# PAPER PROMISES:

## AN AUDIT OF THE SOUTH AFRICAN FORCED MIGRATION FRAMEWORK AND ITS IMPACT ON WOMEN

LAWYERS FOR HUMAN RIGHTS

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Lawyers for Human Rights remains committed to pursuing systematic remedies to rights violations through strategic litigation, research and advocacy, and policy and law reform efforts in South Africa, which together promote the values of an open and democratic society.

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# 1.
# INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

# INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

According to estimates of the United Nations Department of Economic and Social Affairs, there were approximately 400 000 migrant women in South Africa in 2001. By 2017, this number had grown exponentially to 1.8 million migrant women. This means that by 2017, women already comprised 44% of the total migrant population, and yet, "(m)igration in South Africa is typically viewed through a male lens."[1]

Forced migration is defined as "a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees, asylum seekers, and internally displaced persons)."[2] In contrast, migration for voluntary economic reasons, such as better livelihoods and access to education and healthcare, drives international as well as substantial rural to urban migration – especially to the larger metropolitan areas in South Africa such as the cities of Johannesburg and Cape Town.[3] Forced migration is regulated primarily by the Refugees Act of 1998 (the Refugees Act),[4] while voluntary migration is regulated primarily by the Immigration Act.[5]

[1] Mbiyozo "Woman migrants: forgotten victims of South Africa's xenophobia" (2019)
[2] International Organisation for Migration "Forced Migration and Displacement" available at https://migrationdataportal.org/themes/forced-migration-or-displacement accessed on 8 September 2020.
[3] World Bank Group "New Study Finds Immigrants in South Africa Generate Jobs for Locals" 2018 available at https://www.worldbank.org/en/country/southafrica/publication/new-study-finds-immigrants-in-south-africa-generate-jobs-for-locals accessed on 8 September 2020
[4] 130 of 1998, hereinafter the "Refugees Act"
[5] 13 of 2002, hereinafter the "Immigration Act"

It is important to note that factors compelling women to migrate to South Africa are varied and complex, with "push" and "pull" factors that may be different to those applicable to men.[6] In their countries of origin, many refugee women face public and private gender based violence; prejudice due to traditional customs and expectations; forced marriage; forced abortion and pregnancy; and human trafficking abductions.[7] They also often face sexual harassment during their journeys and after arriving in a host country. Once migrant women arrive in South Africa, they again experience difficulties in, *inter alia*, obtaining documentation, accessing government social services, and obtaining livelihood opportunities.

The challenges of migration, both forced and voluntary, are also faced by sexual minorities and gender diverse persons.[8] Women who are lesbian, bisexual, transgender, or queer (LBTQ) asylum seekers, refugees, and undocumented cross-border migrants are particularly vulnerable, as is demonstrated in this report. Research published in 2019 indicates that only 4% of lesbian, gay, bisexual, transgender, queer, and intersex forced migrants have been able to obtain refugee status in South Africa, while 52% of the remainder have asylum seeker status, and 48% are either denied protection by the asylum system in South Africa or have never regularised their immigration status.[9]

A gendered perspective is therefore imperative in understanding and responding to forced migration. It is central to the causes and consequences of forced migration and affects every stage of a woman asylum seeker/migrant's journey. This audit report reviews the existing laws and policies affecting migrant women in South Africa, to systematically identify gaps in the legal and practical protection of women and sexual and gender minorities in the forced migration or displacement context in South Africa.

Lawyers for Human Rights (LHR) recognises that all categories of migrant women face hardships, including economic migrant women and women who are documented in terms of the Immigration Act. However, this report focuses on the legal framework as it relates to **forced** migration, and therefore women refugees and asylum seekers, and their unique lived experiences. Where the term "migrant women" appears, it is with reference to women who have been forced to come to South Africa for their own and/or their family's safety.

[6] O'Neil et al. "Women on the Move" (2016); Bach "Immigration, Integration and Asylum Policies from a Gender Perspective," (2015) 14
[7] Memela "Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area" (2014) 23
[8] The term "gender diverse" refers to gender identities that demonstrate a diversity of expression beyond the binary framework of "male" and "female", or "man" and "woman".
[9] Gandar "They treated Me as if I was Nothing" (2019) 20

# SUMMARY OF RECOMMENDATIONS

Noting a concerning disparity between the aims of the legal framework that applies to forced migration in South Africa, and the lived realities of migrant women in our communities, this report makes the following recommendations under eleven key themes:

## TO REMOVE BARRIERS FACED BY MIGRANT WOMEN IN ACCESSING THE ASYLUM SYSTEM, AND TO IMPROVE THE QUALITY OF DECISION-MAKING IN APPLICATIONS FOR ASYLUM:

- The Department of Home Affairs should introduce a new Amendment Bill in Parliament aimed at removing harmful provisions contained in the Refugees Amendment Act. This should include:

  - all provisions that make the right to work and study subject to application, and therefore at the discretion of the state;

  - all provisions that deem a claim for asylum to be automatically "abandoned" when an applicant fails to renew their temporary visa on time;

  - the strict requirement to apply for an asylum transit visa on entry at the border, which places asylum seekers at risk of being excluded from seeking asylum – an asylum seeker who does not present an asylum transit visa may be excluded from applying for asylum unless they have compelling reasons for not being in possession of this visa.[10]

- The Department of Home Affairs should increase the period of validity of a section 22 visa from six months to one year, to reduce the frequency of the need for renewal, and the associated financial and other costs that impact disproportionately on women;

- The Department of Home Affairs should improve its internal system to allow asylum seekers and refugees to renew their visas at the refugee reception office nearest to them, to mitigate the requirement to travel frequently, which leads to regular absence from work and/or family, and significant financial expenditure for applicants who may already be indigent.

- The Department of Home Affairs should develop improved interview guidelines to address the poor quality of refugee status determination officers' decisions in applications for asylum based on **sexual and gender based violence.**

- The Department of Home Affairs should make provision for the unique needs of women applicants generally, and those who are survivors of sexual and gender based violence, by:

  - making female refugee status determination officers available to female applicants, and

  - ensuring that social workers are available during and after interviews.

[10] Section 4 of the Refugees Amendment Act

- The Department of Home Affairs should strengthen its capacity and infrastructure, through gender- and evidence-based motivation for adequate resource allocation from the National Treasury, to increase access to services for women at RROs, and to reduce long queues and turnaround times in assessing applications for refugee status;

- The Department of Home Affairs should develop and implement regular, improved training programmes for immigration officers, refugee status determination officers, and refugee reception officers. This should be done in partnership with specialist non-governmental organisations and service providers, to:

  - o better deal with asylum seekers whose claims are based on sexual and gender based violence, and

  - o to improve awareness and knowledge of the law and socio-political circumstances in migrant women's countries of origin.

## TO IMPROVE MIGRANT WOMEN'S ACCESS TO HEALTHCARE:

- The national Department of Health should amend the Uniform Patient Fee Schedules, which sets out the fee tariffs that full-paying patients are charged at state hospitals across the various provinces. The amendment must make it clear that refugees, asylum seekers, whether documented or not, who seek help at public hospitals in South Africa are entitled to be treated in the same way as South African citizens, and should be means-tested to determine their ability to pay for any medical services.

- The Department of Health, at national and provincial levels, should take steps to promote knowledge and understanding among public sector healthcare practitioners of:

  - o the legal rights of asylum seekers, refugees, and migrants to access primary healthcare and emergency medical treatment, including reproductive healthcare, and the personal and institutional legal risk that the violation of those rights will attract; and

  - o the National Action Plan to Combat Racism, Xenophobia, and Related Intolerance, to eradicate racism and xenophobia in the healthcare sector.

## TO IMPROVE MIGRANT WOMEN'S ACCESS TO THE RIGHT TO WORK, AND EARN AN INCOME:

- The South African state should sign and ratify the International Convention on the Protection of the Rights of Migrant Workers and their Families 45 /158 (1990), which will oblige the state to take positive steps to protect migrant workers and their families against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.

- The Department of Labour should improve its implementation and enforcement of existing protection regulation, such as the Employment Equity Act[11] which prohibits abuse or discrimination on the basis of sex and gender (among other ground), and enforce employer compliance with the National Minimum Wage Act[12] for migrant women.

- The Department of Labour should urgently implement the 2017 order of the Pretoria High Court, which requires the UIF IT system to be upgraded to recognise asylum seeker and refugee documentation reference numbers. This will ensure that all asylum seekers, migrants, and refugees that contribute to the unemployment insurance fund, are able to draw benefits from that fund when needed.

[11] Act 55 of 1998
[12] Act 9 of 2018

## TO IMPROVE ACCESS TO EDUCATION FOR MIGRANT WOMEN AND THEIR CHILDREN:

- The Department of Basic Education, at national and provincial level, should take positive steps to clarify the legal right of migrant children, including grade 12 learners, to education by directly engaging school governing bodies and teachers' associations. This must include awareness-raising of the court's decision in the *Watchenuka* and *Centre for Child Law matters*.

- Umalusi, the Council for Quality Assurance in General and Further Education and Training, the body that is responsible for issuing matric certificates, should work together with the Department of Basic Education, at national and provincial level, and school governing bodies to ensure that undocumented matric learners receive their matric certificates upon completion of their matric examinations.

- The national Department of Justice and Constitutional Development, in collaboration with the national Department of Basic Education, should engage directly with provincial education departments to popularise the National Action Plan to Combat Racism, Xenophobia, and Related Intolerance to eradicate racism and xenophobia in the schooling system.

## TO IMPROVE MIGRANT WOMEN'S ACCESS TO SOCIAL ASSISTANCE AND FINANCIAL SERVICES:

- The South African Banking Association should advocate for its member banks and their respective branches to consistently recognise asylum seeker and refugee visas, in the same way that South African identity documents are recognised for the purpose by the Financial Intelligence Centre Act 38 of 2001. This is in keeping with the Market Conduct Division's mandate to advocates for the interests of the banking industry regarding legislation and regulation affecting their customers and clients, including the regulatory frameworks for treating customers fairly.

- The national Department of Women, Youth and Persons with Disabilities, which has a mandate to champion the advancement of women's socio-economic empowerment and the promotion of gender equality, should develop and implement long-term economic empowerment programmes for vulnerable women to improve income, and reduce economic dependence. These programmes should be inclusive of migrant women, regardless of their documentation status.

## TO IMPROVE MIGRANT WOMEN'S ACCESS TO SHELTER AND HOUSING:

- The national Department of Social Development should develop policy for the expansion of shelters to include migrant women and their children, regardless of their documentation status.

- The Department of Social Development, at national and provincial level, should increase funding to non-governmental organisations engaged in statutory care work and services (including shelters for abused women and their children), taking migrant women and their children into account.

- The national Department of Social Development, in collaboration with the national Department of Human Settlements, should explore the inclusion of women refugees and asylum seekers and their children in housing assistance programmes and emergency accommodation other than shelters.

## TO IMPROVE OUTCOMES FOR LESBIAN, BISEXUAL, TRANSGENDER, AND QUEER MIGRANT WOMEN:

- The Department of Home Affairs should audit refugee status determination officers' decisions based on sexual orientation, gender identity and expression, and sex characteristics in all functional refugee reception offices, to identify problematic decisions and decision-makers, to inform the content of future training programmes.

- The Department of Home Affairs should develop improved interview guidelines to address the poor quality of refugee reception officers' adjudication of, and discriminatory decisions in, asylum claims for refugee status based on sexual orientation, gender identity and expression, and sex characteristics.

- The Department of Home Affairs should develop and implement improved and ongoing sensitivity training programmes for immigration officers, refugee status determination officers, and refugee reception officers. This should be done in partnership with specialist non-governmental organisations and service providers, to better understand and assess asylum claims based on sexual orientation, gender identity and expression, and sex characteristics.

- The national Department of Social Development in partnership with the Department of Home Affairs should commission research on the specific experiences of lesbian, bisexual, and transgender migrant women – both in accessing the asylum system, and life after refugee status is granted, where applicable.

## TO ENSURE THAT THE WAY FAMILY UNIFICATION POLICIES ARE IMPLEMENTED DOES NOT IMPACT NEGATIVELY ON MIGRANT WOMEN AND THEIR CHILDREN:

- The Department of Home Affairs should ensure that officials at refugee reception offices refrain from withdrawing any person's refugee status and ensure compliance with section 36 of the Refugees Act, which specifically states that only the Standing Committee for Refugee Affairs may withdraw refugee status.

- The Department of Home Affairs should review its policy on separating children from their parents file on turning 18 and adopt a policy which centres on family-unity and family life.

- The Department of Home Affairs should, as standard practice, proactively determine whether asylum seeker's adult dependents, the majority of whom will be women, may have asylum claims of their own.

- The Department of Home Affairs should develop protocols for file separation where this is required for the protection of the rights of migrant women and their children.

## TO PROTECT MIGRANT WOMEN AGAINST XENOPHOBIA AND ITS OFTEN-VIOLENT CONSEQUENCES:

- The national Department of Justice and Constitutional Development and the National Prosecuting Authority should collaborate with the Minister of Police to ensure that perpetrators of xenophobic violence and hate crime are vigorously detected and prosecuted;

- The Parliament of South Africa should complete consultation on, and pass the Prevention and Combating of Hate Crimes and Hate Speech Bill, to provide for the legal recognition trial, and sanction of xenophobic violence as hate crime;

- The South African Human Rights Commission should subpoena relevant state institutions to account for their failure to implement the recommendations made in the Commission's report entitled "Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals";[13]

- Xenophobic utterances by state officials should be publicly condemned by the President of South Africa, and such state officials must be relieved of public office.

## TO IMPROVE PROTECTION FOR MIGRANT WOMEN AGAINST SGBV AND ITS CONSEQUENCES:

- The implementation and monitoring of all legislation and policies aimed at protecting migrant women, in particular the Domestic Violence Act and the Sexual Offences Act, should be strengthened through the National Strategic Plan on Gender Based Violence and Femicide, to ensure that migrant women who are survivors of sexual and gender based violence have equal access to psycho-social and other support services;

- The Department of Home Affairs should permit migrant women to renew their documentation in the absence of their male spouse or partner, who is more often the main file holder;

- The South African government should urgently decriminalise sex work, to reduce the vulnerability of all sex workers, including migrant women, to abuse and victimisation by law enforcement officials and other state service providers such as healthcare practitioners at public hospitals and clinics;

- The national Police Commissioner should issue national instructions to all police officers in line with the National Action Plan to Combat Racism, Xenophobia, and Related Intolerance, to eradicate racism and xenophobia in the South African police service.

## TO ERADICATE UNLAWFUL DETENTION, AND TO ENSURE THAT THE ARREST AND DETENTION OF MIGRANT WOMEN IS FAIR AND HUMANE:

- The Minister of Police together with the Minister of Defence and Military Veterans must address criminal and other misconduct by police officials and soldiers, including the use of excessive force, through:

  - improved training;

  - swift and decisive disciplinary action against officers who engage in abusive or criminal conduct.

- The South African Police Service, the Department of Home Affairs, and the national Department of Health should develop joint protocols for clear coordination to ensure proper screening of detained migrants, including verification of immigration status within statutory limits, and verification of age to ensure children are not detained in the context of immigration detention. Such joint protocols should also ensure the adequate provision of medical services and medicine at immigration detention locations.

- The national Commissioner of Police should issue national instructions regarding the conduct of police officers in line with the safeguards for detainees in the Immigration Act, the Refugees Act, and the Constitution.

[13] https://www.sahrc.org.za/home/21/files/Non%20Nationals%20Attacks%20Report_1-50_2008.pdf

# 2.
# METHODOLOGY

# 2. METHODOLOGY

**This report relies on data from four main sources:**

- Laws governing forced migration and gender in South Africa at regional, national, and international levels;
- Policy briefs, protocols, frameworks, and guidelines that apply to gender and migration in South Africa;
- Existing research, literature, and data where current and available;
- Field research involving case study analysis of migrant women and LBTQ clients at LHR, including general statistics, general information from consultations and LHR case files, and additional interviews conducted with LHR clinic managers. All LHR clients' identifying details have been omitted, or changed entirely, to protect their privacy and legal privilege.

It is important to note that this audit report is based on a selection of those laws and policies most relevant to the objectives of this report. The secondary material reviewed has been reproduced as an annotated bibliography.

The limitations facing this review stem from the fact that the policies and resources analysed deal with the intersectionality of forced migration and gender only, without consideration of the political, social, or economic contexts in countries of origin, or transit countries. The study was further limited by the lack of distinction in literature between the experiences of refugees on the one hand, and asylum seekers on the other, in the migration process. Most of the literature reviewed for this paper stops short of scrutinising the lived experiences of forced migrants once they have gained legal status in South Africa. The lack of secondary sources on lesbian, bisexual, and transgender women and migration, as well as on cisgender migrant women in accessing education and legal services, meant that it was impossible to audit these areas in greater detail.

# 3. LEGAL FRAMEWORK

# 3. LEGAL FRAMEWORK

There is an extensive legal framework governing forced migration to South Africa. Understanding the nature and extent of this framework is key in assessing its gender-awareness, and the impact of South Africa's response to forced migration on migrant women.

The legal framework can be divided into four layers of regulation:

- International legal instruments, which range from being non-binding to requiring domestication through inclusion in domestic law;
- Regional legal instruments, which likewise range from being non-binding to requiring domestication;
- Domestic law, which includes the South African Constitution and is binding on all state entities and private individuals within South Africa;
- Various international, regional, and domestic policies, guidelines, protocols and certain "soft law" instruments which, respectively, vary from being legally binding on South Africa, to being legally persuasive in our courts.

