including the right to work. Failure to protect such rights would result in the infringement of their rights enshrined in the Bill of Rights, more precisely, the rights to life and human dignity. In that case, the refugee economic asset is not beneficial to the South African economy.

2 ENJOYMENT OF THE RIGHT TO WORK

2.1 The right to work as the fundamental right to social progress

The right to work was first introduced by the 1945 Charter of the United Nations as a mechanism to promote the conditions of a dignified life, socio-economic progress and development.²⁰ It is entrenched in the Universal Declaration of Human Rights (the UDHR) as a fundamental right which not only promotes a high standard of living but also safeguards against unfair or exploitative labour practices.²¹ Today, the UDHR forms part of international customary law and serves as a basis of constitutional States, such as for example, South Africa. It became binding international law through the twin international Covenants, adopted in 1966.²² According to Wacks, the adoption of these twin Covenants – referred to as “the International Bill of Rights” – demonstrates a commitment to the promotion and protection of human rights.²³ In the context of the socio-economic paradigm, it can be said that fundamental human rights and liberties would effectively be protected if all people are enabled to lead a productive and a dignified life. In doing so, Article 2(3) of the ICESCR allows “developing countries” to determine to what extent they would guarantee socio-economic rights to non-citizens so as to promote their general welfare. In South Africa, such guarantee is set out under the immigration and refugee frameworks.

It needs to be noted that the right to work is not contained in the Constitution. Rather, it is viewed as a core component of the rights to life and human dignity and as “one of the most precious liberties that an individual possesses” because “to work means to eat and subsequently to live”.²⁴ According to Ngcobo J, the right to work is, first, the foundation of an individual's existence. Secondly, work is a part of an individual's identity and constitutive of his or her dignity. Thirdly, there is a strong

²⁰ Art 55(a) of the Charter of the United Nations, adopted on 26 June 1945.

²¹ Art 23 of the UDHR, General Assembly, Res 217A(III) of 10 December 1948.

²² The International Covenant on Civil and Political Rights, General Assembly, Res 2200A (XXI) of 16 December 1966 (the ICCPR) and the International Covenant on Economic, Social and Cultural Rights, General Assembly, Res 2200A (XXI) of 16 December 1966, (the ICESCR).

²³ Wacks *R Jurisprudence* (London: Blackstone Press Limited 1995) at 248.

²⁴ *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W) at para 64.

nexus between work and the human personality, which “shapes and completes an individual over a lifetime”.²⁵ Drawing on the above, the right to work is very important for an individual’s livelihood as freedom to work is intrinsic to a life of dignity and human fulfilment, in particular, and individual’s social progress and societal prosperity, in general.

However, it comes as no surprise that, under the Refugees Act, the right to work is explicitly accorded to refugees to the exclusion of asylum seekers. Under the Refugee Convention, the right to work is conferred on “refugees lawfully staying” in a host country. The term “refugees lawfully staying” does not simply refer to legally recognised refugees, rather it implies refugees and asylum seekers who are legally in a host country otherwise than merely because of physical presence, or brief presence, or whose stay is purely temporary.²⁶ On the contrary, the term “all refugees” entrenched under the Refugee Convention refers to recognised refugees, asylum seekers, undocumented (or illegal) asylum-seekers or those refugees who overstayed the period for which they were permitted to sojourn or have violated one or more conditions of their sojourn.²⁷

By virtue of being humans, the protection of refugees and asylum seekers in the context of access to essential basic necessities of life is complemented and reinforced by human rights treaties. As noted above, it cannot be contested that the right to work is essentially entrenched in the human rights treaties for the purpose of promoting social progress and a better standard of life, and as an ideal of free human beings enjoying freedom from fear and want. The denial of the right to work would result in imposing destitution and hardship on a person or a group of person denied such right. Both the 1986 Declaration on the Right to Development and the 1993 Vienna Declaration and Programme of Action, in their Preambles, underline that the complete fulfilment of human beings and of peoples would not be realised by the denial of universally recognised rights but by respect for, observance of, and promotion of the essentially and universally recognised rights and freedoms. Such observance and promotion would pave the way to social justice and development, a better standard of living and socio-economic advancement. According to both Declarations, all fundamental rights and freedoms are indivisible, interdependent and interrelated, and that equal attention and urgent consideration should be given to their implementation.²⁸ For the purpose of this

²⁵ *Affordable Medicines Trust and others v Minister of Health and another* 2005 (6) BCLR 529 (CC) at paras 59-61.

²⁶ “Lawfully staying” denotes permitted or regularised stay of a refugee or an asylum seeker for the purpose of international protection. See Da Costa R *Rights of refugees in the context of integration: legal standards and recommendations* (Geneva: UNHCR 2006) at 18 and Edwards (2011) at 936, 976 and 987.

²⁷ Da Costa (2006) at 18.

²⁸ Article 6 (2) of the Declaration on the Right to Development, General Assembly, Res 41/128 of 4 December 1986, states that “[a]ll human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights” and article 5 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 25 June 1993, states that “[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be born in mind, it is the

article, issues in question relate to the rights of refugees in respect of work, dignity, equality, life, and human security. Protection of these interests is of the essence; hence they have equal relevance and significance in the social progress of an individual and of a society. At the heart of social progress lie equal protection and equal opportunities.

The protection of refugee rights is problematic everywhere inasmuch as States are committed to raising the living standards of their citizens and enjoy unfettered discretion to include or exclude non-citizens. Concerning the right to work, it has been argued, and widely accepted by courts of various jurisdictions, that the freedom to choose employment is not universally accepted as a universal right.²⁹ This position raises a constitutional challenge insofar as refugees and asylum seekers are concerned. Challenges arise from the understanding that a host State should, by virtue of the refugee status, accord refugees and asylum seekers favourable opportunities to earn a living through work. Although favourable treatment is not defined by the Refugee Convention, favourable employment opportunities are crucial and essential for refugee livelihood because the right to work: (i) is a fundamental human right that derives “from the inherent dignity of the human person”; (ii) includes the right of *everyone* to the opportunity to gain his or her good living by work;³⁰ and (iii) is a component of social justice which is based on the right to life, equality, and dignity.³¹

Seen from this standpoint, a State cannot deny refugees or asylum seekers a right to work since it forms part of an array of basic human rights and liberties. Chapman and others argue that fundamental human rights must, at all times, be enjoyed by “all people in all places”;³² that is, entitlement may not categorically be restricted to citizens. Place of birth or origin cannot, at all, be given priority as far as human rights are concerned. As Wacks puts it, “the concept of human rights makes little sense unless it is understood as fundamental and inalienable”.³³ In this context, fundamental human rights are rights which are not given by the State and which cannot be taken away by it. Still, some rights can be restricted so as to protect national interests and development. In South Africa, rights that can be limited, including labour rights. They are, first, restricted in terms of section 22 of the Constitution and, secondly, are restricted in terms of “the limitation clause”.³⁴ Considerable controversy, however, relates to section 22 of the Constitution, which states: “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

duty of the state, regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms.”

²⁹ See *The Watchenuka* case (2004) at para 30.

³⁰ Art 6 of the ICESCR.

³¹ Article 2(1) of the ICCPR: State Parties must ensure social justice to all individuals within their territory and subject to their jurisdiction as well as their fundamental human rights including the right to life and dignity.

³² Chapman J, Miller V, Soares AC, & Samuel J “Rights based development: the challenge of change and power” (2005) *GPRC-WP-027* 1 at 4.

³³ Wacks (1995) at 248.

³⁴ S 36 of the Constitution.

On several occasions, South African courts (the Constitutional Court (the CC), in particular, and the Supreme Court of Appeal (the SCA), in general) had the opportunity to review the constitutionality of this provision as it pertains to the restriction of refugees' rights in respect of accessing the labour market.³⁵ These highest courts of the land always objected to the State's argument that section 22 of the Constitution totally prohibits refugees' and asylum seekers' right to work. The CC reasoned that any restrictive measures imposed on refugees and asylum seekers for the protection of national security or the broad public interest must be rational, reasonable and justifiable in terms of the limitation clause³⁶ or should not have "potential to impair the essential content of dignity".³⁷

It is against this background that this article, within the context of the protection of human dignity, raises a number of issues related to the existence of legal and procedural barriers, essentially emanating from positive measures taken to protect and advance South African citizens whose social vulnerabilities are consequences of the apartheid policies. This article will illustrate that the positive measures are applied in all their severity to the rights of refugees. The article, therefore, will turn to discuss these barriers in detail after illuminating the legal position of a refugee, an asylum seeker and a migrant in South African society insofar as the right to work is concerned.

