

The Impact of Immigration Policies on Socio-Economic Transformation in South Africa

Mini-dissertation submitted in partial fulfilment of the requirements for a Master of Laws (LLM) degree in Public Law

By

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August 2016

Summary

This dissertation looks at the impact of immigration policies on socio-economic transformation in South Africa, which constitutionally is established as an open and democratic country. The multi-racial society that South Africa is today composed of is undoubtedly the result of a long history of immigration that has for over the centuries advanced the economy significantly. The study illustrates that among other determinants, immigration in South Africa is regulated by international as well as domestic law, which the government has committed to comply with. Though immigrants bring lots of benefits to the country as established through research, government's immigration policies have in recent times become increasingly restrictive, coupled with a general xenophobic attitude, especially towards immigrants from other African countries. Looking at the imperative for socio-economic transformation introduced with the advent of constitutional democracy in 1994, the study makes the argument that the state resources deployed by the government in trying to combat immigration could instead be used productively in promoting socio-economic transformation by developing the skills capacity of many South Africans. Owing to the fact that African immigrants in South Africa are according to research findings established to be highly educated, skilled and entrepreneurial, their presence in the country could more effectively be explored to develop the productive capabilities of the majority of largely unskilled South African citizens and by so doing, significantly advance socio-economic transformation in the country. On the basis of this analysis, a number of recommendations are made necessitating the government to take concrete action in ensuring that immigration contributes meaningfully to socio-economic development in the country.

Declaration

I hereby declare that this mini dissertation, submitted in partial fulfilment of the requirements for the award of the degree LLM in Public Law, University of Pretoria is my original work. I further declare that all sources cited or quoted are duly acknowledged and referenced. It has not been submitted for the award of a degree at any other university or institution of higher education.

Signed: _____ **Date:** _____

Sinjalo Magdalena Sawa

Acknowledgement

I acknowledge with gratitude the guidance, support and encouragement of my supervisor Ms Keneilwe Radebe for her keen interest in my work to ensure that it is of the quality that this final product is. Any inaccuracies or omissions that may be contained herein are entirely mine. I also extend gratitude to the anonymous examiners that will be assessing this completed product.

My sincere appreciations also go to the staff of OR Tambo library for their dedicated service in enabling me to find the relevant materials for my research. I am also heartily thankful to Mr Ngang Carol for editing my work. To my family and friends and the many other people who assisted me in one way or the other during the entire period of my studies, I am also profoundly thankful for your material, financial and moral support and otherwise. May the good Lord bless you all.

Dedication

This mini-dissertation is dedicated to my mother Thokozile Sawa of blessed memory

Acronyms and abbreviations

ANC	African National Congress
CDE	Centre for Development Enterprise
DHA	Department of Home Affairs
FET	Further Education and Training
GDP	Gross domestic product
ICCPR	International Covenant on Civil and Political Rights
IMF	International Monetary Fund
IOM	International Organisation for Migration
IT	Information and technology
OUA	Organisation of Africa Unity
SANDF	South African National Defence Force
SAPS	South Africa Police Services
SAQA	South African Qualifications Authority
SARS	South African Revenue Services
TBCSA	Tourism Business Council of South Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commission for Human Rights
USD	United States Dollar
VAT	Value added tax

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Chapter One: Introduction

1.1 Background

South Africa is situated on the southernmost tip of the African continent, bordered by other Southern African countries such as Namibia, Botswana, Zimbabwe, Mozambique and Swaziland. It has a population of close to 55 million people and a land surface area of 1,221,037 square km, which makes it the 25th largest and the 24th most populous country in the world.¹ The multi-racial 'rainbow nation', so-called because of its unity in diversity is composed of over 80% that makes up the African race, 2.5% of Asian origin, 8.8% mixed race and 8.4% of the white race, representing the largest white population on the African continent.² According to World Bank ranking, South Africa is classified as an upper-middle income country with a nominal gross domestic product (GDP) of USD323.809 billion and USD5,902 per capita according to 2015 estimates.³ Its economy is the second largest, most infrastructural and technologically advanced in Africa and the 34th largest in the world.⁴

For various reasons, South Africa has as far back as the colonial period been a favourite immigration destination; attracting immigrants of various categories from all over the world. Prior to 1994, immigration into South Africa was regulated by the Aliens Control Act, which by its very name reflected apartheid policy restricting immigrants from the rest of the African continent, who according the Act would not qualify to be assimilated into the white population.⁵ Before the 1990s only whites were allowed to legally immigrate to South Africa.⁶ Large numbers of mostly African migrant workers were shipped-in from neighbouring countries to work in the

¹ Wikipedia 'South Africa' available at: https://en.wikipedia.org/wiki/South_Africa (accessed: 10 February 2016).

² Wikipedia (n 1 above).

³ Wikipedia (n 1 above); World Bank 'Data: South Africa' available at: <http://data.worldbank.org/country/south-africa> (accessed: 10 February 2016).

⁴ Wikipedia (n 1 above).

⁵ Christie K 'Security and forced migration concerns in South Africa' (1997) 6:1 *African Security Review* available at: www.iss.co.za/ASR/6No1/Christie; Khan (n 7 below) 2.

⁶ Maja B & Makanyane S 'Labour migration and South Africa: Towards a fairer deal for migrants in the South African Economy' (2007) *Labour Market Review* 4.

mining, agriculture, construction and service sectors under very harsh, inhumane and restrictive conditions.⁷

African immigrants were thus only allowed clandestine entry into the country as migrant labourers without any legal immigration documentation.⁸ The apartheid era immigration policy was thus fundamentally racist and exploitative. Following the collapse of apartheid and the advent of constitutional democracy in 1994 the situation changed dramatically and by 1995 the democratically elected government had lifted most of the immigration restrictions that barred African immigrants from coming into the country.⁹ As the present-day immigration trends across the world indicate, South Africa quickly became 'one of the top destination countries for African migrants'.¹⁰ This is explained by the fact that, coupled with other pull factors, South Africa's democratic dispensation marked by a progressive constitution that enshrines a broad range rights to everyone, offers more liberties, freedoms and protection from persecution than is available in many other African countries.

Owing to its high socio-economic, legal and political profiling, South Africa promises prospective African immigrants economic opportunities, social security and legal protection that may not be available in their home countries.¹¹ Consequently, since 1994 an influx of immigrants from across the whole of Africa have found their way legally and also clandestinely into South Africa. This massive displacement is motivated not only by the gains that immigrants anticipate to reap but also because South Africa tends to also require the skills that they have to offer for the

⁷ Facchini G, Mayda AM & Mendola M 'What drives individual attitudes towards immigration in South Africa?' (2012) *JEL Classification: F22, J61* 3; Khan F 'Patterns and policies of migration in South Africa: Changing patterns and the need for a comprehensive approach' (2007) University of Cape Town-Discussion paper 3; Siddique MAB 'South African migration policy: A critical review' (2004) *University of Western Australia* 3; Chiranga V 'The effects of immigration in contemporary South Africa' (2013) Master dissertation, Tshwane University of Technology 16.

⁸ Khan (n 7 above) 3.

⁹ Khan (n 7 above) 3.

¹⁰ Broussard NH 'Immigration and the labour market outcomes of natives in developing countries: A case study of South Africa' (2012) *JEL Codes: J61, O175*.

¹¹ Rasool F, Botha CJ & Bisschoff CA 'Push and pull factors in relation to skills shortages in South Africa' (2012) 30:1 *Journal of Social Science* 11.

development of the country. The category of immigrants ranges from a large number of unskilled to a limited number of highly skilled workers.¹²

The irrational fear that immigration poses public health, crime and job security risks, coupled with the negative public perception and in particular the phobia for African immigrants provided the basis for a shift in government's immigration policies which like the Aliens Control Act has become more restrictive and largely unfavourable to African immigrants. Some of the criticisms include the fact that the 2014 Immigration Act is too 'draconian'¹³ and will 'negatively affect current and potential foreign investment into South Africa'.¹⁴ The study focuses on African immigrants, on the basis that though the immigrant stock in South Africa is quite diversified, the larger part, totalling 1,067,936 for the period 2011-2015 according to Statistics South Africa's mid-year population estimates for 2014 is from other African countries.¹⁵ Owing to the imperative for socio-economic transformation, the country as a whole and the majority of disadvantaged South Africans are more likely to benefit from the presence of the large African immigrant population in the country.

The government's intended open and development-oriented immigration policy is contradicted by a highly restrictive approach, which as noted is shaped by a mentality of 'control and expulsion', in addition to a hostile public attitude, especially towards African immigrants.¹⁶ The study departs from the very fundamental assumption that the benefits of immigration outweigh the negative aspects. Situating this within the context of South Africa's constitutional democracy that envisages to '[i]mprove the quality of life of all citizens and free the potential of each person',¹⁷ the study

¹² Rasool, Botha & Bisschoff (n 11 above) 11.

¹³ Hamill J 'Closing the door: South Africa's draconian immigration reforms' (2014) *World Politics Review* available at: www.worldpoliticsreview.com/articles/14145/closing-the-door-south-africa-s-draconian-immigration-reforms (accessed: 20 January 2016).

¹⁴ Oosthuizen N 'Immigration law change met with stern criticism' (2014) *SABC News* available at: www.sabc.co.za/news/a/227dde80442cb97aabbff9a75bb7e80/Immigration-law-change-metwith-stern-criticism-20142905 (accessed: 28 January 2016).

¹⁵ Lehohla PJ 'Mid-year population estimates 2014' (2014) *Statistical release P0302* 31 July 2014 Statistics South Africa 6.

¹⁶ Facchini, Mayda & Mendola (n 7 above) 4.

¹⁷ Constitution of the Republic of South Africa, 1996 preamble.

investigates how the positive attributes of immigration could be explored to advance socio-economic transformation in the country.

1.2 Problem statement

Twenty two years after the transition from apartheid into constitutional democracy with promises of a better life for every South African citizen, the much anticipated socio-economic transformation remains a far-fetched dream, which has partly been blamed on immigrants taking opportunities away from South Africans. South Africa has since 1994 experienced an influx of immigrants from around the world, especially from other African countries. Accordingly, the country is believed to be hosting an exorbitant number of immigrants, a situation which in the last couple of years has erupted into violent waves of xenophobic attacks resulting in massive displacements, loss of life and damage to property. In a reactive attempt to address the underlying causes behind the anti-immigrant sentiments the government proceeded in 2014 to adopt the controversial Immigration Act with the intention to stimulate the distressed economic but in effect has brought the country under the spotlight of criticism. Faced with the constitutional imperative for socio-economic transformation, which necessitates the state to take appropriate measures, including through policy reforms, the criticisms raise fundamental questions relating to how immigration policies impacts on socio-economic transformation in the country.

1.3 Research questions

The principal question that the study responds to is:

- To what extent can post-apartheid immigration policies contribute to socio-economic transformation in South Africa?

This core question is broken down into the following sub questions which are also looked into in order to provide an in-depth understanding of the subject matter:

- What are the factors that determine the choice of South Africa as a favourite immigration destination in Africa?
- To what extent do immigration policies impact negatively or positively on socio-economic transformation in South Africa?

- What value-added contribution do African immigrants make in advancing socio-economic transformation in South Africa?
- What measures are necessary for the government to take to ensure that immigration becomes a contributing factor to socio-economic transformation in South Africa?

1.4 Objectives and significance of the study

This study is intended to achieve two purposes. The first purpose is to improve understanding of how South Africa's prevailing immigration policies impact on socio-economic transformation, which forms the core of the constitutional project to build a free, open, democratic and diversified society and to improve the quality of life for everyone. The second purpose is to ensure that the knowledge generated through this study contributes towards developing the law on issues relating to immigration. The motivation to do so is drawn from the fact that South African immigration policies have in recent years become the subject of criticism, which therefore necessitates a closer examination. Given the constitutional imperative to transform South African society, this study thus aims at making a valued input through a comprehensive analysis on the basis of which recommendations are made on how the government's policies on immigration could be structured to ensure that immigrants add value to the socio-economic transformation project.

1.5 Literature review

The question of immigration in South Africa as this study sees it centres around four main issues that are explored in this narrative on how other scholars and commentators have dealt with the subject. Despite the legal framework that guarantees immigrants equal rights, their situation in terms of human rights' abuses, socio-economic entitlements and day-to-day interactions remains a cause for concern.¹⁸ According to Kabwe-Segatti and Landau, the harsh manner by which South Africa manages the immigration crisis is generating new challenges for the

¹⁸ Kabwe-Segatti AW & Landau LB (eds) 'Migration in post-apartheid South Africa: Challenges and questions to policy-makers' (2008) 33.

consolidation of democracy and development in the country.¹⁹ They further draw attention to the fact that it is problematic that immigration is hardly considered in South Africa as an important tool for development through which the country could reap substantive benefits.²⁰ The Centre for Development and Enterprise (CDE) has accurately stated that immigration has the potential to advance the national economy and therefore the South African government needs to prioritise a more open immigration policy,²¹ which must of necessity be analysed in the context of the constitutional transformation project.

As it has been observed, South African policy responses to migration fails to look at the bigger picture, focusing rather on irrelevant issues while overlooking important linkages between such related areas as the increasing inequality among citizens and unemployment.²² Rather than consider immigration as an instrument by which to create development it is used instead as an instrument of control and exclusion of foreign nationals,²³ which in the legal context amounts to ‘illegality’ in the way African immigrants treated. Though South Africa has transitioned from the apartheid dispensation where immigrants from the African continent were dehumanised and treated with disdain, present-day immigration policies continue to replicate the apartheid informed restrictions on African immigrants.²⁴

By exploring the post-apartheid ideology of *makwerekwere* as a theoretical basis for explaining ‘being, belonging and non-belonging in South Africa’, Isike and Isike describe the context within which African immigrants are imagined and treated, particularly by fellow black South Africans as dreadful species.²⁵ According to the *makwerekwere* creed by which categories of foreigners in South Africa are

¹⁹ Kabwe-Segatti & Landau (n 18 above) 37.

²⁰ Kabwe-Segatti & Landau (n 18 above) 33.

²¹ Bernstein A (ed) ‘South Africa’s immigration policies: A regional perspective’ (2011) *The Centre for Development and Enterprise* 6.