## 3.1 INTERNATIONAL LAW

International covenants and other instruments serve as agreements to ensure that certain basic rights are protected and that state parties abide by their duties and obligations in these regards.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) govern certain of South Africa's obligations to all people, including citizens and non-nationals.[14] South Africa has signed and ratified both the ICCPR and the ICESCR and is therefore obliged to confer a majority of the enumerated human rights in these instruments on "everyone within its borders." South Africa's constitution also provides that international law forms part of domestic law in South Africa, unless it is inconsistent with the Constitution or an Act of Parliament".[15] In addition to certain tenets found in domestic law, as set out below, the ICCPR and ICESCR together entitle all migrants, refugees, and asylum seekers to basic human rights.[16]

South Africa is also party to the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW).[17] While all the rights in this instrument are extended without distinction to both citizens and non-nationals, CEDAW explicitly provides that women are entitled to acquire, change, or retain their nationality and to be protected against human trafficking.[18]

Notably, the first universal instruments to define "refugee", the 1951 UN Refugee Convention Relating to the Status of Refugees together with its 1967 Protocol and the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugees Problems in Africa, excluded the specific experiences of women and other gender minorities in these definitions.[19] The instruments were silent on the persecution and disadvantages specific to sexual and gender minority groups, contributing to the increased vulnerability of women during migration.[20]

In 1991, the United Nations High Commissioner for Refugees (UNHCR) issued its Guidelines on the Protection of Refugee Women in an attempt to overcome the challenges faced by female refugees.[21] These UNHCR guidelines defined female refugees as a vulnerable group whose physical security was at risk during and after their journey, and included the suggestion that legal procedures be reformed to include gender based persecution as a ground for seeking refugee status. The guidelines further provided measures to protect women from physical violence, human trafficking abduction, and sexual violence, and to ensure that they had access to food, healthcare services, and education and could participate in economic activities. However, due to poor implementation of these guidelines, the problems facing refugee women continue.[22]

[14] United Nations Universal Declaration of Human Rights, A/RES/3/217 A (1948); International Covenant on Civil and Political Rights, 14668 (1966); International Covenant on Economic, Social and Cultural Rights, United Nations, 14531 (1966)
[15] Section 232 of the Constitution of South Africa
[16] Article 1 of ICESCR (right to education), and Article 3 of ICESCR (right to emergency medical treatment); Section 27 of the Constitution; Refugees Act; Immigration Act; Mbiyozo "Gender and Migration in South Africa: Talking to Women Migrants" Institute for Security Studies (2018); Zikhali "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers" (2019) 4
[17] Convention on the Elimination of All forms of Discrimination Against Women, United Nations, 20378 (1979)
[18] Articles 9 and 6 of the CEDAW (1981)
[19] UN Refugee Convention Relating to the Status of Refugees, United Nations, 2545 (1951); Protocol Relating to the Status of Refugees, United Nations, Treaty Series, (1967); Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, United Nations, 14691 (1969)
[20] Nyabvudzi and Chinyamurindi "The Career Development Processes of Women Refugees in South Africa: An Exploratory Study" (2019) 3
[21] Guidelines on the Protection of Refugee Women (1991)
[22] Memela "Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area" (2014)

A second set of guidelines entitled "Sexual Violence against Refugees: Prevention and Response" were issued by the UNHCR in 1995.[23] These guidelines were specifically intended to protect women refugees from sexual violence. Under these guidelines, the UNHCR, non-governmental organisations (NGOs) and state parties needed to ensure that the necessary steps were taken to prevent sexual violence. Following these, in 1998 the UN Special Rapporteur on Violence against Women urged states party to the 1951 Refugee Convention, to adopt guidelines with respect to gender based claims for refugee status. A third set of UNHCR guidelines was issued in 2002, which focused on gender-related persecution, extending protection from harm and persecution to that on the basis of sex and sexual orientation.[24] In addition, UNHCR published a Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on the Detention of Asylum Seekers, which, while not binding on states, is considered to be the minimum standard for state practice.[25]

While the extent to which the UN and OAU Conventions have been implemented remains inadequate, South Africa has recognised gender based persecution through the Refugees Act, using both the UNHCR and OAU definitions of refugee and asylum seeker.[26] Under the umbrella of the governing international and national laws that prohibit discrimination based on sexual orientation and gender identity, South Africa is therefore often perceived as a safe haven for "gender refugees" forced to flee their countries due to persecution and discrimination based on their sexual orientation and/or gender identity or expression.[27]

Research, however, also indicates that refugee women may not recognise that their identities and experiences may qualify them as refugees under the Refugees Convention of 1951 (the Refugees Convention). Therefore, even though South Africa constitutionally protects these vulnerable individuals, the lived experiences of women and LBTQ migrants in practice frequently differs markedly to what international law prescribes, and what those fleeing persecution in their own countries hope for. In reality, rather than being able to access their rights, some sexual and gender minority refugees and asylum seekers in South Africa continue to experience significant threats to their safety.[28]

It must also be noted that South Africa has not signed or ratified the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which recognises the specific vulnerabilities of migrant workers and establishes the minimum standards of human rights protections for migrant workers and their family members. South Africa has also not signed the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED).[29] The ICPPED aims to prevent "forced disappearance" where a person is unlawfully detained or disappears. The ICPPED emphasises that no forced disappearance may be done by, or under the state's authority and the state must do what is possible to prevent forced disappearance, which includes not expelling individuals who are at risk of forced disappearances in their country of origin.[30] This convention promotes transparency and accountability from the state for every individual within its borders, by ensuring that the state will not allow anyone to be subject to forced disappearance. Adherence to both the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the ICPPED would provide additional, important protection to women migrants in South Africa.

[23] Sexual Violence against Refugees: Guidelines on Prevention and Response (1995)
[24] Gender Related Persecution Guidelines (2002)
[25] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (2019) para 190
[26] Section 3(a) of the Refugees Act states that a person qualifies for refugee status if that person "owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or not having a nationality and being outside the country of his or her former habitual residence is unable, owing to such fear, unwilling to return to it. An asylum seeker, under section 1 of the Act, is an individual seeking to be recognised as a refugee.
[27] Camminga "Gender Refugees in South Africa: The Common-Sense Paradox" (2018)
[28] Walker and Veary "Gender, Migration, and Health in SADC: A Focus on Women and Girls" (2019) 23
[29] The International Convention for the Protection of all Persons from Enforced Disappearance, A/72/280 (2010)
[30] Article 16 of the International Convention for the Protection of all Persons from Enforced Disappearance, A/72/280 (2010)

## 3.2 DOMESTIC LAW

As a starting point, South Africa's domestic law that applies to forced migration does consider the intersectionality of migrant women's vulnerabilities in section 3(a) of the Refugees Act, and offers protection on certain of those bases. Nevertheless, various changes to these laws and policies over time have eroded, or risk eroding, the fundamental rights protection that they are intended to provide to this group.

Prior to the enactment of the Refugees Amendment Act,[31] which took effect on 1 January 2020 and which substantially changed the Refugees Act, South Africa was historically known for its progressive refugee policy, which offered substantial protection and access to basic rights for refugees and asylum seekers. The Refugees Act granted those seeking asylum access to healthcare, including reproductive healthcare, education, entry into the labour and housing markets, and access to social assistance, aligning its mandate with constitutional and international human rights obligations. Over the last two decades, South Africa's courts have developed refugee and asylum seekers' rights with respect to, *inter alia*, dignity,[32] equality,[33] education,[34] employment,[35] or freedom of self-employment,[36] and documentation.[37]

Section 2 of the Refugees Act further highlights the paramount importance of the principle of *non-refoulement*, which holds that no asylum seeker may be returned to a country where they may face persecution or harm.[38] The principle of *non-refoulement* is the cornerstone of international refugee protection and has been repeatedly endorsed by South African courts as being "so fundamental that no reservations or derogations may be made to it."[39]

The recent amendments to the Refugees Act, however, appear to erode South Africa's rights-based refugee system, undermining a number of constitutional rights, including the right to human dignity and freedom of speech, and are at odds with South Africa's jurisprudence with respect to asylum seekers' right to education, employment, access to the asylum system, and its committed to the principle of *non-refoulement*. In addition to the recent amendments, a real difficulty, as this report will ultimately illustrate, is the proper implementation of domestic laws by executive branches of government, such as the Department of Home Affairs (DHA) and in particular immigration officials, as well as the SAPS. Indeed, there is frequently a sharp contrast between the letter of the law and the practical outcomes for migrant women.

[31] Act 11 of 2017

[32] *Minister of Home Affairs and Others v Watchenuka and Others* [2004] 1 All SA 21 (SCA).

[33] *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T).

[34] *Minister of Home Affairs and Others v Watchenuka and Others* [2004] 1 All SA 21 (SCA). Also see *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG), which upheld the right to education of undocumented children. The Eastern Cape High Court confirmed that everyone has the right to basic education regardless of their status or their ability to provide proof of identity through the production of a birth certificate or other official documentation.

[35] *Minister of Home Affairs and Others v Watchenuka and Others* [2004] 1 All SA 21 (SCA).

[36] *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* [2014] 4 All SA 600 (SCA).

[37] *Saidi and Others v Minister of Home Affairs and Others* (CCT107/17) [2018] ZACC.

[38] Section 2 of the Refugees Act.

[39] *Saidi and Others v Minister of Home Affairs and Others* (CCT107/17) [2018] ZACC at para 29. See also *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T), *Tshiyombo v Members of the Refugee Appeal Board and Others* 2016 (4) SA 469 (WCC), *Kiliko and Others v Minister of Home Affairs and Others* (2739/05) [2008] ZAWCHC 124, and *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC).

### 3.2.1 THE CONSTITUTION

The Preamble to the Constitution states that South Africa "belongs to all who live in it." It makes no distinction between citizens and non-nationals. The South African Bill of Rights in Chapter 2 of the Constitution assures everyone inside the country's boundaries the basic right to equality, human dignity, and the right to freedom and security of the person.[40] The Bill of Rights further recognises a number of socio-economic rights such as the right to a safe environment, adequate housing, healthcare, sufficient food and water and social security, education, and the right to use one's own language and to participate in the cultural life of their choice.[41] Section 27(c) of the Refugees Act[42] provides that refugees enjoy the full legal protection of the Bill of Rights and the Constitution as a whole. Asylum seekers enjoy rights insofar as they are applicable to asylum seekers according to the Refugee Act. These rights should be enjoyed by all, including non-nationals who are in the country, except those rights that are expressly stated to be for South African citizens,[43] such as the right to vote and to form a political party.

The Constitution, in section 9 (commonly known as the equality clause), prohibits discrimination on a variety of listed grounds, including: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Protecting and promoting the rights and freedoms of all categories of migrants and sexual and gender minorities falls within the ambit of the right to equality. Furthermore, section 34 of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[44] seeks to ensure that sex, gender, and nationality (and by extension, non-nationality) cannot be a ground for denial of equality, in line with the Constitution as well South Africa's regional and international law obligations.

Chapter 9 of the Constitution also creates institutions that are independent of the state, to carry out specific mandates in upholding the Constitution. The South African Human Rights Commission (SAHRC), according to section 185, is mandated to promote the protection, development and attainment of human rights, and to monitor and assess the observance of human rights in the country. Due to the prevalence of xenophobia in South Africa, the SAHRC has ongoing initiatives to monitor the human rights violations targeted at non-nationals.[45] The Commission for Gender Equality (CGE) focuses on gender equality according to section 119 of the Constitution. The CGE has recognised migrant women as a marginalised group in its research and monitoring.[46]

[40] Section 9, section 10, and section 12 of the South African Constitution.
[41] Section 24, section 26, section 27, section 30 of the South African Constitution.
[42] Section 27A(d) of the Refugees Act.
[43] *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC)
[44] Act 4 of 2000
[45] See https://www.sahrc.org.za/index.php/focus-areas/immigration-equality accessed on 8 September 2020
[46] See http://www.cge.org.za/ accessed on 8 September 2020

### 3.2.2 THE REFUGEES ACT

A refugee is any person who is granted asylum in terms of the Refugees Act. This Act not only regulates the asylum seeker process, but also provides for rights and obligations of refugees and asylum seekers. It contains provisions that address, *inter alia*:

- how to apply for asylum;
- how a person qualifies for asylum in terms of the listed grounds;
- disqualification of asylum; and
- status determination (or, the process of granting asylum and thereby recognising the person as a refugee; alternatively rejecting an application for asylum as manifestly unfounded, unfounded, abusive, or fraudulent).

Any rejection of an application for asylum can either be appealed or will be subject to an automatic internal review. Depending on the ground(s) for the rejection, the appellant will appeal to the Refugee Appeals Authority of South Africa (RAA), or may make written submissions to the Standing Committee for Refugee Affairs (SCRA), which is tasked with reviewing the decision of the refugee status determination officer (RSDO). Unsuccessful appeals and reviews are dealt with in accordance with administrative law, and can be subject to a judicial review in terms of the Promotion of Administrative Justice Act.[47] Additionally, the Refugees Act deals with the cessation/withdrawal of refugee status, arrest and deportation processes, unaccompanied minors and dependents, as well as the pathways to permanent residence.

It is important to note that the Refugees Act offers asylum on the basis of persecution due to sexual orientation or gender identity. In terms of section 1 of the Refugees Act, refugee status can be granted to a member of a particular "social group", which is defined as a "group of persons of a particular gender, sexual orientation, disability, class or caste". This, along with the protection afforded by the Bill of Rights, which prohibits discrimination on the basis of sex, gender and sexual orientation, requires South Africa to constitutionally protect migrant women and women who are part of the LBTQ communities.[48]

Significantly, the amendments to the Refugees Act and accompanying regulations were also enacted in the beginning of 2020. These amendments are regressive, in that they materially curtail rights that were previously afforded to asylum seekers and refugees. These amendments now prohibit political activity,[49] remove asylum seekers' automatic right to work and study,[50] include a strict requirement to apply for asylum within five days of entering the country,[51] and presume abandonment of a refugee claim should an asylum seeker fail to renew their visa (previously known as a "permit") within 30 days of its expiry.[52]

[47] Act 3 of 2000
[48] Section 9 of the Constitution, 1996
[49] Regulation 4(1)(g) and (i), 4(2), and 4(3) read together with section 5(1)(a) of the Refugees Amendment Act
[50] Section 22(8) of the Refugees Amendment Act
[51] Section 23 of the Immigration Act 13 of 2002 read together with section 21(1B) and regulation 7 of the Refugees Amendment Act
[52] Section 22(12) and (13) read together with regulation 9 of the Refugees Amendment Act

These amendments present particular difficulties for asylum seeker women. For example, not only does the limitation of the automatic right to work undermine an asylum seeker woman's rights to work and self-fulfilment, but it also results in her becoming more vulnerable and dependent on others for survival. This is problematic, given that the state's policy with respect to asylum seekers and refugees is one of local integration, as opposed to confining people to camps. Local integration is based on the assumption that refugees will remain in their country of asylum permanently and find a solution to their plight in that country. It also means that refugees should be granted a range of rights, including freedom of movement, access to education and the labour market, and access to healthcare in order to fully integrate into established communities and support themselves, rather than relying on the services provided in many refugee camps around the world.

Limiting the right to work increases vulnerability of migrant women in other, less obvious ways. For example, this may create a situation where asylum seeker women are not able to leave abusive relationships, where they are financially dependent on an abusive partner, particularly if they are the primary caregiver for their children. The amendments may further result in refugee women being forced to reside in shelters or shared living spaces should they not be able to afford rent, placing them at further, likely unnecessary, risk.

The tightened timeframe for applying for asylum as well as the deemed abandonment of asylum applications for failure to renew temporary visas, are also likely to result in more asylum seekers and their children becoming undocumented. This places asylum seekers, particularly women, at risk of exploitation, arrest, detention, and deportation. Furthermore, it can limit an asylum seeker woman's ability to access government services, such as healthcare and social assistance, and enrolling their children in school.

At the time of publication, the constitutionality of some of the amendments to the Refugees Act were being challenged in court.

### 3.2.3 OTHER RELEVANT LAWS

While not addressing the intersection of migration and gender minorities specifically, the Domestic Violence Act,[53] the Protection from Harassment Act,[54] and the Sexual Offences Act have progressively codified protection for all survivors (men, women, and lesbian, gay, bisexual, transgender, queer and intersex persons) from a wide range of sexual offences.[55]

South Africa has also implemented the Prevention and Combatting of Trafficking in Persons Act (the Trafficking Act), in addition to the Palermo Protocols (2000) that were adopted by the United Nations to supplement the 2000 Convention against Transnational Organised Crime, and to address human trafficking and associated human rights violations in the country.[56] Although strong in its protection of persons from trafficking for labour, removal of organs, and sexual exploitation, the Trafficking Act focuses on women only as victims who migrate or enter sex work by force, on the assumption that women lack agency and never make these decisions for themselves.

[53] Act 116 of 1998
[54] Act 17 of 2011
[55] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007
[56] Prevention and Combatting of Trafficking in Persons Act 7 of 2013; Protocol to Prevent, Suppress and Punish Trafficking in Persons 2000, General Assembly Resolution 55/25

## 3.3 POLICIES, GUIDELINES, AND OTHER FRAMEWORKS

The international, regional, and domestic legal frameworks also include numerous relevant policies, guidelines, and other soft law instruments aimed at addressing the rights of migrants generally, and the rights of migrant women in particular. This reflects that multilateral bodies are increasingly engaged in global efforts to prioritise and promote the rights of women in the context of forced migration, and that South Africa should be no exception in proactively working to meet its international law obligations and/or deemed best practices in these respects.

### 3.3.1 INTERNATIONAL POLICIES AND GUIDELINES

**African Union (AU) Revised Migration Policy Framework for Africa and Plan of Africa 2018-2030 (2018)**

This framework provides a comprehensive and integrated policy guideline to African Union member states encouraging development in areas including labour migration, irregular migration, forced displacement, and the human rights of migrants. As an AU member state, South Africa is obliged to take this policy guideline into consideration in all efforts to promote migration and development, and address migration challenges on the continent. Importantly it notes that migration flows include increasing numbers of migrant women while noting that women and girls are particularly vulnerable to human trafficking, sexual and gender based violence (SGBV), and other risks.

**Global Compact for Safe, Orderly and Regular Migration (2018)**

This non-binding co-operative framework, emanating from the principles of the Charter of the United Nations the Universal Declaration of Human Rights and other international covenants, contains 23 objectives and review mechanisms such as: ensuring all migrants have legal proof of identity; strengthening the transnational response to smuggling and trafficking; managing borders in an integrated manner; and giving migrants access to basic services. Despite this Compact being legally non-binding, South African Courts may refer to or use this Compact as an aid in interpreting migration legislation. The incorporation of gender-responsive language and commitments is noted in both the Global Compact for Safe, Orderly and Regular Migration and the Global Compact on Refugees.