2.2 Who is, and what is the position of, a refugee, an asylum seeker and an economic migrant?

2.2.1 A refugee

Generally, the term "refugee" is often understood to imply a person who was forced to leave his or her country of origin or habitual residence because of war or armed conflict and, due to such war or armed conflict, is unable to return. The legal definitions of the term are contained in the international and regional refugee instruments, viz, the Refugee Convention, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Refugee Convention) and the 1984 Cartagena Declaration on Refugees. The broad, stricter, and legal definition contained in the Refugees Act is however drawn from the Refugee Convention and the OAU Refugee Convention.³⁸ A refugee is a person who

owing to well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular group, is

³⁵ *Union of Refugee Women and others v Director, Private Security Industry Regulatory Authority and others* 2007 (4) BCLR 339 (CC) (the *Union of Refugee Women* case (2007)); and *Somali Association of South Africa and others v Limpopo Department of Economic Development Environment and Tourism and others* 2015 (1) SA 151 (SCA) (the *Somali Association of South Africa* case (2015)).

³⁶ See the *Union of Refugee Woman* case (2007) at paras 66-77.

³⁷ See the *Union of Refugee Woman* case (2007) at paras 34 and 66. See too similar view of the SCA in the *Somali Association of South Africa* case (2015) at para 28.

³⁸ See s 3 of the Refugees Act. See too Article 1 of the Refugee Convention and Article 1 of the OAU Refugee Convention, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis Ababa, 10 September 1969.

outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin of nationality; or is a spouse or dependant of a person [recognised as a refugee].

Evidently, there are two key elements on which the refugee definition is centred. They are a well-founded fear of persecution and an absence of the protection of a country of origin. These two elements are essential as they distinguish refugees from other persons who are forced or obliged to flee due to other events, such as, fear of poverty, famine, economic crisis, and environmental degradation or natural disaster,³⁹ as will be discussed later when dealing with economic migrants.

Notwithstanding the refugee definition, the vulnerable situation of a refugee is further described by Mokgoro and O'Regan JJ as follows:

Refugees had to flee their homes, and leave their livelihoods and often their families and possessions either because of a well-founded fear of persecution on the grounds of their religion, nationality, race or political opinion or because public order in their home countries has been so disrupted by war or other events that they can no longer remain there.⁴⁰

In an effort to guard against these social vulnerabilities, the granting of asylum to a bona fide asylum seeker is imperative. A decision to grant asylum to an asylum seeker has the legal impact of entitling that person to “full legal protection”.⁴¹ Full legal protection includes the right to seek employment and to enjoy other rights contained in the Bill of Rights, save for those rights which the law ascribes to citizens.⁴² According to Landau's analysis, full legal protection constitutes a number of protection factors, such as, physical security, avoidance of torture or *refoulement*, and adequate and dignified means of subsistence. He explains that “adequate means of subsistence” does not only mean meeting the basic needs of refugees and asylum seekers, but includes their

³⁹ Some scholars argue that the term “refugee” should be used in a wide sense to mean an individual who took flight before a danger. See, for example, Klotz A “Migration after apartheid: deracialising South African foreign policy” (2000) 21 *Third World Quarterly* 831 at 831; Lohrmann R “Migrants, refugees and insecurity: current threats to peace?” (2000) 38 *International Migration* 3 at 10; Chimni BS *International refugee law* (New Delhi: SAGE Publications 2001) at 1; Hathaway J *The law of refugee status* (Toronto: Butterworths 1991) at 117-119; and Shacknove AE “Who is a refugee?” (1985) 6 *Ethics* 274 at 278-279.

⁴⁰ The *Union of Refugee Women* case (2007) at para 101.

⁴¹ S 1(vx) read together with s 27(b) of the Refugees Act.

⁴² S 27(b) of the Refugees Act provides that a refugee “enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of the Act.”

“flexibility to move, change employment, and invest in ways that can lead to a dignified life; or, at least, a life of comparable dignity to those around [them]”.⁴³

With respect to employment, Landau explicitly refers to changing employment; hence a refugee is morally and legally entitled to the right to be employed and work. Though refugees are entitled to the right to work, this right is, as explained above, not subject to the freedom to choose any type of employment. This is, in practice, limited by law which explicitly indicate that a non-citizen cannot take up a particular employment⁴⁴ or may reserve employment to permanent residents only.⁴⁵ Accordingly, if a law does not restrict employment to citizens or permanent residents, refugees equally enjoy the freedom to choose from the employment opportunities available to them. As alluded to earlier, a restriction imposed on refugees in respect of employment is, in most cases, not absolute. Indeed, a legislative restriction should be flexible for such restriction to be exempted from if “good cause” is shown. Flexibility would protect against a violation of the right to equality at the threshold.⁴⁶ Black and Chimni have observed that the term “refugee” denotes a status or a certain position within a host society and that associated with it is a right to claim privileges by virtue of that status.⁴⁷

Indeed, by virtue of the refugee status, a refugee enjoys a wide range of civil, social and economic rights contained in the Bill of Rights, which should apply to them on a more favourable basis. As discussed further below, an asylum seeker, who is not yet formally granted asylum, enjoys fewer rights compared to a refugee. However, no matter how fewer they are, they include the right to earn a living.⁴⁸ So who is an asylum seeker really?

2.2.2 *An asylum seeker*

An asylum-seeker is “a person whose request or application for asylum has not been finally decided on by a prospective country of refuge”.⁴⁹ In terms of the Refugees Act, an asylum seeker is “a person who is seeking recognition as a refugee [in South Africa]”.⁵⁰

⁴³ Landau LB “Protection and dignity in Johannesburg: shortcomings of South Africa’s urban refugee policy” (2006) 19 (3) *Journal of Refugee Studies* 308 at 309.

⁴⁴ See, for example, s 9(2) of the National Prosecuting Authority Act 32 of 1998 (a non-citizen cannot be a National Director of the National Prosecuting Authority) and s 6(1)(e) of the Health Professions Act 56 of 1974 (a member of the Health Professional Council will vacate his/her office if he/she ceases to be a South African citizen).

⁴⁵ See, for example, s 23(1) of the Private Security Industry Regulatory Service Act 56 of 2001 and s 15(1)(aa)-(bb) of the Attorneys Act 53 of 1973.

⁴⁶ Kondile J in the *Union of Refugee Women* case (2007) at para 67 stated that the legislative restriction would amount to unfair discrimination if it is not flexible and has no capacity to let in any foreigner when it is appropriate and to avoid hardship against any foreigner.

⁴⁷ Chimni (2001) at 77 and Black R “Fifty years of refugee studies: from theory to policy” (2005) 35 *International Migration Review* 57 at 63.

⁴⁸ Denying asylum seekers the right to work may amount to the deprivation of the right to an adequate standard of living. See Edwards (2011) at 961.

⁴⁹ Jastram K & Achiron M *Refugee protection: a guide to international refugee law* (Geneva: Inter-Parliamentary Union 2001) at 125.

⁵⁰ S 1(v) of the Refugees Act.

The fact that a person has officially made a request for asylum has the legal implication of legalising the asylum-seeker's sojourn as "lawfully staying" in South Africa, of differentiating him or her from other types of non-citizens in the context of applying the asylum rules to them, and of allowing him or her to access certain socio-economic rights. Given that asylum seekers are not yet recognised as refugees, their legal position is uncertain and such uncertainty places them in a far more precarious situation. It is especially important to note that asylum seekers are normally in a particularly vulnerable situation.⁵¹ They are, too, individuals who were forced to leave their countries of origin "with very little (or without any) possession" due to events over which they have no control. More often than not, they, like refugees, suffer from economic deprivation, poverty, and trauma associated with forced displacement and violence which they have experienced and/or witnessed. They are not simply physically present in the country; they are neither just visiting South Africa nor seeking greener pastures; they are within South Africa to seek a safe haven from persecutions and massive human rights violations.

That said, an asylum seeker is protected by the *non-refoulement* principle. For that reason, they cannot be returned or expelled unless it has been established that their applications are "clearly abusive".⁵² If this is not the case, the United Nations High Commission for Refugees (UNHCR) recommends that asylum seekers should be allowed to remain in the country, pending a decision on their initial request or their appeal and that their particular difficulties and needs must be given appropriate attention during the determination of their asylum claim process.⁵³ The question that arises is: how should asylum seekers be treated socially if it is still unclear whether they meet the requirements laid down in the legal definition of a refugee? Should they be afforded socio-economic protection, including the right to work?

To begin with, the precarious plight of asylum seekers regarding their protection is recognised under international protection, which is an intervention offered by a host State in co-operation with the UNHCR to ensure that refugee rights, notably, civil, social and economic rights, are recognised and safeguarded.⁵⁴ For asylum seekers, it has been contended that, apart from humanitarian assistance, they enjoy only the right to basic education.⁵⁵ There are also counter-arguments which hold that their entitlement to

⁵¹ UNHCR *Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1992) (UNHCR Handbook (1992)) at para 190.

⁵² "Abusive request" is not clearly defined by the UNHCR. However, for granting asylum, an applicant must establish that his or her fear of being persecuted is clearly objective and subjective. See UNHCR "Note on burden and standard of proof in the refugee claims" (1998) at para 14. It states that a person has a subjective fear if he or she believes or anticipates that he or she will be subject to that persecution. See further UNHCR *Handbook* (1992) at para 42. It states that a fear should generally be considered as a well-founded fear if an applicant can establish, to a reasonable degree, that his or her continued stay in his or her country of origin has become intolerable to him or her for the reasons stated in the refugee definitions, or would for the same reasons be intolerable if he or she returned there.

