

**UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION**

**111<sup>th</sup> Session of the UN Committee the Elimination of Racial  
Discrimination**

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**SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS TO THE  
UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION IN  
VIEW OF ITS EXAMINATION OF THE COMBINED NINTH TO ELEVENTH  
PERIODIC REPORTS OF SOUTH AFRICA UNDER ARTICLE 9 OF THE  
INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF  
RACIAL DISCRIMINATION**

**Submitted on 27 October 2023**

*Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.*

***The following organizations have endorsed this submission: Lawyers for Human Rights, Section 27, Centre for Applied Legal Studies, Health Justice Initiative, Kopanang Africa Against Xenophobia, Solidarity Centre and the Consortium for Refugees and Migrants in Southern Africa***

# Submission of the International Commission of Jurists to the UN Committee on the Elimination of Racial Discrimination in View of its Examination of the Combined Ninth to Eleventh Periodic Reports of South Africa under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination

## Introduction

1. The International Commission of Jurists (ICJ) makes this submission in respect of South Africa's combined ninth to eleventh reports submitted by South Africa under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention). In particular, the ICJ focuses on Articles 2, 4, 5 and 6 in this submission.
2. The South African Constitution states that the majority of rights are guaranteed to "everyone" – i.e., not only to South Africans but also to non-citizens residing within the State's borders.<sup>1</sup> Only four sections of the Constitution apply exclusively to "citizens".<sup>2</sup> In addition, the ICJ acknowledges and commends South Africa for the finalization of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance<sup>3</sup> (NAP) and the Indicative five-year Implementation Plan that was approved by Cabinet on 27 February 2019. The NAP was officially launched and released at a roundtable dialogue with key stakeholders, including government departments, on 25 March 2019. The ICJ participated in this launch. The NAP is a positive first step toward combatting and eliminating racism, racial discrimination, xenophobia and related intolerance. The NAP is intended to assist South Africa in meeting its international treaty and regional obligations, including under the Convention, as well as its commitments arising from the third UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. However, the ICJ considers that all government departments are not acting in line with the NAP and, in some instances, are actively discriminating against certain persons, contrary to South Africa's obligations under the Convention, in particular, under Articles 4(b)<sup>4</sup> and 4(c).<sup>5</sup>
3. Despite the NAP'S foreword penned by the South African President, Cyril Ramaphosa, stating *'that the plan is based on the collective conviction of South Africans that, given that the ills of unfair discrimination and inequality are human-made; we have the means to completely eradicate these ills from our country'*, the scourge of racism and xenophobia persists and may also be unwittingly institutionalized by government departments and courts. Discrimination on the intersectional grounds of race, class, national or ethnic origin and gender in the world of work remain prevalent in South African society. With respect to this, in this submission, the ICJ considers South Africa's record on the human rights of non-citizens in relation to their access to health care and labour rights in light of the country's obligations under the Convention and sets out examples of discrimination arising from these spheres.
4. In South Africa, the State is discriminately violating non-citizens right to work and residence. This is illustrated by the Constitutional Court's refusal to permit certain categories of non-citizens to be admitted as legal practitioners.<sup>6</sup> In compliance with the fundamental

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<sup>1</sup> *Constitution of the Republic of South Africa*, 10 December 1996, <https://www.refworld.org/docid/3ae6b5de4.html>.

<sup>2</sup> Rights afforded to "citizens" only are: S 19 – political rights, S 20 – citizenship, S21 – the right to enter and remain in and reside anywhere in South Africa and the right to a passport, S 22 – the right to choose their trade, occupation or profession.