²² McConnell C ‘Migration and xenophobia in South Africa’ (d.n.a.) *Conflict Trends* 35.

²³ McConnell (n 22 above) 37.

²⁴ Kalithanyi V & Visser K ‘African immigrations in South Africa: Job takers or job creators’ (2010) 13:4 *South African Journal of Economics and Management Sciences* 376-390.

²⁵ Isike C & Isike E ‘A Socio-cultural analysis of African immigration to South Africa’ (2012) 19(1) *Alternations* 95.

differentiated as Isike and Isike explain, African immigrants are portrayed as worthless good-for-nothing invaders whereas, European immigrants are perceived as coming with lots of potential to invest in the country.²⁶ Notwithstanding the constitutional guarantees for every person in South Africa to be treated with human dignity,²⁷ such perception has resulted in African immigrants being viewed and treated as illiterate uncultured criminals, job snatchers, sick and poverty-stricken scavengers and a social nuisance to the state and the economy.²⁸

As a replica of the apartheid era policy that prohibited entry into South Africa for African immigrants, the *makwerekwere* consciousness among South Africans is a pointer to the fact that African immigrants do not belong in South Africa and therefore are not welcome. The presence of the African immigrant population in the country is thus generally classified as illegal²⁹ or where entry was obtained legally is subsequently rendered illegal by the system through refusal to renew existing visas and permits or through refusal of the opportunity to obtain other legal documentation to stay in the country legitimately. Accordingly, deviations from the ideals of citizenship and belonging to South Africa has exposed African immigrants to strip search, arrest and detention, humiliation, torture, rape, mugging and killing as well as deportation.³⁰

With regard to why migrants choose South Africa as a favourite immigration destination and how immigration impacts on the economy and affects unemployment, Siddique identifies that the exodus of the white population after the collapse of apartheid created a shortage of professional and skilled workers, which in the short term could not be filled by the prevailing local workforce.³¹ He further observes that until a comprehensive manpower and education policy is introduced to equip the black workforce with necessary skills for employment, demand for

²⁶ Isike & Isike (n 25 above) 95-96.

²⁷ Constitution (n 17 above) sect 7(1).

²⁸ Isike & Isike (n 25 above) 96.

²⁹ See generally Solomon H 'Contemplating the impact of illegal immigration on the republic of South Africa' (2000) *University of Pretoria Centre for International Political Studies – Working Paper*.

³⁰ Isike & Isike (n 25 above) 98.

³¹ Siddique (n 7 above) 2.

professional and skilled immigrants will continue.³² The results of a study conducted by statistician Sandile Simelane revealed that proportionately, South Africa lost more skilled workforce through emigration during the period 1970-1997 than it gained through immigration.³³ The trend has continued steadily, which implies that if the scarcity created in the South African labour market is to be filled, immigration does not only need to be encouraged but also facilitated to attract more skilled workers from other parts of the world.

There is supposedly a large immigrant population in South Africa but the estimate of 5 million is grossly exaggerated, probably to stir xenophobic sentiments that the exorbitant number of '[im]migrants pose a real threat in terms of employment opportunities'.³⁴ Tara Polzer of the Forced Migration Programme has observed that there are no reliable statistics relating to the number of immigration in South Africa, which leaves room for speculations that are 'not based on solid evidence'.³⁵ In the same light, there is no available empirical evidence suggesting that the job scarcity in South Africa amounting to over 25% unemployment rate is as a result of immigrants snatching job opportunities from South African nationals. It is confirmed that the total number of foreign nationals in South Africa ranges just between 1.7 and 2.2 million, which proportionately makes up about 3-4% of the entire population.³⁶

A commissioned study conducted in 2014 by the Research Programme Consortium found that '[o]ver the past decade, South Africa's political leadership has increasingly framed international migration as a threat to national, physical and economic security' and thus spends huge sums of tax payers' money on defending the government for failure to comply with the law that it has committed itself to in terms

³² Siddique (n 7 above) 2.

³³ Simelane ES 'Trend in international migration: Migration among professionals, semi-professionals and miners in South Africa, 1970-1997' (1999) Conference paper 2.

³⁴ Siddique (n 7 above) 2.

³⁵ Polzer T 'Population movements in and to South Africa' (2010) *Forced Migration Studies Programme – Migration Factsheet 12*.

³⁶ Mthembu-Salter G *et al* 'Counting the cost of securitising South Africa's immigration regime' (2014) *Migrating out of Poverty—Working paper 20* 6; Polzer (n 35 above) 3; Statistic South Africa 'Documented immigrants in South Africa 2012' (2014) *Statistics South Africa - Statistical release P0351.4*.

of providing protection to the immigrant population within the country.³⁷ Meanwhile, immigration is likely to have more positive development impact both on South Africa as a receiving country and other countries of origin.³⁸ With regard to the positive development impact, it is established that immigrants who come into the country are in average more skilled than most South African nationals;³⁹ a factor which policy experts need to take seriously in order to explore the advantages deriving from immigration to promote socio-economic transformation.

However, as Crush has rightly observed, a fundamental problem relating to a development-oriented immigration policy in South Africa is ‘a public that remains extremely hostile to immigration as a principle and to migrants in general’.⁴⁰ Xenophobia, which twice has attracted global attention, paints an ugly image of South Africa as a country that is inherently hostile to foreign nationals. According to McConnell, the magnitude of the xenophobic incidences of 2008 and 2015 is a clear demonstration of the fact that the majority of South Africans nurse a serious dislike, intolerance and unwelcoming attitude towards African immigrants.⁴¹ According to Hussein Solomon, xenophobia is caused by a very narrow-minded perception of the world around, reason why it is commonly manifested among individuals at the lower rungs of the social ladder who have had little or no exposure to other cultures.⁴²

The xenophobic culture in South Africa is thus explained to originate from the fact that illegal immigrants tend to compete with low-skilled South Africans in the job market, causing a ‘depressing effect on wages as a result of their accepting to work for long hours for low wages and their resistance to unionisation’.⁴³ Such competition as he further explains reduces the changes of local people to have access to employment thus, ‘giving rise to resentment towards illegal immigrants that is then

³⁷ Mthembu-Salter *et al* (n 36 above) 5.

³⁸ Facchini, Mayda & Mendola (n 7 above) 2.

³⁹ Facchini, Mayda & Mendola (n 7 above) 2.

⁴⁰ Crush J ‘South Africa: Policy in the face of xenophobia’ Available at <http://www.migrationinformation.org> (accessed: 16 February 2016).

⁴¹ McConnell (n 22 above) 34; Gordon (n 45 below) 4. *aMakwerekwere* is a Zulu word that refers to unwanted immigrants.

⁴² Solomon 2000 (n 29 above) 4.

⁴³ Solomon 2000 (n 29 above) 4.

expressed in xenophobia'.⁴⁴ In an attempt to explain why the phobia is directed principally against African immigrants, the barbaric attitude has often been attributed to the persistent socio-economic deprivation that the majority of South Africans continue to experience several years after the transition to constitutional democracy with promises of a better life for all.⁴⁵

The government has in reaction; with the aim to create more opportunities for South Africans tightened its immigration laws and made them more restrictive for African immigrants to enter and take up residence in the country. In a statement to justify the changes in the immigration law, Home Affairs Minister explained that the changes are intended to contribute to 'economic development and prosperity of the country'.⁴⁶ Meanwhile, the Director of New World Immigration, Robbie Ragless argues on the contrary that the changes will instead 'negatively affect current and potential foreign investment into South Africa'.⁴⁷

In a report on the impact of the new immigration regulations on the travel and tourism industry for instance, the Tourism Business Council of South Africa (TBCSA) estimates that a 20% drop in demand from families that may be prevented from coming to South Africa for tourism purposes.⁴⁸ This is estimated to result in 'a direct and indirect and induced loss to the South African economy of at least R10 billion per annum and potential job losses of around 24 000'.⁴⁹ This is a significant loss to a country that is struggling to deal with an unemployment rate of 25.5% according to official statistics. The TBCSA argues that South Africa's tourism industry is an important economic sector that plays a key role in boosting the national economy and in sustaining existing jobs or in creating new ones.⁵⁰ While it is undeniable that immigrants may pose a threat to employment opportunities,⁵¹ restricting

⁴⁴ Solomon 2000 (n 29 above) 4.

⁴⁵ Gordon SL 'Migrants in a 'state of exception'' (2010) 1:1 *Transience Journal* 5.

⁴⁶ Oosthuizen (n 15 above).

⁴⁷ Oosthuizen (n 15 above).

⁴⁸ Thornton G 'TBCSA's report on the impact of the new immigration regulations on the travel and tourism industry' (2015) *Tourism Business Council of South Africa* 5.

⁴⁹ Thornton (n 48 above) 5.

⁵⁰ Thornton (n 48 above) 7.

⁵¹ Siddique (n 7 above) 2.

immigration as the TBCSA has illustrated, does not make the situation better. Operating within the context of a global economy, McConnell implores the South African government to take cognizance of the fact that, migration has become a means for combating poverty ⁵² and therefore, could be explored to achieve socio-economic transformation.

The range of literature on immigration in South Africa however, focused largely on the xenophobia reaction to foreign nationals and how immigration policies could be structured to provide greater protection to the vulnerable migrant population. While recommendations in this regard are essential, a win-win context where foreign nationals could be seen as valuable contributors to socio-economic transformation and granted the opportunity to make a positive impact is likely to provide more lasting solutions to the immigration problem. However, research has not sufficiently explored how and to what extent immigration could facilitate socio-economic transformation to the advantage of the vast majority of South Africans who remain disadvantaged due to government's inability to ensure redistributive justice. Thus study thus aims to make a contribution in this regard.

1.6 Methodology

The study has been conducted mainly through desktop research, involving a review and analysis of primary and secondary sources, which include existing literature and commentaries, statute, legislation and policy documents relating to immigration as well as other relevant materials. The study takes a multidisciplinary approach because issues relating to immigration do not only involve the law but are interrelated to other economic and social disciplines, which are sufficiently incorporated to give a comprehensive understanding of the subject.

1.7 Outline of chapters

The study is outlined in five chapters as follows: Chapter one is the introduction, which deals generally with the question; how and to what extent post-apartheid immigration policies could contribute to socio-economic transformation in South

⁵² McConnell (n 22 above) 40.

Africa. The chapter outlines the background to the study, the problem statement and research questions, the objectives and significances of the study, a review of relevant literatures and the methodology used in conducting the study.

Chapter two focuses on the determinants and regulatory framework on immigration in South Africa. In terms of the determinants, the push and pull factors are examined as influencing immigration to South Africa while the regulatory framework is established to include international law as well as domestic law. This creates a political context for implementation which is also described with the aim to situate South Africa's immigration policies within the framework of the constitutional project for socio-economic transformation.

Chapter three attempts an assessment of the impact of immigration policies on socio-economic transformation in South Africa. To this end, the chapter takes a close look at the negative attributes as well as the positive attributes to immigration with the aim to establish on the one hand to what extent immigration impacts negatively and on the other hand, how immigration may impact positively on the transformation project in South Africa.

In chapter four, the discussion centres on the value-added contributions that African immigrants make, particularly in the area of economic development and also in the area of social development in South Africa. The chapter further looks at some of the constraints to socio-economic development resulting from the prevailing negative perceptions about African immigrants necessitating a change of attitude in order to inform the formulation of immigration policies that can make a meaningful contribution to socio-economic transformation in the country, however negligible.

Chapter five provides the concluding remarks, which constitutes a summary analysis of all the chapters, on the basis of which some recommendations are made on measures that the government needs to take to ensure that South Africa's immigration policies are crafted to encourage the valuable contributions by African immigrants to socio-economic transformation in the country.

Chapter Two: Determinants and the regulatory framework on immigration in South Africa

2.1 Introduction

This chapter looks at the determining factors and the regulatory framework that influence immigration to South Africa. The purpose of the chapter is first and foremost to bring clarity on why South Africa has since the fall of apartheid become a favourite immigration destination in Africa and in that regard to explore the legal framework within which immigration takes place and therefore also, the obligations imposed on the government on how appropriately to deal with issues relating to the immigrants in the country. Migration-related policy research conducted by the CDE since the mid-1990s has demonstrated repeatedly that government's policy focuses mainly on having a more open migration regime, with the understanding that skilled immigrants could alleviate some of the skills deficits in the country and help to accelerate economic growth.⁵³

Interestingly, with regard to the imperative for transformation in South Africa, 'pent-up expectations for the restoration of social justice and improvement in the livelihood circumstances' of the disadvantaged segments of the population unfortunately shifted when the government of the African National Congress (ANC) turned away from its pro-poor policy 'to embrace the ideology of free market capitalism'.⁵⁴ The shift of position gave the misleading notion that economic growth constitutes the panacea to socio-economic transformation, which then set the wrong precedent that immigration policies must of necessity be geared towards achieving economic growth. The extant Immigration Act of 2002, which has subsequently been amended a couple of times, highlights as one of its objectives 'to permit an easy flow of highly skilled foreigners and investors into South Africa' with the intention to promote economic growth by:

- (a) Ensuring that businesses in the Republic may employ foreigners who are needed;

⁵³ Bernstein (n 21 above) 3.

⁵⁴ Ngang CC 'Socio-economic rights litigation: A potential strategy in the struggle for social justice in South Africa' (2013) *Master dissertation University of Pretoria* 2.

- (b) Facilitating foreign investments, tourism and industries in the Republic which are reliant on international exchanges of people and personnel;
- (c) Enabling exceptionally skilled or qualified people to sojourn in the Republic;
- (d) Increasing skilled human resources in the Republic;
- (e) Facilitating the movement of students and academic staff within the Southern African Development Community for study, teaching and research; and
- (f) Tourism promotion.⁵⁵

These measures are anticipated to ensure that immigration contributes in advancing the South Africa economy. However, the section of South African society which includes the most marginalised where transformation is largely needed is unlikely to be impacted positively by these immigration measures. More so, immigration is influenced by many different factors not necessarily intended at achieving only economic growth, which therefore necessitates looking at the question of immigration more broadly to determine to what extent policies in that regard could be shaped to address the deep-rooted socio-economic challenges confronting the greater part of the South African population.

