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THE RIGHT OF ACCESS TO HEALTH FOR ECONOMIC MIGRANTS IN TSHWANE

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1.0 Chapter One

1.1 Introduction and research problem

The right of access to health is a fundamental necessity for every person's wellbeing, the community and environment they reside in, regardless of nationality and citizenship status. In South Africa, Section 27(3) of the 1996 Constitution of South Africa states that 'no one may be refused emergency medical treatment'. However, there is a growing recurrence of xenophobic attacks against foreigners in the City of Tshwane's public health establishments[1]. Resident foreign nationals that include economic migrants, refugees, asylum seekers and illegal immigrants from mostly the Southern African Development Community (SADC) region are refused right of access to medical treatment by public and private health personnel, practitioners, and health establishments. This is against the backdrop that the City of Tshwane, formerly Pretoria, is regarded as the most cosmopolitan capital city of South Africa[2]. A determination that is bound by both the Constitution of South Africa and international human rights treatises.

The existing health and immigration legislative framework in South Africa provides little assurance or guarantee for economic migrants to have quality right of access to health in public health establishments. There is unresolved Constitutional interpretation discourse on the necessity for civil and political rights to guarantee socio-economic rights entitlements to everyone, including impermanent residents. While the National Health Insurance ensures that citizens and long-term resident foreign nationals have an equal right of access to health services without due regard of a person's socio-economic status or financial suitability[3]. Public health practitioners continue to exercise discretionary restrictions that set prohibitive requirements to deny patients of foreign nationality that they must be in possession of a valid legal status before they can access medical treatment. Inadvertently, the spate of xenophobic violence against resident foreign nationals has consequentially stigmatised foreign nationals to involuntarily avoid any municipal clinics and government-run public hospitals to access emergency medical treatment and care altogether[4]. This denial of medical treatment to resident non-nationals in South Africa is unconstitutional, a direct

[1] L Landau et.al (2012) 'South Africa Municipalities and Mobility: Planning for the Transient and the Indigent' Policy Research Paper to Limpopo government, *University of the Witwatersrand* 6

[2] The City of Tshwane Integrated Development Plan for 2016/2021 pg. 48, 65, 184, 200

[3] www.health.gov.za (accessed 24 January 2018)

[4] J Crush and G Tawodzera (2014) Medical xenophobia and Zimbabwean migrant access to public health services in South Africa Journal of Ethnic and Migration Studies 40(4) 665-666.

contradiction to Section 27(3) of the Constitution which inviolably states that 'no one may be refused emergency medical treatment'.

1.2 Research Questions

A systemic subjective refusal to treat economic migrant patients living in South Africa provokes an urgent inquiry on the reasons and the consequences of such actions by the public, institutions, and government. The main research questions that guide this study are: (*a*) What is the extent of the meaning of Arendt's 'the right to have rights' as the only meaningful political solution for all migrants in South Africa? (*b*) How is the normative nature of Section 27(3) the right to emergency medical treatment interpreted in South Africa and how is it aligned with the global and regional approaches that protect refugee and migrant's rights? (*c*) To what extent does the inadequate access to Section 27(3) affect migrants in the City of Tshwane?

1.3 Background

International migration has been burgeoning steadily since the turn of the twenty-first century worldwide. Over 200 million economic migrants, refugees and stateless persons are estimated to be living outside of their countries of origin[5]. Migration to these countries has become a survival strategy, more than a choice and opportunity. In host countries, economic migrants are treated as sub-human beings and vagabonds, constantly subjected to xenophobic attacks and a less socio-economic status - one that is devoid of adequate health and wellbeing of a migrant child, woman, youth, or disabled person[6]. Thus, government's lack of action to alleviate injury and loss of human life of foreign nationals not only endangers life but also disregards the protection of public health care of its citizens[7].

South Africa has adopted a progressive 1996 Constitution to address all human rights injustices. The practice of excluding resident foreign nationals from accessing public health care services continues to denigrate the quality of human life of many black African economic migrants, and refugees. Since the earliest of times, in the mining activities of colonial South Africa, poor access to quality health care, an underdeveloped public health care system and untimely medical

[5] www.umigration.org (accessed 24 January 2018)
[6] http://www.un.org/en/durbanreview2009/story33.shtml (Accessed 20 April 2016)
[7] UN Resolution 62/220, Agenda item 68 (b) A/RES/62/220, para 48

treatment was the major contributor of high mortality rates amongst migrant labourers[8]. Many labourers were buried in mass graves surrounding gold and diamond fields, communal residences, and in former mine hospitals.[9].

The City of Tshwane is a category 'A' metropolitan municipality under the local government Municipal Structures Act 117 of 1998 read with section 155(1) of the Constitution of South Africa[10]. It enjoys more government funding compared to other small category B and C municipalities. However it is one of the major cities plagued by a recurrence in xenophobic attacks and community vigilantism aimed at foreign nationals. No recorded conflict resolution has been reached yet and the conflict is premised on the competition for better socio-economic status between citizens and non-citizens[11]. The conflict is manifest in the unprofessional conduct of health personnel in the City of Tshwane's municipal clinics and public hospitals that refuse to give adequate medical treatment to seriously ill patients and are left unattended in the queue for an indefinite period. Those seeking continued medical treatment are referred to non-governmental organisations for the provision of medication.

However, the main obstacles preventing a shift from idealist to realist human rights implementation and access mechanisms in South Africa are the necessity of a citizenship status[12], and national sovereignty[13]. The 1996 Constitution prescribes the objects of local government system to promote a safe and healthy environment through municipalities guile to strive within their financial and administrative capacity to achieve this objective[14].

1.4 Theoretical Framework and Methodology

The challenges of refugees and migrants access to human rights entitlements enshrined under the international law system has troubled many international relations, political philosophers, theorists

[8] H Coovadia et.al 'The health and health system of South Africa: historical roots of current public health challenges' (2009) 374(9692) *The lancet* 825
[9] Van der Merwe A.E *et.al* 'The history and health of a nineteenth-century migrant mine-worker population from Kimberley, South Africa' 2010 65(192) *The South African Archaeological Bulletin*, pp.190.
[10] www.tshwane.go.za (accessed 24 January 2018)
[11] (n 8 above) 825, 828
[12] (n 1 above) 6, 9
[13] (n 4 above)
[14] The 1996 Constitution of South Africa (as amended) Sec 152(1)(2)

and law scholars within social sciences on how to reconcile its contradictions between citizenship and sovereignty in liberal democratic nation-states. Hannah Arendt arguably appeals to this scholarship. The never-ending calamity of exclusion of refugees and stateless persons compelled her to formulate a paradoxically political-legal theory advocating for the 'right to have rights'[15]. Thus the rhe right to have rights is not a means to an end or solution but It demonstrates that sovereignty and citizenship are insignificant in matters of statelessness. Hence the importance of an ascribed 'legal personality' to every person can help augment human dignity through equal access to the most basic human rights entitlements between citizens and stateless persons.

Seyla Benhabib is one of the prominent contemporary political philosophy, international relations and law scholars who has engaged with Arendt's right to have rights discourse among others in extending its relevance far beyond the boundaries of Europe into Africa. However, Human rights have become law in their realism agenda[16]. According to Baldwin, interdisciplinary social science approaches provide for extra-legal perspectives that offer a better basis for inquiry in to the challenges of universal access to health care between nationals and non-nationals[17].

