

MANAGING ECONOMIC MIGRATION IN SOUTH AFRICA

ASMITA PARSHOTAM & CHARISMA NCUBE

SEPTEMBER
2017



*African perspectives.
Global insights.*

SOUTH AFRICAN INSTITUTE OF INTERNATIONAL AFFAIRS

The South African Institute of International Affairs (SAIIA) has a long and proud record as South Africa's premier research institute on international issues. It is an independent, non-government think tank whose key strategic objectives are to make effective input into public policy, and to encourage wider and more informed debate on international affairs, with particular emphasis on African issues and concerns. It is both a centre for research excellence and a home for stimulating public engagement. SAIIA's occasional papers present topical, incisive analyses, offering a variety of perspectives on key policy issues in Africa and beyond. Core public policy research themes covered by SAIIA include good governance and democracy; economic policymaking; international security and peace; and new global challenges such as food security, global governance reform and the environment. Please consult our website www.saiia.org.za for further information about SAIIA's work.

ECONOMIC DIPLOMACY PROGRAMME

SAIIA's Economic Diplomacy (EDIP) Programme focuses on the position of Africa in the global economy, primarily at regional, but also at continental and multilateral levels. Trade and investment policies are critical for addressing the development challenges of Africa and achieving sustainable economic growth for the region.

EDIP's work is broadly divided into three streams. (1) Research on global economic governance in order to understand the broader impact on the region and identifying options for Africa in its participation in the international financial system. (2) Issues analysis to unpack key multilateral (World Trade Organization), regional and bilateral trade negotiations. It also considers unilateral trade policy issues lying outside of the reciprocal trade negotiations arena as well as the implications of regional economic integration in Southern Africa and beyond. (3) Exploration of linkages between traditional trade policy debates and other sustainable development issues, such as climate change, investment, energy and food security.

SAIIA gratefully acknowledges the Konrad Adenauer Stiftung (KAS), the Swedish International Development Cooperation Agency, and the UK Department for International Development which generously support the EDIP Programme.

PROGRAMME HEAD Talitha Bertelsmann-Scott
talitha.bertelsmann-scott@saiia.org.za

© SAIIA SEPTEMBER 2017

All rights are reserved. No part of this publication may be reproduced or utilised in any form by any means, electronic or mechanical, including photocopying and recording, or by any information or storage and retrieval system, without permission in writing from the publisher. Opinions expressed are the responsibility of the individual authors and not of SAIIA.

Please note that all currencies are in US\$ unless otherwise indicated.

Cover photo © Chris Kirchoff,
Brand SA, http://www.Jhbg_CK-Medc744184152-2w.jpg?dl=0

ABSTRACT

This paper provides a comprehensive overview of South Africa's immigration regime and its impact on African economic migrants. The current migration policy is being amended as a result of South Africa's desire to attract skilled migrants and deter irregular and semi-skilled migrants. This is similar to the approaches many developed countries use to attract skilled migrants from developing countries. Drawing on South Africa's long-term experience with migration, the paper identifies policies and legislation that either facilitate or hinder economic migration. It also positions some of South Africa's approaches against those of the EU: both welcome highly skilled migrants but conflate national security issues with the supposed threat that semi-skilled or unskilled migrants pose to their societal makeup. The Green Paper on International Migration's proposed changes to South Africa's migration regime also shows similarities with the EU's approach in terms of heightened border control, increased use of deportation regimes, and suggested asylum seeker processing centres. Should these changes be implemented, they will be regressive in terms of current domestic laws. The suggested policy changes in the green paper do not account for the manner in which the government intends to tackle mounting xenophobic sentiments towards migrants; nor do they provide details on social and training programmes to help up-skill semi-skilled migrants. Yet despite its regressive stance on asylum seekers, the green paper is a step forward in terms of addressing irregular and potentially semi-skilled migration from within the region through the proposed SADC and circular visas. If implemented, these measures will simplify administrative procedures in recruiting migrant workers for specific sectors and reduce the need for businesses to apply for corporate visas. Another positive suggestion is easier processes for foreign graduates seeking employment within the country. Lastly, this paper identifies bottlenecks in current processes in South Africa's migration regulatory framework, and concludes with select policy recommendations for relevant stakeholders.

ABOUT THE AUTHORS

ASMITA PARSHOTAM is an international trade and development expert, and an admitted attorney of the High Court of South Africa, having served her legal articles at Bowman Gilfillan Incorporated. In 2013 she read for an MA in International Relations at the University of the Witwatersrand. She previously worked at the World Trade Organization in Geneva and the European Centre for Development Policy Management.

CHARISMA NCUBE was one of the 2016 SAIIA/Konrad Adenauer Stiftung scholars. He holds an LLB from the University of Fort Hare and has read for an LLM in International Economic Law at the University of the Witwatersrand. He is serving his legal articles at Tshisevhe Gwina Ratshimbilani Inc.

ABBREVIATIONS AND ACRONYMS

BMA	Border Management Agency
DHA	Department of Home Affairs
DHE	Department of Higher Education
DOL	Department of Labour
DRC	Democratic Republic of Congo
diti	Department of Trade and Industry
EC	European Commission
ESA	Employment Services Act
GATS	General Agreement on Trade and Services
IDPs	internally displaced persons
ILO	International Labour Organization
IOM	International Organization for Migration
LDCs	least developed countries
MDCs	more developed countries
NDP	National Development Plan
OECD	Organisation for Economic Development and Co-operation
REC	regional economic community
SACU	Southern African Customs Union
SAPS	South African Police Service
SAQA	South African Qualifications Authority
SARS	South African Revenue Service
SMEs	small and medium-sized enterprises
UNHCR	UN High Commissioner for Refugees
ZDP	Zimbabwe Dispensation Programme

OVERVIEW OF LEGISLATION AND POLICIES

SOUTH AFRICAN LEGISLATION	DESCRIPTION
<u>Refugee Act 1998</u> (Act 130 of 1998)	Legislation regulating asylum seekers and refugee applications in South Africa. The act outlines the recognition of refugees, the asylum-seeking process and the refugee appeal process.
<u>Employment Services Act 2014</u> (Act 4 of 2014) (entered into force in August 2015)	Designed to establish work schemes to enable vulnerable sectors of the population to enter employment, and to create opportunities for self-employment and facilitate youth employment.
<u>Licensing of Small Businesses Bill, 2013</u>	South African government initiative to regularise small-scale and informal businesses. All businesses would be required to register, irrespective of size. Failure to do so would result in monetary and/or criminal penalties.
<u>Immigration Act 2002</u> (Act 13 of 2002) (Regulations published in 2014)	The regulations introduced the critical skills visa. The act has been criticised for being administratively burdensome.
<u>Border Management Agency Bill, 2015</u>	The bill looks to establish the agency that will perform border law enforcement functions at land and port borders and facilitate trade.
Zimbabwe and Lesotho special dispensation programmes, 2009 and 2016 respectively	Designed to facilitate the regularisation of irregular Zimbabwean and Lesotho nationals living in South Africa.
<u>Green Paper on International Migration, June 2016</u>	Gazetted by the South African government for public comment and input in June 2016.
SADC REGIONAL POLICIES	DESCRIPTION
<u>Draft Protocol on the Facilitation of Movement of Persons, 2005</u>	Progressively eliminates obstacles to the free movement of persons within SADC countries.
<u>Draft Labour Migration Policy, 2013</u>	Reflects migration and labour-related issues from a rights-based approach centred on including migrants in their host societies.
<u>Protocol on Employment and Labour, 2014</u>	Broad application to non-citizens and harmonisation of immigration policies.
EU POLICIES	DESCRIPTION
<u>EU Emergency Trust Fund for Africa, 2015</u>	Created to help support fragile African states in order to foster stability in afflicted regions and better address the root causes of migration.
<u>Blue Card Scheme, 2016</u> (as revised)	Designed to attract highly skilled migrants to the EU and provide for their socio-economic integration.

INTRODUCTION

Migration to South Africa and EU member states is neither a recent nor a new phenomenon. Migration has played an integral role in South Africa's economic growth. Historically, unskilled and semi-skilled male migrant labour was drawn from the former homelands¹ and South Africa's neighbouring countries for specific sectors such as mining and agriculture.² Today, Johannesburg and other large cities continue to attract migrant workers from within the country and the region. Similarly, in the 1970s some European countries used bilateral migration agreements to satisfy their low-skilled labour needs, with migrant labourers coming from Turkey, Morocco, Spain and Italy.³ In recent years many EU countries have reduced entry avenues for low-skilled labour migrants from outside the union,⁴ and the focus has shifted to attracting highly skilled foreign workers.

The 2008 global economic recession has in part fuelled negative attitudes towards migration in both South Africa and Europe. The arrival of Syrian refugees in the EU has coincided with the rise of right-wing political parties throughout Europe, and EU member states' foreign policies have become increasingly inward looking. Measures permitting the admission of migrants into the EU have tightened in light of growing nationalistic sentiments.

Legal migration, together with economic migration, has borne the brunt of such policies in South Africa, which are fuelled by perceptions that economic migrants are a threat to job-seeking South African citizens. The demographic makeup of South Africa's larger cities changed after the end of apartheid, as intra-African migration to the country increased. In the post-apartheid era South Africa was held to be a 'beacon of hope' on the continent, a land of economic and social opportunities and welcoming of fellow Africans. The truth, however, has proven to be more challenging. Attitudes among South African nationals towards African migrants changed dramatically post-1994. South Africa has struggled to maintain an economic growth rate to support its population, with youth unemployment and access to education remaining ongoing challenges. The country's financial outlook is dire⁵ and there is growing concern over its ability to provide economic opportunities for unemployed South Africans, let alone migrants. It also faces criticism over its stultified

-
- 1 The Transkei, Bophuthatswana, Venda and Ciskei homelands of the former apartheid government.
 - 2 Tati G, 'The immigration issues in the post-apartheid South Africa: Discourses, policies and social repercussions', *Espace, Population, Societies*, 3, 2008, pp. 423–440.
 - 3 Adepoju A, Van Noorloos F & A Zoomers, 'Europe's migration agreements with migrant-sending countries in the Global South: A critical review', *International Migration*, 48, 3, 2009.
 - 4 *Ibid.*
 - 5 In April 2017 the South African economy was downgraded to junk status by major credit rating agencies, following President Jacob Zuma's sweeping changes to his cabinet, which included the removal of finance minister Pravin Gordhan. See also *Finance 24*, 'Breaking: S&P downgrades SA to junk status', 3 April 2017, <http://www.fin24.com/Economy/breaking-sp-downgrades-sa-to-junk-status-20170403>, accessed 2 May 2017.

approach to finding workable solutions for the large number of economic migrants in the country.

In light of such changing dynamics in both the EU and South Africa, this paper explores economic migration within the context of South Africa's experiences in regulating economic migration. There is not a direct correlation between South Africa and the EU in every aspect, as South Africa has gross levels of income inequality and a high unemployment rate, together with poverty rates structured along racial lines. These are problems specific to South Africa's political and economic context as a result of its history. Similarly, the EU is not a homogenous entity, and each member state faces its own challenges in terms of youth unemployment and the changing social and cultural makeup of its society. The paper does not make direct comparisons between the EU's and South Africa's approach to migration. However, where relevant it will reference parallel policies present in the EU and South Africa, such as border management and control methods, the critical skills visa in South Africa and the [Blue Card scheme](#) in the EU, and the changing approach to refugees in both parties. In doing so, it looks at whether either entity is on the right track, and whether there can be joint lesson learning for both South Africa and the EU.