<sup>3</sup> <https://www.justice.gov.za/nap/docs/NAP-20190313.pdf>

<sup>4</sup> See, for example, in respect of the actions of Operation Dudula: <https://www.aljazeera.com/features/2023/9/26/south-africas-operation-dudula-vigilantes-usher-in-new-wave-of-xenophobia> and <https://www.groundup.org.za/article/stop-the-rot-immigrant-organisations-seek-interdict-against-operation-dudula/>

<sup>5</sup> <https://www.msf.org.za/migrant-children-and-pregnant-women-are-being-denied-potentially-lifesaving-care-south-africa>

<sup>6</sup> *Relebohile Cecilia Rafoneke v Minister of Justice and Correctional Services* <https://www.saflii.org/za/cases/ZACC/2022/29.html>

obligations laid down in Article 2 of the Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights under Article 5(e)(i): the rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration.

5. Additionally, the State has attempted to deprive non-citizens of their right to residency by terminating the Zimbabwe Exemption Permit (ZEP) and to healthcare by denying access to medical care and treatment to non-citizen women. These distinctions have been created under the pretextual guise of distinguishing between citizens and non-citizens within South Africa. However, the effect of such policies, regardless of their justification, perpetuates racial discrimination, xenophobia and a nationalist superiority complex that flies in the face of South Africa's obligations under international human rights law, including, in particular, under the Convention.<sup>7</sup>

### **Legal framework: Constitutional Rights**

6. The South African Constitution enumerates human dignity, the achievement of equality and the advancement of human rights and freedoms as core values of the Constitution.<sup>8</sup> The Constitution requires the South African Judiciary to consider the ambit of both binding and non-binding international law in interpreting South African law. Section 39(1) of the Constitution enjoins courts to "consider international law" in interpreting the rights contained in the Bill of Rights,<sup>9</sup> while Section 39(2) of the Constitution requires courts, when interpreting legislation, to "promote the spirit, purport and objects of the Bill of Rights".<sup>10</sup> Moreover, Section 233 of the Constitution enjoins courts and tribunals, when interpreting legislation, to "prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".<sup>11</sup> Furthermore, the Constitution guarantees that, "everyone is equal before the law and has the right to equal protection and benefit of the law."<sup>12</sup> Discrimination is prohibited on both unlisted and listed grounds, including "ethnic or social origin".<sup>13</sup> Additionally, Section 23 establishes the right to fair labour practices and to form and join a trade union. Section 27 establishes the right for "everyone", not just citizens, to have access to healthcare services, including reproductive healthcare. Finally, the Constitution establishes that the rights to human dignity, equality, life, and freedom and security of person are non-derogable rights.<sup>14</sup>

### **Non-Citizens' Rights**

7. The Constitutional Court's decision in *Relebohile Cecilia Rafoneke v Minister of Justice and Correctional Services* in 2022 failed to recognize the constitutional rights and international human rights of non-citizen lawyers in South Africa, including rights guaranteed under the

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<sup>7</sup> In particular, as mentioned above, the rights guaranteed under Article 5(e)(i) of the Convention, and also the rights guaranteed under Article 5(e)(iv)-(iv): the right to public health, medical care, social security and social services.

<sup>8</sup> *Constitution of the Republic of South Africa*, s1(a), Provision 1, 10 December 1996, <https://www.refworld.org/docid/3ae6b5de4.html>.

<sup>9</sup> *Constitution of the Republic of South Africa*, s39(1) 10 December 1996, <https://www.refworld.org/docid/3ae6b5de4.html>.

<sup>10</sup> *Id* at s39(2).

<sup>11</sup> *Id* at s233.

<sup>12</sup> *Id* at s9.

<sup>13</sup> *Id*.

<sup>14</sup> *Id.* at s37(6), (Equality: "With respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language."; Human Dignity: "Entirely"; Life: "Entirely"; Freedom and Security of Person: "With respect to subsection(1)(d) and (e) and 2(c).").