The chapter is thus structured as follows: The next section deals with the determining factors to immigration in South Africa, which involves an examination of the push and pull that cause migrants to come to South Africa. This is followed by an analysis of the regulatory framework on immigration in South Africa, which highlights the international and domestic laws that guarantee certain rights and freedoms and lay down the conditions for entry and stay in the country as an immigrant. A summary of the chapter is then presented in which some principal points and arguments are underscored.

2.2 Determining factors to immigration in South Africa

The analysis in this section is intended to illustrate why migrants find favour with South Africa over other immigration destinations in the world. Human migration, which involves the singular or massive movement of people from one location to another, including across international borders is a complex global concern and a

⁵⁵ Immigration Act 13 of 2002 art 14

survivalist phenomenon that is 'as old as human existence on earth'.⁵⁶ International migration broadly involves the movement of people across international borders, which includes on the one hand emigrants, referring to those who depart from a sending country and the movement is called emigration and on the other hand immigrants, referring to those who come into a transit or destination country in what is known as immigration.⁵⁷

Though South Africa is known to be a sender of large numbers of migrants to other parts of the world, this study focuses mainly on the aspect of immigration, which in recent times has been a cause for concern in South Africa. The reasons for which people migrate are varied, ranging from causes relating to environmental and climatic conditions, political crisis, economic circumstances and social factors.⁵⁸ These varied reasons have, for purposes of understanding migration trends been classified as either push or pull factors, which are examined in the following sub-sections.⁵⁹

2.2.1 Push factors

The push factors to migration generally consist of the adverse circumstances that compel people to leave their countries of origin to a country of destination.⁶⁰ While this may be detrimental to the country of origin, under the circumstances the need for survival often outweighs the patriotic feeling to stay. Most immigrants to South Africa, particularly those from other parts of the African continent, are in most cases pushed out of their countries by political instability and economy distress.⁶¹ The African political landscape is characterised by volatile electoral transition processes in many sub-Saharan African countries, which often degenerate into civil strife which often then displaces large numbers of peoples, some of whom are forced to try and

⁵⁶ Isike & Isike (n 25 above) 93.

⁵⁷ Simelane (n 33 above) 3.

⁵⁸ See Chiranga (n 7 above) 13.

⁵⁹ Baruch Y, Budhwar PS & Khatri N 'Brain drain: Inclination to stay abroad after studies' (2007) 42 *Journal of World Business* 100.

⁶⁰ Rasool, Botha & Bisschoff (n 11 above) 12.

⁶¹ Magomana T 'Patterns, causes and effects of African immigration into South Africa' (2012) available at: <http://magomana.com/index.php/en/magomana-research/item/54-patterns-causes-and-effects-of-african-immigration-into-south-africa.html> (accessed: 1 March 2016).

find their way into other countries. This explains the reason why areas with the highest levels of political instability, particularly in the horn of Africa, East Africa and Central African regions has displaced and caused increasingly huge numbers of the displaced people to seek refuge in South Africa.⁶² The largest number of refugees and asylum seekers in South Africa originate from conflict and war-torn countries such as Somalia, Angola, Burundi, the Democratic Republic of the Congo and Zimbabwe.⁶³ Some of these conflicts as it is explained resulted from cultural and ethnic problems like in the case of Rwanda and Burundi where Hutus and Tutsis were forced out of their homelands as a result of their specific cultural and ethnic identities.⁶⁴

Coupled with the economic difficulties and high unemployment rates that prevail in most parts of sub-Saharan Africa as well as the increasingly restrictions on legal immigration into Europe, especially for Africans migrants, refugee-induced displacements have increasingly diverted focus towards South Africa.⁶⁵ This too could be explained by the fact that it is relatively easy, non-hazardous and cheaper for migrants from other parts of Africa to make their way to South Africa by land than to other favourite overseas immigration destinations. Migrants may also be displaced and consequently pushed out of their home countries of origin by environmental factors such as floods, draught and other natural disasters.⁶⁶

Immigration that is induced by political instability is usually involuntary in the sense that without the adverse situation, which in a majority of the circumstances poses a threat to life and personal security, the migrants might not have wanted to leave their country. It is within this context that migrants who fall in that category are granted legal protection under international law and also under domestic law, for a country like South Africa that has adopted national legislation in that regard. Under the circumstances, these categories of persons come into the country without necessarily having to achieve the economic growth objectives set out by government but may

⁶² Magomana (n 61 above).

⁶³ Isike & Isike (n 25 above) 94.

⁶⁴ Solomon H 'Strategic perspectives on illegal immigration into South Africa' (1996) 5:4 *African Security Review* 3.

⁶⁵ Tati G 'The immigration issues in the post-apartheid South Africa: Discourses, policies and social repercussions' (2008) 3 *Espace, Populations, Sociétés* 426.

⁶⁶ Solomon 1996 (n 64 above) 1.

equally have potentials that could be of benefit to the country in other ways other than only just to advance the economy. Besides the push factors that force migrants to leave their countries, South Africa also plays a significant role in attracting migrants from the rest of Africa as well as other parts of the world.

2.2.2 Pull factors

Pull factors on the other hand consist of the favourable circumstances in a destination country, including the actions that create the demand for, attract and cause migrants to leave their countries of origin.⁶⁷ It is established that despite being a developing country, the economic opportunities and services in the areas of engineering, medicine, information technology and education that South Africa offers attract many migrants from neighbouring countries, the African continent as a whole and other parts of the world.⁶⁸ It is noted that most migrants are also attracted to South Africa because of attractive salaries, possibilities for early retirement, opportunity to gain international work experience to enhance prospects for advancement, improved lifestyle and a variety of career choices, coupled with the global demand for skilled workers.⁶⁹

The uplifting of immigration restrictions after 1994 without an immediate replacement of the Aliens Control Act with new legislation created a loose space for the influx of immigrants of all categories.⁷⁰ The influx was partly facilitated by the relatively liberal refugee and asylum legislation adopted in 1988, which guarantees to asylum seekers the right to work and to study and also made conditions for entry to refugees and asylum seekers relatively easy and uncomplicated.⁷¹ The immigration legislation that was adopted in 2002 to regulate the admissibility of other categories of immigrants besides refugees and asylum seekers further encouraged the entry of migrants with the potential to make a positive contribution to the South African economy, skilled workers in occupations for which there is a shortage in the country as well as industrialists and other entrepreneurs who wish to relocate their existing

⁶⁷ Rasool, Botha & Bisschoff (n 11 above) 12.

⁶⁸ Rasool, Botha & Bisschoff (n 11 above) 11-12.

⁶⁹ Rasool, Botha & Bisschoff (n 11 above) 12.

⁷⁰ Khan (n 7 above) 3.

⁷¹ See generally Refugee Act 130 of 1988.

businesses or establish new ventures in South Africa.⁷² Unlike under the apartheid system where only unskilled labour migrants were allowed entry from other neighbouring countries to work in the mine, farms and manufacturing industry, the 2002 immigration legislation created access only to skilled personnel and persons with exceptional potential.

In recent years, while immigration by Africans to Europe has become more challenging because of the European Union's asylum policies, South Africa's sound legal and democratic dispensation offers a motivating alternative.⁷³ As the most affluent country situated south of the Saharan together with advancements in technology and a growing world class economy, the demand for essential skills in South Africa makes the country a magnet for immigrants from across the whole of the continent.⁷⁴ In spite of a high unemployment rate that currently stands at over 25%, the demand for skilled migrants is still very high demand, which in addition to other motivating factors exert a pull on migrants from their countries of origin where such skills might be wasted or may serve no productive purpose.

Accordingly, the immigrant population in South Africa is noted to have multiplied and became literally unmanageable.⁷⁵ It is estimated that between 1994 and 2004 the DHA received about 150,000 asylum applications of which 26,900 were granted refugee status, while in 2006 alone; the highest ever number of asylum seekers estimated at 53,363 were admitted into the country.⁷⁶ In the same year 2006, political and economic instability in Zimbabwe caused a huge exodus of over a million Zimbabwean nationals into South Africa.⁷⁷ South Africa has on the other hand suffered a significant brain drain of a large number of its skilled professionals to foreign labour markets such as the United Kingdom, Australia, the United States, New Zealand and Canada,⁷⁸ which need to be replaced.

⁷² Khan (n 7 above) 4.

⁷³ Isike & Isike (n 25 above) 95.

⁷⁴ Magomana (n 61 above).

⁷⁵ Maja B & Makanyane S 'Labour migration and South Africa: Towards a fairer deal for migrants in the South African economy' (2007) *Labour Market Review* 7.

⁷⁶ Chiranga (n 7 above) 21; Maja & Makanyane (n 75 above) 17.

⁷⁷ Chiranga (n 7 above) 21.

⁷⁸ Maja & Makanyane (n 75 above) 20-21.

During the apartheid era, a huge proportion of the black population was disproportionately disadvantaged in terms of knowledge and skills acquisition and also in terms of access to socio-economic opportunities. The advent of constitutional democracy in 1994 raised expectations for the restoration of social justice and improved livelihood among the majority black South Africans.⁷⁹ The new dispensation also served as a pull factor to a multitude of persons to whom democratic South Africa became a haven for greener pasture and better opportunities.⁸⁰ Patterns of immigration into South Africa thus, became progressively complex and diverse; attracting not only refugees and asylum seekers but also economic migrants and skilled professionals from across the Africa continent, Asia and other parts of the world.⁸¹ Due to lack of a comprehensive policy framework in dealing with the complex spectrum of immigrants,⁸² the situation soon became unmanageable and chaotic, resulting in animosity, violence and targeted assault against foreign nationals across the country. This raises concerns about the circumstances under which immigrants are allowed in the country in the first place.

2.3 Regulatory framework

This section focuses on the legal framework that regulates issues relating to immigration with the aim to determine whether South Africa is bound by any legal obligation to welcome and accommodate immigrants in the country and how effectively the advantages deriving from the practice could be maximised for greater socio-economic transformation. Broadly speaking, and as indicated earlier, migration of which immigration is a component is an international phenomenon that is regulated by international law and also by the domestic law of the receiving country. As a receiving country, immigration to South Africa is regulated principally by the Refugee Act of 1988 and by the Immigration Act that was first adopted in

⁷⁹ Ngang 2013 (n 15 above) 2.

⁸⁰ Crush J 'The discourse and dimensions of irregularity in post-apartheid South Africa' (1999) 37:1 *International Migration* 126; Siddique (n 7 above) 2.

⁸¹ Khan (n 7 above) 2.

⁸² Khan (n 7 above) 2.

2002 with subsequent amendments in 2004⁸³ and 2014. These laws are examined in the sections that follow.

2.3.1 International law

Immigration is regulated under international law generally by the international human rights instruments and more specifically by refugee conventions.

2.3.1.1 International human rights instruments

International law makes provision for the right to freedom of movement not only within ones' own country but also across international borders. Specifically, the Universal Declaration of Human Rights (UDHR) stipulates that: 'Everyone has the right to leave any country, including his own, and to return to his country'.⁸⁴ The International Covenant on Civil and Political Rights (ICCPR) provides that: 'Everyone shall be free to leave any country, including his own'.⁸⁵ Relating to persons who have a genuine reason to seek asylum and to make a refugee claim, The UDHR also guarantees to everyone 'the right to seek and to enjoy in other countries asylum from persecution'.⁸⁶

International migration takes place as a manifestation of these universally recognised human rights which are inherent in every person by virtue of the fact that they are human and therefore, the exercise of these rights cannot be denied or taken away except under conditions specified by law. The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is one of the UN human rights-related treaties that govern the protection of migrant workers and their families.⁸⁷ Though South Africa has for long remained a migrant workers receiving country, it has not ratified the Convention and therefore, is not bound by it.

2.3.1.2 Refugee conventions

⁸³ Kabwe-Segatti & Landau (n 18 above) 30.

⁸⁴ Universal Declaration of Human Rights (UDHR) 1948 art 13(2).

⁸⁵ International Covenant on Civil and Political Rights (ICCPR) 1966 art 12(2).

⁸⁶ UDHR (n 84 above) art 14(1).

⁸⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted on 18 December 1990.

The right to seek asylum and to obtain refugee status is also generally protected by common Art 1 of the 1951 UN Refugee Convention and the 1969 OAU (AU) Refugee Convention. The UN Refugee Convention provides that a foreign national may seek refuge in another country;

owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁸⁸

The OAU (AU) Refugee Convention also highlights the same grounds on which a foreign national may seek place of safety in another country.⁸⁹ The OAU (AU) Convention however, adds another dimension not envisaged by the UN Convention, which includes;

owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.⁹⁰

Other than just obligating African states to provide a place of safety to asylum seekers and refugees, the OAU (AU) Refugee Convention recognises such a gesture as a ‘peaceful and humanitarian act’.⁹¹ This creates ‘legitimate expectations that they are open to receive, to provide assistance, and to secure the settlement of asylum-seekers and refugees who seek sanctuary in their countries’.⁹² South Africa ratified the OAU (AU) Refugee Convention on 15 December 1995 and the UN Refugee

⁸⁸ UN Convention and Protocol Relating to the Status of Refugees adopted by General Assembly Resolution 2198 (XXI) 1951 art 1(2).

⁸⁹ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa adopted by the Assembly of Heads of State and Government CAB/LEG/24.3 on 10 September 1969 art 1(1).

⁹⁰ OAU Refugee Convention (n 89 above) art 1(2).

⁹¹ OAU Refugee Convention (n 89 above) art 2(2).

⁹² Ngang CC ‘Transgression of human rights in humanitarian emergencies: The case of Somali refugees in Kenya and Zimbabwean asylum seekers in South Africa’ (2015) *Journal of Humanitarian Assistance* available online at: <http://sites.tufts.edu/jha/archives/2149> 8.

Convention and its additional 1967 Protocol on 12 January 1996.⁹³ Carol Ngang has rightly pointed out, '[w]hen a state ratifies a treaty, it becomes legally bound and obligated to honor the terms of the treaty'.⁹⁴ As part of its obligation to provide protection to asylum seekers and refugees, South Africa has in effect domesticated the provisions of the treaties into domestic law as illustrated next.

2.3.2 Domestic law

Due to the complexity surrounding the question of immigration in South Africa, which is characterised by a diversified immigrant population whose purpose and motivation for seeking South Africa as a destination country are also varied, it is logical that the different categories of immigrants is not regulated by a single umbrella legislation. The Constitution alone may be said to have an umbrella effect because it provides the statutory framework for every other national legislation such as the Refugee and the Immigration Acts.