Drawing on South Africa's long-term experience with migration, this paper identifies policies, regulatory frameworks and labour and immigration laws that either facilitate or hinder economic migration into the country, and looks at the experiences of businesses in dealing with economic migration. It also provides an analytical overview of the successes and challenges of the proposed [Green Paper on International Migration](#), which, once implemented, will effect significant changes to South Africa's immigration regime. Lastly, the paper identifies bottlenecks in current processes within South Africa's migration regulatory framework, and concludes with select policy recommendations.

SOUTH AFRICA'S POSITIONING IN REGIONAL MIGRATION

Post-1994 South Africa became party to a memorandum of understanding between SADC and the UN High Commissioner for Refugees (UNHCR), which reflected a more welcoming and open attitude to migrants and refugees. However, the region lacks comprehensive migration governance policies allowing the free movement of people. In contrast, the EU has implemented a sophisticated governance system of free movement of labour among its member states, coupled with associated rights to work and state benefits.⁶ In achieving this, EU member states have had to relinquish some sovereignty and decision-making on the issue. This explains why the SADC Secretariat has not achieved the same levels of consensus among its members regarding economic migration, as sovereignty is still a highly contested area in the region with most member states unwilling to cede any to the regional body.

Historically, the SADC region has not been in favour of free movement. The 1995 Draft Protocol on Free Movement aimed to gradually reduce barriers to the free movement of

6 Kitimbo A, *Is It Time for Open Borders in Southern Africa?*. Johannesburg: Brenthurst Foundation, 2014.

SADC nationals. However, it was never adopted because of resistance from the three largest host countries in the region: South Africa, Botswana and Namibia. They were concerned about the effects that a free flow of people would have, bearing in mind the sharp economic disparities within the region.⁷ Instead, South Africa's proposed initiative, the Facilitation of Movement Protocol, was markedly more regressive than the draft protocol, and included provisions that delayed harmonisation policies and valued sovereignty and national interests above regional interests.⁸ Other SADC members subsequently rejected this initiative, and in 2005 the [Draft Protocol on the Facilitation of Movement of Persons](#) was reintroduced with the goal of progressively eliminating obstacles to the free movement of persons within SADC countries.⁹ However, to date only four SADC member states have ratified it.¹⁰ It thus lacks the necessary two-thirds majority for implementation and remains unenforceable.¹¹

Cooperation among SADC members is limited to safeguarding national and regional security by exchanging crime and security intelligence, and 'preventing the illegal movement of persons into and within the region'.¹² One of the reasons for its slow uptake might be that the protocol still looks at labour through a national security prism. The SADC approach of viewing migrants as 'potentially dangerous' and a 'security threat' has also placed it at odds with the AU's approach of

- promoting the movement of persons within African regional economic communities (RECs); and
- encouraging the positive role of migrants within their host communities and ensuring their socio-economic development.¹³

Consequently, South Africa's conflation of national security with the movement of nationals from neighbouring states reflects a broader issue at play: safeguarding national interests and borders is more important than finding solutions to irregular migration and encouraging circular economic migration within the SADC region.

7 Nshimbi CC & L Fioramonti, 'The will to integrate: South Africa's responses to regional migration from the SADC region', *African Development Review*, 26, 1, 2014, pp. 52–63. See also *ibid*.

8 Kitimbo A, *op. cit*.

9 Article 2 of the protocol states that the overall objective is 'to develop policies aimed at the progressive elimination of the movement of persons of the region generally into and within the territories of State Parties'. Other goals also include visa-free travel for a maximum period of three months for SADC nationals.

10 South Africa is amongst the list of signatories that have ratified it; DHA, 'White Paper on International Migration for South Africa, July 2017', <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf>.

11 Kitimbo A, *op. cit*.

12 Draft Protocol on the Facilitation of Movement of Persons 2005, Article 11(1)(b) and (e).

13 Dodson B & J Crush, *Migration Governance and Migration Rights in the Southern African Development Community (SADC): Attempts at Harmonisation in a Disharmonious Region*. Geneva: UNRISD (UN Research Institute for Social Development), 2015. See also Nshimbi CC & L Fioramonti, *op. cit*.

SADC nationals are currently permitted 90-day visa-free working rights (Article 3(c) of the draft protocol), and there is no overarching protection for migrants beyond the hosting country's laws and regulations (Article 20). This leaves migrants vulnerable to laws that might be discriminatory and non-compliant with international norms, as not all SADC members afford them social protection and rights. This system also has a restrictive interpretation of admissible immigrants, which is detrimental to the much larger numbers of irregular and economic migrants within the SADC region.¹⁴

In response to the protocol's inertia, SADC members have moved towards implementing the [SADC Draft Labour Migration Policy of 2013](#) instead, which looks at migration and labour-related issues from a rights-based approach centred on integrating migrants into their host societies and providing for their safety.¹⁵ This approach also takes into consideration the interests of and opportunities available to low-skilled workers and informal traders within the region – a marked change from the draft protocol's objectives. In order to cultivate a holistic approach to migration, the International Labour Organization (ILO) is working closely with SADC members to ensure the implementation of the SADC migration policy within national frameworks.¹⁶ The migration policy looks to achieve:

- an evidence-based strategy towards improving and expanding the skills pool within the SADC region; and
- 'pro-poor labour migration policies assisting and protecting this category of workers toward increased and more sustainable income-generating activities'.¹⁷

This complements other SADC initiatives such as the [2014 SADC Protocol on Employment and Labour](#), whose Article 19 goes beyond narrowly defined workers' rights governed by domestic legislation. Instead, it applies to non-citizens and links the benefits of migration to broader development goals for the region.¹⁸

These proposals reflect a marked change from the 2005 draft protocol's initiatives, and SADC governments are increasingly beginning to understand the importance of synchronising their labour markets and laws. However, whether SADC members are able

Article 19 goes beyond narrowly defined workers' rights governed by domestic legislation. Instead, it applies to non-citizens and links the benefits of migration to broader development goals for the region

14 Dodson B & J Crush, *op. cit.*

15 SADC Labour Migration Policy, SADC/ELSJTSCM/1/2013/9, 2013. The migration policy specifically identifies creating a harmonised social protection regime for SADC migrant workers and ensuring a 'minimum floor of social security for migrant workers'.

16 Interview with ILO representative, Johannesburg, 25 August 2016.

17 Measures include fast-tracking mutual recognition and standardised training prior to qualification, as well as providing a database of available critical skills within the region.

18 Dodson B & J Crush, *op. cit.* Specific goals of the employment and labour protocol include: (i) protecting the rights of migrants working in rotational schemes, such as those found in agriculture and mining, and low-skilled/self-employed migrants in the informal sector; (ii) ensuring migrant workers' integration into worker organisations (ie, trade unions); and (iii) establishing minimum social protection for migrant workers within the SADC region.

to implement the changes proposed by the 2014 employment and labour protocol remains to be seen, especially as the 2019 deadline for harmonisation looms on the horizon.¹⁹

South Africa is one of the few states to have ratified the 2005 draft protocol, which signifies a small shift from its previous stance of restricting all forms of migration from SADC countries. It is also working towards implementing the migration policy domestically. Statements released by the Department of Home Affairs (DHA) reflect an understanding of the need for a proactive approach to regional integration and that development aims are intrinsic to the broader economic linkages that South Africa shares with its neighbours, particularly in light of their historical labour migration ties.²⁰ This has fed into a broader approach of including SADC protocols in South Africa's revised immigration measures, as reflected in the green paper.²¹ The ILO is assisting South Africa with creating a rights-based labour migration policy and there are discussions on implementing a sector-driven economic migration policy. To this end, consultations have been held with the agricultural sector.²² A managed regional migration regime could have positive economic effects on SADC as a whole, including increased trade, fewer irregular migrants and lower accompanying costs (deportation, border control, increased police presence) incurred through attempts to keep them out of host countries, and the circular migration of both semi-skilled and skilled labour within the region.²³

South Africa's incorporation of SADC protocols via its current proposed amendments to its immigration regime shows promising signs of creating a more rights-based approach. Although the DHA is aware of the disconnect between law, policy and 'systems for economic migration linked to national and regional development',²⁴ it remains to be seen whether its efforts to harmonise migration protocols will be successful. The question is whether the South African government can balance its obligations to the region with its domestic socio-economic constraints and political mandate.

19 Interview with ILO representative, *op. cit.*

20 South Africa, DHA (Department of Home Affairs), 'Introductory Remarks by former Home Affairs Minister Malusi Gigaba for Third Roundtable on International Migration: Intra-regional Migration within SADC and Implications for International Migration Policy', 6 February 2015a, <http://www.home-affairs.gov.za/index.php/statements-speeches/558-introductory-remarks-by-home-affairs-minister-malusi-gigaba-for-third-roundtable-on-international-migration-intra-regional-migration-within-sadc-and-implications-for-international-migration-policy-february-6th-2015>, accessed 1 September 2016.

21 Interview with ILO representative, *op. cit.*

22 *Ibid.*

23 Kitimbo A, *op. cit.*

24 DHA, 2015a, *op. cit.*

MIGRATION TRENDS AND XENOPHOBIA IN SOUTH AFRICA

EU AND SOUTH AFRICAN SIMILARITIES: SAYING ONE THING, BUT DOING ANOTHER?