Convention, such as the right to work, the right to equality and non-discrimination.<sup>15</sup> This has resulted in violations of Articles 5 (e)(i) and 6 of the Convention.<sup>16</sup>

8. Currently, in South Africa, attorneys who are non-citizens and lack permanent residency are barred from being admitted as legal practitioners regardless of their qualifications. In 2022, the South African Constitutional Court declined to affirm the Free State High Court's determination that Section 24(2) of the Legal Practice Act 28 of 2014 was unconstitutional. The Constitutional Court preserved the provision confirming that only South African citizens and permanent residents were allowed to practise law and be admitted as lawyers in South Africa. The two applicants in this case, Relebohile Cecilia Rafoneke and Sefobok Philip Tsuinyane, are citizens of Lesotho and received their Bachelor of Law (LLB) degrees in 2013 from the University of Free State. Both applicants entered South Africa on a study visa from the Department of Home Affairs. Following the Constitutional Court's decision, foreign law graduates who study within South Africa shall not be permitted to practise law in the country, regardless of their qualifications, publication record or equivalent educational credentials. Judge Zukisa Tshiqi distinguished non-citizens from permanent residents by stating, "*The rationale for accepting permanent residents is that they have been granted a right to live and work in the country on a permanent basis subject to the country's immigration laws. The same cannot be said for non-citizens who are refugees or who are on study or work visas.*" Judge Tshiqi continued by saying non-citizens who chose to study in South Africa, "*made this choice fully conversant with the fact that they are not eligible for admission, or at the very least, they ought to be conversant.*" The Court claimed that non-citizens were not barred from working within the legal sector in positions that did not require admission, stating that, "*they are therefore not left destitute.*" The court failed to consider that, on account of the asylum system's administrative delays, refugees may spend between five to 15 years or even more waiting for their protection claims to be processed and to be formally recognized as refugees, a formal recognition that may then place them on a path toward citizenship. Scholars have criticized the justices for "fail[ing] to consider the fact that vicious xenophobia (fanned by populist politicians) is sweeping across South Africa, and ... [failing to] pause to think how the impugned legislation might be read as (or may, in fact, amount to) an endorsement of the view that foreigners don't have any loyalty or close links to the country and are inherently untrustworthy and dishonest."<sup>17</sup>
9. The South African government's decision to bar non-citizens and non-permanent residents from practising law solely based on their immigration status amounts to discrimination based on national and ethnic origin. A non-citizen/non-permanent resident attorney living in South Africa may have the same law degree, the same test scores, even an identical university transcript to a practising South African attorney, yet, under current South African law, the non-citizen/non-permanent resident attorney will not be admitted into the South African legal profession. The Court in the *Rafoneke* case admitted that the only distinction between such attorneys is their national origin, and yet, the Court justifies its ruling by claiming the non-citizen attorney has made an informed choice when choosing to live in South Africa. The Court claims that a non-citizen attorney knew that admittance is restricted to South African citizens and permanent residents, and then references jobs related to practising law that do not require admittance into the profession as a sufficient alternative. This is not a system of "free choice of employment, ... just and favorable conditions of work," or "protection against unemployment." This is court-ordered underemployment, and the Court fails to acknowledge the pattern of xenophobic policy-making that the South African government perpetuated for several years. Excluding a qualified attorney from the profession solely based on their national origin blocks non-citizens from freely choosing their

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<sup>15</sup> The CERD states in Article 5 that "Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to ... national or ethnic origin, to equality before the law, notably in the enjoyment of the ... the right to work, to free choice of employment, to just and favourable conditions of work, [and] to protection against unemployment".

<sup>16</sup> Under Article 6, States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

<sup>17</sup> Pierre de Vos, *ConCourt's Woeful Ruling on Foreign Legal Practitioners Fails to Consider Vicious Xenophobia Scourge*, DAILY MAVERICK (Aug. 4 2022), <https://www.dailymaverick.co.za/article/2022-08-04-concourt-ruling-on-foreign-legal-practitioners-is-troubling-heres-why/>.

employment, deprives them of just working conditions, and exposes many individuals to the risk of unemployment since South Africa reported a 32.9 percent unemployment rate in the first quarter of 2023.<sup>18</sup> The Court failed to protect these non-citizens' right to work under the Convention by arbitrarily and discriminately deciding that non-citizen/non-permanent residents are unqualified for admittance into the South African legal profession and by assuming, without evidence, that such individuals would have an adequate opportunity to find employment in legal positions not requiring admittance.