⁵³ UNHCR *Handbook* (1992) at para 192.

⁵⁴ Jastram & Achiron (2001) at 129.

⁵⁵ See Goodwin-Gill G *The refugee in international law* (Oxford: Oxford University Press 1996) at 298-299; Hathaway JC & Dent JA *Refugee rights: report on comparative survey* (Toronto: York Lanes Press 1995) at

socio-economic protection depends primarily on the immigration and refugee frameworks of a host country.⁵⁶ Asylum seekers' legal position remains contentiously debatable at both the national and international level.

In South Africa, asylum seekers' admission to the country is regulated by the immigration framework and, once admitted, the conditions concerning their sojourn are spelled out in the refugee framework. Prior to the 2008 amendment to the Refugees Act, their sojourn was, pending the outcome of their claims, subject to conditions determined by the Standing Committee for Refugee Affairs (the SCRA).⁵⁷ The SCRA adopted a condition precluding asylum seekers from enjoying the rights to work and to education for the first 180 days from the date on which they applied for asylum.⁵⁸ An asylum seeker could apply for special consideration to be permitted to work in circumstance where six months (180 days) elapsed while the outcome of the application for asylum was still pending. In 2008, the Refugees Act was radically revised so as to respond to the gap in the refugee framework, by prescribing the conditions of asylum seekers' sojourn and by introducing the rights that flow from that status.⁵⁹ These rights are rights contained in the Bill of Rights insofar as those rights apply to everyone.⁶⁰ Unlike in the situation of refugees, the protection of asylum seekers' rights is more problematic because the 2008 revision does not expressly state that they are "fully" protected. On this basis, some scholars still argue that asylum seekers are, in principle, merely granted the right to stay in South Africa and not to work and study while they are awaiting to be recognised as refugees.⁶¹ This cannot be true. Asylum seekers are jurisprudentially and statutorily allowed to work. The jurisprudential dimension is viewed as a major landmark in the protection of the wellbeing of asylum seekers, as elaborated on below.

It was not till the decision in the *Watchenuka* case (2004), decided on 23 November 2003, that the prohibition on asylum seekers undertaking employment and obtaining education was judicially reviewed. In its analysis, the SCA took into consideration the precarious plight of asylum seekers, particularly the fact that South Africa did not offer any humanitarian assistance to them. Accordingly, the SCA ruled

25 and 31; and Cholewinski R "Economic and social rights of refugees and asylum seekers in Europe" (2000) 14 *Georgetown Immigration Law Journal* 709 at 711.

⁵⁶ Hathway & Dent (1995) at 25 and 31 and Cholewinski (2000) at 711.

⁵⁷ The most essential conditions appear on an asylum seeker's permit, issued in terms of section 22 of the Refugees Act. Other conditions are entrenched under regulation 7 of the Refugee Regulations (Forms and Procedures) of 2000 read together with the form prescribed by annexure 3.

⁵⁸ See the *Watchenuka* case (2004) at para 23.

⁵⁹ Refugees Amendment Act 33 of 2008. See the Title of the Act, which states: "To amend the Refugees Act, 1998, so as to amend, insert and delete certain definitions;...; to provide for the clarification and revision of procedures relating to refugee status determination; to provide for obligations and rights of asylum-seekers;..."

⁶⁰ S 27A of the Refugees Act.

⁶¹ Dalton-Greyling T "Urban refugees: definitions, legal positions and wellbeing in South Africa" (paper presented at the Annual Forum of the Trade & Industrial Policy Strategy) (2008) at 11; and Rugunan P & Smit R "Seeking refuge in South Africa: challenges facing a group of Congolese and Burundian refugees" (2011) 28 *Development Southern Africa* 705 at 708.

that such general prohibition was unlawful and fundamentally violated the right to human dignity simply because “where an employment is the only means for the person’s support” and where education offers an opportunity for human fulfilment at a critical period, the right to dignity is implicated.⁶² With regard to the right to work, the SCA reasoned that the denial of the right to work would severely restrict asylum seekers’ ability to support themselves and their families and to live without positive humiliation and degradation. As a consequence, the denial would aggravate and perpetuate their destitution and have the effect of objectifying and debasing asylum seekers in the context of compelling them to resort to crime, or to begging, or to foraging.⁶³

It is essential for this article to state the facts of the *Watchenuka* case and, particularly, the reasoning of the decision, as the decision brought about a dramatic change in the legal treatment of asylum seekers in respect of access to the labour market and to education. In this case, the respondent was a Congolese widow who entered South Africa from Zimbabwe with her “disabled” twenty-year-old son and who was trained and qualified as a pharmacy technician. Shortly after applying for asylum she secured a place for her son to study at a Cape Town college and she needed employment in order to support herself and her son because her savings had been depleted. She and her son were prohibited, respectively, from undertaking employment and from studying in terms of regulation 7(1)(a) of the Refugee Regulations (Forms and Procedures) of 2000 read together with the form prescribed by Annexure 3 that contained various conditions to be adhered to by an asylum seeker. The respondent applied to the Cape High Court for an order declaring the prohibition in Annexure 3 to the regulation to be contrary to the Constitution and directing the Minister of Home Affairs to permit her and her son to be employed and to study, respectively, whilst awaiting the decision on her application for asylum. The order was granted by the Cape High Court, not on the basis of constitutional principles but on an administrative procedural basis. The Cape High Court found that conditions relating to work and study were determined by the Minister while they could have been determined by the SCRA in terms of section 11(h) of the Refugees Act. Accordingly, the Court concluded that the Minister went beyond the powers expressly conferred on him in terms of section 38(e) of the Refugees Act, vis, to make regulations relating to the conditions for sojourn in South Africa.⁶⁴ The Minister appealed against the decision.

On appeal, the SCA agreed with the court *a quo* that the Minister had no authority to impose the prohibition to work or study, but, nevertheless, upheld the appeal on the ground that the Court would, in granting the relief sought by respondent, have usurped the executive power. It however ordered the SCRA to determine whether asylum seekers should be allowed to work and study pending the finalisation of an application for asylum.⁶⁵

⁶² The *Watchenuka* case (2004) at paras 32-36.

⁶³ The *Watchenuka* case (2004) at para 32.

⁶⁴ The *Watchenuka* case (2004) at para 11-15.

⁶⁵ The *Watchenuka* case (2004) at para 37-39.

In affirming the prohibition in Annexure 3 to the Refugee Regulations to be indeed contrary to the Constitution, the SCA stated that “general prohibition of employment and study for the first 180 days after a permit to sojourn in South Africa has been issued is in conflict with the Bill of Rights”.⁶⁶ Viewing employment as a component of living, the SCA explained that the freedom to engage in productive work – even where that is not required to survive – was indeed a component of human dignity (which inheres in all people – citizens and non-citizens alike). It went on to state that self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is the most bound up with being accepted as socially useful.⁶⁷ The SCA’s remarks were primarily based on the protection of human dignity. The protection of the right to dignity was found to be vital because it is an acknowledgment of the intrinsic worth of human beings and an inspiration for the recognition of other specific fundamental rights that might be threatened or violated.⁶⁸

Pursuant to the decision in the *Watchenuka* case, the SCRA changed its position and allowed asylum seekers to undertake employment and education.⁶⁹ To some extent, the *Watchenuka* judgment informs most of the subsequent judicial reviews concerning (or involving) the determination of refugee rights. For example, it is reflected, to a certain degree, in the CC judgement in the *Union of Refugee Women* case (2007), in which the Court dealt with the constitutionality of the prohibition of refugees rendering a security service as security service providers unless they have obtained permanent residence status.⁷⁰ With reference to *Watchenuka* case, the Court held that the exclusion of refugees from registering their companies as security service providers was constitutional. It was fair discrimination and did not materially invade their dignity because the private security industry framework offered a reasonable measure of flexibility, allowing refugees to engage in the security service industry, on good cause shown.⁷¹ The *Watchenuka* decision also informed the decision of the SCA in the *Somali Association of South Africa* case (2015) in which the Court objected to the respondent’s (the State) argument that its closing down of refugees’ and asylum seekers’ businesses and the refusal to issue licences to them to trade in spaza and tuck shops was in accordance with section 22 of the Constitution, which restricts non-citizens’ freedom to choose a trade or occupation.⁷² The State further argued that both refugees and asylum seekers are, in terms of section 27 of the Refugees Act, allowed to seek employment only, but not to engage in self-employment. With reference to Articles 17(2) and 17(3) of the Refugee Convention, read together with section 27(f) of the Refugees Act, the Court held that the refugee framework “grants refugees exemption from restrictive

⁶⁶ The *Watchenuka* case (2004) at para 24.

⁶⁷ The *Watchenuka* case (2004) at para 27.