Liberal democracies have within them the capacity to provide for inclusive access to socio-economic rights entitlements to both citizens and non-citizens[18]. However, In South Africa, the role legal practitioners to persistently engage social sciences as general facts in court debates only has proved futile for immigrants. Judges inconspicuously neglect the valuable contribution of social sciences as empirical facts (information). While the treatment of social sciences information as factual generalisations discards their validity as an established source of knowledge. However, the *Khosa v Minister of Social Development* judgment, illustrated that the role of empirical evidence (proof) generated during the court case proceedings is more significant. Hence, Burns

[15] Arendt H 'The Decline of the Nation-State and the end of the Rights of Man' in Arendt H *The Origins of Totalitarianism* (1951)
[16] Benhabib S 'The right to have rights: Hannah Arendt on the contradictions of the nation-state' in S Benhabib *The rights of others: Aliens, residents, and citizens* 2004

[17] Baldwin J and Davis G (2003), *Empirical Research in Law* 891
[18] P Cesarini & S Hertel 'Interdisciplinary Approaches to Human Rights Scholarship in Latin America' (2005) 37(04) *Journal of Latin American Studies* 809

concedes that, 'empirical facts are an established part of the judicial reasoning process that allow for continuous evaluation and improvement of the effectiveness of law in society'[19].

[19] K Burns & T Hutchinson 'The impact of 'empirical facts' on legal scholarship and legal research training' (2009) 43(2) *The Law Teacher* 29-31

2.0 Chapter Two

Since time immemorial, the socio-economic condition of economic migrants and stateless persons has been one of innumerable strive to access quality health care and wellbeing. Hannah Arendt in her *Origins of Totalitarianism* thesis demystified this perennial problem faced by economic migrants by presenting a political philosophy conjecture of 'the right to have rights'. Arendt asserts that rights in their quintessential form have a meaning only if an individual, regardless of his/her nationality is part of a political community or is resident in a country to have an inviolable right of access, protection and enjoyment of human rights[20].

The 1993 interim Constitution of South Africa once applied the 'model of denizenship' that disaggregated citizenship in to 'citizenship by residence'. Previously unrecognised black citizens became full citizens both by origin and residence. Whether the 'model of denizenship' that is exclusively a civil and political right can be used once more under the current 1996 Constitution to advance equal right of access to health services between nationals and temporary resident foreign nationals is uncertain. Hence this chapter is a discussion on what is the extent of the meaning of 'the right to have rights' as the only meaningful political solution for all migrants in South Africa?

2.1 The 'Right to have Rights'

> We became aware of the existence of the right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain rights because of the new global political situation.[21].

The lamentation of Arendt's right to have rights over the nature of the newly established constitutional liberal democratic nation-states is a quandary of the inability to provide for a substantive legal protection framework for stateless persons within sovereign borders. Nation-states often transfer international migration governance and administration to law enforcement agencies to prevent long-term resident stateless persons from claiming the same human rights that

[20] (n 15 above) 295
[21] (n 15 above) 296 new correct

are reserved for citizens only[22]. Regardless of social interrelations, economic participation and geopolitical interconnectedness[23], the stateless person appears to be a nuisance provocation and unwanted social change instrument. This is a direct contradiction of the nation-state existence that is established on the principle of equality before the law[24], and assumes that stateless person's 'opinions are insignificant and their actions are ineffective' in the discourse of universal human rights entitlements[25].

International jurists and lawyers alike have, since time past, continued to align their inferences of international law and the Bill of Rights, that only citizens have a sacrosanct privilege to human rights entitlements but economic migrants do not. In other words, international jurists understand that the purity of law is devoid of any substantive knowledge about the disaggregated meaning of citizenship in a nation-state. More so, international jurists fail to ascertain how a liberal constitution can be effective in applying a welfare state that guarantees social security for everyone and ensures all universal human rights entitlements[26]. As a result, human rights entitlements have remained an Achilles heel, a contest between citizens and stateless persons[27].

Moreover, contemporary jurists assert that man is the only sovereign in matters of law, and the people are only sovereign in matters of government[28]. The difference in sovereign responsibility is no longer applicable or able to insure human rights for all[29]. However, the right to have rights invokes a lawful habitable bounded political organisation in which everyone who lives in it, either permanent or impermanent must be guaranteed of their human rights[30]. The right to have rights establishes and sustains a 'human artifice' political organisation that is composed of members who are not necessarily born equal, but have become equal on the strength that they have mutually decided to guarantee themselves of equal rights[31].

[22] (n 15 above) 286-287
[23] (n 15 above) 290, 291
[24] (n 15 above) 290
[25] (n 15 above) 270, 285,
[26] (n 15 above) 292, 295, 298,299,300
[27] (n 15 above) 293,294, 296
[28] (n 15 above) 278, 291
[29] (n 15 above) 291-292
[30] (n 15 above) 296, 298
[31] (n 15 above) 301, 302

In the book, the *Burden of Our Times*, widely known as *The Origins of Totalitarianism*, the 'right to have rights' also means to be ascribed a 'legal personality' status[32]. Every person is recognised as a 'natural person' and any object, thing or organisation has a fictitious legal personality status that of a 'juristic person' before the law[33]. But the right to have rights does not depoliticise human rights by identifying the human with mere life between citizens and non-citizens[34]. Rather, since savages do not possess any civil code knowledge apart from that which concerns to their right of access to livelihoods, the legal human lives by a civil code and he/she commands the power of speech, thought and is an inhabitant of a community[35].

That community is the people's government that holds all power to decide and is the arbiter of refuge, to ensure that the 'right to have rights' for all displaced persons is guaranteed[36]. Whether it is the provision of asylum to political refugees or economic migrants seeking better livelihoods, the principle of the 'right to asylum' is inviolably fundamental to any nation-state or city in the current international law system[37]. Since every person is a member of a community and has become constituent of the people's government and its sovereign authority. Therefore, a 'legal personality' status is a surety of national rights that can be claimed by both a legal and an illegal person, a citizen and stateless undocumented person[38].

2.2 Contemporary Interpretation of the 'Right to have Rights'

Two contemporary interpretations of Arendt's 'right to have rights' are proffered by Seyla Benhabib[39] and Wessel Le Roux's[40] conceptualisation of universal citizenship. The two proponents elucidate on the role of citizenship in universal human rights claims by both citizens and non-

[32] (n 15 above) 301
[33] GF Deiser 'Juristic Person' (1908) 57 *University of Pennsylvania Law Review* 133-138
[34] Andrew Schaap 'Enacting the right to have rights: Jacques Ranciere's critique of Hannah Arendt' (2011) 10(1) *European Journal of Political Theory* 23
[35] (n 15 above) 297
[36] (n 15 above) 291,
[37] (n 15 above) 284, 294-295
[38] (n 15 above) 300
[39] (n 16 above)
[40] W Le Roux 'Residence, representative democracy and the voting rights of migrant workers in post-apartheid South Africa and post-unification Germany (1990-2015)' (2015) 48(3) *VRÜ Verfassung und Recht in Übersee*

citizens. According to Benhabib, the right to have rights invokes a cosmopolitan homogeneity, a form of 'civic' organisation of people bound by the 'rule of law'. This organisation is a legally established political authority which gives less value to citizenship status. Benhabib observes that:

> Thus, our interest is simultaneously in those who move and those who stay put. Whether migrant or landlocked, where a person is-literally and physically-has profound effects on that person's life. One's place on the planet frames the availability of food, of basic goods and broader economic opportunities, of personal security and healthcare, of social connections with other members of one's family's well as of the possibility for ties to larger communities, and of legal recognition as a property owner, a worker, a recipient of social services, healthcare, and education, a family member, a voter, an office holder, a lawful resident, and a citizen[41].

In the book, *The Rights of Others,* Benhabib demonstrates that the plight of vulnerable immigrant communities is the same everywhere even in contemporary democracies. But the panacea to their perenial condition is the the right to have rights, which accords a universal status of personhood or dignity to every human being apart from a citizenship status[42]. Like Arendt, it does not mean that migrants and refugees have never possessed any rights, but their political and socio-economic migration to other countries has caused them to lose all rights which they previously held under their sovereign government or country of origin[43]. Therefore the right to have rights rises out of necessity for a 'civic' rather than a mere 'racial, cultural and linguistically' established polity or government[44]. To sustain coexistence amongst peoples and different communities or 'civic equality,' in the access of universal human rights or national rights[45].