**Global Compact on Refugees (2018)**

This non-binding co-operative framework seeks to foster "more predictable and equitable responsibility-sharing, recognising that a sustainable solution to refugee situations cannot be achieved without international cooperation."[57] Its four key objectives are to ease the pressures on host countries; enhance refugee self-reliance; expand access to third-country solutions; and support conditions in countries of origin for return in safety and dignity. It includes mechanisms to strengthen the agency of women through economic empowerment and access to health and education, as well as ensuring that they are free from SGBV and abuse. The United Nations General Assembly affirmed the Global Compact on Refugees after extensive consultations led by UNHCR with member states, which includes South Africa.

[57] See https://www.unhcr.org/the-global-compact-on-refugees.html accessed on 2 November 2020

**United Nations (UN) 2030 Agenda for Sustainable Development Goals (2015)**

One of the goals of the agenda is to bring the world to a "zero" in terms of discrimination against women and girls. With regards to migration, the Sustainable Development Goals (SDG) highlights the need for member states to implement planned and well-managed migration policies to "facilitate orderly, safe, regular and responsible migration and mobility of people".[58] Apart from protecting women from gender based violence, the SDGs also aim to protect women's "labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular migrant women, and those in precarious employment."[59] As a UN member state, South Africa is politically obliged to measure and report on its progress towards these goals.

**African Union Agenda 2063 (2015)**

In taking a gendered approach, the Agenda highlights some pressing issues regarding the improvement of the lives of women in Africa, proposing that all forms of gender based violence and discrimination, including in social, economic and political spheres, against women and girls be eliminated.[60] The Agenda aims for all girls to fully enjoy all their human rights by 2063. The Agenda also hopes to eliminate all harmful social practices in Africa, especially female genital mutilation and child marriages, and eradicate barriers to quality health and education for women and girls.[61] As a member of the AU, South Africa is politically obliged to participate in the call to action expressed in the Agenda.

**African Union (AU) Joint Labour Migration Programme (2015)**

One of the most important features of the Joint Labour Migration Programme (JLMP) is the recognition of the increased feminisation of labour mobility within and from the continent and the protection of female migrants dominant in the informal economy and agriculture. To address this, the JLMP recommends the enhanced collection and analysis of "gender and age disaggregated data on migrants' economic activity, employment, skills, education, working conditions, and social protection situations."[62] As a member of the AU, South Africa is an automatic participant in this programme.

**Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2013)**

South Africa has not ratified or signed the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights which aims to bolster the rights contained in ICESCR by allowing for individual/s to complain to a separate committee established by the protocol. The committee accepts complaints from individuals who have exhausted all domestic remedies but have not received relief.

**International Labour Organisation (ILO) Domestic Workers Convention (2011)**

Ratified by South Africa in 2013, the convention recognises that domestic work is "mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights".[63]

[58] Goal 10.7 of the UN 2030 Agenda for Sustainable Development Goals (2015)
[59] Goal 8.8 of the UN 2030 Agenda for Sustainable Development Goals (2015)
[60] African Union Agenda 2063 (2015) 17
[61] African Union Agenda 2063 (2015) 8
[62] AU Joint Labour Migration Programme (2015) 4
[63] ILO Domestic Workers Convention No. 189 (2011) 1

**UN Guidelines on International Protection No. 9 (2012)**

These Guidelines apply to claims to refugee status based on sexual orientation and/or gender identity and seeks to provide legal interpretative guidance for governments (including South Africa), legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination under its mandate. The Guidelines clearly define terms such as "lesbian", "bisexual", and "transgender",[64] and assist decision makers to avoid the harmful conflation of sexual orientation with gender identity or expression. The Guidelines also list important considerations in analysing claims based on sexual orientation and/or gender identity and expression, ranging from how to determine an applicant's background and whether there is a well-founded fear of persecution, to linking their personal circumstances with legal grounds for asylum.

**African Common Position on Migration and Development (2006)**

The framework highlights that it is imperative to pay attention to protecting the labour and human rights of migrant women who are vulnerable to exploitation through "frequently abusive conditions under which they work, especially in the context of domestic service and sex industries in which migrant trafficking is heavily implicated.[65] However, these recommendations, while important, are weakened by being non-binding and deferring to national laws and policies on the subject.[66] As an AU member state, South Africa is obliged to take the Common Position into account in its domestic and regional development efforts.

**Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)**

Also known as the Maputo Protocol, this was adopted by the AU to ensure comprehensive rights for women, including the right to social and political equality and improved reproductive health. Despite several reservations, South Africa ratified the Protocol in 2004. The Protocol requires that: state parties take all appropriate measures to ensure the increased participation of women asylum seekers, refugees, returnees and displaced persons in local, national, regional, continental and international decision making; and that state parties protect asylum seeking women refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation.[67]

[64] UN Guidelines on International Protection No 9 (2012) 10

[65] African Common Position on Migration and Development (2006) 7

[66] Crush et al. "Harnessing Migration for Inclusive Growth and Development in Southern Africa" (2017) 31

[67] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003) 11 – 12

**United Nations Security Council (UNSC) Resolution 1325 on Women, Peace and Security (2000)**

The "Relief and Recovery" part of the Resolution also calls for a gendered lens for the advancement of relief and recovery measures to address the needs of women, especially in refugee camps and settlements. Apart from issues with implementation, the Resolution also focuses exclusively on women, without consideration of non-binary genders. South Africa, having voted for the Resolution, is in the process of developing a National Action Plan to implement the Resolution and address women, peace and security challenged in the country.[68] As a UN member state, this UNSC resolution is binding on South Africa.

**Beijing Declaration and Platform for Action (1995)**

This Declaration recognises the barriers facing women in terms of full equality and advancement due to "such factors as their race, age, language, ethnicity, culture, religion or disability" or their status as refugee women, internally displaced women, immigrant women and migrant women, including women migrant workers.[69] It recommends the protection of internally displaced, refugee and migrant women from violence and such measures as gender-sensitive human rights education and training to public officials.[70] It further recommends full access of these women to economic opportunities and the recognition of their qualifications and skills.[71] South Africa must comply with this Declaration and its Platform of Action, as a signatory that participated in the Fourth World Conference On Women in 1995.

## 3.3.2 REGIONAL FRAMEWORKS AND POLICIES

**Southern African Development Community (SADC) Strategy for Sexual and Reproductive Health and Rights 2019-2030 (2018)**

This Strategy provides the policy and programming framework for member states to harmonise the provision of integrated sexual and reproductive health and HIV interventions and services.[72] The Strategy is comprehensive and recognises migrants, mobile workers, refugees, and sex workers as vulnerable populations. It also responds to the specific vulnerabilities of women, such as SGBV, as well as the specific needs of men, boys, and lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) persons. As SADC member, South Africa's Minister of Health approved this regional Strategy in 2018.

**SADC Regional Migration Policy Framework 2018-2030 (2018)**

This Policy Framework offers a comprehensive review of SADC migration policies and engages with much of the key literature on migration and gender. It notes important trends in the feminisation of migration and key vulnerabilities facing women, mostly in terms of exploitation and trafficking. The Framework calls for women's involvement in the policy process when making recommendations to address the need for gender-responsive research and enhanced data collection to address realities. The Framework however fails to acknowledge the literature that challenges the conflation of trafficking and sex work. The Policy Framework outlines roles and responsibilities for all actors in migration governance in SADC members, including South Africa.

[68] See https://city-press.news24.com/Voices/the-women-peace-and-security-agenda-is-finally-making-headway-in-sa-20190819, accessed on 5 March 2020
[69] Beijing Declaration and Platform for Action (1995) 18
[70] Beijing Declaration and Platform for Action (1995) 97
[71] Beijing Declaration and Platform for Action (1995) 21
[72] SADC Strategy for Sexual and Reproductive Health and Rights (2018) 43

**SADC Protocol on Gender and Development (2016)**

This Protocol provides for the empowerment of women, elimination of discrimination and the promotion of gender equality through gender-responsive legislation, policies and projects. While the Protocol recognises human trafficking as a serious issue, largely affecting women and children, it does not engage with migration or mobility. However, the Protocol does recognise women's contributions in the informal sector and recommends adequate remuneration and protection of agricultural and domestic workers. When read in conjecture with the 2014 Protocol on Employment and Labour, these provisions could be beneficial to migrant women in these occupations.[73] This Protocol obliges all SADC members, including South Africa, to adopt specific legislative measures to enable women to have equal opportunities and participation vis-à-vis men.

**SADC Gender Policy (2007)**

Through an extensively gendered analysis, the Gender Policy promotes, inter alia, "rehabilitation measures for women, including elderly and disabled women, and children, to address physical and psychosocial effects of conflict including human rights abuses, gender based violence, post war trauma and reunification of families separated during periods of conflict, demobilisation of armed combatants and repatriation and resettlement of refugee".[74] The Gender Policy also prompts states to enact laws preventing and eliminating all forms of gender based violence in public and private spheres, including human trafficking, and to implement responsive collaborative programs like counseling, legal, medical and police protection units.[75] As a SADC member, South Africa automatically shares the commitments outlined in this Policy.

**SADC Code on Social Security (2007)**

Under its provisions for migrants, the Code urges member states to work towards the free movement of persons in the SADC region, and allowing legal migrants equal treatment to citizens in accessing social security systems and facilitate the portability of benefits across borders.[76] It also extends basic minimum protection of social security to illegal residents and undocumented migrants.[77] When read together, the Code's gender and migrant provisions make it clear that migrant women should have access to social security in the SADC region. The Code provides all SADC members, including South Africa, with strategic direction and guidelines in the development and improvement of social security schemes.

[73] SADC Gender Policy (2007) 25
[74] SADC Gender Policy (2007) 19 and 20
[75] Article 17.1 of the SADC Code on Social Security (2007)
[76] Article 17.3 of the SADC Code on Social Security (2007)

## 3.3.3 NATIONAL FRAMEWORKS AND POLICIES

**National Strategic Plan (NSP) on Gender based Violence and Femicide 2020 – 2030 (2020)**

A key principle underpinning this 10-year NSP is inclusiveness. The plan specifically recognises that migrant and refugee women, and LBTQ women are vulnerable and at heightened risk of SGBV.[78] The NSP is a key document guiding a country-wide response to SGBV and will require action by multiple executive state departments.

**National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (2019)**

The five-year plan, which prohibits discrimination, hate crimes, and hate speech based on nationality, migrant or refugee status, gender and gender identity, sex which includes intersex and sexual orientation, sets goals for the government and the civil society to address discrimination through, inter alia, a rapid response team to respond to and address incidents. Beyond the recognition of forced migrants and gender and sexual minorities as vulnerable groups, the Plan does not make a further bidirectional analysis in this regard.

**The White Paper on International Migration (2017)**

This state White Paper, which was preceded by a Green Paper, signals a shift in South African policy, and potentially legislation, by setting out the framework for future immigration law in South Africa. The White Paper proposes, inter alia, new visa options and schemes for African nationals, which will allow safe and legal immigration avenues for all migrants, with the aim of reducing irregular movement and the specific vulnerabilities that stem from it. It marks a shift, from South African policy which uses immigration detention as a tool to manage movement, to measures to proactively regularise movement. Some of the proposals have been enacted by legislation, in the form of amendments to the Refugees Act.[79] The White Paper focuses less on migrants' rights and more on their legal status, while lacking any gendered data or considerations beyond the recognition that women and children are migrating at an increased rate.[80]

**The National Strategic Plan (NSP) for HIV, TB and STIs 2017-2022 (2017)**

This NSP recognises "key and vulnerable populations" to address "mobile populations, migrants and undocumented foreigners" and "adolescent girls and young women".[81] Through a gendered approach, the NSP engages with the vulnerabilities faced by women such as SGBV, and recognises adolescent and young girls, lesbian, gay, bisexual, transgender and intersex people as a key population for HIV and sexually transmitted diseases. While it identifies policy gaps in the subject area, it fails to recognise the increased risk of migrant women under the accompanying strategies and plans dealing with these vulnerable populations.

**National Development Plan 2030 (2012)**

This plan recognises the issues facing women, especially in terms of race and poverty in rural areas, proposing a range of measures to advance women's equality, empowerment, and active participation in the economy.[82] It also describes the high rates of violence against women and transgender communities, gay men, and lesbian women, which pose a silent threat to the safety of a vulnerable sector of society. It proposes the development of qualitative indicators, expanded to include all categories of vulnerable people, to measure the progress made to secure the safety of potential survivors of gender based violence.[83] There is, however, no in-depth intersectional analyses of LBTQ women and migration in any chapter.[84]

[78] National Strategic Plan on Gender-Based Violence and Femicide 2020 – 2030 (2020) 46
[79] See Refugee Act amendments discussed above.
[80] White Paper on International Migration (2017) 1
[81] National Strategic Plan for HIV, TB and STIs (2017) 23
[82] National Development Plan 2030 (2012) 43
[83] National Development Plan 2030 (2012) 395
[84] National Development Plan 2030 (2012) 470

# 4.
# LIVED REALITIES

# 4. LIVED REALITIES

All people on the move have human rights which should be respected, protected, and fulfilled; as set out above, refugees and asylum seekers have specific needs and rights that are protected by particular legal frameworks.

It is clear that South Africa has a fairly comprehensive, if somewhat fragmented, legal and policy framework in respect of forced migration. This framework constitutes a promise to migrant women entering South Africa: we will recognise, respect, and protect your basic human rights, and we will treat you with dignity.

However, many lived experiences of migrant women in South Africa demonstrate that reality often falls far short of this promise. Women who are forced to migrate face an array of challenges, beginning with their experiences in their country of origin. These trials may start with discriminatory cultural and gender roles in countries of origin, and continue throughout their journey to South Africa, and their attempts to integrate into society on arrival in South Africa. They frequently encounter great difficulty in accessing basic rights and services in South Africa, linked to their legal status (or lack thereof).

Below, the lived experiences of migrant women in South Africa are examined under eleven main themes, with reference to existing literature and case studies based on LHR case files (noting that all clients' identifying details have either been omitted, or changed, to protect their privacy and legal privilege). Each of the case studies illustrate ways in which migrant women face discrimination because of the social group to which they belong. This discrimination is, in most instances, compounded by their race, class, and other immutable aspects of their identity.

## 4.1 ACCESS TO DOCUMENTATION AND QUALITY OF DECISION-MAKING

The operative refugee and asylum system includes many procedural obligations that migrants fleeing persecution must navigate once they enter South Africa. First, at the ports of entry, migrants are issued with asylum transit visas,[85] valid for five days, allowing them to travel to, and submit their claim for asylum at, a Refugee Reception Office (RRO).[86] At the RRO, asylum seekers are given temporary "section 22 asylum seeker visas,"[87] upon application for asylum, which are valid for six or fewer months, and must be renewed repeatedly until a decision is reached about their claim for asylum. Those in possession of the section 22 visas must renew them regularly at the RRO at which they applied, failing which their claim may be deemed to be abandoned and they may be detained and/or deported.[88] The requirement that section 22 visas must be renewed at the RRO at which the asylum seeker lodged their application for asylum, regardless of whether they have since relocated to another province and are in closer proximity to a different RRO, places a great financial burden on an asylum seeker who may have to travel inter-provincially with or without children every three to six months to renew their documentation.

[85] In terms of section 23 of the Immigration Act, read with regulation 7 of the Refugees Act.
[86] Section 21 of the Refugees Amendment Act of 2017
[87] Section 22 of the Refugees Act
[88] Zikhali "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers" (2019) 5; Landau et al. "Xenophobia in South Africa and Problems Related to it" (2005)

Many studies have noted that this process is not only complicated and burdensome, but also rife with corruption.[89] While the section 22 visas, coupled with recent amendments to the Refugees Act, permit asylum seekers to apply for the right to work and study in the country legally (as opposed to automatically granting those rights), asylum seekers may be kept waiting for the outcome of their application for asylum for much longer than the six month-period for which the permit is valid.[90] In the Kiliko (2006) case, it was found that the DHA fails to process asylum applications within a reasonable time, with most applicants awaiting the outcome of their claims for more than five years.[91] In LHR's experience, this period can be even longer, with some clients awaiting decisions for longer than a decade. As desperation increases, so too does vulnerability to corruption that is reportedly endemic to the system.

When a final decision is made by DHA on an asylum seeker's claim for refugee status, the asylum seeker is issued with a status visa under section 24 of the Refugees Act (a "section 24 visa"). Those formally recognised as refugees in this way, and who live in South Africa with refugee status for ten years or more, will qualify to apply for permanent residency.[92] After another five years, a permanent resident can apply for South African citizenship, thus completing the cycle of naturalisation and integration.[93]

However, when an asylum application is rejected, an asylum seeker must deal with the last tier of the bureaucracy by challenging the DHA's decision: first internally, to the RAA or to the SCRA, and as a last resort, to a court in a legal review. The appeal and review processes, much like the rest of the system, is notoriously slow and onerous.[94] In LHR's 2020 report, "Costly Protection: Corruption in South Africa's Asylum System" it is recorded that between 2015 and 2019, 812 472 asylum applications remained unprocessed, 15% of which remain active.[95] Furthermore, the Auditor General's February 2020 report found that there was a backlog of 147 794 cases at the Refugee Appeal Board, now the RAA, which would take 68 years to clear without the RAA taking new cases.[96] Similarly, the Auditor General indicated that the SCRA has a backlog of 40 326 cases, and that it would take a full year for the SCRA to clear its backlog of review cases, if it received no new matters.[97]

[89] Krause-Vilmar and Chaffin "No Place to Go But Up, Urban Refugees in Johannesburg, South Africa" (2011) 13

[90] Zikhali "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers (2019) 4; Rugunanan and Smit "Seeking Refuge in South Africa: challenges facing a group of Congolese and Burundian refugees" (2011); CoRMSA "Protecting Refugees, Asylum Seekers and Immigrants in South Africa" (2009) 86; Landau et al. "Xenophobia in South Africa and Problems Related to it" (2005)

[91] Kiliko and Others v Minister of Home Affairs and Others (2008) ZAWCHC 124; Fassin et al. "Asylum as a Form of Life: The Politics and Experience of Indeterminacy in South Africa" (2017) 163

[92] Sections 26 and 27 of the Immigration Act

[93] Citizenship Act 88 of 1995; Wamundiya "An Exploratory Study of the Role that Identity Documents Play in the Integration of Refugees and Asylum Seekers in South Africa: Reflections from Cape Town" (2014) 14

[94] World Bank Group (2018) at page 30

[95] Lawyers for Human Rights "Costly Protection: Corruption in South Africa's Asylum System" (2020) at page 39.