⁶⁸ The *Watchenuka* case (2004) at para 26.

⁶⁹ See condition 10 appearing on an asylum seeker’s temporary permit, issued in terms of s 22 of the Refugees Act.

⁷⁰ The *Union of Refugee Women* case (2007) at para 1-3.

⁷¹ The *Union of Refugee Women* case (2007) at para 86.

⁷² The *Somali Association of South Africa* case (2015) at para 1-2.

measures under certain circumstance” and demands a host State to “give sympathetic consideration to assimilating the rights of all refugees with regard to wage earning employment to those of nationals”, respectively.⁷³ It concluded that the act of closing down businesses (which is a deprivation of the right to earn a living) would, in addition to impairing the right to human dignity, not only render refugees and asylum seekers more desperate and destitute, but would diminish their humanity as well as send a wrong message to South Africans that can unwittingly fuel xenophobia.⁷⁴ Depriving refugees and asylum seekers of the right to work in the context of self-employment was held to be contrary to the constitutional values of equality, human dignity, and freedom since it was simply intended to impoverish refugees and asylum seekers to such an extent that this destitution would induce them to leave South Africa’s shores.⁷⁵ The Court held that the attitude of the State in that regard was worrying and unacceptable as it would amount to defeating South Africa’s international obligation arising under international refugee and human rights law.⁷⁶

Plainly, these judicial opinions are illustrative. An asylum seeker is not barred from undertaking employment or engaging in self-employment and any legal restriction is to be challenged unless reasonably and rationally justified. Put differently, any limitation on the right to work, like any other right in the Bill of Rights, must be rational and justifiable, based on the values of equality, human dignity and freedom. Navsa J pointed out that it was not rational to deny asylum seekers an opportunity to work, based on the legitimate State concern that the permission to work would be to the advantage of bogus asylum seekers. Navsa J was convinced that bogus asylum claims can be avoided only if applications for asylum are expedited.⁷⁷ Having outlined the legal position of an asylum seeker, the article turns to defining the migrant worker concept and to discussing their rights and benefits within the context of the South African legal system. More attention will be paid to the tendency to treat refugees or asylum seekers as economic migrants.

2.2.3 *Migrant Workers and Economic Migrants*

More often refugees and asylum seekers are confused with economic migrants and the distinction between these two groups is progressively blurred by politicians. The term “migrant” encompasses a range of categories of persons, including refugees and asylum seekers. Logically, refugees and migrants are distinguished for the purpose of effectively responding to their different needs. By virtue of their non-citizen status, the State is, as an expression of the principle of being a sovereign nation, obliged to determine the conditions and terms of their sojourn. The distinction between these groups of people is

⁷³ *The Somali Association of South Africa* case (2015) at para 37.

⁷⁴ *The Somali Association of South Africa* case (2015) at paras 5, 7 and 44.

⁷⁵ *The Somali Association of South Africa* case (2015) at paras 22, 36 and 44.

⁷⁶ *The Somali Association of South Africa* case (2015) at para 44.

⁷⁷ *The Somali Association of South Africa* case (2015) at para 44. See too Cholewinski (2000) at 709 who argues that an expedited asylum procedure would allow asylum seekers to know their position in terms of accessing social benefits. Otherwise they cannot be denied their rights to health, housing, social assistance, education and employment.

recognised in South Africa and the conditions of the migrants' stay (including access to the labour market) are provided for under the Immigration Act, as amended.

Interestingly, the immigration framework does not make reference to either the term "migrants" or the term "economic migrants". Instead, it makes reference to "foreigners" and "illegal foreigners". While a foreigner means "an individual who is neither a citizen nor a resident, but not an illegal foreigner"; an illegal foreigner means "a foreigner who is on South African territory in the contravention of the Immigration Act".⁷⁸ A migrant is, according to an Oxford Dictionary "a person who moves from one place to another, especially in order to find a work."⁷⁹

The UNHCR distinguishes a migrant from a refugee or an asylum seeker as 'a person who, for reasons other than those contained in the legal definition of refugee, voluntarily leaves his or her country of origin in order to take up residence elsewhere. The reason for leaving his or her country may be the desire for change or adventure, or for joining family or other reasons of a personal nature. However, if a person leaves his or her country exclusively for economic considerations, they are economic migrants and neither refugees nor asylum seekers.⁸⁰ Jastram and Achiron narrowly describe an economic migrant as "a person who leaves [his or her] country of origin purely for economic reasons...or in order to seek material improvements in [his or her] livelihood."⁸¹ Self-evidently, economic migrants are neither refugees nor asylum seekers even if they share some social vulnerability.

Although, in recent years, there has been an increase in the number of people who escape from environmental degradation, natural disaster and poverty or destitution, these people are defined as economic migrants and are therefore governed by the immigration policy but not the refugee policy. As a result of their economic migrant status, they are not entitled to "the full legal protection" provided in terms of the Refugees Act; rather, they are entitled to "the diplomatic protection" of their countries and cannot benefit from international protection as refugees and asylum seekers do.⁸² Instead, they might be protected in terms of the most-favoured-nation treatment, which is an obligation flowing from bilateral treaties of friendship between two nations to treat each other's citizens as their own and without discrimination on the basis of nationality. This is known as the principle of reciprocity.⁸³ Worth citing is the principle of reciprocity contained in the 1997 Southern African Development Community (SADC) Protocol on Education and Training which requires each SADC

⁷⁸ S 1(xvii) – (xviii) of the Immigration Act.

⁷⁹ Hornby AS *Oxford Advanced Learner's Dictionary of Current English* 7th ed (New York: Oxford University Press 2006) at 930.

⁸⁰ UNHCR *Handbook* (1992) at para 62.

⁸¹ Jastram & Achiron (2001) at 130.

⁸² Jastram & Achiron (2001) at 130. See too, Hathaway JC *The rights of refugees in under international law* (Cambridge: Cambridge University Press 2005) at 5, who states that "refugee law is not immigration law".

⁸³ Rubenstein JL "The refugee problem" (1939) 15 *Royal Institute of International Affairs* 716 at 726 explains this principle as follows: Each country tells another that I will recognise all rights of your people while they are with us, on condition that you accord the same rights to my people while they are with you.

Member to preferentially treat tertiary students who are citizens in the SADC region as home students as regards fees and accommodation.⁸⁴ It ought to be noted that the Refugee Convention was essentially couched in terms of the limits of the principle of reciprocity. It is from this principle that the claim of the most favourable treatment as accorded to foreign nationals derives.⁸⁵

As previously stated, the term “migrant” covers a range of categories of all non-citizens, *inter alia* diplomats, investors, migrants, refugees and asylum seekers. The comprehensive definition of the term “migrant worker”, incorporated in the 1990 International Convention on the Protection of the Rights of All Migrant Workers (the Migrant Workers Convention), is “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”.⁸⁶ Although the definition includes all non-citizens without making distinction on the basis of their legal status, the Migrant Workers Convention excludes from the definition workers employed by international organizations, government employees sent to perform official functions in the host State, and persons employed by a State or on its behalf outside of its territory to participate in development projects.⁸⁷ It further excludes investors, refugees or asylum seekers, stateless persons, international students and trainees, and seafarers and offshore workers.⁸⁸

Whereas foreign and national professionals alike are required to register with professional councils, only migrant workers (including economic migrants) are additionally and exceptionally required by the Immigration Act to apply for a work permit before engaging in any self-employment activities or wage earning employment. Permits range from general work, exceptional/critical work, intra-company transfer work to corporate.⁸⁹ These work permits are subject to statutory employability conditions, namely, (i) being highly skilled and (ii) unavailability of a suitable citizen.⁹⁰ Again, these two statutory conditions are not applicable to refugees and asylum seekers.

The rationale behind the non-applicability of these conditions is the adoption and ratification of the Refugee Convention, which has the effect of removing those

⁸⁴ See art 7(A)(5).

⁸⁵ For further discussion on these two principles, see Rubenstein (1939) at 726; Weiss P “The international protection of refugees” (1954) 48 *American Society of International Law* 193 at 200-202; and Cholewinski (2000) at 710-712.

⁸⁶ Art 2(1) of the Migrant Workers Convention.

⁸⁷ Art 3 of the Migrant Workers Convention.

⁸⁸ Art 3 of the Migrant Workers Convention.

⁸⁹ Ss 19 and 21 of the Immigration Act.

⁹⁰ S 19(2)(a) of the Immigration Act. A work permit or visa can be granted if no South African citizen with qualifications or skills and experience equivalent to those of the applicant can, despite diligent search, be employed.

restrictive measures.⁹¹ Article 17(2) of Refugee Convention exempts refugees and asylum seekers from any labour restriction, imposed on non-citizens.