## **The Unlawful Termination of the Zimbabwe Exemption Permit Programme**

10. The case *Helen Suzman Foundation v. Minister of Home Affairs*<sup>19</sup> concerned the human rights of approximately 178,000 holders of Zimbabwean Exemption Permits ("ZEP") in South Africa, including their rights to work, study and reside in the country. This special immigration permit was introduced for the first time in 2009 and was renewed on multiple occasions until June 2023, when the permits were set to expire. The permits were issued in response to the political and economic crisis in Zimbabwe. It allowed for undocumented Zimbabweans and their families "illegally residing" in South Africa to be temporarily allowed to reside and work in the country. In 2014, the South African authorities renewed and renamed the "Dispensation of Zimbabweans Project" as the "Zimbabwean Special Permit (SZP) programme", and in 2017 the SZP became the ZEP programme. Notwithstanding the repeated rebranding of the permit, this process authorized the issue of a special permit to Zimbabweans who were able to renew it on multiple occasions. On 28<sup>th</sup> June 2023, in the *Helen Suzman Foundation* case, the High Court of South Africa determined that the Minister of Home Affairs' decision not to extend the ZEP programme, which was due to expire on 30 June 2023, was irrational and unjustified and, therefore, unconstitutional, unlawful and invalid. The result was that the Minister's decision must be set aside. Since then, the ruling has temporarily prevented the termination of the ZEP programme, which allows current permit holders to remain in South Africa for the present time. However, the High Court's decision in the case rested on administrative law grounds, rather than on the basis of an acknowledgment of the human rights of 178,000 Zimbabwean citizens. The Minister of Home Affairs failed to lodge an appeal in good time and is proceeding to pursue other options to file this appeal. In the interim, the Helen Suzman Foundation has approached the court to ensure that the permits remain valid, while the Minister pursues avenues for appeal. The case is ongoing.<sup>20</sup>
11. If the Minister's appeal is successful, or the Minister makes a fresh decision to terminate the ZEP in such a way as to comply with South Africa's administrative law requirements, then those Zimbabwean citizens residing in South Africa will have their right to work and right to freedom of movement under the Convention violated. One of the reasons for the initial establishment of the ZEP Programme was the dire humanitarian and economic situation in Zimbabwe. That situation has not improved and has further deteriorated since 2009. The negative effects of a non-renewal of the permits could result in increased discrimination and xenophobic actions against this group of non-citizens, in violation of Article 2(b) of the Convention.<sup>21</sup> South Africa could experience renewed instances of xenophobic violence, which has plagued the country for nearly two decades.<sup>22</sup>
12. Beyond the *Rafoneke* case, the South African government's procedurally deficient attempt to terminate the ZEP programme also violates the right to work under Article 5 of the Convention. When South Africa created the ZEP programme, it created a programme in

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<sup>18</sup> <https://www.iol.co.za/business-report/economy/south-africas-unemployment-rate-remains-highest-in-world-6f892261-5da0-450d-975c-65a0953f6d06>.

<sup>19</sup> *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* (32323/2022) [2023] ZAGPPHC 490 (28 June 2023) <https://www.saflii.org/za/cases/ZAGPPHC/2023/490.html>

<sup>20</sup> <https://www.sowetanlive.co.za/news/south-africa/2023-10-26-helen-suzman-foundation-goes-to-court-to-ensure-zep-remains-valid-as-motsoaledi-appeals/>

