

UBUNTU, THE CONSTITUTION AND THE RIGHTS OF NON-CITIZENS

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Introduction

A recent report by the United Nations Development Programme (UNDP) estimates that nearly 1 billion people worldwide are migrants.¹ Of these, 214 million are international migrants.² South Africa, the leading economy in Sub-Saharan Africa and known for its political stability, attracts a larger proportion of foreign migrants than the global average.³ Currently, the UNDP estimates that there are nearly 1, 5 million foreign migrants in our country.⁴ Although there are increasing numbers of people in search of asylum, the majority of foreign migrants are looking for employment.⁵ Most foreign migrants entering South Africa are from the SADC countries, in particular Mozambique, Lesotho and Zimbabwe.⁶ The economic instability in neighboring Zimbabwe has led to an increase of numbers of migrants from this country in recent years.⁷

The Constitutional framework within which immigration legislation and policy functions,

* I acknowledge with thanks the research assistance of my law clerks at the Constitutional Court, Ms Lorette Arendse and Ms Olivia Rumble.

¹ Business Day, 6 October 2009, 2.

² As above.

³ International Federation for Human Rights Report (2008) "Surplus People? Undocumented and other vulnerable migrants in South Africa", 8.

⁴ Note 1 above.

⁵ Note 3 above, 8.

⁶ As above.

⁷ As above.

allows for the respect, promotion and fulfillment of the rights in the Bill of Rights for all those who live within our borders.⁸ Of course, certain rights in the Bill of Rights, as in most jurisdictions are reserved for citizens. The remainder of the rights, subject to the limitation clause in section 36 of the Constitution, may be enjoyed by citizens and foreign nationals alike – in particular the socio-economic rights, to which “everyone” is entitled to. The notion that a society can respect and entrench in its basic law, and actually enforce particularly the socio-economic rights of foreign nationals may be viewed as a reflection of a commitment to a spirit of generosity characterizing the society. In the context of the ideals of ubuntu, a notion translatable as encompassed by the spirit and purport of our Constitution-it is envisaged that our societal generosity would prevail when interpreting and fulfilling the applicable rights in the Bill of Rights.

The Constitution

But to what extent, does the Constitution protect foreign nationals living in the country?

The Constitution expressly reserves for citizens the rights in sections 19, 20, 21(3), 21(4) and 22, which are primarily of a civil and political nature and respectively relate to the right to form political parties, the right to vote, the right to free and fair elections, the right to stand for public office, the right to enter, remain and reside anywhere in South Africa, the right to a passport and the right of citizens to choose their trade, occupation or profession freely.

The other rights are formulated as providing protection for “everyone” and “every child.” Important for the purposes of this address are the rights in sections 9, 10 and 12, relating

⁸ See section 7(2) of the Constitution.

respectively to the rights to equality, dignity and freedom and security of the person. Also important are the socio-economic rights in sections 25, 26, 27, 28 and 29. Respectively, these relate to access to land, housing, health care, food and social security and education. Needless to say, the Constitution is anchored on the basic constitutional values, in particular equality, human dignity and freedom-coinciding with the key values of ubuntu, as I will show in due course. The Constitution thus clearly sets the tone for our commitment to the equal protection, respect and fulfillment of the rights of foreign nationals in the country – and the Courts have indeed in their interpretation of the relevant rights, set out the content of these rights and how they impact on foreign nationals. I point out those decisions in a moment. Before I do so, I briefly highlight our international commitment to fulfilling the rights of foreign nationals in South Africa.

International Law

Several international law treaties provide protection for fundamental human rights and more specifically, protect the rights of citizens abroad. Many of these treaties have now become part of South African domestic law. The Constitution gives recognition to international law in our domestic law as an interpretive tool. It requires courts to consider international law when interpreting the rights in the Bill of Rights.⁹ Under section 233, Courts are enjoined to prefer a legislative interpretation which accords with international law. When invoking international law as an interpretative tool for our domestic law, the Constitution embraces a broad approach by including both binding and non-binding sources of international law.¹⁰ The status of international law in the South

⁹ Section 39 (1) (b) of the Constitution.

¹⁰ See *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at 413-4.

