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DEPARTMENT OF EMPLOYMENT AND LABOUR

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WHITE PAPER ON NATIONAL LABOUR MIGRATION POLICY FOR SOUTH AFRICA, MAY 2025

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WHITE PAPER ON NATIONAL LABOUR MIGRATION POLICY FOR SOUTH AFRICA, MAY 2025

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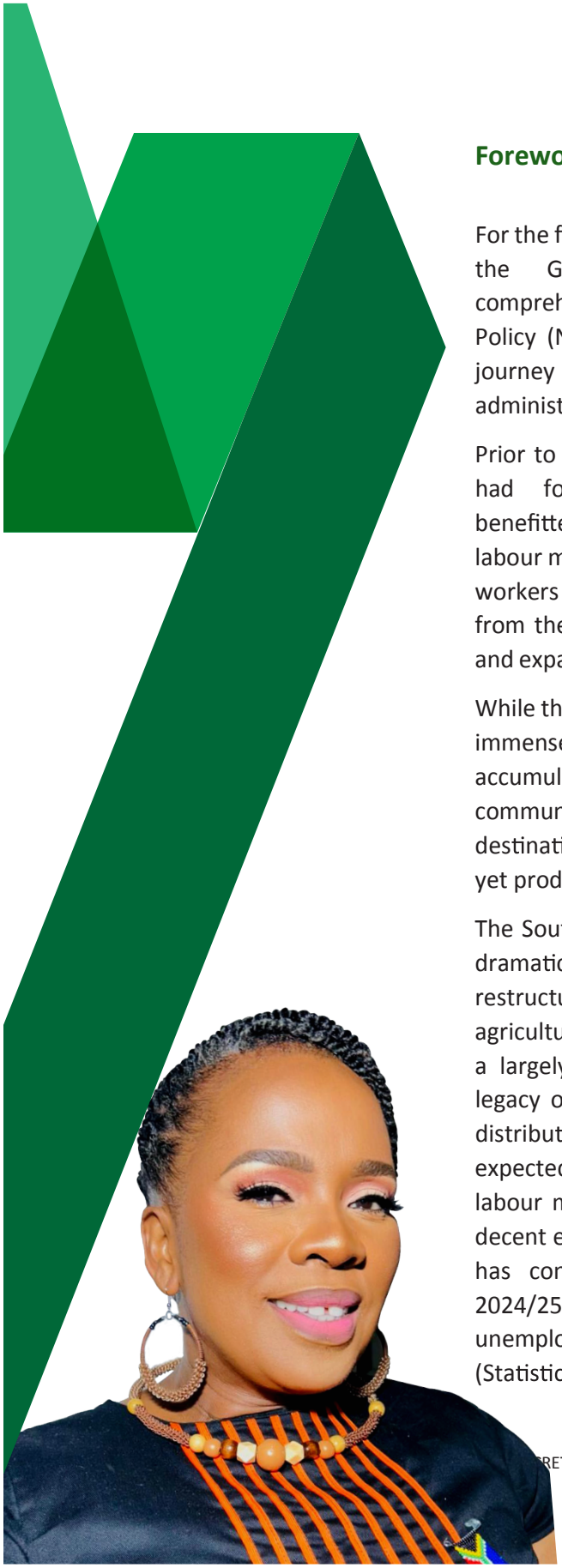
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List of acronyms

ASGISA	Accelerated and Shared Growth Initiative for South Africa
AU	African Union
BCEA	Basic Conditions of Employment Act
BLA	Bilateral Labour Agreement
COIDA	Compensation for Occupational Injuries and Diseases Act
DEL	Department of Employment and Labour
DHA	Department of Home Affairs
DHET	Department of Higher Education and Training
DIRCO	Department of International Relations and Cooperation
DoH	Department of Health
DSD	Department of Social Development
Dti	Department of Trade and Industry
EPWP	Expanded Public Works Programme
ESA	Employment Services Act
ESB	Employment Services Board
FASSET	Finance and Accounting Services Sector Education and Training Authority
FET	Further Education and Training
GCM	Global Compact for Safe, Orderly and Regular Migration
HE	Higher Education
HRDCSA	Human Resource Development Council of South Africa
HRDS	Human Resources Development Strategy
IAB	Immigration Advisory Board
ICBLM	International Cross-Border Labour Migration Directorate (NDEL)
IES	Inspection and Enforcement Services (NDEL)
ILO	International Labour Organization
IMCM	Inter-Ministerial Committee on Migration
IOM	International Organization for Migration
IPAP	Industrial Policy Action Plan
JIPSA	Joint Initiative on Priority Skills Acquisition
KAI	Key Area of Intervention
LFS	Labour Force Survey
LRA	Labour Relations Act
LSP	Lesotho Special Permit

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MTSF	Medium-Term Strategic Framework
NDP	National Development Plan
NEDLAC	National Economic Development and Labour Council
NSDS	National Skills Development Strategy
OSBP	One-Stop Border Post
PEA	Private Employments Agencies
PES	Public Employment Services
QLFS	Quarterly Labour Force Survey
ROSA	Registration of South Africans Abroad
SADC	Southern African Development Community
SADSAWU	South African Domestic Service and Allied Workers Union
SAPS	South African Police service
SARS	South African Revenue Services
SASQAF	South African Statistical Quality Assessment Framework
SASSA	South African Social Security Agency
SETA	Sectoral Education and Training Authority
TEBA	The Employment Bureau of Africa
TVET	Technical and Vocational Education and Training
UIF	Unemployment Insurance Fund
UN	United Nations
UNDESA	United Nations' Department of Economic and Social Affairs
UNHCR	United Nations High Commissioner for Refugees
WHO	World Health Organization
ZSP	Zimbabwe Special Permit



Foreword by the Minister of Labour

For the first time in the history of South Africa, the Government has formulated a comprehensive National Labour Migration Policy (NLMP). The NLMP is a product of a journey that commenced during the 5th administration during 2017.

Prior to 1994, the South African government had for decades institutionalized and benefitted from a well organised foreign labour migrant worker's system that recruited workers the rural areas in South Africa and from the rest of Southern Africa to establish and expand its agricultural and mining sectors.

While the 'migrant labour system' contributed immensely to unprecedented levels of capital accumulation, its socio-economic impact on communities of origin, communities of destination and migrants themselves has not yet produced its potential benefits.

The South African economy started changing dramatically in the 1990s with major restructuring in its mining sector, a decrease in agriculture and rapid growth of services. With a largely young population and apartheid's legacy of discriminatory education and skills distribution, combined with a slower than expected growth rate, the South African labour market was unable to create enough decent employment for its citizens. This trend has continued till the fourth quarter of 2024/25 as we face record-high 31,9% rate of unemployment, particularly among the youth (Statistics South Africa, 2025).

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The dependency of neighbouring countries on migrant workers' remittances created by decades of sending workers to South Africa, has also continued well beyond the recent changes in the South African labour market. South Africa still plays the role of a relative place of opportunity for many in the region affected by climate changes, instability, poverty and inequality in their labour markets.

While the South African Government has regularly adapted its policies to new challenges, the previous reform of its immigration policy occurred in the mid-1990s through a long process which resulted in the adoption of the Immigration Act of 2002. In 2017, the White Paper on International Immigration was adopted, effectively indicating a new policy approach aligned with current realities. The White Paper is currently being reviewed, while other policies are also in the process of development, notably the National Employment Policy.

In the meantime, new dynamics emerged. Like most industrialised countries, South Africa has been in constant need of external expertise and skills to supplement areas in demand nationally whereas a substantive share of its highly skilled professionals in the health, engineering and artisan sectors opted to seek employment abroad. Since the down of our democracy in 19194, a vast number of mostly low-skilled, increasingly female migrants from the Southern African Development Community (SADC) both regular and irregular, refugees from a range of countries in the region and new immigrants from Asia have been attracted by real and perceived opportunities thus diversifying the traditional range of migrant workers settling and employed in the country. In response to the increasing number of economic migrants, different government departments introduced various policies with limited attention paid to the guidance provided by international and regional standards and frameworks.

Historically, Labour migration has been managed as a documentation and permitting issue, as well as in a reactive rather than proactive manner, responding to the private sector's labour needs and labour supply strategies. This has resulted in measures which have been criticised as having sometimes little traction on the country's national development objectives. In addition, social dialogue on labour migration issues has been very limited: social partners have hardly ever been associated to migration policy

The Department of Employment and Labour (DEL) has for long played a central, albeit discreet in the management of labour migration to South Africa. As the custodian of South Africa's labour legislation, DEL played a major role in the work visa vetting system based on a labour market test, in close collaboration

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with the Department of Home Affairs (DHA). Our labour inspection has sought to penalise and discourage exploitative and discriminatory employment situations. The scope of protection under its various labour institutions has been extended to all workers, regardless of their migratory status.

It became increasingly clear over the past few years that South Africa was in need of innovative, radical policy transformation in the area of labour migration in order to meet the needs and expectations of its citizenry as well as those of its partners in the region. The year 2018 marked the adoption of a Global Compact for Safe, Orderly and Regular Migration, an initiative of the United Nations (UN) to which South Africa contributed substantively. In 2018, the African Union (AU) adopted its (revised) Migration Policy Framework for Africa (MPFA) and its Plan of Action (2018-2030), building on the initial 2006 MPFA. In 2015, the AU Heads of State validated the Joint Labour Migration Programme. In 2018 the AU also adopted a Free Movement Protocol and a Continental Free Trade Agreement. Both these instruments are of considerable importance for labour migration in South Africa. At the level of the SADC, an Action Plan and a Policy Framework on Labour Migration were adopted in 2014, which both call on SADC Member States to adopt national labour migration policies by 2019. This deadline was missed as on five (5) member states including South Africa, were still in the process of developing their policies. The latest iteration of the SADC Labour Migration Action Plan (2020-2025) provides a welcome guiding framework for the development of labour migration policy approaches in South Africa.

In close collaboration with the DHA, whose initiative to embark on policy reform with the Green Paper developed in (2016) and the White Paper on International Migration for South Africa (2017), the DEL is proud to present its own original white paper contribution to transforming the manner in which labour migration to and from South Africa is defined and managed to serve the country's development goals.

The National Labour Migration Policy (NLMP) white paper has been conceived as a rights-based, gender-sensitive development-oriented policy instrument which will supplement the country's international migration policy. While the latter addresses overarching and organisational migration issues of a wider scope than labour migration, the NLMP will strictly focus on labour migration. The development of a distinct policy on labour migration is a first in the history of our country and it was made possible thanks to a broad, inclusive and

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comprehensive process spanning over four years and allowing for consultation. Since the publication of the green paper on the 28 February 2022 of **a total of 668 written public submissions were received as at the 31 May 2022. The nine province conducted 31 public hearings and face to face and virtual sessions were held with the Tertiary Institutions and other bodies**.

The NLMP is essentially evidence-based and takes into consideration labour market needs. I also proud to highlight the tripartite plus character of the process and take this opportunity to thank social partners and other key international, regional and national stakeholders for their particularly active and supportive contribution throughout.

The final product speaks to national policy priorities as identified in the National Development Plan and New Growth Path, it responded to the targets defined in the Sixth administration's Medium-Term Strategic Framework and It is also aligned to the Seventh administration's Medium Term Development Plan 2025-2029. The NLMP is also aligned to the National Human Resources Development Strategy. My hope is to witness a time when migrating to or from South Africa in search of employment will be seen and lived as a positive and secure experience for migrant workers, an experience that will benefit equally our economy and society, as well as those of their countries and communities of origin.

I want to thank my predecessors, Minister Oliphant, Minister Thulas Nxesi, Professor Marius Olivier, the International Labour Organization (ILO), the Employment Services Board and the Branch Public Employment Services for their efforts and contribution.

This policy will serve as a guide to our legislation and regulations, our governance and administration systems, process guidelines, our blue print to negotiating new Bi-Lateral labour agreements etc. It is my hope that the successful implementation of this policy will achieve the much-desired development and improvement of South Africa's labour market image. It is in this regard that I commend this policy document to all South Africans, in particular social partners, to take advantage of this initiative for effectively managing labour migration and in so doing, achieving development for the benefit of the country.

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Nomakhosazana Meth (MP)

Minister of Employment and Labour

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Executive summary

Introduction

There are several reasons why it is necessary to adopt a Labour Migration Policy for South Africa. Firstly, this will fulfil South Africa's commitment, made at the level of the SADC ELS (Employment and Labour Sector), to develop and adopt labour migration policies by the end of 2019. Secondly, there is need to provide guidance to the Department of Employment and Labour, the Department of Home Affairs and other government departments on the desired policy framework applicable to labour migration impacting on South Africa. Thirdly, in a range of related areas (e.g., recruitment, data requirements, and labour migration to and from South Africa), policy frameworks are either insufficient or absent. An evidence-based and labour migration policy, which takes into consideration labour market needs, is required to deal with these concerns. Fourthly, there is need to inform an appropriate legislative framework (to accompany the Policy), serving as a mandate for State interventions. In the fifth and sixth instance, improved labour and social protection of migrant workers to and from South Africa requires clear policy direction, regulatory provision and operationalisation, while there is need to inform South Africa's responses to African Union and SADC regional instruments in the making and/or recently adopted. Finally, there is also need to inform the reconsideration of outdated bilateral labour agreements, which South Africa concluded many years ago with five southern African countries.

Labour migration, understood as international mobility for the purpose of employment, has been key to the making of South Africa’s economy and society for centuries, particularly in its mining and agricultural sectors. In 2015, from second place in 2000, South Africa had become the largest host for international migrants in Africa. This trend has increased till March 2025.

Most migrants to South Africa are in search of employment opportunities but there has been rapid diversification of labour migration flows to South Africa from mining and agriculture to services, hospitality, security, transport and other services.

In 2015-2016, the Department of Home Affairs (DHA) embarked on a broad consultative process which culminated with the adoption of the White Paper on International Migration for South Africa in 2017. However, there is to date no

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stand-alone labour migration policy. The current global, regional and sub-regional contexts are conducive to a shift in labour migration management to better harness the developmental potential of migration for regional and sub-regional growth, capitalising on migration's equalising possibilities.

In 2017, the Department of Employment and Labour (DEL) started rolling out its national labour migration policy (NLMP) development process. Given the current context, the drafting of a NLMP as an area for State intervention distinct from other dimensions of migration policy represents the most suitable policy option and one which marks the first attempt by a South African post-apartheid government to deal with labour migration consistently and comprehensively.

The NLMP has been designed to achieve the following:

- Document current challenges on the basis of evidence;
- Adopt guiding principles rooted in South Africa's core values and international commitments;
- Identify national strategic priorities at the intersection of national interests and guiding principles;
- Propose sustainable intervention methods and monitoring and implementation mechanisms.

Conclusions from the Labour Migration Assessment (LMA) (2017)

As an evidence-based policy development process, the NLMP was preceded by the drafting and validation of a Labour Migration Assessment conducted in 2017. The LMA focused on the following issues:

- Macroeconomic background, labour market and migration policies (Key macroeconomic indicators; Key labour market indicators; Migration policies since 1945)
- The governance of migration since 2002 (Division of labour between the DHA and the DEL; South African legislation and migrant workers; International, regional and bilateral obligations of South Africa; Green and White Papers on International Migration)
- Migration trends since 1994 (The state of administrative and statistical data on labour migration; Key indicators; Specific dynamics; Attitudes to migration in South Africa)

Its key conclusions and recommendations are presented in Section 2 and motivate orientations adopted in the NLMP.

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Guiding principles of the South African NLMP

Section 3 of the NLMP then offers a comprehensive albeit concise presentation of the various international and regional binding and non-binding treaties, conventions, protocols and frameworks South Africa is party to, the national legislation relevant to the regulation of labour migration, as well as the global, regional and national frameworks guiding the National Labour Migration Policy (NLMP). In addition, the NLMP is intended to serve gender-sensitive and gender-responsive, as well as overarching social justice considerations.

The NLMP has been designed to serve the overarching objectives of the National Development Plan and other key national policy frameworks.

NLMP thrust and vision

Section 4 unpacks the policy thrust and vision. The NLMP follows a rights-based approach to the protection of all workers employed in South Africa and the protection of South African workers abroad as defined in South Africa's international obligations, regional and SADC commitments, as well as obligations under its Constitution and national labour legislation which is guided by the principle of equality of treatment, in addition to other legal and policy frameworks.

The NLMP complements the management of human mobility across international borders defined in the DHA's White Paper on International Migration for South Africa (2017) by setting government's approach to migration for employment.

Its vision is to give rise to efficient and effective Government leadership and intervention, supported by social partners and all major stakeholders, allowing for safe, orderly and regular migration for employment of highly, semi- and low-skilled workers to and from South Africa, in pursuit of the country's national priorities.

Key areas of intervention (KAIs)

Section 5 of the NLMP seeks to address current policy gaps identified in the Labour Migration Assessment (LMA) (Section 2) and throughout the policy development process. It does so in four interrelated Key Areas of Intervention (KAI):

KAI 1. Labour migration governance and management

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KAI 2. Data for evidence-based policy monitoring and evaluation
KAI 3. Labour migration to South Africa
KAI 4. Labour migration from South Africa

KAI 1 proposes policy intervention in three specific clusters: Department of Employment and Labour structures and organisation; Inter-ministerial coordination of labour migration; Social dialogue and tripartism.

KAI 2 focuses on the coordination of labour migration data analysis for NLMP monitoring and evaluation. KAI 2 is about strengthening the collection, comparison, analysis and use of labour migration related data by a range of data users (government officials, social partners, civil society, the media) for the purposes of policy monitoring and evaluation.

KAI 3 focuses on all activities related to the management of labour migration to South Africa, including the recruitment, selection, placement, employment, visa issuance, access to benefits and return of migrant workers, whether low-, semi- or highly skilled, employed in the South African labour market and their protection.

KAI 4 focuses on interventions which aim to protect and, where necessary and strategic, assist South African workers in search of employment experience abroad, while abroad and upon return.

In section 6, final conclusions are drawn, also in relation to the way forward. It is indicated that the absence of a streamlined labour migration policy framework will perpetuate a number of undesirable realities, including a fragmented and inconsistent approach to labour migration; non-aligned institutional frameworks; irregular labour migration; non-acquisition and – retention of critical skills; insufficient regulatory frameworks, also in respect of recruitment; and the absence of a framework for supporting and channelling South Africans in the diaspora or wanting to work abroad. It is recommended that two measures in particular need to be taken – firstly, comprehensive consultations, also within government and with other stakeholders; and, secondly, draft legislation aimed at implementing the Policy should be developed, supported by an explanatory memorandum explaining the thrust and key provisions of the said legislation.

Annexes

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Section 7 provides five annexes:

1. High-level roll-out/implementation plan
2. Labour Migration Assessment for South Africa validated by the DEL in 2017;
3. List of references and policy documents;
4. Glossary; and
5. List of consulted stakeholders.

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SECTION 1. RATIONALE, BACKGROUND AND CONTEXT

1.1Rationale

There are several reasons why it is necessary to adopt a Labour Migration Policy for South Africa:

- Southern African countries have committed, at the level of the Southern African Development Community (SADC) ELS (Employment and Labour Sector), to develop and adopt labour migration policies by the end of 2019 – at the time of formulation of this policy, several SADC countries have already finalised/adopted their respective national labour migration policies (Lesotho, Namibia, Seychelles and Zimbabwe; Eswatini's policy is awaiting cabinet approval), while certain other SADC countries are in the process of developing theirs;
- There is need to provide guidance to the Department of Employment and Labour, the Department of Home Affairs and other government departments on the desired policy framework applicable to labour migration impacting on South Africa;
- Insufficient and absent policy frameworks in a range of related areas have to be addressed, e.g., in relation to recruitment, data requirements, and labour migration to and from South Africa – for this, an evidence-based labour migration policy, which takes into consideration labour market needs, is required;
- There is need to inform an appropriate legislative framework (to accompany the Policy), serving as a mandate for State interventions;
- Improved labour and social protection of migrant workers to and from South Africa requires clear policy direction, regulatory provision and operationalisation;
- There is need to inform South Africa's responses to African Union and SADC regional instruments in the making and/or recently adopted; and
- There is also need to inform the reconsideration of outdated bilateral labour agreements, which South Africa concluded many years ago with five southern African countries.

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1.2Introduction

1.2.1 Labour migration, understood as **international mobility for the purpose of employment**, has been **key to the making of South Africa's economy and society for centuries, particularly in its mining and agricultural sectors**. In 2015, from second place in 2000, South Africa had become the largest host for international migrants in Africa and was hosting 3.1 million of them, against 2.1 million for Côte-d'Ivoire and 1.2 million for Nigeria, and the fifth African recipient in percentage of the population with 6%, behind Gabon (16%), Libya (12%), Côte-d'Ivoire (10%) and Gambia (10%)[1] (UN DESA, 2016: 29). More recently, in 2022, a number of prominent South African migration data scholars issued a statement on (misconceptions about) the numbers of migrants in South Africa. These have been summarised in a contribution in a publication funded by the HSRC[2] and quoted as follows:

- Stats SA estimates net immigration to be 852,992 people between 2016 and 2021. In 2011 Stats SA estimated that the number of people in the country who were born outside South Africa stood at 2.2 million in Census 2011. The total population in South Africa at that time was about 52 million. More recently, Stats SA estimates that there were about 3.95 million foreign-born people living in the country at the mid-point of 2021. This is a relatively small percentage of the overall national population, which stood at around 60 million. The United Nations Population Division estimated that in 2015, there were about 3.2 million foreign-born people in the country (or 5.8% of the total population). In 2019, this estimate had climbed to 4.2 million or 7.2% of the nation's total population.
- It is therefore suggested that these statistics counter erroneous suggestions that there are tens of millions of undocumented migrants in South Africa. It is not possible for Stats SA to identify the number of undocumented migrants living in the country. However, demographic registration data clearly (and unequivocally) shows that claims about millions of undocumented migrants living in the country are false.
- The contribution also suggests that there is no evidence that international migrants are a major cause of unemployment in South Africa. Reference is made to an analysis of labour migration done by the World Bank in 2018,

[1] This is excluding smaller countries and islands: Djibouti, Mayotte, Reunion, Seychelles, St Helena.

[2] Gordon, S "Xenophobia is on the rise in South Africa: scholars weigh in on the migrant question" *The Conversation* (April 14, 2000) (accessible on https://theconversation.com/xenophobia-is-on-the-rise-in-south-africa-scholars-weigh-in-on-the-migrant-question-181288).

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showing that for every employed migrant in South Africa, two jobs were created for South Africans.

- Regarding participation of foreigners in the labour market, the contribution indicates that, whether looking at the population and housing Census of 2011 or the labour migration modules in the Quarterly Labour Force Survey (QLFS) of 2012 and 2017, foreign participation in the various sectors of the labour market is constant at a maximum of 10–12% per sector. Table 1 below shows participation by foreign-born people in selected sectors of the economy. The contribution suggests that there is no reason to suspect that this may have increased significantly since 2017.

Table 1: Percentage of International migrants in selected sectors of the economy

Sector	2012	2017
Restaurants, bars and canteens - Shebeen	8,5	10,6
Hotels, camping sites and other provision of short stay accommodation	7,2	7,2
Building of complete constructions or parts thereof; civil engineering	8,9	12,0
Growing of crops - Growing of crops combined with farming of animals (mixed farm	7,3	11,7

1.2.2 **Migrants in South Africa, as is the case with migrants worldwide, are vulnerable**. Their vulnerable status has often been acknowledged in South African jurisprudence and in migrant-focused literature. Challenges experienced by migrants may vary for the different migrant categories, but in essence include institutional and structural barriers, such as inadequate and timely access to needed documentation; insecure status given lengthy delays and administrative deficiencies; prejudice, exclusion and discrimination in accessing public health services, even though for most categories of migrants such access is legally provided for; inability to access public housing, or to obtain home loans from banks due to the temporary status of most migrant categories; institutional discrimination and exclusion experienced by certain migrant categories (especially refugees and asylum seekers) in accessing primary and secondary level public education in South Africa; and (increasing) restricted access to the South African labour market – all fuelled and informed by rising xenophobic perceptions and reactions.[3] A recent HSRC contribution reflects on some of the challenges as follows:[4]

> "A report published in 2019 by Stats SA showed that international migrants are more likely to be employed than internal migrants and non-movers.