<sup>21</sup> Article 2 (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

<sup>22</sup> <https://www.ohchr.org/en/press-releases/2022/07/south-africa-un-experts-condemn-xenophobic-violence-and-racial>

which 178,000 Zimbabweans had a justifiable reliance interest. The political and economic situation in Zimbabwe is far from stable. The Zimbabwean economy has nearly abandoned its efforts to maintain a stable national currency, and much of the economy is reliant on the U.S. dollar. Yet, access to U.S. dollars is scarce for many Zimbabweans. Additionally, the national political climate is uncertain and dangerous in Zimbabwe, with reports of abductions, torture, arbitrary arrests and other abuses against opposition politicians and activists. To arbitrarily terminate the ZEP programme would blatantly violate the 178,000 permit holders' right to work under the Convention. The Minister of Home Affairs on behalf of the State has failed to provide justifications for such a termination and has failed to acknowledge the system of reliance the State purposefully created. Terminating this programme requires an adequate process that acknowledges and accounts for reliant parties' rights. The State has completely failed to acknowledge that forcing the ZEP permit holders to return to Zimbabwe exposes such individuals to an immense risk of unemployment, would force the permit holders to abandon the employment, safety and stability they have found in South Africa and would expose them to a great risk of violence and political turmoil based on the current actions of the Zimbabwean government, which continually disregards and violates the human rights of its citizens. Established in Article 5(b) of the Convention is "*the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution*".<sup>23</sup> The South African government will be violating Article 5(b) of the Convention if it terminates the ZEP programme without adequately showing a sufficient level of economic and political stability in Zimbabwe. Further, this process is likely to create a group of persons who are undocumented and who will not leave the country, exposing them to the risk of arrest, detention and deportation, a vicious cycle that was very much the norm prior to the establishment of the ZEP Process. South Africa declared a moratorium on deportations in 2009, prior to the commencement of the ZEP Process. Before 2009, there was a situation of a revolving door of deportations where deportees would return to the country soon after they were deported.<sup>24</sup> South Africa could see a return to this situation.

### **State Healthcare Providers Denial of Healthcare to Pregnant and Lactating Mothers**

13. In 2020, the Gauteng Provincial Department of Health introduced a policy that denied free healthcare services to foreign pregnant women and young children. Such a discriminatory decision is a direct violation of Articles 1, 2<sup>25</sup> and 5(e)(iv) of the Convention. Following the

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<sup>23</sup> CERD art. 5(b).

<sup>24</sup> <https://mg.co.za/article/2005-03-24-sa-is-revolving-door-to-desperate-zimbabweans/>

<sup>25</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>

#### Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

#### Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against

introduction of this policy, however, the Gauteng High Court overruled it and held that all pregnant and lactating women, as well as children under six, had the right to be provided with free health services at South African public hospitals. This court order aligns with the Convention recognizing the right to public healthcare, while refusing to utilize citizenship status as the determinative factor for pregnant mothers, lactating mothers or young children's access to public healthcare. The court also ordered the National Department of Health to issue a circular to all provincial departments of health stating that pregnant and lactating women, who are not members of the medical aid schemes and did not come to South Africa specifically to access healthcare, are eligible for free health services at all public health facilities. The National Department of Health was also instructed by the court to prepare and display posters or notices in all healthcare facilities in all the provinces to reaffirm to the public that all pregnant women, all lactating women and all children below six years of age are entitled to free health services at any public health facility, regardless of their citizenship or documentation status. While the ICJ is encouraged by the Gauteng High Court's recognition of the fundamental right to equal access to public healthcare, the organization remains concerned about the Department of Health's repeated attempts to deny access to healthcare to non-citizens.<sup>26</sup> Civil society organizations working with non-citizens have repeatedly reported instances of denial of healthcare over many years. This is a direct violation of the right to public health and medical care under international human rights law, including under Article 5 of the Convention.

14. However, had the policy been upheld, it would have disproportionately affected persons of non-white ethnicities who are the majority of non-citizens in South Africa and who originate from neighbouring countries throughout the region. As a party to the Convention, South Africa has an obligation to provide public healthcare to "everyone" not just its citizens.<sup>27</sup> Furthermore, the South African Constitution affirms the right of everyone to access healthcare, including reproductive healthcare.<sup>28</sup> Therefore, any action of the nature of the Department of Health's denial of healthcare to non-citizen mothers using citizenship status as justification for denying the right to public healthcare is a violation of the South African Constitution and South Africa's obligations under the Convention.