African legal order has thus gained prominence with the advent of the Constitution. Thus, the Convention Relating to the Status of Refugees of 1951 read with its Protocol of 1967, which we have signed and ratified¹¹, have crystallized several rules of customary international law relating to refugees, and have now become part of South African domestic law, a demonstration of our commitment to the rights of foreign nationals within our borders. This commitment is bolstered by our ratification of a body of other pertinent international treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. At regional level, South Africa has ratified the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child.¹² These international treaties aim to commit member states to the protection of human rights and would require that foreign nationals be accorded equal protection by their host countries.

Domestic Laws

In regulating and managing international immigration, South Africa has passed a number of laws. Most significant for now, is the Immigration Amendment Act of 2004 and the Refugees Act of 1998¹³. Whereas the Aliens Control Act of 1991 had focused primarily on combating illegal immigration, its successor, the Immigration Act, “opens up the

¹¹ See www.ohchr.org.

¹² As above.

¹³ As amended by the Refugees Amendment Act of 2008.

channels” for foreign nationals to become residents in South Africa.¹⁴ The Immigration Act therefore makes provision for the protection of migrants’ rights. Specifically, it aims to “[promote] a human rights based culture of enforcement” and the “[performance] of immigration control within the highest applicable standards of human rights protection.”¹⁵ To achieve this human rights culture, the Immigration Act requires the “[education] of civil society on the rights of foreigners and refugees.”¹⁶

Under the Refugees Act, the obligation to provide equal protection to refugees extends to asylum seekers.¹⁷

But how have the Courts interpreted our obligations towards foreign nationals in South Africa, based on the Bill of Rights, the values in the Constitution and the relevant legislation? Courts have indeed started to create a jurisprudence of equal protection for foreign nationals.

¹⁴ Note 3 above, 18.

¹⁵ See section 1(l) and (n) of the Immigration Amendment Act.

¹⁶ See section 1(p) of the Immigration Amendment Act.

¹⁷ See sections 21 and 22 of the Refugees Amendment Act.

A refugee is a person who is outside the country of her nationality or, in the case of a person having no nationality, is outside any state in which she or he last habitually resided and is unable or unwilling to return to, and is unable or unwilling to avail himself of the protection of that country, because of persecution or a well-founded fear of persecution on account of race, gender, tribe, religion, nationality, membership of a particular social group or political opinion. Similarly a person qualifies as a refugee if her or his life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order. (Section 3 of the Refugees Act as amended.)

An asylum seeker is a person seeking recognition as a refugee in South Africa. In order to achieve this status, an asylum seeker must make application to a Refugee Reception Officer. The Status Determination Officer will then determine whether the application merits the granting of refugee status. Until this determination is made the asylum seeker will be issued with an asylum seeker permit allowing the asylum seeker to sojourn in South Africa temporarily. Until recently asylum seekers were unable to work or study under such a permit, unlike other foreigners who possess a study or work permit. However, this has recently changed as a result of a ruling in the Supreme Court of Appeal which held that such a prohibition unlawfully infringed the dignity of asylum seekers. (See sections 21 and 22 of the Refugees Act of 1998. See also *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA.))

Ubuntu

Although the Courts have yet to expressly evoke ‘ubuntu’ as a value in interpreting the law relating to foreign nationals and their rights, it nonetheless, if appropriately interpreted, has the potential to instill a value based approach to our law which will enrich and hopefully foster the creation of a caring society, which is accountable, compassionate, putting people first in service delivery.¹⁸

Ubuntu, recognized as a philosophical or even spiritual basis for a world view, has increasingly been invoked by our courts to galvanise the reasoning for the application of rights and obligations when interpreting the Constitution.

Viewed as a sufficiently broad concept, ubuntu has been invoked to encompass

¹⁸ See *S v Makwanyane and Another* note 10 above at paras 223-5; 263 and 307. See especially para 308 where ubuntu is defined as including the fundamental values of respect, human dignity and conformity with basic norms, with an emphasis on conciliation as opposed to confrontation. These are values fundamental in an open democratic society like ours based on equality, human dignity and freedom. See also *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at paras 68-9 and in particular paras 113-21. See also *City of Johannesburg v Rand Properties (Pty) Limited and Others* [2006] 2 All SA 240 (W) at para 62-3 where the court stated:

“In South Africa the culture of *ubuntu* is the capacity to express compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community. *Ubuntu* speaks to our inter-connectedness, our common humanity and the responsibility to each that flows from our connection. This in turn must be interpreted to mean that in the establishment of our constitutional values we must not allow urbanisation and the accumulation of wealth and material possessions to rob us of our warmth, hospitality and genuine interests in each other as human beings. *Ubuntu* is a culture which places some emphasis on the commonality and on the interdependence of the members of the community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community, that such a person may be apart of. In South Africa, *ubuntu* must become a notion with particular resonance in the building of our constitutional democracy.”

humanness, respect for humanity, moral virtue, interconnectedness, compassion, group solidarity and group-centred individualism, prioritising the interests of the most vulnerable, among other aspects of the idea.¹⁹

Some critics see it merely as a marketing device, designed to place an African primatur on a set of civil liberties and freedoms, forged largely out of western instruments.²⁰ Constitutional litigation is about conflict, they say.²¹ Thus, a constitutional jurisprudence based on conciliatory values is bound to fail. And you cannot call upon the value system of the majority to set aside the will of the majority. As Rosalind English observes:

“Constitutional adjudication is about conflict, not harmony, and if ubuntu is to be a useful addition to constitutional discourse, we have to get rid of this idea that it is in some way a balm for the conflict at the heart of society.”²²

However, the Constitution is not about conflict, but about harmony. Sachs J, in *Port Elizabeth Municipality v Various Occupiers*²³ discusses the importance of resolving disputes through mediation:

Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off,

¹⁹ YM Mokgoro “Ubuntu and the law in South Africa” (1998) *Buffalo Human Rights Law Review* 3.

²⁰ R English “Ubuntu: The quest for an indigenous jurisprudence” (1996) 12 *SAJHR* 641 648.

²¹ As above, 648.

promotes respect for human dignity and underlines the fact that we all live in a shared society.²⁴

The idea of ubuntu as a world view, encompassing the values which derive from respect and value placed on the basic humanity of a human being would elude if the desire is to pin it down to a single, well-defined concept. Because it translates into communal practices based on interconnectivity, and does not view individual well-being outside of the communal well - being, its contemporary utility becomes particularly difficult. However, its breadth and all-encompassing nature breeds flexibility - and therein lies its value, in my view.

Important to comprehend about the nature of our Constitution, is that it is transformative, where the primary objective, as basis for our democracy, is the transformation of society, so as to

“Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights and in which government is based on the will of the people and every citizen is equally protected by law.”²⁵

The protection of rights in the Bill of Rights and their fulfillment under section 7(2) of the Constitution is thus an important aspect of the constitutional project, placing an obligation on all three arms of government to play their constitutionally assigned role. Each fulfills that role in pursuit of the common ideals of the Constitution: the legislature

²² As above.

²³ 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).

²⁴ As above, para 42.

creating legislation to be implemented by the executive. Failure on their part is viewed as shortcomings in the fulfillment of the constitutional project. Litigants will therefore approach Courts **only** at the instance of non-fulfillment. Courts, therefore, do not act *mero motu*, they do not by themselves initiate adjudication of questions on legislative or executive shortcomings. They exercise their adjudicative power at the instance of litigants.

And the adjudicative powers of the Courts are derived from the Constitution, which is the basic law of the very democracy, based on the will of the people. In other words, when Courts set aside legislative enactments or executive action, they do so on the basis that the legislation or executive action does not pursue the set constitutional project. The Courts thus fulfill a mandate assigned to them by the Constitution pursuing a common goal they share with the other arms of government.

Courts thus have an obligation to adjudicate over legislative and executive constitutional shortcomings, in a manner that places the constitutional project back on track. Constitutional adjudication, in my view, is therefore about restoring the balance in the constitutional project, harmonising the relationship between the legislature and the individual or group, or the executive and the individual and group - in pursuit of the shared constitutional project.²⁶

²⁵ See preamble of the Constitution.

²⁶ See section 8(1) of the Constitution.

Case law

Courts have increasingly interpreted the rights in the Bill of Rights as applying equally to foreign nationals.