2.3.2.1 Constitution of the Republic of South Africa 1996

The South African Constitution is the overarching law of the land to which every other law and all conduct, including by the government and organs of state must at all times be consistent with.⁹⁵ The obligations that it imposes must therefore be complied with.⁹⁶ The Constitution does not make provision for issues relating directly to immigration but lays down general principles of law and standards of behaviour that form the basis of a democratic an open society established on democratic values, social justice and fundamental human rights.⁹⁷ It guarantees the fundamental right to equality under which immigrants who are legitimately within the country may seek protection. The equality clause states that:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

⁹³ UN High Commissioner for Refugees 'States parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol'

⁹⁴ Ngang 2015 (n 92 above) 8.

⁹⁵ Constitution (n 17 above) sects 1.

⁹⁶ Constitution (n 17 above) sects 2.

⁹⁷ Constitution (n 17 above) preamble.

2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.⁹⁸

The Bill of Rights enshrines among others the rights to property, housing, health care, food, water and social security.⁹⁹ According to a purposive interpretation of the Bill of Rights as stipulated by art 39(1)(a) of the Constitution, which must aim to ‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom’, immigrants are not excluded from the constitutional rights. It is noted however, that ‘hardly any South African citizens or politicians see foreigners as entitled to these rights’.¹⁰⁰

2.3.2.2 Refugee Act 130 of 1988

The Refugee Act of 1988 was adopted as a legislative measure to translate the international commitments undertaken by South Africa under the 1951 UN and the 1969 OAU (AU) Refugee Conventions into domestic realisation. The Act defines the process by which someone can apply for asylum in South Africa.¹⁰¹ It envisages:

To give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith.¹⁰²

It is noted that with the advent of democracy in 1994, South Africa shifted from a refugee producing country to one receiving hundreds of thousands of refugees from across the African continent and beyond.¹⁰³ Besides the obligations imposed by the UN and the OAU (AU) Refugee Conventions, the Refugee Act that was drawn up in 1998 and enacted into law in the year 2000 also enjoins the government of South

⁹⁸ Constitution (n 17 above) sect 9(1) & (2).

⁹⁹ Constitution (n 17 above) sects 25, 26 & 27.

¹⁰⁰ Laher H ‘Antagonism toward African immigrants in Johannesburg, South Africa: An integrated threat theory (ITT) approach’ (2008) *Master dissertation, University of Witwatersrand 2*.

¹⁰¹ Mthembu-Salter *et al* (n 36 above) 10.

¹⁰² Refugee Act (n 71 above).

¹⁰³ National Consortium for Refugee Affairs ‘Summary of key findings: Refugee protection in South Africa (2006) *Kutlwanong Democracy Centre 1*.

Africa to receive, accommodate and protect persons who have been compelled to leave their countries of origin as a result of well-founded fear of persecution, violence, or conflict.¹⁰⁴ By adopting domestic legislation to complement its international engagements, South Africa reaffirms its commitment to be bound by its own law in providing protection to asylum seekers and refugees within its borders, not only as a humanitarian gesture but essentially as a legal obligation.

The Act allows South Africa the authority to set the principles and standards relating to the reception of asylum seekers; regulate the asylum application process and the conditions for the granting of refugee status. It also provides among others for the rights and obligations that refugees and asylum seekers are legally entitled to. As the National Consortium for Refugee Affairs has outlined, the following rights can generally be deduced from the Refugee Act:

- They have the right to not be returned to their country of origin or any other country if doing so would place their life or security at risk;
- From the moment they lodge an asylum application, they have the right to work and study. Refugees have access to health care, public relief, and assistance. All people in South Africa have the right to life saving medical treatment;
- The right to have their asylum applications adjudicated in a manner that is lawful, reasonable and procedurally fair, which includes the right to appeal a negative decision on asylum claim;
- The right to freedom of movement and not to be arbitrarily arrested and detained. When detained, under conditions consistent with human dignity.
- The right to legal representation.¹⁰⁵

The Act specifically provides that once granted legal status, refugees are entitled to full legal protection and the enjoyment without discrimination of all the rights and privileges set out in the Bill of Rights.¹⁰⁶ Emphasis is placed on the rights to seek employment, access basic health care and education.¹⁰⁷ Thus, the same rights that are guaranteed to all South African are equally guaranteed to refugees for as long as

¹⁰⁴ National Consortium for Refugee Affairs (n 103 above) 1.

¹⁰⁵ National Consortium for Refugee Affairs (n 103 above) 2.

¹⁰⁶ Refugee Act (n 71 above) art 27(b).

¹⁰⁷ Refugee Act (n 71 above) art 27(f) & (g).

they discharge of their legal responsibility to respect and stay within the confines of the laws of the country.¹⁰⁸

The Refugee Act prohibits the government from refusing entry into the country, expelling, extraditing or returning to any other country or be subject to any similar measure, if as a result of any of such action the persons concerned are exposed to persecution or threat to life.¹⁰⁹ The legal obligations imposed by the Refugee Act in conjunction with the Refugee Conventions mentioned above entail that South Africa may not forcefully repatriate the asylum seekers and refugees within its borders except for reasons that are genuinely justified by law. The perpetuation of any action by the government or the allowance of such action to be perpetuated by a third party would be deemed to contravene both international as well as domestic law.

South Africa's progressive refugee and asylum legislation with an impressive guarantee of rights is inspiring, probably accounting for the massive influx of foreign nationals to seek refuge in the country.¹¹⁰ However, it is noted that although these rights are provided for by law, accessing them remains an illusion for many refugees and asylum seekers.¹¹¹ In spite of these assurances of protection, the two instances of widespread xenophobic eruptions, which affected large numbers economic immigrants as well as asylum seekers and refugees, hold evidence of the government's indifference in providing sufficient protection as stipulated by the law. Government's indifference has often manifested in the fact that instead of taking decisive measures or concrete action in dealing with the crisis, rather tried to mitigate the gravity by claiming that xenophobic attacks are acts of criminality.

The Refugee Act places responsibility upon the South African government to provide full protection and provision of rights set out in the Constitution – this includes access to social security and assistance.¹¹² As earlier mentioned, as of 12 January 1996, South Africa is bound by ratification to the UN Refugee Convention, obliging

¹⁰⁸ Refugee Act (n 71 above) art 34.

¹⁰⁹ Refugee Act (n 71 above) art 2.

¹¹⁰ National Consortium for Refugee Affairs (n 103 above) 3.

¹¹¹ National Consortium for Refugee Affairs (n 103 above) 3.

¹¹² McConnell (n 22 above) 38.

the state to provide equal treatment to refugees as it would to its nationals.¹¹³ Meanwhile, though the Immigration Act attempts to be more migrant-friendly, it is considered extremely limited and ambiguous, with emphasis almost exclusively focused on attracting highly skilled migrants.¹¹⁴ It may be argued that such a policy is discriminatory and therefore, contravenes international human rights law that provides for the right to movement to everyone without discrimination of any form¹¹⁵ as well as the constitutional law guarantee of equality and non-discrimination.¹¹⁶

Compliance with the law entails the government to take its obligation to ensure sufficient protection of the foreign nationals in the country seriously and most importantly to ensure that they make a valuable contribution in transforming the country's socio-economic landscape. On this note, it is essential to look at the legal instrument that regulates the category of immigrants who come to South Africa for other reasons than to seek asylum.

2.3.2.3 Immigration Act 13 of 2002 as amended in 2014

The South African Immigration Act of 2002 as amended in 2004 and in 2014 is the primary legal instrument that regulates and sets out conditions of entry, residence and departure of the broader range of immigrants including temporary visitors of different category, economic migrants, investors and permanent residents. The Act lays down conditions and procedures for obtaining visas and permits for skilled migrants, students, tourists and other categories of permanent and temporary migrants and also envisages the arrest and deportation of undocumented migrants.¹¹⁷ Despite recommendations to the government to relax its immigration policy, the 2014 amendment of the Immigration Act rather 'increased the barriers to migration for all categories of migrants'.¹¹⁸

The Immigration Act does not provide for the same kind of rights and privileges as guaranteed by the Refugee Act, which means that the government is under no

¹¹³ McConnell (n 22 above) 38.

¹¹⁴ McConnell (n 22 above) 37.

¹¹⁵ UDHR (n 87 above) art 13(2); ICCPR (n 88 above) art 12(2).

¹¹⁶ Constitution (n 17 above) sect 9.

¹¹⁷ Polzer (n 35 above) 4.

¹¹⁸ Mthembu-Salter *et al* (n 36 above) 8.

particular human right obligation towards immigrants whose entry into the country is regulated by the Act. However, because the Act is presumed not to be inconsistent with the Constitution that embraces ‘all who live’ in South Africa, it is logical to argue that the constitutional guarantee of equality and non-discrimination allows foreign nationals who are legitimately within the country on regular visas or permits to enjoy the same rights and to exercise the same responsibilities like South African nationals. Tara Polzer has ascertained that the Bill of Rights ‘grants all people in South Africa—citizens and both documented and undocumented non-citizens—rights to life, dignity, equality before the law, administrative justice, basic education, basic health care, and labour rights’.¹¹⁹ The Constitution also guarantees to *everyone*, including foreign nationals and their dependants, the right to social security and assistance.¹²⁰

The application of the social security provision to foreign nationals has been the subject of litigation at the Constitutional Court in *Khosa and others v Minister of Social Development*.¹²¹ The litigation resulted from claims to social grants for the children of Mozambican immigrants who had legitimately obtained permanent residence status in South Africa and therefore qualified to be considered for such grants.¹²² The Department of Social Development argued as per provisions of the Social Assistance Act 59 of 1992 that because the complainants did not have South African citizenship, were not entitled to social grants.¹²³ The Court found the state’s argument to prioritise South African citizens to the detriment of permanent resident foreign nationals unconvincing, unreasonable and in violation of its constitutional obligation and therefore, held that the exclusion of permanent residents from the social assistance programme constituted unfair discrimination and a violation of the rights to equality and access to social security.¹²⁴ The Court thus, ordered the Minister of Social Development to extend the social grants scheme to include all permanent residents who meet the illegibility criteria.¹²⁵

¹¹⁹ Polzer (n 35 above) 3-4.

¹²⁰ Constitution (n 17 above) sects 27(1)(c) & 28(1)(c).

¹²¹ *Khosa & Others v Minister of Social Development* 2004 (6) SA 505 (CC).

¹²² *Khosa* (n 121 above) para 1.

¹²³ *Khosa* (n 121 above) paras 3-5.

¹²⁴ *Khosa* (n 121 above) para 82.

¹²⁵ *Khosa* (n 121 above) para 98.

2.4 Context for implementation

This section is intended to show that the constitutional democratic context within which the Refugee and Immigration Acts operate, the government is required to structure its immigration policy to be more receptive, accommodating and immigrant-friendly in view of combining the imperative for socio-economic transformation and the need to protect the national interest. However, it seems that the constitutional changes introduced with the coming of the new political dispensation created a framework in which various interest groups are struggling to consolidate their positions and therefore, see immigrants as a new threat that needs to be dealt with.¹²⁶

Historically, the immigration question in South Africa has been an extremely sensitive and controversial issue.¹²⁷ Though government thinking on immigration has in principle changed in favour of a policy that takes into consideration the contribution that immigrants can make to the South African society in the largest sense, anti-immigrant sentiments are still very much prevalent.¹²⁸ Owing to the fact that a large proportion of the South African population is without the skills that are in demand by the advanced economy and therefore, can most often only qualify for unskilled labour, the immigration policy restricts the entry of unskilled migrants into the country and rather encourages 'highly skilled migrants to work in key sectors of the economy'.¹²⁹ This is motivated by the massive shortage in skilled workforce which, in the short to medium term can only be addressed by encouraging the immigration of skilled workers.¹³⁰

In spite of this, it is noted that '[s]ignificant political constituencies and administrative services remain ambivalent or even opposed' to the idea of an open and receptive immigration policy, making it difficult for immigrants to enter and stay in the country legally.¹³¹ As a key regional, continental and global actor, South Africa

¹²⁶ Kabwe-Segatti & Landau (n 18 above) 29.

¹²⁷ Kabwe-Segatti & Landau (n 18 above) 29.

¹²⁸ Kabwe-Segatti & Landau (n 18 above) 30.

¹²⁹ Kabwe-Segatti & Landau (n 18 above) 29.

¹³⁰ Kabwe-Segatti & Landau (n 18 above) 30.

¹³¹ Kabwe-Segatti & Landau (n 18 above) 30.

is indeed caught in between favouring an open immigration policy and dealing with domestic challenges.¹³² This invokes the question how the government intends to balance the priorities of protecting the national interest while at the same time promoting socio-economic transformation through the integration of immigrants.

2.4.1 Imperative for socio-economic transformation

South Africa's constitutional dispensation imposes an obligation on the state as a well as all sectors of South African society to strive towards large-scale socio-economic transformation with the aim to bridge the inequality divide. The context that sets the pace for the achievement of the imperative for transformation is outlined by the Preamble to the Constitution¹³³ and the Bill of Rights which, as the cornerstone of the country's democracy underscores the democratic values of 'human dignity, equality and freedom' guaranteed to 'all people in our country'.¹³⁴ The process of transformation, for which Karl Klare originally coined the term 'transformative constitutionalism',¹³⁵ envisages a situation in which the entire country needs to redress not only the wrongs of the past, but an effective makeover of the socio-economic *status quo* and the resulting societal imbalances bequeathed by apartheid.¹³⁶ It entails sweeping egalitarian reforms and radical measures for change, which must be undertaken within the framework of the law and in accordance with established constitutional principles.¹³⁷

The allusion that the Constitution makes by referring to 'all people in our country' needs to be understood in the broadest sense to include foreign nationals of various categories, who are not only entitled to the constitutional guarantees outlined in the Bill of Rights but are also, in their capacity as natural persons bound by the

¹³² Kabwe-Segatti & Landau (n 18 above) 31.

¹³³ Ngang CC 'Judicial enforcement of socioeconomic rights in South Africa and the separation of powers objection: The obligation to take "other measures"' (2014) 14 *African Human Rights Law Journal* 660.