Both the European Commission (EC) and the South African government have, on paper, recognised the benefits of economic migration. In June 2016 the EC released its *Integration Action Plan of Third Country Nationals*, which aims to harness integration to ‘realise the full potential of migration’.²⁵ This includes addressing the impending skills shortage that EU member states will suffer as a result of their aging population.²⁶ In comparison, South Africa’s dire need for skilled labour resulted in its creation of the critical skills visa in the *Immigration Act 2002’s 2014 regulations*, while the former minister of home affairs, Malusi Gigaba, recognised the positive impact that immigrants have on broader South African society and the country’s development.²⁷

However, migration continues to be regarded as a national security issue in South Africa. The government distinguishes between legal and ‘desirable’ skilled economic migration and unspecific irregular migration (often encompassing unskilled or semi-skilled labour), which must be actively discouraged.²⁸ Viewing irregular migration from within the SADC region as one of the country’s foremost security challenges, the presence of migrants must be balanced against South Africans’ demands for jobs, development and resources.²⁹

Similarly, EU member states are also accused of tightening restrictions for lower-skilled migrants. Some Eastern European countries are building border walls which, coupled with the growing social distrust of migrants, illustrate the challenges facing the EU. Host countries often implement specific measures to stem the influx of migrants, including conflict prevention, development assistance, trade partnerships and political dialogue – all of which are increasingly being used by EU member states to lessen migration pressure

Migration continues to be regarded as a national security issue in South Africa. The government distinguishes between legal and ‘desirable’ skilled economic migration and unspecific irregular migration (often encompassing unskilled or semi-skilled labour), which must be actively discouraged

-
- 25 The Integration Action Plan also contains provisions for integrating refugees into host countries. See Rondine F, ‘Integration as a benefit for migrants and host societies: The new Commission Action Plan’, EU-Logos, 7 July 2016, <https://eulogos.blogactiv.eu/2016/07/07/integration-as-a-benefit-for-migrants-and-host-societies-the-new-commissions-action-plan/>, accessed 1 September 2016.
- 26 Pre-departure and pre-arrival measures; education for migrants; labour market integration and access to vocational training; access to basic social services; and integration into broader society.
- 27 South Africa, DHA, ‘Introductory remarks by the former Minister of Home Affairs, Malusi Gigaba, on the occasion of the Colloquium on a New international Migration Paradigm for South Africa’, June 2015b, <http://www.home-affairs.gov.za/index.php/state-ments-speeches/642-introductory-remarks-by-the-minister-malusi-gigaba-on-the-occasion-of-the-colloquium-on-a-new-international-migration-paradigm-for-south-africa-in-pretoria-on-june-30th-2015>, accessed 1 September 2016.
- 28 Dodson B & J Crush, *op. cit.*
- 29 DHA, 2015a, *op. cit.* Similar sentiments were expressed during an interview with DOL (Department of Labour) employees, Pretoria, 16 August 2016.

on their borders.³⁰ In order to address its migration and refugee concerns, the EU has implemented additional steps that will complement its [2015 EU Agenda for Migration](#). It is also working on mobilising additional financing in Africa over the next five years,³¹ notably through increased funding for the EU Emergency Trust Fund for Africa.³² Other measures include:

- tightening control over its external borders through increased coastal border patrols along the Mediterranean coastline;³³
- integrating positive and negative incentives into its development and trade policies to reward those countries willing to cooperate on migration management and ensure there are consequences for those that refuse;
- providing enhanced support to the Valetta Action Plan; and
- creating legal routes to the EU.

The EU's actions on the issue have drawn the ire of African leaders, notably South African President Jacob Zuma. In September 2015 he criticised the EU for being an agent of its own crisis through certain member states' involvement in the political regime change in Libya, a decision that sparked waves of migration from Northern Africa to Europe's border.³⁴ Nevertheless, despite criticising EU migration and refugee policies, South Africa appears to be following a similar trajectory: the green paper now has a 'risk-based' approach, which involves making the asylum system in South Africa less attractive by removing asylum seekers' rights to free movement and employment while their papers are processed.³⁵ While this is regressive when compared with current domestic policies, it is not entirely unaligned with international laws on migration and asylum seekers. Thus it is perhaps unsurprising that South Africa is taking this step. The country has historically drawn its mandate on migration issues from international best practices, and might simply

The green paper now has a 'risk-based' approach, which involves making the asylum system in South Africa less attractive by removing asylum seekers' rights to free movement and employment while their papers are processed

30 Lindstrom C, 'Addressing the root causes of forced migration: A justice and home affairs policy of freedom, security and justice?', *Journal of Social Policy and Administration*, 39, 6, 2005, pp. 587–605.

31 EC (European Commission), 'Commission announces new migration partnership framework: Reinforced cooperation with third countries to better manage migration', Press release, 7 June 2016, http://europa.eu/rapid/press-release_IP-16-2072_en.htm, accessed 24 November 2016.

32 The EU Trust Fund was created in 2015 at the Valetta Summit to help support fragile African states in order to foster stability in afflicted regions and to better address 'the root causes of destabilisation, displacement and irregular migration, by promoting economic and equal opportunities, security and development'. See EC, 'The EU Emergency Trust Fund for Africa', http://ec.europa.eu/europeaid/regions/africa/eu-emergency-trust-fund-africa_en, accessed 24 November 2016.

33 Adepoju A, Van Noorloos F & A Zoomers, *op. cit.*

34 Fabricius P, 'Zuma ad-libs a controversial position on the migration crisis', *ISS Today*, 17 September 2015, <https://www.issafrica.org/iss-today/zuma-ad-libs-a-controversial-position-on-the-migration-crisis>, accessed 27 August 2016.

35 Interview with International Organization for Migration (IOM) representative, Hatfield, 7 July 2016; interview with Scalabrini Institute for Human Mobility (SIMHA) researcher, 1 July 2016.

be following through on the rhetoric present in current international discussions on asylum seekers, refugees and mixed migration flows.

Moreover, the South African government intends to establish a Border Management Agency (BMA) that will act as a single authority managing South Africa's ports of entry. The BMA will also have exclusive responsibility for performing border law enforcement functions at land and port borders, and is recognised as a national public entity under the Public Finance Management Act.³⁶ This will give the BMA the unique ability to exercise border law enforcement functions and facilitate cross-border trade.³⁷ The media reports that the South African Police Service (SAPS) and the South African Revenue Service (SARS) find the BMA's 'operational liberties to be unclear', a polite way of suggesting that its creation encroaches on the security aspect of the SAPS's work and the customs duties that fall within SARS's ambit.³⁸ Despite these reservations, on 8 June 2017 (and on the third attempt) the National Assembly finally passed the BMA Bill.³⁹ A reading of the bill reveals that SARS and the SAPS's concerns are not without merit, particularly in respect of the wide-ranging functions, duties and powers of officers (Section 13). However, Gigaba has reaffirmed that the BMA will not usurp SARS's duties of collecting customs and will instead simply work with police at existing border management posts without assuming their responsibilities.⁴⁰

There are similarities between some of the BMA's functions and those of the EU agencies tasked with border control and management. Here the realpolitik relations between the two parties must be kept in mind. According to one academic, owing to South Africa's prominence on the continent and its close relations with many EU member states there are suggestions that the EU's and South Africa's actions are coordinated. In light of this strategic relationship with South Africa, which other African partner is better placed to drive a message deterring irregular and economic migration? South Africa's political stance thus increasingly mirrors US and EU policies on migration and asylum seeking,⁴¹ causing a shift in the government's policy positions on these issues.

36 Border Management Bill, 2015, sections 4(a) and (c).

37 *Ibid.*, sections 3(a) and (d). In terms of Section 5(1)(c) the BMA's function is 'to provide an enabling environment to facilitate legitimate trade'.

38 Magubane K, 'Gigaba seeks to appease fears about Border Management Agency's powers', *Times Live*, 13 September 2016, <http://www.timeslive.co.za/politics/2016/09/13/Gigaba-seeks-to-appease-fears-about-Border-Management-Agency%E2%80%99s-powers>, accessed 24 November 2016.

39 Davis, G. 'Border Management Authority Bill finally passed', *Eyewitness News*, 8 June 2017, <http://ewn.co.za/2017/06/08/border-management-authority-bill-finally-passed>, accessed 10 July 2017

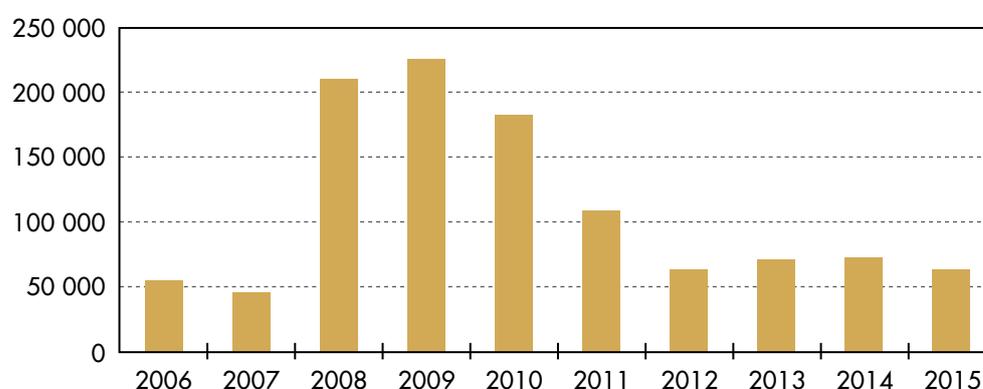
40 *Ibid.*

41 Interview with African Centre for Migration Studies researcher, Johannesburg, 4 August 2016; interview with SIMHA researcher, *op. cit.*

The philosophy behind South Africa's initial refugee and migration policies

South Africa currently has a 'no refugee camp' approach to asylum seekers. Regarded as extremely generous in its provisions, the [Refugee Act 1998](#) guarantees all asylum seekers the right to work and reside legally in the country while their papers are being processed. When coupled with the administrative backlog in processing asylum-seeking applications, this policy has allowed many African nationals to enter the country and work for indefinite periods of time.

FIGURE 1 NUMBER OF REGISTERED ASYLUM SEEKERS IN SOUTH AFRICA, 2006–2015



Source: Budlender D, *Migration and Employment in South Africa*. Johannesburg: African Centre for Migration & Society, University of the Witwatersrand, 2014

As a result various migrant communities have formed, consisting of a wide variety of African nationals from Ethiopia, Somalia, the Democratic Republic of Congo (DRC) and neighbouring states. From 2006 to 2011 the country received the highest number of asylum seekers in the world.⁴² According to UN records, the number of asylum seekers in South Africa stood at 62 000 in 2015, making it the 10th largest global recipient country of asylum seekers.⁴³ This figure does not account for asylum claims currently pending (which drastically increase the number of asylum seekers and statistically position South Africa as the largest host country of asylum seekers in the world in 2015).⁴⁴ Owing to tightened measures this number has since declined, and the UNHCR now lists 121 645

According to UN records, the number of asylum seekers in South Africa stood at 62 000 in 2015, making it the 10th largest global recipient country of asylum seekers

42 Amit R, *Making Migrants 'Il-legible': The policies and Practices of Documentation in Post-Apartheid South Africa*. Cape Town: SCIELO, 2014.

43 UNHCR (UN High Commissioner for Refugees), 'Global trends: Forced displacement in 2015', <http://www.unhcr.org/576408cd7.pdf>, accessed 25 August 2017.

44 *Ibid.*

persons residing in South Africa as ‘refugees’, with 1.22 million ‘persons of concern’ as of 2015.⁴⁵

South Africa is home to a wide variety of foreign nationals. Zimbabweans and Nigerians are among the top five largest foreign communities present in the country. According to the National Immigration Information System, African asylum seekers account for 71% of the applications received in 2015.⁴⁶

Countries	Numbers
Zimbabwe	20 405
Ethiopia	10 176
DRC	8 029
Nigeria	7 431
Bangladesh	5 110
Somalia	2 595
Pakistan	2 460
Malawi	2 310
Ghana	2 271
India	1 781
Republic of Congo	1 485
Lesotho	1 437
Mozambique	1 220
Uganda	753
Burundi	678

Source: DHA, ‘Green Paper on International Migration in South Africa, 21 June 2016’, *Government Gazette*, 40088, 24 June 2016

Statistics present vastly different numbers on the economic migrants, irregular migrants and mixed migration present in the country, mainly because it is difficult to document unrecorded migrants. Much of the data available thus tracks legal migration into South

45 The UNHCR defines persons of concern as individuals who are not refugees, internally displaced persons (IDPs), stateless persons or returned refugees/IDPs, but to whom the UNHCR extends its protection and/or assistance services, based on humanitarian or other special grounds. See UNHCR, ‘UNHCR statistics: The world in numbers’, http://popstats.unhcr.org/en/overview#_ga=1.6625328.307696761.1470303449, accessed 12 July 2016.