In *Larbi-Odam and Others v MEC for Education (North-West Province) and Another*²⁷, Regulation 2(2) of the Regulations dealing with the terms and conditions of employment of educators provided that, subject to certain exceptions, only South African citizens may be appointed to permanent teaching posts in state schools. The Court declared the Regulation invalid on grounds that it was inconsistent with the equality provision of the Interim Constitution. Thus, denying permanent residents job security, the Court held, when they are permitted to live and work in South Africa indefinitely and to apply in due course for citizenship was unfair discrimination. The Court was of the view that in the context of citizenship, a personal attribute which is difficult to change, foreign nationals are a particularly vulnerable group, prone to discrimination because, among other reasons, they are a minority with little political muscle.

In *Minister of Home Affairs v Watchenuka*²⁸, Nugent JA, writing for the Supreme Court of Appeal, noted that “human dignity has no nationality. It is inherent in all people, citizens and non-citizens alike, simply because they are human being. And while that person happens to be in this country, for whatever reason, [their human dignity] must be respected, and is protected, by section 10 of the Bill of Rights.”

²⁷ 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC).

²⁸ 2004 (4) SA 326 (SCA); 2004 (2) BCLR 12 (SCA).

In *Khosa and Others v Minister of Social Development and Others*²⁹, certain provisions of the Social Assistance Act disqualified a group of non-citizens who had residence status from receiving certain welfare benefits. A unanimous Constitutional Court held that the Constitution vests the right of access to social security in "everyone" and that permanent residents are bearers of this right. Also holding, that the exclusion of permanent residents from the social assistance scheme is discriminatory and unfair, the Court decided that the right to equality had been infringed.

Van Reenen J from the Cape High Court, in *Kiliko and Others v Minister of Home Affairs and others*³⁰ affirmed that the obligation imposed by section 7(2) means that: [t]he state...is obliged to respect the basic human rights of any foreigner who has entered its territory, and any such person is under the South African Constitution, entitled to all fundamental rights entrenched in the Bill of Rights, save those expressly limited to South African citizens.”

In *The Union of Refugee Women and Others v The Director of the Private Security Industry Regulatory Authority and Others*³¹, the Constitutional Court had to decide on the constitutionality of section 23(1) (a) of the Private Security Industry Regulation Act which lists citizenship or permanent residence as a requirement for the registration of security service providers with the Private Security Industry Regulatory Authority. In a dissenting judgment, the minority held that section 23(1) (a) discriminates unfairly on the basis of refugee status. They emphasised the vulnerable status of refugee groups in South

²⁹ 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

³⁰ 2006 (4) SA 114 (C).

Africa and the need to ensure that legislation does not promote xenophobia. They also pointed to South Africa's international law obligations under the 1951 Geneva Convention which require signatory states to accord refugees the most favourable treatment accorded to foreign nationals in the same circumstances in respect of wage-earning employment.

Most recently, the Constitutional Court, in *Koyabe v Minister of Home Affairs*³², disagreed with the state's contention that foreign nationals are not entitled to reasons for a decision declaring them illegal foreigners under section 8(1) of the Immigration Amendment Act. The Court held that a decision under section 8(1) has an adverse impact on foreign nationals, it stigmatises them and may become a basis for denial of entry into other countries. Thus, the Court declared that foreign nationals are indeed entitled to reasons in terms of section 5 of PAJA and section 33 of the Constitution, and that contending otherwise, is contrary to the spirit of our Constitution. In this regard, the Court emphasised that our constitutional democracy requires public service officials to ensure that the public administration is governed by the values enshrined in our Constitution. In particular, the principles of batho pele and ubuntu enjoin the public service to treat people with respect and dignity.

Violation of human rights of non-citizens

Following the violent attacks on foreign nationals last year, former president Thabo Mbeki decried the “age old spirit of ubuntu that enjoins every member of the community

³¹ 2007 (4) BCLR 339 (CC).

³² [2009] ZACC 23, Case No CCT 53/08, 25 August 2009, as yet unreported.

to act in solidarity with those in dire circumstances.”³³

The Constitution and legislation give protection to the rights of foreign nationals and the courts have interpreted these rights responsively. Thus, the law at all levels protects foreign nationals against human rights violations. There is a need to filter this consciousness through to society, in general. As a country which has a great level of importance in today's global economy, we must create a culture of knowledge, appreciation and respect for our national and international obligations towards foreign nationals. And we must take communities with us. Section 1 of the Immigration Amendment Act requires that we create a culture of human rights in government and civil society as part of the management of immigration. That duty falls largely on the Department of Home Affairs as the department administering the relevant legislation. However, interdepartmentally, co-ordinated efforts, together with co-operation from civil society including community-based organisations, would enhance government's efforts. State organs such as the Human Rights Commission and the Gender Commission will remain important actors. They have a constitutional mandate to create a human rights culture in society.³⁴ It may be essential to target not only society in general, but particularly the public service in the Department of Home Affairs who administer the Immigration and Refugees legislation, and the police who enforce aspects of the legislation. Indeed, the creation of a human rights culture is crucial in the light of reported violations against foreign nationals.