Regardless of this approach, employers and professional councils in South Africa extend the restrictive measures to refugees and asylum seekers. In addition, most employers, according to CorMSA and Lanzi Mazzocchini, discriminate against refugees and asylum seekers – mainly because they are not sensitised to refugee rights.⁹² They fear a criminal sanction that might be imposed on them if they employ refugees and asylum seekers as it is deemed that refugees are also required to conform to the restrictive measures. The sanction which is stipulated by section 49(3) of the Immigration Act for a first offender is a fine (which the Court may deem just) or imprisonment not exceeding one year. The reality is that if refugees or asylum seekers are employed, employers cannot be criminally sanctioned. 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. Central to this confusion is the different role players' tendency of regarding refugees and asylum seekers as economic migrants who bogusly claim to be refugees.⁹³ Because of these bogus claims, they should therefore be restricted from South Africa's benefits, including employment opportunities. The major problem lies in making a distinction between bogus and genuine asylum seekers before finalisation of their claims. The politicisation of the issue of refugees as economic refugees led many South Africans to erroneously view the employment of refugees and asylum seekers as taking their job opportunities away from them and being a drain on national economic resources.⁹⁴ With this understanding, every effort is, in practice, made to restrict them from accessing the local labour market in order to protect national resources, advantages and economic (or employability) opportunities.⁹⁵

⁹¹ Art 17(2) of the Refugee Convention. See also s 231(4) of the Constitution, which provides that international agreement or convention, is legally binding on South Africa "when it is enacted into law by national legislation".

⁹² CorMSA (2009) at 106 states that refugees and asylum seekers are denied employment on the basis of being non-citizens and Lanzi Mazzocchini *EM Policy implication learned from the analysis of the integration of refugees and asylum seekers at tertiary education in Cape Town* (unpublished Masters thesis, University College Dublin, 2007/2008) at 43 posits that "employers ...are neither familiar with the documentation issued to refugees and asylum-seekers nor with the rights derived from such documentation".

⁹³ See the address by Home Affairs Deputy Minister Fatima Chohan on the commemoration of World Refugee Day at the St Martins De Porres Catholic Church, Orlando West, Soweto, delivered on 19 June 2011 in which she stated that South Africa has more asylum seekers to deal with than all 27 countries of the European Union combined. The majority of them do not qualify for refugee asylum partly because the asylum system is abused by economic migrants intent on regularising their stay.

⁹⁴ Khan F "Patterns and policies of migration in South Africa: changing patterns and the need for a comprehensive approach" (2007) at 10. Paper drafted for discussion on patterns and policies of migration, available at www.refugeerights.uct.ac.za/patterns_policies_migration_FKhan.html (accessed 12 June 2011). Also see Kofman E "Rights and citizens" (1993) 25 *American Sociology Review* 393 at 395.

⁹⁵ Lubbers R "After September 11: new challenges to refugee protection" (2003) *US Committee for Refugees, World Refugees, World Refugee Survey* 1 at 1; Hawkins F "Canadian immigration and management" (1974) 8 *International Migration Review* 141 at 141; and Düvell F & Jordan B "Immigration, asylum and welfare: the European context" (2002) 22 (3) *Critical Social Policy* 498 at 498.

The article has illuminated the difference between migrants and refugees or asylum seekers, and now turns to examine and elaborate on the accessibility of employment to refugees and asylum seekers and the legal barriers stemming from remedial – substantive equality – measures. The distinction between refugees or asylum seekers and citizens will be developed to clarify the ambivalent attitudes of the State towards the protection of these two groups' distinct but overlapping interests.

3 REFUGEE RIGHTS VERSUS SUBSTANTIVE EQUALITY

3.1 Commitment to redressing the imbalances of the past

Under the apartheid system, South Africa was a deeply divided society in terms of socio-economic settings. In redressing this, the post-apartheid Constitution vests equality of rights, privileges and benefits in citizens and implicitly grants socio-economic rights to citizens and non-citizens alike. Conversely, through an equality framework, a constitutional commitment is made to redress the socio-economic needs of citizens, with a particular focus on a section of society that has historically been severely disadvantaged by the ravages of apartheid.⁹⁶ There is an entrenched feeling in South African society that shares the same spirit, values and beliefs that the designation and formulation of socioeconomic laws in the context of substantive equality would lead to an egalitarian society. It was within this spirit and aspiration, that socioeconomic laws such as the Employment Equity Act 55 of 1998 (the EEA), the Competition Act 89 of 1998, the Broad Based Economic Empowerment Act 53 of 2003 (the BBEEA), and the Preferential Procurement Policy Framework Act 5 of 2000 (the PPPFA), were enacted and are essentially concerned with providing preferential treatment to historically disadvantaged communities. Of fundamental concern is the fact that certain socio-economic laws, policies and strategies explicitly restrict socio-economic benefits and advantages to “vulnerable people” with citizen or permanent resident status to exclusion of the refugees and asylum seekers.

Although the moral commitment exists to protect humanity, it is crucial to note that a sovereign nation enjoys the prerogative power to determine the manner in which it will safeguard and preserve its resources, materials and opportunities, and the conditions under which it will distribute them with a view to protecting the humanity of foreign nationals who temporarily or permanently reside within its geographical borders. In this respect, non-citizens are admitted into South Africa subject to conditions and terms (rules) mainly contained in the immigration policy, which relate to socio-economic exclusion and self-sufficiency. In the context of the exclusionary and self-sufficiency rule, the immigration policy clearly bars foreign nationals who cannot fend for themselves while staying in South Africa from admission, and authorises the deportation and expulsion of those whose financial support has depleted to such an extent that they are likely to “become a public charge”.⁹⁷ It follows that greater access to

⁹⁶ S 9(2) of the Constitution.

⁹⁷ S 30(1)(a) of the Immigration Act.

livelihoods and socio-economic opportunities, for instance, housing, social security, health care services, and bursaries for tertiary education, would be unavailable to foreign nationals. As regards livelihood opportunities, further strict immigration rules were established regulating recruitment of foreign nationals in the labour market: foreign nationals are offered opportunities to be employed provided that, first, they are in possession of a work permit, and secondly, no suitably qualified citizen is, despite diligent search, available to fill the position.⁹⁸ These rules affirm that the South African labour market is open to foreign nationals with critical or exceptional skills but closed to those who are low- and semi-skilled foreign nationals. With regard to providing social welfare, the exclusionary and self-sufficiency rule undoubtedly suggest that South Africa distances itself from responding to the social vulnerabilities of destitute non-citizens, and that it is the responsibility of their countries to ensure the wellbeing of their citizens when staying in South Africa. The pertinent question is: whether or not the exclusionary and self-sufficiency rule should apply to refugees and asylum seekers.

If the matter is conceptually analysed within the limits of immigration policy theory, one would conclude that refugees and asylum seekers should also be excluded from the socio-economic domain on the basis of their foreign national status. However, in terms of refugee policy theory, they are not. First, the Refugees Act exempts them from the said rule through mechanisms that accord to them basic rights contained in the Bill of Rights, including socio-economic rights. Secondly, the Refugees Act, it is argued, is an urban asylum policy that encourages a group of refugees and asylum seekers (mostly poor and vulnerable) to self-settle and integrate into South African society.⁹⁹ A self-integration approach points towards the necessity to earn a living through legal means for possible integration. Work, whether gainful employment or self-employment, becomes imperative, as without work social integration is impossible. Work is essentially necessary for the restoration of hope in a country where the State does not offer financial support for the promotion of initial integration of refugees. The integration of refugees at State expense was rejected by South Africa, with the tabling of the Green Paper on International Migration in relation to the Refugees Act.¹⁰⁰

It should be borne in mind that the post-1994 South African society bases its legal and political morality on the notion that the restoration of dignity, advancement of equality in rights, and promotion of social, sustainable development would be achieved only if the distribution of wealth and advantages is re-engineered and re-arranged to benefit the poor and the most desperate citizens. Thus, the closing socio-economic gap between the previously advantaged and the historically disadvantaged came to be at the

⁹⁸ S 19(2)(a) of the Immigration Act states that “[a] general work permit may be issued by the Department to a foreigner....if the prospective employer satisfies the Department in the manner prescribed that despite diligent search he or she has been unable to employ a person in the Republic with qualifications equivalent to those of the applicant”.

⁹⁹ See Richter M *Challenges to the successful implementation of policy to protect the right of access to health for all in South Africa: Report to Dr Patrick Maduna, Chief of Services: Gauteng Department of Health, 3 June 2008* at 4, 17 and 30; Landau (2006) at 308; and Landau LB, Ramajathan-Keogh K & Singh G “Xenophobia in South Africa and problems related to it” (2005) 15 (Forced Migration Working Paper Series # 13).

¹⁰⁰ Handmaker J “No easy walk: advancing refugee protection in South Africa” (2001) 48 *African Today* 91 at 96-98.

forefront of South Africa's efforts and is constitutionally sound.¹⁰¹ This generates South Africa's conflicted and ambivalent attitudes towards refugees and asylum seekers, particularly on the question of whether they should be included in the positive State measures that seek to turn socio-economic rights into reality.