46 DHA, ‘Green Paper on International Migration in South Africa, 21 June 2016’, *Government Gazette*, 40088, 24 June 2016.

Africa. Table 2 depicts the top five countries of origin for legal migrants entering South Africa in 2013. The 2011 and 2016 South African consensus results also reflect the UN figures in Table 2.

Countries	Numbers
Mozambique	462 412
Zimbabwe	358 109
Lesotho	310 925
UK	305 660
Namibia	129 488
Total	1 566 594

Source: UNICEF (UN Children's Fund), 'UNICEF migration profiles: South Africa, 2013', <https://esa.un.org/MigGMGProfiles/indicators/files/SouthAfrica.pdf>

The country has one of the highest deportation rates in the world. This is despite the fact that the rising number of migrants in the country is a clear indication that deportation, while costly, has been largely ineffective as a deterrent measure

Table 3 shows the changes in ranking of migrant-sending countries to South Africa. The vast majority of sending countries are within the SADC region, together with India, Bangladesh and Pakistan. However, it is important to bear in mind the make-up of these country groupings in South Africa: although Zimbabwe and Mozambique show the largest volumes, Lesotho's is proportionally the highest: half of all working-age Basotho men work in South Africa.⁴⁷

Keeping track of undocumented migrants entering South Africa is far more challenging. According to the Southern African Migration Project network, the number of undocumented migrants in South Africa could be anywhere between 1 and 2 million people.⁴⁸ In the post-apartheid era the South African government has used deportation schemes to tackle irregular immigration, and the country has one of the highest deportation rates in the world. This is despite the fact that the rising number of migrants in the country, as depicted in Table 4, is a clear indication that deportation, while costly, has been largely ineffective as a deterrent measure. According to the DHA's own statistics, 54 169 persons were deported during 2014/15, of whom 44 536 (82%) were from SADC countries: Mozambique (19 562), Zimbabwe (13 962) and Lesotho (11 012).⁴⁹ Deportation also feeds into a political rhetoric that obscures the real demand for labour in

47 Meny-Gibert S & S Chiumia, 'Factsheet: Where do South Africa's international migrants come from?', *Africa Check*, <https://africacheck.org/factsheets/geography-migration/>, accessed 11 July 2017.

48 *Ibid.*

49 DHA, 2016, *op. cit.*

TABLE 3 TOP 20 SENDING COUNTRIES (2011 AND 2016)

2011			2016		
Countries	N	%	Countries	N	%
Zimbabwe	672 308	38,1	Zimbabwe	574 047	39,6
Mozambique	393 231	22,3	Mozambique	293 405	20,2
Lesotho	160 806	9,1	Lesotho	160 749	11,1
Malawi	86 606	4,9	Malawi	78 796	5,4
UK	81 720	4,6	UK	56 412	3,9
Namibia	40 575	2,3	Swaziland	38 038	2,6
Swaziland	36 377	2,1	DRC	31 504	2,2
India	31 165	1,8	Namibia	30 701	2,1
Zambia	30 054	1,7	Nigeria	30 314	2,1
Ethiopia	28 230	1,6	India	25 063	1,7
Nigeria	26 341	1,5	Ethiopia	22 148	1,5
Somalia	26 116	1,5	Zambia	19 119	1,3
Congo-Brazzaville	26 061	1,5	Germany	13 894	1,0
DRC	25 630	1,5	Bangladesh	12 764	0,9
Germany	20 494	1,2	Pakistan	11 157	0,8
Bangladesh	19 696	1,1	Somalia	10 954	0,8
Pakistan	17 241	1,0	Botswana	10 759	0,7
Portugal	15 626	0,9	Congo-Brazzaville	10 686	0,7
China	15 071	0,9	Portugal	9 931	0,7
Botswana	12 316	0,7	Ghana	8 943	0,6

Source: Statistics South Africa, Community Survey 2016: Statistical Release, p.27, http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016-_Statistical-releas_1-July-2016.pdf

host countries and encourages hostility and xenophobia towards migrant communities.⁵⁰ Table 4 details South Africa's increasing deportation rates.

Although there are high volumes of migrants from within the region, South Africa is yet to implement a regional work permit for these labourers.⁵¹ It also has the highest number of bilateral agreements within the region, which has historically been used to regulate economic migration from Mozambique, Malawi, Lesotho and Swaziland,⁵² and dictate the terms and conditions on how migrant labour can enter the South African workforce and in which industries migrants can work.

50 De Haas H, *op. cit.*

51 Interview with ACMS researcher, *op. cit.*

52 Kitimbo A, *op. cit.*

TABLE 4 SOUTH AFRICA'S DEPORTATION RATES OF FOREIGN NATIONALS, 2014/15

CITIZENS OF:	Mozambique	Zimbabwe	Lesotho	Malawi	Swaziland	Tanzania	Nigeria	China	DRC	Ghana	Total top 10	Total (all countries)
April	2 257	2 950	1 324	1 225	136	95	9	11	3	7	8 017	
May	4 998	1 658	947	404	244	1	52	3	26	9	8 342	
June	1 654	1 165	1 384	302	185	52	8	2	1	9	4 762	
July	1 733	1 455	1 058	716	175	68	8	3	4	5	5 225	
Aug	2 205	996	1 077	208	171	4	76	5	0	17	4 759	
Sept	2 454	1 246	1 008	899	182	4	12	6	25	5	5 841	
Oct	1 170	1 052	704	911	98	101	15	11	3	6	4 071	
Nov	253	47	510	603	126	81	13	7	3	3	1 646	
Dec	884	255	881	608	45	0	8	8	7	6	2 702	
Jan	273	214	730	2	165	3	15	22	2	1	1 427	
Feb	311	1 547	695	2	26	3	16	15	7	6	2 628	
March	1 370	1 377	694	705	42	0	10	9	1	3	4 211	
Total	19 562	13 962	11 012	6 585	1 595	412	242	103	82	77	53 635	54 169
% of total deported	36	26	20	12	3	1	0	0	0	0		

Source: DHA (Department of Home Affairs), Green Paper on International Migration, Dialogue Presentation, September 2016

As part of limiting this migration, the government has issued notably fewer permanent residencies to nationals from SADC and other African countries, instead opting for various categories of temporary residence and work permits. Residency admissions for economic migrants have been as low as 150 000 in recent years (the majority of which have been granted to Zimbabwean nationals), and this figure does not account for irregular migrants.⁵³ To date, feasible employment choices for economic migrants living in South Africa include mining, agriculture, domestic and gardening labour, and small-scale trading.⁵⁴ Unfortunately, these are also sectors that can provide employment to semi-skilled South African nationals. With the unemployment rate sitting at 27% nationally (the highest it has been in 13 years)⁵⁵ it is difficult for the government, particularly the Department of Labour (DOL), to justify or actively encourage the recruitment of foreigners

53 Dodson B & J Crush, *op. cit.*

54 *Ibid.*

55 Mashiloane K, 'Unemployment rate: South Africa a ticking time bomb,' News24, 23 November 2016, <http://www.news24.com/MyNews24/unemployment-rate-south-africa-a-ticking-time-bomb-20161123>, accessed 24 November 2016.

in jobs that could easily be filled by South Africans. This means that the government has little political or economic room for manoeuvre, constrained as it is by its obligation to meet the needs of its electorate and satisfy the demands of trade unions and workers, while satisfying market demands as well.

XENOPHOBIC ATTACKS IN SOUTH AFRICA: AFRICAN BROTHERS IN ARMS NO MORE?

Anti-immigrant sentiments have flared up in South Africa in the past decade, notably in 2008, 2013 and 2015. Xenophobic attacks on migrants (derogatively known as *ama-kwerekwere*) in South Africa are attributable to a number of factors, including poor service delivery, competition for resources, unemployment and poor community leadership.⁵⁶ Public perceptions of economic migrants are fuelled by communal views that ‘migrants take jobs away from local South Africans’. This is despite evidence suggesting that international migrants account for just 4% of the overall South African working population and are mostly self-employed in the informal sector.⁵⁷ Accordingly to a recent study,

- entrepreneurial income-generating activities among migrants in certain areas were twice as high when compared to South African nationals; and
- 12% of migrants employed four to five South African workers, while only 10% of South Africans surveyed were self-employed.⁵⁸

The government has issued notably fewer permanent residencies to nationals from SADC and other African countries, instead opting for various categories of temporary residence and work permits

TABLE 5 REPRESENTATION OF ECONOMIC MIGRANTS IN SOUTH AFRICA PER SECTOR OF THE ECONOMY

Sector	Distribution of migrants (%)	Migrants as % of whole	South Africans as % of a total
Trade	30	8	92
Services	12	3	97
Construction	12	9	91
Private households	11	8	92
Manufacturing	10	5	95
Finance	10	5	95
Agriculture	6	7	93
Transport	4	4	96
Mining	3	8	92

Source: DHA, ‘Green Paper on International Migration in South Africa, 21 June 2016’, *Government Gazette*, 40088, 24 June 2016

56 The South African Human Rights Commission defines xenophobia as ‘the deep dislike of non-nationals by nationals of a recipient state’. See also South African History Online, ‘Xenophobic violence in democratic South Africa’, <http://www.sahistory.org.za/article/xenophobic-violence-democratic-south-africa>, accessed 27 July 2016.

57 Budlender D, ‘Migration and employment in South Africa’, MIWORC (Migrating for Work Research Consortium) Policy Brief, 2, 2014, http://www.miworc.org.za/docs/MiWORC-PolicyBrief_2-Migration-and-employment-in-SA.pdf, accessed 28 July 2016.

58 Interview with IOM representative, *op. cit.*

12% of migrants employed four to five South African workers, while only 10% of South Africans surveyed were self-employed

Table 5 depicts the sectors in which migrants are most likely to work. The statistics show that migrants tend to be self-employed (30%), followed by employment in services and construction (both 12%) and domestic work (11%).

Both state-sponsored media and the government discourse have repeatedly linked irregular migration with increased crime rates, exacerbating public intolerance of foreigners. This holds true even for those who are legally permitted to work and live in the country.⁵⁹ For example, proposals to tighten refugee laws and comments by government ministers Lindiwe Zulu and Nomvula Mokonyane on the presence of foreign-owned spaza shops in townships have done little to temper the flared tensions in these areas.⁶⁰ The most vicious attacks occurred in 2008, when 62 people were killed. The government's response to the attacks was to deny their xenophobic nature.

Some interviewees felt that the DHA's efforts to counter xenophobia have been largely ineffective, with its use of simplistic billboard advertisements and television campaigns instead of addressing widespread social problems.⁶¹ Little information is made available to local communities regarding the positive contributions migrants make to South African society. As a result, there is growing distrust of and disrespect for migrants, legal or not.