¹³⁴ Constitution (n 17 above) sect 7(1).

¹³⁵ Klare K 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150.

¹³⁶ Ngang 2014 (n 133 above) 661.

¹³⁷ Klare (n 135 above) 150.

responsibility to ensure that the transformative vision embodied is achieved.¹³⁸ This notwithstanding, long-standing resentment by South Africans against immigrants, has often been blamed on ‘frustrations over the government’s failure to deliver housing and social services’.¹³⁹ It seems that the underlining cause behind the animosity against African immigrants is not necessarily because they constitute a social ill but because of the government’s failure or inability to satisfactorily deliver on its political promises to provide housing and social services to all South Africans. If such is the case, it makes no sense that the blame is shifted to immigrants instead of addressing the real issues at stake.

Judging by the statement made by the Zulu King Goodwill Zwelithini, which is widely believed to have ignited the 2015 xenophobic eruptions,¹⁴⁰ it might not be wrong to say that resentment against immigrants is often instigated by local leaders for political reasons. These political reasons do not exclude the fact that politicians take advantage of circumstances to divert attention from their inability to deliver on political promises by making foreign nationals to be seen as taking away opportunities from South Africans. Though the law allows foreign nationals to enter and take up temporal or permanent residence in the country, the national response to immigrants leaves much to be expected in terms of ensuring that immigrants do not become a burden but a contributing factor to socio-economic transformation in the country.

2.4.2 National interest

Understandably, the reason for South Africa’s highly restrictive immigration policies is explained by the need to protect the national interest. A huge proportion of the

¹³⁸ See Constitution (n 17 above) sect 8(2).

¹³⁹ Bobb S ‘Poverty, inequality blamed for 2008 xenophobic attacks in South Africa’ (2010) *Voice of America* available at: <http://www.voanews.com/content/poverty-inequality-blamed-for-2008-xenophobic-attacks-in-south-africa-88445737/160358.html> (accessed: 26 February 2016).

¹⁴⁰ In a speech delivered to over 10,000 people at a traditional gathering in Durban in 2015, a day before the eruption of the xenophobic violence, the highly influential Zulu King Goodwill Zwelithini is alleged to have said ‘foreigners must pack their bags and go home’. Though the King claims to have been misquoted by journalists, his statement is widely believed to have instigated the violence against African immigrants. See *The Guardian* online at: <http://www.theguardian.com/world/2015/apr/20/south-africa-xenophobic-violence-zulu-king-goodwill-zwelithini> (accessed: 30 April 2016).

South African population live in extreme poverty, and thus the popular feeling is that the government should to a greater extent prioritise its own citizens for employment and the provision of social amenities.¹⁴¹ According to Polzer, the immigration system as opposed to the asylum and refugee regime is unnecessarily ‘dominated by concerns about economic and physical security’ and not sufficiently tailored to address national realities in terms of skills and labour needs as well as human rights and socio-economic development in the country.¹⁴² Government’s obsession to protect the interest of South African citizens against an imaginary security threat posed by immigrants is costing tax payers huge sums of money meanwhile, the actual problem as the Research Migration Consortium has established is government’s failure to effectively implement the laws by which it is bound.¹⁴³

Research has shown that governments attempt to promote the national interest by policing immigration for national security reasons is illogical in the sense that by criminalising immigration, many immigrants that could genuinely have obtained legal status and contributed positively in advancing the economy are forced to go into hiding and in so doing instead increasing security risk.¹⁴⁴ More so, money that would have been spent productively, for example, in providing basic social services which constitutes a major socio-economic problem is often wastefully spent on trying to deport immigrants, which in most cases result into litigation when such deportation campaigns are challenged in court.¹⁴⁵

It is argued here that owing to the imperative for broad-based socio-economic transformation in South Africa, the need to prioritise the national interest does not exclude the contribution that immigrants could make to the country. If immigrants are granted equal enjoyment of the socio-economic rights enshrined in the constitution as illustrated by the *Khosa* case discussed above, there is no reason why they should not be required as a matter of responsibility to contribute positively to the socio-economic development of the country. Instead of looking at African immigrants as a social problem to be dealt with, it is the duty of the government to

¹⁴¹ Kabwe-Segatti & Landau (n 18 above) 29.

¹⁴² Polzer (n 35 above) 5.

¹⁴³ Mthembu-Salter *et al* (n 36 above) 5.

¹⁴⁴ Mthembu-Salter *et al* (n 36 above) 18.

¹⁴⁵ Mthembu-Salter *et al* (n 36 above) 11-16.

ensure that the potentials that they possess are effectively utilised to the mutual benefit of the country and the persons concerned.

2.5 Summary conclusion

By looking at the determinants of immigration in South Africa, this chapter effectively has demonstrated that the presence of a large number of foreign nationals, especially from other African countries may not only be attributed to the adverse circumstances that forced them to leave their countries of origin but also to the fact that South Africa needs and attracts them. For the same reasons that migration has become an unavoidable international phenomenon, South Africa does not represent any exception to the practice of sending and receiving migrants to and from other parts of the world. This is established to take place within the framework of both international as well as domestic laws to which South Africa has legally committed itself with regard to accepting and accommodating foreign nationals in the country.

With international obligations deriving from the treaties that South Africa has ratified, coupled with relatively liberal domestic refugee legislation and a progressive Constitution that guarantees a broad range of rights to citizens as well as immigrants, the obligation is imposed on the government to protect the foreign nationals within the country. Coupled with the need to achieve socio-economic transformation, which entails the mobilisation of huge amounts of resources to be able to improve the livelihood conditions of the millions of disadvantaged South Africans, the argument advanced in this regard is how immigration could be seen as a contributing factor to the achievement of that objective rather than as a problem. A further illustration showed that in trying to deal with immigration as a problem, the government engages in unnecessary expenses¹⁴⁶ that could legitimately be allocated to providing much need social services or to creating opportunities to improve the livelihood circumstances of disadvantaged South African.

In the next chapter I make an in-depth analysis of how immigration impacts on socio-economic transformation in South Africa.

¹⁴⁶ Mthembu-Salter *et al* (n 36 above) 11-16.

Chapter Three: Assessing the impact of immigration policies on socio-economic transformation

3.1 Introduction

This chapter aims to illustrate how immigration impacts or may impact on socio-economic transformation in South Africa. As highlighted by Gabriel Tati, the African ANC government has since ascending to power had to deal with numerous challenges, among which is ‘the implementation of an immigration policy regime that suits the transformative and developmental needs of the nation’.¹⁴⁷ As the world becomes progressively more inter-connected through globalisation, people are becoming even more mobile, making international migration an increasingly important part of international development and consequently reshaping individual states policies.¹⁴⁸ Global trends in international migration indicate that it is a growing phenomenon that is not stoppable in the immediate future. For instance, it is established that the ‘number of international migrants increased from 150 million in 2000 to 214 million in 2012’, involving almost every country in the world.¹⁴⁹ Yet, as the International Organisation for Migration (IOM) has noted, ‘migration remains inadequately integrated into development frameworks at national and local levels, and public perception of migrants and migration are often very negative’.¹⁵⁰

Meeting in 2013 for the High-Level Dialogue on International Migration and Development, the United Nations helped to ‘identify concrete measures to strengthen coherence and cooperation at all levels, with a view to enhancing the benefits of international migration for migrants and countries alike and its important

¹⁴⁷ Tati (n 65 above) 423.

¹⁴⁸ Thrane A ‘New trends in migration: South African case study’ (2013) available at: <https://globalprosperity.wordpress.com/2013/10/04/new-trends-in-migration-south-african-case-study/> (accessed: 5 March 2016).

¹⁴⁹ Thrane (n 148 above).

¹⁵⁰ International Organisation for Migration *World Migration Report: Migrant, Well-being and Development* (2013) 23-24; Thrane (n 148 above).

links to development, while reducing its negative implications'.¹⁵¹ In this regard, Aubrey Thrane estimates that:

International migration, in all likelihood, will continue to increase and affect the economies, societies, and cultures of countries around the world- so it is imperative for us all to understand this phenomenon and its implications for development now and in the future.¹⁵²

In spite of the growing global trend in international migration and its estimated advantages, in South Africa, the question of immigration is still viewed with a lot of negativism, xenophobia and intolerance.¹⁵³ Studies show that South Africa records 'the highest level of opposition to immigration recorded by any country in the world' where similar studies have been carried out.¹⁵⁴ It is apparent that South Africa faces the challenge of balancing the need to promote the welfare concerns of its citizens and taking advantage of the potential benefits that may accrue from immigration. Benefits to South Africa as a receiving country may come as a result of increased output as a result of the skills and experiences that immigrants come with.¹⁵⁵ Though it is believed that the country's immigration policies are accommodative of anyone who can contribute to developing the new South Africa,¹⁵⁶ there is little or no evidence of any assessment that has actually been carried out by government to determine to what extent immigration contributes towards achieving that goal.

It is acknowledged that excessive immigration may also have undesirable socio-economic consequences,¹⁵⁷ which therefore necessitates the discussion in this chapter to be able to determine both the negative and positive attributes of immigration. The chapter is thus divided into two sections. The first part deals with the negative attributes, while the second section deals with the positive attributes of

¹⁵¹ United Nations 'High-level dialogue on international migration and development' 3rd & 4th October, 2013 available at: <http://www.un.org/esa/population/meetings/HLD201/mainhol> (accessed: 5 March 2016); Thrane (n 148 above).

¹⁵² Thrane (n 148 above).

¹⁵³ Thrane (n 148 above).

¹⁵⁴ Mattes R *et al* 'Still waiting for the barbarians: South Africans' attitudes to immigrants and immigration' (1999) *IDASA Migration Policy Series 14*; Solomon 2000 (n 29 above) 6.

¹⁵⁵ Simelane (n 33 above) 3.

¹⁵⁶ Isike & Isike (n 25 above) 102.

¹⁵⁷ Simelane (n 33 above) 3.

immigration. A synthesis of both angles is then made in the concluding section to establish whether South African immigration policies are actually geared towards ensuring that socio-economic transformation is achieved.

3.2 Negative attributes

The negative attributes are discussed in this section in terms of how issues relating to immigration adversely affect socio-economic transformation in South Africa. It is true that immigration, especially when it happens illegally, comes with a lot of negative consequences.¹⁵⁸ It has been argued that excessive immigration may have undesirable socio-economic consequences like increased crime, overcrowding, and increased unemployment, to name a few.¹⁵⁹ According to Magomana, the presence of illegal immigrants in South Africa in recent times has had a huge negative impact on the country's economy, educational system and the government's ability to deliver social services.¹⁶⁰ The pressure is said to be enormous on South African society as a whole, but largely on the disadvantaged black population who are now forced to compete at every level with immigrants.¹⁶¹

The complexity surrounding the question of immigration, resulting from the government's high-handedness in trying to restrict or reduce the number of foreign nationals in the country and the reaction from immigrants in trying to cheat the system in order to obtain legal permission to stay makes it 'difficult to accurately assess the costs and benefits of immigration to South Africa'.¹⁶² This may be explained by the fact that reason and sound judgment has been overtaken by adrenaline driven emotions rather than by decisive measures in indentifying the real issues at stake and in taking concrete actions in addressing them. Immigration is thus seen quite negatively in the sense that it poses the following challenges.

3.2.1 Pressure on socio-economic opportunities

¹⁵⁸ Tati (n 65 above) 426.

¹⁵⁹ Simelane (n 33 above) 3.

¹⁶⁰ Magomana (n 61 above).

¹⁶¹ Magomana (n 61 above).

¹⁶² Mthembu-Salter *et al* (n 36 above) 7.

Hussein Solomon has elaborately pointed out the pressure that is exerted on social services, employment opportunities as well as the security risks and threat to political stability that South Africa faces as a result of the large number of illegal immigrants in the country, which he estimates to be between 2.5 and 4.1 million.¹⁶³ He illustrates how illegal immigrants put unskilled or low-skilled South Africans at a disadvantage in the job market by accepting to work beyond normal working hours for far-below-the-standard wages, how they get involved in petit and hard crimes ranging from counterfeiting, fraud, human trafficking, drug peddling, small arms trade and hired assassinations.¹⁶⁴ According to Magomana, the competition for access to social services constitutes the source of conflict between South Africans and foreign nationals, especially given that the government has in more than two decades after the fall of Apartheid, not been capable of addressing social concerns relating to housing, education and employment.¹⁶⁵

Consequently, it is observed that the general feeling of South Africans to the presence of immigrants has dramatically changed from an initial tolerant attitude to an attitude of hostility and belligerent.¹⁶⁶ The change in attitude is argued to be justified by the fact that immigrants compete with South Africans at every level for employment, housing, and access to social welfare services such as health care and education.¹⁶⁷ This line of argument that immigrants constitute an economic burden to the state is however, not founded on fact. In the period between 1994 and 2012 when South Africa experienced the highest influx of immigrants, the economy simultaneously flourished at the rate of 3.3% per annum.¹⁶⁸ During this period of high economic performance, immigrants were hardly seen as a burden to the economy. However, as Khalid Koser has rightly noted; during times of recession,

¹⁶³ See generally Solomon (n 29 above).

¹⁶⁴ Solomon (n 29 above) 10-17.

¹⁶⁵ Magomana (n 61 above).

¹⁶⁶ Magomana (n 61 above).

¹⁶⁷ Magomana (n 61 above).

¹⁶⁸ Industrial Development Corporation 'South African economy: An overview of key trends since 1994' (2013) *Industrial Development Corporation* 1.

anti-immigrant sentiments generally increase.¹⁶⁹ A similar view is expressed by Eugene Campbell who points out that on numerous occasions when the economy of a country collapses, immigrants have often without justification been scape-goated and demonised for being the cause, thus giving reason for their massive deportation.¹⁷⁰

Using the examples of Ghana and Nigeria where large numbers of immigrants from both states were reciprocally deported in 1969 and in 1983 and 1985 respectively due to a sudden economic downturn, Campbell illustrates that the depression that both countries experienced was caused by market factors but the immigrant populations were forced to take the blame.¹⁷¹ Since 2012 when the South African economy started declining, the government has in the characteristic manner embarked on very restrictive immigration policies, which include massive deportation of immigrants though without proof that these immigrations are the actual cause of the country's economic woes.