[96] Portfolio Committee on Home Affairs "Report of the Auditor-General on a Follow-Up Performance Audit of the Immigration Process for Illegal Immigrants at the Department Of Home Affairs" (February 2020) at page 7.

[97] Portfolio Committee on Home Affairs "Report of the Auditor-General on a Follow-Up Performance Audit of the Immigration Process for Illegal Immigrants at the Department Of Home Affairs" (February 2020) at page 7.

Under the 1951 Refugee Convention, host states must assist refugees in obtaining and retaining proper identity and travel documentation.[98] While the Refugees Act also incorporates these obligations, the punitive provisions of the Immigration Act, [99] whereby any undocumented migrant may be subjected to detention and/or deportation, is criticised as a violation of international law governing the rights of displaced persons.[100] At the same time, the South African government has been accused of actively implementing measures that make the refugee and asylum process increasingly difficult, deterring new applicants and forcing them to return to their country, in contravention of the international and regional instruments in place.[101]

The restrictive functioning of the refugee system in South Africa has far-reaching consequences. The lack of documentation and coercive policing techniques force migrants into a position of "irregularity" (undocumented, or in possession of irregular documentation), which in turn renders them more vulnerable to abuse and discrimination.[102] Asylum seekers and refugees therefore find it difficult to access constitutionally guaranteed socio-economic rights and services, since access to these basic rights is largely dependent on proper documentation. On the other hand, the state's argument for further, more restrictive[103] migration policies appears to stem, at least in part, from the link frequently made between migrants and criminality (including being undocumented).[104]

An important theme observed in assessing existing law and policy and the lived realities of many migrants, however, is that the punitive and restrictive measures do not necessarily reduce or discourage irregular migration.[105] For instance: low-skilled or unskilled migrants are not given work visas, and asylum seekers are restricted from working, studying or being self-employed in terms of the recent amendments to the Refugees Act. This functions as a disincentive for migrants to enter the country in a regular manner, and encourages the adoption of a variety of methods to cross borders informally – and to stay undocumented, while in South Africa, rather than taking the risk of returning "home".[106]

As a more general matter, the complexity and arduous nature of the asylum seeker process has particular, negative implications for women asylum seekers and their children.

[98] Articles 27 and 28 of the Refugee Convention; Zikhali "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers" (2019) 4

[99] Sections 30 and 31 of the Refugees Act; Section 32 of the Immigration Act states that any "illegal foreigner" should leave the country unless permitted by the DHA to remain in the country

[100] Zikhali "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers" (2019) 5

[101] Walker and Vearey "Gender, Migration, and Health in SADC: A Focus on Women and Girls" (2019) 13; Heinrich Boll Stiftung "Interview with Victor Chikalogwe: 'A Double Challenge': LGBTI Refugees and Asylum Seekers in South Africa" (2018)

[102] Landau et al. "Xenophobia in South Africa and Problems Related to it" (2005); Walker and Vearey "Gender, Migration, and Health in SADC: A Focus on Women and Girls" (2019)

[103] Maunganidze and Formica "Freedom of Movement in Southern Africa, A SADC (pipe)dream?" (2018)

[104] Walker and Vearey "Gender, Migration, and Health in SADC: A Focus on Women and Girls" (2019) 13

[105] Gandar "They treated Me as if I was Nothing" (2019)

[106] Mbiyozo "Women Migrants: Forgotten Victims of South Africa's Xenophobia" (2019); Mbiyozo "Gender and Migration in South Africa: Talking to Women Migrants" (2018)

# THE ASYLUM PROCESS IN SOUTH AFRICA

### 1. Arrival

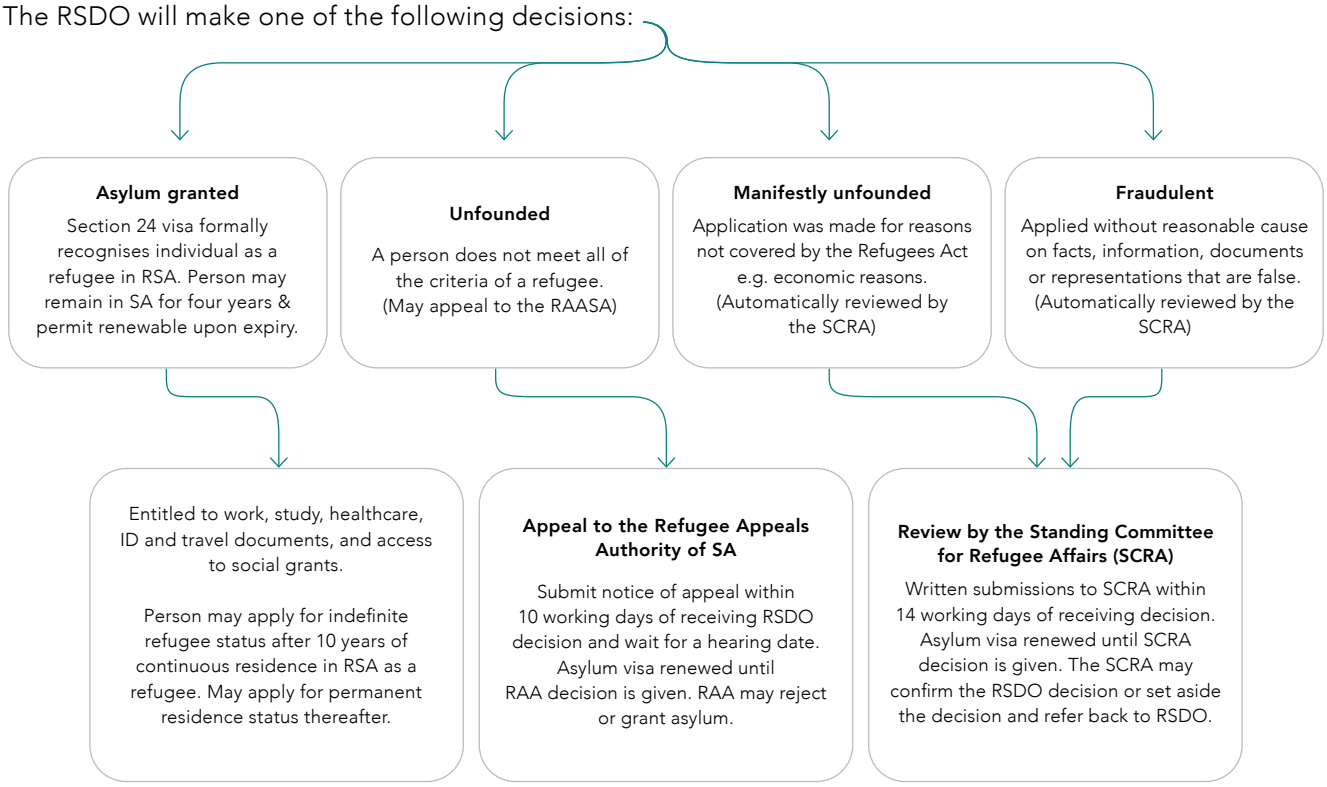
Obtain an asylum transit visa at a port of entry, which is valid for 5 days.

A newcomer must then report to a RRO within 5 days of entry into South Africa to lodge an application for asylum.

- Biometrics captured (photo + fingerprints) by RRO officer
- Complete BI-1590 application form
- Status determination interview with a Refugee Status Determination Officer (RSDO)
- Receive either an asylum seeker visa (section 22 visa) or refugee visa (section 24 visa)

### 2. Decision

The RSDO will make one of the following decisions:




### 3. Asylum rejected

Judicial Review

If the appeal or review process is unsuccessful, the asylum process with the Department of Home Affairs (DHA) has ended. At this point the visa will no longer be valid and individuals are issued with a notice to appear before an Immigration official at a future date.

Should an individual wish to challenge either the RAAor SCRA's decision, they may do so by means of a high court application known as a judicial review. A judicial review application must be launched within 180 days of receiving a decision from RAA or SCRA. An individual is entitled to be issued with an asylum seeker visa, valid for 30 days at a time, pending the outcome of their high court application. If the judicial review is unsuccessful the person will need to leave the country.

A 35-year old woman did not inform the RSDO of the sexual abuse and intimidation she suffered at the hands of a militia group in her home country. She was questioned during her hearing with the then Refugee Appeal Board (RAB), now the RAA of South Africa, on why she failed to provide this information. The omission of this information was interpreted to mean that she was fabricating the ordeal. She responded by saying the environment at the RSDO office was not conducive to explaining her full personal circumstances: there was a language barrier, the RSDO was shouting at her, there were people walking in and out of the office, and she was not given the opportunity to relay her story.

In another case, a 30-year old woman fled her home country following gang rape in a conflict zone in 2013. In her still-torn clothes and with bleeding wounds, she entered South Africa informally. She was then able to obtain a medical report with help from her immigration legal counsel. Despite the medical report that documented her assault, her application was rejected first by a RSDO and then by the RAB. While the state attorney offered to settle the case, it did not guarantee her legal status as a refugee. With LHR's assistance, she has filed for a judicial review of the decision.

A 30-year old woman client from a conflict zone had her asylum application rejected as "manifestly unfounded". Despite her unique situation, the RSDO did not recognise her personal circumstances in making this decision. Her brother was an active member of an NGO, and on the basis of her association with him, she became part of a group of women who were kidnapped by rebels and subjected to persecution. After the rejection of her application for asylum in South Africa, LHR assisted her with making submissions to the SCRA to review and set aside the RSDO decision.

A pregnant 32-year-old asylum seeker from west Africa had fled to South Africa with two minor children, to seek protection after her husband was killed by the militia group aligned to the ruling party in her home country. Once in South Africa, she approached the Cape Town RRO to apply for asylum, but was informed that the office did not take new applications and that she would have to go to the Musina RRO instead. However, given that she was pregnant at the time and did not have the financial means to travel to Musina, she remained undocumented for 10 months. She could not receive any antenatal care because she was undocumented.

First, migrants, especially those crossing the borders without transiting through formal ports of entry, may face extreme challenges before they even arrive at a RRO to make their asylum claims. Migrant women are often travelling to South Africa along hidden and dangerous routes, which increases their exposure to exploitation and violence. Seeking assistance with migration by relying on "third parties" such as smugglers and the risk of being victims of human trafficking is also increasingly common.[107] Many migrant women reportedly experience robberies, rapes, beatings, and exploitation during informal border crossings.[108]

Once inside South Africa, women and LGBTQI migrants have also reported safety concerns, both outside and within the RROs, with officers and staff accused of being xenophobic and discriminatory.[109] Women suffer disproportionately in other ways, for instance, when asylum seekers are forced to spend the night outside a RRO to gain access, women will be at disproportionate risk of SGBV, and "soft targets" for opportunistic theft and other safety threats. Waiting in long queues, sometimes with small children, also creates opportunities for crime and corruption.[110] Thereafter, applicants are required to repeatedly return to the same RRO every six months, for section 22 visa renewals. This creates further economic and family care challenges for women, who are often the primary caregivers of children. Applicants for asylum often do not settle near the RRO that issued their section 22 visa, and instead travel to cities and towns where they feel they have the best chance of finding income and/or community. For this reason, returning frequently for visa renewal is no simple or cheap matter, as many migrant women are compelled to travel long distances either with or without their dependents, and likely spend a few days waiting to access the RRO.

There are currently only three fully functioning RROs in South Africa, located in Durban, Musina and Pretoria. Some research reports have undertaken specific analysis of the impact that the closure of the RROs in Johannesburg, Port Elizabeth, and Cape Town have had on migrant women. Migrant women are often indigent and face extreme hardship in arranging transportation to the RROs in the short duration of the legislated five-day period to submit their asylum applications at these offices. Transit visas often expire by the time asylum seekers are interviewed at the RROs, making them vulnerable to refoulement if they are perceived to have failed to make a strong enough case to stay.[111]

Several court rulings on the detrimental effects of the closure of these RROs on migrants[112] have arguably gone unheeded over the years. The parliamentary Portfolio Committee on Home Affairs, as well as academic writings and reports, have criticised the DHA not only for its failure to reopen RROs in compliance with multiple court orders, but also for the backlogs, long queues, corruption, and ineffective systems and facilities in place at the RROs.[113]

[107] Walker and Vearey "Gender, Migration, and Health in SADC: A Focus on Women and Girls" (2019) 20
[108] Amit "No Way In: Barrier to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices" (2012) 10
[109] Walker and Vearey "Gender, Migration, and Health in SADC: A Focus on Women and Girls" (2019) 21
[110] Amit "No Way In: Barrier to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices" (2012) 11
[111] Bhagat (2018) at page 159.
[112] Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others (2013) (7) BCLR 819 (WCC), in which the state's decision to close the Cape Town Refugee Reception Office to new applicants for asylum after 29 June 2012 was declared unlawful and set aside, with the court ordering that the RRO should be re-opened
[113] LHR "Costly Protection: Corruption in South Africa's Asylum System" (2020); Gandar "They treated Me as if I was Nothing" (2019); Amit "No Way In: Barrier to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices" (2012)

Another significant challenge is that of appointment slips. RROs issue newcomers with an appointment slip reflecting a date on which to return to the RRO in order to lodge their application for asylum, if the RRO is unable to assist the newcomer on the day of their arrival at the RRO. The appointment slip, which is a small piece of paper printed with minimal details, is easily lost and LHR has observed that the ink on these slips fades rapidly, making them illegible. Such slips do not constitute valid documentation and do not entitle the newcomer to any rights in terms of the Refugees Act, nor do they regularise the person's stay in the country. The appointment slip simply states the newcomer's name and the date of their appointment for the lodging of an application for asylum. LHR is aware of newcomers with appointment slips from the Port Elizabeth RRO, requiring them to return to that office to make application for asylum the following year. Asylum seekers in possession of only these appointment slips remain enormously vulnerable during the period preceding the date on which they are permitted to lodge their asylum claims, as their right to remain in the country is frequently challenged by law enforcement officers, and other rights including, *inter alia*, to health, education, and work are simply more difficult to access when asylum seekers are left in this state of limbo, through no fault of their own.

It is also widely acknowledged that the DHA is significantly understaffed and under-resourced, and its workload and backlogs add significantly to the inefficiency of the system.[114] For example, while RROs provide access to interpreters telephonically to overcome language barriers, studies have shown that the quality of interpretation brings the administrative fairness of the process into question.[115]

Some literature has considered the risks faced by LGBTQI individuals as migrants in South Africa, especially as undocumented non-nationals.[116] This is set out in more detail below, at section 4.7, but in sum, when making an asylum claim based on sexual and gender based persecution, lesbian, bisexual, and transgender persons are required to first "prove" their sexual orientation or gender identity, and secondly, must prove that they have faced persecution in their home country because of their sexuality or gender identity. By contrast, the UNHCR has advised that: "[s]elf-identification as LGBT should be taken as an indication of the individual's sexual orientation. … Where the applicant is unable to provide evidence as to his or her sexual orientation and/or there is lack of sufficiently specific country of origin information the decision-maker will have to rely on that person's testimony alone."[117]

In addition to these shortcomings, the reportedly homophobic attitudes of the RSDOs cause further problems for migrant women. Several reports have found that the interview questions asked by RSDOs are often highly invasive and dehumanising. When the applicants' answers do not match the expectations of the RSDOs, this can lead to the RSDO doubting the applicants' credibility, and ultimately their applications are rejected if they do not physically appear or act the way their stated sexual orientation or gender identity may be narrowly perceived by an RSDO.[118]

The unregulated processes of decision-making and the subjective nature of RSDO screening makes migrant women, including LBTQ women, particularly vulnerable to a securitised and militarised approach.[119] This overarching structural barrier to accessing documentation reflects the urgent need for training at the DHA on gender and sexual minorities.[120]

[114] Tafira and Others v. Ngozwane and Others (2006) ZAGPHC 136; Macanda and the Minister of Home Affairs & Others (2006) 2006 (4) SA 114 (C); World Bank Group (2018) 29; Fassin et al. "Asylum as a Form of Life: The Politics and Experience of Indeterminacy in South Africa" (2017) 163

[115] Amit "No Way In: Barrier to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices" (2012) 11

[116] Gandar "They treated Me as if I was Nothing" (2019); PASSOP "My Home, My Body and My Dreams, Reflections by LGBTQI Refugees in South Africa" (2019) 1

[117] UNHCR (2004) Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation, UNHCR Regional Representation in Japan. Available at http://www.unhcr.org/refworld/docid/4551c0d04. html, accessed May 24, 2019

[118] Hakizimana "LGBT Asylum Claims: The Case of South Africa" (2018) 50

[119] Bhagat "Forced (Queer) migration and everyday violence: The geographies of life, death, and access in Cape Town" (2018) 159

[120] Section 4 of the Refugees Amendment Act

## RECOMMENDATIONS: REMOVAL OF BARRIERS TO ACCESS THE ASYLUM SYSTEM

- The DHA should introduce a new Amendment Bill aimed at removing harmful provisions contained in the Refugees Amendment Act. This should include:
  - o all provisions that make the right to work and study subject to application, and therefore at the discretion of the state;
  - o all provisions that deem a claim for asylum to be automatically "abandoned" when an applicant fails to renew their temporary visa on time;
  - o the strict requirement to apply for an asylum transit visa on entry at the border, which places asylum seekers at risk of being excluded from seeking asylum – an asylum seeker who does not present an asylum transit visa may be excluded from applying for asylum unless they have compelling reasons for not being in possession of this visa.[121]
- The DHA should increase the period of validity of a section 22 visa from six months to one year, to reduce the frequency of the need for renewal, and the associated financial and other costs that impact disproportionately on women;
- The DHA should improve its internal system to allow asylum seekers and refugees to renew their visas at the RRO nearest to them, to mitigate the requirement to travel frequently, which leads to regular absence from work and/or family, and significant financial expenditure for applicants who may already be indigent.