The government's overall inertia regarding the attacks is a serious cause for concern, as this seems to indicate less of an interest in eradicating such events than in tacitly condoning them.⁶² In 2015 the government introduced Operation Fiela, a coordinated operation across various departments that did little to strike at criminal elements and instead used force to target and suppress foreigners. It was severely criticised by civil society for fuelling xenophobic sentiments, reflecting the government's ongoing lip service to combatting xenophobia.⁶³ The government has done little to tackle the phenomenon's real causes, namely the lack of: (i) social services for local and migrant communities; (ii) social education on the positive benefits that migrants bring to the country; and (iii) an environment where locals and economic migrants can live and work together.

59 Klotz A, *op. cit.*

60 Mbatha A, 'SA hardens attitude to immigrants as attacks flare up', *Moneyweb News*, 2 February 2015, <https://www.moneyweb.co.za/uncategorized/sa-hardens-attitude-to-immigrants-as-attacks-flare/>, accessed 10 July 2017. See also 702 News, 'Min. Lindiwe Zulu to foreigners: "Share your ideas with local business owners"', 28 January 2015, <http://www.702.co.za/articles/1505/zulu-foreign-business-owners-must-share>, accessed 31 August 2016.

61 Interview with ILO representative, *op. cit.*; interview with ACMS researcher, *op. cit.*

62 The attacks on foreigners occurred days after Zulu King Goodwill Zwelithini said immigrants should 'pack their bags and leave' South Africa. He was supported by Edward Zuma, who warned, 'We need to be aware that as a country we are sitting on a ticking time bomb of them [foreigners] taking over the country.' *News 24*, 'Government: SA ready to help xenophobia victims', 6 April 2015, <http://www.news24.com/SouthAfrica/Politics/Govt-SA-ready-to-help-xenophobia-victims-20150406>, accessed 5 September 2016.

63 *The Citizen*, 'SA government xenophobia response a "festering contradiction"', 12 May 2015, <http://citizen.co.za/380894/sa-govt-xenophobia-response-a-festering-contradiction/>, accessed 5 September 2016.

The government should focus on creating awareness of migrants' economic contributions to South African communities, to help reduce friction between foreigners and local communities⁶⁴ and prevent xenophobic attacks. There are insufficient linkages between the regional economy and South Africa's economic growth, which goes towards explaining why little room is created domestically for migrants, and why their skills are not being adequately used.⁶⁵ This will hopefully change in the near future, as the International Organization for Migration (IOM) continues to engage with government stakeholders to establish active labour migration programmes that will facilitate vocational training for migrants.⁶⁶

THE SOUTH AFRICAN CONTEXT: POLICY AND LEGISLATIVE FRAMEWORK

INTER-GOVERNMENT RELATIONS AND THE IMMIGRATION ACT 2002, WITH 2014 REGULATIONS

The DHA is tasked with regulating immigration into South Africa. It has three core functions: merging development issues with international migration, addressing national security concerns, and satisfying its migration responsibilities in accordance with international law.⁶⁷ From interviews with DHA officials it seems their personal impression is that the department has a balanced approach towards policymaking and migration, which is reflected in its visa waivers for eight SADC countries.⁶⁸

However, migration policies in the various government departments do not appear to be well coordinated. Some experts question the true level of cooperation between the DOL, the DHA and the Department of Trade and Industry (dti), suggesting that the DHA's stance on migration as a national security issue detracts from the dti's mandate to actively encourage investment and create a business-friendly environment in the country. Should the BMA be implemented, it will be yet another state agency that will require more coordination among an even greater number of government departments (SARS and the SAPS), increasing an already heavy workload. Instead of the dti's overseeing small businesses and entrepreneurship, a separate government department is tasked with this responsibility: the Department of Small and Medium Sized Enterprises (SMEs). The variety of actors involved makes departmental coordination efforts more difficult, and adds the additional burden of requiring time and more financial and human resources, which the government may not be able to afford.

64 Interview with ILO representative, *op. cit.*

65 Interview with ACMS researcher, *op. cit.*

66 Interview with ILO representative, *op. cit.*

67 Interview with DHA official, Pretoria, 15 September 2016.

68 *Ibid.* Visas are waived for 90-day visits from Botswana, Namibia, Tanzania, Zambia and Zimbabwe. Persons staying in South Africa from Lesotho, Malawi, Mauritius, Mozambique and Swaziland do not require visas for visits that are under 30 days. See DHA, 'Countries exempt from South African visas', <http://www.dha.gov.za/index.php/immigration-services/exempt-countries>, accessed 10 July 2017.

Despite study visas' being among the highest number of granted visas, people on study visas have not always found it easy to remain in South Africa and find employment. One of the changes that the green paper looks to address is implementing easier processes that retain foreign nationals who have studied at South African universities in jobs within South Africa

The DHA is criticised for having an administratively lengthy asylum process and an unenthusiastic approach to documenting migrants who enter South Africa.⁶⁹ While it may be that many migrants do not enter legally, some critics suggest that ensuring these migrants remain undocumented actually 'fulfils the DHA's objective of facilitating their removal'. Yet this also stops it from knowing who is in the country and on what grounds.⁷⁰ The lengthy administrative process has also negatively impacted those economic migrants who enter the country legally and with a job offer in hand. Current migration policies, although seeking to deter irregular economic migration, have done little to encourage market and investor confidence in the country. Instead, they cast South Africa as an environment marred by red tape, legal requirements and an inability to conduct business freely.

TABLE 6 STATISTICS ON TEMPORARY VISAS ISSUED
1 JUNE 2014 – 14 JANUARY 2016

Type of temporary residence visa	Number	Percentage (%)
Relative Visa (Spouse)	28 608	24
Study Visa Section 13	22 074	18
Visitors Visa Section 11(1)	16 632	14
General Work Visa Section 19(2)	11 582	10
Visitors Visa Section 11(6)	11 221	9
Critical Skills Visa Section 19(1)	7 195	6
Other	23 925	20
Total	121 237	100

Source: DHA, Green Paper Dialogue Presentation, South Africa, 2016

As detailed in Table 6, the South African government has issued the largest quantity of visas in relation to spousal visas, while general work visas totalled a meagre 11 582 over a two-year period. Despite study visas' being among the highest number of granted visas, people on study visas have not always found it easy to remain in South Africa and find employment. One of the changes that the green paper looks to address is implementing easier processes that retain foreign nationals who have studied at South African universities in jobs within South Africa. This is a positive step, as South Africa seeks to retain skilled personnel and address the brain drain. In effecting such changes to the country's migration regime, the government will have to balance the retention of foreign graduates against the rising numbers of skilled South African graduates who are struggling to enter the job market.

69 Amit R, *op. cit.*

70 *Ibid.*

In fulfilling its mandate of creating jobs for South African citizens, the DOL is concerned with ensuring South African placement in the labour market and targeting and monitoring employers that illegally hire migrant workers. The DOL specifically requires ‘evidence of a diligent search’ when recruiting foreign nationals; ie, verifications from government databases and private employment agencies that a job vacancy cannot be filled by a South African citizen before being filled by a foreigner.⁷¹ An employer must also adduce that the salary and benefits for foreign employees are not inferior to those offered to South Africans employed in similar positions, and there must be proof of qualifications, as evaluated by the South African Qualifications Authority (SAQA).⁷² The DOL stresses that these measures have a turnaround time of 30 days and are taken to ensure that the DHA is correctly advised when processing visa applications.⁷³ In light of the immense pressures facing the department to find solutions to South Africa’s unemployment crisis, the DOL has to ensure that no foreign labour replace that which can be found domestically. Yet to date micro-managing skills categories and recruitment has done little to facilitate a cohesive approach to skilled recruitment. In fact, it has had the opposite effect, by failing to grow the economy and implement successful labour policies.

The promulgation of the [Employment Services Act \(ESA\) 2014](#), which entered into force in August 2015, is a small sign of change within the DOL. Minister Mildred Oliphant views the ESA and its Employment Services Board as tools to protect vulnerable workers, prevent their potential abuse by unscrupulous employers, and regulate the recruitment of foreign nationals.⁷⁴ The legislation is a step in the right direction, particularly through its inclusion of provisions that address vulnerable workers and provide skills development for such workers.⁷⁵ The act does not define ‘vulnerable workers’, but discussions with DOL staff indicate that economic migrants are included in this category.⁷⁶ As part of its goal to protect vulnerable workers, Section 8(4) also provides that even in the absence of a valid work permit, an employee is still entitled to enforce all statutory claims against an employer by virtue of the law or a relationship with the said person.

While the ESA does look to include foreign workers in its provisions, their employment is subject to the promotion of the skills development of South African citizens and permanent residents, and the proviso that foreign recruitment should not adversely impact the rights and expectations of South Africans.⁷⁷ Foreign recruitment is acceptable

71 Interview with DOL employees, *op. cit.*

72 Immigration Act 2002 (Act 13 of 2002), 2007 as amended, *Regulation Gazette*, 10199. Pretoria: Government Printer, 22 May 2014, Section 18(3)(a)(iv).

73 Interview with DOL employees, *op. cit.*

74 Ramutloa L, ‘Landmark New Employment Services Act comes into operation, says Minister of Labour’, DOL (Department of Labour), 17 August 2015, <http://www.labour.gov.za/DOL/media-desk/media-statements/2015/landmark-new-employment-services-act-comes-into-operation-says-minister-minister-of-labour/?searchterm=Employment%20Services%20Act%202015>, accessed 12 September 2016.

75 Employment Services Act 2014 (Act 4 of 2014), sections 2(1)(d) and 2(1)f). See also Section 5.

76 Interview with DOL employees, *op. cit.*

77 Employment Services Act, *op. cit.*, Section 2(1)(h).

only where employers are satisfied that no other person in the country with suitable skills can fill the same vacancy.⁷⁸ The ESA's positioning is broader in that it does not reserve employment for citizens only; however, it has a clear preference for recruiting South African citizens and those foreigners already in the country, while ensuring skills transfer programmes are initiated by employers in all cases where foreign nationals are employed.⁷⁹ In light of the balancing act the government is required to undertake between international protocol and citizens' demands, the reservation of first right for skilled and unemployed South Africans comes as no surprise. Such reservation practices are also in line with global practices.

The ESA has only recently been promulgated, and its impact remains to be seen. The legislation reflects an attempt by the South African government to coordinate skills development between its relevant departments, while also enabling the recruitment of foreigners and, importantly, not punishing those vulnerable workers who are employed without valid permits.

CRITICAL SKILLS VISA: HINDERING OR ATTRACTING FOREIGN TALENT TO SOUTH AFRICA?

Under apartheid, white, skilled and mostly European workers were encouraged to come to South Africa. In 1990 European migrants accounted for more than half of all skilled migrants, but by 2002 this had dropped to 30%.⁸⁰ South Africa is also suffering a 'brain drain', in which 7% of the professionals employed in the country opted to immigrate to countries such as the UK, Australia and New Zealand from 1989–2003.⁸¹ The green paper finds that more than 520 000 South Africans emigrated in this period, of whom 120 000 had professional skills. This is more than eight times the number of professionals who immigrated to South Africa during the same time period.⁸² As a result the country faces a conundrum: it continues to lose skilled labour but has been unable to replace these individuals quickly enough, which has created large gaps in its workforce.

