



Briefing Paper 542

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A Quota System for Migrants Is this a solution?

"Since migrant groups seldom have any opportunity to defend themselves, they have become easy targets for extremist groups looking for opportunities to advance their political agenda. Few policy-makers want to take chances on such a divisive issue, and during periods of economic crisis they may choose simply to repatriate foreign workers and close the migration gates. This happened recently in South-East Asia in the aftermath of the 1997 Asian financial crisis, for example, but has also occurred in other parts of the world. Even the most responsible political parties have been known to play the "migration card" in order to win more votes."¹

1. Introduction

On 19th January this year, Julius Malema, the leader of the Economic Freedom Fighters (EFF), visited shops and restaurants in Johannesburg's *Mall of Africa* ostensibly to ascertain the numbers of foreign nationals versus South Africans employed in those establishments. Mr Malema claimed to be doing this as part of an 'oversight exercise' in his capacity as a Member of Parliament.² In his comments, Mr Malema said that the investigation was meant to ascertain that the employment arrangements were such that South Africans and foreign nationals were both employed, and to ensure that they worked together amicably in a manner that diffused any xenophobic tensions.

He emphasised that his visit was not aimed against foreign nationals who had come here looking for a better life, but against owners of establishments who might be capitalising on the vulnerability of foreign nationals as a means to exclude South Africans from employment.³ Mr Malema stated that African unity began on the shop floor, in sharing schools, and on picket lines to ensure that there was fairness for all. He alluded to the often-aided grievance that, because of the vulnerability and non-unionisation especially of undocumented

foreign nationals, it was easy to exploit them in terms of wages.⁴

At the end of October 2021, Mr Malema called for the collapsing of borders,⁵ a repeat of similar earlier calls. At the height of the hard lockdown, when borders were fully closed, he had called on SADC citizens to find creative ways of crossing into this country, noting that for many of them South Africa was home.⁶ It would thus appear that the EFF's claimed policy coherence lies in ensuring that those who cross are not preferred to South Africans, but work alongside them in what Mr Malema has called 'fair conditions'.

As an aside, a former Secretary of Parliament has questioned whether oversight rules include such random site visits. Labour Minister Thulas Nxesi has also said that the 'inspections' were illegal and that it would be better if the MPs accompanied labour inspectors on their routine visits as observers.⁷ It has also been pointed out that even labour inspectors cannot make random visits unless there is a good reason for doing so and various processes have been complied with.⁸ The incident also raises questions about access to personal information and documents. An article in the *Daily Maverick* indicates that there are three

court judgements against the EFF outlawing its interference in the work place.⁹

Mr Nxesi commented further:

“One cannot seek to see the enforcement of the law by breaking the law. Violence in seeking to identify areas of non-compliance is counterproductive to the principle of labour market stability and labour peace, which are important to attract foreign investment needed to fight unemployment, inequality and poverty. The government is dealing with regulations regarding the employment of foreign workers in SA. It is imperative to wait for the process to be completed rather than parties acting outside the law, which will be tantamount to breaking the law.”¹⁰

The Department of Employment and Labour said in an important clarification,

“The principle of fair labour practice is a fundamental right enshrined and guaranteed in the Constitution. The Labour Relations Act and the Basic Conditions of Employment Act give effect to the principle of fair labour practice. The legislation prescribes recourse for employees who feel their rights have been trampled upon, the legislation is intended to protect employees irrespective of their nationality as long as the employment relationship can be identified. The same rights accorded to an SA employee apply to foreign nationals. That means they are entitled to conditions of employment and prescribed minimum wage. Any employer who departs from this principle because an employee is a foreign national violates our laws.”¹¹

But that is a discussion for another time. What is of importance now is that undoubtedly these high-profile actions have added to the already robust political discourse on contested issues of immigration, employment of undocumented foreigners, and the ever present spectre of xenophobia.