## RECOMMENDATIONS: QUALITY OF DECISION MAKING

- The DHA should develop improved interview guidelines to address the poor quality of RSDO decisions in applications for asylum based on SGBV.
- The DHA should make provision for the unique needs of women applicants generally, and those who are survivors of SGBV, by:
  - o making female RROs available to female applicants, and
  - o ensuring that social workers are available during and after RSDO interviews.
- The DHA should strengthen its capacity and infrastructure, through gender- and evidence-based motivation for adequate resource allocation from the National Treasury, to increase access to services for women at RROs, and to reduce long queues and turnaround times in assessing applications for refugee status;
- The DHA should develop and implement regular, improved training programmes for immigration officers, RSDOs, and refugee reception officers. This should be done in partnership with specialist non-governmental organisations and service providers, to:
  - o better deal with asylum seekers whose claims are based on SGBV, and
  - o to improve awareness and knowledge of the law and socio-political circumstances in migrant women's countries of origin.

[121] Section 4 of the Refugees Amendment Act

## 4.2 ACCESS TO HEALTHCARE

According to the South African Constitution, everyone living within the boundaries of the state, regardless of citizenship or residential status, has the right to access primary healthcare and emergency medical treatment, including reproductive healthcare.[122] In addition to the Constitution, the National Health Act,[123] the Immigration Act and the Refugees Act regulate refugees' and migrants' access to health and emergency care.

Despite this constitutional and legal protection, literature points to an ongoing disconnect between policy and practice. The laws and regulations governing the right of refugees and asylum seekers to healthcare are inconsistent, leading to improper and confusing interpretation by medical practitioners.[124] Under the Refugees Act as well as the National Health Act, refugees are entitled to basic health services, but no explicit reference is made to asylum seekers or other migrants. The Immigration Act, on the other hand, requires medical practitioners to check the legal status of the patients before administering care, thereby undermining both the National Health Act and the Refugees Act.[125]

The courts in South Africa have not articulated under what conditions forced migrants may exercise the constitutional right to access healthcare. Research has thus argued that the lack of case law forces hospital administrators to become interpreters of the law.[126] It is important to note that the right to healthcare, including reproductive healthcare in South Africa under section 27 of the Constitution, is subject to "progressive realisation." This means that the state will implement healthcare and services gradually, subject to the availability of resources. This creates a dilemma for healthcare practitioners: do they as a matter of course provide healthcare and services to migrant women, especially to migrant women in critical obstetric need, or do they recall that resources are limited due to "progressive realisation", and decide that those resources should be kept for citizens?[127]

Clinics and hospitals routinely refuse to accept the paper appointment slips that sometimes constitute a woman's only proof that she is pursuing an asylum application. Health facilities will likewise not accept expired visas, even where a woman can provide a paper appointment slip from the DHA showing she is awaiting an opportunity to renew her documents. LHR has on many occasions been obliged to intervene in such cases, to assert these women's right to emergency and primary medical assistance, including on behalf of asylum seeker and migrant women who are visibly pregnant.

Migrant women must also contend with what researchers have termed "medical xenophobia."[128] This refers to the personal xenophobic attitudes that some healthcare professionals bring with them into the workplace, where they have considerable power to withhold services, or to influence the way services are delivered to asylum seekers, migrants, and refugees. This phenomenon is not limited to healthcare professionals and is also prevalent among other "helping professions," such as such as teachers and social workers.[129]

[122] Section 27 of the South African Constitution; Zikhali "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers" (2019) 4

[123] National Health Act 61 of 2003

[124] Gandar "They treated Me as if I was Nothing" (2019); Alfaro-Velcamp "'Don't send your sick here to be treated, our own people need it more': Immigrants' Access to Healthcare in South Africa" (2016)

[125] Section 42 of the Immigration Act; section 27 of the Refugees Act

[126] Alfaro-Velcamp "'Don't send your sick here to be treated, our own people need it more: Immigrants' Access to Healthcare in South Africa" (2016) 54

[127] Alfaro-Velcamp "'Don't send your sick here to be treated, our own people need it more': Immigrants' Access to Healthcare in South Africa" (2016) 53: "Many immigrants – especially the undocumented – are often unable to obtain care because of a lack of papers or because of 'progressive realization,' the notion that the state cannot presently afford to provide treatment in accordance with constitutional rights."

[128] Crush and Tawodzera "Medical xenophobia: Zimbabwean access to health services in South Africa." (2011)

[129] Crush and Tawodzera "Medical xenophobia: Zimbabwean access to health services in South Africa." (2011)

Literature shows that migrant women are regularly denied services at public hospitals and clinics due to their nationality.[130] This is closely tied to a lack of documentation, and the increasing state efforts to restrict migration and securitise national borders, worsening health risks for displaced women and girls.[131] HEARD, a division of the University of KwaZulu Natal, estimated in a 2016 factsheet on unsafe abortion that only 50% of all abortions in South Africa are provided in legally designated facilities. For migrant women, this failure of the South African national health system to provide adequate abortion services may be compounded by xenophobic attitudes, forcing many to resort to illegal abortions with dire health consequences.[132]

Studies have also highlighted the increased health risks for migrant women doing sex work, including HIV and other sexually transmitted diseases, due to a lack of access to birth control and other health and screening services.[133]

In LHR's experience, asylum seekers are often required to pay for basic medical treatments, while refugees are not. LHR has sent numerous letters on behalf of affected clients, urging public hospitals to waive fees. Most recently, the Gauteng Province has implemented new healthcare tariffs which many LHR clients have reported as unaffordable.[134] This will have a disproportionate impact on migrant women, who are less likely than their male counterparts to have access to resources, and yet are more likely to bear the burden of child and family healthcare.

Literature indicates that the relationship between migration and health remains poorly understood by relevant officials and medical practitioners.[135] Legal frameworks and public health systems also undermine the developmental potential of migration, by failing to engage adequately with mobility despite the high levels of migration and a high burden of communicable disease in the country.[136] Literature recognises key gender issues and vulnerabilities related to migration and health, and outlines the need for guiding policies and frameworks as well as broadening knowledge to operationalise a gendered response.[137]

Likewise, there appears to be no detailed analysis of the mental and psychological impact of the migratory hurdles on women, particularly lesbian and transgender women. There is also a lack of studies on the intersection of health and mobility among lesbian and transgender women.

[130] Memela "Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area" (2014) 136; Zikhali "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers" (2019) 7

[131] Walker and Vearey "Gender, Migration, and Health in SADC: A Focus on Women and Girls" (2019) 9; Vearey "Moving Forward, Why Responding to Migration, Mobility and HIV in Southern Africa is a Public Health Priority," (2018) 96; Alfaro-Velcamp "'Don't send your sick here to be treated, our own people need it more': Immigrants' Access to Healthcare in South Africa" (2016) 53

[132] Mabaso "The Impact of the 'Global Gag Rule' on Migrant Women and Women from Poor Households in Cape Town: A case study" (2019) 4

[133] Walker and Oliveira "Contested Spaces: Exploring the Intersections of Migration, Sex Work and Trafficking in South Africa" (2015) 137

[134] Hospitals Ordinance (14/1958): Revision of the Uniform Patient Fee Schedule relating to Hospital Mortuary, 2020 Provincial Gazette No, 103.

[135] Walker and Vearey "Gender, Migration, and Health in SADC: A Focus on Women and Girls" (2019) 12

[136] Walker and Vearey "Gender, Migration, and Health in SADC: A Focus on Women and Girls" (2019) 12

[137] Walker and Vearey "Gender, Migration, and Health in SADC: A Focus on Women and Girls" (2019) 9

## CASE STUDY

A 40-year old woman asylum seeker was taken off life-saving kidney dialysis treatment for chronic end-stage renal failure, at a public hospital. Her section 22 visa was up to date, and she had already been in South Africa for close to nine years, awaiting a decision on her asylum application. She was told that only citizens, permanent residents, and recognised refugees are eligible to receive chronic dialysis treatment,[138] and to receive organ transplants.[139] Without one of these, her (preventable) death was imminent. Despite an attempt to litigate against the hospital and Department of Health on this policy, the High Court did not find in favour of the patient, holding that there "are numerous South Africans who have been excluded from dialysis treatment on the basis of a scarcity of resources." The court relied on the decision in the well-known matter of *Soobramoney v Minister of Health KwaZulu Natal*,[140] in which a South African citizen was denied dialysis the basis of limited resources, and found that no unfair discrimination on the basis of nationality had taken place.

[138] Clause 1.6.2 of the hospital's Standing Operating Procedures for the Provision of Long-term Renal Replacement Therapy, which states that all patients being considered for this treatment must produce documentary proof of South African citizenship or permanent residence.
[139] Section 61(3) of the National Health Act
[140] CCT 23/97

## RECOMMENDATIONS:

- The national Department of Health should amend the Uniform Patient Fee Schedules, which sets out the fee tariffs that full-paying patients are charged at state hospitals across the various provinces. The amendment must make it clear that refugees, asylum seekers, whether documented or not, who seek help at public hospitals in South Africa are entitled to be treated in the same way as South African citizens, and should be means-tested to determine their ability to pay for any medical services.

- The Department of Health, at national and provincial levels, should take steps to promote knowledge and understanding among public sector healthcare practitioners of:

  - the legal rights of asylum seekers, refugees, and migrants to access primary healthcare and emergency medical treatment, including reproductive healthcare, and the personal and institutional legal risk that the violation of those rights will attract; and

  - the National Action Plan to Combat Racism, Xenophobia, and Related Intolerance, to eradicate racism and xenophobia in the healthcare sector.

## 4.3 LABOUR RIGHTS/THE RIGHT TO TRADE

In terms of the Refugees Amendment Act, asylum seekers are not automatically entitled to work in South Africa, and must apply do so.[141] If granted, the right to work must be endorsed on the asylum seeker's section 22 visa. An application for the right to work will be subject to an assessment of: first, the asylum seeker's ability to sustain herself; and second, if she cannot sustain herself, whether there is any organisation that can assist her with basic necessities. If granted, and her section 22 visa is endorsed, the asylum seeker will have 14 days from the date of taking up employment in which to submit proof of employment to DHA, or risk her employer being fined.[142]

These provisions of the Refugees Amendment Act are likely to hinder an asylum seeker's ability to secure employment, particularly if an asylum seeker visa does not automatically state that the asylum seeker may work in South Africa, as under the Refugees Act before it was amended. Employers tend to be sceptical about whether asylum seekers have the right to work at all, and the introduction of these new amendments is likely to cause further concern and confusion amongst potential employers.

[141] Section 22(6), (7), (8), and (9) of the Refugees Amendment Act
[142] Section 22(9) and (10) of the Refugees Amendment Act

Asylum seekers have very limited opportunities for employment in South Africa as a general matter. Many take up informal work, which could include domestic work, care work, or some form of trading. Employers in both the formal and informal sectors are slow to employ asylum seekers,[143] not least due to the short validity of their section 22 visas, and the regularity with which they are required to renew these visas, taking up time that could be spent at work. There is often a language barrier and confusion around equivalence of qualifications – for instance, according to one study, employers in South Africa do not understand the academic qualifications of some Congolese nationals because their credentials are written in French.[144] Xenophobic public sentiment has led to migrants being blamed for unemployment, crime, and limited access to services in South Africa.[145]

The Refugees Act legally entitles a refugee to "full legal protection", including the right "to seek employment".[146] South African courts have interpreted the right to work to include the right to be self-employed, and including the right to trade and earn a living in the informal sector. However, academic writings contend that in practice that right is limited for refugees firstly in terms of section 22 of the Constitution, which states that "every **citizen** [own emphasis] has the right to choose their trade, occupation or profession freely", and secondly in terms of the "limitation clause" in section 36 which allows for the limitation of constitutional rights by law of general application, and to the extent that the limitation is reasonable and justifiable in an open and democratic society. It is argued that together, these provisions have the effect of reserving the choice of vocation only for citizens and permanent residents.[148] In reviewing the constitutionality of these provisions, South African high courts have in several cases rejected the state's argument that's section 22 entirely prohibits refugees' and asylum seekers' right to work.[149] It has instead been held that depriving refugees and asylum seekers of their right to self-employment and choice of work is contrary to the constitutional values of equality, human dignity and freedom.[150]

Moreover, the post-apartheid Constitution entrenches the right to substantive equality, or equality in outcomes, which may require affirmative action measures with a particular focus on the more disadvantaged and vulnerable members of society. In the public labour market, such measures may include preferential treatment of "designated groups," such as women, Black people, and people with disabilities.[151] However, refugees and asylum seekers who hail from African countries, and who are socially vulnerable, and are increasingly female, do not fall within the scope of the designated groups and are excluded from employment in the public sector under the Public Service Act (1994).[152]

[143] Zikhali "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers" (2019) 6; Landau et al. "Xenophobia in South Africa and Problems Related to it" (2005)
[144] Kenge "The Experiences of Congolese Women Refugees in South Africa: A Church Response" (2017) 7
[145] Fuller "Double Jeopardy: Women Migrants and Refugees in South Africa" (2008) 9
[146] Section 27(f) of the Refugees Act.
[147] Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others [2014] 4 All SA 600 (SCA).
[148] Kavuro "Refugees and Asylum Seekers: Barriers to Accessing South Africa' Labour Market" (2015) 6
[149] Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others (2007) (4) SA 395 (CC); Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others (2014) 4 All SA 600 (SCA); Kavuro "Refugees and Asylum Seekers: Barriers to Accessing South Africa' Labour Market" (2015) 7
[150] Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others (2014) 4 All SA 600; Kavuro "Refugees and Asylum Seekers: Barriers to Accessing South Africa' Labour Market" (2015) 14
[151] Employment Equity Act 55 of 1998; Public Service Act 103 of 1994
[152] Public Service Act 103 of 1994

While there is a dearth of gender-disaggregated data on migrant flows and occupations, a study in South Africa found that migrant women only have a 56% probability of being employed compared to migrant men.[153] An observation therefore made in most academic writings on the subject is that migrant women are more likely to be unemployed than male migrants.[154] Those who do gain employment are observed to often do so in the unskilled or informal economy, engaging in hawking, hairdressing, dressmaking, and sex work, or in the domestic and agricultural sectors.[155] Research shows that as many as one-third of migrants in South Africa are self-employed in the informal economy. While there are very few non-national women traders, surveys of migrant entrepreneurs show that women occupy particular niches in the sector. Overall, women refugees are perceived as one of the most vulnerable groups of the immigrant workforce.[156]

Literature has highlighted the low wage regime and exploitative conditions in many of the sectors occupied by migrants.[157] While informal jobs are clearly an important means of livelihood,[158] a lack of documentation, low language skills, poor or no formal qualifications, xenophobic attacks, and gender stereotyping often means that women have no choice but to be subjected to potentially exploitative conditions with weak oversight or protection of their labour rights.[159] The impact of limited access to formal employment has disproportionally negative effects on the migrant women who are forced to accept low wages and longer working hours in unsafe working environments.[160] Additionally, the fact that migrant women often need to provide for dependents increases their willingness to work in low paid and dangerous settings.[161] Some academics have noted that women refugees often feel they must prioritise their families' immediate survival, at the expense of pursuing career paths that could provide more long term stability.[162] In line with such survival strategies, and to gain entry into the labour force, migrant women accept jobs in the informal job market despite professional qualifications they may have obtained in their country of origin.[163]

The labour rights of migrant women reviewed in academic papers tend to mostly consider employment in the spheres of domestic services and farm labour.[164] While half of all migrants are women, the career trajectories of migrant women, especially lesbian and transgender women, have received less in-depth scholarly attention than those of migrant men, despite being often framed as gender neutral.[165]

What is clear, is that migrant women are often reluctant to report workplace abuse, exploitation, and poor conditions to the authorities, for fear of arrest as an "illegal foreigners", losing their only source of income, and deportations[166] – this is especially true for migrant women doing sex work, as restrictive and punitive immigration policies and the ongoing criminalisation of sex work in South Africa conspire to make them doubly vulnerable.[167] One study shows that migrant women doing sex work are normally heads of households, supporting an average of five persons.[168]

[153] Crush et al. "Harnessing Migration for Inclusive Growth and Development in Southern Africa" (2017) 2
[154] Farley "Refugee Legislation in South Africa: A Feminist Foreign Policy Analysis – Part 1" (2019); Bloch "Gaps in Protection: Undocumented Zimbabwean Migrants in South Africa" (2008) 14; Krause-Vilmar and Chaffin "No Place to Go But Up, Urban Refugees in Johannesburg, South Africa" (2011) 5
[155] Farley "Refugee Legislation in South Africa: A Feminist Foreign Policy Analysis – Part 1" (2019); Walker and Vearey "Gender, Migration, and Health in SADC: A Focus on Women and Girls" (2019) 20; Kihato "Migrant Women of Johannesburg: Everyday Life in an In-Between City Johannesburg" (2013); Nyabvudzi and Chinyamurindi "The Career Development Processes of Women Refugees in South Africa: An Exploratory Study" (2019); Hiralal "Women and Migration – Challenges and Constrains – A South African Perspective" (2017) 11
[156] Nyabvudzi and Chinyamurindi "The Career Development Processes of Women Refugees in South Africa: An Exploratory Study" (2019) 1; Rydzik et al., (2017)
[157] Crush et al. "Urban Informality and Migrant Entrepreneurship in Southern African Cities" (2014) 2
[158] Crush et al. "Harnessing Migration for Inclusive Growth and Development in Southern Africa" (2017) 22
[159] Crush et al. "Urban Informality and Migrant Entrepreneurship in Southern African Cities" (2014) 3; Hunter and Skinner "Foreign Street Traders Working in Inner City Durban: Local Government Policy Challenges" (2003) 5
[160] Memela "Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area" (2014) 22
[161] Farley "Refugee Legislation in South Africa: A Feminist Foreign Policy Analysis – Part 1" (2019)
[162] Nyabvudzi and Chinyamurindi "The Career Development Processes of Women Refugees in South Africa: An Exploratory Study" (2019) 6
[163] Nyabvudzi and Chinyamurindi "The Career Development Processes of Women Refugees in South Africa: An Exploratory Study" (2019) 3; Bimha (2017) at page 33.
[164] Knowledge (2013) at page 9.
[165] Nyabvudzi and Chinyamurindi "The Career Development Processes of Women Refugees in South Africa: An Exploratory Study" (2019) 2
[166] Crush et al. "Harnessing Migration for Inclusive Growth and Development in Southern Africa" (2017) 22; Kihato "Migrant Women of Johannesburg: Everyday Life in an In-Between City Johannesburg" (2013)
[167] Walker and Oliveira "Contested Spaces: Exploring the Intersections of Migration, Sex Work and Trafficking in South Africa (2015) 130
[168] Walker and Oliveira "Contested Spaces: Exploring the Intersections of Migration, Sex Work and Trafficking in South Africa" (2015) 137

Asylum seekers and refugees who are fortunate enough to obtain formal employment, are not safe from discrimination either. One manifestation of systemic discrimination in this context, is the difficulty many migrants have in accessing the South African Unemployment Insurance Fund (UIF). The same UIF monthly payment that employers legally deduct from the salaries of South African citizens, is also deducted from the salaries of asylum seekers and refugees. On this basis, it would follow that they, too, should be entitled to claim unemployment insurance when retrenched or dismissed. However, in LHR's experience, attempts to do so are routinely refused on the basis that they do not have South African identity numbers, or South African identity documents.

