

Benign Neglect or Active Destruction? A Critical Analysis of Refugee and Informal Sector Policy and Practice in South Africa

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Abstract

To fully comprehend the disabling policy environment in which refugees in South Africa attempt to carve out a livelihood, it is important to analyse two largely independent but overlapping streams of policy-making. This paper first examines the post-apartheid refugee protection regime and traces how and why a generous right-based approach has been progressively comprised by growing restrictionism, exclusion and bureaucratic ineptitude. The 2017 Refugees Amendment Act and White Paper on International Migration represent the culmination of this process. While both are probably unimplementable and will be the subject of numerous court challenges, they can be seen as a major retreat and an increasing failure to protect. The second part of the paper traces the history of national and municipal informal sector governance since the early 1990s. Since so many refugees are forced or choose to work informally, the uncertainty and confusion this history has produced is of particular relevance. Refugee entrepreneurs have regularly been the victims of general and targeted informal sector eradication campaigns. Therefore, there is a fundamental contradiction between a refugee protection policy that demands self-reliance from refugees and informal sector policies that undermine self-reliance at every turn.

Keywords Refugee protection, Refugees Act, detention centres, informal sector, Home Affairs.

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Introduction

The past decade has seen South Africa's apparently generous asylum and refugee system flounder, characterised by ever-growing wait times for status decisions, increased barriers for application and renewal of permits, and growing disregard for refugee law and court orders (Amit, 2011, 2012, 2015; Johnson, 2015; Polzer Ngwato, 2013). The South African Government has increasingly taken the position that the country's post-apartheid refugee protection legislation is far too generous and needs to be revised in the direction of more restrictions and fewer rights. This has resulted in major changes to the seminal 1998 Refugees Act in the form of the 2017 Refugees Amendment Act, and the promise of a new approach to migration and refugee protection in the Green Paper and White Papers on International Migration in South Africa. These developments seek to align South Africa with the more exclusionary and restrictive treatment of asylum-seekers and refugees in many other countries (Fiddian-Qasmiyeh et al., 2014).

In the absence of material support from the government or the United Nations High Commission for Refugees (UNHCR), one of the primary livelihood strategies of asylum-seekers and refugees has been to create work for themselves in the informal sector. The policy environment in which refugee entrepreneurs run informal businesses on the streets and in residential areas is framed by policy and legislation at national, provincial and local levels. Those working in the informal sector face an ambiguous policy environment that has occasionally supported but largely ignored – and at times actively destroyed – informal sector livelihoods and those of migrant and refugee businesses in particular.

To fully understand the disabling policy environment within which migrants and refugees establish and operate their enterprises in the South African informal sector, we need to bring together these two streams of analysis. Therefore, this paper begins with a discussion of South Africa's changing refugee policies and practices and traces the erosion of the protective and progressive refugee policy approach that characterised the immediate post-apartheid period (Handmaker et al., 2011). In the context of the refugee

livelihoods which are central to the country's local integration approach, it is vital to have effective and efficient recognition of refugee status and an accompanying basket of rights to support survival through employment or entrepreneurship (Jacobsen, 2005). The paper then reviews post-apartheid informal sector policy and practice. While the informal sector largely fell through policy gaps in the first ten years of democracy, the analysis suggests that increasing attention has been paid to this issue in recent years. While there have been longstanding tensions between foreign and South African informal sector operators, from 2012 an overtly anti-foreign migrant sentiment has been expressed in official policy and practice.

The paper underlines the need for both a rights-based asylum system and more progressive policy towards the informal sector. Refugee entrepreneurs and service providers agree that obtaining refugee status is key to enabling refugee entrepreneurship and sustainable livelihoods. Despite the obstacles put in their way, refugee business owners appear to be succeeding, at least on par with their South African counterparts. This suggests that secure status and the associated basket of rights are serving refugee entrepreneurs in the context of sustainable livelihoods. While these arguments should mark a road map to successful local integration, the South African Government continues to pile on administrative and logistical barriers to the asylum process and prospective refugees. These measures add to the ambiguity around migration management in the country and complicate the prospects for refugees to provide for themselves in a safe and sustainable manner.

The paper is based on a review of media and official government sources, published and grey literature, and extended interviews with key informants in Cape Town, Limpopo and Gauteng during 2015. A total of 30 in-depth interviews were conducted including with sector researchers, refugee and diaspora associations, refugee rights NGOs, law enforcement, the City of Cape Town and Western Cape Governments and international organisations (such as the IOM and UNHCR). Interviews were also conducted with national government departments including Home Affairs, Labour and Small Business Development.

Refugee Policy and Practice

South Africa is a signatory to the 1951 United Nations Convention on the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Since the end of apartheid, it has built a reputation as a protective and progressive refugee receiving country. South Africa's 1998 Refugees Act integrated international refugee protections into domestic law and exceeded international standards in important respects. The Act made generous allowances for freedom of movement, access to health and education services, some social protection and the right to work. Most notably, the Act embraced local integration over encampment, which was a progressive choice in Africa at the time (Handmaker, 2001). Underpinning the Act was a political and ideological approach which posited that refugees were permitted and fully expected to temporarily integrate into the host country and benefit from all attendant protections and rights granted to citizens by the Constitution. Refugees who had been in the country for five years and were still unable to return were entitled to apply for permanent residence. In return for these progressive policies, both government and the UNHCR incurred minimal costs in providing material support for asylum-seekers and refugees in the country.