Consequently, in 2014 the South African government implemented new immigration regulations that included the critical skills visa and abolished the previous quota system. Interviews with the DHA revealed that its role in designing the critical skills visa was a result of the DOLs unwillingness to formulate such a list and the dti's reluctance to be involved in the process.⁸³ The Department of Higher Education (DHE), which should have been involved in compiling the skills-shortage list, did not lead on the matter, resulting in the DHA's having to do so. Moreover, the DHE is supposed to update the skills-shortage list each year in order to ensure that the list remains current. However, it has not been updated since its first publication. The seeming lack of coordination among

The DHE is supposed to update the skills-shortage list each year in order to ensure that the list remains current. However, it has not been updated since its first publication

78 *Ibid.*, Section 8(2)(a).

79 *Ibid.*, Section 8(2)(c).

80 Stern M & G Szalontai, 'Immigration policy in South Africa: Does it make economic sense?', *Development Southern Africa*, 23, 1, 2006, pp. 123–145.

81 *Ibid.*

82 DHA, 24 June 2016, *op. cit.*

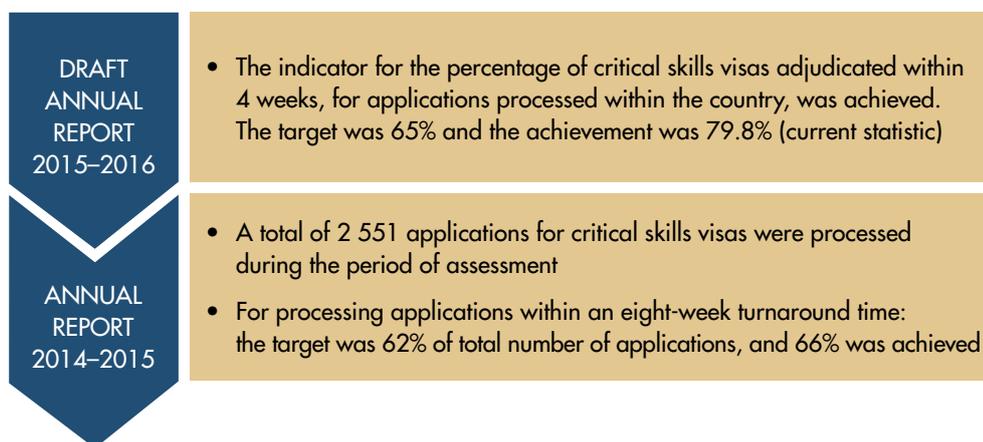
83 Interview with DHA official, *op. cit.*

departments, together with non-responsibility for issues falling within the purview of specific departments, could be attributed to interdepartmental politics. The DHA is thus responsible for creating policies that try to improve South Africa’s immigration regime but lacks input from government departments with the required expertise.

The ‘skills shortages’ approach also means the current immigration system is still loaded against the majority of regional migrants, who lack the necessary skills and training that would make them eligible for recruitment.⁸⁴ There is a mismatch between the skills deemed critical for South Africa’s economic growth and the much broader list of skills needed to harness socio-economic growth in the country. Among the criticisms of the government’s approach have been its lack of pilot-case testing of the critical skills visa regime prior to implementation, and its failure to sufficiently define ‘critical skills’ by limiting these to professionals and excluding other skillsets required in the country, such as technicians and teachers.⁸⁵ Skills recruitment and determining which skills should be included on the critical skills list is a highly politicised issue, which has made efforts to address the country’s skills shortage even tougher.⁸⁶

Nevertheless, making the critical skills visa efficient and hence attractive to employers is an ongoing process. The DHA aims for a maximum turnaround time of eight weeks for processing these visas, and feels that current processes are an improvement on the previous regime of employers being solely responsible for sponsoring work visas.⁸⁷ Figure 2 depicts the significant improvements in the timeframe for visa processing, year-on-year.

FIGURE 2 TIMEFRAMES FOR PROCESSING CRITICAL SKILLS VISAS



Source: Data obtained from interview with DHA officials, Pretoria, September 2016

84 Dodson B & J Crush, *op. cit.*

85 Telephonic interview with immigration lawyer, 7 July 2016.

86 Interview with ACMS researcher, *op. cit.*

87 Interview with DHA official, *op. cit.*

As a parallel comparison with the critical skills visa regime, the EU's Blue Card initiative offers an approach that can be modified to suit South Africa's needs. While not without its controversies, the Blue Card initiative is designed to address the socio-economic integration of third-country nationals within their host countries. Traditionally, the admission of non-EU citizens has been a controversial issue. Many EU member states feared losing control of their labour markets, which resulted in a weakened original Blue Card directive adopted in May 2009.⁸⁸ To date, the Blue Card initiative has been under-utilised by member states owing to their restrictive admission requirements, parallel rules and national procedures, which have limited its implementation. In June 2016 the initiative was revised with the aim of making it easier to attract highly skilled foreigners who will contribute to the EU's economic growth. Some of these reforms include:

- labour market integration tools;
- recognition of migrants' existing qualifications;
- flexible salary range;
- recruitment of third nationals in areas with labour shortages; and
- measures that ensure the rights of both Blue Card holders and their families are protected.⁸⁹

The changes to the Blue Card initiative are designed to make the EU an attractive market for foreign, highly skilled labour, and this could work within the South African context. Easier and quicker visa processes, recognition of existing skills, and allowing the list of 'labour shortage sectors' to be dictated by market demands (rather than a static government-defined list) could all work towards attracting skilled migrants to South Africa. Other measures could include changing the approach to a points-based system, which is identified in the green paper. A points-based system would be more comprehensive, as the assessed individuals would require a range of skills and be assessed on the relevance of their work experience, prior positions and language skills. It would also enhance departmental cooperation by requiring the DOL to work closely with the DHE and focus on upgrading teaching resources at technical and vocational education and training colleges, stimulating skills development, actively recruiting skilled trainers with industrial experience and marketing South Africa as a desirable foreign direct investment destination in terms of human capital.⁹⁰

88 Van Riemsdijk M, 'Rescaling governance of skilled migration in Europe: Divergence, harmonisation, and contestation', *Population, Space and Place*, 18, 2011, pp. 53–258.

89 EC, 'Delivering the European Agenda on Migration: Commission presents Action Plan on Integration and reforms 'Blue Card' scheme for highly skilled workers from outside the EU', Press Release, 7 June 2016, http://europa.eu/rapid/press-release_IP-16-2041_en.htm, accessed 1 September 2016.

90 Bernstein A, Altbeker A & A Johnston, 'The Growth Agenda: Priorities for Mass Employment and Inclusion – SKILLS', CDE (Centre for Development and Enterprise), 2016, <http://www.cde.org.za/wp-content/uploads/2016/04/5.Skills.pdf>, accessed 4 October 2017.

LICENSING OF SMALL BUSINESSES BILL: FURTHER RESTRICTIONS ON ECONOMIC MIGRANTS

However, for each step taken forward by the government, another two are taken backwards. Currently, the dti is required to approve investment applications before an investor can apply for a business visa. Via the [Immigration Act 2002](#) the dti has also declared certain industries to be ‘undesirable’ (Section 15(1A)),⁹¹ which has made it virtually impossible to obtain a business visa for these industries. This is reinforced by the 2014 regulations, whereby applicants for a business visa (with the intention of establishing a business in South Africa) must show that at least 60% of the total staff employed will be South African citizens or permanent residents.⁹²

The [Licensing of Small Businesses Bill](#) follows suit in designating small-scale informal businesses as yet another ‘undesirable’ industry for migrant involvement, fuelled by certain officials’ opinion that small businesses should be ring-fenced for locals.⁹³ If implemented, it will adversely impact both small-scale entrepreneurial migrants and South Africans. The bill requires all businesses, irrespective of size, to buy a business licence from their local municipality. The purpose of the bill is, inter alia, to regulate businesses, promote the development of a South African economy through a standardised framework and encourage an environment that promotes compliance, business licensing and the sustainability of businesses.⁹⁴

Some commentators do recognise the good intentions behind the bill, such as the desire to ensure transparent business practices.⁹⁵ However, the overwhelming response has been severely critical of the bill and the dti, particularly in relation to concerns that the bill will hinder the development of SMEs in an industry already subjected to high failure rates.⁹⁶ The dti’s Minister Rob Davies has emphasised that the bill’s intention is not to raise the bar of bureaucratic regulation, as its critics claim, but rather to stamp out illegal business operators and traders.⁹⁷ Nevertheless, it is difficult to see how a hawker is supposed to comply with the bill’s onerous paperwork requirements without being adversely affected.

A reading of the bill reveals its foremost goal: to control, limit and prevent economic migrants from operating spaza shops, hawking or conducting similar forms of informal trade in local municipalities. The bill is applicable to any person carrying out business in

91 Government Gazette No. 37837, 15 July 2014, Notice 561 identifies undesirable businesses as (i) importers of second-hand motor vehicles for the purpose of exporting to other markets; (ii) the exotic entertainment industry; and (iii) the security industry.

92 Immigration Act (as amended), *op. cit.*, Section 14(1)(b).

93 Interview with DHA official, *op. cit.*

94 Licensing of Small Businesses Bill, sections 2(b) and 2(c).

95 Anderson A, ‘BUSA, chamber weighs in on Business Licensing Bill’, *Business Day*, 25 April 2013, <http://www.bdlive.co.za/business/2013/04/25/busa-chamber-weigh-in-on-business-licensing-bill>, accessed 9 September 2016.

96 Opinion expressed by Business Unity SA CEO Nomaxabiso Majokweni in *ibid.*

97 Ensor L, ‘Minister defends Licensing of Businesses Bill’, *Business Day*, 23 April 2013, <http://www.bdlive.co.za/business/2013/04/23/minister-defends-licensing-of-businesses-bill>, accessed 9 September 2016.

South Africa, and includes migrants within its powers (Section 3). This is reinforced by Section 6(1), which links the application for a valid business permit to the Immigration Act 2002 and the Refugee Act 1998. As a catch-all provision, Section 24 ensures that no irregular/illegal foreigner, economic migrant or ‘undesirable person’ is able to qualify for a licence – stripping economic migrants of their right to be economically self-sufficient by preventing them from being self-employed. Lastly, Section 18(1) imposes punitive measures on those who hire irregular (referred to as ‘illegal’) migrants, increasing the risks for South Africans who choose to engage in business transactions with or employ economic and irregular migrants.

Further analysis of the bill reveals that:

- Various provisions vest decision-making powers to regulate small businesses in licensing authorities and municipalities, based on their own initiatives, ‘sole discretion’ and public interest, without providing clear guidance or checks and balances (beyond those listed in schedules 4 and 5 of the Constitution) to ensure transparency.⁹⁸ Licensing authorities possess wide powers, conferred on municipalities and the SAPS, to monitor, conduct inspections and confiscate goods (sections 33 and 34). Such wide-ranging powers could also be abused, resulting in the harassment and detention of irregular migrants, with little recourse to justice for the victims.
- The bill is illogical in its application and unduly severe: failure to produce an operating licence will result in fines and/or imprisonment for a period of up to 10 years (Section 27), while there is a presumption that if, within 30 days, there has been no rejection of an application, the licensing authority is deemed to have issued a business licence (Section 8). With such a provision, how can licences be properly policed and monitored, when there will be no way of verifying whether a licence has in fact been issued or not?