[3] For a recent reflection on the literature in this regard, in relation to refugees and asylum-seekers, see Olivier, M. & Tewolde, A. "Social protection for Refugees and Asylum Seekers: A South African case study" in *Handbook of Social Protection and Social Development in the Global South* (eds: Patel, L. Plagerson, S. and Chinyoka, I.) (Cheltenham. UK: Edward Elgar Publishing, forthcoming 2023) (chapter 24).

[4] Gordon, S "Xenophobia is on the rise in South Africa: scholars weigh in on the migrant question" *The Conversation* (April 14, 2000) (accessible on https://theconversation.com/xenophobia-is-on-the-rise-in-south-africa-scholars-weigh-in-on-the-migrant-question-181288).

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However, the work that foreigners generally do does not conform to the Decent Work Framework of the International Labour Organisation. In 11 of the sub-domains on this framework, the score for international migrants was worst in eight of them. It would seem that many foreigners are working in indecent conditions. A recent investigation into the informal sector showed that many migrants working in the informal economy are very vulnerable. This group was more likely than non-migrants to have poor working conditions. About half (55.6%) had not made contributions to the South Africa's Unemployment Insurance Fund and 40.5% had no employment contract. Of those with a contract, 41.3% had one with an unspecified duration."

1.2.3 **The rising incidence of xenophobia is cause for concern.** According to the findings of a recent HSCR South African Social Attitude Survey, two key areas seem to drive anti-immigrant sentiment in South Africa: (i) zero sum myths ("for South Africans to gain, foreigners must lose", given the perception that foreign nationals take jobs of South Africans); and (ii) social welfare chauvinism ("restrict social welfare access for immigrants"). The public discourse on xenophobia is seen as having an important positive impact against it, and needs to be strengthened.

1.2.4 **Most migrants to South Africa are in search of employment opportunities**. Many are low-skilled but substantive numbers are medium- to highly-skilled; most continue to come from Southern Africa, but there have also been new migration flows from the rest of the continent and several parts of Asia (India, Pakistan, Bangladesh and China) as well as a continuation of immigration from Europe, the main historical region of origin.

1.2.5 Furthermore, over the past twenty-five years, restructuring in mining and the reopening of the country with the demise of apartheid have resulted in **rapid diversification of labour migration flows**, which now feed into multiple sectors of the economy, as well as rapid increase in cross-border trade. Simultaneously, rising numbers of highly qualified South Africans, from both the public and private sectors, have left the country to seek experience or settle permanently abroad making South Africa one of the largest countries of origin for African graduates in the world.

1.2.6 South Africa does not currently have adequate data to measure reliable estimates of the stocks and flows of foreign labour in South Africa (Budlender, 2013). This makes it **difficult to measure the impact of migration on the South**

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African labour market. Yet, it is crucial to obtain reliable information on this to inform appropriate policy responses, especially in view of commonly held public perceptions that the labour market participation of foreigners, including asylum-seekers, have a negative impact on the South African labour market and on the ability of South Africans to participate in the labour market. As indicated in the draft National Employment Policy (2021), some studies found that immigration into South Africa had a negative impact on the rate of employment of local workers. However, recent reports emanating from the World Bank,[5] the OECD and ILO,[6] as well as a recent study conducted by the IOM and the City of Johannesburg in relation to the contributions of migrant business owners living in informal settlements and inner-city Johannesburg,[7] have come to different

[5] World Bank *Mixed migration, forced displacement and job outcomes in South Africa* (2018). Key findings of the World Bank report, based on an analysis of employment and wages data for the period 1996-2011, include among others the following (as taken from the executive summary) (World Bank, 2018: 1-5; emphasis added):

- "The estimation results indicate that **immigration has a positive impact on local employment, labour earnings, and wages**. The estimated effects of immigrant growth on local employment are positive and highly significant in all specifications and are similar in terms of magnitudes. They show that a one percent increase in the number of immigrants relative to the previous period raises local employment by 0.2 percent. In other words, one immigrant worker generates approximately two jobs for locals."
- "Immigrants and locals are not perfect substitutes and the **complementarity of tasks** they perform might generate efficiency gains in the economy."
- "We must also note the prevalence of self-employment among immigrants: self-employment accounted for 25 percent of total jobs for immigrants, compared to 16 percent for locals. Migrants are more likely to appear in entrepreneurial roles than locals, suggesting that their actions are likely to **promote economic growth by enhancing, for instance, the supply of small retail establishments**."
- "An important note of caution is that these results are retrospective in nature given the data limitations mentioned, and therefore these results may differ in the current context. It is also well documented that even in the best circumstances, **migration and displacement may have significant short-term costs for receiving communities**."

[6] OECD/ILO *How Immigrants Contribute to South Africa's Economy* (OECD Publishing, Paris, 2018), accessed at http://dx.doi.org/10.1787/9789264085398-en on 7 October 2019. Key findings of the OECD/ILO report include among others the following (as taken from the executive summary), indicating the impact of immigration to South Africa in relation to the labour market impact on South African-born workers, the impact on economic growth, and the impact on public finance (OECD/ILO, 2018: 15-17; emphasis added):

- "**Immigrants are well-integrated into the labour market** in terms of employment and unemployment rates, and **in general do not seem to displace native-born workers**. Immigrant workers are more likely to be employed than native-born South Africans, which is consistent with the country's very low employment rate. Immigration seems to be, at least in part, demand-driven, and immigrant workers are frequently found in occupations with high growth rates."
- "The **impact of immigration on gross domestic product (GDP) per capita is positive**, and the estimates from an econometric model show that **immigrant workers may raise the South African income per capita by up to 5%.**"
- "Immigrants also have a **positive net impact on the government's fiscal balance**. This is due to the fact that they tend to pay more in taxes, especially in income and value added taxes."

[7] International Organization for Migration (IOM) *The socioeconomic contributions of migrant business owners in South Africa's informal urban settlements and inner-city areas: A case study of the City of Johannesburg* (IOM, 2021). Key findings from this study include: (i) Migrant businesses contribute to value chains within the Gauteng province as well as in their specific settlements; (ii) A significant proportion of direct economic benefits from foreign-owned businesses comes through rental payment to (South African) property owners; (iii) However,

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conclusions. The latter study recommends measures to encourage migrants who qualify to register for tax and to so also allow for the DEL to inspect and enforce legislation that curbs employee exploitation, whether employees are documented or not; to address the issues of local community leaders and South African business owners who feel that migrant businesses are cheating the country; to let local people benefit from the migrant businesses through employment of at least a certain percentage of South Africans (i.e., imposing a quota); and to consider inclusive ways of formulating policies that regularise migrants whose businesses contribute significantly to their host communities.

1.2.7 The South African Government response to the changes since 1994 has consisted of several **policy and legislative adaptations at the margin** which, while departing substantively from the previous racist apartheid policy and introducing innovative legislation, on asylum in particular, have often addressed issues in silos. As one of the leading economies in the region and a diverse, progressive society, South Africa will ensure that its approach to employment-related migration into and out of the country balances out the interest of its labour market development against that of its economy while respecting South Africa's commitment to its neighbours and region, also by contributing to the demands of and capitalising on the opportunities of the regional labour market.

1.3Historical overview of labour migration to and from South Africa

1.3.1 In the 19th and 20th centuries, immigration to South Africa was shaped by a system known as the **"two-gate policy"** (Crush, 2000; Peberdy, 2009). The front gate welcomed people who corresponded to the criteria of attractiveness defined by the governing minority. It was compulsory to be "readily assimilable" within the White population of the Republic until 1986. The back gate served a double function: preventing unwanted migrants from entering and settling in while allowing cheap and relatively docile labour in for temporary periods.

1.3.2 As far as labour migration was concerned, South African policy was the result of the relations between the South African state, the agricultural and mining sectors, and labour-sending neighbouring countries. The 'two-gate policy' was closely connected to the grand apartheid scheme, notably its

given the absence of regular documentation status allowing them to reside and run businesses in South Africa legally, most of the businesses do not have bank accounts and have little or no knowledge about direct tax payments and are, therefore, seen by South African citizens as not making a positive contribution to the country.

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homelands policy, and influx control. The policy blurred the lines between citizens (specifically, the indigenous population) and foreigners (Peberdy, 2009). For long, it **treated the indigenous populations of South Africa as foreigners in their own land**.

1.3.3 Through bilateral labour agreements (BLAs) with five neighbouring SADC countries (Botswana, Eswatini (Swaziland), Lesotho, Malawi and Mozambique) mineworkers were imported to work on South African mines. These agreements posed many challenges, mainly because of their unilateral nature and weak protection of the rights of mineworkers.

1.3.4 This dominant "two-gate policy" was no longer sustainable in the new context of the advent of democracy and South Africa's reopening to the rest of the continent and the world. **Profound economic restructuring** in core sectors such as mining and agriculture, the rise of other sectors (construction, hospitality, services and finance) and mounting internal pressure due to structural unemployment all contributed to reshape immigration to South Africa at the turn of the 1990s. **The Mining Charter**, concluded between the South African Government and mining companies and adopted in 2003, at the request of Government entrenched the principle of the gradual phasing out of foreign workers through the non-renewal of contracts. The 2018 Mining Charter effectively entrenches the priority being given to South African citizens.

1.3.5 A **wide consultative process** took place over a 10-year period (1994–2004). It led to the passage of the new Immigration Act of 2002, the first post-Apartheid immigration act, and different amendments, as well as to the adoption of its Regulations in 2014 and legislation on asylum, the Refugees Act of 1998, as subsequently amended. However, in essence, the **new laws were a continuation of the dual system of limited permanent high-skilled immigration and temporary lower-skilled migration, mainly through corporate permits**. Other instruments, such as asylum and deportation have also played a key role in shaping migration to South Africa in the contemporary period.

1.3.6 **Historically, the** Department of Home Affairs (**DHA) has been tasked with the governance of migration**. Labour migration has been managed as a documentation and permitting issue, as well as in a reactive rather than proactive manner, responding to the private sector's labour needs and labour supply strategies. This has resulted in measures which have been criticised as having sometimes little traction on the country's national development objectives. In addition, social dialogue on labour migration issues has been very

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limited: social partners have hardly ever been associated to migration policy formulation in South Africa, let alone its implementation. Inter-ministerial coordination has also never worked fully satisfactorily with recurrent challenges and identified gaps between ministries.

1.4Policy development context and methodology

1.4.1 Currently labour migration is managed through legislation on international migration (Immigration Act of 2002) and a range of dispositions across several legislative corpuses. In terms of strategy, the approach is dominated by the notion of risk as defined by the DHA White Paper on International Migration, 2017), and there is **no stand-alone labour migration policy**, which also emphasises developmental objectives of labour migration.

1.4.2 The implication of this is that different regulatory activities pertaining to labour migration are managed under different ministries, with limited coordination and **without an overarching vision, direction and objective** of the kind of contribution that labour migration ought to make towards national development. Among others, these activities are:

- Recruitment of foreign workers by public and private employment agencies (Department of Employment and Labour - DEL),
- Inspection of workers' conditions of employment by Inspection and Enforcement Services (IES, DEL), Immigration Inspectorate (DHA), Mining Inspectors (Department of Minerals and Energy; Health Inspectors (Department of Health) and various Local Municipalities enforcement Agencies, including in relation to workers in the informal economy such as informal traders, waste pickers, minibus-taxi drivers and rank marshalls,
- Issuance of work and corporate permits (DHA following DEL recommendations),
- Determination of critical skills needs in South Africa (DHET, DHA, DEL, DTIC),
- Policies governing the shortage of skills in specific sectors (Department of Higher Education and Training - DHET but also Department of Health (DoH), Department of Science and Technology - DST),

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- Assessment of foreign skills in South Africa by the South African Qualification Authority (DHET)
- Assessment of South African skills in the diaspora (Department of International Relations and Cooperation - DIRCO),
- Financial regulations on remittance transfers (National Treasury) and their implementation (private banks),
- Allocation of compensation monies by the Compensation Fund (DEL) and the Compensation Commissioner and its licenced agencies such as Rand Mutual Association, and Federated Industries Mutual Association (DoH), and claiming benefits from the Unemployment Insurance Fund (UIF),
- Tracing of beneficiaries of due benefits and pension rights accrued across various private funds and trusts (private sector and social security agencies),
- Conciliation, mediation and arbitration of industrial disputes (Commission for Conciliation, Mediation and Arbitration (CCMA)),
- Negotiation and management of bilateral labour agreements with neighbouring countries by individual departments (DIRCO, DEL, DHA and DoJ&CD).

1.4.3 The current global, regional and sub-regional contexts are conducive to a **shift in labour migration management to better harness the developmental potential of migration for regional and sub-regional growth**, capitalising on migration's equalising possibilities. It is well accepted that migrants boost economic output, while in their countries of origin, the impacts of movement are felt in higher incomes and consumption, better education and improved health, as well as at a broader cultural and social level. In particular, mobility generally brings benefits, most directly in the form of remittances sent to family members. Simultaneously, measures need to be adopted to arrest potential negative developmental consequences that may flow from, among others, uncontrolled irregular migration. Considering these dimensions, the Global Compact for Safe, Orderly and Regular Migration (2018), rooted in the 2030 Agenda for Sustainable Development, builds upon the recognition that migration is a multidimensional reality of major relevance for the sustainable development of countries of origin, transit and destination, which requires coherent and comprehensive responses. It acknowledges that migration contributes to positive development outocmes and to realising the goals of the 2030 Agenda for Sustainable Development, especially when it is properly managed.

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1.4.4 The equalising possibilities of migration are reflected in the alleviation of further migration pressure, wage differentials, unemployment pressure, harmonisation of qualifications frameworks, or skills & technology transfers (ILO, 2015). In addition, existing regional and sub-regional frameworks are calling for an alignment to international and regional labour standards (ILS) in order to ensure better protection of migrant workers.

1.4.5 Labour migration to and from South Africa should be taking place **in a manner that contributes to South African society**, **does not undermine its own labour protection regime and serves regional integration goals**. In addition, several recent developments at **regional (African Union - AU) and SADC** levels, in the form of guiding frameworks on labour migration, have been adopted, strongly encouraging (SADC) Member States to develop national labour migration policies aligned with international and regional labour standards by 2019.[8] Responsibility for developing such policy lies squarely with the NDEL.

1.4.6 Over the years, the **DEL has worked closely with the DHA** and provided technical expertise in the issuance of work permits and determination of critical skills. It has also regularly supported research on the conditions of recruitment and employment of foreign workers in the country. As the DHA itself embarked on a comprehensive review of its migration policy in 2014, the DEL, with support from the ILO, initiated discussion on the development of a national labour migration policy for South Africa, first internally in early 2015, and then at the occasion of a broadly inclusive and participatory labour migration seminar and policy development workshop held in November 2015 in Pretoria.

1.4.7 A vast array of DEL staff (Headquarters and Provinces), DHA, DIRCO, Treasury, Department of Trade; Industry and Competition (DTICi), Statistics South Africa (StatsSA), DHET, organised labour and business, civil society organisations and international organisations, were invited and participated in the exercise. The outcome of this workshop was a ***Draft National Labour Migration Policy Outline***, produced as the result of participatory deliberations during the November 2015 workshop, and intended to provide an indication of key thematic orientations and operational needs identified by participants.

[8] To mention only the most recent and relevant such frameworks, these are: The Revised Migration Policy Framework for Africa of the African Union (2018), replacing the 2006 Migration Policy Framework; The Joint Labour Migration Programme validated in the Declaration on Poverty Eradication (approved by the African Union Summit of Heads of State, January 2015); Protocol to the Treaty establishing the African Economic Community relating to the Free Movement of Persons, Right of Residence and Right of Establishment (adopted in 2018); the SADC Labour Migration Policy Framework (2014); the SADC Labour Migration Action Plan (2013-2015, 2016-2019 and 2020-2025).

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1.4.8 **In 2015, the DHA rolled out the review of its international migration policy to which the NDEL made several contributions**. This process culminated in the holding of a colloquium in July 2015 and the publication of a *Green Paper on International Migration* in June 2016 for public comments. At the invitation of the DHA, the DEL responded with a submission on matters impacting its policy mandate and operations. Subsequently, the *White Paper on International Migration* was adopted in 2017.

1.4.9 In **2016**, the DEL formalised its **Road Map for the development of a national labour migration policy**. It is the task of the DEL to ensure that the mobility of labour to and from South Africa meets the employment and development priorities set out in the National Development Plan (NDP) and the policy coherence objectives of the Medium-Term Strategic Framework (MTSF) (2014-2019). In 2017, the DEL therefore started rolling out its **national labour migration policy development process**.

1.4.10 At the **international level**, the UN launched the development of a **Global Compact for Safe, Orderly and Regular Migration** in September 2016, with the New York Declaration. It was adopted in December 2018 and offers a new framework within which labour migration will occupy an important space.

1.4.11 The **method** adopted by the DEL in developing the NLMP has been planned over **four phases spanning over a four-year period (2015-2018)**:

- Internal stock-taking and preliminary discussions (2015-2016);
- Labour Migration Assessment and Policy Drafting (2017);
- Broad-based, inclusive and participatory consultative phase (2017-2018);
- Consolidation and final policy validation (2018 – now 2019).

1.4.12 The **Labour Migration Assessment (LMA)** was conducted from June to August 2017 with support from the International Labour Organization (ILO). It was based on a desktop review of existing statistical and administrative labour migration data, qualitative research evidence, and inputs from the various NDEL branches dealing with labour migration processes. It also drew on the key themes identified during the 2015 labour migration policy development seminar hosted by the NDEL and on the 2016 and 2017 Green and White Papers on International Migration released by the DHA. Following this thematic identification, key questions, the outline and the main contents were developed by the NDEL Steering Committee for the Development of the national labour

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migration policy. The drafting process unfolded under the supervision of the NDEL Steering Committee.

1.4.13 The **draft National Labour Migration Policy (NLMP)** was developed drawing on the conclusions of the Labour Migration Assessment. It was submitted to internal reviews of the NDEL Steering Committee. The LMA and draft NLMP constituted the baseline documents for a series of consultations held from November 2017 to June 2018.

1.4.14 **Stakeholder identification** has been conducted by the DEL Steering Committee with reference to the DEL direct stakeholders, National Economic Development and Labour Council (NEDLAC)'s constituencies, and a range of stakeholders identified with the assistance of the DHA (See Annex 7.4. List of consulted stakeholders). **Consultations** took place at regional (SADC), national (NEDLAC, inter-ministerial and national stakeholders), and provincial levels (9 provinces).

1.4.15 On the 15th July 2020, the President confirmed the establishment of a 12 member **Inter-Ministerial Committee on Migration (IMCM),** to deal with matters relating to migration of foreign nationals for employment and related economic opportunities. The IMCM is expected to submit to Cabinet, policy recommendations on South Africa's position in relation to the employment and economic opportunities for South African citizens and foreign nationals taking into consideration amongst others: (a) The relevant global treaties, AU and SADC protocols; (b) Aspects such as labour and employment, the various sectors in the economy, crime and border security; and (c) The Constitution of the RSA and other applicable legislation.

1.4.16 The final draft NLMP is meant to be accompanied by amendments to the Employment Services Act (ESA) to give effect to the NLMP, and to be **submitted to Cabinet** via the IMCM. Based on the approval to be sought from Cabinet, the broader **public and social partners will be consulted**, before the final version is submitted to Cabinet, and thereafter to NEDLAC in accordance with the provisions of the NEDLAC Act. The NEDLAC report will be tabled to Parliament for consideration when the proposed Amendment Bill is processed. See Annex 7.1 High-level roll-out/implementation plan.

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1.5 Rationale for a National Labour Migration Policy (NLMP)

1.5.1 The **current policy environment** has neither fully addressed the changing needs of the South African economy nor aligned South African laws and practices to existing international and regional standards and frameworks of protection ensuring that South African and migrant workers are treated equally in practice. Nor is there a policy framework, which provides a coordinated and consistent basis for the meaningful and streamlined management of labour migration.

1.5.2 In view of the historical and current importance of labour migration to South African development, of the profound reorganisation of these inward and outward flows but also of the numerous challenges encountered in their management over the past two decades, as well as taking account of global, regional and SADC policy developments advocating for robust national policy instruments, it has become **imperative for South Africa to develop its own national labour migration policy**.

1.5.3 Given the current context, the drafting of a NLMP as an area for State intervention distinct from other dimensions of migration policy represents the most suitable policy option and one which marks the **first attempt by a South African post-apartheid government to deal with labour migration consistently and comprehensively.**

1.5.4 The NLMP aims to equip South Africa with a **technically sound policy instrument**, which will strengthen the country's approach to labour migration, in a coordinated manner across key ministries, notably but not exclusively between the DEL and DHA, and thus contribute to the radical socio-economic agenda set out in the MTSF 2014-2019 and NDP 2030.

1.5.5 The NLMP has been designed **to achieve the following**:

- Document current challenges on the basis of evidence;
- Adopt guiding principles rooted in South Africa's core constitutional and other values and international as well as regional commitments and frameworks;
- Identify national strategic priorities at the intersection of national interests and guiding principles;
- Propose sustainable intervention methods and monitoring and implementation mechanisms.

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1.5.6 The **scope and targets of the NLMP** are:

- Migrant workers seeking employment and those already employed in the country;
- South African work-seekers interested in taking employment abroad;
- All relevant Government ministries playing a part in the admission, selection, placement and information of migrant workers and in the placement and protection of and liaison with South African migrant workers abroad;
- Social partners;
- Private sector stakeholders either as employers of migrant workers or as private recruiting agents;
- A range of other stakeholders as specified in Annex 7.4.

1.5.7 The NLMP is divided into the following sections:

- Section 1. Background and Context
- Section 2. Labour Migration Assessment and Beyond: Conclusions and Recommendations
- Section 3. Guiding principles of South Africa's NLMP
- Section 4. NLMP Thrust and Vision
- Section 5. Key Areas of Intervention
- Section 6. Final Conclusions and the Way Forward
- Section 7. Annexes

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SECTION 2. LABOUR MIGRATION ASSESSMENT (LMA) AND BEYOND: CONCLUSIONS AND RECOMMENDATIONS

2.0.1 The LMA focused on the following issues:

- **Macroeconomic background, labour market and migration policies** (Key macroeconomic indicators; Key labour market indicators; Migration policies since 1945)
- **The governance of migration since 2002** (Division of labour between the DHA and the DEL; South African legislation and migrant workers; International, regional and bilateral obligations of South Africa; Green and White Papers on International Migration)
- **Migration trends since 1994** (The state of administrative and statistical data on labour migration; Key indicators; Specific dynamics; Attitudes to migration in South Africa)

2.0.2 The assessment drew on the latest available statistical and qualitative data from South African (Statistics South Africa, DHA, other government departments and tertiary education institutions) and international sources (World Bank, ILO, OECD).

2.0.3 This section presents key conclusions immediately followed by recommendations that can be inferred from the LMA findings on each of the main thematic clusters above, bearing in mind development subsequent to the drafting of the LMA.

2.1 Economic background, labour market and past migration policies

2.1.1 Since its first democratic elections in 1994, South Africa has considerably **reduced poverty**[9] thanks to large investments in infrastructures and in social grants targeting the poorest. However, South African economic growth has resulted in skewed outcomes, as it has largely benefited the privileged minority,

[9] While the number of people living below the 2015 poverty line of R441 per person per month, or in extreme poverty, increased to 13.8 million in 2015, compared to the 11 million reported in 2011, this is lower than the number of people living in extreme poverty reported in 2009, which was at 16.7 million. The Gini coefficient, which measures income inequality with 0 representing perfect equality and 1 representing perfect inequality, improved from 0.72 reported in 2006 to 0.68 in 2015 (Statistics South Africa, Poverty trends report 2017) and to 0.62, according to OECD data (OECD, Income inequality, 2017). South Africa has one of the highest Gini coefficient in the world. The draft National Employment Policy (2021) quotes a Gini co-efficient of 0.73, based on a study published in 2019.