2. The Context

The controversial ‘oversight visits’ took place in the context of vehement xenophobic political utterances. This has been particularly true since the run-up to the 2021 local elections. They also

came at a time when the Department of Home Affairs has announced that the decade-long Zimbabwean Exemption Permit will not be renewed, and that holders thereof will have a year to find other types of visas to justify their stay in South Africa.¹²

The visits also happened while residents of Soweto were engaging in ‘Operation Dudula’, a campaign to rid the streets of foreign traders and the sale of illegal goods. The campaign, spearheaded by the local community policing forum and the South African National Civic Organisation, has amongst its aims, “to put South Africans first.”¹³ Comments from this group show strong xenophobic sentiments. A recent report showed that they “chased those they deemed to be illegal immigrants, accusing them of being responsible for criminality and of taking economic opportunities away from South Africans by hijacking stalls and breaking bylaws...”¹⁴

At the same time, there has been a sharp rise in xenophobic sentiments from some political parties. The Patriotic Alliance has been at the forefront of such remarks.¹⁵ Gayton McKenzie, the leader of the party, has been unambiguous about sending foreigners without the correct documents back to their home countries. As he puts it, if his party held power, “beginning at 9am by 9.30am every foreign national without valid papers would be on their way back to their home country”. He is clear in his messaging: “We do not want illegal foreign nationals in our country.”¹⁶ He speaks of ‘100% jobs for South Africans’, and pursues a logic that foreigners, because they are vulnerable and not unionised, are cheaper options for employers and in that way steal jobs from South Africans. The gist of his remarks centres around job loss and employment. Given the gravity of unemployment and its dire knock-on effects, it is arguably one of the most emotive and manipulative areas of political rhetoric. Indeed, it could be argued that this narrative around ‘foreigners steal jobs’ is simply wrong. In a statement protesting against the scapegoating of foreigners for the unemployment woes in South Africa, the National Union of Metalworkers of South Africa (NUMSA) points out that when the Department of Employment and Labour briefed the Tourism Portfolio Committee in November 2021 about migration trends, it held that migrants formed only 4% of the population. NUMSA points out that, with an expanded unemployment rate of 46%, it was factually incorrect to suggest that such a small number was responsible for unemployment.¹⁷ Mr

McKenzie makes a small exception for employing highly qualified foreigners where no South Africans are available, but he consistently draws a direct parallel between employed foreigners and South African job losses. He pays little attention to the numerous studies that conclude that the situation is more complex and nuanced than this^{18;19}

Action SA, another new political party, which like the Patriotic Alliance made good showings at the local election polls in 2021, has a similar viewpoint on foreign nationals. In its most recent campaign the party leadership called for unregistered schools run by foreign nationals, and in its own words, “worse still, staffed by foreign nationals” to be shut down.²⁰ It has been pointed out that the focus on those run by foreign nationals is tantamount to xenophobia, since the call ought to be to shut down all unsanctioned schools.²¹ Mr Mashaba has a long history of robust opinions on the presence of foreign nationals in inner cities and especially in Johannesburg.²² He is on record as saying, “we have to get rid of illegal foreigners, I mean this matter is not negotiable.”²³ Mr Mashaba blames the chaotic immigration policies, the dysfunction of DHA, and the failure of the ANC to improve the lot of people for the presence of so many migrants.²⁴

It is worth noting a comparative experience from the United States. The migration scholar Donald Kerwin says:

“An age-old feature of anti-immigrant movements, including those that historically targeted Catholic immigrants, has been to blame immigrants for whatever social problems happen to be prominent at the time. In recent years, persons without immigration status have been collectively blamed for terrorism, the health-care crisis, mortgage defaults, the “Great Recession,” high unemployment, displacement of U.S. workers, federal and state budget shortfalls, and the return of leprosy to the United States. The phenomenon of scapegoating—with its roots in the ritual of Yom Kippur of symbolically laying the communal sins of a people on a goat and casting it into the wilderness (Lev. 16:5, 7–10)—undermines the Christian commitment to build the human family.”²⁵

The fact that two parties with similar views on immigrants, with a common narrative about foreigners stealing jobs and similar sentiments, could on their first showing at the polls garner

such high numbers of votes, is in itself a commentary on xenophobic attitudes across considerable swathes of our population. This must mean that any irresponsible, politically expedient populist activities could easily trigger dire and dangerous consequences, as our history has shown.