It is questionable whether the bill can be implemented as binding legislation. As a signatory to the General Agreement on Trade and Services (GATS), South Africa is bound by international rules regulating trade in goods and services, including the establishment of foreign-owned and -controlled retail businesses and the goods they sell.⁹⁹ It is doubtful whether the bill’s desire to subject foreign retailers to economic needs tests will be achievable, in light of the fact that South Africa has agreed to full market access and national treatment commitments in retail services within the confines of the GATS.¹⁰⁰ Nevertheless, in tightening one of the only viable economic opportunities available to economic migrants, the South African government is creating further burdens for its own

98 Licensing of Small Businesses Bill, *op. cit.*, sections 17(1) and 22. Section 29(1) (dispute resolution) does not provide for an independent dispute resolution authority, but instead requires that the licensing authority must establish the said dispute settlement body.

99 Cronje JB, ‘Retail services and small business development in South Africa’, *tralac*, 4 February 2015, <https://www.tralac.org/discussions/article/6965-retail-services-and-small-business-development-in-south-africa.html>, accessed 7 December 2016.

100 *Ibid.*

citizens in their attempts to become economically self-sufficient, which does little to aid the current economic difficulties facing the country.

THE GREEN PAPER: A PANACEA FOR SOUTH AFRICA'S MIGRATION WOES?

The ideology behind the green paper

The decision to review and amend the current immigration policies is a result of the 1999 White Paper on Immigration's inability to capture the changing migration landscape and the country's socio-economic conditions.¹⁰¹ The green paper intends (i) to manage international migration in line with the country's [National Development Plan \(NDP\)](#), while also 'guarding sovereignty, peace and security', and (ii) to engage in a 'consensus-driven policy and legislative approach on how to manage international migration'.¹⁰² It also reflects an African-orientated immigration policy in accordance with the [AU's Agenda 2063](#), which seeks to implement visa-free travel for African citizens and the issuance of visas upon arrival at ports of entry.¹⁰³ Lastly, the green paper recognises the importance of maintaining links with the South African diaspora as a way to combat the brain drain and militate against potential lost skills and capital, and to contribute to South Africa's development.

Strengths of the green paper

The green paper proposes adopting a risk-based approach to international migration, which will include biometric verification, security screening regimes, and the creation of a National Identity System. In order to achieve this, systems and human capacities within border control units and the DHA will have to be improved; land and maritime ports of entry must be specifically designated; and one-stop border posts will be created. These measures are supposed to help address irregular migration, stem cross-border criminal activities, and facilitate trade. However, this heavy security focus must be balanced against the need to simplify the immigration regime: bona fide travellers such as academics and business people will be granted long-term multiple entry visas, which will help improve South Africa's image as a destination country for skilled individuals.

The green paper acknowledges the need to create a commission responsible for processing and protecting asylum seekers and refugees, and to develop capacity to research migration and generate reliable statistics. The creation of population registers for the SADC region will also assist in keeping track of cross-border movement, and reduce irregular migration. Lastly, policy coherence will be pursued across all relevant government agencies.

The green paper proposes adopting a risk-based approach to international migration, which will include biometric verification, security screening regimes, and the creation of a National Identity System

101 DHA, 'Towards a White Paper on International Migration in South Africa: Guidelines for Consultation', 15 June 2016.

102 DHA, 24 June 2016, *op. cit.*

103 *Ibid.*

There is also a clear desire to attract professionals and academics to the country, although insufficient detail is provided on how exactly this will be achieved.¹⁰⁴ The government intends to grant special exceptions for foreign graduates who graduate from South African universities with degrees recognised on the critical skills list. This will help combat the brain drain by retaining skills within the region. The DHA is also proposing long-term visas for professionals who enter and work in the country on a regular basis, with a desire to leverage foreigners' professional skills for economic growth. This could be achieved via:

- granting permanent residency and post-graduate visas to qualifying international students upon graduation from a South African university; and
- training and transferring skills.

The green paper recognises the need for a more sector-driven approach to the regulation of economic migrants. This reflects a change from the past approach of pure compliance, which has not been conducive to improving regional relations or regional integration.¹⁰⁵ The government also intends to continue with the special dispensation programmes for SADC nationals such as the 2009 Zimbabwe Dispensation Programme (ZDP) and the ongoing Lesotho Dispensation Programme, particularly as they provide an opportunity to regularise irregular migrants living in South Africa, better manage SADC nationals' circular migration, and further contribute to the green paper's developmental objectives.

Consequently, the DHA is working on reformatting the work visa (for example, through the creation of an interdepartmental commission that will publish lists of skills required based on national and sectoral priorities and strategies) while introducing SADC special work visas based on a quota regime (to be determined through bilateral agreements) and SADC cross-border traders' visas. Within the green paper three options are tabled for consideration:

- continuation of the current status quo, with few avenues of recourse for semi- and low-skilled SADC nationals;
- free labour mobility of SADC nationals; or
- a regime for economic migrants from the Southern African Customs Union (SACU) region, which will help to facilitate legal migration.

Unsurprisingly, all of these considerations will be weighed against ensuring that South Africans are not disadvantaged by the option of cheaper labour available from within the region. Whether this is the best approach remains arguable. For example, the South African government could also look into pursuing employment and training opportunities for its citizens abroad. Moreover, if the government is serious about addressing semi-skilled migration it should work towards increasing economic development throughout the Southern African region through regional integration, which allows sustainable

104 CDE, 'CDE Comments on the Green Paper on International Migration', September 2016, <http://www.cde.org.za/cde-comments-on-the-green-paper-on-international-migration/>, accessed 5 October 2017.

105 Interview with DHA official, *op. cit.*

economic development, improved trading and border relations, and manageable cross-border movement. Of course, progress on the regional front depends on cooperation from other SADC/SACU members – South Africa cannot bring about change all alone.

Weaknesses of the green paper

Unfortunately, the proposed changes to South Africa's refugee and asylum policies are severely regressive. The green paper calls for an encampment-like policy, which it defines as asylum seeker processing centres. The DHA states that such a system will not be for the prolonged detention of migrants or the creation of permanent camps; instead, the centres will act more as vetting and arrival centres to process migrants' legal entry into the country, protect vulnerable refugees, and identify those who could present a criminal threat to the country.¹⁰⁶ Upon asylum seekers' arrival in South Africa, a needs assessment will be undertaken and various humanitarian organisations will be stationed at the centres to provide necessary services. 'Low-risk asylum seekers may have the right to enter or leave the facility under specified conditions.'¹⁰⁷

However, the IOM and UNHCR have expressed concerns over the proposed encampment policy, as it deviates from current international norms. There are fears that the need to profile refugees prior to their entering the country will only reinforce existing xenophobic sentiments and biases. The desire to implement such a policy raises questions surrounding the extent of private sector involvement in providing services to such camps, the sustainability of the ensuing costs that the government would bear, and whether such a policy would help the government address the current backlogs in processing existing asylum-seeking requests. The idea that the encampment system would help protect vulnerable migrants while preventing suspicious or dangerous migrants from integrating into broader society is also questionable, as this would require considerable human, financial and technical resources. The green paper does not detail how these resources will be sourced and made available. It also proposes that asylum seekers not have an automatic right to work or study, as the processing centres will cater to their needs. In light of the Supreme Court of Appeal's 2004 *Watchenuka* judgement¹⁰⁸ permitting asylum workers to work and study while in South Africa, it remains to be seen whether the proposed encampment policy will withstand constitutional legitimacy tests. Lastly, no real links are made between the failures of current migration policies and their supposed impact on public safety and national security.¹⁰⁹ As such, the green paper hinges on and reinforces existing preconceptions on how migrants engage in criminal activities, and does not offer real data/statistics to back up its claims.

The green paper suggests that residency and naturalisation will be determined on strategic goals to build South Africa – another regression from current policies that provide automatic permanent residency subsequent to the stipulated conditions being

There are fears that the need to profile refugees prior to their entering the country will only reinforce existing xenophobic sentiments and biases

106 Interview with DHA official, *op. cit.*

107 DHA, 24 June 2016, *op. cit.*

108 *Minister of Home Affairs v Watchenuka and Another* 2004 (4) SA 326 (SCA).

109 CDE, *op. cit.*

The proposal to introduce induction or orientation programmes is something often seen in certain European countries – an indication that South Africa is looking to set higher qualifying thresholds that mirror a European approach to citizenship and permanent residency requirements

met.¹¹⁰ This means that permanent residencies will be awarded on ‘exceptional proposals’ alone.¹¹¹ What determines exceptional proposals and strategic considerations for the nation building required in South Africa remains an open-ended question, and the criteria for selecting such individuals are not detailed in the green paper. Such an unqualified requirement could give rise to further xenophobic sentiments, or could be used by the government to offer permanent residency to highly skilled individuals only, instead of allowing qualifying candidates to apply for permanent residency regardless of the type of visa in their possession.¹¹²

This approach also does little to address redistributive justice concerns or internal migration trends and could simply perpetuate certain apartheid regime tendencies, owing to the constant differentiation between ‘us’ and ‘them’.¹¹³ For example, refugees would no longer qualify to apply for permanent residencies based on the number of years they have spent in the country; instead, this would be determined on the basis of meeting skills and investment requirements. This links with the easier conditions that will be implemented for those with skilled visas to obtain permanent residency and for foreign graduates, who will be encouraged to remain in South Africa and seek employment.

The proposal to introduce induction or orientation programmes is something often seen in certain European countries – an indication that South Africa is looking to set higher qualifying thresholds that mirror a European approach to citizenship and permanent residency requirements. However, whether this proposed change would be successful remains questionable. South Africa is extremely non-homogenous with people from various religious, cultural, linguistic and racial backgrounds. Across Europe, assimilationist strategies to incorporate foreigners into local societies have experienced only mixed results, and it is likely that the proposed changes in the green paper will face significant difficulties in terms of implementation, particularly in light of South Africa’s own diverse population.

According to data from 2011–2013, China accounted for the highest number of applications for work-related visas, followed by Zimbabwe, India, Pakistan and Nigeria.¹¹⁴ Family-related visas and permanent residency visas are also clustered along these ethnic lines, suggesting that South Africa is attracting migrants from a very specific pool of foreigners. However, despite providing these statistics, the green paper erroneously suggests that immigrants of European and Western origins have benefitted the most from post-apartheid policy frameworks.¹¹⁵ The green paper also suggests that permanent residencies and citizenships are currently being granted to international migrants with

110 Cronje JB, ‘South Africa’s new draft policy on international migration,’ tralac, 6 July 2016, <https://www.tralac.org/discussions/article/10037-south-africa-s-new-draft-policy-on-international-migration.html>, accessed 15 July 2016.

111 *Business Day Live*, ‘Balancing the migration flow’, Editorial, 4 July 2016, <http://www.businesslive.co.za/bd/>, accessed 15 July 2016.