## Demographics and Legal Recognition

### *Non-Citizens*

15. Due to its economic status, stable democratic institutions and industrialized economy, South Africa hosts the largest number of non-citizens among all African countries. Census 2022 data showed there were more than 2,4 million international migrants, which equates to just above three percent of the total population of South Africa. Most of these people come from

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persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

<sup>26</sup> This is supported by reports and evidence from NGOs like Lawyers for Human Rights, Section 27 and Health Justice Initiative and academics working with refugees and migrants who report that this denial of access to health care has been happening over many years

<sup>27</sup> CERD art. 5.

<sup>28</sup> *Constitution of the Republic of South Africa*, s27(1)(a) 10 December 1996, <https://www.refworld.org/docid/3ae6b5de4.html>.

the Southern African Development Community (SADC) region (86 percent) and of these, 45,5 percent came from Zimbabwe, followed by Mozambique with 18,7 percent and Lesotho with 10,2 percent. The top five sending countries to South Africa were Zimbabwe, Mozambique, Malawi, Lesotho and the United Kingdom; these five countries have maintained their rank since 2011.<sup>29</sup> As discussed above, the ZEP programme accounts for 178,000 Zimbabwean migrants presently in South Africa. In total, it is estimated that there are roughly 2.9 million non-citizens residing in South Africa.<sup>30</sup> This accounts for slightly less than five percent of the overall population of around 60 million.<sup>31</sup> However, these numbers are likely underestimating the number of non-citizens because of the prevalence of “unauthorized migrants” from neighbouring countries.<sup>32</sup> Roughly 75 percent of South Africa’s non-citizen population comes from elsewhere in Africa.<sup>33</sup> Zimbabwe is the largest origin country with around 24 percent of non-citizens present in South Africa being Zimbabweans.<sup>34</sup> A racial dynamic exists within South Africa’s migration trends. While other African nations contribute greatly to immigration in South Africa, South Africa’s white population contributes greatly to the outflow of South African citizens to other developed countries, such as the United States, the United Kingdom and Australia.<sup>35</sup> In 1996, white residents accounted for 11 percent of South Africa’s population while in 2021 white residents accounted for only eight percent of the population. Therefore, South Africa’s non-citizens are mostly people of non-white ethnicities and are increasingly faced with xenophobic policies from the South African government.

### *Informal Economy*

16. The informal economy remains an unrecognized portion of the South African economy. There is a great need for South African policymakers to rethink their approach to this prevalent segment of the economy. They must acknowledge that human livelihoods and general welfare are under threat when the informal economy is criminalized through vagrancy laws, and when such economy is ignored when drafting economic legislative frameworks. Even though the informal economy of South Africa provides livelihoods to a sizeable number of persons, it is still underestimated and largely missing from economic policy formulation and analysis.<sup>36</sup> People of non-white ethnicities, including non-citizen immigrants to South Africa, are by far the main drivers and participants in the country’s informal economy. South Africa’s informal waste collectors constitute a major portion of this informal economy. As a result, to continue to ignore, criminalize or fail to adequately legislate to promote growth within this portion of the economy will perpetuate racial discrimination, wealth gaps and poverty. For example, it is estimated that informal waste collectors play a central role in South Africa’s waste economy by collecting 80 to 90 percent of used packaging and paper that is recycled.<sup>37</sup> This work is essential to South Africa’s 57 percent overall recycling rate.<sup>38</sup> This saves South African municipalities millions of rands per year, provides important inputs for industrial production and guarantees livelihoods for

<sup>29</sup> [https://census.statssa.gov.za/assets/documents/2022/P03014\\_Census\\_2022\\_Statistical\\_Release.pdf](https://census.statssa.gov.za/assets/documents/2022/P03014_Census_2022_Statistical_Release.pdf)

<sup>30</sup> *Migration Data in the Southern African Development Community*, MIGRATION DATA PORTAL (May 31, 2023), <https://www.migrationdataportal.org/regional-data-overview/southern-africa#:~:text=An%20estimated%202.9%20million%20migrants,of%20education%20and%20better%20opportunities>.

