

# LAWYERS FOR **HUMAN RIGHTS**

Making Rights Real Since 1979

## **SUB-NATIONAL GOVERNANCE AND THE PLIGHT OF PEOPLE WORKING WITHIN PUBLIC SPACES**

NABEELAH MIA  
HEAD: PENAL REFORM PROGRAMME  
nabeelah@lhr.org.za

*14 NOVEMBER 2023*



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# About Lawyers for Human Rights (LHR)

- Programmatic Areas

- Refugee & Migrant Rights Programme
- Penal Reform Programme
- Strategic Litigation Programme
- Environmental Rights Programme
- Land & Housing Unit
- Gender Equality

- What does the Refugee and Migrant Rights Programme cover:

- Direct legal assistance in Durban, Pretoria & Johannesburg relation to access to documentation and related concerns for refugees and asylum-seekers
  - Representation of asylum-seekers at the Refugee Appeals Authority & Standing Committee for Refugee Affairs
  - Pathways to citizenship and identification for stateless persons
  - Immigration Detention Monitoring
  - Advocacy and Outreach
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# Context

- Migrants who are not eligible for work or critical skills visas rely on the informal economy in order to make a living
- While there has been an increasing recognition by the South African government of the importance and role of the informal economy, there has been an increase in attempts to exclude migrants from the informal economy through exclusionary migration and economic policies
- Justifications for exclusions include: 1) restrictions of opportunities for South Africans; 2) migrants engage in illegal activities; 3) an increase in migrant shops means an increase in business robberies; and 4) curbing migrant-owned shops will curb xenophobic outbreaks
- Evidence shows that migrants integrate into and increase the local economy
- 2017 conducted by Dr Tanya Zack:
  - cross-border traders who travel to South Africa from neighbouring countries turn over an estimated 10 billion rand (US\$581million) annually in Johannesburg CBDA
  - An individual cross-border trader from neighbouring countries such as Zambia can inject up to 50,000 rands (US\$2884) into the informal economy of Johannesburg.

Sources:

<https://360info.org/how-migrant-entrepreneurs-find-their-way-in-south-africa>

<https://blogs.worldbank.org/african/empirical-evidence-shows-migrants-in-south-africa-create-jobs/>

Gao, Y. (2022) Analysis of Immigrant Employment in South Africa. Theoretical Economics Letters, 12, 518-529. doi: [10.4236/tel.2022.122029](https://doi.org/10.4236/tel.2022.122029).

# Challenging policies and practices which inhibit the work of migrants as informal traders

## Background

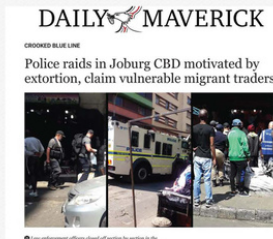
Across South Africa, municipalities have enacted ambiguous and over-reaching by-laws and policies to control and inhibit informal trading.



The policing of these by-laws disproportionately affects asylum seekers and migrant workers who are not granted access to the documentation required to be employed.



These discriminatory practices and policies towards informal traders and the work of migrants are increasing their marginalisation and exclusion.



## Strategies used to challenge these practices

### Advocacy

Submissions on the draft National Labour and Migration Policy and Services Amendment Bill

Report on the National Labour and Migration Policy and Services Amendment Bill

Submissions to the Portfolio Committee on Home Affairs' public hearing on the Refugee Amendment Bill

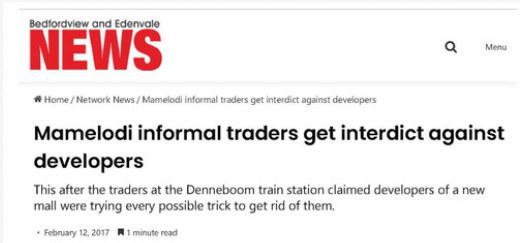
Submissions on the development of the Crafters Precinct at the Owl House in Nieu Bethesda



### Litigation

Challenging the exclusion of asylum seekers and refugees' from applying for licences to trade in tuck shops in both the High Court & Supreme Court of Appeal

Constitutional challenge on behalf of waste reclaimers, seeking a declaration that workers can re-commence their waste re-cycling activities unimpeded under COVID-19 regulations



# Locating LHR's work in the right to dignity

- *Minister of Home Affairs and Others v Watchenuka and Others* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) - seminal in recognising the right to work
- Dignity is entrenched in our Constitution as both a value and a right
- An applicant for asylum is not normally entitled to study or employment pending the outcome of their applications, there are instances where prohibiting this would be unlawful and infringe on the right to dignity under section 10 of the Constitution

“The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents’ counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.” (para 27)

# Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism ZASCA 143

- Context: Operation Hardstick where SAPS shut down businesses in Limpopo that were operating without business permits - targetted Somali and Ethiopian nationals who hold asylum or refugee status and operated spaza shops and were hindered from applying for permits on the basis of their lack of South African citizenship
- the Supreme Court of Appeal held that “where persons have no other means to support themselves and will as a result be left destitute, the constitutional right to dignity is implicated”, and that it could discern no “impediment to extending the principle there stated in relation to wage-earning employment to selfemployment”. (para 43)
- If a “refugee or asylum seeker is unable to obtain wage-earning employment ... can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade as aforesaid.” (para 43)