We are in the midst of this shifting political narrative and it is too soon to make definitive assessments in terms of how this will influence policy. In the meantime, the clashing views have yielded some policy and political insights that are worth exploring, whether we like them or not.

3. Some Policy Considerations

One of the shifts has been towards a more vocal acknowledgement that the energy of protest should not be aimed at the foreign nationals, and that they should not be scapegoated or made to carry the blame. The protest should be aimed at employers who prefer to employ undocumented foreigners because they can exploit them. The protest should be taken to the doors of government departments where incompetence and political expedience deprive people of legal migration routes. While too much deplorable action is still meted out to foreigners, there are signs that the structural causes of the poverty that so exacerbates the quest for limited resources, political policies and corruption as well as ruthless behaviour, are being tackled as toxic issues *per se* instead of other working people. This is trajectory worth exploring and looking for its resonance in the policy domain.

A second interesting policy aspect has been the emergence of the notion of quotas in this contested matrix of foreign nationals, labour, exclusion, and the guarantees of the Constitution. Several diverse voices from varied ideological backgrounds have found common cause in exploring the idea of quotas. In response to the oversight visits by the EFF, Minister Nxesi spoke of the need for quotas for foreign nationals working in South Africa and for regulation in the domain of semi-skilled work. He saw this as one way of navigating between the need to deal with massive unemployment in South Africa and our obligations under various international agreements and protocols. He also said that it followed international practice, and confirmed that the move to quota systems and regulation was

far advanced, and was with Nedlac.²⁶ On 25th January, the Department of Employment and Labour offered some reminders of the contents of the National Labour Migration Policy and the proposed amendments to the Employment Services Act. It prefaced its statement by saying that “the South African population has ‘expectations’ regarding access to work for local citizens, given worsening unemployment and perceptions or views that foreign nationals, especially undocumented, are distorting labour market access.”²⁷

4. Quotas

The Department’s statement spoke of the introduction of quotas:

“The Employment and Labour National Labour Migration Policy will introduce maximum quotas on the total number of documented foreign nationals with work visas that can be employed in major economic sectors such as Agriculture, Hospitality and Tourism, and Construction, just to name a few.”²⁸ It also mentioned ‘undesirable sectors’, and indicated that the policy would be complemented by small business interventions and the enforcement of a list of undesirable sectors where foreign nationals could not be allocated business visas. There will also be amendments to the Small Business Act to limit foreign nationals establishing SMMEs and trading in some sectors of the economy.²⁹ It also noted changes to the Immigration Act, the Citizenship Act and the Refugee Act to provide for more ‘orderly’ migration.

Finally, the statement spoke of the critical skills list. This list will be used as a last resort to allow foreign nationals in possession of the listed skills that the economy requires, and where job offers have been made, to be allocated work visas. The government will also impose various obligations on both the employer and the foreign national to transfer skills to locals, and permits will be limited to specific durations.³⁰ The Department also gave the assurance of protection for migrants: “The Department will ensure the protection of migrant workers and their families in accordance with international standards and guidelines. SA will also implement these initiatives within the context of its regional integration and co-operation imperatives that have already been agreed to at

the Southern African Development Community and AU levels.”³¹

In the political party realm, a private member’s Bill from the IFP calls for a quota system as a means of resolving growing labour tensions and of curbing the high unemployment rate, especially amongst youth.³² SA Federation of Trade Unions General Secretary, Zwelinzima Vavi, added his support for a quota system, arguing that there was international precedent for this.³³ These innovations will no doubt meet with considerable opposition, and increase fears of people migrating clandestinely and remaining under the radar, thus increasing their vulnerability. The policy will be tested against the Constitution and SA’s international obligations, but it does seem, for better or worse, to indicate the present parameters for advocacy in the contested area of labour and foreign nationals. It is certainly an early point in the discussion.

5. An Insight from Catholic Social Teaching

It is worth noting, as we enter this important policy discussion, that Catholic Social Teaching holds the following as entry points to the discussion. (These should be read alongside the core principles of respect for human dignity and the universal destination of goods.)