Benhabib notes that the only credible agency in which this civic polity can survive, is an establishment of a 'juridical space, a domain of rights relations' and not of 'kindness', that citizens together with state and non-state actors, public and private institutions are all able to engage with

[41] S Benhabib and J Resnik *Migrations and mobilities: Citizenship, borders, and gender* (2009) 1
[42] (n 16 above)68
[43] (n 16 above) 67
[44] (n 16 above) 60
[45] (n 16 above) 61-63

foreign nationals within their territory fairly[46]. However the juridical space has always suffered from discretionary contestation. Judges fail to include social science material or empirical facts within their judgments consistently[47]. Rather judges should acquire more knowledge of the social sciences to enable them to fulfil their policy-making function of using law as a means to the ends of serving society wisely and to its good[48].

The right to have rights cannot be confined to be conceptual or a mere 'ought of law to comply with the dictates of international law obligations and norms always[49]. But it is responsibility to safeguard, protect and fulfill the indivisible universal human rights claims to every citizen and non-citizen[50]. Hence in the foreclosure debate, Benhabib underpins the right to have rights as cosmopolitanism, a parlance for 'foreign co-citizens', who are no longer guests, but resident aliens[51].

A South African Constitutional law and international law expert, Le Roux defines a 'civic political franchise' to be relative to the 'model of denizenship' or citizenship by residence that was once used in South Africa under the 1993 interim Constitution. The model of denizenship is a legal status that gives equal entitlement to human rights claims, protection, enjoyment and access between nationals and temporary resident non-nationals or economic migrants.

> According to the denizenship model, the problem with grand apartheid was the sharp distinction between foreign residents and citizens. The solution to apartheid required the complete disaggregation of citizenship rights, that is, the recognition of political rights as constitutive of the dignity of all residents as participatory subjects of law, as opposed to objects of state power[52].

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[46] Benhabib S 'The philosophical Foundations of Cosmopolitan Norms' in S Benhabib *Another cosmopolitanism* (2008) 22,24
[47] (n 19 above) 2
[48] Kiromba Twinomugisha, B 'Beyond Juridical Approaches: What Role can the Gender Perspective Play in Interrogating the Right to Health in Africa' in F Viljoen (eds) Beyond the Law: Multidisciplinary Perspectives on Human Rights (2012) 51
[49] (n 46 above) 24,25,29,30
[50] (n 16 above) 67
[51] (n 46 above) 36
[52] (n 40 above) 267

Apartheid was a government sponsored social policy of separating citizens from non-citizens, 'white' immigrants from 'black' seasonal workers. Under Apartheid, universal human rights suffrage was racially inferred. White South Africa had a sacrosanct right of access to all rights entitlements, but the majority of the black citizenry did not enjoy the same rights. Apartheid supposed a willful separation was necessary, because universalism of human rights claims could be construed with a claim to political rights that are sacrosanct to citizens[53]. Le Roux asserts the dismantling of Apartheid citizenship status dogma by a disaggregated citizenship status allowed for the temporary availability of rights to all resident persons and the exercise of voting rights in 1994[54]. Between white South African emigrants who were unable to access their rights abroad, the reincorporated black citizenry and the inclusion of resident seasonal migrants from the SADC region, were all qualified to participate as full citizens through the model of denizenship under the 1994 interim Constitution of South Africa. Hence, Benhabib underscores the significance of the dichotomy between universal human rights and sovereignty claims is the existential root paradox at the heart of the territorially bounded state-centric international order[55].

Although Apartheid did declare all black people foreigners and all white people natives, the 'human' is now declared a subject of law, wholly accountable to the new democratic Constitution of South Africa. Every resident person is in *de jure* a legal person whether white or black who can lay claim to a right or entitlement that is enshrined in the Constitution of South Africa[56]. Though the nature of sovereignty accentuates that political equality will always protect some but not all[57]. Nevertheless, the importance given to state sovereignty is able to create a 'world state' that is unstable, xenophobic and discriminatory[58].

The 'Janus face' paradox of the right to have rights is the legal bureaucracy between international law and national law, where the citizenship status of a person still determines the non-

[53] (n 40 above) 268
[54] (n 40 above) 266
[55] (n 16 above) 69
[56] (n 40 above) 266-267, 270, 272; see also Jeremy Sarkin 'The drafting of South Africa's Final Constitution from a Human Rights Perspective' (1999) 47(1) *The American Journal of Comparative Law* 80
[57] (n 16 above) 66
[58] (n 46 above) 26

permissibility and permissibility of human rights entitlements. Citizenship itself has constantly devalued denizenship because rights at any given moment can never be adequately distributed or accessed. Albeit, historically, political rights were considered an absolute necessity in Rome for all her political refugees but nowadays, whether a person is a political, economic, or social refugee, to all of them, human rights in total are indivisible in their necessity and access. Thus, countries that are skeptical of those institutions tasked to ensure their realisation, are not willing fully to accept denizens or immigrants, because no one knows the full extent or impact of denizenship model on how it might alter their social, political, and economic status[59].

Therefore, without sustenance of Arendt's 'principle of asylum' on foreign co-citizenship' or the 'model of denizenship' the nation-states will always be susceptible to political degeneracy. The world's displaced persons, stateless, economic migrants, refugees and asylum-seekers documented or undocumented are in need of protection under international law[60]. To allow for the boundary of a country's citizenship status to be constantly renegotiated[61].

2.3 Implications of the 'Right to have Rights' in South Africa

The implication or meaning of 'the right to have rights' in South Africa since the start of the burgeoning mass migration influx of economic migrants from Zimbabwe to South Africa. Economic migrants in South Africa suffer from arbitrary selective application and interpretation of international human rights law protections between citizens and no-citizens. The explicit disregard of the Constitutional provisions that uphold human dignity and equal access to social welfare, health services and wellbeing are of major concern. Medical xenophobic attacks against foreign nationals seeking medical treatment continue to exist in public health establishments. Health personnel and practitioners in both the public and private sector deny and prevent economic migrant patients the right of access to adequate and quality medical treatment. This hopeless situation for economic migrants and refugees seeking the right of access to human rights remains deeply entrenched[62]. Hence, Arendt goes further to say that:

[59] (n 40 above) 274,277,278
[60] (n 46 above) 36
[61] (n 46 above) 35; (n 39 above) 270-273
[62] (n 15 above) 269

> …because *more than* residence *and work, is the hierarchy of values* which pertain in civilised countries is reversed in [their] case…regardless of treatment, independent of liberties or oppression, justice or injustice, *they have lost all those parts of human existence which are the result of our common labour, the outcome of human artifice*[63].[*emphasis added*]

The right to have rights is a clear paradox of why Arendt remained reservedly optimistic about universal human rights and equal legal protection for both citizens and stateless persons within nation-states. South Africa's Constitutional contestations both within and outside the judiciary institution do suffer from the same paradox of the right to have rights. International human rights law professor in Africa, Viljoen asserts that the burgeoning international mass migration influx to South Africa since 1994 has left government institutions and organs adamantly hesitant to 'use international law as a guide to interpretation and a substantive legal remedy'[64].

Dugard presents a seemingly unresolvable constitutional debate between the 1993 Constitution and the incumbent 1996 Constitution on whether civil and political rights are fundamentally necessary to guarantee other constitutional rights such as socio-economic rights. Dugard, Constitutional lawyer underscores the inherent operational difficulties of international law treaties under the South Africa's plural legal system that applies a dualist and a monist legal system concurrently[65]. A *dualist* legal system produces *transformation* through legislative amendments while *monism* produces a *hierarchy of norms*[66]. But a dualist system is matter of *Political Will*, while monism is a concern of *judiciary* contestation. Hence to determine on which rule or law is better than the other can only result in a clash of interpretation between international law and national law[67]. The judiciary institution thus suffers from decision-making incapacity[68].