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due to limited employment growth. With an expanded **unemployment rate**[10] of 43.1% in the third quarter of 2012, which represents approximately 11.9 million persons, **South Africa's employment situation has considerably worsened** since the early 2000s. As noted by the draft National Employment Policy (NEP) (2021), while the number of those employed increased marginally by 1.17 million between 2009 and 2020, the **narrow unemployment rate**[11] increased by five percentage points in the intervening period, breaching the 30% mark.[12] In fact, most recently South Africa's (narrow) unemployment rate reached a near record high: according to Statistics South Africa, the narrow unemployment rate stood at 32.9% in the July-September 2022 quarter, meaning 7.7 million people were unemployed.[13] The NEP estimates that in 2020, just over 5 million South Africans were unemployed for more than a year. This coincides with a steady rise in informal employment and is accompanied by skills shortage in certain areas and a mismatch of skills. Black women[14] and youth are worst affected by unemployment, underemployment and precarious conditions of employment.

2.2.2 **Youth and female unemployment:** According to Stats SA, the youth aged 15-24 years are the most vulnerable in the South African labour market as the unemployment rate among this age group was 59,6% in the third quarter of 2022. Approximately 3,5 million (34,5%) out of 10,2 million young people aged 15-24 years were not in employment, education or training (NEET). Nevertheless, as high as it is, the graduate unemployment rate is still lower than the rate among those with other educational levels, meaning that education is still the key to these young people's prospects improving in the South African labour market.[15] The female labour force participation rate (in the formal workforce) has remained alarmingly low at 52.6% for the third quarter of 2022; nevertheless, generally speaking there has been a more pronounced rise in the population of unskilled and semi-skilled work undertaken by women. In fact, women are overrepresented in risky, low-wage and low-productivity work. Also, in periods of crisis, women (in both paid and unpaid work) experience shocks

[10] The expanded definition of unemployment or broad definition of unemployment includes discouraged job-seekers: those that want to work but are not actively searching for a job as they have lost hope, wanted to work but there are no jobs in the area or were unable to find work that required their skills.
[11] Unlike the expanded definition, the narrow definition *also* considers those who are unemployed, but who have taken specific steps in a specified, recent period to seek paid employment or self-employment.
[12] https://www.reuters.com/article/us-safrica-economy-unemployment-idUSKBN2AN0S1.
[13] P02113rdQuarter2022.pdf (statssa.gov.za).
[14] According to Stats SA's third quarterly Labour Force Survey of 2022, Black African women are the most vulnerable with an unemployment rate of 39,1% in Q3:2022. This is 4,0 percentage points higher than the national average for women at 35,1%: *ibid*.
[15] P02113rdQuarter2022.pdf (statssa.gov.za).

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differently (for example, in relation to unpaid childcare labour in the COVID-19 pandemic period). In addition, there is still a significant gender-based wage gap (NEP, 2021). The phenomena described here apply in particular to migrant youth and females, respectively.

2.1.3 **Reducing unemployment is a central and critical imperative for the future of South African society and economy**. The unemployment levels currently encountered in the country put considerable pressure on decision-makers when it comes to migration issues.

- **Recommendation:** Labour migration policy should be able to demonstrate a net contribution preferably to employment creation, but also to economic development or sustainability, as well as sub-regional stability and integration.
- Employment creation, skills transfer, sector-based or provincial development and stability indicators should be built in the labour migration policy structure and monitored over time. These measures should be aligned with the suggested next steps interventions indicated by the NEP (2021) to counter the significant unemployment scenario in South Africa. Firstly, consideration has to be given to adopt pro-employment macro-economic policies, particularly in the form of mass social employment, i.e., public employment programmes (supported by employment guarantees). Secondly, other dedicated active labour market policies ALMPs) need to be pursued – including work-seeker assistance programmes, skills training, measures aimed at increasing the returns to labour (thus influencing firm level factor choices) and demand side measures.
- Measures to address youth and female unemployment should consider the position of both South African citizens and foreigners, who legally reside in and are entitled to work in the country.

2.1.4 South Africa has also struggled with **skills scarcity in specific sectors and sub-sectors** for many years as the result of various factors such as attrition to the private sector in health professions, emigration, displacement of skills from manufacturing to finance, etc. The South African Government has adopted **several measures to address this challenge** and among them, has drawn several scarce skills lists, the latest being the Department of Higher Education and Training (DHET) Occupations in High Demand List 2015. A new National List of Occupations in High Demand was gazetted in 2020. The DHA, drawing on data

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from other departments, had established a Quota List gazetted in 2007, and published a Critical Skills List in 2014, and finalised a more recent Critical Skills List in 2020.[16] The DHA is the custodian of the Critical Skills List, developed in accordance with the provisions of the Immigration Act. However, it is unclear whether there has been any assessment of these different measures and whether immigration policy has been performant in reducing skills shortages to date. Certain sectors such as **finance** witness **increasing recruitment of foreign personnel in managerial positions** even though, there as in other sectors, their overall share of total employment remains limited (2%). Furthermore, there is ample evidence that the issuing of temporary residence visas and permanent resident permits is not attracting the categories of international migrants that will contribute to the growth of the economy while in the country. To the contrary, it appears that South Africa is home to many international migrants who are low skilled and, in most cases, dependent on the State for social assistance and services. International migrants who have low to middle levels of skills often compete directly with unemployed South Africans. They also settle in urban areas (townships and largely in informal settlements) where South Africans from rural or peri-urban areas are competing for similar scarce resources, services and opportunities.[17]

2.1.5 **Recommendations**:

- Attraction and retention of skills, particularly of critical skills, in the country regardless of their origin (local or foreign) should be made a priority within the provisions of international and national legal obligations. This implies that there should be regular updating and closer monitoring of critical skills lists in relation with policy impact and clear management on targets. Critical skills lists should always be informed by a proper evidence base, in particular a functioning labour market information system, as well as a transparent consultation process, and be sensitive to challenges experienced in particular sectors to attract willing and capable South Africans to work, as well as the demands emanating from the evolution of work, with new occupations arising, also as regards 4IR and 5IR developments. There may also be a need to consider special

[16] DNA Economics *A Technical Report for the 2020 Critical Skills List* (Produced for the Department of Higher Education and Training (DHET) as part of the Labour Market Intelligence (LMI) research programme (2020).
[17] *Visa Facilitation Services (VFS) System (16 June 2014 – 01 December 2016)*.

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requests by sector-specific representative institutions providing verified evidence of challenges in specific occupations and sectors.

- Measures and incentives need to be adopted to ensure that the relevant visa/permit types attract in particular skills needed in the country. Streamlined, consistent and coordinated approaches should inform work visa issuance, including the issuing of corporate visas where the evident need for immigrant labour in certain sectors or occupations has been proven.
- Priority incentives should be generalised in affected sectors for South African as well as foreign professionals already in the country such as students, refugees or migrants already present legally.
- Aggressive recruitment among the diaspora and foreign nationals abroad should also be envisaged for critically affected sectors and professions alongside normal applications for work visas.
- There should also be better coordination and transparency of professional organisations and education and training quality assurance bodies in establishing recognition of qualifications and competencies consistent with national critical skill lists and those with skills in high demand.

2.1.6 Conversely, since 1994, South Africa has been losing **substantial numbers of skilled and experienced professionals to emigration** with documented records, as for instance in accounting where the South African Institute of Chartered Accountants (SAICA) reports that by June 2015, approximately 19% of all registered South African Chartered Accountants were working abroad. Health is another case in point with the World Health Organization (WHO) pointing to South Africa as one of the African countries with the largest number of doctors abroad.

2.1.7 **Recommendation**:

- In addition to coordinated incentives for retention of skills, there should be coordinated programmes maintaining links with professionals in the diaspora and creative and flexible pathways for their temporary or permanent return maximising their possible contribution to South African society, without undermining in any manner citizens' fundamental right

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of movement.[18] Experience of such measures from Asia, but also from some African countries, could inspire this dimension.

2.1.8 **South African labour migration policies over the 20th century** have among other been guided by the conclusion of bilateral labour agreements (BLAs) concluded between South Africa and sending countries. However, these agreements have largely become obsolete due to the phasing out of foreign labour in mining. There has been a growing disjuncture between what these agreements were meant to address and actual labour migration dynamics to other sectors of the South African economy. The BLAs are not aligned with good practice standards emanating from international guidelines, among others due to their inordinate deferred pay arrangements and weak protection of migrant workers' rights and interests.

2.1.9 **Recommendations**: The DHA's and DEL's current policy efforts are a historical step towards coordinated consultative policy-making in the field of labour migration. These efforts should ensure that no area of concern is left unattended.

- Bilateral agreements with neighbouring countries should be entirely revisited and reviewed on the basis of mutual needs and reciprocal commitments serving the best interests of SADC populations. It is necessary to consider how South Africa and the other affected SADC countries view the unfolding of the labour market structure, opportunities and requirements from a *regional, rather than purely individual country* perspective, bearing in mind that all SADC Member States have repeatedly committed to furthering regional integration – the *White Paper on International Migration* considers integration within SADC as paramount to South Africa's international migration policy and proposes a set of measures to facilitate further the safe, orderly and regular migration of SADC nationals to South Africa (Chapter 11).
- The development of policy approaches to cross-border labour migration involving neighbouring SADC countries should also consider other regional programmes and objectives, including regional collaboration on a sectoral basis (e.g., in migrant health, education, mining, tourism), regional skills and qualifications recognition, harmonisation and

[18] See the recent published comparative review of policies and practices to attract skilled migrants in China, Singapore, Japan, Germany and Singapore. http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/publication/wcms_565474.pdf

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alignment frameworks, regional data harmonisation frameworks, and the facilitation of free movement of persons, to which South Africa has committed itself.

- BLAs whether with SADC countries or beyond should be aligned to international standards and recent policy developments at international, regional and SADC levels, as well as among Member States. Of particular importance in this regard are two (recent) guiding instruments, the one emanating from the UN and the other from the AU, i.e., the UN *Guidance on Bilateral Labour Migration Agreements* (2022) *Guidelines on Developing Bilateral Labour Agreements (BLASs)* (2022).
- Their review should adopt an approach inclusive of social partners and other relevant stakeholders.
- BLAs should also be strengthened technically to become effective and efficient tools in the governance of labour migration.
- Sectoral BLAs concluded by individual South African government departments, for example to procure professional migrants to fill particular employment needs in a certain sector, need to be designed in consultation with NDEL, need to be aligned with international standards, and communicated to DIRCO and DHA, to ensure a coordinated approach to BLAs.

2.2 Governance of labour migration since 2002

2.2.1 Since 1994, one new law, the Immigration Act of 2002, and several amendments and regulations, have tried to address **the shift from the migrant labour system to the spread of labour migration to other sectors outside of mining and farming**. However, with limited possibilities for legal entry into the South African labour market for low-skilled workers from neighbouring countries, there have been a **steady growth of irregular migration** as well as **clogging of the newly adopted asylum system**. Policy responses have taken the form of **ad hoc regularisation schemes** (in 1996, 2001, 2009 and 2016), partly resulting in special permit (visa) regimes (in particular with Lesotho and Zimbabwe) to operationalise the regularisation dispensation, and large scale costly **deportations** of tens to hundreds of thousands of individuals a year. **Emigration of skilled South Africans** has not been addressed efficiently through any specific policy and constitutes a growing problem in certain sectors.

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2.2.2 **Recommendations**: Observation of the past twenty years of labour migration management in South Africa reveals clearly identified weaknesses and challenges that need to be addressed both consistently across policy areas and individually at a technical level.

- As recommended in the White Paper, creating legal pathways into the South African labour market for low-skilled workers from neighbouring countries and SADC partners on the basis of negotiated agreements seems to be the best way to stymie unhealthy levels of irregular migrants, prone to exploitation and abuse. These agreements should afford stability and protection to migrant workers while at the same time being monitored and adjusted regularly at cross-border, national, provincial and local level, in consultation with the countries of origin.
- The objective should be to bring deportations to a minimum level.
- Emigration of skilled South Africans has not been addressed thoroughly in any policy document for years. Policy efforts should ensure that they capture the full scope of the issue and develop appropriate, innovative and effective policy responses, that may range from regular diaspora mapping, counter-attrition policies based on international benchmarking for wages, incentives for temporary and permanent return, rosters of experts and coordination of professionals' associations.

2.2.3 There is currently **a clear division of labour between South African departments regarding the management of labour migration but areas for improvement have been identified**. The DHA has been the lead department in migration issues in general and has dealt with the drafting of migration policy and legislation, as well as with the administration of border control and documentation verification for most of the 20th century up until today. It has **outsourced most of its front desk visa services to a private company** since 2014 which has resulted in a general increase in visa fees.

2.2.4 The **DEL** has played a complementary role in **assisting the DHA with labour market tests** to assess the legitimacy of general work and corporate visa applications against the actual demand needs of the South African labour market. The DEL also plays a role in terms of ensuring enforcement of the South African labour legislation to all workers, including migrant workers, through its inspectorate system. Other departments, **DHET and the Department of Trade and Industry and Competition (DTIC)**, have played a more minor role in aspects such as determination of critical skills or vetting of investors' credentials. While

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inter-ministerial coordination does exist formally and in practice, there is no integration of databases or no integrated services to the public as yet.

2.2.5 **Recommendations on 2.2.3 and 2.2.4**:

- The DEL should become the lead department in the definition of labour market needs and priorities in relation to labour migration regulation.
- The DHA should remain the custodian of border control, visa issuance and identity documentation and verification, as well as final decision-maker on all aspects of migration unrelated to work and employment (all other visa types, asylum, security vetting, document authentication, civil registration, etc).
- Wavers in relation to immigration requirements, impacting on labour migration, will be considered by DHA in consultation with the DEL.
- The conclusion of revised BLAs should be undertaken in coordination with DIRCO, while DEL should be consulted by all other departments when concluding BLAs that include labour migration, to ensure coordination.
- All aspects of labour migration governance should be consolidated and strengthened within the DEL and performed by its core units or in collaboration with other departments and coordinated by the DEL (compliance of employment services, labour market tests, skills-in-demand lists, monitoring of labour market indicators, labour inspection, conciliation and arbitration, compensation, social protection of migrant workers).
- This reform should be envisaged as a two-pronged process:
    1. Clarification of respective responsibilities should be undertaken with a view to a mid-term evolution into
    2. A “one-stop shop inter-ministerial model” for users behind which there would be intervention of all relevant departments with clarified internal procedures.

2.2.6 South Africa currently has a **range of legislative instruments, human rights, immigration and labour legislation**, which regulate the flow of migrant workers into the country, protect workers’ fundamental and labour rights and determine the scope of their access to state services in health, education, housing, etc. **South African labour legislation by and large aligns to international labour standards** and meets the country’s international obligations. Actual enforcement, in particular of labour inspection, clear

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separation between labour inspection and immigration control and equality of treatment between local and migrant workers, seem to be the major challenges.

2.2.7 **Recommendations**: While South Africa has not ratified any of the key international conventions relating to migrant workers, its national legislation, including the constitutional framework, is based on the principle of equality of treatment. This is a positive dimension which should be strengthened through broader enforcement.

- Labour inspection for enforcement of equality of treatment between local and foreign workers and protection of their rights requires specific training and approaches. This should be addressed through the strengthening of capacities of labour inspectors of both DEL and DHA across all provinces and branches as well as among labour inspectors operating at sectoral level, e.g., the mining sector.
- South Africa has opted for labour and immigration inspections which are conducted in respect of each law and with an emphasis on the protection of workers' rights, in addition to enforcement of immigration regulations. Strengthened integration between the two services will continue.

2.2.8 The 2017 **DHA's White Paper on International Migration for South Africa** offers many useful and constructive leads on the management of labour migration but its all-encompassing nature (covering all migration related issues) and purpose (guiding the DHA's intervention) does not provide a fully-fledged strategic rethinking of labour migration management, at the service of South Africa's national interest and priorities.

2.2.9 **Recommendation**:

- This confirms the need for South Africa to develop an evidence-based, gender sensitive NLMP, specific to the employment aspects of migration into and out of South Africa.

2.3 Migration trends and developments since 2001

2.3.1 While the 2001 Census indicated that approximately 1 million of the then population of about 45 million were non-South Africans, all available indicators point to a **rapid growth and sector diversification of migration flows (e.g., agriculture, construction, manufacturing, trade and private households) to**

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South Africa since then, with a total share of the population of about 4% according to Census 2011 while LFS data from 2012 indicate a 7% share of the labour force, a figure still within the range of international standards. However, according to 2012 data, the **share of migrant workers to total employment in any of these sectors remained below 10%,** debunking the myth of an overwhelming presence of migrant workers in certain sectors. Nevertheless, geographical concentrations of migrant workers have been documented qualitatively. Another characteristic of **migrant workers in South Africa is their concentration in the informal sector and in precarious employment,** and the prevalence of **informal cross-border trading**. Lastly, as earlier indicated, a report published in 2019 by Stats SA showed that international migrants are more likely to be employed than internal migrants and non-movers. Nevertheless, the demographic profile of the South African workforce by skill level, 2007-2018, indicates a marked statistical reduction in the labour market participation rate of foreign nationals in the formal economy (draft National Employment Policy, 2021; Employment Equity Reports).

2.3.2 **Recommendations**: Statistical indicators confirm that South Africa has become one of the most attractive hubs for migrant workers in the Africa region. It is important that labour migration to South Africa remains within reasonable limits, responds to the needs of its labour market and is not used by unscrupulous employers to exert downward pressure on wages and conditions of work, or abused by human smugglers. The concentration of migrant workers in informal occupations and precarious forms of employment, that is in the most marginal segments of the labour market, is a worrying trend. This is of concern particularly considering that migrant workers have substantively higher rates of employment than local workers. In fact, across the board, Statistics South Africa (2019) found that immigrants have poor access to decent work, also in terms of labour rights and social security protection. Employment precarity is characteristic of the labour market engagement of many immigrants in South Africa, especially in sectors with a disproportionate share of migrants (Draft National Employment Policy, 2021).

- There is therefore a need for the DEL inspectorate to have the ability to monitor sector dynamics in terms of employment of migrant workers to ensure employment in decent conditions of work and prevent concentrations which would result in social dumping.

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- In other sectors, such as higher education, South Africa is attractive to foreign professionals, e.g., lecturers. This should, subject to the advancement of employing South Africans in these sectors, be enhanced and further incentives for retention of their skills should be put in place.
- Private employment agencies and temporary employment services should be compelled by law to follow strict equality of treatment in their recruitment processes of migrant workers. The DEL should develop a three-pronged approach to the regulation of private employment agencies based on control, sanctions and incentives for compliance.

2.3.3 In terms of section 31(2)(b) of the Immigration Act, the Minister of Home Affairs is empowered to grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision. This provision has served as the basis for the granting of residence to nationalities of the following countries who were illegally residing and, in some instances, working in SA. Over the years, between 2009 and 2019, these special permit regimes offered pathways to legal residence for approximately 336,000 people.[19]

More recent developments include:

- Zimbabwe: In accordance with the Zimbabwean Exemption Permits Programme, special permits were issued between 2018 and 2020, and are valid until December 2021.
- Lesotho: Lesotho nationals who were working, studying or running businesses in South Africa had been granted special permits, which expired on 31 December 2019, and the Lesotho Exemption Permit replaced these, which is valid for four years starting from 1 January 2020.
- Angola: The Angolan Special Dispensation provided for special permits issued to Angolans who were previously recognised as refugees by the South African Government and these are valid until 31 December 2021.

While these special dispensation regimes create legal pathways for the holders to reside and work in South Africa, the (limited duration) permanent residence

[19] K N Bule & L B Landau *A drop in the ocean: labour market effects of South Africa's special dispensations for Southern African migrants* (ACMS) (A report for the International Labour Organisation, 2020) 21.

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status attached thereto may create discrepancies in comparison with the treatment in law, rights and entitlements of particular temporary categories of migrant workers, who often entered South African legally.

2.3.4 While South Africa probably has one of the most comprehensive and efficient **statistical data collection** systems in the region, there are areas for improvement, such as the frequency of the migration module in the Labour Force Survey (only administered twice by Statistics South Africa, in 2012 and in 2017, to date). The **scattering of administrative data**, its lack of alignment to international standards, missing indicators and minimal usage of both administrative and statistical data by policymakers are some of the identified key challenges. In addition, the **absence of a reliable labour market information** system, to which labour migration policy frameworks should be linked, is of particular concern. The Labour Market Intelligence Partnership (LMIP), a research consortium led by the Human Sciences Research Council (HSRC) and funded by the Department of Higher Education and Training (DHET), does not yet provide reliable data. In fact, as has been affirmed in a recent report on skills supply and demand in South Africa, the country as yet does not have a credible dataset about immigrants to South Africa; also, the limited data available provides a very weak signal of skills demand in the country.[20]

2.3.5 **Recommendations**:

- South Africa has functional and efficient data collection mechanisms (with a few gaps in administrative data that can be addressed, for instance in terms of disaggregation of labour inspection notices per migratory status). However, it needs to have a coordination system for the analysis of administrative and statistical data in order to monitor labour migration data on a regular basis with regular reports placed in the public domain. There is also a need to develop a tailored framework for the collection, analysis and use of data in relation to labour migration from South Africa, and to inform appropriate policy responses in this regard.
- Administrative data between the DHA and the DEL should be better coordinated and complied with the South African Statistical Quality Assessment Framework (SASQAF) from Statistics South Africa.

[20] Reddy, V., Bhorat, H., Powell, M., Visser, M. and Arends, A. *Skills Supply and Demand in South Africa* (LMIP Publication, Human Sciences Research Council, Pretoria, 2016) 43.

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- Data users (policy-makers, social partners, civil society organisations) should be well informed and capacitated to understand, analyse and use such data for regular policy monitoring and evaluation.
- There is a need to develop a well-functioning labour market information system, to which labour migration planning and policy frameworks should be linked. Recently, the DEL and Stats SA enhanced engagements with the ILO in establishing the LMIS for South Africa; the aim is to have the LMIS for South Africa functional with all the stakeholders' involvement.

2.3.6 One last key indicator informing labour migration policy is that of **attitudes to migration** from the national population. Several **opinion surveys** have pointed to **generally high and stable anti-immigrant sentiment among the South African population**. There have also been the **continuous incidents of violent attacks on foreign nationals**, with outbursts of violence in 2008, 2010, 2015, and also more recently, often at the initiative of locally organised groups of small business owners, disgruntled residents or work-seekers. Of note is the fact that in only few instances have these incidents been workplace related. However, none of the **past and current policy initiatives, public awareness campaigns and Government condemnations** seem to have stymied the generally negative attitudes among the population.

2.3.7 **Recommendations**:

- Given that labour migration to South Africa, whether skilled or low-skilled is a long-term dynamic, it is important to ensure that the South African population, and South African workers in particular, are well informed about what motivates the strategic choices made by the South African government on labour migration issues and educated to the rights and responsibilities of both nationals and non-nationals.
- Equally, social partners should be capacitated on migrant workers' specific rights and issues and to employers' responsibilities so as to ensure continued peaceful industrial relations regarding the integration of migrant workers at the workplace.
- Workers' organisations should be encouraged to develop position documents and provisions in their constitution defining their position regarding the mobilisation and organisation of all migrant workers, including those in irregular situations.

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SECTION 3. GUIDING PRINCIPLES OF SOUTH AFRICA'S NLMP

3.0.1 This section provides a comprehensive albeit concise presentation of the various international binding and non-binding treaties, conventions, protocols and frameworks South Africa is party to, the national legislation relevant to the regulation of labour migration, as well as the global, regional and national frameworks guiding the National Labour Migration Policy (NLMP). Where relevant, the section indicates what the reporting mechanisms are and how they will impact implementation of the NLMP.