Positive State measures to remove the legacy of apartheid are the State's core mandate. The mandate is drawn from the substantive equality clause,¹⁰² which reads as follows: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

Legislative measures that were taken to respond to inequalities or disparities in employment, occupation and income within the national labour market include the EEA and the Public Service Act 103 of 1994 (the PSA). These labour laws were enacted to protect persons or categories of persons disadvantaged by unfair discrimination or apartheid policies. A disadvantaged person is described by the African National Congress (ANC), in its Reconstruction Development Programme (the RDP) as a person who was confronted by serious social and economic problems; who "struggled against the apartheid system over decades, to improve his or her life, to restore peace", and to contribute to the realisation of a more just society; and who suffers from poverty "as direct result of the apartheid policies and their collapse".¹⁰³ Certainly, these ills of apartheid cannot be redressed simply by a political expression of disapproval but by affirmative measures aimed at eradicating unfair discrimination in employment and having a diverse workforce broadly representative of South Africa's diverse communities.¹⁰⁴

Because all sectors of socio-economic development were affected by apartheid, social redress cut across all sectors of the economy in order to advance and protect the previous disadvantaged communities, in particular, and to ensure equal opportunity to all, in general.¹⁰⁵ This moral and political stance was noted by the CC with approval.¹⁰⁶ From this perspective, this article does not intend to argue that affirmative measures are unfair in their nature but seeks to point out that South Africa is confronted by a dilemma in balancing the interests of citizens against the interests of refugees. An absence of integrating refugees in essential socio-economic distributive laws

¹⁰¹ ANC *The Reconstruction and Development Programme* (Johannesburg: Umunyano Publication 1994) at 2.

¹⁰² S 9(2) of the Constitution.

¹⁰³ ANC (1994) at 2-3.

¹⁰⁴ ANC (1994) at 2-3. See too, the Long Title of the EEA read together with section 11(2)(b) of the PSA.

¹⁰⁵ Legislated positive policies and measures adopted following the constitutional dispensation to address the adverse effects of oppression were designed to favourably advance those who were historically disadvantaged. See De Vos P "Looking backwards, looking forward: race, corrective measures and the South African Constitutional Court" (2012) 79 *Transformation: Clinical Perspective on Southern Africa* 144 at 148-150.

¹⁰⁶ De Vos (2012) argues that the CC affirms that the potential beneficiaries of affirmative measures are those who were mainly disadvantaged on the basis of being Black.

fundamentally affects refugees and asylum seekers as regards accessing various social opportunities offered by both the private and public labour markets.

This is true, because the preferential treatment accorded to disadvantaged groups is, in the private labour market, protected by the EEA, and, in the public labour market, by the PSA. These employment affirmative measures are essential for nation building and re-engineering South Africa's economy so as to offer all citizens the opportunity to contribute to it productively.¹⁰⁷ In order to get there, the EEA targets the disadvantaged communities, which it normatively identifies as "designated groups". Contextually, the term "designated group" refers to Black people, women and people with disabilities and the term "Black people" is a generic term which means "Africans, Coloureds and Indians".¹⁰⁸ Although most refugees and asylum seekers hail from African countries and are socially vulnerable,¹⁰⁹ they do not fall within the scope of designated groups for the reasons provided throughout this article. It follows that refugees and asylum seekers would, perhaps, enjoy the same treatment accorded to previous advantaged group in the private labour market.¹¹⁰ The exclusion of refugees and asylum seekers from competing with *designated groups* indeed poses a threat to their employment accessibility given that most of them do not possess progressive skills. Whereas the EEA gives first priority to designated groups, the PSA restricts eligibility to access the public labour market to citizens and permanent residents. Refugees and asylum-seekers are not permanent, but rather temporary, residents. It follows that they are not eligible to work in the public sector.

The article accordingly has illustrated the measures taken in the spirit of redressing the past iniquities within the labour dominion; it highlighted the legal and political feelings towards non-citizens, including the dilemma faced by South Africa; and it has finally demonstrated how positive measures are prejudicial to refugee rights. The article now turns to illuminate the distinction between formal equality and substantive equality and to illustrate that refugees and asylum seekers are predominantly protected in terms of the former.

3.2 Two components of equality protection: formal and substantive

Although all human being are equally entitled to the fundamental rights and freedoms entrenched in the UDHR, ICCPR and ICECR as well as the South African Constitution, rights and benefits are, at national level, distributed either within the formal equality framework or the substantive equality framework or both. These frameworks of

¹⁰⁷ ANC (1994) at 18-19.

¹⁰⁸ S 1 of the EEA.

¹⁰⁹ Refugees are vulnerable in South African society and elsewhere because their plight calls for compassion and they have limited resources at their disposal. See *Ndikumdavyi v Valkenberg Hospital and Others* [2012] 8 BLLR 795 (LC) (the *Ndikumdavyi* case) at para 17 and the *Union of Refugee Women* case (2007) at paras 24 and 28.

¹¹⁰ Like members of previously advantaged groups, refugees, asylum seekers, and migrant workers can nonetheless be employed by an employer who employs fewer than 50 employees and has a maximum total annual turnover of less than five million rand, or be employed in a position where a citizen is not available to fill it. See sections 1 and 5 of the EEA.

equality are entrenched in the South African Constitution. They are easy to distinguish in theory but hard to distinguish in practice. They are here reviewed in a theoretical approach with specific reference to refugees. As a starting point, the Refugee Convention requires State Parties to entitle refugees to treatment at least as favourable as that accorded to non-citizens with respect to the right to work. Favourable treatment implies that they should be given differentiated treatment tailored to meet their vulnerabilities and needs. Favourable treatment can be said to be framed in substantive equality discourse. Yet, the Refugee Convention is couched in the non-discrimination approach; an approach that demands provision of equal protection and equal benefit of the law. This kind of equality is conceived in terms of the formal equality framework and is contained under the constitutional equality clause.¹¹¹ Typically, it is the formal equality that is enjoyed by refugees and asylum seekers, given that they do not enjoy the remedial measures embodied in substantive equality for the purpose of eliminating historical discrimination. In other words, they do not enjoy equal and full rights and benefits in the same fashion as a designated group does.

Sachs points out that the equality clause does not place a positive obligation on the State to improve the quality of life of all people so as to live a dignified life;¹¹² that is, in this case, to improve people's living conditions by availing them of equal employment opportunities. He indicates that a positive obligation to do so is imposed by socio-economic rights.¹¹³ Nonetheless, most of positive distributive laws that give substance to socioeconomic rights are crafted within the framework of substantive equality for the purpose of ensuring an effective social transformation and achievement of an egalitarian society. It is within this context that favourable treatment of refugees is bypassed or overlooked in the context of transformative constitutionalism.

Both formal equality and substantive equality feature heavily in the implementation of affirmative action measures with respect to promoting employment equity. Formal and substantive equality are distinct in nature, and these distinct are well captured in the *Stoman v Minister of Safety and Security and others* case (2002)¹¹⁴ in which the Labour Court held that the EEA seeks to attain substantive equality "as opposed to mere formal equality".¹¹⁵ With regard to formal equality, the law merely assumes that people are in an equal position, whereas substantive equality addresses the injustices of the past, deep racial inequality and other forms of systemic and systematic discrimination.¹¹⁶ Remedial measures cannot, at all, amount to unfair

¹¹¹ S 9(1) of the Constitution provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law".

¹¹² Sachs A *The strange alchemy of life and law* (Oxford University Press: New York 2009) at 170.

¹¹³ Sachs (2009) at 170.

¹¹⁴ (2002) 23 ILJ 1020 (T) (the *Stoman* case (2002)).

¹¹⁵ The *Stoman* case (2002) at para 1029.

¹¹⁶ The *Stoman* case (2002) at para 1029.

discrimination.¹¹⁷ In emphasising their essence, the Labour Court, in the *Harmse v City of Cape Town* case (2003),¹¹⁸ reasoned that an employer's failure to promote remedial measures – substantive equality – may instead be seen as unfair discrimination.¹¹⁹ In stricter terms, remedial measures apply to the said designated groups, “who were dispossessed of their lands and resources, deprived of their dignity and who continue to endure the consequences”.¹²⁰ On the other hand, refugees and asylum seekers endure the consequences of economic deprivation caused by forced displacement and war destruction, but not by apartheid policies. Though designated groups and refugee groups live in similar social conditions, they are not in equal positions. A different approach towards responding to their needs is unquestionably crucial.

However, our concern is the central conflict arising from the remedial measures taken by South Africa to ensure that precedence is given to the historically disadvantaged in the national labour market. With regards to the promotion of equality in a substantive way, remedial measures are applied to the detriment and prejudice of refugee rights. Regardless of this, by analogy, the CC in the *Minister of Finance and others v Van Herden* case (2004)¹²¹ indicated that such prejudice is constitutionally justifiable. The Court based its reasoning on a Canadian case and eventually approved its view: “The fact that it may create a disadvantage in certain exceptional cases while benefiting a legitimate group as a whole does not justify the conclusion that it is prejudicial”.¹²²

This suggests that notwithstanding the prejudice flowing from remedial measures, these measures are legitimate as a designated group benefits from them. Accordingly, it can be justified that the exclusion of refugee groups might, somehow, in the pursuit of an equal society, serve a governmental purpose. This begs the question of whether remedial measures can wholly supersede refugee rights without infringing the right to equality.