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[63] (n 15 above) 286, 300
[64] Viljoen F 'An introduction to International Human Rights Law' in F Viljoen *International Human Rights Law in Africa* (2012) 19-22
[65] J Dugard 'International law and the South African Constitution' (1997) 77(92) *European Journal of International Law* 79,81
[66] (n 64 above)
[67] (n 46 above) 27-29
[68] (n 46 above) 15,23,24,27,31

Consequently, the pluralist legal system has altered the application of Constitutional law in South Africa from being *explicit* to *implicit* in outlining all human rights obligations and duties for 'everyone'. Though no constitution can ever fully resolve the separation of human rights entitlements between citizens and non-citizens[69]. The need to enhance the impact or 'internationalisation' of international human rights law at the societal, legal, economic, and political levels is paramount[70]. Hence, the claims of universal human rights access made by resident stateless persons under South African law must constantly be renegotiated according to the ever changing dynamics of the South African judicial system practice[71].

Dugard notes that the lack of self-execution principle of international law treaty provisions on civil and political rights has dampened the progressive development of social and economic rights and the Constitutional Court's adjudication processes[72]. *Firstly*, the judicial institution still holds less power than do other government institutions, to decide on international treaty ratification, accession and domestication because of the institution's alleged incompetency to scrutinize and present conclusions to parliament for approval[73]. Brand has argued that the differential allocation of responsibility amongst government organs and institutions is the reason why the Constitutional Court of South Africa (CCSA) has had a prolonged struggle with socioeconomic rights adjudication,[74]

The CCSA has been engaged less in legal cases that fall within its consideration[75]. A clear indication that ehe CCSA suffers from institutional limitation, that is, the inability to pronounce judgments and ensure compliance and implementation by all government agencies involved[76]. In the *Khosa v Minister of Social Development* judgment, the CCSA pointed out that the lack of state resources was not in any way a sufficient decision that could be used to limit the extent on how

[69] (n 40 above) 268-269
[70] (n 64 above) 20,21,25
[71] (n 46 above) 19-20,24,30,35
[72] (n 65 above) *83-84*
[73] (n 65 above) 81
[74]Brand D 'The South African Constitutional Court and Livelihood Rights' in F Viljoen (ed) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 414
[75] JC Mubangizi 'The Constitutional Protection of Socio-Economic Rights in selected African Countries: A comparative Evaluation' (2006) 2(1) *African Journal of Legal Studies* 2-8
[76] (n 74 above) 424

long-term resident non-nationals should have the right of access to health services in South Africa[77]. Such a stance by the CCSA has become a defining illustration that South African jurists are faced with a dilema on how best to resolve the socio-economic status dispossession of black people conjoined with the vulnerability of economic migrants in post-Apartheid South Africa[78].

Currently the uncertainty of the South African legal system promises less protection and security for economic migrants and refugees[79]. It is a *Janus faced* legal system with life-threatening *consequences* upon the composite population of vulnerable economic migrants living in South Africa's city's or local government[80]. Already economic migrants and refugees subsist in deplorable conditions lacking quality: health, social security, food, education, and housing services. This uncompassionate environment is described by Arendt as a sorrowful exhibit of an irreparable loss of universal 'legal personality' status in constitutional liberal democracies, which results in perpetual exclusion and violence where:

> Those forced out of their protective boundaries encountered hatred [*Xenophobia – additional emphasis*] propagated by a sordid and weird political atmosphere of a Strindbergian family quarrel…which became public affairs and debate of whether they should be incorporated or not… This hatred came from everyone in all directions, haphazardly and unpredictably in the newly established nation-states…Now everybody was against everybody else, and most of all against his closest neighbours[81].

Social science empirical facts have long illustrated how misaligned traditional legal methods can be in entrenching far reaching consequences for economic migrants. Crush has observed that there is an existence of 'medical xenophobia' violence that is used to prevent and deny the right of access to public health care services to resident foreign nationals in South Africa[82]. The metropolitan

[77] (n 74 above) 415,434
[78] Le Roux W 'Descriptive overview of the South African Constitution and Constitutional Court' in F Viljoen (ed) *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2013) 135-136
[79] See also the book *Genres of Critique: Law and Aesthetics* which elucidates on the liminal legality or the aesthetics of Law about the challenges that affect transformation of the constitution of South Africa.
[80] (n 46 above) 32
[81] (n 15 above) 267-268
[82] (n 4 above) 656-658, 660,662

cities of Tshwane- formerly Pretoria- Johannesburg, Cape Town, Durban are the hardest hit. The widespread medical xenophobia violence is propagated by health personnel or workers in the public health hospitals and clinics located mostly in black townships. Nurses refuse to administer medical treatment services to economic migrant and refugee patients, regardless of the emergency medical situation. They demand legal documents before a patient can access medical treatment. While public servants and general labour forces in government institutions, together with traditional authority and communities, have all shown disdain towards foreign nationals seeking medical treatment in public hospitals and clinics.

Coovadia contends that the historical and present public health system in South Africa has remained political[83]. Municipalities maintain that the access to universal public healthcare service delivery is only exclusive for citizens[84]. Hence they disregard any collection, processing and use of statistical information about the existence of resident economic migrants, other than what they intend to reverse or improve upon in the socio-economic status of their permanent residents or nationals[85]. Also the persistent international migration influx continues to overload local government's administrative capacity to provide for adequate medical supplies; workforce and quality public health care service delivery[86]. However, Landau asserts that South African municipalities lack an integrated municipality service delivery planning and budgeting, that is inclusive of both permanent residents and the transient non-national residents[87].

Hence, it is imperative to assume that if the right to have rights cannot be a sufficient guarantee of any right of access to health services by economic migrants, but is fundamental to the prolongation and preservation of human life[88]. Then according to Constitutional law scholar Ngwena, the right of access to health in South Africa shall mean: (1) being able to access health care that is affordable, available, and effective; (2) to prevent and control local endemic diseases, enhance immunization programs against major infectious diseases, effective treatment of common diseases and injuries,

[83] (n 8 above) 825, 828
[84] (n 1 above) 6, 9
[85] (n 15 above)
[86] (n 1 above)
[87] (n 1 above) 6,8,12-13,15
[88] (n 16 above) 67

and to provide for adequate essential medicines within primary healthcare; (3) it also means prioritizing care to women, children, and vulnerable groups[89].

In conclusion, the implications and necessity of the right to have rights in South Africa illustrates the role of social science interdisciplinary approach on legal judgments can help expedite the right of access to socio economic rights in South Africa. Despite the increase in racial and nationality tensions that have stubbornly remained a significant drawback whenever universal human rights claims, their qualification, and access, by resident foreign nationals are invoked[90]. The re-adoption of the model of denizenship is the only sensible civic responsibility needed to guarantee economic migrants in South Africa the right of access to socio-economic rights[91].

[89] C Ngwena 'The Recognition of Access to Health Care as a Human Right in South Africa: Is It Enough?' (2000) 5(1) *Health and Human Rights* 31
[90] (n 40 above) 268
[91] (n 46 above) 36

3.0 Chapter Three

The Constitutional Court of South Africa is faced with a *proviso* challenge whether all socio-economic rights provisions can be entirely applied to both nationals and resident non-nationals. The *Khosa v Social Development* judgment presents an antagonistic views between citizens rights and non-citizens rights based on national sovereignty, citizenship status privileges and the embrace of cosmopolitanism within the Judiciary institution of South Africa. Hence this chapter follows the views of J Mugkoro and J Ngcobo on the Khosa judgment. It interogates the question on How is the normative nature of Section 27(3) the right to emergency medical treatment interpreted in South Africa and how is it aligned with the global and regional approaches that protect refugee and migrant's rights?

3.1 The Khosa Case

The Khosa Case is a stark reminder of two dissenting legal views or schools of thought about the right of access to health since the adoption of a liberal 1996 Constitution of South Africa. The two judges, Mokgoro J and Ngcobo J both present different perspectives regarding the extent of the right of access to health as enshrined in Section 27(3) to temporary resident immigrants or economic migrants. On one hand, Mokgoro J's judgment, pronounced that long-term temporary resident non-nationals should not be deprived of any right of access to social security because they are susceptible to destitution and vulnerability. On the other hand, Ngcobo J maintained that it is permissibly valid for government to deny access because of financial constraints and through national legislation.