<sup>31</sup> Khangelani Moyo, *South Africa Reckons with Its Status as a Top Immigration Destination, Apartheid History, and Economic Challenges*, MIGRATION POLICY INSTITUTE (Nov. 18, 2021), <https://www.migrationpolicy.org/article/south-africa-immigration-destination-history>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *How SA Could Benefit from an Informal-Economy Policy-Focused Approach*, UNIV. PRETORIA (Dec. 12, 2022), [https://www.up.ac.za/news/post\\_3121255-how-sa-could-benefit-from-an-informal-economy-policy-focused-approach#:~:text=South%20Africa's%20informal%20economy%20is,the%20informal%20sector%20is%20shrinking](https://www.up.ac.za/news/post_3121255-how-sa-could-benefit-from-an-informal-economy-policy-focused-approach#:~:text=South%20Africa's%20informal%20economy%20is,the%20informal%20sector%20is%20shrinking).

<sup>37</sup> David Littlewood, Felix Donkor, Joyce Mnesi Mdiniso & Sherwat Elwan Ibrahim, *Circular Economy and the Puzzle of Formalization: Insights from Circular Waste Picking in South Africa*, FUTUREEARTH (Sept. 2, 2022), [https://futureearth.org/2022/09/02/circular-economy-formalization-waste-picking-south-africa/#:~:text=Informal%20waste%20pickers%20\('reclaimers',overall%20recycling%20rate%5Bii%5D](https://futureearth.org/2022/09/02/circular-economy-formalization-waste-picking-south-africa/#:~:text=Informal%20waste%20pickers%20('reclaimers',overall%20recycling%20rate%5Bii%5D).

<sup>38</sup> *Id.*



nearly 100,000 people, while also diverting waste from landfills and benefiting the environment.<sup>39</sup>

17. While the South African Constitution recognizes social and economic rights, including the right to work,<sup>40</sup> informal economy workers frequently working in public spaces are subject to by-laws and regulations that are written in a manner that is difficult to understand. These laws are critically important, and ignorance of these provisions can result in confiscation of goods, removal from premises or even prosecution.<sup>41</sup> Additionally, informal jobs are disproportionately taken up by women, resulting in women tending to also have lower incomes and less access to resources granted to employees within the formal economy.<sup>42</sup> Women often bear the burden of domestic work, reproductive and caretaking roles. These responsibilities often complicate any formal daytime work for such women. Furthermore, gender income gaps are more prevalent in informal economy work, which creates a reinforcing effect on the gender pay gap with more women occupying the informal economy than men.<sup>43</sup> Furthermore, the State's dependence on informal waste collection has created a vast sector of the economy that falls outside of regulations that could protect workers' physical health and economic interests. Therefore, under South Africa's Convention obligations, the State should seek to recognize and legislate in a manner that accounts for informal economic activity, such as domestic work and informal waste collection. Only through addressing such economic activity will South Africa be able to ensure such workers have just and favourable conditions of work, equal pay for equal work and the freedom to choose their employment without fear of unjust criminalization of such activity through by-laws and local regulations.