The courts have ruled that asylum seekers are indeed entitled to claim UIF benefits,[169] and to deny an asylum seeker these benefits simply because they are not in possession of a South African identity number or document, amounts to unfair discrimination. The Department of Labour has been ordered to correct its systems to allow any asylum seeker who had contributed to the UIF, to receive benefits. In February 2019, the High Court in Pretoria again ruled that it was unconstitutional to exclude asylum seekers from claiming UIF benefits, and ordered the Department of Labour to make the necessary changes in its systems to allow asylum seekers to claim benefits.[170] Despite these court orders, the Department of Labour to date persists in its refusal to process the UIF benefit applications of asylum seekers.

Finally, and as set out above, Article 6 of the International Convention on the Protection of the Rights of Migrant Workers and their Families 45 /158 (1990) states that, "(m)igrant workers and members of their families shall be entitled to effective protection by the state against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions." However, South Africa has not signed or ratified this international convention. In the context of ongoing systemic xenophobic violence targeting migrant workers, including women, it is noted that such violence takes place with impunity, and therefore represents another area in which migrant women workers' rights continue to be undermined.

## RECOMMENDATIONS:

- The South African state should sign and ratify the International Convention on the Protection of the Rights of Migrant Workers and their Families 45 /158 (1990), which will oblige the state to take positive steps to protect migrant workers and their families against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.

- The Department of Labour should improve its implementation and enforcement of existing protection regulation, such as the Employment Equity Act[171] which prohibits abuse or discrimination on the basis of sex and gender (among other grounds), and enforce employer compliance with the National Minimum Wage Act[172] for migrant women.

- The Department of Labour should urgently implement the 2017 order of the Pretoria High Court, which requires the UIF IT system to be upgraded to recognise asylum seeker and refugee documentation reference numbers. This will ensure that all asylum seekers, migrants, and refugees that contribute to the unemployment insurance fund, are able to draw benefits from that fund when needed.

[169] *Saddiq v Department of Labour and Others* 04/201 All SA ZAEQC (2017)
[170] *Musanga and Others v Minister of Labour and Others* 29994/18 ZAGPPHC (2019)
[171] Act 55 of 1998
[172] Act 9 of 2018

## 4.4 EDUCATION

The right of refugees to receive the same basic education as citizens is clearly stipulated in both international and domestic law in South Africa.[173] Under the Refugees Act, "refugees as well as refugee children are entitled to the same basic health services and basic primary education which the inhabitants of the republic receive from time to time."[174] For asylum seekers, however, it wasn't until the Watchenuka[175] case in 2004 that the prohibition on obtaining education and undertaking employment was judicially reviewed and declared unconstitutional. In that case, the Constitutional Court held that the right to education, especially as an important route for human fulfilment at a critical period, amounts to the right to dignity.

A recent study has found that 60% of migrants from other SADC countries coming to South Africa have only partial secondary school education or less, and over 50% of migrants from the rest of Africa have completed secondary school with 25% holding a post-secondary qualification.[176] Another study discovered that many migrants who come to South Africa, have not completed their education as a result of political conflict and instability in their country of origin.[177] Given the importance of education in the attainment of skills to access livelihood opportunities, as well as proper social integration for migrants, women seeking asylum in South Africa should have access to education to pursue personal and social fulfillment, and to improve their chances at earning an income and avoiding poverty.

Asylum seekers and refugees, especially those who are undocumented, face significant obstacles in accessing the education to which they are entitled. The first hurdle frequently comes with the requirement for refugees and asylum seekers to pay school fees, which may be a financial impossibility due to a lack of access to documentation and employment, and poverty.[178] Academic research has also identified language barriers, and the recognition of their degree/qualification by South African education authorities, to be factors impeding migrant women from accessing education and ultimately employment. Even highly educated asylum seekers with professional skills urgently needed in South Africa, such as medical professionals, encounter significant hurdles. These include challenges in obtaining recognition of foreign qualifications by the South African Qualifications Authority, difficulties relating to degree conversion courses, and the financial burden of getting degrees accredited to enter the formal workforce in the roles for which they are qualified.[179] Many refugees and asylum seekers are simply too consumed by the difficulties of obtaining and maintaining refugee status, as discussed above, to have the luxury of prioritising education in their daily lives.

In addition to the challenges of accessing education for themselves, migrant women who are primary caregivers of children, frequently bear the primary burden of finding and accessing education at primary and secondary institutions for their children, and must navigate the applicable legal and regulatory framework – while often contending with xenophobic attitudes that influence decision-makers' (selective) application of the law. Until a High Court judgment given in December 2019,[180] in a matter brought by the Centre for Child Law, undocumented children were barred from accessing basic education. In this matter, the court found laws governing access to education by non-national children in South Africa to be contradictory to section 29(1)(a) of the Constitution, which clearly states that "everyone has the right to an education, including adult basic education." However, despite the judgment, school admissions policies remain inconsistent and/or poorly implemented, and are not standardised.

[173] Article 22 of the Refugee Convention 1951; Section 29(1) of the South African Constitution guarantees everyone the right to a basic education.
[174] Article 27 of the Refugees Act.
[175] *Minister of Home Affairs v Watchenuka* (2004) 1 All SA 21 (SCA)
[176] Crush "Harnessing Migration for Inclusive Growth and Development in Southern Africa" (2017) 13
[177] Hunter and Skinner "Foreign Street Traders Working in Inner City Durban: Local Government Policy Challenges" (2003) 7
[178] Landau et al. "Xenophobia in South Africa and Problems Related to it" (2005) 27
[179] Fassin et al., (2017) at page 174.
[180] *Centre for Child Law and Others v Minister of Basic Education and Others* (2840/2017) [2019] ZAECGHC 126

Prioritising the education of girl children has shown to have multiple benefits not only for the child herself, but also for her community, and is an internationally recognised strategic development priority[181] that is as important for migrant women and girls as it is for South Africans. Women who receive a proper education are more informed about nutrition and healthcare, marry at a later age, and if they become mothers their children will generally be healthier. Providing girls with an education can also prevent child marriage, and harmful cultural practices such as female genital mutilation (FGM), with data showing that girls and women with no education are significantly more likely to be in favour of the existence of FGM.[182] They are more likely to find employment in formal labour market and earn higher incomes than women who have not received education. The cumulative effect of these factors can uplift households, communities, and ultimately countries.

## CASE STUDY

A 17-year-old who was born in South Africa to refugee parents from a neighbouring country was unable to sit for her matric examinations due to not being in possession of any identity documents, other than her handwritten birth certificate. Following her father's acquisition of permanent residence due to his long stay in South Africa as a refugee, she was still unable to obtain any further documentation, including permanent residence, on the basis that her father no longer had a refugee status document due to him acquiring permanent residence. Although she was able to attend school for the duration of her high school career and matric year, she was not permitted to write her exams in the absence of that documentation. After intervention by LHR, the school eventually allowed the student to write her final examinations.

At the time of writing, matric results had yet to be released, and the student remained in a state of uncertainty as to whether the Department of Education and school would release her results in the absence of documentation.

## RECOMMENDATIONS:

- The Department of Basic Education, at national and provincial level, should take positive steps to clarify the legal right of migrant children, including grade 12 learners, to education by directly engaging school governing bodies and teachers' associations. This must include awareness-raising of the court's decision in the Watchenuka and Centre for Child Law matters.

- Umalusi, the Council for Quality Assurance in General and Further Education and Training, the body that is responsible for issuing matric certificates, should work together with the Department of Basic Education, at national and provincial level, and school governing bodies to ensure that undocumented matric learners receive their matric certificates upon completion of their matric examinations.

- The national Department of Justice and Constitutional Development, in collaboration with the national Department of Basic Education, should engage directly with provincial education departments to popularise the National Action Plan to Combat Racism, Xenophobia, and Related Intolerance to eradicate racism and xenophobia in the schooling system.

[181] https://www.worldbank.org/en/topic/girlseducation

[182] UNICEF "Female Genital Mutilation/Cutting: A statistical overview and exploration of the dynamics of change" 2013

## 4.5 ACCESS TO SOCIAL ASSISTANCE AND FINANCIAL SERVICES

State social assistance was not initially provided to refugees through the Refugees Act. It became available to refugees through litigation.[183] Access to a state social grant is only available to a person with formal refugee status, for as long as the individual retains that status. It is not provided to asylum seekers with temporary section 22 visas, although in reality, asylum seekers often have to make use of their temporary visas for many years before they receive a final decision on their application for asylum. Asylum seekers have, only in some emergencies, been permitted to receive Social Relief of Distress grants, such as during xenophobic attacks in 2008 and in the provision of Covid-19 relief in 2020. There is also no state social assistance provided for undocumented or asylum seeker children.

These restrictions can put an already vulnerable group in an even more precarious position, particularly given the challenges related to accessing regular employment for asylum seekers and the long periods during which asylum seekers are forced to remain in this temporary classification, as set out above. Asylum seekers therefore often rely on the assistance of NGOs for survival, however, this form of support cannot be provided on a permanent basis due to the limited resources available at these organisations. With the amendments to the Refugees Act, including the removal of the automatic right to work for asylum seekers, it is likely that NGOs will see an increase in asylum seeker women who cannot support themselves and their children through work, requiring social assistance.

Adding to these challenges is the fact that asylum seekers face significant difficulty in opening bank accounts. Over the past few years, a number of banks have refused to open bank accounts for asylum seekers due to the temporary nature of their section 22 visas. A bank often has the discretion to open a bank account for non-nationals, upon presentation of valid DHA documentation, proof of residence, and proof of income. The bank will then verify the form of documentation with the DHA.[184]

While some banks do allow asylum seekers to open accounts, asylum seekers generally report that each time their section 22 visa expires, the bank freezes the account. The account holder will then be unable to access her account, until she has presented her renewed asylum seeker visa.[185]

Considering that RROs seldom renew visas on the date they expire, asylum seekers have limited access to financial services until they have managed to renew their visas – which can take up to several weeks. This has serious consequences for asylum seekers and their families, ranging from an inability to pay school fees, use transportation, or purchase food and basic necessities. These consequences undermine the socio-economic rights of migrant women, who are often responsible for child and family care, as set out in the Constitution, the Refugees Act, and South Africa's international law obligations – including asylum seekers and refugees' rights to basic education, healthcare, non-refoulement, and the best interests of the child principle.

[183] This was following the matters of *Scalabrini Centre of Cape Town and Five Others vs. The Minister of Social Development, the Minister of Finance, the Minister of Home Affairs and Another, Case No. 32054/ 2005 and Bishogo, C. and Others vs. Minister of Social Development and Others*, Case No. 9841/05, High Court of South Africa, Transvaal Provincial Division, Consent Order, September 2005, which confirmed refugees eligibility for foster-care grants and disability grants, respectively.

[184] Public Compliance Communication No. 03A (PCC 03A), in terms of the Financial Intelligence Centre Act 38 of 2001

[185] Section 3.3 of PCC03A, Public Compliance Communication (PCC) of the Financial Intelligence Centre Act 38 of 2001

CASE STUDY

A 30-year-old asylum seeker from west Africa was unable to access her bank account due to the expiration of her section 22 visa. She was also unable to immediately renew her visa due to personal circumstances. As a result of her expired visa, the bank froze her account and she was unable to access her funds to purchase food and basic necessities, and to pay her monthly expenses, placing her in a very vulnerable situation. Despite several attempts to engage with the bank, only legal intervention by LHR led to unlocking this account.

## RECOMMENDATIONS:

- The South African Banking Association should advocate for its member banks and their respective branches to consistently recognise asylum seeker and refugee visas, in the same way that South African identity documents are recognised for the purpose by the Financial Intelligence Centre Act 38 of 2001. This is in keeping with the Market Conduct Division's mandate to advocates for the interests of the banking industry regarding legislation and regulation affecting their customers and clients, including the regulatory frameworks for treating customers fairly.
- The national Department of Women, Youth and Persons with Disabilities, which has a mandate to champion the advancement of women's socio-economic empowerment and the promotion of gender equality, should develop and implement long-term economic empowerment programmes for vulnerable women to improve income, and reduce economic dependence. These programmes should be inclusive of migrant women, regardless of their documentation status.

## 4.6 ACCESS TO SHELTERS/ HOUSING

A shared and pressing concern for many migrant women, both documented and undocumented, is finding shelter. Unlike other refugee-receiving countries on the continent, South Africa does not house refugees in camps, instead encouraging them to "self-settle" and integrate into local communities.[186] This means that migrant women who arrive in South Africa are left to their own devices to find accommodation, most choosing to settle and work in the inner city and townships on the outskirts of larger cities.[187] Since accommodation is frequently their biggest regular expenditure, in many cases, migrant women must settle for low-cost homes shared by several families in degraded areas. If they cannot find accommodation, they resort to staying with friends, sleeping in churches, parking lots, places of business, or on the street.[188]

Although some non-governmental and charitable organisations and shelters provide emergency accommodation, the need is far greater than what can be accommodated. Such places of safety may also be state-funded and therefore only accessible to citizens. Discrimination and xenophobia can also lead to migrant women being barred from accessing, or being prematurely ejected from shelters for abused women and other forms of residential care.[189]

Refugees and asylum seekers do not have any rights to access state-subsidised housing, but can enter into lease agreements, and are legally protected by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[190] against unlawful evictions. Despite this legal protection, however, it is LHR's experience that migrants remain the victims of unlawful evictions and other unlawful practices by landlords, such as the physical retention of status documentation as rent security. These landlords act in the secure knowledge that migrants will be reluctant to approach state authorities for assistance, for fear of detention and/or deportation, and are unlikely to have access to legal advice and representation to seek recourse in the Rental Housing Tribunal[191] or a court.

For these reasons, female migrants frequently rely on networks of compatriots from their home countries to learn the local language and various survival strategies, including navigating accommodation and employment challenges.[192] It must be noted however, that assistance from the migrants' host communities is not always unconditional and freely given, particularly for lesbian and transgender women. Shelters funded by religious institutions may be reluctant to provide accommodation to non-nationals, LGBTQI persons, or even sex workers.[193] The Pride Shelter situated in Cape Town is only shelter dedicated solely to LGBTQI persons in South Africa, but can only provide temporary accommodation for up to one month free of charge, after which a client's stay can be extended for one additional month at R35.00 per day, for a total of 3 months. The lack of residential care services specifically for homeless migrant women has also been problematised.[194]

[186] Landau et al. "Xenophobia in South Africa and Problems Related to it" (2005); Rugunanan and Smit "Seeking Refuge in South Africa: challenges facing a group of Congolese and Burundian refugees" (2011)
[187] Krause-Vilmar and Chaffin "No Place to Go But Up, Urban Refugees in Johannesburg, South Africa" (2011) 9; Kenge" The Experiences of Congolese Women Refugees in South Africa: A Church Response" (2017) 3
[188] Krause-Vilmar and Chaffin "No Place to Go But Up, Urban Refugees in Johannesburg, South Africa" (2011) 19
[189] Memela "Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area" (2014) 135
[190] Act 19 of 1998
[191] The independent tribunal established by the Rental Housing Act 50 of 1999, where complaints about unfair practice may be lodged by a tenant or a landlord of a property (for example, a house, room or flat), for the resolution of disputes relating to issues like unacceptable living conditions, insufficient maintenance or repairs of a property, failure to refund a deposit of the tenant, and eviction without a court order, and/or unfair discrimination.
[192] Amisi and Ballard "In the Absence of Citizenship: Congolese Refugee Struggle and Organisation in South Africa, Globalisation, Marginalisation & New Social Movements in post-Apartheid South Africa" (2005) 11
[193] Camminga "Gender Refugees in South Africa: The Common-Sense Paradox" (2018)
[194] Zikhali "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers" (2019) 9

Further shelter and housing challenges highlighted in research reports include the consequences of low-cost housing not only on migrant women personally, but also on their family structures, including reduced intimacy among couples. With many migrants being obliged to share accommodation with others, women's unique privacy, safety, and hygiene needs are impacted disproportionately to those of their male counterparts.[195] Migrant women who are single heads of households are also at heightened risk of contact crime and theft when living in insecure neighborhoods or with multiple other families.[196]

Finally, it must be again noted that successful model of refugee self-reliance depends on a state that not only permits, but ensures, that refugees and asylum seekers can engage in self-sustaining economic activity. But xenophobic violence and challenges around documentation, as discussed above, present significant challenges to long-term self-reliance, as do the new limitations on the rights of asylum seekers to seek and secure employment. In a vicious circle, scapegoating migrants and blaming them for social ills like systemic unemployment impacts negatively on the ability of migrants to be self-reliant, and therefore to secure safe housing. The specific impacts of this cycle on migrant women and children are severe.