In the years since these somewhat idealistic beginnings, South Africa has seen a distinct deterioration in the rights-based approach to refugee protection (Amit, 2011, 2015; Handmaker et al., 2011; Igglesden & Schreier, 2011; Landau, 2006). International praise for South Africa's liberal approach has been eroded by chronic processing delays, poor and ill-informed adjudication and the corruption and mismanagement which has become endemic to the asylum process. South Africa has one of the longest asylum adjudication periods in the world, in some cases it lasts many years. After 2007, economic free fall in Zimbabwe imposed significant pressure on the asylum system as migrants from Zimbabwe moved in significant numbers to South Africa (Crush & Tevera, 2010; Crush et al., 2015). Arguably, South Africa's failure to anticipate and account for the entry of Zimbabweans *en masse* created a situation whereby the asylum system became contorted into something of a 'catch all' for generalised migration into South Africa. It is worth noting,

however, that part of the reason for the dramatic increase in asylum-seeking from Zimbabwe was the establishment of a Refugee Reception Office in Musina, close to Zimbabwe, specifically to speed up the issue of asylum-seeker permits.

Those close to the process argue that the demand for a place in South Africa's asylum queue, with its attendant right to work, rendered the system ineffectual at conducting legitimate asylum adjudication. In government discourse, this has translated into a strident denunciation of "bogus" claimants and "abuse of the system" by economic migrants (Mabuza, 2016). The official position is that 90% of asylum-seekers are economic migrants, a figure apparently based on the rate of acceptance of refugee claims (DHA, 2016: 29). However, this conclusion is a non-sequitur, given the well-documented delays in adjudication, the arbitrariness of many decisions, and the practice of adjudicating claims by country or origin and not the personal experiences of the individual claimant (Amit, 2012).

The reasons for this shift from rights and protections towards exclusion and control are seen by some as the inevitable consequence of life in a country where the majority still struggle to meet basic needs and there is competition for scarce public resources such as education, health care and shelter, as well as employment and other livelihood opportunities (Hassim et al., 2008). In this zero sum game, every advantage that a refugee or asylum-seeker enjoys necessarily disadvantages a South African. However, Gordon (2016) shows that South Africans do not oppose refugee protection for reasons of economic self-interest. Rather, their opposition, and that of many policy-makers, is further evidence of the deeply xenophobic character of South African society, with its attendant failure to acknowledge the positive economic, social and cultural contribution that refugees and asylum-seekers make to the country (Crush et al., 2015). As Gordon (2016: 1) argues, "public animosity towards refugees in South Africa has motivated anti-immigrant riots, violence, and prejudice which has negatively impacted on refugee protection." Landau and Duponchel (2011: 19) further suggest that "a protection strategy dedicated to maximizing refugees' freedom and integration may prove politically untenable in an era of pronounced anti-immigrant hostilities."

Government argues that the breakdown of the asylum system in South Africa, and the need for a new approach, is because it has been overwhelmed by economic migrants. For a while, it argued that there were a million unprocessed asylum-seekers in the country, a figure that was uncritically reproduced by the UNHCR and the media. The fact that the system itself was badly under-resourced, staffed by small numbers of poorly-trained officers and riddled with corruption was less-often acknowledged. The Green Paper now admits that this figure was erroneous and that in mid-2015, South Africa had only 78,339 active asylum-seekers (Section 22 permit holders) and had issued 119,600 refugee (Section 24) permits since 2002 of which only 96,971 were still active. Having previously claimed that the country was one of the largest refugee destinations in the world, this admission represented a considerable climb-down by the Department of Home Affairs (DHA) (Stupart, 2016). Therefore, rather than being motivated by a need to address an overrun system, the recent developments are better interpreted as a response to the desire of South Africans to make the country an undesirable destination for asylum-seekers by narrowing refugee rights and imposing additional limitations on the ability of refugees to find safety and security in South Africa.

Within government, four inter-connected strategies have been developed to achieve these ends. All are embodied in recent administrative decisions including the 2016 Refugees Amendment Act (which passed Parliament in March 2017 and currently awaits Cabinet approval before becoming law) and the Green Paper and White Papers on International Migration in South Africa (DHA, 2017). The first strategy has been to move away from an integration towards an encampment model of protection. The DHA has now publicly declared its intention of establishing what it calls Asylum-Seeker Processing centres away from the country's urban areas (which is widely and correctly seen by critics as a euphemism for encampment) (DHA, 2016). Plans have apparently been drawn up for the location and physical infrastructure of detention centres close to the Zimbabwe and Mozambique borders (Mah & Rivers, 2016) and, according to one source, construction has begun on a detention centre at Lebombo. The White Paper notes that these detention

centres will accommodate all asylum-seekers during their status determination process (DHA, 2016: 65).

Following from the proposal that asylum-seekers should be kept in secure facilities while their claims are adjudicated, freedom of movement and integration into local communities (as at present) would be halted. So-called “low risk” asylum-seekers might be released into the care of national or international organisations and family or community members. However, asylum-seekers would not have the automatic right to work or study “since their basic needs will be catered for in the processing centres” (DHA, 2016: 68). To try and pre-empt the inevitable, and justifiable, criticism towards South Africa’s introduction of a policy of encampment, the Green Paper awkwardly asserts that “these centres should not be considered as contrary to the policy of non-encampment but as centres for mitigating security risks posed by irregular migration. Only refugees and not asylum seekers will be allowed to integrate into communities” (DHA, 2016: 66). The protestation that this somehow represents a continuation of the country’s non-encampment policy is disingenuous in the extreme. Under this policy, asylum-seekers will be sequestered in detention centres for the duration of the adjudication process, which is unrealistically envisioned to be a 60 to 90 day process. Whether that process takes place within the proposed period or not, during that time asylum-seekers will be fully dependent on government or the UNHCR for food, shelter, health care, education and other basic needs.