# Advocacy: Submissions on the NLMP & ESAB

- 28 February 2022 Department of Employment and Labour calling for public comment on the draft National Labour Migration Policy (NLMP) and the Employment Services Amendment Bill (ESAB).
- Aimed to regulate labour migration to and from South Africa, and to allow for the introduction of quotas for employment opportunities reserved for South Africans and foreign nationals.
- SERI and LHR after consultation with partners and clients (domestic workers, farm workers and refugees and asylum seekers) made the following submissions:
  - restrictions to the right to work go against South Africa's obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) that protects the right to work regardless of nationality, legal status and documentation.
  - premised on a false assumption that the solution to the high unemployment facing the country lies in the restriction of migrant work and the reservation of opportunities for South African workers.
  - Pitting local workers against migrant workers, whether in public discourse or proposed legislation, has the potential to further fuel xenophobic tensions
  - Do not consider sector-specific challenges and nuances, as well as potentially varied outcomes

**WHAT YOU NEED TO KNOW ABOUT THE NATIONAL LABOUR MIGRATION POLICY & EMPLOYMENT SERVICES AMENDMENT BILL**

**WHY WERE THE NLMP AND ESAB CREATED?**

The draft National Labour Migration Policy (NLMP) was introduced to facilitate and regulate the flow of labour to and from South Africa. It's aimed at addressing the country's 'brain drain' by keeping skilled workers in the country.

Similarly, the Employment Services Amendment Bill (ESAB) was created to amend the Employment Services Act (2014) to regulate the employment of non-South African nationals.

The South African government states that, overall, the draft policy and Bill are aimed at retaining skilled labour, growing the economy, creating opportunities for South Africans and combatting unemployment.

While we welcome the introduction of laws to protect workers' rights, the NLMP and ESAB fall short in this regard.

**WHY DO THE DRAFT POLICY AND BILL FALL SHORT?**

- The provisions of the draft policy and Bill **place restrictions on the right to work** which are inconsistent with South Africa's constitutional and international human rights law obligations.
- The NLMP and ESAB seem to **disregard the valuable contributions that migrant workers make** to the economy and seem to be based on the (debunked) myth that restricting non-nationals' access to the labour market will solve unemployment.
- The Bill **gives labour inspectors excessive power** to enforce immigration rules. This goes against the purpose of their role which is to protect workers' rights and contradicts the ILO Labour Inspection Convention (1947) which South Africa has ratified.
- The **quota system** the policy and Bill introduce **will not remedy most (or any) of the challenges** it is aimed at addressing, like the high unemployment rate. SERI's consultations with their clients showed that leaders of unions for domestic workers and farm workers did not support restricting employment opportunities for non-nationals through quotas or by any other means.
- Many of the provisions are **problematic for refugees and asylum seekers**, disregarding their right to work, as well as failing to consider the often lengthy or cumbersome asylum-seeking and refugee status determination processes.

**HOW CAN THE DRAFT POLICY AND BILL BE IMPROVED?**

We recommend a **complete overhaul of the NLMP and ESAB** to ensure that their provisions don't restrict the right to work and don't go against South Africa's obligations in terms of the Constitution and commitments under international human rights law.

The draft policy and Bill cannot adequately tackle sector-specific challenges and/or consider the circumstances of refugees, asylum seekers and other migrant workers because their **scope is too wide**. Rather than creating opportunities for locals in an exclusionary way, we recommend that the authorities **enforce existing labour laws** to protect workers' rights irrespective of their nationality.

In response to the South African Department of Labour's call for public comment on the NLMP and ESAB, the Socio-Economic Rights Institute of South Africa, Lawyers for Human Rights and the Scalabrini Centre of Cape Town, with research and advocacy support from the International Commission of Jurists, have made detailed submissions with specific recommendations to improve the policy and Bill.

Follow @SERI\_RightsSA, @ScalabriniCT, @LHR\_SA and @ICJ\_Africa on Twitter for regular updates on this campaign.

**SERI** Socio-Economic Rights Institute  
**LAWYERS FOR HUMAN RIGHTS**  
**Scalabrini** Centre of Cape Town  
**icj** International Commission of Jurists



# Threats to exercising the right to work - Xenophobia

 Moneyweb

## Spaza audits feared to create division and xenophobia

'If it's only targeting spaza shops that are owned by foreign nationals, then it's unlawful, it's unconstitutional, and it will be...

4 days ago



 SABC News

## 'SA faces challenge of undocumented foreign spaza shop owners'

Home Affairs Minister, Dr. Aaron Motsoaledi, says the country is facing a challenge of undocumented foreign nationals running spaza shops in...

5 hours ago



 EWN

## Govt wants to clamp down on spaza shops run by illegal foreign nationals

Minister in the Presidency Khumbudzo Ntshavheni said by-laws were to be introduced in municipalities aimed at tightening the monitoring of...

1 week ago



 SowetanLIVE

## READER LETTER | Citizens must wake up, boycott foreign spaza shops

It is an utter disgrace that right in front of our noses in our motherland, law enforcement agencies could not detect the influx of...

2 weeks ago



# **Threats to exercising the right to work - White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the Migration System in South Africa (November 2023)**

- Proposing an overhaul of the citizenship, immigration and refugee protection legal and policy framework
- Proposes withdrawal from international conventions
- In the context of the right to work:
  - increased reliance on quotas for employment of migrants
  - restrictions on visa
  - restrictions on the right to employment and self-employment
- Public comments due by 19 January 2024

# THANK YOU



@LHR\_SA



Lawyers for Human Rights



info@lhr.org.za



www.lhr.org.za