3.2.2 Security risks

Looking specifically at illegal immigrants, which means those who come into the country clandestinely; either with forged documentation or without any form of legal documentation at all, Solomon makes a strong argument why it is necessary to curb the inflow of illegal immigrants because of the adverse impact that they pose to national security, political stability and the livelihood security of South African citizens.¹⁷² With regard to the risk posed by illegal immigrants to national security, it is noted that because of their irregular status in the country, many illegal immigrants resort to commercial crimes such as internet scams, forgery, hijacking, smash and carry and trafficking, which has adversely affected the crime situation in South Africa.¹⁷³ He goes further to explain how illegal immigrants constitute a threat to political stability by the fact that, especially those from Mozambique are forming

¹⁶⁹ Koser K 'International migration: A very short introduction' (2013) available at: <http://blog.oup.com/2013/11/immigration-migration-debate-vsi/#sthash.Su48saMO.dpuf> (accessed: 22 March 2016).

¹⁷⁰ Campell EK 'Reflections on illegal immigration in Botswana and South Africa' available at: <http://www.bioline.org.br/pdf?ep06010> (accessed: 23 March 2016) 3.

¹⁷¹ Campell (n 170 above) 3-4.

¹⁷² See generally Solomon 2000 (n 29 above).

¹⁷³ Solomon 2000 (n 29 above) 12-13.

relief organisations, which though have a philanthropic objective, are being used by political parties in the country for ulterior motives.¹⁷⁴

It is also said particularly of Mozambicans and Zimbabweans who constitute the largest illegal immigrant communities in South Africa, that a greater majority of them uneducated and unskilled.¹⁷⁵ Their presence in the country therefore, poses a livelihood security risk to the majority of South African citizens who are also largely uneducated and possess very low skills in the sense that they are forced to compete unfavourably with their immigrant counterparts for menial jobs.¹⁷⁶ The lively security risk factor is aggravated by the fact that illegal immigrants are said to be carriers and transmitters of deadly diseases such as yellow fever, malaria, tuberculosis, cholera and AIDS.¹⁷⁷ The allegation has however not been proven. There is no substantial evidence of an outbreak of the above named diseases as a result of the influx of African immigrants into the country. It is noted that cholera epidemic for instance, caused a massive influx of Zimbabweans into South Africa in 2008.¹⁷⁸ No corresponding outbreak of cholera in South Africa has ever been reported as resulting from the Zimbabweans immigrants who came into the country.

3.2.3 Phobia and victimisation

During the two widespread xenophobic eruptions in 2008 and 2015 that were directed not only at migrants with irregular status but also at legally established immigrants,¹⁷⁹ the South African government demonstrated a surprisingly nonchalant attitude that has been described as ‘xenophobic nationalism’¹⁸⁰ or ‘institutionalized xenophobia’.¹⁸¹ Instead of addressing the xenophobia

¹⁷⁴ Solomon 2000 (n 29 above) 15.

¹⁷⁵ Solomon 2000 (n 29 above) 10.

¹⁷⁶ Solomon 2000 (n 29 above) 10.

¹⁷⁷ Solomon 2000 (n 29 above) 13-14.

¹⁷⁸ Mlambo A & Raftopoulos B ‘The regional dimensions of Zimbabwe’s multi-layered crisis: An analysis’ available at: http://www.iese.ac.mz/lib/publication/proelit/Alois_Mlambo.pdf (accessed: 23 February 2015); Ngang 2015 (n 94 above) 4.

¹⁷⁹ Tati (n 65 above) 426.

¹⁸⁰ Ngang 2015 (n 95 above) 9.

¹⁸¹ Sanchez D ‘What’s the economic impact of South African xenophobic attacks?’ (2015) *AFKInsider Newsletter* available at: <http://afkinsider.com/94557/economic-impact-of-south-african-xenophobic-attacks/> (accessed: 10 March 2016).

straightforwardly, the government rather downplayed its magnitude and seriousness by shoving the attacks aside as criminally motivated. In so doing government played Pontius Pilate by dissociating itself of a direct legal responsibility to protect the foreign nationals that came under attack by South Africans.

This is not to say that crime was not involved when the xenophobic attacks took place. It is noted that criminal gangs took advantage of the chaos to carry out their criminal activities and see immigrants as ‘soft targets’ who would not report the crime for fear of victimisation or deportation.¹⁸² The government’s aloof attitude seemed to imply that the supposed criminals were justified in attacking the foreign nationals. Whatever, the circumstances, the government’s explanation failed to hold water because it acted against the law by failing to sufficiently protect the victims of the attack in respect of the rights to life and security of person.¹⁸³ In response to the 2015 attacks, the government only jumped to action in taking decisive measures to bring the violence under control when it became obvious that retaliation was threatened or actually been perpetuated against South African businesses and nationals in other countries across Africa.¹⁸⁴

At a Cabinet briefing, Minister Jeff Radebe is quoted to have warned the government that ‘[t]he impact of attacks has far reaching implications on our economic, social and relations with the continent and the world’ and that ‘South African companies who are running successful businesses in the continent who help to contribute to our revenue and sustain our economy may suffer the same fate’.¹⁸⁵ So, even though the xenophobic attacks were targeted at foreign nationals in South Africa, the repercussions were far-reaching and had quite negative impact on South African

¹⁸² Reitzes M ‘Divided on the ‘demon’: Immigration policy since the election’ (1995) 8:9 *Policy Review Series* 42; Solomon 2000 (n 29 above) 6.

¹⁸³ The South African Constitution provides in sects 11 and 12(1)(c) respectively that: ‘Everyone has the right to life’ and that; ‘Everyone has the right to freedom and security of the person,... to be free from all forms of violence from either public or private sources’. The ICCPR also provides in art 6(1) and 9(1) respectively that: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’ and that; ‘Everyone has the right to liberty and security of person.... No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’.

¹⁸⁴ Sanchez (n 181 above).

¹⁸⁵ Sanchez (n 181 above).

nationals and business. It is reported that not only foreign nationals were killed during the attacks but a number of South African citizens as well, while many also suffered damage to property.¹⁸⁶

One of the primary motives for aiming to achieve socio-economic transformation as established by the Preamble to the Constitution is in order to '[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'.¹⁸⁷ This purpose cannot be achieved by creating new divisions through phobia and hatred, social injustices and the violation of the fundamental human rights of immigrants. Phobia and victimisation do not help in socio-economic transformation but rather perpetuate division and stagnation.

3.2.4 Immigration policing and wasteful expenditure

Though there is no evident to show that the social problems and security risks outlined above are only generated by foreign nationals, such perceptions create the context for the perpetuation of social division, inequality and discrimination, which in accordance with the transformation project are unconstitutional.¹⁸⁸ Negative perceptions often provide reason for the expulsion of immigrants with the potential to contribute positively to socio-economic transformation in the country. As Mthembu-Salter *et al* have rightly observed, the abusive treatment of immigrant communities has negative repercussions not only on immigrants but also on the state.¹⁸⁹ For instance, where the abuse of immigrants has been challenged in court, it has caused the state to lose huge sums of monies in legal bills.¹⁹⁰ Evidence is provided of the amounts of state revenue spent by different state departments, including the South African Police Services (SAPS), the Department of Defence and

¹⁸⁶ Sanchez (n 181 above).

¹⁸⁷ Constitution (n 17 above) preamble.

¹⁸⁸ Presenting immigrants in a very negative perspective breeds stigmatisation and gives the impression that because they are not South African, they are not worthy to be treated with dignity. Meanwhile the Constitution clearly stipulates in section 1(a) that 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms'.

¹⁸⁹ Mthembu-Salter *et al* (n 36 above) 7.

¹⁹⁰ Mthembu-Salter *et al* (n 36 above) 7.

the South African National Defence Force (SANDF) in collaboration with the DHA in trying to combat immigration.¹⁹¹

A study of some 90 cases brought before the courts against the DHA for violating immigration and refugee laws, whereby individuals challenged their illegal arrests and detention, it is established that over the period of 23 months between 2009 and 2010 alone, the DHA squandered R4.7 million as litigation cost for wrongfully detaining ‘individuals who should never have been detained in the first place’.¹⁹² Such amounts, which are wastefully spent as a result of the ‘disregard for the rule of law’, undermine South Africa’s democracy.¹⁹³ More so, it is submitted that such amounts could have profitably been used in creating productive opportunities such as promoting apprenticeships and entrepreneurships in order to develop the capabilities of South Africans who are seriously lacking in such potentials.

3.3 Positive attributes

In spite of the obviously negative impact of immigration to the South African society as shown above, there are also positive attributes to it, which are explored in this section. It is stated that:

In many middle income countries, the immigrant population tends to be relatively more skilled than the native population, receiving many of the skilled workers from neighbouring countries, escaping adverse economic, social and political problems faced in their home countries. These characteristics of the labour markets in developing countries and the immigrants that cross international borders in search of better opportunities can have important implications for the welfare of native workers.¹⁹⁴

The analysis on the positive attributes of immigration to South Africa draw from the above perspective though not related only to the labour market. The aim is to illustrate how these positive attributes could be of benefit to driving socio-economic transformation in the country. This is also based on the conviction that not all

¹⁹¹ Mthembu-Salter *et al* (n 36 above) 11-16.

¹⁹² Amit R & Zelada-Aprili R *Breaking the Law, Breaking the Bank* (2012); Mthembu-Salter *et al* (n 36 above) 8.

¹⁹³ Mthembu-Salter *et al* (n 36 above) 8.

¹⁹⁴ Broussard (n 10 above) 2.

immigrants to South Africa are necessarily criminal or pose a security risk.¹⁹⁵ The important consideration in this regard is to determine how the potential of immigrants could be utilised to maximise socio-economic transformation. In essence, what potentials do African immigrants possess that South Africa could benefit from to advance socio-economic transformation?

3.3.1 Immigrants' education and skills potential

According to statistics issued by the South African Qualifications Authority (SAQA), most of the international students graduating from South African universities with 'education-related qualifications in 2010 were from Namibia (1072 or 36%), followed by Zimbabwe with 236 (7.9%), then Lesotho and Swaziland, both with 206 (6.9%) graduates'.¹⁹⁶ As per country of origin of migrant teachers who apply to have their qualifications evaluated in South Africa, the bulk of applications are reported to be from migrants from other African countries, amongst which are Zimbabwe 61%, Ghana 9%, Nigeria 7% and Lesotho 5%.¹⁹⁷ In spite of the nationalist sentiment that immigrants snatch opportunities from South Africans, it is established that in the area of education migrant teachers employed by the state represent less than 0.5% of the total number of teachers employed in public schools in 2010, which is quite insignificant.¹⁹⁸ The implication however, as noted by SAQA is that if for instance, the number of Zimbabwean teachers currently employed in South Africa choose to return home, it will cause a large, sudden shortage of teachers in the country.¹⁹⁹

Educational potential often generally translates into skills potential. Studies illustrate that immigrant workers in the country are relatively well-educated and highly skilled.²⁰⁰ This implies a direct skills transfer as Nzinga Broussard points out that increases in the supply of immigrants increases the labour force participation and employment rates of native-born South Africans.²⁰¹ Accordingly, it is acknowledged

¹⁹⁵ See generally Solomon 2000 (n 29 above).

¹⁹⁶ Keevy J, Green W & Manik S *The Status of Migrant Teachers in South Africa: Implications for Policy, Research, Practice* (2014) 51-64.

¹⁹⁷ Keevy, Green & Manik (n 196 above) 71.

¹⁹⁸ Keevy, Green & Manik (n 196 above) 92.

¹⁹⁹ Keevy, Green & Manik (n 196 above) 73.

²⁰⁰ Thrane (n 148 above).

²⁰¹ Broussard (n 10 above) 2-3.

that migrant labour has always played an enormous role in South Africa's development'.²⁰² However, despite their educational and skills potential, empirical evidence shows that because immigrants are often not treated with the same preference as nationals, they are forced by circumstances to resort to unskilled employment or take jobs that under-utilise their skills.²⁰³ This in turn produces 'significant displacement effects on low-skilled native-born South Africans',²⁰⁴ which means that the system tends to create the situation for which immigrants are accused for snatching job opportunities from South African nationals. The question then is why government policies could not be structured to ensure that the skills which immigrants possess are sufficiently utilised to achieve maximum socio-economic benefits for the country?

3.3.2 Immigrants' productive capabilities

Julie Andersen describes migrants as 'rational value-maximizers',²⁰⁵ a quality that represents the determination to make the most value out of every single opportunity that they stumble upon in the country of destination. She argues that it is intuitively unlikely that migrants would go through all the challenges that they embrace 'if they were not going to at least try to be successful in their destination country'.²⁰⁶ Accordingly, it is stated that immigrants are 30% more likely to start up new businesses than local citizens.²⁰⁷ A majority of African immigrants come to South Africa with that kind of rational value-maximising attitude, which develops into entrepreneurship and the creative potential to start up new business ventures, usually in the informal sector but sometimes also within the formal economy. Before ending up in South Africa as a destination country, most African immigrants have travelled to other parts of the world and therefore, have a global perspective on how to convert local opportunities for gainful purposes; a quality which most South

²⁰² Broussard (n 10 above) 6.

²⁰³ Broussard (n 10 above) 2-3.

²⁰⁴ Broussard (n 10 above) 3.

²⁰⁵ Andersen J 'Why countries restrict migration—and why they should stop' (2012) *According to Julie* available at: <https://accordingtojulie.wordpress.com/2012/04/30/why-countries-restrict-migrationand-why-they-should-stop/> (accessed: 22 March 2016).

²⁰⁶ Andersen (n 205 above).

²⁰⁷ Koser (n 169 above).

Africans lack owing to the fact that they might never have moved out of the localities where they were born.

3.4 Summary conclusion

It cannot be denied that immigration poses a huge constraint on the South African society as has been discussed in this chapter. It should however, be born in mind that these challenges deriving from the presence of foreign nationals in the country are likely to continue to exist even if all immigrants are deported and adequate measures taken to curb or stop the inflow. The crime rate in South Africa is likely to reduce significantly but will not completely be eradicated. The government is very unlikely to dramatically meet the demands for social service delivery. The over 25% unemployment rate is not likely to drop in the sense that most immigrants in the country often find it extremely difficult to secure formal employment. It means that the proportion or actual number of immigrants in the country actually has no direct bearing on the current official unemployment statistics. The absence of immigrants in the country is certainly going to create space for menial jobs for a large number of unskilled South Africans but unfortunately, will not solve the problem of inequality, which the project of socio-economic transformation aims to address.