Refugee service providers overwhelmingly agree that this is a no-win situation: if services to refugees are better than services available to South Africans, South Africans will cry foul and poor South Africans may even present as refugees in order to access direly needed services. On the other hand, if services in the detention centres are worse, South Africa will suffer the criticism of the international community for failing in its duty to respect the rights of refugees within its borders. The cost of constructing and maintaining camps for large numbers of asylum-seekers will be massive and the UNHCR has indicated that it will not underwrite detention costs despite appeals from the South African Government (which has previously constrained the UNHCR from offering material assistance to asylum-seekers.) If South Africa faced an

influx of asylum-seekers in the future akin to the over 200,000 Zimbabweans between 2006 and 2009, it is hard to see how these centres would even begin to cope.

The second major strategy is to steadily put in place procedural, administrative and logistical hurdles that complicate refugees' already tenuous status and sustainability in the belief that this will act as a disincentive to asylum-seekers coming to the country and make life extremely difficult for them if they do come. The most obvious example is the DHA cutting the number of Refugee Reception Offices in the country in half, closing busy offices at Crown Mines (Johannesburg), Cape Town and Port Elizabeth Refugee Reception Offices (RRO). Only three RRO's remained open: in Musina, Durban and Pretoria. The closure was "not merely a technical, operational decision, but one which impacts on the basic principles of the asylum system, namely access (for initial applications, renewals, status determination interviews and appeals) and administrative efficiency and fairness" (Polzer Ngwato, 2013). Legal challenges have produced contradictory outcomes. The Supreme Court of Appeal (SCA) ordered the re-opening of the Port Elizabeth RRO, a judgment which the Department has been very slow to implement. In contrast, the Cape Town High Court decided that the Cape Town RRO could remain closed. The 2016 Refugees Amendment Act gives the Director General of Home Affairs the power to "dis-establish" any RRO and to force a whole category of asylum-seeker (defined in terms of country of origin or "a particular gender, religion, nationality, political opinion or social group") to report at a designated RRO.

Second, and partly as a result, the administrative requirement that asylum-seekers should renew their permits every one to six months at one of the RROs (rather than an ordinary Home Affairs Office) imposes considerable financial and other hardship. The period granted on renewal appears to be entirely arbitrary and, according to some refugees, depends on how much they are willing to pay under the table. Individuals and families who have found safety, shelter, kin, communities, work or school in other parts of the country are forced to travel to one of the RROs to ensure that they remain in status. Furthermore, wait-times for receiving or renewing a permit can be

considerable. The scene outside the Marabastad (Pretoria) RRO was described by one organisation as follows:

They go to Home Affairs to Marabastad to get their asylum permit. So they come to Pretoria, there are queues and queues, never-ending queues. And then each country has a day. So now you have come to the Home Affairs office and it's not your turn, your turn only comes after 4 days. And then you are told that if you have ZAR 2,000, these officials walk around and if you have money, you give them the money and go to the front of the queue. If you don't have money, then you are right at the back. And then you have to come back the following week on the day of your country.

In a situation where asylum-seekers are almost exclusively self-supporting, without the assistance of government or the international community, they sacrifice valuable time and money, risk jeopardising employment, and travel with or leave small children behind when they do so. Under the 2016 Act, failure to renew an asylum-seeker permit within one month of expiry now leads to automatic revocation of status, forfeiture of the right to renewal and treatment as an "illegal foreigner" under the Immigration Act (that is, arrest and deportation). Asylum-seekers whose claims are refused are also to be treated as "illegal foreigners." An asylum-seeker with an expired permit is also guilty of an offence and liable to a fine and imprisonment of up to five years or both. Any individual or group of asylum-seekers or refugees can now be arrested and deported on the vaguely-worded grounds of "national interest, national interest or public order." These provisions would seem draconian even if the system was efficient and transparent, a description that certainly does not apply here.

The third strategy is to undercut court judgements that have affirmed the right of asylum-seekers and refugees to employment and self-employment, the essence of the post-apartheid model of refugee integration. The 2016 Act explicitly seeks to overturn a judgment that permitted asylum-seekers to work in South Africa while awaiting adjudication of their claim. Prior to the future holding of asylum-seekers in detention centres (as envisaged by the Green Paper), the onus will now be on "family and friends" to support the asylum-seeker for their first four months in the country. If such support is not

available, the UNHCR and NGOs are permitted to provide “shelter and basic necessities.” In both situations, the asylum-seeker is prohibited from working, while government assumes no responsibility for their care and protection. The Standing Committee on Refugee Affairs is also now empowered to unilaterally decide under what conditions asylum-seekers may work or study. If they are permitted to do so, they are required to provide a letter from the employer or institution within fourteen days from the date of employment or enrolment. The employer or institution can be fined ZAR 20,000 if they fail to provide the documentation in the prescribed period. The right to work can also be revoked by the Director General. The Act says nothing about the right to access informal work or self-employment, a key component of earlier court judgments.

The fourth strategy which will directly affect those with refugee status is to try and ensure that protection is ever only temporary by making it extremely difficult for refugees to progress to permanent residence and eventual citizenship. The 1998 Act stated that refugees were entitled to apply for permanent residence after five years of continuous residence in South Africa and refugees “of good and sound character” could be issued with permanent residence permits irrespective of the length of sojourn in the country. This is clearly one reason why the maximum length of a refugee permit was set at four years. It is unclear how many long-term refugees have tried to access or been granted permanent residence. DHA (2016: 29) notes that there were 1,175 applications between mid-2014 and early 2016, but does not say how many were successful.