- Persons have the right to find opportunities in their homeland
- Persons have the right to migrate to support themselves and their families
- Sovereign nations have the right to control their borders
- Refugees and asylum seekers should be afforded protection³⁴

In an interesting distillation of these points, Donald Kerwin writes:

“According to Catholic Social Teaching, migration should be a matter of choice, not necessity. People have a right not to have to migrate, and states have a responsibility to provide the minimal conditions that would allow their residents to flourish and realize their God-given rights at home. However, when states fail to meet this responsibility, persons have a right and responsibility to seek conditions that will allow them to live in dignity and support their families. According

to Catholic Social Teaching, the right to migrate creates a corresponding moral responsibility on the part of states to receive and to welcome immigrants. The Catholic Church has been criticized for its alleged support of “open border” policies. In fact, it recognizes the right and the responsibility of nations to regulate immigration. Yet it teaches that this responsibility must be tempered by a commitment to safeguard rights and to promote the common good, which it sees as the very purpose of states. In Catholic thought a state’s responsibilities to its own residents does not relieve it of the responsibility to defend the rights of the greater human family. This concept—known as the universal or “borderless” common good—starts from the premise that certain minimum “goods” (including rights) apply to all people and must be afforded to all, even if doing so requires states, individually or collectively, to reach beyond their borders.”³⁵

This is by no means the final or even the middle word in this robust conversation, but it is a thought worth adding to the attempts to shape a just narrative with regard to migration and labour.

6. Conclusion

The past weeks have exposed some of the deep conflicts and ambiguities that surround the

presence of (especially) undocumented migrants in South Africa and the populist, opportunist narratives that accompany this reality. There is little doubt that the problems regarding migration and labour are complex and profoundly multi-faceted; hence it is both irresponsible and damning to seek solutions through superficial and opportunistic narratives and practices. Policy makers in particular have a responsibility to bring to such matters great discernment, wisdom, intellectual insight, justice and best practice. Our faith and cultural traditions may well help us to develop fresh insights that can shift us beyond the polarised impasse that seems to trap this discussion in inflexible ‘either-or’ situations. In the faith community we would do well to struggle with the four verbs Pope Francis has developed – ‘welcome, protect, promote and integrate’,³⁶ which can be translated in this context into policies that respect dignity and are just to those who seek a better life, and to those amongst whom they settle. It is a huge responsibility, since its outcomes will shape our social fabric and community relations for a long time to come. In November 2021, Pope Francis, drawing on his own experience, put it succinctly: “In the light of the Latin American experience, I was able to affirm that immigrants, if they are helped to integrate, are a blessing, a source of enrichment and new gift that encourages a society to grow.”³⁷ This insight might well be the beginning of a way forward.

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¹ *Towards a fair deal for migrant workers in a global economy*, 2004 see <https://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf>

² <https://www.youtube.com/watch?v=wSZkCJmUT9I>

³ <https://www.youtube.com/watch?v=E2-MlAqTPo>

⁴ <https://www.youtube.com/watch?v=oGYpBMss63M>

⁵ <https://www.youtube.com/watch?v=Afsy5mNwQD8>

⁶ <https://www.timeslive.co.za/news/south-africa/2021-10-21-watch--ill-never-support-this-nonsense--mashaba-on-malemas-call-for-open-borders/>

⁷ <https://www.youtube.com/watch?v=MsOs9UzRBF0>

⁸ <https://ewn.co.za/2022/01/24/labour-inspectors-can-t-do-random-inspections-without-just-cause-dept>

⁹ <https://www.dailymaverick.co.za/article/2022-01-20-efcs-restaurant-worker-smoke-out-ignores-three-judgments-outlawing-its-workplace-interference/>

¹⁰ <https://www.sowetanlive.co.za/news/2022-01-19-labour-minister-says-employment-matters-are-his-to-handle-after-controversial-eff-checks/>

¹¹ <https://www.sowetanlive.co.za/news/2022-01-19-labour-minister-says-employment-matters-are-his-to-handle-after-controversial-eff-checks/>

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