112 Cronje JB, 2016, *op. cit.*

113 Interview with Lawyers for Human Rights, Johannesburg, 3 October 2016.

114 DHA, 24 June 2016, *op. cit.*

115 CDE, *op. cit.*

relatively low levels of skill and capital – presumably a reference to the Zimbabweans, Chinese, Pakistanis and Indians, although there is little proof to substantiate this statement. At the same time, the green paper does not account for the high levels of entrepreneurial experience or qualifications that might be found in this group.¹¹⁶ Nevertheless, the apparent presumption that this group consists of predominantly unskilled migrants helps to explain why the document now proposes to select candidates for permanent residency based on ‘exceptional proposals’ and stipulated conditions being met. The green paper thus reflects a desire by the government to strictly regulate the entrance of migrants into South Africa based on their skill levels and ability to contribute to the formal economy. This raises the question as to whether non-African skilled immigrants will be welcomed, and whether Asian immigrants, whose numbers have grown in recent years, will continue to find South Africa a welcoming environment.

While the green paper is not without its flaws, it nevertheless does reflect the positive headway made in addressing the stifling and administratively bureaucratic immigration policies currently in place. However, in light of conflicting political pressures, the need to cater for unemployed South Africans and the general fear of foreigners, it remains to be seen how much of the green paper’s recommendations will be legislated. There are some noble intentions geared towards making the country more investor and business friendly, as well as efforts to recruit highly skilled economic migrants. Yet the green paper simultaneously reflects the potential to burden what could be streamlined and simplified policies with onerous requirements and qualifications at every step of the way. Ultimately, the potential changes taken forward from the green paper into the ensuing White Paper on International Migration will speak volumes about how the government balances the demands of its electorate with the need to tackle the regulatory challenges in South Africa’s immigration policy regime.

POLICY RECOMMENDATIONS AND ROOM FOR EU-SA ENGAGEMENT

ROOM FOR ENGAGEMENT BETWEEN EU MEMBER STATES AND SOUTH AFRICA ON ISSUES OF ECONOMIC MIGRATION

- Overall, South Africa’s changing migration regime shows mixed results, and it appears that some EU and South African policies are increasingly aligning, to the detriment of irregular migrants. While positive steps are being taken to attract skilled labourers, academics and other professionals to the country, the proposed new asylum policies are regressive compared to the current progressive laws.
- Although a streamlined skilled work visa is a good idea, South Africa needs to further refine its critical skills visa. One way to do this would be to ensure that skilled professionals are recruited on a market-driven basis and employers are not solely reliant on a fixed list of government-deemed necessary skills that does not account for the changing needs of the economy. In this way, South Africa could cooperate with

The green paper reflects a desire by the government to strictly regulate the entrance of migrants into South Africa based on their skill levels and ability to contribute to the formal economy. This raises the question as to whether non-African skilled immigrants will be welcomed, and whether Asian immigrants, whose numbers have grown in recent years, will continue to find South Africa a welcoming environment

116 *Ibid.*

select EU members facing similar problems of youth unemployment and untrained citizens to engage in lesson sharing and problem solving.

- Long-term financial and technical investment in comprehensive and progressive migration policies is essential for both the EU and South Africa. This involves implementing progressive initiatives that strike a positive balance between addressing root causes of migration and catering to national security issues. Both parties should work on implementing social programmes aimed at helping their citizens engage with, understand and welcome migrants into their communities.
- South Africa participates in the Migration Dialogue for Southern Africa,¹¹⁷ which provides an opportunity for continuous engagement with all SADC government officials in working towards a rights-based agenda on migration and its accompanying challenges. The EU could look at engaging in similarly structured discussions between sending countries and its member states in order to find amicable and mutually beneficial solutions for its own migratory challenges. There is also potential for migration dialogues and strategising between the two parties within the EU–South Africa Dialogue Facility.
- It is necessary to collaborate on efforts that address holistic developmental concerns on the continent, and within the Southern African region. There should be long-term engagement between the EU and the AU that addresses development-focused issues in all African RECs, and this should not only be limited to the Sahel region. Currently, EU initiatives are criticised for being focused on countries that only directly affect its national security concerns, and penalising ‘non-cooperation’ with the EU will do little to foster good relations between EU member states and their African counterparts. Instead, this will simply reinforce perceptions of the EU’s colonial legacy on the continent and increase mistrust between the EU and African governments.

POLICY RECOMMENDATIONS FOR AN IMPROVED MIGRATION FRAMEWORK IN SOUTH AFRICA

- The main challenge is to implement an immigration system that streamlines processes and creates enabling conditions for the movement of people. This would involve implementing immigration, labour and security laws that are aligned. It would also involve creating accurate population registers, updating the list of required skills to be broader and more comprehensive than only critical skills, and allowing the market to play a role in deciding what skills are needed in South Africa.
- The green paper does not sufficiently detail how a change of attitude to migrants and migration policy will be effected among government officials, who tend to perpetuate existing stereotypes about migrants. Changing their viewpoint is essential if economic migration is to be seen as a force for good rather than a burden, as it is currently viewed.

117 The Migration Dialogue for Southern Africa (MIDSA) is a regional consultative process on migration that is a non-binding, inter-state forum for discussions on issues surrounding migration and matters of mutual interest. Although migrants’ rights are not an explicit topic for discussion within MIDSA, the issue of migrants’ rights has informed consultations, and migrants’ rights have featured as part of MIDSA dialogues. See Dodson B & J Crush, *op. cit.*

- South Africa should look to engage beyond technocrats and the elite. If managing economic migration is to be utilised for the country's benefit, stakeholder engagement needs to go beyond technocrats and CSOs that are already aware of the difficulties facing the country's economy.¹¹⁸ There is a real need to engage the communities where semi-skilled migrants reside; to inform them of the benefits that could flow from their engagement and involvement with economic migrants as a host community. This can be done through vocational training, workshops and projects that encourage host communities to collaborate and work with migrants. These measures will help dispel existing negative connotations with migrants and prove that economic benefits can flow from such collaborative efforts. In order to implement such programmes, the government must create an enabling environment for economic migrants in South Africa, and collaborate with the private sector to make such initiatives financially viable and available on a long-term basis.
- Given the politicised nature of government jobs, it is unlikely that the public sector will reap the benefits of an improved approach to recruiting skilled migrants. There is thus an urgent need for the government to implement Section 195 of the Constitution to improve public administration and to explore how the public sector can be supplemented with skilled migrants, particularly in the education and public health spheres.¹¹⁹
- Although dispensation programmes have helped regularise irregular SADC nationals present in the country, these programmes are still an imperfect long-term solution and their effectiveness remains to be seen. The DHA is in the process of negotiating similar dispensation programmes with other countries in the SADC region.¹²⁰ Despite its successes, one of the challenges experienced in implementing the ZDP was regularising illegal migrants, which led to distrust of the government's intentions and consequently insufficient levels of communication between the government and migrant communities.¹²¹ The ZDP initiative was targeted at employed Zimbabweans already in the country.¹²² It appears that there was little consultation between the DHA and the business sector in the creation and implementation of the ZDP, which did not address the inefficient processing that required applicants to queue on numerous occasions, and it failed to cultivate the trust of the business community/employers owing to its hasty implementation.¹²³ Flaws in past dispensation programmes such as online availability only, costly procedures, and the requirement that applicants remain in their current job¹²⁴ will have to be addressed if the government wishes to effectively utilise these programmes to tackle irregular migration. Dispensation programmes are only a short-term solution, while a SADC-based work visa/circular migration visa is the ideal legal and long-term solution.

118 CDE, *op. cit.*

119 *Ibid.*

120 *Ibid.*

121 Interview with DHA official, *op. cit.*

122 Amit R, *op. cit.*

123 *Ibid.*

124 Interview with ACMS researcher, *op. cit.*

- Removing economic migrants' entrepreneurial avenues only increases the burden on existing social services to ensure that these communities are catered for. Based on specific criteria, Canada, Chile, Ireland, Singapore and the UK have all implemented policies that make it easier for immigrant entrepreneurs to start businesses.¹²⁵ This is something that the government should encourage instead of stifle, as it intends to do with the Licensing of Small Businesses Bill. Entrepreneurial economic migrants who are self-sufficient can be incorporated into the tax regime, contribute to social expenditure and make vital contributions to national development, which are all end-goals in South Africa's NDP.
- Improving current mechanisms for recruiting skilled workers is essential. There is also a need to balance the country's NDP goals (broad-based black economic empowerment initiatives and requirements) with creating a favourable climate that encourages both economic migrants and investors. Providing institutions that train low-skilled South Africans is the government's responsibility, not a burden to be borne by investors and skilled migrants, as suggested in the green paper. Instead, forcing investors to contribute to training schemes could act as a huge deterrent to investing in South Africa.
- Similarly, there is concern that the government will fall into the trap of stipulating multiple qualifying conditions that will deter skilled migrants from entering the country.¹²⁶ In reforming the current migration policy, the government should first create favourable conditions that encourage economic migration, across a broad range of verifiable and strong skills. South Africa is a country deeply in need of skills across a wide spectrum (not only 'critical' skills) and has limited state capacity.¹²⁷ It is also not positioned like some countries (eg, Australia and Canada) to arbitrarily limit the number of skilled migrants based on artificial needs that are driven by politics rather than the economy and labour market.
- The need to drive regional integration and implement circular and/or sectoral visas has already been discussed. However, solutions to regional issues could also start at a local level. Municipalities have become involved in finding solutions, which is a positive development. For example, some cities have a migration health desk, and organisations such as the South African Local Government Association are trying to re-think sectoral policies to enable migrants' access to social benefits within their local municipalities.¹²⁸ If successful pilot studies could be implemented domestically, it would afford national governments throughout the region the opportunity to pursue similar policies, which could ultimately offer SADC nationals limited medical and social benefits in host countries while providing them with a SADC-wide identity card. Bottom-up initiatives are extremely useful as pilot case initiatives on how to better integrate migrants into host communities.

125 CDE, *op. cit.*

126 CDE, *op. cit.* Qualifying criteria listed in the green paper include work experience, amount of money to invest in the country, type of business to invest in, and willingness to work in sectors with high-skill needs.

127 *Ibid.*

128 Interview with ACMS researcher, *op. cit.*

SAIIA'S FUNDING PROFILE

SAIIA raises funds from governments, charitable foundations, companies and individual donors. Our work is currently being funded by, among others, the Bradlow Foundation, the UK's Department for International Development, the Konrad Adenauer Foundation, the Royal Norwegian Ministry of Foreign Affairs, the Swedish International Development Cooperation Agency, the World Bank, the Swiss Agency for Development and Cooperation, the Open Society Foundations, the Organisation for Economic Co-operation and Development, Oxfam South Africa and the Centre for International Governance and Innovation. SAIIA's corporate membership is drawn from the South African private sector and international businesses with an interest in Africa. In addition, SAIIA has a substantial number of international diplomatic and mainly South African institutional members.



Jan Smuts House, East Campus, University of the Witwatersrand
PO Box 31596, Braamfontein 2017, Johannesburg, South Africa
Tel +27 (0)11 339-2021 • Fax +27 (0)11 339-2154
www.saiia.org.za • info@saiia.org.za