By aiming at securing the refugee rights, the CC has laid down factors to take into consideration to determine whether refugees and asylum seekers are unfairly discriminated in the labour market, *inter alia*:¹²³ (1) Universality of the fundamental constitutional rights; (2) Non-universality of the right of occupational choice; (3) Sovereign power over determination of conditions of admission and stay; and (4) Potential impairment of the essential content of the dignity of a person.

¹¹⁷ S 6(2)(a) of the EEA provides that it is not unfair discrimination to take affirmative/remedial measures and s 14(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the PEPUDA) provides that it is not unfair discrimination to do so.

¹¹⁸ [2003] 6 BLLR 557 (LC) (*The Harmse case* (2003)).

¹¹⁹ *The Harmse case* (2003) at paras 42-43.

¹²⁰ See the Preamble of the PEPUDA.

¹²¹ 2004 (11) BCLR 1125 (CC) (*the Van Herden case* (2004)).

¹²² *The Van Herden case* (2004) at para 39.

¹²³ *The Union of Refugee Women case* (2007) at para 46.

Among these factors, the fourth factor plays an important role in the balancing of interests because it guards against potential invasion of human dignity. It also guards against determination of conditions that can amount to unfair or unjustifiable discrimination, with a potential to inhibit enjoyment of a life of dignity. Although it is accepted that the State has a sovereign power over the determination of conditions related to employability, any prohibition, exclusion or limitation in this regard should be analysed through the lens of dignity and unfair discrimination. Proceeding along this vein, an absolute exclusion of refugees from the public labour market and their partial exclusion from the private industries increases their hardship, deprivation and suffering. In such case, they have the potential to impair refugees' dignity – simply because without work, they are deprived of their only means of financial support and, equally of their dignity and humanity. A national guideline on employability of refugees and asylum seekers, frankly, is needed to determine their position. In the next section, the article examines other challenges to accessing the South African labour market.

4 OTHER CHALLENGES TO ACCESSING THE LABOUR MARKET

It is trite that labour sectors require every professional or expert to register with a professional council of expert practitioners for his or her occupational field to be enabled to practise in South Africa. There are major aspects that bar refugees or asylum seekers from registering with professional councils as elaborated in detail below. These aspects, which restrict utilisation of refugee economic assets, include legal security, legal status (permanent or refugee status) and the highly-skilled criterion.

4.1 Legal security

Legal security is a pillar of engaging in, or earning a living through, legal activities. When we refer to asylum-seekers' and refugees' legal security, it means the provision of legal and valid documentation.¹²⁴ Refugees and asylum seekers cannot be registered with professional councils unless they possess lawful and valid documents provided in terms of the Refugees Act. Refugees and asylum seekers face a huge challenge in accessing documentation services. In 2005, in the *Kiliko and others v Minister of Home Affairs and others* case (2006),¹²⁵ it was indicated that the Department of Home Affairs (the DHA) is challenged with processing asylum application within a reasonable time.¹²⁶ Most applicants for asylum awaited the outcome of the adjudication of their cases for more than five years.¹²⁷ Nine years later, the same challenge of expediting the assessment of

¹²⁴ See Executive Committee of the High Commissioner, Standing Committee (30th Meeting), "Protracted Refugee Situations" EC/54/SC/CRP.14 of 10 June 2004 at para 17.

¹²⁵ 2006 (4) SA 114 (C) (the *Kiliko* case (2006)).

¹²⁶ The *Kiliko* case (2006) at para 25.

¹²⁷ The *Kiliko* case shows in detail how refugees and asylum seekers face difficulties in acquiring documentation. See also Landau LB "Urbanisation, nativism, and the rule of law in South Africa's forbidden cities" (2005) 26 *Third World Quarterly* 1115 at 1121-1123.

asylum applications was also recognised in the *Somali Association of South Africa* case (2015).¹²⁸

In 2009, it was reported by the *Tribune* newspaper that the DHA was facing 30 years to clear the backlog.¹²⁹ Lanzi Mazzocchini posits that this massive backlog of applications has a severe impact on asylum seekers' self-settlement and integration in a society, particularly with respect to having access to and competing in the national labour market.¹³⁰ It is apparent that a lack of documentation hampers asylum seekers from registering with professional councils that limit eligibility for registration to individuals with refugee status. Furthermore, the massive backlog has a severe impact on refugees to renew and validate their stay upon the expiry of their stay period in South Africa. If their documents are not valid, they cannot be registered and thus seek employment. Even those employed cannot work; hence they will be deemed to be illegal foreigners.

As regards refugees' identity document (ID), the DHA issues the maroon ID to refugees but not the green bar-coded ID granted to South African citizens and permanent residents.¹³¹ This has created misunderstanding and, as a result, has the implication of not delivering services to refugees because government agents, employers or administrators contend that refugee – maroon – IDs are not legitimate.¹³² By virtue of having maroon ID, they are automatically not employed by various companies or institutions. Landau has pointed out that the lack of issuing nationally recognised documentation has the severe impact on converting refugee rights into entitlements.¹³³ Legal insecurity creates a significant and substantial obstacle for refugees and asylum-seekers in a way that affects their ability to work as practitioners in South Africa. Although Landau is of the view that legal security is not an end in itself,¹³⁴ this article argues that it is crucially important because it is one of the major conditions that should be met for registration eligibility, and subsequently to be employed. Regardless of legal security, some professional councils or companies require permanent residence status, and this is a challenge.

¹²⁸ The *Somali Association of South Africa* case (2015) at para 44. It was accepted by both parties that in a number of instances finalisation of an asylum claim can take three years.

¹²⁹ Jones L "Home Affairs needs 30 years to clear backlog" *Tribune* 11 October 2009 at 21. See also the report of UNHCR entitled "2010 UNHCR country operation profile: South Africa" which states that there are 43500 recognised refugees in South Africa.

¹³⁰ Lanzi Mazzocchini (2008) at 44.

¹³¹ Lanzi Mazzocchini (2008) at 43.

¹³² Lanzi Mazzocchini (2008) at 43. See further Bidandi F & Wamundiya A "Evaluating refugee access to institution of higher learning in South Africa: the role of government, universities and civil societies Organisations" (2009) at 9. Available at http://sanord.uwc.ac.za/usrfiles/users/9174080913/Conference_2009/BidandiWamundiya.pdf, (accessed 10 November 2012).

¹³³ Landau (2006) at 315-316.

¹³⁴ Landau (2006) at 316.

4.2 Permanent resident status requirement

Permanent resident status should not be a determinant factor for registration with professional councils since refugees and asylum seekers are allowed to work as discussed above. However, some professional councils are inclined to permit permanent residents to register as if they are citizens. These, for example, include the Law Society of South Africa (LSSA), and the Security Industry Regulatory Authority (SIRA). Although refugees' and asylum seekers' freedom to work is limited, they cannot be wholly deprived of the right to work as attorneys or security service providers.

Taking into consideration the value of work with regard to a refugee's livelihood, the article argues that the professional councils should make the registration criteria flexible in order to include refugees, because refugees are closely allied to permanent residents and enjoy an almost similar legal position in South African society as observed by Mokgoro and O' Regan JJ:

Refugees...are a special category of foreign nationals. They are more closely allied to permanent residents than to those foreign nationals who have rights to remain in South Africa temporarily only...Recognised refugees also have a right to remain in South Africa indefinitely in accordance with the provisions of the Refugees Act.¹³⁵

This indicates that refugees should, in most circumstances, be treated as if they are permanent residents. Scholars argue that refugees, like permanent residents, have become "denizens" of the State by virtue of it conferring upon them basic rights traditionally associated with citizenship, on the one hand,¹³⁶ and being settled in the host country, on the other.¹³⁷ As denizens, both refugees and permanent residents should enjoy almost similar rights and benefits.

Within this viewpoint, refugees (not asylum seekers) should enjoy the right to work as permanent residents do. Otherwise, to require refugees to be permanent residents so as to enjoy the right to work is in conflict with section 27(f) of the Refugees Act. It violates their most precious liberties to engage in productive work, to fend for themselves, and to participate in a host community. It deprives them of the opportunity to achieve fulfilment of what it means to be human, and to lead the kind of life they value. Traditionally, a refugee is encouraged to apply for permanent residence after five years of continuous residence in South Africa from the date on which he or she was granted asylum.¹³⁸ Once a refugee attains permanent residence he or she no longer falls under the Refugees Act but under the Immigration Act. In terms of the Refugees Act, the

¹³⁵ *The Union of Refugee Women* case (2007) at para 99.