3.0.2 There are, of course, also other guiding principles outside the framework of instruments. Two such principles should in particular be highlighted:

- **Equality of opportunity and treatment with respect to employment and occupation aiming at ensuring equal access to employment, vocational training and education, job promotion and advancement, job security, and equal pay for work of equal value and conditions of work.** This guideline ensures that workers' performance is rewarded according to productivity and merit, taking into account the objective characteristics of the job (e.g., skills, knowledge, responsibilities, working conditions), and **without interference of considerations unrelated to merit** (e.g., sex, race or religion, nationality, citizenship, national origin, etc.)
- **Combatting Discrimination at work** including any distinction, exclusion or preference based on race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation (for which there is no objective or legitimate justification).

3.1 South Africa's international and regional obligations

3.1.0.1 South Africa has ratified a **vast range of international conventions that have some relevance to labour migration and the protection of migrant workers** although it is has not ratified the three key international conventions most relevant to labour migration, as indicated below. Table 1 summarises the international instruments and Table 2 the regional instruments (AU and SADC) ratified by South Africa.

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3.1.0.2 It is in South Africa's interest to support and encourage **coalitions of like-minded states among SADC Member States** in order to build threshold of rights through the ratification of similar conventions. South Africa is therefore supportive of the ratification of further instruments as a sub-regional approach to harmonisation of rights and standards between SADC Member States.

3.1.0.3 The South African Constitution (1996) contains important provisions regarding the role and importance of international law. To the extent that South Africa has ratified these instruments, it is bound by their standards and provisions (section 231). Furthermore, when interpreting fundamental rights contained in the Bill of Rights, including the rights covered in the constitutional part of this report, courts, tribunals and forums have to consider international law – which, according to the Constitutional Court, includes both binding and non-binding international law (Section 39(1)(b). See *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) *BCLR* 665 (CC); *Government of RSA v Grootboom and others* 2000 (11) *BCLR* 1169 (CC). Also, according to section 233 of the Constitution, there is a constitutional preference for statutory interpretation which is aligned to international law. The section stipulates: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

3.1.1 UN Treaties and Protocols

3.1.1.1 International UN treaties and conventions ratified by South Africa and of relevance to labour migration are:

- **Universal Declaration of Human Rights**
- **International Covenant on Civil and Political Rights (ICCPR)**
- **International Covenant on Economic, Social and Cultural Rights (ICESCR)**
- **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)**
- **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**
- **International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)**
- **International Convention on the Rights of the Child (CRC)**
- **Convention on the Rights of Persons with Disabilities (CRPD)**

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- **Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees**

These instruments are relevant to labour migration in terms of the general protection of migrant workers' fundamental human rights they afford, as well as more specific rights (civil and political, social and cultural) and categories of migrants they protect (women, children, persons with disabilities, refugees). Of particular importance is the fact that these instruments, as is the case with other UN and ILO instruments, as well as AU and SADC instruments, do not allow unequal treatment of migrant workers. South Africa has, however, not yet acceded to the 1964 Convention Relating to the Status of Stateless Persons, or the 1961 Convention on the Reduction of Statelessness.

3.1.1.2 South Africa has also ratified **specific instruments against transnational organised crime** which may be related to labour migration processes, particularly in terms of recruitment and travel across international borders. These instruments are important because they protect both migrants into South Africa as well as South Africans who would fall victim to these crimes on an outward journey.

3.1.1.3 The **United Nations Convention against Transnational Organized Crime** of 2000 (it entered into force in 2003) is the main international instrument in the fight against transnational organized crime. The Convention is further supplemented by three Protocols, which target specific areas and manifestations of organized crime:

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;
- Protocol against the Smuggling of Migrants by Land, Sea and Air;
- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

All of these instruments have been ratified by South Africa.

3.1.1.4 The **Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children**, is the first global legally binding instrument with an agreed definition on trafficking in persons. Its objectives are to facilitate convergence in national approaches and to protect and assist the victims of trafficking in persons with full respect for their human rights.

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3.1.1.5 The **Protocol against the Smuggling of Migrants by Land, Sea and Air** is the first global international instrument to adopt a definition of smuggling of migrants. The Protocol aims at preventing and combating the smuggling of migrants, as well as promoting cooperation among States parties, while protecting the rights of smuggled migrants and preventing the worst forms of their exploitation which often characterise the smuggling process.

3.1.2 ILO Conventions and Protocols

3.1.2.1 As can be seen from Table 1, South Africa has ratified **all ILO fundamental conventions**, as well as some of the technical conventions which are indirectly relevant to migrant workers, such as Convention 189 on Domestic Workers, an occupation where there are substantive numbers of migrants according to the 2012 Labour Force Survey (about 9% of workers in the sector were migrant workers then).

3.1.2.2 **Ratification of these ILO fundamental conventions** (see Table 1) and some of the key **governance** (Convention 081 - Labour Inspection Convention, 1947 (No. 81), and **technical** conventions Convention 189 – Domestic Workers Convention, 2011 (No.189)) is very important because **they apply to all workers, regardless of their migratory status** (regular or irregular).

3.1.2.3 South Africa has, however, **not ratified the two ILO key instruments**: Convention 097 - Migration for Employment Convention (Revised), 1949 (No. 97) and Convention 143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), nor has it ratified two other important technical instruments in relation with migrant workers: Convention 157 - Maintenance of Social Security Rights Convention, 1982 (No. 157) and Convention 181 - Private Employment Agencies Convention, 1997 (No. 181). South Africa has also **not ratified the UN International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW)**.

3.1.2.4 Of particular importance is also Convention 019 – Equality of Treatment (Accident Compensation) Convention, 1925 ratified by South Africa. In terms of this Convention, South Africa undertakes to grant to the nationals of any other ILO Member State which shall have ratified the Convention, who suffer personal injury due to industrial accidents happening in its territory, or to their dependants, the same treatment in respect of workmen's compensation as it grants to its own nationals.

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3.1.3 International reporting mechanisms

3.1.3.1 As signatory to these various conventions, South Africa is bound to their **respective reporting mechanisms**. These are:

- Committee on the Elimination of Racial Discrimination (CERD)
- Human Rights Committee (HRC)
- Committee on Economic, Social and Cultural Rights (CESCR)
- Committee on Elimination of Racial Discrimination Against Women (CEDAW)
- Committee Against Torture (CAT)
- Committee on the Right of the Child
- Committee on the Rights of Persons with Disabilities
- Division for Treaty Affairs (DTA), Organized Crime and Illicit Trafficking Branch (OCB), Human Trafficking and Migrant Smuggling Section (HTMSS) of UNODC
- ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR)
- International Migration Review Forum (IMRF) (follow up and reporting on the Global Compact for Safe Orderly and Regular Migration (GCM))

3.1.3.2 In addition to the above, as a member of the United Nations, South Africa is reviewed regularly under the **Universal Periodic Review (UPR),** which is a unique process involving a review of the human rights records of all UN Member States. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations. In its reports on South Africa and recommendations issued by other Member States (2008, 2012, 2017), the issue of the protection of migrant workers has been raised repeatedly. Also, several UN supervisory bodies have been critical of South Africa's treatment of categories of non-citizens, including the lack of adequate access to all social services for refugee and asylum-seeking children and the absence of appropriate family reunification measures.

3.1.3.3 South Africa remains committed to regular and accurate reporting to these various monitoring mechanisms on each instrument it has ratified. At the time of policy formulation, South Africa accepted more than 10 recommendations linked to increased protection of migrants, refugees and

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asylum seekers formulated in the Universal Periodic Review under the UN Office of the High Commissioner for Human Rights.[21]

3.1.4 AU and SADC instruments

3.1.4.1 AU instruments ratified by South Africa and of relevance to labour migration are:

- **African Charter on Human and Peoples' Rights**
- **African Charter on the Rights and Welfare of the Child**
- **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa**
- **African Youth Charter**
- **OAU Convention Governing the Specific Aspects of Refugee Problems in Africa**

3.1.4.2 Compliance with these instruments is monitored in particular by the African Commission on Human and Peoples' Rights (AComHPR), in addition to the specific mechanisms indicated in each of the instruments.

3.1.4.3 In interpreting the foundational instrument, i.e., the African Charter on Human and Peoples' Rights (ACHPR), the key monitoring body, the African Commission on Human and Peoples' Rights has made it clear that (both regular and irregular) migrant workers are to be regarded as vulnerable and disadvantaged groups. Hence states should recognise and take steps to combat intersectional discrimination based on among others migration status; need to ensure that migrants are covered by the social security system and have physical access to social security services; shall ensure that members of the families of migrant workers shall enjoy equality of treatment with nationals with regard to access to education, social and health services and participation in cultural life. (AComHPR *Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights* (2010)).

3.1.4.4 SADC instruments ratified by South Africa and of relevance also to labour migration are:

- **Protocol on the Facilitation of Movement of Persons (2005)**

[21] https://www.upr-info.org/database/index.php?limit=0&f_SUR=159&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=100&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly

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- **Protocol on the Development of Tourism (1998), as amended**
- **Protocol on Education and Training (1997)**

3.1.4.5 Compliance with ratified instruments is monitored by different monitoring institutions, depending on the instrument. In the case of the Protocol on the Facilitation of Movement of Persons, the SADC Organ is the monitoring institution.

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Table 1. Ratification of international human rights, labour, anti-trafficking and labour migration instruments by South Africa, 31st December 2018.

Treaty, convention or protocol	South Africa's position	Monitoring mechanism
UN Treaties and ILO Conventions		
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	✓	Committee on the Elimination of Racial Discrimination (CERD)
International Covenant on Civil and Political Rights (ICCPR)	✓	Human Rights Committee (HRC)
International Covenant on Economic, Social and Cultural Rights (ICESCR)	✓	Committee on Economic, Social and Cultural Rights (CESCR)
Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)	✓	Committee on Elimination of Racial Discrimination Against Women (CEDAW)
Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	✓	Committee Against Torture (CAT)
Convention on the Rights of the Child (CRC)	✓	Committee on the Right of the Child

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International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW)	×	Committee on Migrant Workers
Convention on the Rights of Persons with Disabilities (CRPD)	✓	Committee on the Rights of Persons with Disabilities
Convention Relating to the Status of Refugees	✓	No monitoring body (supervision: UN High Commissioner for Refugees (UNHCR))
Convention Relating to the Status of Stateless Persons	×	No monitoring body
C019 - Equality of Treatment (Accident Compensation) Convention	✓	
C029 - Forced Labour Convention, 1930 (No. 29)	✓	ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR)
C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)	✓	
C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)	✓	
C100 - Equal Remuneration Convention, 1951 (No. 100)	✓	
C105 - Abolition of Forced Labour Convention, 1957 (No. 105)	✓	

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C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	✓	
C138 - Minimum Age Convention, 1973 (No. 138)	✓	
C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)	✓	
C081 - Labour Inspection Convention, 1947 (No. 81)	✓	
C097 - Migration for Employment Convention (Revised), 1949 (No. 97)	×	
C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)	×	
C157 - Maintenance of Social Security Rights Convention, 1982 (No. 157)	×	
C181 - Private Employment Agencies Convention, 1997 (No. 181)	×	
C189 – Domestic Workers Convention, 2011 (No.189)	✓	
UNODC Protocols		
United Nations Convention against Transnational Organized Crime	✓	Division for Treaty Affairs (DTA), Organized Crime and Illicit Trafficking

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Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime	✓	Branch (OCB), Human Trafficking and Migrant Smuggling Section (HTMSS) of UNODC
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime	✓	

Table 2. Ratification of AU and SADC human rights, labour and labour migration instruments by South Africa, 31st December 2018.

Treaty, convention or protocol	South Africa's position	Monitoring mechanism
African Charter on Human and Peoples' Rights	✓	African Commission on Human and Peoples' Rights
African Charter on the Rights and Welfare of the Child	✓	African Commission on Human and Peoples' Rights
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	✓	African Commission on Human and Peoples' Rights

African Youth Charter	✓	African Commission on Human and Peoples' Rights
OAU Convention Governing the Specific Aspects of Refugee Problems in Africa	✓	
SADC INSTRUMENTS		
Protocol on the Facilitation of Movement of Persons (2005)	✓	SADC Organ
Protocol on the Development of Tourism (1998)	✓	SADC Organ
Protocol on Education and Training (1997)	✓	SADC Organ

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3.2 Guiding frameworks at international, regional and SADC level

3.2.0 As a United Nations, ILO, African Union, and SADC Member State, **South Africa is also guided in its implementation of its national labour migration policy by several international, regional and SADC frameworks based on international standards and best practice**. South Africa is committed to upholding the best standards in these various policy areas and ensuring that these are translated into or contribute to strengthening national legislation and current and effective administrative practices. These various frameworks and their implications are presented and explained in the rest of the sub-section.

3.2.1 Sustainable Development Goals (SDGs) indicators

3.2.1.1 The **Sustainable Development Goals (SDGs)**, officially known as "Transforming our world: the 2030 Agenda for Sustainable Development", is a set of 17 "Global Goals" with 169 targets among them. It is a non-binding document but the targets attached to the goals are used for international bench-marking. As such South Africa will regularly report to the UN on all SDGs.

3.2.1.2 Several SDGs are **directly related to migration**, and some more specifically to **labour migration**. These are:

- **Primary SDGs**:
    - 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all – focusing among others on ending modern slavery and human trafficking and elimination of the worst forms of child labour (8.7), and the protection of the labour rights and promotion of safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment (8.8)
- **Secondary SDGs**:
    - 5. Achieve gender equality and empower all women and girls – focusing also on eliminating all forms of violence against all women and girls, including trafficking (5.2);
    - 10. Reduce inequality within and among countries – highlighting the facilitation of orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies (10.7), and reducing, by 2030, to less than 3% the transaction costs for migrant

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remittances and eliminating remittance corridors with costs higher than 5% (10.c);

- 17. Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development – also by enhancing capacity-building support to increase significantly the availability of high-quality, timely and reliable data disaggregated by among others migratory status (17.18).

3.2.1.3 As part of its NLMP, the NDEL is committed to providing accurate data to report on progress achieved in each of these SDGs.

3.2.2 The United Nations Global Compact for Safe, Orderly and Regular Migration

3.2.2.1 The United Nations Global Compact for Safe Orderly and Regular Migration (GCM) is an initiative of the latest UN High Level Dialogue on Migration envisaged in the **New York Declaration on Refugees and Migrants (A/RES/71/1) adopted in October 2016**. The GCM involved a process of intergovernmental negotiations, and was formally adopted in December 2018.

3.2.2.2 The GCM gives expression to the vision to "… set out **a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions**. It makes an important contribution to global governance and enhances coordination on international migration. It presents a framework for comprehensive international cooperation on migrants and human mobility. It deals with all aspects of international migration, including the humanitarian, developmental, human rights-related and other aspects of migration. It is guided by the 2030 Agenda for Sustainable Development[22] and the Addis Ababa Action Agenda of the Third International Conference on Financing for Development,[23] and informed by the Declaration of the High-level Dialogue on International Migration and Development adopted in October 2013.[24]"

3.2.2.3 South Africa participated in the process leading to the adoption of the GCM and will ensure that its NLMP is aligned to the principles embedded therein.

[22] Resolution 70/1.
[23] Resolution 69/313, annex.
[24] Resolution 68/4.

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3.2.3 Other relevant international frameworks

3.2.3.1 South Africa's NLMP also draws on existing non-binding frameworks which have been adopted by the ILO through tripartite processes to which it participated as a Member State. These frameworks are:

- **ILO Guiding Principles on the Access of Refugees and Other Forcibly Displaced Persons to the Labour Market** (2016)
- **ILO Principles and Operational Guidelines on Fair Recruitment** (2016)

3.2.3.2 Another valuable migration compliance scheme which the South African NLMP draws on is the International Organization for Migration (IOM)'s **International Recruitment Integrity System (IRIS)** (2013).

3.2.4 AU and SADC frameworks and policy processes

3.2.4.1 It is important for the NDEL to recognise the **regional policy context** in which South Africa operates. The African Union (AU) has reached a common position and adopted several policy frameworks supporting the ideal of free movement. The **African Charter on Human and People's Rights** referred to above, in its article 12 stipulates that "every individual shall have the right to freedom of movement and residence within the borders of a State, provided he abides by the law". In 2006, the AU clarified its position with the adoption of two key documents, the **African Common Position on Migration and Development** (2006) which spells out the region's position regarding the external migration of its citizens, and the **Migration Policy Framework for Africa** (2006), updated in 2018 in the form of the (revised) **Migration Policy Framework for Africa (MPFA) and its Plan of Action (2018-2030)**. The MPFA provides guidelines to Member States for the development of harmonised national migration policies and intra-regional coordination.

3.2.4.2 In 2015, the AU Commission garnered support to take the AU migration agenda one step further. Firstly, confirming its sustained interest in a rights-based approach to migration issues expressed in the Ouagadougou Plan of Action, the AU officially adopted the **Joint Labour Migration Programme (JLMP)** as part of its Declaration on the Eradication of Poverty at the January 2015 Summit of Heads of State. Spearheaded by the AUC with support from the IOM, ILO and UNECA, the JLMP is conceived as the operationalisation of the 2006 Migration Policy Framework (now the 2018 MPFA) in the area of labour migration. The preferred implementation level of the JLMP is that of African Regional Economic Communities (RECs). Technical meetings in 2015 helped seven of the RECs (CEN-SAD, COMESA, EAC, ECCAS, ECOWAS, IGAD, SADC) identify their priority areas for intervention. Secondly, in 2015 in its **Declaration**

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on Free Movement, the AU announced the adoption of a regional free movement regime by 2018, including through the harmonization of the RECs' migration regimes and superseding of national legislations. In 2022, two further instruments were adopted by the AU, i.e., the **Draft Guidelines on the Development of a Model Migrant Welfare Programme/System** and the **Guidelines on Developing Bilateral Labour Agreements (BLASs)**.

3.2.4.3 In 2018 the AU adopted the **Protocol to the Treaty establishing the African Economic Community relating to the Free Movement of Persons, Right of Residence and Right of Establishment, (AU FMP)**, together with another instrument, which impacts also on the cross-border movement of those who trade in services, i.e., the 2018 **Agreement establishing the African Continental Free Trade Area (AUCFTA)** and its associated **Protocol on Trade in Services**. The AU FMP provides for the free movement of workers to be achieved in 2023 via a phased approach. Article 14 of the AU FMP stipulates:

> "1. Nationals of a Member State shall have the right to seek and accept employment without discrimination in any other Member State in accordance with the laws and policies of the host Member State.
>
> 2. A national of a Member State accepting and taking up employment in another Member State may be accompanied by a spouse and dependants."

In order for free movement of workers to be achieved, countries need to ensure that a host of measures need to be in place, including the mutual recognition of qualifications and portability of social security benefits (see Articles 18 and 19).

3.2.4.4 At **SADC level**, while free movement features in its founding Treaty, SADC has since preferred the route of facilitated movement, the fight against trafficking, support to harmonised and rights-based labour migration policies, and other sub-regional arrangements to streamline orderly cross-border migration, including labour migration. Relevant SADC frameworks are:

- **Protocol on the Facilitation of Movement of Persons** adopted in 2005 under the SADC Organ on Politics, Defence and Security. In 2016, the Protocol had however only been ratified by Botswana, **Es**watini, Mozambique and South Africa, and could therefore not be enforced.[25] South Africa will continue to lobby SADC Member States for its ratification. The overall objective of the Protocol is to develop policies aimed at the progressive elimination of obstacles

[25] Apparently, by April 2021 seven SADC Member States have ratified the Protocol, still four short of the required number of Member States to cause the Protocol to enter into force.

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to the movement of persons of the region generally into and within the territories of state parties. This objective will be achieved by facilitating entry, for a lawful purpose and without a visa, into the territory of another state party for a maximum period of 90 days per year for bona fide visits and in accordance with the laws of the state party concerned; permanent and temporary residence in the territory of another state party, in accordance with the laws of the State Party concerned; and permission for establishment in the territory of another state party, in terms of the national laws of the State Party concerned (Articles 3, 17 and 20).

- **SADC Code on Social Security** adopted in 2007 and more specifically its **Article 17 on Migrants, Foreign Workers and Refugees** which promotes bi- or multilateral agreements, inclusion of migrant workers in national social security schemes, equality of treatment with nationals, an aggregation of insurance periods and the maintenance of acquired rights and benefits between similar schemes in different Member States, portability of benefits across Member States, access to coverage for self-employed workers, access to minimum protection for irregular workers, and extension of social security to refugees. **Harmonised SADC Regional Strategic Plan on Combating Illegal Migration, Smuggling of Migrants and Trafficking in Persons** was developed to enable comprehensive implementation of the 10-Year SADC Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children (2009-2019).
- **SADC Labour Migration Action Plan 2013-2015, renewed for 2016-2019 and again 2020-2025** and **SADC Labour Migration Policy Framework, 2014**: These two non-binding frameworks are key to the adoption of national labour migration policies by all SADC Member States. South Africa is fully committed to their implementation.
- Of relevance to labour migration are also the SADC frameworks and arrangements in relation to cross-border **health**, **social security** and **skills and qualifications recognition and harmonisation** in SADC – which are all endorsed by South Africa.
    - Regarding **health**, Outcome 1.4 of the (2016-2019) SADC Labour Migration Action Plan concerns **Migrant workers to**

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have access to care across borders and at workplace. Of particular importance are the SADC policies and initiatives in relation to TB and HIV in mines. The policy framework includes the SADC Declaration on TB in the Mining Sector (2012), Framework for Harmonized Management of TB (2014) and the SADC Code of Conduct in the Mining Sector (2015), and regional programmes (TB in the Mining Sector in Southern Africa (TIMS)). Progress has also been made with developing one-stop health screening and referral services for migrants as they enter South Africa (e.g. with Mozambique). Harmonisation of health and labour policies is foreseen in, among others, the SADC HIV Strategic Framework.

- As regards **social security**, provision is made for equal treatment in relation to (contributory) social security and access to, and portability of social security benefits in several SADC instruments – among others the SADC Code on Social Security (2007), the SADC Cross-Border Portability of Social Security Benefits Policy Framework (2016), the Guidelines on the Portability of Social Security Benefits in SADC (2019), the SADC Labour Migration Action Plan 2013-2015, renewed for 2016-2019 and again for 2020-2025 and SADC Labour Migration Policy Framework, 2014.
- Concerning **skills and qualifications recognition**, the SADC Qualifications Framework (SADCQF), established in 2011, has the purpose of enabling easier movement of learners and workers across the SADC region and internationally. It is a 10-level Regional Qualifications Framework underpinned by learning outcomes and quality assurance principles that will provide a regional reference for qualifications and quality assurance mechanisms in SADC. It effectively coordinates qualifications, promotes the transfer of credits within and among SADC Member States, and creates SADC regional standards. Alignment of national qualifications frameworks or systems is being piloted in several SADC Member States, including South Africa.

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3.3 National policy principles and coordination

3.3.0 The NLMP has been designed to serve the **overarching objectives of the National Development Plan and other key national policy frameworks**. This sub-section will first explain briefly how the NLMP responds to their strategic requirements and aligns to their priorities. Second, complementarity with the DHA's new White Paper on International Migration for South Africa (2017) is explained. Third, the sub-section clarifies how the NLMP intends to complement the NDEL's and other ministries' employment-related policies. A final point is made to show how the NLMP both makes use of, prolongs and strengthens the spirit and implementation of existing labour legislation.

3.3.1 Alignment with National Development Plan, New Growth Path, Medium-Term Strategic Framework (2014-2019) and Decent Work Country Programmes (2010-2014) and (2018-2023)

3.3.1.1 As national policy under the responsibility of the NDEL, the **NLMP was designed to serve the broader objectives of key policy frameworks guiding overall government intervention in South Africa**:

- National Development Plan (NDP): A Vision for 2030 (2012);
- New Growth Path (NGP) (2010 – 2020);
- Medium-Term Strategic Framework (MTSF) (2014-2019);
- Decent Work Country Programmes for South Africa (2010-2014) and (2018-2023).