In 2013, the DHA stripped all refugees from Angola of their refugee status irrespective of length of residence and then issued them with two-year non-renewable temporary residence permits (called Angolan Cessation Permits or ACPs) (Carciotto, 2016). In 2016, after extensive negotiations with the DHA, it was agreed that former Angolan refugees could apply for permanent residence. The Western Cape High Court then issued an order by which all former Angolan refugees with expired ACPs could apply for permanent residence. In February 2017, the Scalabrini Centre of Cape Town submitted 1,757 applications on behalf of Angolan refugees to the DHA. The successful

court action not only prevents the summary deportation of former Angolan refugees but potentially provides an important precedent for future cases of cessation. However, the 2016 Act gives the Minister of Home Affairs new powers to issue an order which ceases recognition of an individual refugee or group of refugees or to revoke refugee status, without the obligation to provide any justification for such an action. The right of a refugee to apply for permanent residence has also been extended from five to ten years.

A final policy issue of relevance to this paper is asylum-seeker and refugee access to financial services. As other papers in this special issue show, refugee entrepreneurs have very limited access to start-up capital and other loans from formal banking institutions. Prior to 2010, the Financial Intelligence Centre Act (FICA) also prohibited refugees and asylum-seekers from opening bank accounts in South Africa. That policy was later eased but among FICA's anti-money laundering provisions is a requirement for banks to verify the identity of persons wishing to open a bank account. Banks are given wide discretion as to how they implement the requirements, with the result that many refuse to open bank accounts for refugees and asylum-seekers based on the fear that they will not be able to correctly validate refugee identity documents. In response to legal action, the DHA and FICA reached an agreement for the former to provide banks with means to verify the authenticity of refugee and asylum permits issued by the DHA.

In practice, opening a bank account remains a challenge for refugees and asylum-seekers, with banks remaining distrustful of the various types of documentation issued by Home Affairs, viewing it as less formal or secure than a South African national identity card. At those institutions where it is possible for a refugee to open a bank account, there have been instances of refugees and asylum-seekers having their assets frozen when identity documents have not been renewed on time, when identity documents change, or when the DHA has failed to respond to verification enquiries in a timely manner. Service providers report that ongoing challenges around the banking sector present a very real risk to families struggling to meet basic survival needs. A frozen bank account raises grave protection concerns, threatening the ability to pay rent, buy food, care for children and even cover costs for long distance travel for the

purposes of renewing status documentation (Washinyira, 2012). The end result, noted by several interviewees, is that in the townships and informal settlements where many refugees own and operate their businesses, shops and homes offer a ready target for criminals who are well aware that cash is likely stored on the premises. This dynamic puts refugee families and livelihoods at risk not only of loss of profits and other assets, but also of violence and trauma when break-ins and robberies occur.

Informal Sector Policy and Practice

As noted in the introduction to the paper, due to the lack of formal job opportunities, international migrants have little choice but to work in the informal sector, suggesting that informal sector policy and practice shapes livelihood opportunities. This section critically analyses this policy arena in the post-apartheid period at national and provincial level and in the three largest metropolises.

The apartheid state was particularly averse to informal sector activities. Lund (1998: 6) reminds us that apartheid policies controlled where black South Africans could live, what they could own and, through job reservation policies, what work they could do. Black South Africans were forbidden by law from engaging in manufacturing businesses and access to business premises was strictly regulated to prevent them from operating businesses in 'white' areas (Manning & Mashigo, 1994). In the mid-1980s, influx control laws became increasingly unenforceable and were abolished in 1986. In 1987, the National White Paper on Privatisation and Deregulation introduced a more tolerant approach to black small business as part of a broader new economic philosophy informed by the Reagan-Thatcher era of deregulation. The change of attitude culminated in the Businesses Act 71 of 1991 (which repealed numerous restrictive laws and secured a more liberal approach to business licensing, premises and hours for both formal and informal businesses). This legislation was a key measure for removing barriers to the operation of informal activities and was, in effect, a complete reversal of the apartheid approach. This piece of legislation is still in place today.

Subsequent to the passing of the Act, informal-sector activities increased in all cities and towns. Local authorities, however, complained that they were unable to cope, particularly with trading in public spaces. This led in 1993 to the Businesses Amendment Act 186 of 1993 (RSA, 1993). The Act gave provinces the discretion to develop their own legislation and allowed local authorities to formulate street-trading bylaws, outline what was allowed and declare restricted and prohibited trade zones. Since then, local authorities across the country have promulgated such bylaws, evidently near mirror-images of each other. In all of the major metropolises, for example, the sanction in the case of violation was inappropriately criminalised – either a fine or imprisonment, suggesting a punitive approach to street-trader management.

At a national level, the 1995 White Paper on the Development and Promotion of Small Businesses was one of the first economic policy initiatives of the post-apartheid government. The White Paper and the legislation that stemmed from it – the National Small Business Act of 1996 – both acknowledge survivalist and micro-enterprises as components of small business, thus making them, on paper, beneficiaries of government support. However, both documents are silent on the specific needs of these smaller players, suggesting the role played by this group in the small business/informal sector was not seen as a critical issue. Neither refer to foreign migrants or refugees. To implement this new approach the Department of Trade and Industry (DTI) set up the Ntsika Enterprise Promotion Agency as a facilitation and promotion body for small businesses and Khula Finance to secure small-business access to financial services. They supported the establishment of a country-wide network of Local Business Development Centres (LBDCs) to provide non-financial support to SMMEs. In 2004, a comprehensive review of the impact of the post-apartheid government's small, medium and micro enterprise (SMME) programmes concluded that "existing government SMME programmes largely have been biased towards the groups of small and medium-sized enterprises and to a large extent have by-passed micro-enterprises and the informal economy" (Rogerson 2004: 765). Devey et al. (2003; 2008) evaluated the national-government skills-development system, concluding similarly that those working in the informal-sector had "fallen into the gap" between small businesses and the unemployed. These findings were echoed in Budlender et

al.'s (2004) informal sector budget analysis and confirmed by survey data conducted with informal sector operators in Johannesburg and Durban (Chandra & Rajaratnam, 2001; Skinner, 2005).