### **Informal Work: Exclusion from Labour Law Protection**

Article 5(e)(ii): the right to form and join trade unions

18. Since most workers in the informal economy are not employees and fall outside the South African labour legislation, such as the Labour Relations Act 66 of 1995<sup>44</sup> and the Basic Conditions of Employment Act 75 of 1997,<sup>45</sup> these workers do not enjoy the rights to freedom of association, to collective bargaining or to strike, which have allowed workers in other sectors to make significant gains.<sup>46</sup> Although some informal economy workers have formed associations, they are limited because frequently do not have the resources necessary to effectively unionize, and too often their work lacks a centralized authority where advocacy could be directed.<sup>47</sup> Yet, Article 5(e)(ii) of the Convention provides "*the right to form and join trade unions.*" With respect to this, the right to organize and to collective bargaining has been interpreted by the ILO Committee on Freedom of Association to extend to workers in the informal economy.<sup>48</sup>

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* s23.

<sup>41</sup> eThekweni Municipality's Nuisances and Behavior in Public Places By-Laws of 2015; Beaches By-Law 2015, [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S2077-49072020000100015](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072020000100015).

<sup>42</sup> *Identifying Barriers to Formalization: A Snapshot of Key Challenges in South Africa's Informal Economy*, ILO (April 2021), [https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-pretoria/documents/publication/wcms\\_836484.pdf](https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-pretoria/documents/publication/wcms_836484.pdf).

<sup>43</sup> *Id.*

<sup>44</sup> The Labour Relations Act 66 of 1995, <https://www.gov.za/documents/labour-relations-act>

<sup>45</sup> Basic Conditions of Employment Act 75 of 1997, [https://www.gov.za/sites/default/files/gcis\\_document/201409/a75-97.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a75-97.pdf)

<sup>46</sup> Kruger & Tshoose, *The Impact of the Labour Relations Act on Minority Trade Unions: A South African Perspective*, [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812013000400008#:~:text=The%20LRA%20remedied%20an%20important,and%20principles%20governin g%20collective%20bargaining.&text=One%20of%20the%20most%20significant%20changes%20in%20the%20new%20LRA,provided%20for%20legislated%20organisational%20rights](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812013000400008#:~:text=The%20LRA%20remedied%20an%20important,and%20principles%20governin g%20collective%20bargaining.&text=One%20of%20the%20most%20significant%20changes%20in%20the%20new%20LRA,provided%20for%20legislated%20organisational%20rights).

<sup>47</sup> Tanya Goldman, *Working Paper No.60: Series on Representation and Organization Building – Organizing in South Africa's Informal Economy*, ILO, [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---ifp\\_seed/documents/publication/wcms\\_117671.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/publication/wcms_117671.pdf).

<sup>48</sup> *ILO Recommendation concerning the transition from the informal to the formal economy*, 2015 (No.204), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_377774.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_377774.pdf).

## **RECOMMENDATIONS**

### **Non-Citizens' Rights**

19. Enact legislation that permits trained attorneys who are non-citizen/non-permanent residents to be admitted into the South African legal profession. Remove unequal practices and policies that discriminate against non-citizens and deny or undermine their ability to work in their chosen profession. Promote and advance the rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration;
20. Acknowledge that, based on the demographics of South Africa's migration trends, discrimination based on national origin and citizenship status carries a quality of xenophobia and racial discrimination and should be recognized as unconstitutional and a violation of South Africa's obligations under the Convention;
21. Halt the termination of the ZEP programme and institute a pathway toward permanent residency for the 178,000 Zimbabweans who have lived and worked in South Africa for over a decade under the ZEP programme; and
22. Extend the ruling that found denying access to public healthcare for non-citizen mothers, lactating mothers and children under the age of six is unconstitutional so as to ensure that denial of access to public healthcare to any individual in South Africa is unconstitutional.

### **Informal Economy**

23. Formalize the informal economy by ensuring that informal economy workers are catered for under labour, occupational health and safety, social protection and non-discrimination laws;
24. Ensure that by-laws and regulations comply with the right to work and the right to non-discrimination in the South African Constitution and under the Convention;
25. Ensure that informal economy workers enjoy the right to collective bargaining and the right to form and join trade unions, in order for them to establish effective collective structures to protect their interests; and
26. Continue to domesticate the ILO Recommendation 204 to facilitate the transitioning of the informal economy.