3.3.1.2 The NDEL shares **the diagnosis of the NDP** that:

> If properly managed, migration can fill gaps in the labour market and contribute positively to South Africa's development. Energetic and resourceful migrant communities can contribute to local and national development, and diverse, cosmopolitan populations are often the focus of cultural, economic and intellectual innovation. If poorly managed, however, the skills and potentials of migrants will be neglected. Migration will remain a source of conflict and tension, and migrants will be increasingly vulnerable, subject to continued abuse, exploitation and discrimination. (NPC, 2011: 105).

The NLMP follows the **NDP's recommendation** of a "labour market that is more responsive to economic opportunity" thanks to, among other things, "skilled immigration" (Op.cit.: 40), to its **objectives Nos. 10** of adopting "a more open immigration approach to expand supply of high-level skills" (Op.cit.: 65) and **67** of relaxing "immigration requirements for highly skilled science and mathematics teachers, technicians and researchers. All graduates from foreign countries should be granted 7-year work permits." (Op.cit.: 71), and the "**need**

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to adopt a much more progressive migration policy in relation to skilled as well as unskilled migrants" (Op.cit.: 101). The NLMP embraces the recommendations of the NDP in terms of "**required steps to better facilitate migration**" which are:

- Improving data collection, coordination and analysis as a matter of urgency.
- Easing the entry of skilled migrants.
- Countering xenophobia by conducting sustained public awareness campaigns and public discourse engagements.
- Effectively addressing the rights and vulnerabilities of migrants.
- Introducing support programmes to regularise migrant residence.
- Ensuring better and more consistent law enforcement (by protecting victims and prosecuting perpetrators).
- Strengthening transnational infrastructure (transport, electronic communications, banking services).
- Addressing the specific needs of migrants in South Africa. (Op.cit.: 107)

In terms of **labour-market policies**, the NLMP embraces the NDP proposal to adopt "**a more open approach to skilled immigration to expand the supply of high skills in the short term, in a manner that obviates displacement of South Africans**." (Op.cit.: 134).

3.3.1.3 The NLMP responds to the injunctions formulated in the **New Growth Path** of 2011, more specifically to the following point:

- 2.2 Micro-economic package. Four: Stepping up education and skills development which calls for the finalisation of "the National Skills Development Strategy taking into account the needs emerging from the growth path. In addition, the overall supply of highly skilled labour should be increased by continued efforts to streamline the immigration system in ways conducive to the inflow of skills, linked to a skills transfer programme and an on-going commitment to upgrade domestic education on a broad basis." (Economic Development Department, 2011: 48).

3.3.1.4 The NLMP also concurs with the **Medium-Term Strategic Framework (MTSF) 2014-2019** that:

> South Africa faces immediate skills shortages which are constraining investment and growth. While measures are being put in place to develop scarce skills, it is also necessary to encourage in-migration of skills in the short to medium-term. Steps will be taken to ensure that the regulatory environment makes South Africa an attractive destination for skilled people. (Government of the Republic of South Africa, 2014: 10).

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3.3.1.5 **Decent Work Country Programmes (2010-2014) and (2018-2023)**: The NLMP is supportive of Output 6.6 of the 2010-2014 Decent Work Country Programme: Support for social security coverage to migrant workers (including portability of benefits) of Outcome 6 (More people have access to better managed and more gender equitable social security benefits). More broadly, the NLMP sees the following as part of Outcome 2.1 of the 2018-2023 Decent Work Country Programme: Expanded and effective social security systems.

3.3.2 White Paper on International Migration for South Africa (2017)

3.3.2.1 The **DEL is supportive of the changes and the modernisation of South Africa's immigration policy** as announced in the White Paper and specifically of the impetus to ensure better integration of South Africa within SADC.

3.3.2.2 The DEL considers that improved management of migration to and from the country and particularly of migration for employment requires **additional coordinated strategic and technical inputs**. This is what the NLMP seeks to achieve.

3.3.2.3 The management of labour migration in South Africa should be sensitive of need **to minimise risks that migrants could constitute to the South African security, economy and society** and to establish risk levels prior to their entering the territory – as indeed emphasised in the *White Paper on International Migration*. In addition to the importance of this risk factor, international standards and best practice point to the vulnerabilities inherent to migrancy and advocate rather for **a rights-based approach** ensuring maximum protection of all workers, local and migrant, throughout the migration cycle. There should therefore be **a balance between a risk-based approach and a rights-based one, as the two approaches should be seen as complementary**.

3.3.2.4 In particular, the NDEL concurs fully with the DHA that "**stronger enforcement of labour and migration laws is critical to ensure that citizens are not disadvantaged by employers paying economic migrants lower wages**. Irregular migration is likely to decrease, if employers' compliance with immigration and labour laws increases. In other words, the focus should be on unscrupulous employers rather than individual migrants, because it is their hiring practices which act as a pull factor for irregular migration." (DHA, 2017: 57).

3.3.2.5 The DEL supports **multiple innovations** mentioned in the White Paper such as strengthening of services to South African emigrants and returnees; regularisation programmes for citizens from the Southern African Customs Union (SACU), as well as Zimbabwe, Mozambique and Malawi, the opening of new visa options for the low-skilled, cross-border traders and small and medium

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enterprises (Op.cit.: 56-57), and inter-ministerial coordination on inspection for instance and data collection and usage. Several of these and other interlinked areas, including the recognition of qualifications, reintegration into the South African labour market, monitoring of skills distribution and transfer, better enforcement of labour legislation, or integrated collection of labour migration data, pertain to labour migration policy and involve a range of other departments and pertain to labour migration policy.

3.3.2.6 The **NLMP should therefore be seen as complementary to the White Paper** and be considered the **guiding framework on all issues related to migration for employment**.

3.3.3 Employment-related policies

3.3.3.1 Since 2005, with the **Accelerated Shared Growth Initiative for South Africa (ASGISA)**, a limited set of interventions intended to serve as catalysts to accelerated and shared growth and development with a focus on skills, and the **Joint Initiative for Priority Skills Acquisition (JIPSA)**, the South African Government has been aware of the need to boost skills acquisition and retention through immigration of skilled foreign labour.

3.3.3.2 The draft National Employment Policy (NEP) (2021), commissioned by the NDEL, aims at promoting full, productive and freely choose employment at the heart of socio-economic and development policies through a rights-based approach and a broad basis of agreement achieved through social dialogue in line with the ILO Employment Policy Convention, 1964 (No. 122). The goals and objectives of the NEP are to ensure that (a) there is work for all who are available for and seeking work, (b) such work is as productive as possible, (c) there is freedom of choice of employment and the fullest opportunity for each worker to qualify for, and to use their skills and endowments in, a job for which they are well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin.[26] The NEP sub-theme on migration provides an analysis on the empirical evidence on the impact of employment of foreign nationals in the South African labour market, reflected on in different parts of this policy. Two of the key conclusions of the NEP concerning the treatment of migrant workers should be highlighted here:

- Employment policies, while prioritizing the role of South Africans in key sectors where unequal power and bargaining relations allow employers to exploit migrant workers, need to pave the path for a framework that

[26] ILO Guide on Employment Policy and International Labour Standards.

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targets all workers in such sectors irrespective of their country or place of origin.

- In particular, such policy needs to focus on creating a socially accepted economic vulnerability floor beneath which no wages or conditions of work, of South Africans and migrants should fall. This would be in line with South Africa's national and international obligations to ensure decent work for all.

3.3.3.3 In addition to the draft NEP, South Africa has several **employment-related frameworks and policies** which provide directions in terms of the role to be played by foreign labour in efforts to strengthen national employment and economic growth:

- NDP
- NGP
- MTSF
- Outcome 4: Decent employment through inclusive growth of the DWCP
- Industrial Policy Action Plan (IPAP)
- Expanded Public Works Programme (EPWP)
- Revised Strategic Plan 2015-2020 (Department of Employment and Labour)

3.3.3.4 IPAP (2014) sees immigration as one way to fill in skills deficits and mismatches (DTI, 2014: 29).

3.3.3.5 EPWP is reserved to South African citizens.

3.3.3.6 The NDEL's Revised Strategic Plan (2020-2025) highlights the development of both this Policy and the Employment Policy.

3.3.4 Other policy areas

3.3.4.1 The NLMP is informed and guided by other overarching government programmes, especially the **Human Resource Development Strategy (HRDS) for South Africa 2010-2030** (2010) and the **National Skills Development Strategy (NSDS) III** (2014), as well as the **National Skills Development Plan 2030 (NSDP)** (2019).

3.3.4.2 As noted in the **HRDS**, "(…) the SETA sector skills plans, the Higher Education (HE) and Further Education and Training (FET) enrolment planning and the immigration quota list are not informed by a common, credible and

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consistent modelling of skills supply and demand projections." (2010: 13). The NLMP will contribute to the following HRDS resolutions:

- **Strategic Priority Eight**: To ensure that the balance of immigration and emigration reflects a net positive inflow of people with priority skills required for economic growth and development (Op.cit.: 19);
- **Commitment One**: **Strategic Priority 1.2: To increase the number of skilled personnel in the priority areas of design, engineering, artisans that are critical to manufacturing, construction and cultural activities through net immigration**;
- **Commitment Two activities**: Review and align the national scarce skills list to arrive at a common official national skills list that is aligned to the country's social and economic priority goals (including the Antipoverty Strategy, ASGISA, NIPF and IPAP) and which would guide all HRD activities in the country, especially with regards to HET, FET, immigration targets and SETAs (Op.cit.: 34).

3.3.4.2 The NLMP will contribute to the **NSDS III** (2014), particularly in terms of its Goal 4.1 Establishing a **credible institutional mechanism for skills planning** which relates to the goals and activities pursued in the HRDS. It will also contribute to the NDSP principles, including the promotion of integration of the NSDP within the Post School Education and Training System, and understanding skills demand.

3.3.4.3 In view of the high unemployment rate in South Africa, this Policy supports an arrangement that a certain percentage of the total staff complements employed in the operations of businesses are South African citizens (or permanent residents) employed permanently in various positions. It supports the principle that the percentage generally be set at 60%, subject to the need for a proper labour market analysis to confirm, or review the set percentage. It also supports the position that there may be a need to fully or partially exempt certain sectors or sub-sectors of the labour market, for a set time period, from this arrangement, based on labour market information supporting the granting of the exemption. An appropriate legislative framework should provide the mandate for this arrangement, and should identify the specific visa categories to which this applies. The Policy further recognises that the imposition of this requirement not only on newly established businesses, but also on existing businesses, should duly account for the need to ensure employment protection of foreign workers lawfully employed by such businesses, and that this arrangement therefore may have to be progressively implemented in relation to currently established businesses. The said legislative framework should indicate appropriate penalties for non-compliance by

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employers, and ensure that inspectors have the required powers to enforce the arrangement."

3.3.5 National legislation

3.3.5.1 For the past two decades, the Government of South Africa has developed a **broad legal apparatus which aligns to international human rights and labour standards in terms of various dimensions of labour migration**: the protection of migrant workers and their families, equality of treatment between national and migrant workers, regulation of private employment agencies, labour rights and social protection of migrant workers in South Africa and access to social benefits before return to the country of origin. The NLMP is rooted in existing legislation and strives to ensure its effective implementation. It also aims to improve and strengthen national legislation on labour migration when and where appropriate.

3.3.5.2 **Constitution / Human Rights**: The Constitution (1996) extends protection also to migrants and migrant workers. The Constitutional Court and other courts have on numerous occasions held that migrants generally and migrant workers specifically are to be seen as vulnerable categories in society, worthy of the protection of the Constitution. As such and in principle, unequal treatment is not to be allowed. The list of Human Rights is contained in the **Bill of Rights**, Chapter 2 of the **South African Constitution**, the highest law in the country. These rights extend to any human being in the Republic of South Africa, regardless of their migration status and including in detention, except for those rights accorded to citizens only. The following core provisions can be highlighted:

- The rights to equal treatment (section 9) and the right to human dignity (section 10) have played a major role in extending protection to migrants and migrant workers in South Africa.
- Every citizen has the right to choose his or her trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law (section 22).
- Everyone has the right to fair labour practices (section 23(1)).
- "Everyone has the right to have access to healthcare services, including reproductive health care" (section 27 (1)(a)).
- "Everyone has the right to social security, including, if they are unable to support themselves and their dependents" (section 27(1)(c)

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- "No one may be refused emergency medical treatment" (section 27(2))
- "Every child has the right to a name and nationality from birth" (section 28(1))
- Section 29(1)(a) of the Constitution states that everyone has the right to a basic education, including adult basic education. This has been interpreted to include undocumented migrant children in SA.
- Sections 21 and 23 of the Constitution lay a solid overarching policy foundation for managing international movements and residence rights of foreigners and citizens:
    - "Everyone has the right to freedom of movement" [section 21(1)];
    - "Everyone has the right to leave the Republic" [section 21(2)];
    - "very citizen has the right to enter, to remain in and to reside anywhere, the Republic" [section 21 (3)];
    - "Every citizen has the right to a passport" [section 21 (4)]; and
- Most of the rights are subject to limitation in terms of section 36 of the Constitution.

However, it needs to be indicated that not all constitutional rights accrue to non-nationals. In *Rafoneke v Minister of Justice and Correctional Services*[27] the Constitutional Court held that section 22 of the Constitution preserves the rights of *citizens* to choose their trade, occupation or profession freely and that it also empowers the State to enact legislation to regulate freedom of trade, occupation and profession. In so doing, the State is empowered to limit access to a trade, occupation or profession to citizens only.

3.3.5.3 **Social rights**: Only permanent residents and recognised refugees are eligible to access social grants through the South African Social Security Agency (SASSA). Refugees qualify for all social grants, except for the war veteran grant. Other migrant workers cannot qualify for social grants. However, the special COVID-19 Social Relief of Distress Grant was, per court order, extended to asylum-seekers and special dispensation holders as well.

3.3.5.4 **Labour legislation**: South Africa has adopted the **principle of equality of treatment**. This means that every aspect of its labour legislation extends to all

[27] 2022 (6) SA 27 (CC); 2022 (12) BCLR 1489 (CC).

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workers. **Migrant workers are therefore protected by all South African labour laws**:

- **Skills Development Act No. 97 of 1998 and Skills Development Levies Act No. 9 of 1999**
- **Compensation for Occupational Injuries and Diseases Act** (COIDA) No. 130 of 1993 (as amended)
- **Occupational Diseases in Mines and Works Act (ODMWA) No. 78 of 1973**
- **Labour Relations Act (LRA)** No. 66 of 1995 (as amended)
- **Basic Conditions of Employment Act (BCEA)** No. 75 of 1997 (as amended)
- **National Minimum Wage Act (NMWA) No. 9 of 2018** also applies regardless of workers' nationality or migratory status.
- **Unemployment Insurance Act No. 63 of 2001** (as amended) and **Unemployment Insurance Contributions Act No.4 of 2002**.
- **Access to conciliation and arbitration** through the Commission for Conciliation, Mediation and Arbitration (CCMA), a dispute resolution body established in terms of the Labour Relations Act, 66 of 1995, has been extended to migrant workers, including those in irregular situation.
- **Employment Services Act No. 4 of 2014** and draft Regulations on the Employment of Foreign Nationals of 2018: facilitates the employment of foreign nationals in a manner that is consistent with the objects of the Act and the Immigration Act No. 13 of 2002; provision is also made in draft Regulations of 2018 for the registration and regulation of public employment agencies and private employment agencies respectively. Amendments to the Employment Services Act are being drafted, to give effect to the provisions of this Policy, including the imposition of quotas.
- The **Refugees Amendment Act** No. 11 of 2017 (RAA) (implemented on 1 January 2020) severely curtails the right of asylum-seekers to work. Section 22(8) of the Refugees Act, as amended by RAA 2017, commences from the premise that the right to work in the Republic may not be endorsed on the asylum-seeker visa of any applicant, who – (a) is able to sustain himself or herself and his or her dependants; (b) is offered shelter and basic necessities by the UNHCR or any other charitable organisation or person; or (c) seeks to extend the right to work, after having failed to produce a letter of employment.The **National Health Insurance Bill** (B 11-2019) extends coverage to refugees, but treats asylum-seekers on par with 'illegal foreigners', by stipulating (in clause 4(2)) that an asylum-

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seeker or illegal foreigner is only entitled to (a) emergency medical services; and (b) services for notifiable conditions of public health concern. However, it also stipulates that all children, including children of asylum-seekers or illegal migrants, are entitled to basic health care services as provided for in section 28(1)(c) of the Constitution (clause 4(3)).

3.3.6 Jurisprudence

South African case law has reached important conclusions regarding the labour and social protection to which different migrant (worker) categories are entitled. The labour and social protection which accrues to migrant workers is among others influenced by their access to the labour market. A synopsis of some of the key judgments reveals:

- Section 22 of the Constitution preserves the rights to choose their trade, occupation or profession freely to citizens. This provision empowers the State to enact legislation to regulate freedom of trade, occupation and profession, and to exclude non-nationals, or categories of non-nationals, from access to a particular trade, occupation or profession – as long as the state does not act arbitrarily, and as long as the exclusion or restriction does not amount to a blanket prohibition to work.[28]
- The **blanket prohibition of wage-earning employment** by asylum-seekers has been found to be unconstitutional, on the basis that this would infringe their right to human dignity, as they would be left destitute.[29]
- This principle was subsequently **extended** – the prohibition on asylum-seekers to seek **self-employment** was found to infringe their right to human dignity, as this would deprive them from earning a living and leave them destitute. In the *Somali Association* case the Supreme Court of Appeal held that held that they were entitled to apply for a new business or trading licences, apply for renewal of such licenses and apply for and renew written consent to operate tuck-shops or spaza shops in terms of the applicable legislation. The Court further declared that the closure of businesses operated by refugees and asylum seekers in terms of valid permits is unlawful and invalid.[30]

[28] *Rafoneke v Minister of Justice and Correctional Services* 2022 (6) SA 27 (CC); 2022 (12) BCLR 1489 (CC).
[29] *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA).
[30] *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* 2015 (1) SA 151 (SCA).

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- The **fundamental right to equality** could also be affected. The Constitutional Court has held that permanent residents may not be discriminated against *vis-à-vis* citizens when it comes to access to permanent employment in the public sector as teachers[31] and to access to social assistance.[32] However, there is some authority in the case law for a **distinction** to be drawn between foreigners with **permanent** and those with **temporary residence status**.
- The right to **fair labour practices** may also be relevant. It has been held that foreign workers whose **work permits have expired** are nevertheless entitled to employment protection, due to the operation of this fundamental right.[33]
- *Lucien Ntumba Musanga v Minister of Labour*, a settlement agreement was entered into to permit applications for Unemployment Insurance Fund benefits from applicants who could only provide asylum permit numbers. Regulations to the Unemployment Insurance Act, preventing this, were challenged as being unconstitutional and requiring amendment to the Unemployment Insurance Act, which prevented asylum-seekers from receiving UIF benefits.[34]
- The COVID-19 introduced Social Relief of Distress grant (for unemployed persons not in receipt of any other social grant or Unemployment Insurance Fund benefits – now extended until March 2023) initially excluded asylum-seekers and special permit holders, entitling only citizens, permanent residents and refugees to this benefit. In *Scalabrini Centre and another v Minister of Social Development and others*, the court ordered that the asylum-seekers and special dispensation permit holders already in the country were eligible for the grant and able to apply for this relief.[35]

[31] *Larbi-Odam v Member of the Executive Council for Education* (*North-West Province*) 1997 12 BCLR 1655 (CC); 1998 1 SA 745 (CC) pars 30–31: "Permanent residents should . . . be viewed no differently from South African citizens when it comes to reducing unemployment." See also *Baloro v University of Bophuthatswana* 1995 8 BCLR 1018 (B); 1995 4 SA 197 (B).
[32] *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC) pars 68–75. The exclusion of non-citizens who were permanent residents from receiving social assistance grants in terms of the then Social Assistance Act 59 of 1992 ss 3(c) and 4(b)(ii) constituted unfair discrimination.
[33] *Discovery Health Ltd v CCMA* [2008] 7 BLLR 633 (LC).
[34] (Unreported) Case No. 29994/18 NGHC.
[35] [2020] ZAGPPHC 308.

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SECTION 4. NLMP THRUST AND VISION

4.1 Main orientations and guiding paradigm of the NLMP

4.1.1 The National Labour Migration Policy (NLMP) has a **fundamental role to play in achieving the goals of South Africa's national guiding frameworks** in terms of skills acquisition, employment creation and retention, and generally, in terms of fostering decent conditions of work for all workers, national and foreign, in South Africa and abroad, in the best interest of South African society and economy.

4.1.2 The NLMP is rooted in the **principles of the South African Constitution and the objectives of the National Development Plan** as well as other relevant national policies and frameworks.

4.1.3 The NLMP follows a **rights-based approach to the protection of all workers employed in South Africa and the protection of South African workers abroad** as defined in South Africa's international obligations, regional and SADC commitments, as well as obligations under its national labour legislation which is guided by the principle of equality of treatment. Overall, the NLMP should reflect and serve social justice considerations and objectives.

4.1.4 The NLMP is informed by the appreciation that migration and its management need to be harnessed to serve the developmental needs of South Africa. Also, from a broader developmental, including sustainable development perspective, there is need to ensure that the NLMP is sufficiently gender-sensitive and gender-responsive, bearing in mind the needs, experiences and plight in particular of women migrants.

4.1.5 The NLMP complements the management of human mobility across international borders defined in the DHA's **White Paper on International Migration for South Africa** (2017) by **setting government's approach to migration for employment.**

4.2 Vision

4.2.1 Accordingly, the NLMP holds a vision of labour migration for South Africa based on the following premises:

- **Labour migration to and out of South Africa is a historical and long-term trend** linked to in particular structures of economies and multiple historical and cultural linkages between Southern African peoples. As such, it is only likely to grow.

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- **If strategically managed, labour migration constitutes an opportunity** for individuals to empower themselves and their families; for employers to benefit from the added value of this foreign labour force; for national workers to acquire new skills and experience; for workers' organisations to grow their power base through international solidarity; for countries to strengthen their ties and avoid social dumping; and for regional organisations to consolidate and advance their integration.
- **Only a rights-based, gender-sensitive approach to labour migration, based on labour market needs and** balancing the interests of all major stakeholders to reach a progressive, coherent and implementable consensus, **will allow realisation of the ideal of decent work for all and the objective of employment creation** which are at the heart of the South African national project.

4.2.2 The **vision** of the NLMP is:

To give rise to efficient and effective Government leadership and intervention, supported by social partners and all major stakeholders, allowing for safe, orderly and regular migration for employment of highly, semi- and low-skilled workers to and from South Africa, in pursuit of the country's national priorities.

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SECTION 5. KEY AREAS OF INTERVENTION

5.0.1 Section 5 of the NLMP seeks to address current policy gaps identified in the Labour Migration Assessment (LMA) (Section 2) and throughout the policy development process. It does so in four interrelated Key Areas of Intervention (KAI):

1. **Labour migration governance and management**
2. **Data for evidence-based policy monitoring and evaluation**
3. **Labour migration to South Africa**
4. **Labour migration from South Africa**

5.0.2 Each KAI is organised around the same structure: 1. Scope, problem and objective; 2. A set of policy interventions whose number will vary from KAI to KAI; 3. Anticipated benefits of intervention. This is to allow comparability between KAIs but also for monitoring and evaluation purposes in terms of translation of these KAIs into an outcome-based action plan at a later stage.

5.1 Key Area of Intervention 1. Labour migration governance and management

5.1.1 Scope, problem, objective

5.1.1.1 KAI 1 focuses on **labour migration governance and management structures and processes defined as all the institutions, laws, administrations and their operating procedures** which contribute to the regulation of labour migration into and from South Africa.