In 2003, President Mbeki publicly advocated for the idea of the 'second economy' in an address to the National Council of Provinces. Mbeki's (2003) second economy was characterised by "underdevelopment, contributes little to GDP, contains a large percentage of our population, incorporates the poorest of our rural and urban poor, is structurally disconnected from both the first and the global economy, and is incapable of self-generated growth and development." According to Mbeki (2003), Cabinet had resolved that the development of the second economy required "the infusion of capital and other resources by the democratic state to ensure the integration of this economy within the developed sector." This would be achieved in a number of ways, including the development of SMMEs and cooperatives, the expansion of micro-credit and skills development. Although the concept was not new, its application to South Africa was a watershed moment for national informal sector policy. For the first time since the end of apartheid, the informal sector was given a policy profile. The whole idea of the second economy elicited a flurry of criticism (Devey et al., 2006; du Toit and Neves, 2007). According to Devey et al. (2006: 242), second economy arguments were based on the premise that "the mainstream of the economy is working rather well, and government action is needed to enhance the linkages between the first and second economy and where appropriate to provide relief, such as public works programmes, to those locked into the informal economy."

While the critics pointed to the conceptual flaw of seeing the formal and informal as structurally disconnected, subsequent policy pronouncements suggested that the informal sector should be eradicated altogether. For example, the next major statement on economic policy imperatives, the Accelerated Shared Growth Initiative of South Africa (or ASGISA), called for the "elimination" of the second economy (RSA, 2006: 11). In 2008, the Presidency initiated the Second Economy Strategy Project which proposed the progressive incorporation of the second into the first economy (Philip, 2009; Philip & Hassen, 2008). The final strategic framework and headline strategies

were approved by Cabinet in January 2009 (after Mbeki's recall as President by the ANC). While the Community Works Programme (CWP) was implemented, the rest of these headline strategies were not translated into the activities at national, provincial and local government levels.

Since 2012, increasing attention has been paid to the informal sector at national level – although in somewhat haphazard and uncoordinated fashion. Different initiatives represent simultaneous neglect, support and suppression. The National Development Plan (NDP), for example, assigns a large role to small businesses in its employment scenarios and plans. The NDP's ideal scenario projects that 11 million jobs will be created by 2030, suggesting that 90% of these new jobs will be created by small and growing enterprises. Depending on the scenario, the plan projects that the informal sector (and domestic work) will create 1.2 million to 2.1 million jobs (NPC, 2012: 121). However, the NDP chapter on the economy says nothing about strategies for the informal sector as such, or how existing operators in the informal sector will be supported, or how barriers to entry will be addressed to help generate new jobs.

Meanwhile, also in 2012, the DTI established a new directorate for Informal Business and Chamber Support. Rogerson (2016a: 175) notes that this was an initial recognition by the department of the role of the informal sector in broadening economic participation. By November 2012, the directorate had established a reference group charged with developing a National Informal Business Development Strategic Framework. Under the guidance of the reference group, the DTI staff conducted consultations with stakeholders in the informal sector, formal business and local government officials over a few months, reporting back to the reference group in February 2013. This would lead to the launch of the National Informal Business Upliftment Strategy (NIBUS) in 2014.

In the same period, unbeknown to the Reference Group, another section of the DTI was working on new legislation to replace the Businesses Amendment Act of 1993. In March 2013, the DTI released the Draft Business Licensing Bill (DTI, 2013). The draft Bill's stated aim was "to provide for a simple and enabling framework for procedures for application of business licences by setting

norms and standards [providing] a framework for co-operative governance” (DTI, 2013: 5). The DTI Minister, Rob Davies, publicly claimed that the Bill was put in place to deal with illegal traders and semi-illegal practices in South Africa, citing illegal imports, sub-standard goods, counterfeit goods and drug and illegal liquor trading. In fact, such issues are already adequately dealt with through other laws like the Customs and Excise Act of 1964, the Foodstuffs, Cosmetics, and Disinfectants Act of 1972, the Counterfeit Goods Act of 1997, the Drug and Drug Trafficking Act of 1992 and a draft of provincial level legislation aimed at regulating (through the issuing of licences) informal liquor outlets or shebeens. The draft Bill specified that anyone involved in business activities – no matter how small – would need a licence. Foreign migrants would only be licensed if they had business permits (which, according to the 2002 Immigration Act, have to be applied for in the country of origin and are only granted if the applicant can demonstrate having ZAR 2.5 million to invest in South Africa). The Bill suggested wide ranging discretionary powers be given to both the licensing authority and inspectors, far greater than those granted by the 1993 Business Amendment Act. Section 5.1a of that Act mandates an upper limit on fines of ZAR 1,000 or imprisonment not exceeding three months. The draft Bill proposed no upper limits on the fines charged; those found guilty of contravening the Act could be imprisoned for up to ten years.

The Draft Bill elicited a flurry of criticism, with many organisations pointing out that the proposals were largely punitive and would result in large-scale criminalising of the informal sector. A submission from StreetNet International, on behalf of street trader organisations from all nine provinces, was particularly vociferous:

What the [1991] Businesses Act added to the new South Africa was a developmental approach [...] instead of the old abolitionist approach which characterised the Apartheid era. We believe that the repeal of the Businesses Act and replacement with this Bill [...] would take us back to the era of forced removals (Horn, 2013: 2).