³³ The Star, 12 June 2008.

The International Federation for Human Rights reports that “police control and harassment is a common experience among foreign migrants.”³⁵ In January of this year, police raided the Johannesburg Central Methodist Church, using pepper spray and batons against 1200 sleeping foreign nationals, including women and children seeking shelter.³⁶ Notwithstanding the motivation for the raid, the police have been criticised, and correctly so, for adopting law enforcement methods reminiscent of Apartheid style policing.³⁷

The Lindela Repatriation Centre -where foreign nationals arrested on immigration charges are detained- have been condemned by human rights organisations for its inhumane treatment of foreign nationals.³⁸ Detainees complain of physical abuse at the hands of wardens and the deprivation of access to legal counsel.³⁹

Human Rights Watch reports that foreign nationals are frequently subjected to procedural obstacles and administrative delays when seeking status as refugees and are forced to stand in long queues and in filthy conditions.⁴⁰ Clearly, the principles and values of batho pele and ubuntu require re-invigoration.

Our country is still staggering from the recent violent attacks which had been described

³⁴ See section 181 of the Constitution.

³⁵ Note 3 above, 5.

³⁶ <http://www.mg.co.za/article/2008-02-01-church-leaders-outraged-at-police-raid>. [accessed on 11 October 2009].

³⁷ As above.

³⁸ Note 3 above, 5.

³⁹ As above, 5-14.

⁴⁰ Human Rights Watch World Report (2009) 115-19.

by former President Thabo Mbeki as an “absolute disgrace.”⁴¹ As stated earlier, South Africa, as a leading regional economy, attracts a larger proportion of foreign migrants than the global average.⁴² It is estimated that there is 1.5 million foreign migrants in South Africa.⁴³ Thus, whether we like it or not, South Africa, like a magnet, attracts people from all over the world. Cities, such as Johannesburg, which receive the influx of immigrants, are experiencing a growing demand for public resources.⁴⁴ As Nathi Mthethwa, the director of the inner city region observed, the city has limited resources and “the supply is not matching demand, because of immigration trends.”⁴⁵ He expresses the concern that the “situation will get worse, because more people are coming to Johannesburg as a matter of economic survival.”⁴⁶ It is in this context that it is important to pursue the purposes of the Immigration Amendment Act closely and efficiently. In particular the objective requiring the Department of Home Affairs to educate civil society about our obligations towards foreign nationals living in the country.

Narrow perceptions of the important role of foreign migrants and the plight of asylum seekers unfortunately still abound within our society, typically characterised by a fear that they threaten the security of jobs, housing and social services for South African nationals. This need not be so. The "Roll Back Xenophobia" campaign has demonstrated that these perceptions can be altered.⁴⁷ The massive work done by non-

⁴¹ The Star, 12 June 2008.

⁴² Business Day, 6 October 2009.

⁴³ As above.

⁴⁴ As above.

⁴⁵ As above.

⁴⁶ As above.

⁴⁷ The campaign is a partnership between the South African Human Rights Commission, the National Consortium on Refugee Affairs and the United Nations High Commissioner for Refugees.

governmental organisations, including dedicated church and community based groups, as well as the lobbying, advocating and services providing achieved a degree of success at the time and should be encouraged.

Conclusion

To achieve a sustainable culture of respect for human rights, however, the respect must be mutual. Programmes should not only address the integration of foreign nationals within local communities, and foster respect for foreign nationals within government departments. There is equal need to highlight to refugees and asylum seekers, their obligations towards their host country and the people. Indeed, as the cases mentioned earlier, have emphasised, there is an aching need within the Department of Home Affairs to foster a culture of mutual respect for human dignity, interconnectivity and mutual tolerance.

Thank you.