5.1.1.2 As indicated in the LMA (Section 3) and in Section 2.2 of the NLMP, labour migration governance currently suffers from **various challenges**:

- Historical concentration of policy design and decision-making within the DHA
- Overemphasis on policy priorities based on risk-assessment over skills enhancement and employment issues leading to ineffective monitoring of skills management priorities
- Enforcement of migrant workers' labour and social protection rights, particularly for most vulnerable workers (women, youth, domestic workers, etc.) via effective enforcement

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- Weak and inadequate inter-ministerial coordination leading to high turnaround times and miscommunication in the processing of work visas
- Limited data and information sharing systems entrenching a siloed approach
- Weak to no policy interventions and structures on sensitization of migrant workers to fraudulent recruitment, induction to South African labour legislation, as well as accompanying measures for South Africans seeking employment abroad
- Limited to non-existent consultation and inclusion of social partners (employers' and workers' organisations and communities) through NEDLAC and other bodies such as the Immigration Advisory Board on key labour migration matters

5.1.1.3 In addition, government is mindful of the need to be sensitive and responsive to the context and challenges of particularly vulnerable labour migrant categories. Here two such categories are highlighted in particular:

- Women and children are especially affected by migration. Nowadays, a significant number of women migrate independently of their families to pursue their opportunities. The migration experience is not always safe for women migrant workers. Due to their dual vulnerability as migrants and women, they are still disproportionately affected by various risks and human rights violations arising from their mobility. This may arise from the fact that a significant number of women migrant workers are employed in low-skilled occupations. They tend to integrate gender-segregated sectors that are primarily informal and unregulated, therefore offering them little or no protection, with limited or no bargaining power and few opportunities to receive information and social support. Women migrant workers in an irregular situation are particularly vulnerable to harassment, intimidation or threats, and economic and sexual exploitation, including trafficking and racial discrimination.[36]
- A recent HSRC contribution[37] suggests that a Stats SA investigation into the informal sector, published in 2020,[38] showed that many migrants

[36] Submission made by the Commission for Gender Equality.
[37] Gordon, S "Xenophobia is on the rise in South Africa: scholars weigh in on the migrant question" *The Conversation* (April 14, 2000) (accessible on https://theconversation.com/xenophobia-is-on-the-rise-in-south-africa-scholars-weigh-in-on-the-migrant-question-181288).
[38] Stats SA *COVID-19 pandemic in South Africa: Demography Volume* (2020) (https://www.statssa.gov.za/?page_id=1854&PPN=Report%2000-80-05).

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working in the informal economy are very vulnerable. This group was more likely than non-migrants to have poor working conditions. About half (55.6%) had not made contributions to the South Africa's Unemployment Insurance Fund and 40.5% had no employment contract. Of those with a contract, 41.3% had one with an unspecified duration. Also, they experience particular challenges in relation to their treatment by local authorities, their exposure to xenophobic conduct, and several regulatory attempts to prohibit or restrict their access to and involvement in labour market activity.

5.1.1.4 KAI 1 seeks to address these challenges and proposes policy intervention in **three specific clusters** (Department of Employment and Labour structures and organisation; Inter-ministerial coordination of labour migration; Social dialogue and tripartism).

5.1.2 Department of Employment and Labour structures and organisation

5.1.2.1 The NDEL currently performs **three main tasks** in relation to labour migration as described in the LMA (Section 3.2.2):

- Advising the DHA on the issuance of general work, corporate and business visas;
- Inspecting employers' compliance in the application of labour legislation to migrant workers;
- Regulating labour intermediaries (private employment agencies) through its Employment Services Act (2014).

5.1.2.2 In addition to these functions and as will be detailed in Section 5.4 of this policy, it seems desirable **to strengthen the DEL's role in terms of matters relating to the emigration of South Africans abroad in search of employment**.

5.1.2.3 In all four of these areas, **internal restructuring and strengthening of capacity** will be undertaken in terms of:

- **Work visas (Labour Migration Directorate):** In 2009, the South African Government embarked on proactive measures to regulate inflow of labour migration by establishing a Public Employment Services (PES) branch within the DEL with a mandate to facilitate the employment of foreign nationals, advise the DHA on issuance of work visas. The office will have to play a vital role in the effective administration, implementation and monitoring of the policy throughout the country. PES plans to strengthen its work visa processing system through a series of

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measures: Increasing productivity and decreasing turn-around times; Strengthening of labour market tests against which applications are assessed based on international best practice; Strengthening of inter-ministerial coordination with relevant departments (DHA, DTI).

PES has already developed a sophisticated job-matching system, the Employment System of South Africa (ESSA). It is an electronic system, meeting place for workseekers and employers. The system is capable of collecting information about work seekers and employers from anywhere in the country. This policy should transform employment exchanges and professional executive registries into nationwide one-stop job centres for the registration of work seekers within the country and also for those who may wish to engage in employment abroad and seek employment in South Africa from abroad. It would provide work-seekers with information about regular means of securing visas for employment purposes in all parts of the world and would give name and addresses of registered and licensed Private Employment Agencies. Employers would be able to place orders for workers from any part of the world and have their request met with a short time. Another advantage is that the system would provide researchers with information on the dynamics of labour and skill shortages and make known to the public and other relevant labour market information.

- **Regulation of Private Employment Agencies and Public Employment Agencies:** Government will regulate Private Employment Agencies and Public Employment Agencies through supervision and monitoring of the recruitment activities of private employment promoters or agencies, to minimise malpractices and abuses against those seeking jobs in South Africa or abroad and in addition to the cancelation of licenses, criminal proceedings will be introduced against serious offenders. Special attention will be paid to the recruitment and deployment of categories of workers, e.g., domestic workers who are especially vulnerable to malpractice and abuse. The recruiter will have to expose the intending migrant worker to his/her contract of employment in the presence of an authorised labour official before the migrant embark on his/her journey. The NLMP supports the regulatory framework adopted to give effect to the above – in particular ES Act (2014) and the different sets of regulations adopted in terms of ES Act.

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- **Accompanying measures for the placement of South Africans abroad (and reintegration into the South African labour market)**: PES will establish and capacitate a dedicated unit for the placement of South African work-seekers abroad drawing on international best practice and develop a range of services to assist South African returning migrant workers in their efforts to reintegrate them into the national labour market as well as incentives based on international best practice (fiscal, point-system, qualification based, etc. e.g. Malaysia, Mauritius).
- **Converting the Directorate Labour Migration Services and Opportunity Registration and Placement into a Chief Directorate for Labour Migration with expanded functions**: Given the significantly expanded labour migration functions to be executed by NDEL, it is necessary to provide for this expansion in the structure of the NDEL organigram. A well-staffed Chief Directorate may have to be established, to address functions not taken care of by other branches of NDEL. This expanded scope will include, among others, liaison with and the rendering of services in respect of South African migrant workers prior to departure, while they are engaged in the country of destination, and upon return. It would also have the task of liaising with other government departments on issues concerning migrant workers to and from South Africa, and be involved in the planning, negotiation, conclusions, implementation and monitoring of bilateral labour agreements.

5.1.3 Inter-ministerial coordination and inter-governmental collaboration

5.1.3.1 There will be **a redefinition of responsibilities and procedures between the DEL and the DHA**. The NDEL will become **the lead department in the definition of labour market needs and priorities** on the basis of:

- information provided by the DHET Occupations in High Demand List 2020;
- additional information from SETAs;
- improved labour market tests;
- a list of specific waivers for certain sectors, occupations and nationalities, based on research and subject to specific conditions specified in bilateral agreements (SADC special work visas).

5.1.3.2 The **DHA** remains the custodian of border control, visa issuance and identity documentation and verification, as well as the final decision-maker on all aspects of migration unrelated to work and employment (i.e. all other visa

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types, asylum, security vetting, document authentication, civil registration of foreign nationals, naturalisation, etc).

5.1.3.3 **All aspects of labour migration governance will be consolidated and strengthened within the NDEL and performed by its core units, or performed in collaboration with other departments and coordinated by the NDEL** (compliance of employment services, alignment with international and regional standards and guidelines, labour market tests, skills-in-demand lists, monitoring of labour market indicators, labour inspection, conciliation and arbitration, compensation, social protection of migrant workers, regulation of private employment agencies).

5.1.3.4 It is therefore proposed that coordination between the DHA and the NDEL be stepped up in order to work towards **an integrated service for applications for general work (including own-account work in the informal economy), corporate and business visas**, behind which there would be intervention of all relevant departments and agencies with a view to decreasing turnaround times, simplifying procedures and increasing exchange of information between departments in shorter times. This structural transformation should be a phased reform.

5.1.3.5 In the **interim period**, communication, sharing of information, joint training sessions between the DHA and the NDEL on labour migration will be increased and interim procedures put in place in order to improve services to the public.

5.1.3.6 A **regular inter-ministerial meeting schedule** between the NDEL, the DHA, the DHET, the Dti, and on an ad-hoc basis, other relevant ministries, will be established in order to increase and strengthen information sharing on skills management issues and monitor the impact of policy implementation.

5.1.3.6 The **critical role of provincial departments and local government** in labour migration management will be respected. Local government in particular has a crucial role to play as regards the assessment of and responses to the geographical reality of migrant (worker) presence, and informal economy involvement, affecting foreign nationals as well. Collaboration between national government, provincial government departments, as well as local government will be ensured and initiated by DEL.

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5.1.4 Social dialogue and tripartism

5.1.4.1 In the current policy context, social partners are invited to sit on the **Immigration Advisory Board (IAB)**, at the discretion of the Minister of Home Affairs. They do so in their personal capacity and not as representatives of most representative social partners. This system is insufficient to ensure the kind of consultation and participation in decision-making that would align to international best practice.

5.1.4.2 While the **National Economic Development and Labour Council (NEDLAC)** has the possibility to table labour migration matters and issue recommendations, it has only irregularly and inconsistently done so over the past two decades.

5.1.4.3 The Sub-committee on Employment Services Regulations under the Employment Services Board which functions on the principle of tripartite social dialogue plus will be the Sub-Committee advising the Minister on the management and evaluation of the NLMP.

5.1.4.4 This structure will be **distinct from the IAB** as it will only deal with labour migration-related matters and function under the principle of tripartite social dialogue as defined by the ILO. Its establishment should result in the redefinition of the scope of issues addressed by the IAB in order to avoid duplication.

5.1.5 Anticipated benefits

5.1.5.1 The DEL should be strengthened in its own ability to develop labour migration policy, to strategically manage it, and should gain in efficiency in implementing it.

5.1.5.2 Inter-ministerial coordination, currently one of the weakest points in the management of labour migration in South Africa, should become more efficient and integrated in order to propose integrated, diligent and professional services to the public.

5.1.5.3 Social partners and other key stakeholders will become much more closely associated with policy decision-making, management and evaluation thus ensuring stronger consensus building regarding the role played by labour migration policy in South African society. Workers' organisations will be able to make use of this new platform to gain knowledge of labour migration issues as well as to bring up issues from their rank-and-files; employers' organisations will

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have an avenue to voice their needs and prerequisites in terms of recruitment of foreign labour, or flag shortages in sectors and occupations; communities and civil society organisations will be able to voice their members' concerns and appreciation of procedures in place. This new social dialogue structure should also ensure more regular and accurate information of NEDLAC on all labour migration related issues.

5.2 Key Area of Intervention 2. Data for evidence-based NLMP monitoring and evaluation

5.2.1 Scope, problem, objective

5.2.1.1 KAI 2 focuses on the **coordination of labour migration data analysis for NLMP monitoring and evaluation**. "Data" is understood here as all statistical and administrative quantitative data as well as qualitative research dealing with labour migration administration, demographics and emerging trends from and into the South African territory. KAI 2 is about **strengthening the collection, comparison, analysis and use of labour migration related data by a range of data users** (government officials, social partners, civil society, researchers, the media) for the purposes of policy monitoring and evaluation.

5.2.1.2 Labour migration data (which include statistics, administrative data, and research) are currently **scattered across a range of departments and agencies**, among others Statistics SA, South African Qualifications Authority (SAQA), several government departments and research institutions). In addition, there is no functional Labour Market Information System yet operating in South Africa, to which labour migration data, planning and strategies can be linked.

5.2.1.3 There is **currently no institution or organisation undertaking to collect and analyse existing labour migration data on a regular basis**. There are also obstacles to the sharing of information relating to issues of confidentiality, security, discrepancies in formats used, lack of record keeping and of a culture of data analysis for policy purposes, public / private sector divide, weak inter-ministerial coordination and poor understanding of data usage by data users themselves.

5.2.1.4 KAI 2's main objective is **to foster a culture of labour migration data usage for policy monitoring and evaluation** by:

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- Supporting inter-ministerial coordination of data gathering and analysis;
- Instilling a culture of record and data keeping and sharing among departments and agencies in charge of labour migration issues;
- Nurturing a culture of collaborative partnership between all actors involved in labour migration data collection and analysis, more specifically between the NDEL, the DHA, other relevant ministries, Statistics South Africa, and academic institutions;
- Educating data users (Government officials, social partners, civil society stakeholders, the media) in the understanding of labour migration trends.

5.2.2 Coordination of statistical and administrative labour migration data collection for policy monitoring and evaluation

5.2.2.1 Existing mechanisms of **statistical data collection on labour migration in place under Statistics South Africa have been reviewed and assessed against international labour statistics best practice and are considered robust** (Budlender, 2013), with the necessary adjustments and improvements that should be effectuated from time to time, as per recommendations issued by the SADC meetings of national bureaux of statistics, SADC Labour Migration Action Plan and the International Conference of Labour Statisticians which adopted new frameworks pertaining to data on labour migration in 2018 (19th ICLS).

5.2.2.2 **Four improvements** in terms of statistical labour migration data collection which the NDEL supports are:

- The introduction of an emigration module into the labour force, community and census surveys to provide data on South Africans residing abroad for purposes of employment could be considered;
- The iteration of the migration module of the LFS at more regular intervals; e.g., two years;
- Strengthening of disaggregation possibilities at provincial and metro level;

- Establishment of a Labour Market Information System (currently envisaged) with clear linkages to labour migration;
- Aligning the labour migration data environment with the Labour Market Observatory currently being developed by SADC, that will be including information on labour migration, considering the development of a SADC data hub on all types of migration data, of which labour migration will be part.

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5.2.2.3 Gathering and reporting on labour migration statistical data will be aligned with the migration statistics conceptual framework adopted by the UN Statistical Commission in 2021.[39]

5.2.2.4 The DEL, DHA, DHET, DST and Statistics SA will come together to establish **a joint structure, which can take the form of a network or of resource-sharing**, and whose scope and powers will be decided jointly. The newly established structure will ensure sharing of administrative, statistical and research data produced by each institution and organise **capacity-building training workshops for data producers and data users** to create space for engagement and ensure wide and adequate usage of labour migration data for policy monitoring and evaluation.

5.2.2.4 Its main **purposes** will be to:

- In accordance with the relevant SDG indicators, coordinate labour migration data (both statistical and administrative) analysis and dissemination, standardisation of indicators, and disaggregation of indicators per migratory status, but also by race, gender, sector and geographical location, as well as per other relevant SDGs indicators
- Issue recommendations regarding the monitoring of specific trends as the data become available,
- Update and monitor record-keeping and sustainability of adopted indicators,
- Identify, design and participate in various workshops to enhance the capacity-building for data producers and data users.

5.2.3 Collaboration and partnerships for research on emerging trends in labour migration

5.2.3.1 Under the supervision of the DEL's Research Unit, the NDEL will work together with the private sector and enter into a **sustainable partnership with academic institutions** with a track record of research on labour migration issues to establish a schedule of qualitative research on emerging trends which will complement information gathered from statistical and administrative data.

5.2.3.2 This partnership will provide the DEL with the necessary resources to produce **regular (at least annual) reports on the state of labour migration**

[39] UN Statistical Commission (Fifty-second session, 1-3 and 5 March 2021) *Migration Statistics* (E/CN.3/2021/11).

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dynamics into and from South Africa to inform the public and policy-makers as well as assist Government in its management of labour migration.

5.2.4 Anticipated benefits

5.2.4.1 The DEL will rely on a robust, internationally recognised pool of labour migration relevant data to monitor and evaluate its policy intervention.

5.2.4.2 Government as a whole will rely on a functional collaborative information-sharing network for policy-making on labour migration and collaborative partnerships between key departments and statistical agencies will be formalised, strengthened and functional.

5.2.4.3 Statistical data collection instruments will be improved and aligned to international standards and better understood by all users.

5.2.4.4 Administrative data instruments will be standardised, better kept, and shared for analysis and policy evaluation purposes.

5.2.4.5 The relationship between the NDEL and academic institutions will be strengthened leading to mutual reinforcement of knowledge on labour migration and evidence-based policy-making.

5.2.4.6 Up-to-date qualitative research on emerging trends will be readily available to the DEL, other departments and statistical agencies, civil society organisations, the media and the public at large.

5.3 Key Area of Intervention 3. Labour migration to South Africa

5.3.1 Scope, problem, objective

5.3.1.1 KAI 3 focuses on **all activities related to the management of labour migration to South Africa**, including the recruitment, selection, placement, employment, access to benefits and return of migrant workers, whether low-, semi- or highly skilled, employed in the South African labour market and their protection.

5.3.1.2 Labour migration to South Africa is neither a new phenomenon nor one bound to disappear but rather one in constant flux. While South Africa has policy, legislation, and institutions in place regarding the regulation of labour migration, the White Paper on International Migration for South Africa (2017)

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and the LMA have revealed **numerous challenges in its management and outcomes**:

- Lack of strategic thinking and consistent direction regarding how labour migration should serve national interest as defined in the NDP and other national policy documents;
- Urgency to address the country's skills needs;
- General skills mismatch and inability to retain skills within the country;
- Growing numbers of irregular migrant workers and own-account (self-employed) in the informal economy confined in low-skilled, precarious, and often dangerous occupations, and unsustainable ad hoc regularisation schemes based on weak partnerships between South Africa and its neighbours within SADC;
- Widespread fraudulent recruitment practices and illegal, dangerous and exploitative working conditions;
- Enforcement challenges, also in relation to the protection of migrant and national workers from exploitative conditions and violations of their rights at work and;
- Non-existent social protection for large numbers of migrant workers, especially those in irregular and vulnerable situations;
- Ineffective social protection systems and claim mechanisms resulting in billions of Rand of unclaimed benefits during and after completion of employment contracts;
- Lack of adequate measures to improve the integration of refugees and asylum seekers into the South African labour market and make use of their skills efficiently;
- Obsolete bilateral labour agreements with SADC countries calling for review and adaptation to existing flows and the new objectives of South Africa's international migration and labour migration policies;
- Lack of ratification by South Africa and its neighbours of international conventions on labour migration, and lack of harmonisation efforts.

5.3.1.3 KAI 3's **main objective** is to **give a new momentum to the management of labour migration to South Africa**. This is based on a strategic approach, founded on the set of national priorities and on regional and international commitments of South Africa, aimed at promoting a rights-based, gender-sensitive framework for the protection of migrant workers.

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5.3.2 Accessing the South African labour market: Strategic orientations

5.3.2.1 Retaining control over **access to its territory and labour market** remains a fundamental expression of any country's sovereignty. South Africa needs to strike a balance between various imperatives:

- the expectations of its people in terms of their employment, well-being and security,
- the needs of its economy in terms of prosperity and employment creation,
- its integration in its region and the sustainability of its partnerships within SADC and beyond.

5.3.2.2 South Africa's various **national policy frameworks and international and regional commitments** provide guidance as to the **priorities** that should be pursued in terms of welcoming migrant workers to its labour market. These priorities can be summarised as follows:

1. **Attracting and retaining skills (in)to the country** to meet temporary shortages and long-term needs of the economy;
2. **Imposing quotas to limit the number of foreigners** with a view to protect employment opportunities for South African workers;
3. **Prioritising certain sectors in urgent need of critical skills** through the establishment of a credible skills planning mechanism;
4. **Improving conditions for all migrant workers and their families in terms of human rights and fundamental rights at work** as well as **fighting xenophobia and any forms of inhuman treatment of migrant workers**, also through well-designed and -targeted public awareness campaigns and public discourse engagements;
5. **Improving the conditions of social protection of migrant workers** in South Africa and upon return in their country of origin;
6. **Creating legal labour migration pathways through strong bi- and multilateral partnerships with SADC Member States** and beyond.

5.3.2.3 KIA 3 will therefore focus on these priorities defined at the national level and strengthen or establish the **necessary structures and operating procedures** where relevant to implement these efficiently.

5.3.3 Attracting and retaining skills and prioritising sectors in need of critical skills

5.3.3.1 The NLMP will focus on **four dimensions** which are interlinked but distinct:

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- Attracting skilled workers in general into the country (or brain gain),
- Retaining them,
- Prioritising certain sectors in urgent need of critical skills,
- Skills and qualifications recognition and harmonisation.

These priorities may correspond to different timeframes from the most immediate needs to fill in positions for a few months, to temporary shortages of a few years, to long term structural or strategic needs.

5.3.3.2 There are at least **two implications**: First, there should be a sustainable and credible skills-planning mechanism from which to address these varied needs within these different timeframes; second, the implementation measures should be efficient and flexible.

5.3.3.3 The establishing of a **skills-planning mechanism is the primary responsibility of DHET** and beyond the scope of this policy. However, the NLMP proposes a phased approach starting from existing instruments and supported by **collaborative work between the DHET, DEL and DHA**.

5.3.3.4 **Existing instruments** are:

- DHET Occupations in High Demand List 2020 to be reviewed every two years
- DHA Critical Skills List to facilitate the issuing of work visas (as specified in the Immigration Amendment Act of 2013; and following from the former scarce skills list published by the DHA in 2007 under JIPSA).

5.3.3.5 Both lists have limitations in format, accuracy, measurement of vacancies and geographical breakdown. It is therefore proposed that the **methodology for establishing the two lists be reviewed.** It is proposed that the master list be the **DHET Occupations in High Demand list**, improved from time to time, and that there be an annexed list, the **Occupations in High Demand Opened to Foreign Labour** or **OHDOFL** for work visa purposes under joint supervision of the NDEL and DHA.

5.3.3.6 The **OHDOFL list** should also be updated every two years. It should be based strictly on occupations drawn from the DHET OHD list from which certain occupations will be removed for reasons which should be justified by national policy. These would typically be occupations reserved to citizens due to security requirements and strategy (e.g., security, civil service restrictions, national policy). The OHDOFL List should provide targets per occupations, at least at national level.

5.3.3.7 A **third list, which could be called Critical Skills List**, should be drafted on an annual basis, to identify a set of occupations urgently needed in the

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country. It could also be established from special requests by employers providing verified evidence of challenges in specific occupations and sectors.

5.3.3.8 There should be **proactive recruitment of foreign skills.** A set of measures, to be envisaged with the Department of International Relations and Cooperation (DIRCO) and in consultation and collaboration with employers' organisations, could entail: Job advertisements relayed by embassies; Campaigns about the Occupations lists; Facilitation of job fairs abroad; Subsidisation of immigration costs; Fast-tracking of immigration procedures; etc.

5.3.3.9 Depending on the identification of specific occupations (short term, temporary, long term), specific **skills transfer measures** should be adopted. This would require amendment of the Employment Services Act of 2014 from time to time. For example, skills transfer should be adapted to the relevance of the type of qualifications and skills brought by the foreign employee rather than be standardised. Also, it may be impractical to expect effective skills transfers in certain occupations, such as domestic work, short-term work engagements and seasonal (agricultural) labour, as well as in work environments not attractive to South Africans. Skills transfer plans should also not be used as replacement of or to the detriment of skills development plans in enterprises of more than 50 employees. There may be a need to assist employers with preparing a Skills Transfer Plan; SETAs may have to be involved for this purpose, through the development of guidelines for the effective implementation of skills transfer plans.