Tensions between foreign and South African informal sector operators have characterised the informal sector since the mid-1990s (Peberdy & Rogerson, 2002). In trying to understand the motivation behind the draft bill, analysts pointed to an upsurge of anti-foreign sentiment not only in the informal sector itself but now from within government. Crush and Ramachandran (2015: 49) cite the following examples:

A senior official in the Department of Home Affairs [...] is reported to have informed South African MPs that “if you go to Alexandra, you go to Sunnyside, you go everywhere, spaza shops, hair salons, everything has been taken over by foreign nationals [...] they displace South Africans by making them not competitive.” At an official meeting, then National Police Commissioner Bheki Cele characterized immigrants and refugees as “people who jump borders,” were flooding into the country and destroying the livelihoods of South African informal traders. He continued: “our people have been economically displaced. All these spaza shops [in the townships] are not run by locals [...] One day our people will revolt, and we’ve appealed to the Department of Trade and Industry to do something about it.

The onerous conditions imposed on foreign migrants for accessing a licence contained in the Bill would mean that few migrant informal operators would qualify and would therefore be criminalised. Indeed, it has been argued that the Bill was introduced to regulate foreign migrants in the interests of their South African counterparts (Crush et al., 2015: 15-17). According to Rogerson (personal communication), by May 2013, DTI officials conceded the Bill was ‘too blunt’ and in need of re-drafting. At the time of writing (April 2017), no revised draft has been gazetted.

In part stemming from the work of the informal-business reference group, the DTI released the National Informal Business Upliftment Strategy (NIBUS) in early 2014 (Rogerson, 2016a). This is the first post-apartheid and nationally-coordinated policy approach to the informal sector. NIBUS has two key delivery arms – the Shared Economic Infrastructure Facility (SEIF) and the Informal Business Upliftment Facility (IBUF) – tackling infrastructure and skills deficits respectively. SEIF provides funding for new infrastructure and upgrading or maintaining existing infrastructure shared by informal

businesses. Up to ZAR 2-million financing is available to municipalities on a 50:50 cost-sharing grant basis. IBUF focuses on skills development, promotional material, product improvement, technology support, equipment and help with registration. Part of the IBUF pilot involved training 1,000 informal traders in a partnership with the Wholesale and Retail Sector Education and Training Authority.

This was the first time that the DTI had explicitly focused on the informal sector through a strategy to tackle two critical needs, infrastructure and skills development. The policy approach was also characterised by implicit and explicit anti-migrant sentiment. It identifies a supposed “foreign trader challenge” in the informal sector, noting that “there is evidence of violence and unhappiness of local communities with regard to the takeover of local business by foreign nationals” [our emphasis] (DTI, 2014: 10, 22). There are numerous suggestions to strengthen specifically South African informal sector businesses. The proposed solution to reduce the “xenophobia associated with foreign national traders” is to “influence the type of businesses that foreign nationals should run and the demarcated areas where these businesses should be active” (DTI, 2014: 57). NIBUS cites the precedent of the Ghana Investment Promotion Centre Act, which has reserved the sale of any goods in a market, petty trading and hawking, and the operation of metered taxis, car hire services, beauty salons and barber shops to nationals only, as well as India and Malaysia’s restrictions on foreign economic participation (DTI, 2014: 22-3). Much critical reference is made to the policies of the DHA with the DTI noting incorrectly there are “no regulatory restrictions in controlling the influx of foreigners” (DTI, 2014: 22). Rogerson (2016a: 184) concludes that “NIBUS is a pro-development approach for South African informal entrepreneurs which is allied to an anti-developmental agenda towards migrant entrepreneurs.”

Anti-foreign sentiment reinforces a generally punitive approach to the informal sector that focuses on regulation and control. The November 2015 report of the Ad Hoc Parliamentary Committee investigating the 2015 xenophobic attacks on migrants and refugees working in the informal sector, recommended the regulation of their township businesses. The report states, for example, that municipal governments should improve systems for

providing and monitoring business permits, noting a “tendency of issuing too many licenses” to businesses operating out of residential dwellings, many of which do not comply with municipal by-laws (Parliament of South Africa, 2015: 38-39). There are also reports that disarray around licensing creates a situation where refugee business owners are applying for licences they do not need and paying fines for violating licences they are not required to have. This punitive approach runs counter to good practice in management and support of the informal economy both in South Africa and globally (Chen, 2012). Ironically, increased regulation of township business would be destructive for South African and migrant informal operators alike. The focus on curtailing migrant entrepreneurship diverts attention from what Crush and Ramachandran (2015: 53) identify as “the real, urgent need to support and enhance opportunities for all small entrepreneurs.”

Provinces are also mandated to play a role in regulating and supporting the informal sector, but have been slow in addressing the issue. While the 1993 amendment to the Businesses Act empowered provinces to develop dedicated provincial business acts, to date no provinces have done that. For example, in KwaZulu-Natal (KZN) an informal economy policy process was initiated in 2003. This resulted, after an eight-year process – in the KZN Informal Economy Policy of 2011 – but it still has not been developed into a White Paper, the precursor to new legislation. Such foot dragging suggests that it is not a priority. In other provinces, reference is made to the informal sector in local economic development strategies (as in Limpopo) as well as township development strategies. The Western Cape promulgated its first dedicated Informal Sector Framework (Western Cape Province, 2014) and Gauteng recently released the Gauteng Informal Business Development Strategy (Gauteng Province, 2015). Both focus on aligning the relevant departments’ work with NIBUS. All of the documents echo the need for financial and non-financial support to informal businesses (especially through small-business development centres), supporting informal trading in townships, improved access to business-related infrastructure facilities and reviewing regulations and bylaws to support the informal business sector (Gauteng Province, 2015: 47-59). On paper, all of these recommendations seem to be uncontroversial and important steps forward.