¹³⁶ Kofman (1993) at 395; Benhabib S "Twilight of sovereignty or the emergency of cosmopolitan norms? Rethinking citizenship in volatile times" in Faist T & Kivisto P (eds) *Dual citizenship in global perspective* (Hampshire: Palgrave 2007) at 247; and Le Roux W "Economic migrants, expatriate citizens and the right to vote within the South African Development Community (SADC)" (2009) 2. Available at <http://www.inter-disciplinary.net/wp-content/uploads/2009/10/lerouxpaper.pdf>, (accessed 10 July 2011) at 2.

¹³⁷ Kofman (1993) at 395 and Fix M & Laglagaron L "Social rights and citizenship: an international comparison" (2002) *The Urban Institute* 1 at 2.

¹³⁸ S 27(c) of the Refugees Act read together with s 27(d) of the Immigration Act.

professional councils should favourably allow refugees to register once they are formally recognised as such. This will also be consistent with the Refugee Convention. Irrespective of the permanent residence requirement challenge, the refugee status requirement challenges asylum seekers as elaborated below.

4.3 Recognition of formal refugee status

Traditionally, only a refugee was allowed to work; but the *Watchenuka* case (2004) held that an asylum seeker should not be deprived of the right to work as it was his or her only means of survival. This decision is, however, in conformity with the Refugee Convention which morally and legally demands that State Parties consider the integration of refugee rights into national labour laws for facilitation of accessibility to the national labour market.¹³⁹ Asylum-seekers, as refugees lawfully staying in South Africa, should be facilitated to gain access to the labour market, too.

Regardless of the noticeable evolution of refugee rights, as delineated in this article, some professional councils allow refugees to register to the exclusion of asylum seekers, for example, in the engineering sector.¹⁴⁰ Besides, the Policy of the Department of Health on Recruitment and Employment of Foreign Health Professionals in the Republic of South Africa of 2006 (the Health Recruitment Policy) does not extend eligibility to asylum seekers. It clearly states that asylum seekers are not eligible to be employed in a full-time basis on the fixed establishment or enrolled for the examination processes by a Health Professional Council in South Africa (HPCSA).¹⁴¹ Job offers issued to them will not be endorsed until they are recognised as refugees,¹⁴² nor can they be recruited and employed as interns or in the community services.¹⁴³ This runs contrary to the *Watchenuka* (2004) decision, the 2008 amendment to the Refugees Act and the Refugee Convention.

Yet, refugees are categorised by the Health Recruitment Policy as temporary residents.¹⁴⁴ Temporary residents can only be offered a “fixed term contract” or “part-time employment” *but not* permanent employment.¹⁴⁵ It does not matter whether the employment opportunity is offered by a private or public institution. The Health Recruitment Policy was challenged in the *Ndikumdavyi* case (2012). In this case, the argument raised by the refugee applicant that this policy on the recruitment and employment of refugees in the health sector is discriminatory was, however, left open.¹⁴⁶ Rather, the Labour Court endorsed the restriction of eligibility to citizens and

¹³⁹ Arts 17(3) and 19(1) of the Refugee Convention.

¹⁴⁰ Engineering Council of South Africa (ECSA), available at <http://www.ecsa.co.za> (accessed 7 December 2010).

¹⁴¹ Rule 3.5.2 of the Health Recruitment Policy.

¹⁴² Rule 3.5.2 of the Health Recruitment Policy.

¹⁴³ Rules 10.1 and 11.3 of the Health Recruitment Policy.

¹⁴⁴ Rule 3.5 of the Health Recruitment Policy.

¹⁴⁵ The *Ndikumdavyi* case (2012) at para 6.

¹⁴⁶ The *Ndikumdavyi* case (2012) at paras 14 and 27.

permanent residents, as required by section 10 of the PSA, based on the ground that the refugee applicant did not challenge its constitutionality.¹⁴⁷ Non-recruitment to a permanent position of a refugee who had stayed in South Africa for the period of three years' residence or who is married to a South African or is a parent to one or more children possessing South African citizenship would amount to a violation of the Refugee Convention.

With respect to the engineering sector, its professional council should consider the decisions in the *Watchenuka* case (2004), the *Union of Refugee Women* case (2007) and the *Somali Association of South Africa* case (2015) as well as the rights conferred on asylum seekers in terms of the Refugees Amendment Act 33 of 2008, to formulate the criteria allowing them to register. All professional councils should take this into consideration. Asylum seekers need work to survive. Absolute exclusion would have the consequence of compelling them to resort to illegal coping mechanisms and thus becoming a threat to national security. By virtue of their humanity, coupled with their vulnerability, there is a need to afford them an opportunity to regain their hope, dignity, self-esteem and self-reliance. These refugee economic resources should not be left unexploited in a country such as South Africa which is experiencing skills shortages in various sectors.¹⁴⁸

4.4 Highly-skilled qualification criterion

The Immigration Act requires highly-skilled qualifications or experience,¹⁴⁹ but this is relaxed by the Refugees Act read together with the Refugee Convention. From an exemption perspective, the highly-skilled requirement should not apply to both refugees and asylum seekers. Nonetheless, in practice, professional councils, especially in the health sector, require that *all* non-citizens only be employed if they are exceptionally "highly-skilled". The Health Recruitment Policy states that foreign health professionals should "compet[e] fairly for the prospective position and on condition that no qualified South African citizen or permanent resident is readily available or has applied for the position".¹⁵⁰

This clearly suggests that refugees and asylum seekers cannot be employed if they are not "highly-skilled". Although the Health Recruitment Policy cautions that it should be interpreted in terms of the Refugees Act, it does not expressly exempt refugees and asylum seekers from the high-skilled and non-availability of citizens or permanent residents rules. This will apparently prejudice refugees' and asylum seekers' right to work. As argued above, the refugee rights should be given considerable

¹⁴⁷ The *Ndikumdayi* case (2012) at para 26.

¹⁴⁸ Daniels RC "Skills shortages in South Africa: a literature review" (2007) at 12-20. Development Policy Research Unit. Available at <http://www.lmip.org.za/sites/default/files/documentfiles//Skills%20Shortages%20in%20South%20Africa.pdf> (accessed 12 June 2011). A high level of skills shortages is experienced in several sectors, including educators, academics, medical practitioners and nurses, engineers and technicians, biotechnologists, managers, and information and communication technology professionals.

¹⁴⁹ S 2(1)(j)(i)(cc) read together with s 19(2)(a) of the Immigration Act.

¹⁵⁰ Rule 5.1.1 of the Health Recruitment Policy.

attention when the HPCSA (or any other professional council) designs and develops a recruitment and registration policy. The employers cannot be given the task to interpret a policy as this would result in uncertainties or inconsistencies. To avoid these, a policy on recruitment, employment and registration should be developed in compliance with the Refugees Act, or else, refugees and asylum seekers will not be able to convert their rights to work into entitlements.

5 CONCLUDING REMARKS

There is a worrying gap in South African recruitment and employment policies in respect of retaining refugees and asylum seekers. They are left aside in every policy that aims at protecting the interests and expectations of citizens and at redressing the past inequality in employment, thereby establishing social justice. Reluctance to harmonise refugee rights with the legislated recruitment and labour measures is, as has been demonstrated, influenced and reinforced by the fallacies that refugees and asylum seekers are not genuine, and by an inability to distinguish between the refugee and immigration frameworks. In addition, South Africa's conflicted attitudes towards the integration of refugee rights with certain socio-economic rights result in the exclusion of refugees and asylum seekers in a number of socioeconomic policies. South Africa faces the following difficult questions. Should we allow them to share and enjoy our resources? If yes, how and to what extent should they access them? A fair balancing of the interests of refugees and citizens is needed so as to protect refugee rights, too.

The conflicted attitudes are illustrated by the fact that since the adoption of the Refugees Act no measure has been adopted by South Africa to give effect to refugee rights, implicitly or overtly recognised by the Refugees Act. Refugee rights thus remain unclear. Their vagueness makes it difficult to ascertain whether remedial measures and national security are analogous grounds for discriminating against refugees and asylum seekers in terms of either section 22 or the limitation clause of the South African Constitution. For a meaningful protection of refugees and asylum seekers, it is desirable to create a clear guideline that provides for industries in which refugees cannot be employed or positions which they may not occupy or, alternatively, industries in which they can be employed. Failure to specify this would result in certain employers arbitrarily invoking section 22 of the Constitution; an invocation that has a potential to infringe the refugee rights.

Legal and procedural barriers highlighted in this article fundamentally violate refugee rights. Worth mentioning here are the twin rights to life and human dignity. These rights will be safeguarded if refugees and asylum seekers are allowed to earn a living through legal coping mechanisms. To earn a living and to improve their conditions will enable them to enjoy other rights, such as, the right to housing, food, health, and development. Work is a source of value, respect and self-reliance and self-confidence. Without work, refugees and asylum seekers are caught in a cycle of structural poverty and socio-economic dependency on the State purse and, mainly, other members of society. They are reduced to inferior people who cannot be treated as equal members of society. Above all, refugees' human resource is wasted.