Socio-economic transformation in South Africa envisages improving the quality of life on the most part for disadvantaged South Africans. This may be achieved only through bridging the inequality gap in such a manner that the difference between the haves and the have-nots in terms of skills, income and otherwise is sufficiently blurred. It is good to acknowledge the fact that it is practically impossible to completely put a stop to immigration.²⁰⁸ Without sidetracking the negative aspects in this regard, the important question to consider is how those negative attributes could be overcome and how the positive aspects attributed to immigration could be explored to ensure maximum socio-economic gains for the country. In this regard it is essential to proceed to look at the value-added contribution that African immigrants make to socio-economic development in the country.

²⁰⁸ See Solomon 1996 (n 64 above) 14.

Chapter Four: Contributions by African immigrants and the constraints posed by the South Africa system to socio-economic transformation

4.1 Introduction

This chapter looks at how the positive attributes of immigration discussed in the previous chapter concretely contribute towards advancing South African society and how these contributions could be explored to inform government policies on immigration particularly relating to African immigrants. According to Julie, it is more advantageous to maximise the benefits arising from immigration because, as she argues, restricting immigration is more costly and that such restrictions are often not quite effective.²⁰⁹ Looking at the potential benefits that may be derived from immigration, Koser estimates that;

Not only have we tended to focus on the wrong challenges arising from migration; we have also failed to do proper justice to its opportunities and benefits, which in most circumstances far outweigh the negatives. Migration can drive economic recovery, lift millions out of poverty, and make the world a more interesting place.²¹⁰

There is conclusive evidence that migrants contribute positively to economic growth in the countries where they settle in the sense that skilled migrants are capable of driving innovation and competitiveness, reason why ‘so many countries are desperate to attract them’.²¹¹ Following the competitiveness among the world’s leading economies to attract skilled migrants from other parts of the world, the question that the government of South Africa may need to consider is how to make the most of the large African immigrant population in the country.

Economists estimate that removing immigration controls could greatly revitalise the global economy by ensuring that workers have the opportunity to move to places where their skills could more profitably be utilised and therefore, give them the

²⁰⁹ Andersen (n 205 above).

²¹⁰ Koser (n 169 above).

²¹¹ Koser (n 169 above).

chance to be more productive.²¹² Many of the African immigrants that come to South Africa are motivated by the fact that the skills they possess could be put to productive use within South Africa's advanced economy much more than those skills could be utilised in their own countries with relatively weak economies.

It is evident that socio-economic transformation in South Africa is mostly targeted at the most disadvantaged segments of the population and geared towards bridging the inequality gap across the spectrum of South African society. Following arguments that immigrants possess vast amounts of education and entrepreneurial skills which constitute a bonus to the country,²¹³ one would imagine a national policy in favour of the integration of those immigrants to create the situation to ensure the transfer of essential skills to low-skilled South Africans. On the contrary, government's immigration policy rather favours the importation of highly skilled immigrants, which though is good for sustaining the country's advanced economy basically challenges the purpose for genuine socio-economic transformation in the sense that the skills deficit gap at the lower levels of society might continue to exist.

4.2 Nature of contributions

In terms of the nature of contributions that African immigrants make to the development of South African society, Nkazie has observed that 'South Africans are not only benefiting economically but also on a social level'.²¹⁴

4.2.1 Contributions to economic development

In spite of the negative perception about international migration, especially following the recent uncontrollable influx of migrants from eastern to central Europe, different countries, including the most industrially advanced such as the United States of America and Canada for example have in recent years adopted immigration policies

²¹² Legrain P *Immigrants: Your country needs them* (2007) 64; Andersen (n 197 above).

²¹³ Reitzes M 'Strangers truer than fiction: The social and economic impact of migrants on the Johannesburg inner city' (1997) *Centre for Policy Studies - Social Policy Research Report* 42; Laher (n 100 above) 3.

²¹⁴ Nkazie 'Indispensable immigrant's contribution to South Africa—Mkhaya Award' (2015) *Amazing things that bring positive results* available at: <http://ibn.co.za/indispensable-immigrants-contribution-to-south-africa-mkhaya-award-2/> (accessed: 30 March 2016).

that seek to attract more immigrants from around the world.²¹⁵ The reasons why these countries encourage immigration provide valuable lessons for understanding the potential benefits that may be derived from it.

4.2.1.1 Market potential

The size of the population of a country determines its market potential in terms of domestic demand and supply of goods and services and also in terms of bilateral trade with other countries. With a population of just over 55 million, an increasingly large population that may be attained by encouraging immigration is beneficial in boosting South Africa's market potential to compete favourably with other economies with a huge domestic market like Nigeria, which has a population of over 200 million people. This would require the government to liberalise its immigration policies to ease the naturalisation process and therefore, enable more immigrants to take up citizenship. In Canada, with a population of about 35 million people, every immigrant into the country is seen as a 'citizen in waiting' and through a liberalised policy, the country is said to have achieved the highest naturalisation rates in the world at 89% with evidence of a thriving economy as a result.²¹⁶

The Canadian example is meant to illustrate that immigration could be as good as how state policy makes it. Though the population of South Africa is almost twice that of Canada, it does not hinder the fact that a larger population is an added advantage economically. The South African government may thus need to reconsider its immigration policies that are resistant to integrating immigrants into the demographic structure of the country. An increase in the size of the population means a consequential increase in demand for goods and services and therefore also, more pressure on the production sector, which in turn stimulates employment as demand for labour also increases. The argument that immigrants unduly benefit

²¹⁵ The United States attracts immigrants through its DV lottery programme through which allocated immigration quotas are granted allowing migrants from almost every country in the world to immigrate to the US. Canada also offers the Federal Skilled Worker Programme among others, through which skilled and semi-skilled labour force is pulled from around the world into Canada every year, representing 81% of all immigrants into the country.

²¹⁶ Broadbent A & Omidvar R 'Five reasons Canada leads the world on immigration' (2012) *Hire Immigrants* available at: <http://www.hireimmigrants.ca/2012/12/17/five-reasons-canada-leads-the-world-on-immigration/> (accessed: 24 March 2016).

from social services at the expense of South African tax payers seems to ignore the fact that immigrants also contribute enormously to the tax poll, especially through the value-added tax (VAT) system, which is imposed on the most essential goods and services and payable by every single person irrespective of country of origin. A larger population thus also imply an increase in state revenue from taxation.

4.2.1.2 Investments in the informal economy

In a developmental state like South Africa, the informal economy has a significant role to play in promoting an enterprising middle-class. Unfortunately, the informal economy in South Africa is not quite as developed as the formal economy, which accounts for the high levels of inequality that continues to separate the haves from the have-nots. African immigrants to South Africa have quite successfully been able to explore this space with phenomenal results. Endowed with entrepreneurial and artisanal skills, most African immigrants, because they are usually unable or unlikely to find formal employment, take advantage of the not-too-developed informal economy to establish small and medium size businesses in the retail trade, fashion and designing, beauty saloons, catering services, liquor parlours, motor mechanics, waste recycling, and information and technology services among others.

It is established that businesses owned and run by foreign nationals actually contribute to an estimated 25% of the GDP in South Africa.²¹⁷ Besides contributing enormously to the state revenue, most of these informal businesses operated by African immigrants provide employment to low-skilled South Africans and the opportunity to acquire on-the-job experience and practical entrepreneurial and artisanal skills to enable them start up their own businesses. More so, because these informal businesses are generally tax-exempt, they sell or render services at relatively reduced cost thus, significantly improving livelihood for the poor. This notwithstanding, the immigrants who operate within the sector are portrayed as 'unacceptably encroaching the informal business sector and the livelihoods of the large number of South Africa's unemployed people'.²¹⁸

4.2.2 Contribution to social development

²¹⁷ McConnell (n 22 above) 34.

²¹⁸ Laher (n 100 above) 14.

The contributions that African immigrants make to social development include within the context of education, social integration and affinity to African integration.

4.2.2.1 Contribution to the educational system

One of the areas through which socio-economic transformation can most dependably be achieved is through education. As of 2006, the number of foreign students studying in South African universities was about 53,733, the majority of whom were from other African countries.²¹⁹ This is an enormous intellectual bonus for South Africa and a serious motivating factor to South African students in terms of academic competitiveness. It is also acknowledged that foreign students are often ‘the main revenue source for many universities, and in effect subsidize local students’.²²⁰ This is a reality in South African universities where except for certain categories of students with special exception, foreign students pay double the amount of fees in addition to other international levies, which local students do not pay.²²¹

Research shows that the ‘teaching profession is one of the many South African sectors facing a skills crisis’, with a total of 62,000 vacant positions in public schools as of 2008, especially in the area of mathematics and sciences.²²² Most of these vacancies are often filled by immigrants.²²³ Contrary to Solomon’s argument that the African immigrant population in South Africa is largely without formal education,²²⁴ research conducted by SAQA shows that of all the migrant teachers employed by the state in 2010 the majority were from other African countries, with Zimbabwe and Ghana topping the ranking with 72% and 9% respectively, while only a negligible 1%

²¹⁹ McGregor K ‘South Africa: Huge growth in foreign students’ (2007) *University World News* available at: <http://www.universityworldnews.com/article.php?story=20071206163532421> (accessed: 7 March 2016).

²²⁰ Koser (n 169 above); McGregor (n 219 above).

²²¹ See for example the fees structure for international students at University of Pretoria ‘Fees and funding: International students’ (2016) available at: <http://www.up.ac.za/fees-and-funding/article/277401/international-students> (accessed: 06 March 2016).

²²² Phiri K ‘The contribution of skilled immigrants to the south African economy since 1994: A case study of health and higher education sectors’ (2010) *Masters dissertation – University of Stellenbosch* 24.

²²³ Phiri (n 222 above) 26.

²²⁴ Solomon 2000 (n 29 above) 10.

of the foreign teachers were employed from countries outside of Africa.²²⁵ In actual numbers, it is also documented that in 2011 there were more than 5,400 foreign teachers working in public schools in South Africa among whom 3,796 were from Zimbabwe alone, 500 from Ghana and 90 from Namibia.²²⁶ A number of Further Education and Training (FET) as well as technical colleges across South Africa offering quality education in the areas of management and accounting, banking and finance, information and technology (IT), mining, electrical engineering and motor mechanics, to name a few are known to be owned and operated by immigrants, especially from Uganda.²²⁷

In justification of the fact that ‘immigrants do jobs that natives will not do’,²²⁸ the coalition of teachers’ unions in South Africa are said to have observed that the country is not producing sufficient teachers because school leavers ignore the occupation because teachers are lowly paid and also because the teaching ‘profession in South Africa is not attractive’.²²⁹ As a result, foreign nationals, because they do not have many options available readily take up the teaching profession, which South Africans refuse to do. Owing to the need to achieve socio-economic transformation in South Africa, these contributions by African immigrants in developing the country’s educational system need to be encouraged for the reason that they constitute a stimulating factor in educating and building the skills capacity of disadvantaged South Africans to become more qualified and competitive in the labour market.

On the contrary, because of government policy to no longer employ foreign teachers, schools that continue to do so, maybe because of the need pay very low salaries.²³⁰

²²⁵ Keevy, Green & Manik (n 196 above) 96.

²²⁶ News24 ‘Over 5 000 foreign teachers in SA’ (2011) *News24* available at: <http://www.news24.com/SouthAfrica/News/Over-5-000-foreign-teachers-in-SA-20110726> (accessed: 30 March 2016). The figures are reported to be ‘taken from the government employee database, Persal’.

²²⁷ The colleges referred to include Brooklyn, Denver, Jeppe, Jintek, Shephard, Appollo, and American colleges among others.

²²⁸ Nkazie (n 214 above).

²²⁹ News24 (n 226 above).

²³⁰ Placements in Education ‘Foreign teachers in South Africa: The situation in January 2014’ (2013) *Placements in Education* available at:

Placement in Education, the entity that is responsible for deploying teachers to schools across South Africa intimates that, ‘we have been told that some teachers in these schools are paid R4000 to R5000 per month. The school knows they will stay - because most schools cannot appoint foreign teachers’.²³¹

4.2.2.2 Social integration

Hwabibi Laher has rightly noted that in addition to the skills that African immigrants possess, the diversity that they bring is to a great extent beneficial to South Africans.²³² However, in spite of the legal guarantees that promise fair treatment to immigrants as discussed in chapter two, when the system flouts these guarantees it excludes and alienates immigrants and therefore push them into clandestine operations with all the negative consequences associated to that. On the contrary, the more immigrants are granted the opportunity to hassle-freely integrate into South African society the more likely they are to add value to socio-economic transformation in the country. This is in the sense that they will be able to operate legitimately in terms of running businesses, carrying out financial transactions with the banks and investing in the country. More importantly, as the government may make it possible, they would be able to transfer their skills to ensure the socio-economic empowerment of many disadvantaged and unskilled South Africans.

Findings from a study conducted in parts of KwaZulu-Natal revealed a 74% affirmation by the sampled population that by watching movies from other African countries, there is clear indication that Africa’s numerous cultures are more similar than they are different’.²³³ It means that if the conditions are made favourable, African immigrants have much in common to share with native born South Africans than the make-belief differences that are being propagated through xenophobic sentiments. Studies on migration in Europe have shown that contact between immigrants and European nationals to a great extent reduce prejudice, animosity and the negative stereotypes about immigrants.²³⁴ As a manifestation of the kind of

<http://www.placementsineducation.co.za/index.php/site/viewblogarchive/id/63> (accessed: 30 March 2016).

²³¹ Placements in Education (n 229 above).

²³² Laher (n 100 above) 3.

²³³ Isike & Isike (n 25 above) 101.

²³⁴ Laher (n 100 above) 7.

social integration that aims to foster the imperative for transformation that envisages unity in diversity;²³⁵ many South Africans have been married to immigrants, thus debunking the negative stereotypes about foreign nationals as basically evil-intentioned and carriers of deadly diseases. Children have been born in most of the conjugal relationships and thus, over time a much broader perspective about social relationships between African immigrants and South African nationals is progressively been established.