Section 27 in the Constitution of South Africa provides for the following:

> (1) Everyone has the right to have access to:
> (a) health care services, including reproductive health care;
> (b) sufficient food and water; and
> (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
> (3) No one may be refused emergency medical treatment.[92]

[92] Constitution Section 27

The Department of Social Department as the respondent put two plausible yet inadequate arguments as its defence. *Firstly*, the decision to deny and prevent access to socio-economic rights benefits towards long-term resident immigrants was not absolute because the definition of a citizen can always be extended to include a non-citizen[93]. *Secondly*, the legislation only seeks to encourage financial self-sufficiency amongst immigrants and ease the burden from the state[94]. But Khosa in his application argued that the use of a citizenship status lacked any Constitutional guarantee to social security, to equality, to human dignity, to life and to children's rights[95]. Hence, Mokgoro J emphasizes that all government departments or institutions in South Africa must be aware of the limitations in their institutional competence and independence when engaging Constitutional matters and international law treaties without involving the Constitutional Court.

According to Mokgoro J, economic migrant persons are vulnerable and indigent persons who have a Constitutional claim to the right to social security and health. The Department of Social Development as the *respondent*, represented by the minister and other senior executive management officials had inappropriately sought litigation from the High Court to determine whether economic migrants had the right of access to health in South Africa through the Immigration Act of 2002 Legislation. Rather Mokgoro J declared that the Constitutional Court has supreme competency and authority to decide on the Constitutionality and validity of the Immigration Act legislation in relation to the right of access to Section 27 socio-economic rights entitlements[96].

The respondent sought to subvert the Constitutional Court institution in pursuant of a narrow interpretation on the nexus between the international law treaties and national law. Immigration legislation was assumed to have more authority over international law. However, such a view held by the respondent did not consider the existence of a plural legal system in South Africa. The paradox of the 'hierarchy of norms' between Constitutional law and the legislative Immigration Act implied by the respondent cannot be negated. Hence, Mokgoro J applied a monist legal

[93] Khosa and Others v Minister of Social Development and Others 2004 6 BCLR 569 (CC) para. 119-122
[94] Khosa para. 121-122
[95] Khosa para. 100
[96] Khosa para. 23-24

interpretation between national law and international law, as a single legal system to allow for an explicit Constitutional entitlement of socio-economic rights to economic migrants in South Africa.

However, Ngcobo J applies a consistent dualist interpretation on the matter and deposits that, both the Constitution and the Immigration Act do not explicitly ascribe any rights and privileges to immigrants, serve only for the citizens[97]. Though the right of access to Section 27 socio-economic rights is applicable to 'everyone' because the constitutional reference to 'everyone' means what it conveys[98]. The claim of access to socio-economic rights by long-term resident immigrants is detached from the Constitution altogether. Based on that the South Africa's immigration policy is yet to recognise that immigrants too upon being admitted into the country legally can be susceptible to destitution[99]. Rather the State social security system or welfare state encourages a naturalisation policy for immigrants once they are admitted into the country[100].

More so, Ngcobo J's judgment ignores that economic migrants in *toto* are long-term temporary resident foreign nationals who have the right of access to health services, regardless of their citizenship status[101]. The two Zimbabwe Dispensation Permit and Lesotho Dispensation Permit since inception have failed to facilitate any naturalisation or citizenship acquisition. The permits are issued under Section 31 of the Immigration Act which gives a government Minister the discretionary powers to regulate and determine which Constitutional rights entitlements must be accessible or not to all 'undesirable persons' in South Africa[102]. Therefore, the dispensation permit does not substantively ascribe any entitlement to Chapter 2 Bill of Rights in the Constitution for documented or legal economic migrants. Although refugees and asylees do have full entitlement to Chapter 2 Bill of Rights in the Constitution of South Africa as provided for in the Refugees Act of 1998[103].

[97] Khosa para. 125
[98] Khosa para. 111
[99] Khosa para. 132
[100] Khosa para. 130
[101] Khosa para. 126, 131
[102] Dispensation permits are issued in terms of Section 31 of the Immigration Act – obtained fromgerson.muti@dha.gov.za
[103] Refugees Act 130 of 1998 (as amended) art. 27(b)

It is therefore uncertain as to how will South Africa align its use of dispensation permits with the ratification of the International Convention on Economic, Social and Cultural Rights (ICESCR) commitments going forward[104]. Nevertheless, Mokgoro J does not limit or restrict the scope of application and interpretation of the right of access to Section 27 socio-economic rights because the Constitutional Court has dealt with socio-economic rights cases on four previous occasions[105]. The right of access to health or medical treatment allows for the rationing of free medical treatment based on the available financial resources to ensure adequate supply and provision of medication in all public health hospitals and clinics and that everyone can obtain affordable public health services[106].

The Constitution of South Africa delegates a mandate to provide for adequate health care services through a local government system and to ensure that each municipality or city council in South Africa strives financially and administratively to promote a safe and healthy environment in their local communities[107]. The Constitution also provides for everyone to seek administrative action or institute a criminal procedure against any natural person and juristic person or institution accused of refusing to administer medication and treatment[108]. More so, the Health Act ensures that the coordination of all health care services provision is done through an inclusive public and private national health system in South Africa[109]. This includes the provincial and district level public hospitals, clinics, and private health establishments[110]. To administer the provision of free primary health care services, reproductive health and emergency medical treatment contemplated in Section 27 of the Constitution[111].

3.2 What Legal Recourse is available for Non-Citizens claim to Section 27(3)

Hence there is sufficient legal recourse leeway available for resident non-nationals to protect them from systemic medical xenophobia practices but lacks enforcement at local government and

[104] http://indicators.ohchr.org/ (accessed 07 September 2017)
[105] Khosa para. 43
[106] Government of the Republic of South Africa *v* Grootboom 2000 4 BCLR 1169; Minister of Health *v* Treatment Action Campaign 2002 10 BCLR 1075; Mazibuko *v* City of Johannesburg 2010 3 BCLR 239 (CC)
[107] Constitution Chapter 7 Section 152(1)(2)
[108] Constitution Section 8, 9(1)(3) & 33, 34
[109] National Health Act 61 0f 2003 (as amended) 2(a)(i)(ii)
[110] Health Act Chapter 5-6
[111] Health Act schedule 1 definitions; Health Act art. 4 (3)(b)

community levels. The South African Emergency Medical Services regulate inter-health facility medical treatment and during transportation of the ill or injured[112]. If 'a health care provider, health worker or health establishment refuses a person access to emergency medical treatment'[113]. Barring any reasonable circumstance or decision that may require a patient to provide documentation such as patient records or personal information before treatment[114]. A health health establishment has a duty or responsibility to ensure that such a patient gets timeous access to medical treatment or transfer the patient to another appropriate capable public health establishment[115].

The Health Act gives a responsibility to the affected patient(s) to lodge or submit a written complaint against the health personnel and health establishment for dispute resolution[116]. The Health Professions Council registrar has the mandate to resolve the dispute, refer the matter to a relevant health ombudsman for arbitration or the appropriate court under the South African judicial system[117]. Upon such admission of guilt by the offender, the Emergency Medical Services Regulations stipulate that a person or organisation which refuses a patient treatment in an emergency medical care situation or causes irreparable harm is guilty of an offence and liable to conviction or imprisonment not exceeding a period of five years, and a suspension of an operating license of the health establishment and practitioner[118].