However, a clear anti-foreign sentiment is also reflected at provincial level. The Gauteng strategy, for example, states:

The existing competition for trading permits among local and foreign nationals is evident. Unfortunately, there are no regulatory restrictions in controlling the influx of foreign nationals. The Departments of Trade and Industry and Home Affairs should assist the province in devising strategies and policies to control foreign business activities (Gauteng Province, 2015: 45).

Similar sentiments are expressed in the Western Cape document (Western Cape Province, 2014: 46). In KZN, the provincial government's thrust has been to form and fund the KZN Provincial Association of Traders, and fund traders' training academies in various districts. The purpose of this initiative, as outlined at its launch, is to "bring back our general dealer stores that used to be seen in our townships and villages" adding that these "stores [...] have been sold to foreign nationals" (News 24, 2015). Statements like this suggest that the provincial government aims to 'level the playing field,' favouring South Africans over migrant and refugee operators.

The provincial government in Limpopo Province has perhaps the most overtly hostile approach to migrants and refugees working in the informal sector. In 2012, it launched Operation Hardstick, an aggressive military-style campaign that targeted small informal businesses run by migrants and refugees. The Somali Association of South Africa supported by Lawyers for Human Rights contested the action in the Courts. Court documents show that despite being labelled a crime-fighting initiative, Operation Hardstick was selectively enforced, affecting only migrant entrepreneurs and not South African businesses in the same locations. Police shuttered over 600 businesses, detained owners, confiscated stock, imposed fines for trading without permits and verbally abused the owners. Affected business owners were informed that "foreigners" were not allowed to operate in South Africa, that their asylum-seeker and refugee permits did not entitle them to run a business and that they should leave the area. Thirty displaced migrants from Ethiopia were forced to

flee when the house they had taken refuge in was fire-bombed (Supreme Court, 2014).

The Court noted that police actions “tell a story of the most naked form of xenophobic discrimination and of the utter desperation experienced by the victims of that discrimination” (Supreme Court, 2014:6-7). The judgment observed that “one is left with the uneasy feeling that the stance adopted by the authorities in relation to the licensing of spaza shops and tuck-shops was in order to induce foreign nationals who were destitute to leave our shores” (Supreme Court, 2014:25). The Court ruled in favour the Somali Association and effectively established the right to self-employment for all asylum-seekers and refugees. Opposing the appeal were all three tiers of government – national, provincial and municipal – including the Limpopo Member of the Executive Council (MEC) for Safety, Security and Liaison; the Provincial Commissioner of Police; the National Police Commissioner; the Standing Committee on Refugee Affairs; the Ministers of Police, Labour and Home Affairs; and two municipalities.

At local government level, there is a preoccupation with the most visible element of the informal sector – street vendors – who operate in public spaces over which there are often competing interests. However, a scan of policy statements on street trading or the informal sector shows that, on paper, the positive contribution of the informal sector is often recognised. For example, in its street trading policy, the City of Johannesburg (2009: 3) states that “informal trading is a positive development in the micro business sector as it contributes to the creation of jobs and alleviation of poverty and has the potential to expand further the City’s economic base.” The City of Cape Town’s (2013: 8) policy advocates a “thriving informal trading sector that is valued and integrated into the economic life, urban landscape and social activities within the City of Cape Town.” The eThekweni Informal Economy Policy (2001:1) states that the “informal economy makes an important contribution to the economic and social life of Durban.”

Despite the positive rhetoric, city-level actions reveal an ambivalent, if not actively hostile, approach to street traders. Wafer (2011) provides details of the aggressive approach to street trading in Johannesburg over the post-

apartheid period. In late 2013, this culminated in a draconian action when the Johannesburg City Council violently removed and confiscated the inventory of about 6,000 inner-city street traders, many of them migrants (Zack, 2015; Rogerson, 2016a; Rogerson 2016b). A group of traders took the City to court and the Constitutional Court ruled in their favour. Acting Chief Justice Moseneke stated that Operation Clean Sweep was an act of “humiliation and degradation” and that the City’s attitude “may well border on the cynical” (Constitutional Court, 2014). Street traders have returned to the streets but in more limited numbers with the city declaring large inner-city areas to be restricted and prohibited trade zones.

An analysis of Cape Town’s approach to street traders indicates systematic exclusion in the inner-city, exemplified by the allocation of only 410 street-trading bays in the whole inner city (Bukasa, 2014). Township trading is characterised by long-term neglect. Zulu (2016) shows that in Khayelitsha, the city council had invested very little in infrastructure for street traders and had devolved the management of street trading to a small group of traders, with negative consequences for many. Crush et al. (2015: 15) argue that, although the policy environment in Cape Town varies across parts of the city and between segments of the informal economy, “the modernist vision of a ‘world-class city’ with its associated antipathy to informality dominates, and informal space and activity is pathologized.”

Foreign migrants face an additional set of challenges. In an interview for this study, the Cape Town Department of Economic Development claimed that “the City, in terms of its policy around trading, doesn’t differentiate and we don’t discriminate. There’s set criteria in terms of who qualifies (for a trading bay and permit) and how that person qualifies. We don’t look at what nationality the person is.” But, as the interviewed official admitted, the City is forced to discriminate in practice because refugees have to produce documentation that South Africans do not. In particular, the renewal of asylum and refugee permits is extremely unpredictable (in terms of wait times and length granted) and became much more difficult once the DHA declared that renewal had to be effected at the office of application, which could be thousands of kilometres away in Johannesburg or even Musina. One common way around this

challenge is for South Africans to obtain the permit and then rent the space to refugees at a profit.