4.2.2.3 Affinity to African integration

It is undeniable that South Africa has much in common geographically, historically and culturally with the rest of the African continent than with other parts of the world. Though quite advanced economically than many other African countries, a look at the long term prospects for the entire continent as is currently projected by the African Union through Agenda 2063, envisaging progressive integration towards a United States of Africa, illustrates that socio-economic transformation in South Africa like in every other African country is inextricably connected.²³⁶ Five African countries, namely Seychelles, Mozambique, Rwanda, Comoros and Madagascar have begun to offer visa-free access or visas on arrival to immigrants from all African countries with accompanying benefits to tourism, investment and economic competitiveness.²³⁷

Recommendations have been made by the TBCSA to the South African government to adopt similar visa-on-arrival measures.²³⁸ The government is however, yet to take a policy decision in this regard. With the outlined advantages of the visa-on-arrival system in maximising economic benefits for the country and also, as Africa increasingly becomes integrated there is hope that South Africa will eventually adopt such a policy. Socio-economic transformation as envisaged by the project of

²³⁵ Constitution (n 17 above) preamble.

²³⁶ See generally African Union Commission 'Agenda 2063: The Africa we want' (2014) *African Union*.

²³⁷ African Development Bank Group 'Visa restrictions and economic consequences in Africa' (2013) *African Development Bank Group* available at: <http://www.afdb.org/en/blogs/afdb-championing-inclusive-growth-across-africa/post/visa-restrictions-and-economic-consequences-in-africa-11987/> (accessed: 7 April 2016).

²³⁸ Thornton (n 48 above) 10.

transformative constitutionalism envisages a legitimate radical change of livelihood circumstances, human capabilities and the social relationships of the vast majority of South Africans.²³⁹ If immigration can contribute in achieving this objective, there is no reason why policy cannot be adopted in the regard.

4.3 Constraints to socio-economic transformation

In acknowledgement of the contributions by African immigrants to development in the country, it is reported that the Department of Home Affairs has initiated the Mkhaya Migrant Awards for Africa Day slated for the 25th of May every year, 'to honour and recognise migrants contributing to South Africa's development as well as South Africans contributing to the development of Africa in their various fields of expertise'.²⁴⁰ It is a laudable initiative, which demonstrates a shift towards recognising immigrants as valuable contributors to development within South African society as a whole.²⁴¹ The real challenge however, remains to do away with negative perceptions owing to the fact that the government's attitude as well as that of the general public towards African immigrants is yet to change completely.

4.3.1 Barriers to obtaining legal documentation

Instead of aligning with the government's showcased good intentions to be more accommodative to immigrants, its immigration legislation and policies have increasingly made the obtaining of visas and permits more and more difficult than previously. Added to this is a very negative and reluctant attitude from the DHA in granting work and residence permits to immigrants from other African countries.²⁴² Without the necessary legal documentation to operate it is unimaginable how immigrants can be able to put their creative and productive potential at the disposal of South Africa. There are also known cases of immigrants with valid permits who have travelled out of the country and on return have been refused entry back into the country, thus violating some of the fundamental human rights guaranteed to these

²³⁹ See Klare (n 135 above) 150.

²⁴⁰ Nkazie (n 214 above).

²⁴¹ Nkazie (n 214 above).

²⁴² Placements in Education (n 230 above).

immigrants by international as well as the domestic laws to which South Africa has committed to fulfil.

4.3.2 Counterproductive measures

While government immigration policy favours the hiring of skilled foreign nationals, the prevailing situation in most government departments and organs of state is unfortunately counterproductive. Other government departments such as for instance, the Department of Basic Education have gone to the extent of refusing to employ foreign nationals even when they are in possession of valid work permits.²⁴³ According to reports, teachers are no longer allowed to be employed in public schools, which has resulted in the termination of the contracts of all foreign teachers and if at all they are hired, at very discouraging salary rates and without any determinate contracts.²⁴⁴ In reaction to the pressure from trade unions for employers not to hire foreign nationals, Professor Jonathan Jansen, is said to have decried the rationale behind such a policy, which according to him challenges common sense.²⁴⁵ Reporting on the state of education for the period 2013/14 the Auditor-General points out that in seven out of South Africa's nine provinces, over half of the teachers making up a total of 16,000 teachers employed by the Department of Basic Education have no diploma or the required qualifications to teach.²⁴⁶ Yet, highly qualified immigrants would not be granted the opportunity for the simple reason that they are not South African.

Another counterproductive measure is reported in the North West Province where the Premier is said to have embarked on a campaign to seize spaza shops owned by the foreign nationals in the province and hand them over to the local people.²⁴⁷

²⁴³ Placements in Education (n 230 above).

²⁴⁴ Placements in Education (n 230 above), Maravanyika (n 245 below).

²⁴⁵ Maravanyika B 'Unions 'prevent hiring of good foreign teachers' (2015) *Pretoria News* available at: <http://www.iol.co.za/news/south-africa/gauteng/unions-prevent-hiring-of-good-foreign-teachers-1897694> (accessed: 30 March 2016).

²⁴⁶ Maravanyika (n 245 above).

²⁴⁷ Nedu 'Foreigners can no longer own spaza shops in North West Province—Premier Supra Mahumapelo' (2016) *BUZZ SOUTH AFRICA* available at: <http://buzzsouthafrica.com/north-west-premier-supra-mahumapelo-to-bar-foreign-owned-spaza-shops/> (accessed: 30 March 2016).

While it is important to empower the local populations economically, it is doubtful that doing so by seizing shops owned by immigrants is the most sensible thing to do owing to the fact that to succeed in business takes more than just owning a shop. It requires capital and entrepreneurship without which, taking over immigrants' shops might not provide a sustainable solution to the socio-economic disadvantage that the local populations in the province face.

These counterproductive measures do not only discourage initiative and productivity, it also violates the constitutional 'rights of all people in our country' and undermines the 'democratic values of human dignity, equality and freedom' which the state is enjoined to 'respect, protect and fulfil'.²⁴⁸ In view of the history of disadvantage and dispossession under which a majority of the people of South Africa have been subjected for long, it is reasonable to put the citizens first in line for transformation.²⁴⁹ However, to achieve such transformation at the expense of immigrants is not only constitutionally wrong but also legally unacceptable.

4.4 Summary conclusion

This chapter has dwelt on the concrete value-added contributions that African immigrants bring to the country, particularly in advancing socio-economic transformation and how through a series of counterproductive measures the governance system helps to impose constraints to the realisation meaningful socio-economic transformation. In examining the issues relating to African immigrants from this two-sided perspective, the intention has been to reiterate the fact that the benefits that South Africa stands to achieve from the large African immigrant population in the country far outweigh the supposed pressure that they are assumed to exert on the economy and in the delivery of social services. By making this analysis, the need is spelled out for the government to considerably reshape its immigration policies to be more friendly and accommodative to African immigrants, importantly because of the socio-economic gains that South Africa stands to reap from such a policy.

²⁴⁸ Constitution (n 17 above) sect 7(1)&(2).

²⁴⁹ McConnell (n 22 above) 34.

While ensuring to enforce cabinet decision to legalise and thus, accommodate illegal immigrants who have resided in the country for longer than five years, without any criminal record,²⁵⁰ the government should increasingly aim at ensuring a uniform application of its immigration policies across all government departments and services. As Nkazie has rightly indicated, if issues relating to immigration are properly handled, which includes a relaxed and open immigration policy in favour of African immigrants; it can to a great extent lead to large-scale socio-economic transformation in the country.²⁵¹ An open immigration policy should however, not be understood to mean loose border controls. It is recommended to create the space for a level-headed sensible debate about the pros and cons of immigration in order to correct the stereotypes about immigrants.²⁵² This is particularly necessary in South Africa where there is still a lot of mixed reaction to the question of immigration even within government. Without the counterproductive measures that contradict the immigration policy that allows for the ‘easy flow of highly skilled foreigners and investors into South Africa’, their presence could be even more beneficial than the country has been able to make the most of.

²⁵⁰ Solomon 1996 (n 64 above) 11-12.

²⁵¹ Nkazie (n 214 above).

²⁵² See Koser (n 169 above).

Chapter Five: Conclusion and recommendations

5.1 Concluding observations

This study has been able to establish the fact that the government of South Africa is legally bound by its international obligations based on the treaties that it has duly ratified and also by its domestic duties obtaining from the obligations imposed by the Constitution as well as the Refugee and Immigration Acts relating to the immigrants in the country. The law does not allow the government or the people of South Africa to at any time become manifestly 'hostile' to immigrants as has been the practice where immigrants are wrongfully refused the right to obtained legal documentation, to enjoy the advantages and opportunities guaranteed to by law. Owing to the need for socio-economic transformation in the country, the argument is advanced that instead of engaging in wasteful expenditure of tax payers' money and the irrational use of state resources in policing or trying to combat immigration, the government could more logically allocate such resources to achieve greater socio-economic benefit for the broader South African society.²⁵³

The study revealed that South Africa's immigration crisis does not pose the kind of threat that the government seems to make believe or of which the people of South Africa have become scared, which in effect is generating more negative consequences that are holding back the transformation project. The conclusion to draw, especially with regard to government's inconsistency in applying the laws governing immigration and refugee protection, coupled with the widespread genuine criticisms relating to immigration policies is that the government has failed in honouring its legal obligations. It is worth reiterating the fact that immigration has positive development impact both to South Africa as the receiving country as well as to other African countries from where immigrants origin.²⁵⁴ If properly and diligently managed, especially in accordance with the provisions of the law, immigration is more likely to contribute positively in advancing socio-economic transformation in the country as it has contributed in advancing the economy.

²⁵³ See sects 3.2.4 (chapter three) above.

²⁵⁴ Facchini, Mayda & Mendola (n 7 above) 2.

Based on the key findings, which include the fact that many Africa immigrants to South Africa are highly educated and experienced and possess the artisanal and entrepreneurial potential to generate new jobs,²⁵⁵ this study makes a number of recommendations to the effect that South Africa's immigration policies may be restructured to be more accommodative and appreciative of the African immigrant population in the country as a valuable asset in contributing to socio-economic transformation to the benefit of the vast majority of disadvantaged South Africans.

5.2 Recommendations

Owing to that fact that immigration has a transformative role to play, no matter how small, it is important for the government of South Africa to adopt an open immigration policy to ensure that immigrants, especially those from other African countries who constitute the majority of the immigrant stock in the country to make a meaningful contribution in sustaining socio-economic transformation. It is unlikely that South Africans would have the zeal to acquire essential skills even from the most skilled immigrations with the prevailing perceptions that immigrants are job snatchers, unwelcome welfare benefactors, spreaders of disease and perpetrators of crime.²⁵⁶ In view of changing the negative perceptions and xenophobic sentiments that have become engrained in the consciousness of many South Africans, the government needs to be create forums for frank discussions about issues relating to immigration and what the country stands to benefit from it. This would help to dispel myths and misconceptions about African immigrants as a social nuisance. In this regard, the government needs to allow a certain degree of tolerance for African immigrants who demonstrate proof of the kind of skills that low-skilled South African could benefit from.

As a practical measure, the government, in collaboration with civil society organisations need to organise broad-based sensitisation campaigns, particularly within local communities aimed at enabling South Africans to see African immigrants not as a threat but as an asset from whom valuable skills and experiences

²⁵⁵ See sects 3.3.1, 3.3.2 (chapter three) & 4.2.1 (chapter four) above.

²⁵⁶ Hammerstad, A 'Linking South Africa's immigration policy and Zimbabwe diplomacy' (2011) *SAIIA Policy Briefing* 42 2.

could gainfully be acquired. In this regard, a system needs to be created, which can closely be monitored to ensure that adequate knowledge, skills and technology transfer is effected from skilled immigrants to low-skilled or unskilled South Africans through apprenticeship and mentoring for example. Owing to a shared African heritage, characterised by the *ubuntu* philosophy of ‘I am because you are’, which rallied the rest of Africa behind the liberation movements in the fight against apartheid,²⁵⁷ it is more likely for the predominantly black disadvantaged South African population to learn and acquire essential skills and trade from African immigrants than from immigrants of other races. This could be achieved through establishing community development schemes in disadvantaged communities where immigrants can volunteer their skills in different vocations and in turn transfer those skills to the local communities. Such a venture would ensure that rather than just grant immigrants, especially asylum seekers and refugees the right to integrate into South African society, the community development schemes could provide appropriate entry points and in return, the local populations could also benefit. The resources allocated to fighting immigration could most beneficially be invested in such community development schemes.

It is noted that ‘[l]ittle statistical work has been done to create a profile of the [immigrant] population in South Africa’.²⁵⁸ In this regard, it is recommended for the South African government to carry out a special census to establish the actual number of foreign nationals in the country. The census should specifically highlight the actual number of African immigrants, their education and skills capacity. Such information would enable the government to determine precisely how to deal accurately with the immigrant population that is of productive value. This would also necessitate the formulation of appropriate policies to ensure that immigrants with the requisite skills capacity can be able to contribute productively towards socio-economic transformation in the country.

²⁵⁷ Pitamber P ‘How our African neighbours helped end apartheid’ (2015) *Media Club South Africa* available at: <http://www.mediaclubsouthafrica.com/culture/4182-south-africa-s-neighbours-helped-to-end-apartheid> (accessed: 25 February 2016).

²⁵⁸ Solomon 1996 (n 64 above) 8.

The government needs to initiate and encourage foreign exchange programmes for the youths of South Africa to get international exposure and to gain cultural intelligence among other invaluable skills. In order to achieve socio-economic transformation there is need for social cohesion not only among the segregated factions of South African society but also between the local and immigrant populations. To achieve this, the government needs to establish Cultural Exchange Centres to facilitate dialogue and to promote cultural intelligence between South Africans and immigrants. In this way, xenophobic sentiments could more accurately be checked and brought under control.

There is also a great need for the government to harmonise its immigration policies that encourage the importation of skilled labour to ensure that those policies become uniformly applicable within all the government departments as well as within the private sector. Trade unions also need to be sensitised of the importance of such a policy for socio-economic transformation and ultimately for the empowerment of the majority of disadvantaged South Africans who remain largely without the requisite skills capacity to be able to free their potential and improve their quality of life.

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