However, the legal recourse that is available to everyone, even to economic migrant's resident in South Africa, is alone insufficient for improving the right of access to health. Economic migrants in South Africa though they form part of the local community are not effectively involved in the development, implementation, and review of the municipality's performance management system[119]. The Municipal Systems Act limits the authority of municipal council structures from

[112] National Health Act 61 of 2003 – Emergency Medical Services Regulations of 2015 Schedule 1. Definitions: (a)(b)(c)
[113] Health Act art. 5
[114] Health Act art. 6-17
[115] Health Act art. 44(1)(2)
[116] Health Act art. 18(1)(2)(3)(b); Health Act art. 46
[117] Health Professions Act 56 of 1974, Regulations relating to the conduct of inquiries into alleged unprofessional conduct under the health professions act 1974 (2009) art. 2, 3 & 4
[118] EMS Regulations art. 29(1)(c)(iii)(g)(i)(ii)
[119]Municipal Systems Act art. 42

prohibiting local community participation in the affairs of the municipality which may include the periodic implementation of the Integrated Development Plan (IDP); annual budgets and municipal services which incorporate health services contemplated in the Health Act[120]. But Municipalities lack adequate and timeous responsive interventions to address the needs of their transient local community members in accordance with the mandate given under the local government system in the Constitution of South Africa to safeguard healthy communities[121].

3.3 Other Legal Instruments

South Africa is one of five countries that define and interpret the right to health in their constitutions as emergency medical treatment[122]. However ambiguous the definition, it adheres to the International Human Rights law which incorporates the International Bill of Rights comprised of the 1948 Universal Declaration, the two 1966 Conventions and their Protocols on civil and political rights, and socio-economic rights[123]. Hence the ICSECR explicitly recognises that everyone has the right to enjoy highest attainable standard of physical and mental wellbeing through adequate treatment to prevent diseases and uphold healthy society[124].

The African Charter on Human and Peoples' Rights in article 16 provides for every individual to have the right to enjoy the best attainable state of physical and mental health[125], regardless of statelessness, citizenship, refugee, economic migrant, physical disability, gender, and socio-economic status of a person. Moreover, Resolution 141 of the African Commission urges all African States to guarantee the full scope of access to needed medicines to everyone without discrimination and to ensure physical, economic and information accessibility[126]. In addition, the Committee on Economic, Social and Cultural Rights has concluded that the core obligation of

[120]Local Government: Municipal Systems Act 32 Of 2000 (as amended 5 July 2011-date) art. 16(1)(a)(i)(iv)(v), 16(1)(c), 16(2)
[121] Municipal Systems Act art. 50(10(2); 51(a)
[122] UNHCR The Right to Health Fact Sheet No. 31 pp. 10-11
[123] UNHCR Factsheet 31 pp. 1, 5-10 & 34
[124] The 1966 International Covenant on Economic, Social and Cultural Rights art. 12
[125] African Charter art. 16(1)
[126] The African Commission on Human and Peoples' Rights Resolution 141 on Access to Health and Needed Medicines in Africa (2008) para. 1-3

States is to ensure that there is adequate accessibility to affordable healthcare through physical facilities, services, goods and information dissemination[127].

The General Comment 14 of 2000 has also made a significant observation, that the right to health does contain both freedoms and entitlements. On the one hand, the *freedom* to control one's health and body; sexual and reproductive freedom; the right to be free from torture; non-consensual medical treatment and experimentation. On the other hand, every person is *entitled* to have an equal opportunity to a system of health protection and provides the highest attainable level of health[128]. It is therefore not permissible for a State or country to discriminate anyone from having the right to access to health through immigration control or economic migrant's socioeconomic status vulnerability. Therefore, the African Committee on the Rights and Welfare of the Child judgment against the State of Kenya, declared that to deny health services to migrant children is a violation of article 14 of the African Children's Charter, because:

> The affected children had less access to health services than comparable communities who were not comprised of children of Nubian descent. There is *de facto* inequality in their access to available health care resources, and this can be attributed in practice to their lack of confirmed status as nationals of the Republic of Kenya. Their communities have been provided with fewer facilities and a disproportionately lower share of available resources as their claims to permanence in the country have resulted in health care services in the communities in which they live being systematically overlooked over an extended period of time. Their health needs have not been effectively recognised and adequately provided for, even in the context of the resources available for the fulfilment of this right[129].

Therefore the Khosa judgment does not imply that only citizens have a right of access to health, neither does it mean that economic migrants poor socioeconomic status is a privilege to access free health services offered in the neighbouring country(ies). However, the failure to reconcile between the civil and political rights of foreign nationals and socio-economic rights illustrates a gap in law,

[127] The Right to Health in The Economic, Social And Cultural Rights Of Migrants In An Irregular Situation publication pp. 38-40
[128] General Comment 14 of 2000 para. 8
[129] C Heyns & M Killander *African Union Human Rights Instruments* (2013) 460, para. 62

that of inconsistency of the legislative framework with the constitution and the role of social science materials in the Constitutional Court of South Africa.

The following chapter builds on the judgment of Mokgoro J, by illustrating the consequences the consequences of lack of access to timely medical treatment and how government organs, businesses and civil society must adhere to their constitutional mandate of promoting quality and adequate access to health care services in the communities they operate in.

4.0 Chapter Four

The City of Tshwane is one of the hardest hit metropolitan municipalities by medical xenophobia recurrence, relative to its geographical location in the cosmopolitan province of Gauteng. The challenges associated with the provision and administration of municipal health services adequately are huge. It is irrefutable that the right of access to health is under threat of medical xenophobia, in townships and in political echelons against economic migrants. However, medical xenophobia limits access to emergency medical treatment for economic migrants in severe health conditions and is a threat to human life[130]. Therefore, this section focuses on: To what extent does the inadequate access to Section 27(3) affect migrants in the City of Tshwane?

The challenges of in-access to health or emergency medical treatment in Tshwane illustrate a diabolic or unfortunate scenario that is created by perennially subsisting in a illegality condition. Economic migrants suffer from ghettoized living conditions, a life a devoid of human dignity. However, empirical facts as presented in this chapter proffer an argument that this has to change because of empirical evidence available in Tshwane. This is only one area of evidence that can add to the need for more enforcement of constitutional provisions enshrined in the Bill of Rights that, the right of access to emergency medical treatment is fundamentally necessary because it upholds human dignity for all. It also spells out how the effects of impermanent condition or status of a person may lead to gross human rights violations known to man: that is genocide. The number of people dying from avoidable circumstances of in-access due to policy, judicial ineffectiveness and political will.

4.1 The City of Tshwane (CoT)

The metropolitan City of Tshwane (CoT) is the world's third largest city council geographically but has a population of over 2 million which incorporates two-thirds of rural area. The sparsely populated area has increased administrative capacity in addressing the city's main burden of high disease control and constant international migration influx[131]. But, the city's attraction of economic migrants is driven by the city's rapid economic growth and infrastructure development and high

[130] J Crush & G Tawodzera 'Medical xenophobia and Zimbabwean migrant access to public health services in South Africa' (2014) 40(4) *Journal of Ethnic and Migration Studies* 665.
[131] 'The City of Tshwane Integrated Development Plan for 2016/2021' 138.

demand labour[132] that has increased demand for municipal health services[133]. This demand has led to a compromised service capacity, quality, and operations in the administration of medical supplies, staffing and operating hours in public health establishments[134]. The CoT Department of Emergency Medical Services has declared an overwhelming incapacity in attending to high percentage of patients seeking pre-hospital emergency treatment, care, and transportation of the sick and injured[135].

However, the CoT has a significant role on a person's health and wellbeing in its jurisdiction[136]. South African cities, beginning in 1940's have always been home to huge internal and international migrant economic activity in agricultural and mining activities[137]. It is worth noting that South African provinces have always enjoyed semi-autonomous administration. But in the apartheid era, freedom of movement of all resident black people from one province to another was limited and required documentation or pass-ports. As expected, it was not easy for black South Africans and seasonal migrants or economic migrants to access healthcare facilities, treatment, and medication[138]. Rather irregular access to emergency medical services created disease incubator patterns that reciprocated as far beyond the neighboring countries[139].