Gastrow and Amit (2015) detail the regulation of Somali-owned spaza shops in Cape Town townships and show how mediation efforts led by the police and non-governmental organisations have culminated in agreements prohibiting the opening of new Somali shops in certain areas. They outline various formal regulatory attempts to control and curtail the operations of Somali businesses including fines, drafting new by-laws, issuing policy statements about foreign shops and proposing laws tightening the regulation of the spaza market (Gastrow & Amit 2015). They also note that both formal and informal measures skirt the law, are applied in a discriminatory manner and stifle free competition. The City thus appears to be protecting the interests of South African spaza shop owners over their foreign counterparts. With respect to the informal sector more generally, the modernist vision of the 'world-class city' with its associated antipathy towards informality and the pathologising of informal space and activity, predominates.

Durban was once hailed for its relatively liberal stance on the informal sector (Lund & Skinner, 2004; Dobson & Skinner, 2009). A progressive informal sector policy was unanimously accepted by the City Council in 2001 and remains official policy today. The Council's actions reflect a more ambivalent approach, however. For example, a Council-approved shopping mall development at the inner-city Warwick Junction transport node threatened 6,000 traders operating there, and was only halted by a legal challenge (Skinner, 2010). In 2013, traders in both the inner city and outlying areas identified harassment by the police as their key business challenge (Dube et al., 2013). In 2015, traders won a legal case challenging the constitutionality of confiscating their goods, forcing the city to redraft the street trader by-laws. Again, court action proved to be the only way to secure relief.

Conclusion

Distinct from many other refugee receiving countries, South Africa's rights-based refugee legislation has historically allowed for refugees and asylum-seekers to access a broad array of rights from health services to education and employment. South Africa has never hosted a dedicated refugee camp or

detention centre. In this environment, refugees and asylum-seekers have independently found their way into South Africa's social and economic fabric, sending their children to South African schools, finding employment in South African businesses and households and establishing their own formal and informal businesses. The 2017 Amendment Act and White Paper are clear evidence of a new and less generous policy direction which is intended to shrink asylum space and further constrain the rights and protections afforded to refugees and asylum-seekers.

Cumulatively, the changes documented in this paper illustrate a significant shift in South Africa's long held policy for the local integration of refugee populations. By removing the right to work and confining asylum-seekers to detention centres, it is assumed that the practice of asylum-seeking by economic migrants will cease. This, of course, completely ignores evidence of the positive economic contribution of refugees and asylum-seekers who, under existing law, are permitted to pursue economic livelihoods. The ongoing move away from a rights-based approach to refugee protection is seen most clearly in the 2017 Refugees Amendment Act and the proposals in the 2017 White Paper on International Migration.

International trends which increasingly stress the positive development impacts of refugee populations are being completely ignored (UNHCR, 2014; World Bank, 2016). Rather, the emphasis is on the 'exceptionalism' of forced migrants and the need to craft a coercive, non-developmental approach to dealing with refugees. This represents a profound shift in the country's approach to refugee rights, protections and associated international obligations, moving away from an integration approach towards a containment approach. While the new approach may appear to be a local response to intemperate local demands, it is part of a more global trend which seeks to inhibit access to the physical territory and refugee protection systems of those countries by erecting physical, economic and social barriers (Mountz, 2013; Mountz et al., 2013). If the proposed South African refugee policy is ever operationalised in the face of the inevitable court and constitutional challenges, it may deter non-refugee migrants from further afield, but it is unlikely to act as a deterrent to economic migrants from neighbouring

countries. They will simply find other ways to come, live and work in South Africa, a fact which seems to be acknowledged in the White Paper's proposals to make SADC-specific work, traders' and micro-enterprise permits available to migrants.

While there may be a belief that detention centres will reduce the flow of genuine asylum-seekers to South Africa, there remains a whole set of unanswered questions about whether there will be new policies that directly affect those who have refugee status. Here the White Paper is almost silent, although it does assert that under the existing system refugees are allowed to apply for permanent residence "even though their status is inherently temporary." The Amendment Act extends the period of qualification to 10 years while the White Paper recommends abolishing this right altogether. There is no indication of whether those with refugee status will be denied the right to work, to self-employment, to freedom of movement and to access health and educational services. On the other hand, they will not be given any additional resources and will be expected to pursue their own livelihoods, as at present.

To understand the challenges and obstacles that refugees face in securing these livelihoods, it is important to examine the policy and regulatory environment within which those in the informal sector try to survive. Refugees and asylum-seekers confront a formidable set of challenges in operating their informal enterprises in South African cities (Crush et al., 2015). At best tolerated, and at worst hounded out of communities by xenophobic mobs and violent entrepreneurship, South Africa is certainly not a safe haven for those fleeing violence and persecution at home. However, as this paper argues, xenophobic violence and police inaction are certainly not the only difficulties they face. South African city managers oscillate between benign neglect and active destruction of the vibrant and economically-productive informal sector. Migrants and refugees who operate informal enterprises have been the main targets in a series of national, provincial and local-level "operations" designed to inhibit or eradicate their businesses from urban space. Thus, there is a fundamental contradiction between a refugee protection policy that demands

self-reliance from refugees and informal sector policies that undermine self-reliance at every turn.

A comparison of the 2015 Draft Refugees Amendment Bill and the final 2016 Act suggests that the petitions and representations of human rights groups and refugee and migrant associations had little or no impact in softening the legislation, so litigation in the courts is the most likely way to roll back these draconian provisions. The courts have clearly played an increasingly important role in securing the livelihoods of informal sector operators in general, and migrant entrepreneurs in particular, in post-apartheid South Africa. Litigation has been one of the key sources of support to migrant entrepreneurs, highlighting the core contradiction between the rights enshrined in the South African Constitution and South Africa's relatively progressive refugee protection regime, on the one hand, and the policies and actions of key government departments and officials, on the other. Protecting unalienable rights relies on a cohort of legal human rights non-governmental organisations prioritising migrant livelihood rights and being willing and able to pursue time-consuming and costly litigation on their behalf.

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