## CASE STUDY

A 40-year old woman asylum seeker fled her home country after she was enslaved at a rebel group camp for several months. She suffered physical and mental health problems due to the severe torture and abuse that she experienced at the camp. On arriving in South Africa, she applied for asylum. Her time in the country has been difficult due to her extensive and chronic healthcare and psycho-social needs after being tortured. As a consequence, shelters do not want to admit her, because her physical and mental health problems are beyond their mandate, and cause disruption for other residents. She has become homeless, as a result, and when she has slept on the street, she has been repeatedly raped.

## RECOMMENDATIONS:

- The national Department of Social Development should develop a policy for the expansion of shelters to include migrant women and their children, regardless of their documentation status.
- The Department of Social Development, at national and provincial level, should increase funding to non-governmental organisations engaged in statutory care work and services (including shelters for abused women and their children), taking migrant women and their children into account.
- The national Department of Social Development, in collaboration with the national Department of Human Settlements, should explore the inclusion of women refugees and asylum seekers and their children in housing assistance programmes and emergency accommodation other than shelters.

[195] Kenge "The Experiences of Congolese Women Refugees in South Africa: A Church Response" (2017) 3; Sigsworth et al. "The Gendered Nature of Xenophobia in South Africa" (2008)
[196] Krause-Vilmar and Chaffin "No Place to Go But Up, Urban Refugees in Johannesburg, South Africa" (2011) 19

## 4.7 LBTQ WOMEN

Over time, literature has noted that the Refugees Act, when poorly interpreted, results in the violation of LBTQ women's rights.[197] Studies indicate deep flaws in the implementation of the provisions of the Refugees Act dealing with gender and related grounds for asylum, detailing inconsistent implementation, homophobia, and the abusive treatment of "gender refugees" by the DHA.[198]

The South African public and DHA officials often conflate sexual orientation, gender identity or expression, and sex characteristics. This results in systemic discrimination against lesbian and transgender migrants not only in the asylum process, but general prejudice and social stigma – often similar to that in their home countries from which they fled.[199] Importantly, an asylum system that does not meet the standards of administrative fairness raises the risk of refoulement, potentially nullifying the purpose of the refugee framework.[200]

When an asylum application is based on sexual orientation, gender identity and expression, and/or sex characteristics (SOGIESC) related persecution, lesbian, bisexual, and transgender women are obliged to "prove" their sexual orientation or gender identity first. Secondly, they must prove that they have faced persecution in their home country because of their sexual orientation, gender identity/expression, or sex characteristics.[201]

There are no formal South African guidelines as to what constitutes "proof" for claims based on SOGIESC. Applicants are, however, required to verify that their country of origin is unwilling or unable to protect them from harm. This requirement is problematic, as it relies predominantly on official records in the applicant's country of origin. In many African countries, a victim of persecution based on SOGIESC may not be willing or able to create a "paper trail" by reporting victimisation to authorities such as the police, or seek medical assistance, due to fear of further harassment and discrimination, or even arrest. In some cases, abuse is perpetrated by official authorities themselves. A lesbian, bisexual, or transgender woman making an asylum claim at the RRO may therefore be unable to demonstrate that they are unprotected in their country of origin, causing their asylum claim to be denied. It is also observed that there is a lack of communication of the applicants' rights, including an understanding of what a section 22 visa means and to what it entitles an applicant, that persecution based on SOGIESC are valid grounds for asylum, and that applicants have the right to appeal if their claim is initially rejected.[202]

[197] Memela "Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area" (2014) 133
[198] Farley "Refugee Legislation in South Africa: A Feminist Foreign Policy Analysis – Part 1" (2019); Harris "Untold Stories: Gender Related Persecution and Asylum in South Africa" (2009) 29
[199] Camminga "Gender Refugees in South Africa: The Common-Sense Paradox" (2018)
[200] Amit "No Way In: Barrier to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices" (2012) 9
[201] See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, at para 44
[202] Hakizimana "LGBT Asylum Claims: The Case of South Africa" (2018) 50; Amit "No Way In: Barrier to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices" (2012) 29

The requirement to "prove" one's sexual orientation or gender identity is especially problematic when compared to claims based on, for example, political affiliation or religious belief. RSDOs generally do not require an asylum applicant to first prove their political opinion or religious beliefs prior to assessing whether someone faced, or reasonably fears, persecution in their home country on these grounds. Added to this, LHR has observed that in almost all its cases relating to claims based on sexual orientation and gender identity, RSDOs are failing to adopt a standard and consistent burden of proof. It is well-accepted that the applicant in an asylum application has the burden of establishing the veracity of their allegations and the accuracy of the facts on which their claim is based. However, the decision maker shares the duty to ascertain and evaluate all the relevant facts. This is achieved, to a large extent, by the adjudicator being familiar with the objective situation in the country of origin concerned, being aware of relevant matters of common knowledge, guiding the applicant in providing the relevant information and adequately verifying facts alleged which can be substantiated.[203] Decision makers are required "to assist an applicant in obtaining relevant information in order to properly determine the application".[204] This cannot happen when an RSDO is not properly sensitised and trained to understand the distinction between sexual orientation, gender identity, and/or sex characteristics; when an RSDO is ignorant of the prevailing social circumstances or legal frameworks in countries of origin that may criminalise certain SOGIESC identities; or when an RSDO brings their personal homo- or trans-phobic prejudices to bear in their assessment of the applicant's claim.

Several reports have found that the interview questions asked by the RSDOs are invasive and dehumanising. When the applicants' answers do not match the expectations of the RSDOs, this leads to doubts about the applicants' credibility and ultimately their applications are rejected if they do not physically appear or act the way the mentioned sexual orientation or gender identity may be narrowly perceived.[205] The unregulated processes of determination and the subjective nature of the screening make women and LBTQ persons particularly vulnerable to an aggressive approach. This overarching structural barrier to asylum seekers accessing their rights reflects that there is insufficient and ineffective training by DHA, concerning sexual or gender minorities.[206]

[203] Office of the High Commissioner for Refugee Affairs, Geneva "Note on Burden and Standard of Proof in Refugee Claims" 16 December 1998
[204] Gavric v Refugee Status Determination Officer 2019 (1) SA 21 (CC) at para 73
[205] Hakizimana "LGBT Asylum Claims: The Case of South Africa" (2018) 50
[206] Bhagat "Forced (Queer) migration and everyday violence: The geographies of life, death, and access in Cape Town" (2018) 159

Academics have only recently begun reviewing underlying causes and the impact of xenophobic persecution faced by the LGBTQI community.[207] A 2018 Hate Crimes Working group study noted that LGBTQI persons reported the second-highest rate of hate crime incidents in South Africa,[208] with non-nationals reporting the highest rate of hate crimes. This means that lesbian and transgender migrant women may face exponential prejudice, on multiple intersecting grounds including race, nationality, class, and sexual orientation or gender identity/expression. Despite evidence confirming the extreme vulnerabilities faced by these marginalised groups, studies of gender based violence against them in settings like prisons and mine hostels indicate that law enforcement agencies are unresponsive to reports, with high rates of under-reporting to being with.[209] Under-reporting is undoubtedly driven by fear of arrest, deportation, or xenophobic and homo- or trans-phobic attitudes among authorities.

In a report by the LGBTI Refugee Support and Advocacy Project conducted by PASSOP, it was revealed that 90% of queer asylum seekers, despite receiving their section 22 visas, continued to be unemployed, felt unsafe in their homes, and many reported ill-treatment by DHA officials, security personnel, and interpreters when they applied for, or renewed, their visas.[210]

While some analysis underscores the experiences and vulnerability of LBTQ women, these complex experiences and urgent need for improved equality in outcomes for SOGIESC minority groups remain largely invisible in DHA policy.[211] The specific experiences of lesbian and transgender women have not been extensively considered in academic writings, with studies referring to LBTQ women collectively, without much disaggregated data. Literature reviewed for this report does, however, point to LBTQ women being a highly mobile population facing heightened vulnerabilities and risks, including abuse, discrimination, violence, and marginalisation.[212] At the same time, LBTQ migrants are rendered invisible through being undocumented, living and working in marginalised spaces and sectors, while employing tactics to survive and navigate related risk.

South Africa may be perceived as a safe-haven for many SOGIESC minorities, who take hope from the progressive Constitution and other laws that should protect them here. However, many LBTQ women who fled persecution in their home countries come to regret their choice to seek safety in South Africa, in the light of the challenges they face from the moment of their arrival, and the realisation that their lived reality here will not match their expectation of a more progressive and safe society.

[207] Amisi and Ballard "In the Absence of Citizenship: Congolese Refugee Struggle and Organisation in South Africa, Globalisation, Marginalisation & New Social Movements in post-Apartheid South Africa" (2005) 1
[208] Hakizimana "LGBT Asylum Claims: The Case of South Africa" (2018) 42
[209] Kistner "Gender-Based Violence and HIV/AIDS in South Africa, A Literature Review" (2003) 25
[210] PASSOP "A Dream Deferred: Is the Equality Clause in the South African Constitution's Bill of Rights (1996) just a far-off hope for LGBTI Asylum Seekers and Refugees?" (2012)
[211] Walker and Vearey "Gender, Migration, and Health in SADC: A Focus on Women and Girls" (2019) 23
[212] PASSOP "My Home, My Body and My Dreams, Reflections by LGBTQI Refugees in South Africa" (2019)

## CASE STUDIES

A 25-year-old lesbian asylum seeker from a conflict zone came to South Africa fearing homophobic persecution. The RSDO accused her of lying about her sexual orientation, rejecting her claim as "fraudulent."

A 40-year-old lesbian woman from a neighbouring country fled her home country when two men raped her and her partner for homophobic reasons. When she reported the assault to the local police, they not only refused to help her but harassed her on the basis that homosexuality is illegal in her home country. She also had a son from a previous heterosexual relationship, which made it even harder for her to prove her case at the RRO, where the RSDO did not understand how a lesbian woman could have a biological child. Her asylum claim based on fear of persecution in relation to sexual orientation was rejected as "fraudulent".

A 51-year-old transgender woman was gravely persecuted in her home country for much of her life. Fearing for her life, she came to South Africa with her partner. Her application seeking asylum was rejected as "unfounded" when the RSDO refused to acknowledge that she is a transgender woman.

## RECOMMENDATIONS:

- The DHA should audit RSDO decisions based on SOGIESC in all functional RROs, to identify problematic decisions and decision-makers, and to inform the content of future training programmes.
- The DHA should develop improved interview guidelines for RSDOs, to address the poor quality of RSDO adjudication of, and discriminatory decisions in, asylum claims for refugee status based on SOGIESC.
- The DHA should develop and implement improved and ongoing sensitivity training programmes for immigration officers, RSDOs, and refugee reception officers. This should be done in partnership with specialist non-governmental organisations and service providers, to better understand and assess asylum claims based on SOGIESC.
- The national Department of Social Development in partnership with DHA should commission research on the specific experiences of lesbian, bisexual, and transgender migrant women – both in accessing the asylum system, and life after refugee status is granted, where applicable.

## 4.8 MARRIAGE AND FAMILY UNIFICATION

According to Article 16(3) of the Universal Declaration of Human Rights, 1948, "(t)he family is a natural and fundamental group unit of society and is entitled to protection by society and the State." Furthermore, according to Article 18(1) of the African Charter on Human and Peoples' Rights, 1981, "(t)he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health."

This position in law does not always work to the benefit of migrant women. Officials in the asylum system frequently reinforce traditional gender roles of women as subordinate to men, by placing the claims of refugee women who arrive with their male spouses or partners in the same claim files by default, without asking women if they would like to file their own, separate claims[213] – even when a woman may have good grounds for an individual claim, she is simply "declared" as part of the family, with her spouse or father of their children as the "principal" applicant.[214] If the principal (male) applicant's asylum or refugee claim is successful, the entire family is granted the same status.

While this process is advantageous in some ways, it risks women and children being refused refugee status should the spouse's claim be rejected, even if those family members have different reasons and separate claims for seeking asylum. Research on migrant women also highlights that the women sometimes do not understand their circumstances or experiences, including of SGBV during a war and conflict, as grounds for status under the 1951 Refugee Convention. The requirements to prove persecution, the conservative interpretation of the Refugees Act, and the procedural barriers of the asylum system translate to women being much less likely to be principal asylum applicants than male migrants.[215]

The lack of a gendered approach to family unification becomes especially clear when one considers that married migrant women, who become single in South Africa through death or divorce, will lose years of refugee status under their ex-spouse's file, which should count towards their naturalisation or application for permanent residence. A woman in this position must re-start the asylum process alone, and from scratch. Similarly, a woman asylum seeker who is abandoned by her spouse or partner while in South Africa, will face significant difficulty in renewing her own and her children's section 22 visas or obtaining a final decision on their asylum claim, in the absence of the principal claimant. The separation of DHA files in such cases is extremely difficult to bring about, in LHR's experience.

Additionally, children are generally documented with their mothers, and not their fathers, thus placing the responsibility for the regularisation of the children's documents and presence in South Africa on their mothers. This means that despite not being the principal applicant, migrant women frequently bear additional costs and spend significant time fulfilling this obligation.[216] In most cases, children of asylum seekers are documented as dependants in terms of section 3(c) of the Refugees Act. However, in LHR's experience, the process of children being issued visas can take months, and asylum seekers are often told that they will be called by the RRO for an appointment for their children – a call that never comes. The children's lack of documentation limits their access to basic rights, including education, despite case law confirming undocumented children's right to basic education.

[213] Khan et al. "Refugee Women as victims of Intimate Partner Violence" (2020) 250
[214] Bach "Immigration, Integration and Asylum Policies from a Gender Perspective" (2015) 14; Section 21 of the Refugees Act
[215] Bloch (2010) at page 5.
[216] Khan et al. "Refugee Women as victims of Intimate Partner Violence" (2020)

The family unification and file sharing policies also affect dependents who reach the age of majority. When the child of a refugee turns 18, or gets married, they may not have an individual claim to refugee status.[217] In terms of the Refugees Act, only the SCRA may withdraw a person's refugee status after consideration of all the relevant factors.[218] However, in practice it is officials at the RROs who unlawfully separate a child from their parent's file and withdraw their refugee status without taking into consideration any relevant factors. When a child is separated from their parents file on turning 18, they not only forfeit the many years they have lived in the country as a refugee, which should count towards their eligibility for permanent residence or naturalisation, but have to begin the asylum process afresh. If during this process their claim is rejected, they may face deportation, leading to separation from their families and South African communities in which they have become integrated. Given the heightened social vulnerabilities and pressures discussed above, this impacts disproportionately on young migrant women.

## CASE STUDIES

A 40-year-old woman from east Africa was formerly married to a South African citizen. She met her husband in her home country in 2006 while he was deployed there as a soldier. She returned to South Africa with him, using a visitor's visa that her husband had arranged for her. After residing in South Africa for a short period of time and having three children, her husband became increasingly abusive and she left him. After the separation, however, she could not qualify for asylum, and has been undocumented since. She currently stays at a shelter for abused women and children, and is pursuing an application for permanent residence in South Africa, through a ministerial exemption in terms of the Immigration Act, though these applications can take years to process and are often unsuccessful.

A 35-year-old woman from north Africa came to South Africa on a visitor's visa for an arranged marriage to a Somali man who was already settled here. After her arrival, and only after getting married as arranged, she discovered that the man was much older, already married, and already had children. She was joined to her husband's refugee file, and granted refugee status in 2008, when the acceptance rate for such applications was relatively higher than at present. She spoke no English at the time, and as a result was unable to legally divorce her spouse and separate their files, without assistance. Her family has abandoned her as a result of her subsequent divorce.

[217] Section 21B(3) of the Refugees Act states "where a dependent of a recognised refugee ceases to be a dependent by virtue of marriage or cessation of his or her dependence upon the recognised refugee, as the case may be, he or she may apply in the prescribed manner to be permitted to continue to remain within the Republic.

[218] Section 36 of the Refugees Act

## RECOMMENDATIONS:

- The DHA should ensure that officials at RROs refrain from withdrawing any person's refugee status and ensure that officials comply with section 36 of the Refugees Act, which specifically states that only the SCRA may withdraw refugee status.
- The DHA should review its policy on automatically separating children from their parents' file on turning 18.
- RSDOs should, as standard practice, proactively determine whether an asylum seeker's adult dependents, the majority of whom will be women, may have asylum claims of their own.
- The DHA should develop protocols for file separation where this is required for the protection of the rights of migrant women and their children.

## 4.9 XENOPHOBIA AND VIOLENCE

Migrants exhibiting cultural, language, and ethnic differences to the general South African population become vulnerable to xenophobic attitudes and behaviour in the country, including violence and discrimination,[219] where xenophobia is prevalent among local communities.[220]

In 2008, when xenophobic violence broke out and spilled onto the streets of Johannesburg and informal settlements, townships, and inner-city spaces in South Africa, LHR assisted approximately 10 000 migrants seeking legal recourse, through all four of its walk-in law clinics located Pretoria, Johannesburg, Musina, and Durban. In 2015, this violence peaked again and made its way into the media with five people losing their lives, and approximately 5 000 people were displaced during xenophobic attacks in the KwaZulu-Natal province. On 20 March 2015, the Zulu king, King Goodwill Zwelithini, spoke at a "moral regeneration" event in Pongola, KwaZulu-Natal. He commented on the presence of cross-border migrants in South Africa and said, "(w)e request that all foreigners should take their baggage and be sent back." In 2016, more outbreaks of xenophobic violence were reported, and this occurred again in 2019.