A study carried out in 2010 Kimberley, in one of South Africa's historical big cities in the heydays of mining boom. Archeologists exhumed and studied 107 individual migrant mine workers' skeletons from the Gladstone cemetery which was adjacent to the Kimberley mine hospital in the late 1800's. The observations highlighted that the lack of timely emergency medical treatment in this once densely populated area full of migrant mine workers was the major reason for high mortality. Degenerative disorders accounted for 68.3 percent, trauma 50.6 percent; nutrition

[132] C Mazars et al 'The Well-Being of Economic Migrants in South Africa: Health, Gender And Development' *Working Paper for the World Migration Report* (2013) 21.
[133] (n 131 above) 155.
[134] (n 131 above) 138.
[135]'The City of Tshwane 'Health and Social Department, Annual Report 1 July 2009 to 30 June 2010' 71.
[136] L Guadagno 'Urban migrants, vulnerability and resilience' in June J.H. Lee (eds) *World Migration Report 2015 - Migrants and Cities: New Partnerships to Manage Mobility* (2015) 85.
[137] (n 136 above) 90.
[138] (n 132 above) 23.
[139] (n 8 above) 819.

disorders claimed 15.0 percent; infectious diseases 10.2 percent and congenital abnormalities 5.8 percent. Hence many died because of undiagnosed illnesses[140].

The human skeletons in the historical city of Kimberley are a stark reminder of the grave consequences when there is a lack of the right of access to health services. Contemporary South African cities including the CoT experiencing huge international migration influx and economic growth have a huge task to try and avoid the historical injustices. If this is not addressed the right of access to universal health care remains an 'Achilles heel' in combating the silent genocide of economic migrants in South African cities[141].

4.2 Challenges faced by Economic Migrants in the City of Tshwane

The provision of primary health care in South Africa is the sole responsibility of the provincial government though it relinquishes the power of municipalities function to promote health programs[142]. Hence the CoT has been caught unawares in effectively managing migration influx and administration of service delivery[143]. Mostly in poor black communities and townships heavily reliant on public hospitals and clinics for their health care needs[144], including a large vulnerable Zimbabwe migrant population which ranks second in the South Africa international migration populations index, with 39 percent of the total arrivals[145], and a total of 60.1 percent immigrants residing in South Africa[146]. The situation has thus exposed local government system countrywide of its readiness and capacity to timely respond and manage migration induced disasters in the access and provisioning of Emergency Medical Services (EMS) in high demand.

The CoT disaster responses have arguably remained minimal since 2009 despite national and provincial government efforts and available support in securing healthy cities and individual

[140] (n 9 above) 190.
[141] Unpublished PhD thesis, GR Muchiri 'Historical and Contemporary Explanations for Xenophobia in South Africa, University of Pretoria-Centre for Human Rights, 2016 55.
[142] (n 8 above) 828.
[143] (n 1 above) 6.
[144] Statistics South Africa (STASSA) Community Survey Report 2016 24.
[145] (n 144 above) 27 & 52-53.
[146] (n 132 above) 14.

wellbeing[147]. This has left the CoT handicapped in the implementation of the local government Integrated Development Plans which helps the city update its population needs, particularly in the economic migrant's consumption of municipal services which include health services, education, housing, and food[148]. However, political structures and office bearers or municipal council in the municipality administration contend that South Africa is still recovering from the history of an underdeveloped, underfinanced, and dysfunctional public health care system[149].

The CoT is formally designated a national health district, but has about 2.7 million residents without health insurance who are heavily reliant on 13 out of 22 clinics that provide antiretroviral treatment under the state funded public health care system.[150]. Only 2 out of 23 clinics in *Atteridgeville* and *Mamelodi* townships accept treatment of foreigners[151]. Moreover, the expenditure of the CoT's five municipal services divisional regions remains incongruous to the city's sparsely population size and demography[152]. Hence there is an apparent correlation with the general dissatisfaction of residents on poor municipality health services characterized by patient victimization and unprofessional conduct by nurses and hospital clerks in these poor black townships that incorporate large informal settlements population[153].

As a result, there is constant scarcity in accessing medical treatment that fuels an emergency medical treatment resource based conflict. Between residents and non-national residents in the densely-populated regions 1 and 3 of the CoT are the main hotspot areas experiencing regular xenophobic violence against foreigners[154]. This has made the CoT to be one of the progenitors of medical xenophobic violence[155].

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[147] The City of Tshwane Disaster Management Plan Updated Level 1 (2011) 77; n 139 above, sec 41(1)(b) & 152(1)(d); Local Government: Municipal Systems Act 32 of 2000 (as amended) sec 26(g); Disaster Management Act 57 of 2002 sec 52-53.
[148] (n 1 above) 5 & 7 & 9; (n 131 above) 1.
[149] (n 8 above) 819 & 825 & 829.
[150] http://www.parliament.gov.za/content/Tshwane_General_and_Regions_Report_2013.pdf (accessed 10 January 2017)
[151] Unpublished: VI Modey-Ebi 'The challenges facing vulnerable urban refugee women living in Pretoria/Tshwane', University of Pretoria-Centre for Human Rights, 2016 41.
[152] http://www.tshwane.gov.za/sites/residents/Services/Pages/City-and-Regional-Development.aspx (accessed 10 January 2017).
[153] J Crush & G Tawodzera 'Medical Xenophobia: Zimbabwean access to health services in South Africa' (2011) *Southern African Migration Programme, Africa Portal (SAMP)* 9-10 & 12 & 15-26.
[154] (n 1 above) 11 & 14.
[155] (n 153 above) 3 & 16.

The CoT's emergency medical services has remained below satisfactory levels in all regions[156]. A substantial 67 percent of all residents in 2013 attributed their dissatisfaction to poor or slow response of the emergency medical and ambulance services followed by 16 percent of residents who received no assistance at all. In 2013, a total of 83 percent of patients attributed their dissatisfaction to poor health service provision in the city[157]. Emergency medical services utilisation decreased from 71.3 percent in 2009 to 60.6 percent in 2013 indicating less consumption in public health hospitals and clinics. On average, use of municipal health clinics services stands at 55.5 percent annually in the last 10 years. However, the emergency and disaster management services average has remained constant at 8.6 percent[158].

Stigma and fear has sharply declined the number of foreign-born persons chose not to disclose their nationality in national statistics gathering surveys and programs from 2,2 million in 2011 to 1,6 million in 2016, which represents a discrepancy or short-fall of 600 thousand migrants[159]. Apart from the conviction not disclose their identities to protect themselves from xenophobia stigmatisation. The Human Rights Watch has lamented on the discriminatory tendencies against economic migrants that extend as far as government department's programs of action performed by civil servants[160]. Not to mention that the CoT's performance targets focus more on planning for permanent residents than temporary residents[161].

On the other hand, private emergency medical services practitioners charge exorbitant fees at the expense of giving priority to treating patients in an emergency medical situation[162]. One of the private medical aid scheme organizations, SAPAESA which has more than 40 affiliates clearly state that they prefer medical aid scheme patients to access adequate and quality emergency medical treatment and care[163]. However, costs alone charged by private establishments prohibit

[156] City of Tshwane Resident Satisfaction Survey 2013 pg.133 & 248.
[157] (n 156 above) 63.
[158] (n 156 above) 94-96.
[159] (n 144 above) 3 & 24 & 26.
[160] (n 153 above) 3-4 & 12-13.
[161] (n 1 above) 6 & 9.
[162] (n 151 above) 38-40 & 43 & 45.
[163] http://sapaesa.co.za/about-us/ (accessed 18 February 2017).

many migrants and the local black populace who have less income and can only meet their basic livelihoods needs[164]. Hence if migrants do nothing at all to address their challenge of access to emergency medical services, the current insufficiency and lack of participation in health insurance schemes provided for by their employers and in government social security schemes, will further exacerbate their already individual poor health and that of their family member's wellbeing[165].