5.3.3.10 In fact, a more formalised approach may also have to be considered: in particular instances **(formal) upskilling** may in any event and in addition to formal skills transfers be needed – as many South Africans lack basic literacy and numeracy skills, implying that they are not eligible even to enter lower-level NQF learnerships.

5.3.3.11 The legislative framework informing the imposition of the requirement of a skills transfer plan should allow for exemption in relation to specified sectors or sub-sectors of the labour market, for a set time period. Legislation should also indicate appropriate penalties for non-compliance by employers, and ensure that inspectors have the required powers to enforce the arrangement. Monitoring and reporting mechanisms need to be developed; a clear third-party review process may be needed.

5.3.3.12 **Retention of skills** in the country is a clearly identified national priority. Recent research points to the risk of attrition to emigration also affecting highly skilled foreign workers in South Africa (Segatti, 2014). International research

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(Carrera et al., 2014) shows that the **following factors play a decisive role in the retention of highly skilled migrants**:

- Access to contract of employment for permanent positions;
- Joint visa procedures for spouse and dependents;
- Automatic issuance of work visa for spouse;
- Right to study for spouse and dependents;
- Facilitated access to permanent residence after no longer than three years for the migrant worker and family.

Employers should therefore not be discouraged from granting permanent positions to highly skilled foreign workers. Visa dispositions cited above should accompany issuance of critical skills or any work visa whose holder falls under either the OHDOFL or the Critical Skills lists. The automatic issuance of work visas for spouses and dependants of such work visa holders should be considered. The same may be required in the case of spouses/dependants of inter-company transferees.

5.3.3.13 The processing of critical skills visa applications should be based on the **meeting of targets** set for the OHDOFL and Critical Skills lists.

5.3.3.14 Full alignment with the SADC Qualifications Framework (SADCQF) should be ensured (see par 3.2.4.4 of this Policy).

5.3.4 Imposing quotas to protect job opportunities for local workers

5.3.4.1 The imposition of quotas to limit the number of foreign nationals from competing for the few technical and low skilled jobs available is being considered. This would require enabling legal provisions to this effect. This is a *current* requirement, in terms of the *Immigration Regulations* (2014) (as amended) made under the *Immigration Act* of 2002, in relation to **business persons** applying for either a **business visa** or a **permanent residence permit**.[40] Also, the draft *Regulations on the Employment of Foreign Nationals* (2018) in terms of ESA requires proof of this requirement on the part of the applicant for a **work visa** or a **corporate visa**.[41] A related question is whether this requirement can, or should be made applicable also to the composition of businesses

[40] *First Amendment of the Immigration Regulations, 2014 made under the Immigration Act* (Government Notice No. R. 1328, Government Gazette 42071 of 29 November 2018), amending Regulations 14 and 24 – this is applicable to the situation where a person intends to establish or invest in a business, or has done so.
[41] *Draft Regulations on the Employment of Foreign Nationals* (Government Notice No. R. 1433, Government Gazette 42120 of 28 December 2018: Regulation 2(1)(k) and 3(1)(k) respectively.

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already/currently employing foreign nationals, and not only when a business visa (or a permanent residence permit for a business person), work visa or corporate visa application, or the renewal of a business visa, is entertained.

5.3.4.2 Country policies and practices in relation to the quota arrangement intended in the narrower sense above, differ vastly. A recent OECD/ILO report on the contribution of immigrants to the economies of **developing countries** notes that:

> "Labour immigration quotas can be used to limit the number of labour immigrants and to direct them to specific occupations or sectors. Argentina, Cote d'Ivoire, Nepal and Rwanda have no specific quotas in place. Some other partner countries have certain forms of quotas. For example, at the firm level, foreign-born workers can represent up to 40% of staff under corporate permits in **South Africa**, while companies in the **Dominican Republic** are only allowed to employ immigrant workers up to 20%. In Ghana individual companies have some restrictions on the total number of immigrant employees."[42]

5.3.4.3 In fact, it has to be noted that imposing quota regimes is a worldwide phenomenon, also in countries of the global North, for example in EU Member States.[43] In *Rafoneke v Minister of Justice and Correctional Services*[44] the Constitutional Court affirmed that the constitutional reservation of the right to trade, occupation or profession to citizens is not uncommon in democracies, and that the South African state has an obligation to protect the interests of its citizens.

5.3.4.4 However, as also acknowledged in *Rafoneke* and a number of key Supreme Court of Appeal judgments, the total exclusion from work of migrant workers, or particular categories of migrant workers, may amount to the impairment of the constitutional right to human dignity.

5.3.4.5 Also, the inconsistent or arbitrary determination of a quota, for particular sectors or occupations, may fall foul of constitutional equality

[42] OECD/ILO *How Immigrants Contribute to Developing Countries' Economies* (OECD Publishing, Paris, 2018) (accessed at http://dx.doi.org/10.1787/9789264288737-en on 3 October 2019) 62. See also OECD/ILO *How Immigrants Contribute to the Dominican Republic's Economy* (OECD Publishing, Paris, 2018) (accessed at http://dx.doi.org/10.1787/9789264301146-en on 4 October 2019).

[43] See European Commission *The application of quotas in EU Member States as a measure for managing labour migration from third countries* (EMN INFORM, 2013) – https://emn.ie/publications/the-application-of-quotas-in-eu-member-states-as-a-measure-for-managing-labour-migration-from-third-countries-emn-informs/.

[44] 2022 (6) SA 27 (CC); 2022 (12) BCLR 1489 (CC).

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prescripts, even if it could be argued that, based on the provisions of section 22 of the Constitution, the state is entitled to regulate freedom of trade, occupation and profession in favour of South African citizens.

5.3.4.6 In introducing a quota system, particular attention would have to be paid to the fact that the certain categories of foreign workers generally have access to the labour market on par with South African citizens – including permanent residents (a category which in turn includes special dispensation holders) and refugees.

5.3.4.7 In view of the fact that the imposition of quotas may impinge on the constitutional rights of those affected thereby, it needs to take into consideration several qualifications, with particular emphasis on:

- To avoid arbitrary decision-making in this area, the imposition of quotas should be informed by labour market evidence.
- Imposing quotas should be accompanied by a transparent process, which allows for consultation also at the provincial level and with sectoral role-players. Among others, the unavailability of South Africans to occupy certain positions and the inability to attract South African with sufficient skills to work in certain sectors, are some of the matters to be considered in the course of the consultation.
- As indicated by the Constitutional Court in *Rafoneke*, reserving trade, occupations or professions for South Africans needs to take into account South Africa's international law reciprocal obligations under multilateral and bilateral treaties, such as GATS (General Agreement on Trade in Services). Imposition of quotas therefore has to mindful of the fact that citizens from designated countries may have an entitlement to work in a particular trade, occupation or sector.
- Provision needs to be made to apply for exemptions from a quota regime. This should be stipulated (also) in the legislation, and not merely in regulations. Relevant factors or criteria to be considered should among others include actual skills needed and critical skills provided for in the Critical Skills List; as well as sector- or occupation-relevant realities in the country.
- There should be a process of regular review of quotas, based on reliable labour market evidence and a transparent process.

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- Also, employers should be assisted in how to transition to the new quota system.
- The continued employment of foreign nationals in excess of a quota imposed on the sector or occupation, especially those who are permanently employed, is a particularly contentious area. Termination of employment under these circumstances may raise labour law procedural considerations, in addition to constitutional concerns.
- The imposition of quotas to regulate competition between South African and foreign national workers in the informal economy for limited available public space and access to markets and other resources needs to be considered. This would require enabling legal provisions to this effect at local government level – taking into account the requirement that the imposition of quotas has to be informed by comprehensive statistical evidence with regard to each work sector in the informal economy.

5.3.5 Preventing fraudulent and unethical recruitment and regulating intermediaries

5.3.5.1 **Recruitment** is a critical dimension of regular labour migration. With increased poverty and inequality, structurally high unemployment rates and young populations, Southern Africa and the Africa region as a whole are prone to fraudulent and unethical recruitment practices. The shift from the migrant labour system, where recruitment was centralised by one agency and served one industrial sector, to the current context which is dominated by individual initiatives and a vast array of private intermediaries calls for more stringent regulation.

5.3.5.2 To regulate recruitment practices, South Africa draws on several **international frameworks, binding protocols and conventions, as well as its own legislation** These are among others:

- ILO Fair Recruitment guidelines
- IOM's social compliance framework: IRIS
- World Employment Confederation Code of Conduct
- Palermo protocols ratified by South Africa
- SADC Regional Strategic Plan on Combating Illegal Migration, Smuggling of Migrants and Trafficking in Persons
- SADC Labour Migration Policy Framework and Action Plan

5.3.5.3 In terms of **national legislation**, the **Employment Services Act No. 4 of 2014** regulates the **operation of private employment agencies**, both temporary

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employment services and recruitment agencies constituting private employment agencies for purposes of the Act. Draft regulations of 2018 also provide for the recruitment of foreign workers by private employment agencies, as the Act works on the premise that all provisions of the labour legislation apply to all workers regardless of their status. While the Employment Services Act has usefully strengthened labour legislation, its current state leaves the following situations unaddressed:

- The explicit authorisation for private employment agencies to facilitate the recruitment of foreign workers into South Africa;
- The sourcing and recruitment of foreign workers abroad for employment in South Africa;
- The recruitment of South African workers for overseas placement by South African or foreign private employment agencies or the partnering between South African agencies and foreign ones;
- The activities of foreign private employment agencies in South Africa;
- Online recruitment activities by South African or foreign private employment agencies.

Future review of the regulations should address these gaps.

5.3.5.4 The **vetting of contracts of employment** in the process of work visa issuance needs to be strengthened to ensure full compliance with labour legislation and sectoral determination where relevant. It should apply across sectors, including in farming for seasonal work. Compliance with contract of employment conditions should also become a condition for renewal of registration for private employment agencies.

5.3.5.5 The **charging of fees to work-seekers** which is authorised under specific circumstances under Regulation 5(8) of the Regulations with regards to private employment agencies published in terms of the Skills Development Act and under Section 15(2) of the Employment Services Act (forthcoming regulations) needs to be clarified as a matter of priority, including in situations of recruitment of migrant workers abroad or recruitment of South Africans for overseas placement.

5.3.5.6 Consideration needs to be given to **involve public employment agencies** in the **procurement of migrant workers** to fill critical skills needs in South Africa, and to arrange for **government-to-government agreements for the recruitment of South African workers** to help fulfil skills needs of SADC and other countries, in particular sectors.

5.3.5.7 Consideration should also be given to arrange for **self-regulation** of private employment agencies – in particular via the establishment of umbrella

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bodies exercising professional control (among others via the issuance of Codes of Conduct). The Kenyan examples of KAPEA and ASMAK serve as successful examples. Private regulation provides for professional standards set by the industry itself, and for supervision by the industry. It effectively strengthens and complements public regulation.

5.3.6 Enforcing rights at work for all workers: Sensitization, education, labour inspection and conciliation mechanisms, sensitive sectors

5.3.6.1 South Africa has embraced **existing international frameworks of protection of migrant workers' rights** through its membership of the ILO and SADC (SADC Labour Migration Policy Framework and Action Plan). At **national level**, its NDP and the White Paper on International Migration both support effective protection of all migrant workers and the strengthening of regular pathways to labour migration. South African legislation has explicitly adopted the principle of equality of treatment throughout its different Acts and institutions.

5.3.6.2 However, research on conditions of employment of migrant workers in South Africa has regularly revealed **violations of their fundamental human and labour rights, non-compliance with sectoral determination, particularly on minimum wages**. Statistical data indicate the **concentration of migrant workers in vulnerable conditions of work and informal situations of employments**. As mentioned earlier in this policy (see par 3.1.3.2), international reporting mechanisms and supervisory bodies have pointed to repeated **cases of abuses, xenophobic violence and discrimination against migrants in general and in instances, migrant workers**. This stock taking calls for strengthened and effective enforcement of migrant workers' rights.

5.3.6.3 Research on conditions of own-account (self-employed) migrant workers in the informal economy in South African municipalities has revealed violations of their fundamental human rights, discrimination by municipal authorities and enforcement agents, and consequent vulnerability to practices of bribery and corruption as the only means of securing access to public space, markets and other basic work resources.

5.3.6.4 The NLMP asserts the role of **Public Employment Services** within the NDEL in terms of coordination of all interventions aimed at improving those conditions through a holistic approach which addresses all the different stages in the migrant worker's labour migration cycle, from recruitment, information and sensitisation, travel to South Africa, contract of employment, induction at work site, conditions of work and of living, access to social protection and portability of benefits, and return and reintegration in the country of origin.

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Some of these activities, in particular those performed in South Africa, are under the direct supervision of PES, and those outside the country are to be undertaken in partnership with PES' counterparts in, in particular, SADC countries of origin.

5.3.6.5 In addition to its general coordination role and the regulation of PEAs, PES and more specifically, the **International Cross Border Labour Migration Directorate**, will undertake to modernise its work visa application operating procedures and coordination mechanisms with other departments as described in Sub-section 5.1.2 and 5.1.3 of the NLMP.

5.3.6.6 Central to the enforcement of existing legislation is the role of **Inspection and Enforcement Services** (IES) of the NDEL. IES will reinforce substantively its role in the implementation of labour migration policy. It will be done through the following **measures**:

- Labour inspectors of both DEL and DHA to be **trained to the specific requirements of migrant workers' protection** and to be retrained when new processes are introduced;
- **Labour and immigration inspections conducted in respect of each legislation to ensure strengthened enforcement, also in relation to the protection of workers' rights, with a specific focus on sectors of interest** known to have concentrations of migrant workers, including known vulnerable sectors such as domestic work, construction, farming;
- Municipal enforcement agents to be trained to the specific requirements of the protection of own-account (self-employed) migrant workers in the informal economy, and to be retrained when new processes are introduced;
- **Disaggregation per migratory status of worker** (foreign / national) will be streamlined in notices issued to employers for non-compliance all inspections (work visa and general labour inspections) to create data on discrimination and meet the requirements of SDG 17.18;
- **Record-keeping of violations of labour legislation** will be undertaken to monitor characterised violation trends per sector, occupation, type of employer, geographical area, nationality; blacklisting of repeat offenders
- **Collaboration with prosecuting authorities for most serious violations and abuses** will be strengthened to ensure robustness of evidence and increase conviction rates of fraudulent and abusive employers.
- It is necessary to **ensure that inspectors have to powers to stringently enforce compliance with labour legislation and migrant worker-specific legislation applicable to migrant workers**. Their powers and functions should be set out clearly in legislation, which should deal with the

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following specific matters, along the lines provided for in other South African labour laws:

- Appointment of labour inspectors (if not already provided for)
- Functions and powers of inspectors
- Powers of entry
- Powers to question and inspect
- Cooperation with labour inspectors
- Securing an undertaking
- Compliance order

5.3.6.7 The NLMP acknowledges the role of the **CCMA and the Labour Court** in assisting workers regardless of their migratory status to pursue their rights through dispute resolution and encourages further initiatives to strengthen its ability to engage regular and irregular migrant workers. Among others, the following **measures** should be considered:

- Sensitisation of all workers through information campaigns conducted by IES to the scope of operations for CCMA and the Labour Court;
- Capacity-building of mediators and judges to labour migration issues and specific rights of migrant workers under South African legislation and jurisprudence;
- Record keeping of cases dealt with by the two institutions with disaggregation per migratory status (SDG 17.18) in order to allow for analyses of trends.

5.3.6.8 **Workers' and employers' organisations** have an important role to play in preventing, detecting and combatting exploitative and abusive situations among their members. In addition to reinforcing their role at policy advisory level as indicated in this policy, of paramount importance is their role in training their members concerning the rights of migrant workers, and developing effective services to assist migrant workers at all stages of the migration cycle – prior to departure e.g. through information dissemination, as well as direct services for those facing abuse, exploitation, harassment while employed,

5.3.6.9 In addition to the previous points of intervention, there is need for **immediate action towards identified industrial sectors and categories of migrant workers** with a record of documented abuses and exploitation and affected by general deficits of decent work.

The **sectors** are:

- Construction and related services
- Domestic work and cleaning services
- Farming

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- Hospitality and related services
- Mining and sub-contracting
- Security
- Entertainment
- Care work

Categories of migrant workers particularly at risk are:

- Irregular migrants
- Migrants with chronic diseases or disability
- Women and youth
- Children employed illegally
- Domestic workers
- Farm workers
- Female entertainment and sex workers
- Community health workers, waste pickers and informal traders

In collaboration with relevant departments, the NDEL will develop a **priority annual action plan to strengthen advocacy, inspection and enforcement in these sectors** specifically targeting the situation of vulnerable categories of migrant workers with referral and protection contingency plans for victims of the most serious abuses.

5.3.7 Social protection and compensation of migrant workers in South Africa and back in the country of origin

5.3.7.1 The social protection and compensation of migrant workers is supported broadly in international and AU frameworks. It has been acknowledged as both **one of the main weaknesses and priority areas by SADC Member States**, first in its 2007 Code on Social Security (Article 17), and in both its Labour Migration Policy Framework (2014) and Action Plan (2020-2025). South Africa's (2010-2014) **DWCP identified it as its main priority** in relation with migrant workers and the **White Paper on International Migration** (2017) explicitly supports putting in place "mechanisms (…) to facilitate provision of social security and portability of social benefits to qualifying international migrants" (Chap. 13, 2017: 65). At the AU level, comprehensive provision is now made for access to social security for migrant workers and portability of social security benefits in the JLMP, the MPFA, Article 19 of the AU Free Movement Protocol adopted in

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2018 and, from the perspective of African countries of origin, the AU Draft Guidelines on the Development of a Model Migrant Welfare Programme/System. At the SADC level, the SADC Cross-Border Portability of Social Security Benefits Policy Framework (2016) and the Guidelines on the Portability of Social Security Benefits in SADC (2019) provide a framework for the cross-border portability of social security benefits.

5.3.7.2 **Specific challenges and bottlenecks** related to the social protection and compensation of migrant workers in South Africa and back in their country of origin have been documented in multiple reports.

5.3.7.3 The NLMP acknowledges these most pressing needs for intervention and proposes a range of measures in the **following areas**:

a. Actual enforcement of social protection rights which migrant workers are entitled to, including access to health care;
b. Effective and sustainable facilitation of access to accrued rights and benefits in South Africa and back in the country of origin;
c. Emergency exhaustion of outstanding claims
d. Actual enforcement of claims for compensation under COIDA and ODMWA
e. Prevention of exposure of migrant workers to Occupational Safety and Health hazards
f. Improvement of data capturing and reporting on social protection and compensation

In collaboration with relevant departments and agencies, the DEL will develop **an annual action plan on the social protection and compensation of migrant workers to implement these areas of intervention**.

5.3.7.4 **Area a. Actual enforcement of social protection rights which migrant workers are entitled to, including access to health care** should focus on the following:

- Ensure that social protection measures, in particular contributory social security measures, are on par with those availed to South African workers in terms of equality of treatment and non-discrimination and in compliance with existing legislation are clearly specified in contracts of employment vetted by the DEL;

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- Ensure that social protection contributions by employers and employees and actual access to benefits are effective during inspections for work and corporate visa holders and if not, issue sanctions;
- Sensitise employers to the need to extend social protection to migrant workers effectively, including UIF and pension contributions where relevant;
- Sensitise provident and pension funds and operators in this sector to the need to develop specific outreach strategies for migrant workers;
- Sensitise workers' organisations to the role they can play in running the necessary checks to ensure that migrant workers' rights to social protection are enforced;
- In collaboration with the DoH, sensitise public health care management and medical personnel to the rights of both regular and irregular migrant workers and working refugees and asylum seekers.
- Sensitise migrant workers about their rights to social protection.

5.3.7.5 **Areas b. Effective and sustainable facilitation of access to accrued rights and benefits in South Africa and back in the country of origin and c. Emergency exhaustion of outstanding claims** should focus on the following:

- Strengthen human resources within the Labour Centres with administrative skills to facilitate effective access to accrued rights and benefits, especially in situations of litigation and blockade, and with the capacity to initiate legal redress if need be;
- Streamline access to affordable remittance transfers to countries of origin;
- Prioritise the exhaustion of outstanding claims recorded in pension, provident and compensation funds over a one-year timeframe;
- Ensure accessibility of this service to current and former migrant workers through online service, hotline telephone line and face-to-face meetings;
- Utilise the SADC Forum to identify development, job-creating projects drawing on funds accumulated by former migrant workers;
- Ensure that this unit works closely with relevant departments (National Treasury, UIF and Compensation Fund, as well DoH (in relation to the ODMWA-mandated Compensation Commissioner)), agencies and employers' organisations in South Africa, and relevant counterparts across SADC Member States, essentially with Botswana, Eswatini, Lesotho, Malawi, Mozambique, Zambia and Zimbabwe.

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5.3.7.6 **Areas d. Actual enforcement of claims for compensation under COIDA and ILO Convention 19 (Equality of Treatment – Accident compensation) as well as ODMWA and e. Prevention of exposure of migrant workers to Occupational Safety and Health hazards** should focus on the following;

- The DEL and the Compensation Fund, as well as DoH under whose auspices the Compensation Commissioner operates, should work closely towards the exhaustion of outstanding claims by former migrant workers;
- Sensitisation by IES of employers' and workers' organisations to prevent exposure of all workers to OSH hazards and the concentration of migrant workers in exposed occupations and shifts;
- Invest further in mobile clinics and health check-ups, and finding and supporting beneficiaries in neighbouring countries;
- Streamline and improve systems to determine the eligibility of beneficiaries abroad to claim benefits.

5.3.7.7 **Area f. Improvement of data capturing and reporting on social protection and compensation** should focus on the following:

- Introduce disaggregation per migratory status (nationality and work permit type) in record keeping of processed cases for assistance with pension and compensation rights;
- Centralise data capturing with the structure established in Sub-section 5.2 on Data for policy monitoring to evaluate progress and achievement
- Ensure regular internal and public reporting on progress achieved on recovery of benefits by migrant workers

5.3.8 Integration of refugees and asylum seekers into the labour market

5.3.8.1 In the absence of specific income grants, **integration of refugees and asylum seekers into the labour market** is considered international best practice. The 1951 Refugee Convention, ratified by South Africa, recommends access to gainful employment (Chapter III, Article 17). The ILO also recently formalised this issue in its Guiding Principles on the Access of Refugees and Other Forcibly Displaced Persons to the Labour Market (2016). South Africa has adopted this approach since the adoption of its Refugees Act in 1998, for refugees, and through jurisprudence for asylum seekers in 2004 (*Watchenuka* case) and for trade licenses in 2014 (Somali Association of South Africa case).

5.3.8.2 The **White Paper on International Migration** (Chapter 13) reasserts South Africa's international commitments and its specific commitment to a non-

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encampment policy (Op.cit.: 60). The White Paper envisages the "removal of automatic right to work and study for asylum seekers" (Op.cit.: 61), now confirmed by the provisions of the Refugees Amendment Act 11 of 2017. To the extent that a right to work for asylum-seekers is endorsed for particular asylum-seekers, and generally in relation to refugees, the NLMP addresses the issue of labour market integration for both refugees and asylum seekers as per the discussion below.

5.3.8.3 While very few data are available on this specific group regarding its performance in the labour market, **available research** shows that their integration into the labour market is currently hindered by:

- Employers' suspicion and ignorance of their labour rights and documentation;
- Legislative void regarding for instance their access to employment and training services;
- Challenges in accessing banking services due to suspicion and ignorance of banking operators;
- Lack of clarity and length of processes related to residence permits, with refugees' application for permanent residence and asylum seekers' adjudications taking extended periods of time;
- Challenges in the recognition of their qualifications and experience.

These challenges create a situation where many individuals in this group are maintained in a state of limbo preventing them from making positive contributions to South African society and its economy.