Xenophobic sentiment and attacks are fuelled by those political and state leaders who openly blame migrants for crime and unemployment, thereby perpetuating the unfounded view that non-nationals deprive "more deserving" citizens of jobs, housing, and other economic goods.[221] Their increased vulnerability on multiple intersecting grounds makes migrant women, including LBTQ women, targets for more severe forms discrimination and xenophobic violence. Despite fleeing violence and persecution in their own home countries, migrant women frequently continue to live in fear in South Africa, preferring not to interact with or seek assistance from the police or relevant authorities – even when they experience crime and violence.[222] In fact, literature indicates that migrant women are victimised by law enforcement officials themselves with SGBV.[223] Thus, silence and underreporting prevail.[224]

During xenophobic outbreaks, migrant women's already precarious livelihoods are disrupted by violence and displacement, and damage to property – especially when they are engaged in informal trading, stock may be stolen or destroyed by perpetrators. Those working in more formal employment may become unable to, or are fearful of, attending work during a xenophobic attack due to the risk of being in public spaces, jeopardising their employment. Migrant woman may also have to stay home to look after their children during these outbreaks, as children may not be able to safely attend school.

[219] Sigsworth et al. "The Gendered Nature of Xenophobia in South Africa" (2008) 17
[220] Sigsworth et al. "The Gendered Nature of Xenophobia in South Africa" (2008) 17
[221] South African Human Rights Commission "Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals" (2010) 8
[222] Hiralal "Women and Migration – Challenges and Constrains – A South African Perspective" (2017) 10.
[223] Memela "Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area" (2014) 135; Zikhali "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers" (2019) 6
[224] Kenge "The Experiences of Congolese Women Refugees in South Africa: A Church Response" (2017) 7; Sigsworth et al. "The Gendered Nature of Xenophobia in South Africa (2008)

The South African state has to date done little to address recurring xenophobic attacks, except to issue the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance in March 2019. In its 2020 World Report, Human Rights Watch found that "virtually no one has been convicted for past outbreaks of xenophobic violence, including the attacks in 2019, the Durban violence of April 2015 that displaced thousands of foreign nationals, and the 2008 attacks on foreigners, which resulted in the deaths of more than 60 people across the country."[225]

The testimonies of LHR clients speak to ongoing acts of xenophobia that predominantly Black African migrants experience regularly in South African communities. These attacks, and other forms of discrimination, take place with virtual impunity, and are not thought of as hate crimes despite meeting the generally accepted definition. Civil society organisations have lobbied the South African government for hate crime legislation since 2009, to no avail. A draft Prevention and Combatting of Hate Crimes and Hate Speech Bill was introduced to the legislature in 2018, subsequent to pressure from a variety of human rights organisations. However, this Bill was left to lapse on 17 May 2019, and had to be revived in cabinet on 29 October of the same year. At the time of writing this report, the Bill had not moved any further through the law-making process.

## RECOMMENDATIONS:

- The national Department of Justice and Constitutional Development and the National Prosecuting Authority should collaborate with the Minister of Police to ensure that perpetrators of xenophobic violence and hate crime are vigorously detected and prosecuted;
- The Parliament of South Africa should complete consultation on, and pass the Prevention and Combating of Hate Crimes and Hate Speech Bill, to provide for the legal recognition trial, and sanction of xenophobic violence as hate crime;
- The South African Human Rights Commission should subpoena relevant state institutions to account for their failure to implement the recommendations made in its Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals;[226]
- Xenophobic utterances by state officials should be publicly condemned by the President of South Africa, and such state officials must be relieved of public office.

[225] Human Rights Watch World Report 2020 "South Africa: Events of 2019".
[226] https://www.sahrc.org.za/home/21/files/Non%20Nationals%20Attacks%20Report_1-50_2008.pdf

## 4.10 GENDER BASED VIOLENCE

South Africa has exceptionally high levels of SGBV. Police statistics for 2019/20 show 621 282 reported incident of contact crimes, with sexual offences accounting for 53 293 for those incidents.[227] This number is likely much greater, due to chronic under-reporting stemming from a variety of challenges including (but not limited to) social stigma, undue family or community pressure, financial dependence on perpetrators, and a lack of faith in the criminal justice system.

Many asylum seeker and refugee women are in South Africa because they have fled conflict zones, sexual and domestic violence, and political or economic repression in their home countries. Militia groups frequently assert their control over civilians through physical violence, rape, and sexual abuse, targeting women, girls, and sometimes men.[228]

While SGBV should be recognised as a ground of persecution in terms of section 3(1) of the Refugees Act, research has shown that asylum claims based on SGBV are often rejected, because SGBV is regarded by RSDOs as a "domestic issue" or within the scope of the country of origin's criminal justice system.[229] The deep emotional and psychological trauma, and physical injury often associated with SGBV, suffered by migrant women in their home country, is then compounded by the physical insecurity and violence they frequently face once in South Africa.[230] In fact, research cites SGBV as one of the top threats faced by migrant women in the country.[231]

Migrant women have also been studied as victims of human trafficking, reportedly making up to 80% of victims in this context.[232] There have also been reports that migrant women are raped by informal cross-border transporters, who may demand sex in exchange for assisting migrant women to enter the country.[233] Several studies demonstrated that the movement process itself, from home to destination country, leads to increased vulnerability of migrant women to communicable diseases like HIV.[234]

Research has also considered the distinctions between "private" and "public" SGBV, resulting in women having their asylum applications refused or not being recognised as refugees when the claim is based on such persecution.[235] Cases of rape, but also incest and domestic violence, for instance, may not be considered valid refugee claims as these experiences are construed as private acts, even when inflicted by state officials.[236] Alternatively, acts of rape and other forms of SGBV, are considered too ubiquitous to justify a claim. Interviews with LHR clinic managers revealed that some RSDOs are of the view that "rape happens everywhere, even in South Africa", and on the basis of that logic, reject asylum claims based on SGBV as unfounded.

[227] Annual crime statistics available at https://www.saps.gov.za/services/crimestats.php
[228] UNHCR "Roundtable on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence" (2012) 2
[229] Discussed in the section dealing with access to documentation.
[230] CoRMSA "Protecting Refugees, Asylum Seekers and Immigrants in South Africa" (2009) 68
[231] Mbiyozo "Gender and Migration in South Africa: Talking to Women Migrants," Institute for Security Studies (2018); Gandar "They treated Me as if I was Nothing" (2019)
[232] Mbiyozo "Women Migrants: Forgotten Victims of South Africa's Xenophobia," (2019); Gandar "They treated Me as if I was Nothing" (2019)
[233] Zikhali "Understanding the Implications of the Closure of Refugee Reception Offices for the Lives of Women Asylum Seekers" (2019) 9; CoRMSA "Protecting Refugees, Asylum Seekers and Immigrants in South Africa" (2009) 68.
[234] Nunez et al. "Migration and Health in South Africa" (2010)
[235] Beijing Declaration at page 57
[236] Memela "Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area" (2014) 19; Harris "Untold Stories: Gender Related Persecution and Asylum in South Africa" (2009) 22

Moreover, single migrant women or those who do not have spouses in South Africa find it difficult to establish a livelihood, especially if they have children to support. This may lead migrant women to turn to sex work as the only option for income generation. However, the ongoing criminalisation of this work in South Africa, is in turn associated with increased risk of violence and abuse from law enforcement and other state service providers such as healthcare practitioners.

Migrant women also remain at risk, once in South Africa, of SGBV perpetrated by men from their own communities.[237] Due to the file sharing and family unification policies discussed above, migrant women who find themselves in abusive relationships may be forced to stay in those relationships because their male spouse or partner is the principal file holder in their asylum claims. A refugee woman who is receiving access to a range of state services for herself and her children, linked to her formal status and documentation, may be loath to leave an abusive spouse or partner if she believes that doing so will jeopardise her or her children's status. Similarly, as has already been discussed, an asylum seeker woman whose claim is joined with that of an abusive spouse or partner, may have little or no control over her section 22 visa renewal, as she remains dependent on the principal file holder. For these women, domestic legislation such as the Domestic Violence Act and the legal remedies it offers, will mean little when compared to the need for proper status documentation.

## CASE STUDIES

A 47-year-old non-national married a South African citizen and together they had three children. As a result of her marriage, she obtained a relative's visa, which allowed her to stay in the country with her spouse and children. After a few years of marriage, her spouse became increasingly verbally and physically abusive, resulting in her and her children leaving the family home in fear of their lives. Despite her leaving the family home, she continued to suffer severe physical and emotional abuse from her husband, and ultimately obtained a protection order from the Family Court. Following this, her husband refused to assist her in renewing her documentation, effectively holding her immigration status as ransom. Due to the breakdown of their marriage and continued abuse, she obtained an order of divorce, following which she was unable to return to her country of origin due to harmful cultural practices, and her fear of being subjected to an honour killing for the divorce resulting in her becoming a *sur place*[238] refugee.

A 45-year old asylum seeker fled conflict in her home country with her infant daughter. While living in South Africa, she and her young daughter were both raped by an unidentified person, for what she believes are xenophobic reasons. She then fell pregnant and continued to receive threatening texts. Even after she moved to another South African city, she was attacked twice and stabbed outside her house. She has since reported feeling alone and scared, particularly after the police refused to help her with the case because she was "a foreigner".

[237] Amisi and Ballard "In the Absence of Citizenship: Congolese Refugee Struggle and Organisation in South Africa, Globalisation, Marginalisation & New Social Movements in post-Apartheid South Africa" (2005) 30

[238] A *sur place* claim arises after arrival in the country of asylum, either as a result of the applicant's activities in the country of asylum or as a consequence of events, which have occurred or are occurring in the applicant's country of origin since their departure.

## RECOMMENDATIONS:

- The implementation and monitoring of all legislation and policies aimed at protecting migrant women, in particular the Domestic Violence Act and the Sexual Offences Act, should be strengthened through the National Strategic Plan on Gender Based Violence and Femicide, to ensure that migrant women who are survivors of SGBV have equal access to psycho-social and other support services;

- The DHA should permit migrant women to renew their documentation in the absence of their male spouse or partner, who is more often the main file holder;

- The South African government should urgently decriminalise sex work, to reduce the vulnerability of all sex workers, including migrant women, to abuse and victimisation by law enforcement officials and other state service providers such as healthcare practitioners at public hospitals and clinics;

- The national Police Commissioner should issue national instructions to all police officers in line with the National Action Plan to Combat Racism, Xenophobia, and Related Intolerance, to eradicate racism and xenophobia in the South African police service.

## 4.11 DETENTION AND ACCESS TO JUSTICE

In addition to the fundamental human rights conferred on non-citizens in South Africa, the Constitution recognises their rights to "administrative action which is lawful, reasonable and procedurally fair," to be given written reasons for an administrative decision, and to review of administrative action by a court or an independent tribunal, and to access the courts.[239] The Promotion of Administrative Justice Act was passed to give effect to this constitutional right for administrative justice by laying out the requirements for just administrative action.[240] The Refugees Act further requires that the constitutional right to administrative justice be observed.[241] Moreover, the constitutional rights of arrested, detained, and accused persons are also extended to everyone within South Africa.[242]

However, available literature recognises that displaced persons, minority groups, and women are amongst the most vulnerable sectors of the society facing restricted access to justice. Among the reasons identified for this lack of access are poverty, corruption, living in poorly resourced areas, illiteracy, ignorance of existing means to access justice, legal and institutional discrimination, and fear of interacting with public officials.[243] Moreover, reports of refugees and asylum seekers being unlawfully arrested because of problems with documentation, as well as deported or extradited in contradiction of the Immigration Act and Extradition Act, are also common.[244]

Studies have showed that for migrant women to access justice in administrative matters, such as the decisions of RROs, it is important that they have access to the resources necessary to navigate the administrative system, including translation assistance, and legal advice and support.[245] For the most part, social and legal support is provided to asylum seekers and refugees by NGOs in the country's major cities. Civil society therefore stands alone in providing legal assistance and other aid, including food or accommodation, while the state fails to meet its legal obligations towards migrant women.[246]

[239] Sections 33 and 34 of the South African Constitution
[240] Section 3 of Promotion of Administrative Justice Act 3 of 2000
[241] Section 24 of the Refugees Act; Amit "No Way In: Barrier to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices" (2012) 17
[242] Section 35(2) of the South African Constitution
[243] Matshakaile "Access to Justice for Non-Citizens: A Constitutional Analysis" (2014) 46
[244] Matshakaile "Access to Justice for Non-Citizens: A Constitutional Analysis (2014) 14
[245] Okpechi "Access to Justice and Asylum Seekers in South Africa" (2011) 238
[246] Okpechi "Access to Justice and Asylum Seekers in South Africa" (2011)

Where access to administrative justice fails, arrest, detention, and deportation may soon follow. While South African courts have ruled 120 days to be the maximum time allowed by the Immigration Act to detain non-nationals, in practice immigration policies have often been applied in a manner that keeps non-nationals detained for unreasonably long periods of time.[247] Currently, the regular presence of the South African Human Rights Commission at the Lindela Repatriation Centre, which is the facility where many arrested migrants are held prior to deportation, has resulted in a drastic reduction in detainees detained beyond 120 days. However, reports have documented a high number of infringements at police stations with designated immigration detention holding cells, due to the lack of an oversight mechanisms at this level. Many migrants are also detained at police stations or correctional facilities which are *not* designated for immigration detention, in conditions that do not meet the minimum standards of detention as set out in either the Immigration Act or the Constitution. Unhygienic cells, and a lack of access to healthcare services and chronic medication during detention, will have a disproportionate effect on women due to menstruation, possible pregnancy, breastfeeding, and/or exposure to SGBV which requires specific medial intervention and post-exposure prophylaxis.

Migrant women also need access to justice and legal support for issues beyond immigration matters at the DHA. As has been demonstrated in this report, migrant women are vulnerable to a range of civil law challenges, such as unlawful evictions, protection orders in cases of domestic violence and labour-related issues.[248] NGOs will, for most, be the only option for seeking such assistance, due to fear and distrust of the state and its service providers.

## CASE STUDY

A 40-year-old woman asylum seeker from a neighbouring country was walking home from work when a police officer approached her and asked her to produce her documentation. She produced a certified copy of her asylum seeker visa, but the police said that the certification had expired and proceeded to arrest her, taking her to the police station. While she was kept in the holding cells, her husband came to the police station with her original asylum seeker visa. He also brought their eight-month old baby, who was still breast-feeding. The police refused to release her and said that DHA first had to "verify" the asylum seeker visa. She was kept in the police cells with her baby. The conditions of the cells were unsanitary and her baby became sick. Despite informing the police that her baby was unwell, medical assistance was not provided. She was released after three days after LHR intervened legally in the matter. On her release, she was dismissed from her job for failing to attend work for the three days during which she was unlawfully detained.

[247] Matshakaile "Access to Justice for Non-Citizens: A Constitutional Analysis" (2014) 14; Amit "No Way In: Barrier to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices" (2012) 13

[248] Okpechi "Access to Justice and Asylum Seekers in South Africa" (2011) 235

## RECOMMENDATIONS:

- The Minister of Police together with the Minister of Defence and Military Veterans must address criminal and other misconduct by police officials and soldiers, including the use of excessive force, towards the creation of a fair and humane detention system, through:
  - o improved training;
  - o swift and decisive disciplinary action against officers who engage in abusive or criminal conduct.
- The South African Police Service, DHA, and the national Department of Health should develop joint protocols for clear coordination to ensure proper screening of detained migrants, including verification of immigration status within statutory limits, and verification of age to ensure children are not detained in the context of immigration detention. Such joint protocols should also ensure the adequate provision of medical services and medicine at immigration detention locations.
- The national Commissioner of Police should issue national instructions regarding the conduct of police officers in line with the safeguards for detainees in the Immigration Act, the Refugees Act, and the Constitution.

# 5.
# CONCLUSION

# 5. CONCLUSION

In South Africa, forced migration is regulated through national laws and policies guided by international and regional frameworks. These laws, policies, and frameworks offer a promise, albeit limited, of recognition and protection to migrant women entering South Africa. However, despite being limited in its focus, this audit report exposes serious weaknesses in the implementation of the applicable legal framework, and how this failure impacts negatively on women who have come to South Africa with the hope of a better life for themselves and their families.

The review of international efforts to formulate a common approach towards migration highlights several legal and policy instruments that South Africa has been unwilling to ratify or unable to implement. On a regional level, SADC provides a free movement zone, but member states prefer to deal with each other through a series of bilateral treaties and memoranda of understanding. While SADC has committed to harmonising migration policies and facilitating intra-regional migration, it can be argued that, "state and public attitudes towards migration are at best ambivalent and at worst strongly hostile, including serious violations of migrants' rights."[249] What is required however is a coherent regional system of migration governance that would provide legal channels for those who want to migrate, reduce current high levels of corruption and abuse in the immigration system and reduce the exploitation of migrant women who enjoy few rights and protections.[250]

As was noted in the section dealing with the methodology of this report, there is a lack of secondary sources on lesbian, bisexual, and transgender women and forced migration. There is a clear need for deeper and fuller study of the experiences of these women in the forced migration context, in order to develop improved and more conscious protection, for the realisation of the right to substantive equality as guaranteed in the South African Constitution.

This audit report has shown that a legal framework that appears satisfactory on paper, is meaningless when it is not observed by the state, and if it is not gender conscious. Provisions that may appear gender neutral, often result in indirect discrimination against migrant women. Moreover, both direct and indirect discrimination against migrant women is taking place with impunity, with little or no consequences for the state actors and private individuals who are perpetrators. The general disdain of the migration system, and society at large, towards of migrant women keeps them vulnerable in South African communities where they expected to integrate.

However, this need not be the case. There are constructive, remedial steps that can be taken by the South African state and other decision makers to improve outcomes for migrant women. The recommendations made in this report constitute but a portion of actions that will greatly improve the lives of migrant women and their families, and ensure that the human rights promises contained in the South African forced migration framework do not live on paper alone.

[249] Crush "Harnessing Migration for Inclusive Growth and Development in Southern Africa" (2017)
[250] Crush "Harnessing Migration for Inclusive Growth and Development in Southern Africa" (2017) 4

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