The various Non-Governmental Organisation's (NGO's) registered with the CoT to provide health care services are alone not enough to complement the ever-widening gap on the cost of health care[166]. In the recent changes to the public health care financing system, the Gauteng Department of Health in 2014 published a 'Non-South African citizens (foreign patients) Guidelines' which state that hospitals should demand full, up-front payments from patients without permits, refugee documents and asylum status. This means that patients, who cannot prove they are living in South Africa legally, must be able to meet all costs before they can get treatment[167]. Not to mention the National Health Insurance (NHI) which objectively promotes access to a fair, efficient, and affordable health care for all disadvantaged South Africans with a poor socio-economic status[168]. It is a huge setback for all migrants, documented and undocumented that once again citizenship status is being used to determine and further regulate access to emergency medical treatment.

However, engagement of migrant communities into the administration strategies of the CoT is essential for the progressive planning and development in the CoT's municipal health services. Hence, there cannot be any justifiable decision to prefer health service delivery to permanent residents over migrant temporary residents by any traditional authority or political influence. Rather efforts must be intensified to increase information about migrant populations in local government. The CoT's heavily reliance on StatsSA and IHS Global Insight statistical information

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[164] (n 132 above) 28-29.

[165] Kristy Siegfried 'South Africa's health system shuns asylum seekers' (2014) http://www.irinnews.org/report/100776/south-africa-s-health-system-shuns-asylum-seekers (accessed 14 December 2016).

[166] http://www.tshwane.gov.za/sites/residents/Services/HealthMedical/Pages/Health-Care-NGO.aspx (accessed 20 February 2017).

[167] Hasina Gori 'Refugees and asylums seekers puzzled by new health guidelines' (2014 http://www.sabc.co.za/news/a/2812de0042a6fc8bb517ff56d5ffbd92/Refugees-and-asylums-seekers-puzzled-by-new-health-guidelines-20142201 (accessed 14 December 2016).

[168] Use of health facilities and levels of selected health conditions in South Africa: Findings from the General Household Survey (2011) 78.

on population and service delivery, which has proved inadequate benchmark because it provides unusable information on immigration population dynamics in Local Government Development Plans (IDP) should be curbed.[169]

Moreover, the CoT remains unable to be proactive in embracing new sources of information to complement its planning and budgeting strategies available from the Community Development Workers (CDW) social work services who have a presence in all the regions of the CoT. Notwithstanding the central government's lack of a proactive approach on its constitutional supporting role in interpreting and designing of effective response mechanisms to planning for temporary populations not recorded in the national census statistics[170]. Hence there is a sense or perception that however valuable migration is to municipalities, it is fundamentally the prerogative of the Department of Home Affairs (DHA) and law enforcement institutions to administer[171].

Apparently local government in South Africa is under duress to provide for nuanced service delivery capacity and quality. Residents in almost all South African cities constantly protest poor service delivery. It is therefore unusual for widespread exclusion of temporary residents from accessing emergency medical services and in consultative resident's associations meetings within local government[172]. The promulgated CoT Local Authority Notice 1923 of 2015 by-law methods for public participation ascribes recognition to participate in consultative sessions to locally recognized organisations and traditional authorities[173]. Madumo has noted that part of the exclusion of temporary residents in cities is that African traditional leadership authority is highly influential in these session meetings because they focus more on service delivery administration within local government. However traditional leaders have an exclusive privilege to approve and give preference to their homogenous residents in the provision of services falling within their jurisdictional territory over temporary residents and migrants[174].

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[169] (n 131 above) 33 & 201.
[170] (n 1 above) 8 & 12-13 & 15.
[171] (n 1 above) 6.
[172] (n 1 above) 14-15.
[173] City of Tshwane - Local Authority Notice 1923 of 2015, sec 8.1.2.
[174] OS Madumo 'Developmental Local Government Challenges and Progress in South Africa' (2015) 23(2) *Administratio Publica* 158.

Therefore, the legal plurality that exists between African traditional authority and municipal law in the Constitution of South Africa, makes it difficult for temporary residents who have no traditional representation at all, though they are constitutionally protected[175]. To also have an equal share in the City of Tshwane's 2055 objective, that seeks to provide for an equitable city supporting human happiness, social cohesion, safety, and health of citizens[176]. However, the salient use of 'citizens' prefix, excludes temporary residents and undervalues the principle of diversity, human dignity, safety and protection for all who call Tshwane home[177]. Every household is thus identified by a person or group of persons occupying it and not citizen or immigrant resident in the CoT[178].

In retrospect, the CoT is yet to incorporate and embrace international migration or cosmopolitanism in the Tshwane Vision 2055. But the failure to utilise social science empirical facts is relative to the administrative failure in improving service delivery at local government level in South Africa. Hence credible statistical collection on international migration is needed to improve access to public health service.

[175] (n 174 above) 157.
[176] (n 131 above) 10-11.
[177] (n 173 above) sec 3(1)(b).
[178] (n 156 above) 7.

5.0 Chapter Five

5.1 Conclusion

In conclusion, South Africa is known globally to be a benevolent cosmopolitan 'rainbow nation', it is not immune to the deficiencies common to liberal constitutional democracies[179]. But the existing protection gap between the international legal system and the South African legal system needs to be addressed to enhance protection and support for economic migrant's rights. Cities can offer both the best and the worst of environments for health and well-being inadvertently. But increase in demand for health services must never result in discriminatory laws and oppressive administrative system, victimization, stigmatization and xenophobia that is currently witnessed in South African cities.

The contradiction of the right to have rights shall remain an unresolved paradox between politics and law for contemporary nation-states. If the current trend persists to allow for the treatment of international law in South Africa as inferior to the constitution but variably superior to the national legislation[180]. Then, the civic boundary is necessary to incorporate the stateless person into the democratic people or citizenry as a legal subject to the Constitution and sovereign authority of South Africa[181]. To eliminate the antagonism between nationals and non-nationals right of access to health in South Africa[182].

Therefore the call for the right to have rights is imperative for South Africa to enhance cooperation and continuous planning in the protection and security of the fundamental human rights to health, dignity, life, food, shelter and education[183]. Also to promote the very core principle of health equity according to the Constitution[184], which rests in the heart of the local government equitable share system[185]. Even though formal policies of inclusion have been set up by relevant institutions and

[179] (n 46 above) 32
[180] (n 64 above) 21
[181] (n 46 above) 32-35
[182] (n 8 above) 819, 825, 828, 829
[183] (n 141 above) 61 & 93.
[184] The Constitution and public health policy in *Health and Democracy* (2007) http://section27.org.za/wp-content/uploads/2010/04/Chapter2.pdf (accessed 18 November 2016) 3.
[185] (n 1 above) 9-11.

migration authorities, there is never a guarantee of adequate protection[186]. Hence, the tentative argument explored in this thesis is for local governments and municipalities to expedite the inclusion of economic migrants by heeding Arendt's observations on rights.

However, the lack of political will in South Africa is not keen to resolve the issue of foreign nationals in respect of civil and political rights and socio-economic rights nexus. Without the political will and a pragmatic judiciary, the lives of economic migrants at risk, incapacitates them physically, mentally and financially to add value wherever they work. This is a test also of the credibility of 'work' in relation to national development. It further isolates the country from the African Unions Agenda 2063 and other international development treaties that seek to promote a non-racist non-discriminate society.

Hence Benhabib's 'civic' engagement is that civil and political rights are necessary to guarantee social and economic rights in contemporary liberal democratic nation-states. Those who face challenges of rights access must never remain invariably impugned and castrated first by the lack of civil and political rights in South Africa. But the reduction on the spread of diseases both within and beyond the borders of South Africa is paramount. Therefore the need for human rights protection, fulfillment and justice to those in political asylum and socio-economic refuge is necessary for everyone in South Africa, permanent or impermanent, legal or illegal, citizen or economic migrant.

[186] (n 136 above) 88.

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