5.3.8.4 The NLMP proposes the following **measures**:

- **Sensitisation of employers' and workers' organisations, private employment agencies, and labour inspectors of both DEL and DHA** to the specific rights held by, documentation issued to and vulnerabilities encountered by refugees and asylum seekers;
- **Sensitisation of the banking sector operators** to the importance of this category of workers accessing banking services to facilitate their full integration into the labour market, where foreseen by legislation;
- In collaboration with the DHA, and subject to prevailing legislation, **detection of refugees and asylum seekers' experience and qualifications at an early stage and orientation towards relevant institutions** with a view to their labour market integration or completion of training and education;
- **Disaggregation of data regarding refugees and asylum seekers** per gender, qualification, experience and employment situation and

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centralisation in the structure proposed in Sub-section 5.2 to monitor trends and patterns of integration into the labour market.

5.3.9 Working together as SADC: Ratification of conventions, social security agreements, privileged bilateral partnerships and special SADC special visas

5.3.9.1 As an AU and SADC Member State, South Africa has repeatedly committed to furthering **regional integration**. This it has done also through its ratification of several relevant SADC Protocols, including the Protocol on the Facilitation of the Movement of Persons. Labour migration is a key pillar of this as highlighted in the AU Revised Migration Policy Framework for Africa and Joint Labour Migration Programme, and the SADC Protocol on the Facilitation of Movement and SADC Labour Migration Policy Framework and Action Plan. The DHA's White Paper considers integration within SADC as paramount to South Africa's international migration policy and proposes a set of measures to facilitate further the safe, orderly and regular migration of SADC nationals to South Africa (Chapter 11).

5.3.9.2 Convinced that only durable solutions can alleviate the current negative pressure exerted by large numbers of irregular migrant workers on wages, conditions of work and more broadly, the bargaining power of all workers in South Africa, and recognising that their presence constitutes an obstacle to the fair implementation of labour legislation by the NDEL, the NDEL supports the visas proposed by the DHA for piloting: the SADC special work visa, the SADC traders' visa, the SADC small and medium enterprise (SME) visa (Op.cit., Chapter 11: 57). These visas will need to be explicitly designed to include informal cross-border traders and own-account (self-employed) workers in the informal economy. The DEL proposes to conduct preliminary research into the implementation and impact of these visas on the labour market and to assist the DHA in determining criteria for their implementation.

5.3.9.3 Regarding **regular migrants from SADC countries**, implement the provisions of the Protocol on the Facilitation of the Movement of Persons, ratified by South Africa, while heeding the free movement of workers provisions of the Protocol to the Treaty establishing the African Economic Community relating to the Free Movement of Persons, Right of Residence and Right of Establishment (AU FMP).

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5.3.9.4 The NLMP goes further in proposing the following **measures to strengthen partnerships and collaborative approaches with South Africa's neighbours in SADC**:

- The DEL will make use of the SADC Employment and Labour Sector (ELS) platform to advocate for **ratification of international and regional (AU and SADC) instruments** for the protection of migrant workers with a view to creating thresholds of protection within SADC;
- The DEL will work closely with DTIC and DSBD to implement the STR (Simplified Trade Regime) for informal cross-border traders in agreement with neighbouring SADC Member States;
- The DEL will work closely with DIRCO to **review and amend existing bilateral labour agreements with SADC Member States** with a view to aligning them to international standards of protection, as promoted in ILO Recommendation No. 86 Annex and to minimum standards favourable to workers;
- Where possible and relevant, the DEL in collaboration with the Department of Social Development will enter into **mutual social security agreements** to reciprocate social security coverage with SADC Member States – the 2016 SADC Cross-Border Portability of Social Security Benefits Policy Framework and the Guidelines on the Portability of Social Security Benefits in SADC (2019) already provide a basis for action in this regard;
- The NDEL will actively participate to **Joint Bilateral Commissions** with countries of origin and promote the NLMP approach across all discussions relating to labour migration;
- The NDEL will support **strengthened collaboration and joint operations between its labour inspectorate and those of neighbouring countries of origin of migrant workers**.
- The DEL will encourage South African workers' organisations to consider entering into **bilateral trade union agreements** with their sister organisations in countries of origin to work jointly on prevention of fraudulent recruitment and educate migrant workers to South African labour laws, and encourage South African informal traders' organizations to enter into bilateral agreements with their sister organizations across borders to negotiate for the implementation of the STR (Simplified Trade Regime) on common borders between them.

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- Strengthen SADC-wide collaborative action in other identified areas of relevance, including migrant health and the skills and qualifications recognition.

5.3.10 Anticipated benefit

5.3.10.1 Clarity of purpose and of complementarity between the DHA and the NDEL in their respective responsibilities will lead to increased efficiency in implementation, monitoring and evaluation.

5.3.10.2 The approach adopted being strongly rooted in identified policy commitments will be seen by civil servants and recipients as more legitimate and consistent with broader objectives, such as employment policy.

5.3.10.3 The proposed measures offer a balanced, measured and flexible way forward, prioritising the import of necessary skills into the country, on the basis of sustainable evidence-gathering mechanisms, and the formalisation of regular pathways for the lower-skilled from SADC to ensure regional integration and cohesion.

5.3.10.4 Emphasis can then be placed on stringent implementation of labour laws based on the education, sensitisation and strong adherence of all key role players, Inspection and Enforcement Services of the NDEL, employers, workers' organisations and migrant workers.

5.3.10.5 South Africa's links with its neighbours are strengthened through renewed, enhanced partnerships working toward harmonisation of standards across SADC.

5.3.10.6 Improved protection, including social protection of migrant workers.

5.4 Key Area of Intervention 4. Labour migration from South Africa

5.4.1 Scope, problem, objective

5.4.1.1 KAI 4 focuses on **interventions which aim to protect and, where necessary and strategic, assist South African workers in search of employment experience abroad**.

5.4.1.2 The NLMP approach to labour migration from South Africa is one that is mindful of the **fundamental right of movement** enshrined in the South African Constitution as well as in the Universal Declaration of Human Rights and South

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Africa's international obligations towards its own citizens abroad. It is also mindful of the guidance in this regard contained in the African Union's Draft Guidelines on the Development of a Model Migrant Welfare Programme/System and the UN *Global Compact for Safe, Orderly and Regular Migration* (2018). The NLMP also acknowledges the following **challenges**:

- The emigration of South Africans for employment purposes has been a neglected area of State intervention;
- As a result, its mapping and data collection have been limited and inconsistent;
- Data available point to acute rates of emigration among specific, highly skilled occupations, and in some instances, scarce skills;
- Retention of skills and incentives for South African emigrants to come back on a temporary or permanent basis have been neglected;
- There is evidence of remigration of highly skilled foreign professionals from South Africa to other OECD countries pointing to challenges in their retention, particularly in the health sector;
- The facilitation of recruitment and placement of South African work-seekers overseas in fair and ethical conditions of employment for occupations or skills levels which are in high offer in South Africa and for purposes of acquisition of experience and exposure to international standards has not been sufficiently explored;
- South African migrant workers are not offered adequate assistance and protection in terms of their labour and social protection rights throughout their journey and upon return to South Africa, especially in terms of fraudulent and unethical recruitment and reintegration into the labour market.

5.4.1.3 The NLMP offers a set of strategic objectives and effective practical intervention measures to **strengthen protection of and assistance to South African citizens seeking employment experience abroad**.

5.4.2 Policy development, monitoring of brain drain and mapping of diaspora

5.4.2.1 The NLMP supports the development of a diaspora policy in close collaboration with Dirco.

5.4.2.2 In collaboration with Statistics South Africa, DIRCO and the DHA, the NDEL, as part of the structure proposed in 5.2 (KAI 2) will **review and strengthen quantitative and qualitative data collection mechanisms for the monitoring of**

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the departures of skilled South Africans and (with the support of the IOM) mapping of skilled South Africans established abroad for employment purposes.

5.4.2.3 Monitoring and mapping activities will result in the **publication of policy-oriented analyses** informing outreach and sensitisation campaigns and further qualitative research on the understanding of drivers of emigration and remigration.

5.4.2.4 Remittances will be estimated from the balance of payment at the Reserve Bank. With regards to the use of remittances, income and expenditure surveys will describe the dynamics related to the expenditure of such remittances.

5.4.3 Incentives to stay and incentives to come back

5.4.3.1 In collaboration with relevant departments and drawing on both the DHET Occupations in High Demand list (5.3.3) and the monitoring and mapping tools described in 5.4.2, the NDEL will design a **national strategy for skills retention**, targeting both South African and foreign highly skilled workers, in sectors particularly affected by skills loss through emigration or remigration and shortages.

5.4.3.2 This national strategy for skills retention will include a section on **incentives to come back on a temporary or permanent basis to South Africa and to impart skills and experience in a range of ways**, targeting countries of destination of South African highly skilled workers or workers who have been educated and trained in South Africa. This plan can include seasonal programmes, volunteering, lecturing, reintegration with promotion, etc...

5.4.4 Overseas recruitment facilitation and placement of South African work-seekers and protection throughout the migration journey, including reintegration upon return

5.4.4.1 Cognisant of the fact that this has been a neglected dimension of labour migration policy in South Africa, the NDEL will undertake **research into the placement of South African work-seekers overseas through fair recruitment processes and into decent conditions of employment for occupations or skills levels which are in high offer in South Africa** and for purposes of acquisition of experience and exposure to international standards. This research will envisage the sectors and occupations of relevance, the availability and capacity of existing public and private placement services, required accompanying services for

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overseas assistance, and overseas niche markets offering conditions of employment and social protection commensurate with or superior to South African standards. Differentiated policy options and pilots could be run.

5.4.4.2 **Sectors and occupations** which could be explored in priority and where South Africa already has recognised training standards are the entertainment industry, seafarers and cruise ship staff, domestic work, housekeeping, and care.

5.4.4.3 Independently of the outcome of 5.4.4.1, the NDEL will establish **assistance services for South African workers already employed abroad** and in need of assistance. In collaboration with DIRCO, the NDEL will discuss the possibility to establish hotlines and posting labour attachés when and where relevant to address South African overseas workers' most frequent assistance requests.

5.4.4.4 To the extent required, NDEL in collaboration with DIRCO will make available legal and welfare support to South African migrant workers abroad. Consideration will also be given to extending social security support to South African migrant workers who may not be appropriately covered by the social security system of the country of destination.

5.4.4.5 In collaboration with the DoH, the DEL will assist with the **reintegration of health professionals into the South African labour market, preferably in the public sector**, upon their return from overseas placement.

5.4.4.6 Conclude bilateral labour agreements or memoranda of understanding in collaboration with other line departments for the **provision of surplus manpower to governments and enterprises abroad** where this is needed, on the basis of government-to-government arrangements

5.4.4.7 Develop and implement, in collaboration with other line departments, frameworks and programmes to **reintegrate returning South African migrant workers** into the South African labour market and society.

5.4.5 Anticipated benefit

5.4.5.1 The South African Government and public will have reliable, up-to-date data on flows and stocks of highly skilled South Africans employed abroad and on sectors and occupations particularly affected by attrition to emigration or remigration.

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5.4.5.2 South Africans in search of an overseas employment experience will be assisted and protected throughout their journey by reliable and effective Government services.

5.4.5.3 South Africa will rely on a national strategy for skills retention.

5.4.5.4 South African work-seekers with skills in high offer in South Africa will be availed safe and orderly opportunities to acquire overseas work experience at conditions commensurate with or superior to South African standards.

5.4.5.5 Assistance to reintegration into the labour market, especially into the public sector, will be available upon return.

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SECTION 6. SUMMARISED CONCLUSIONS AND THE WAY FORWARD

The absence of a streamlined labour migration policy framework will perpetuate a number of undesirable realities:

- A fragmented and inconsistent approach to labour migration;
- Non-aligned institutional frameworks;
- Irregular labour migration;
- Non-acquisition and –retention of critical skills;
- Insufficient regulatory frameworks, also in respect of recruitment; and
- The absence of a framework for supporting and channelling South Africans in the diaspora or wanting to work abroad.

Two measures in particular need to be taken:

- Firstly, there is a need for comprehensive consultations, also within government (for example, DMR, DHA and DIRCO), and with other stakeholders; and
- Secondly, draft legislation aimed at implementing the Policy should be developed, supported by an explanatory memorandum explaining the thrust and key provisions of the said legislation.

SECTION 7. ANNEXES

7.1 High-level roll-out/implementation plan

Roll-Out plan/Road Map

Action	Responsible Entity	Time frame
1. NEDLAC Consultations concluded on the Draft Policy and Proposed Employment Services Amendment Bill (ESAB)	DG and DDG PES	10 August 2023
2. Presidency Secondary Socio Economic Impact Assessment System (SEIAS) Certificate issued	DDG: PES	04 November 2023
3. State Law Advisors for secondary (ESAB) Certification issued	DDG: PES	14 December 2023
4. Government Social and Economic Cluster Presentation made on revised NLMP/ESAB	DG: Employment and Labour	February 2024
5. Presentation of NLMP/ESAB Cabinet for approval to table to Parliament	Minister	February 2024

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To be provided separately.

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---------- Unemployment Insurance Contributions Act No.4 of 2002

---------- Employment Services Act No.4 of 2014

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Immigration Act, Act 13 of 2002 (South Africa)

Labour Relations Act, Act 66 of 1995 (South Africa)

Private Security Industry Regulation Act, Act 56 of 2001 (South Africa)

Refugees Act, Act 130 of 1998 (South Africa)

Refugees Amendment Act, Act 11 of 2017

7.3.4 Case law

Ahmed v Minister of Home Affairs [2018] ZACC 39

Baloro v University of Bophuthatswana 1995 8 BCLR 1018 (B); 1995 4 SA 197 (B)

Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (1) BCLR 1 (CC)

Discovery Health Ltd v CCMA [2008] 7 BLLR 633 (LC)

Dunwell Property Services CC v Sibande [2012] 2 BLLR 131 (LAC)

Government of the Republic of South Africa & others v Grootboom & others 2001 (1) SA 46; 2000 (11) BCLR 1169) (CC)

Joseph v University of Limpopo [2011] 12 BLLR 1166 (LAC)

Kaunda & others v President of the Republic of South Africa & others 2005 (4) SA 235 (2004 (10) BCLR 1009) (CC)

Khosa v Minister of Social Development; *Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC)

Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another 1997 (12) BCLR 1655 (CC)

Lawyers for Human Rights v Minister of Home Affairs 2004 7 BCLR 775 (CC); 2004 4 SA 125 (CC)

Mzalisi NO & others v Ochogwu & another (630/2018) [2019] ZASCA 138 (judgment of 01 October 2019)

Nandutu and Others v Minister of Home Affairs and Others 2019 (8) BCLR 938 (CC)

Rafoneke and Others v Minister of Justice and Correctional Services and Others 2022 (6) SA 27 (CC); 2022 (12) BCLR 1489 (CC)

Ruta v Minister of Home Affairs 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC)

S v Makwanyane 1995 (3) SA 391 (CC); 1995 (6) *BCLR* 665 (CC)

Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others 2015 (1) SA 151 (SCA)

Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others 2007 (4) SA 395 (CC)

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7.3.5 Internet sources

https://businesstech.co.za/news/business/343169/new-law-to-block-foreigners-from-working-in-certain-sectors-in-south-africa/

https://www.fin24.com/Economy/new-laws-on-the-cards-to-regulate-participation-of-foreigners-in-sa-economy-report-20190928

https://www.insideover.com/migration/ugandas-open-door-refugee-policy-causes-security-and-economic-risks.html

https://www.fragomen.com/insights/alerts/qualifying-salary-local-employees-quota-calculation-set-increase

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7.4 Glossary

The definitions below for concepts used in this Policy have been derived from organisations specialising in the migration field. However, for purposes of gathering of and reporting on labour migration statistical data, the migration statistics conceptual framework adopted by the UN Statistical Commission in 2021[45] should be the guiding framework.

Migrant

Any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is (IOM definition). An emigrant is a person leaving his/her country of origin. An immigrant is a person settling in a country of destination.

Labour migrant or migrant worker

A person who is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national (UN definition).

Irregular migrant

A person whose movement takes place outside the regulatory norms of the sending, transit and / or receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries, it is entry, stay or work in a country without the necessary authorization or documents required under immigration regulations. From the perspective of the sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the administrative requirements for leaving the country. There is, however, a tendency to restrict the use of the term "illegal migration" to cases of smuggling of migrants and trafficking in persons (IOM definition).

Refugee

A person who, "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political

[45] UN Statistical Commission (Fifty-second session, 1-3 and 5 March 2021) *Migration Statistics* (E/CN.3/2021/11).

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opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country (Art. 1(A)(2), Convention relating to the Status of Refugees, Art. 1A(2), 1951 as modified by the 1967 Protocol). In addition to the refugee definition in the 1951 Refugee Convention, Art. 1(2), 1969 Organisation of African Unity (OAU) Convention defines a refugee as any person compelled to leave his or her country "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country or origin or nationality." Similarly, the 1984 Cartagena Declaration states that refugees also include persons who flee their country "because their lives, security or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order." (UN and IOM definitions).

Asylum seeker

A person who seeks safety from persecution or serious harm in a country other than his or her own and awaits a decision on the application for refugee status under relevant international and national instruments. In case of a negative decision, the person must leave the country and may be expelled, as may any non-national in an irregular or unlawful situation, unless permission to stay is provided on humanitarian or other related grounds (IOM definition).

Smuggling

"The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (Art. 3(a), UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000). Smuggling, contrary to trafficking, does not require an element of exploitation, coercion, or violation of human rights (UNODC and IOM definitions).

Trafficking in persons

"The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation" (Art. 3(a), UN Protocol to Prevent, Suppress and Punish Trafficking in Persons,

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Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime, 2000). Trafficking in persons can take place within the borders of one State or may have a transnational character. (UN and IOM definitions).

International Labour Standards (ILS)

ILS are legal instruments that have been drawn up by the ILO's constituents (governments, employers and workers) and set out basic principles and rights at work since 1919. This comprehensive system of instruments (protocols, conventions and recommendations) on work and social policy, is backed by a supervisory system designed to address all sorts of problems in their application at the national level. ILS are aimed at promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity (Adapted from ILO definition).

Convention (ILO)

Conventions are legally binding international treaties that may be ratified by Member States of the ILO. Conventions lay down the basic principles to be implemented by ratifying countries (ILO definition).

Recommendation (ILO)

Recommendations serve as non-binding guidelines. Recommendations either supplement a specific convention by providing more detailed guidelines on how it could be applied or can also be autonomous, i.e. not linked to any convention (ILO definition).

Framework

A set of guiding ideas and principles from which policy is developed, or on which decisions are based within an organisation or an institution. The degree to which frameworks are binding will vary from case to case (Adapted from Merriam Webster dictionary).

Sustainable Development Goals (SDGs)

The Sustainable Development Goals (SDGs) are a collection of 17 global goals set by the United Nations. The broad goals are interrelated though each has its own targets to achieve. The total number of targets is 169. The SDGs cover a broad range of social and economic development issues. These include poverty, hunger, health, education, climate change, gender equality, water, sanitation,

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energy, environment and social justice. The UN-led process involved its 193 Member States and global civil society. The resolution is a broad intergovernmental agreement that acts as the Post-2015 Development Agenda. Each Member State reports regularly on advancement of the targets.

Private Employment Agency

Any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;

(b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks;

(c) other services relating to job-seeking, determined by the competent authority after consulting the most representative employers and workers' organisations, such as the provision of information, that do not set out to match specific offers of and applications for employment (ILO definition).

Occupations in High Demand (OHD)

OHD refer to those occupations that show relatively strong employment growth, or are experiencing shortages in the labour market (South African Department of Higher Education and Training (DHET) definition).

Scarce skills

Scarce skills refer to those occupations in which there are a scarcity of qualified and experienced people, currently or anticipated in the future, either (a) because such skilled people are not available or (b) they are available but do not meet employment criteria. (DHET definition).

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7.5 List of consulted stakeholders

SECTION A: Written comments received from the organisations

Number	ORGANISATIONS
1.	Agri Letaba
2.	Agri Limpopo
3.	AGRI SA
4.	Agri Western Cape
5.	Allied Health Care Associations of South Africa
6.	Bolt Services Za (Pty) Limited
7.	BUSA
8.	Capes
9.	Centre for Law and Society, University of Cape Town
10.	Chatsworth Cheshire Home
11.	City of Mbombela
12.	Cofesa – Confederation of Employers in South Africa
13.	Commission for Gender Equality
14.	COSATU EC
15.	Dear South Africa (represented about 322 public)
16.	Devac
17.	E DING CO.LTD (received 2 June 2022)
18.	Employer's Organisation for Hairdressing Cosmetology Beauty (EOHCB)
19.	Erwee Inc. Attorneys
20.	Express Employment Professionals
21.	Forum for Immigration Practioners South Africa (FIMSA)
22.	Fragomen Africa (Pty) Ltd.
23.	Gauteng Provincial Government
24.	Helen Suzman Foundation
25.	Immigration Consulting South Africa (IMCOSA)
26.	Inclusive Society institute
27.	International Organization for Migration (IOM UN MIGRATION)
28.	Minerals Council South Africa
29.	Mpumalanga Department of Economic Development and Tourism (6 June 2022)
30.	National Employers Association of South Africa (NEASA's)
31.	National Union of Mineworkers
32.	Norton Rose Fulbright South Africa Inc (6 June 2022)
33.	Office of the Premier - Western Cape Government
34.	Onelogix
35.	OUTsurance Holdings
36.	Permits foundation
37.	Positive Freight Solutions
38.	Pple group (Pty) ltd

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39.	Professional Transport and Allied Workers Union of South Africa (PTAWU)
40.	Research Associate
41.	SA Canegrowers (3 June 2022)
42.	SALOM GROUP HOLDINGS
43.	SATAWU
44.	Scalabrini Centre of Cape Town
45.	Socio Economic Rights Institute (SERI)
46.	South African Cane Growers' Association
47.	South African Local Government Association (SALGA)
48.	Statistics South Africa
49.	Stellenbosch University – Faculty of Law
50.	Takealot.com
51.	The Banking Association South Africa
52.	The Catholic Parliamentary Liaison Office (CPLO)
53.	The Democracy Development Program – The Migration Project
54.	The Migration Project (submitted by The Democracy Development Plan)
55.	The Road Freight Association
56.	The United Nations High Commissioner for Refugees (UNHCR) and The United Nations Human Rights Office of the High Commissioner for Human Rights (OHCHR)
57.	Tshwane University of Technology
58.	Uber
59.	Universities South Africa
60.	University of Cape Town - Refugees rights Clinic
61.	University of Cape Town - Research Associate Centre for Law and Society,
62.	Visa one (1 June 2022)
63.	Western Cape Government – Office of the Premier
64.	Women in Informal Employment: Globalizing and Organizing (WIEGO)
65.	Workplace Strategies on behalf of Ordein
66.	Xpatweb (Pty) Ltd
67.	ZZ2 Legal Services

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Section C: a list of all various organisations attended Provincial Public Hearings/Roadshows

Eastern Cape	Free State	Gauteng	Kwazulu Natal	Limpopo	Northen Cape	North West	Western	Mpumalanga
Guest House (Hospitality Sector)	Office of the Premier	Civic Movement : SANCO	Traditional Medicines Association	Agri-Limpopo	Agri-NK	Community Restoration Empowerment NPO	EMPLOYERS	Bushbuckridge Local Municipality
Public Service Association (PSA)	National Union of Mine workers (NUM)	Restaurant Bargaining Council	Nquthu Municipality	Indigo Farming	Agric Northern (	Metropolitan NW Region	NCFAWU - ORGANIS	Department of Public Works, Roads and Transport
Khanyisa High School	SADTU	Parliamentary Constituency Office Kempton Park	Newcastle District Municipality	COSATU	Kimberley Engin	Arts, Culture, Sports and Recreation	NGO	Department of Agriculture
Eastern Cape Communal Wool Growers Association (ECCWGA)	SACTWU	Textile industry	CCMA	AmbrosiaCOSATU	Beefmaster	SAMWU	Local Community	NAFCOC
Nonyameko Consulting	Sheep Shearer Forum	Entrepreneur Engineering enterprise	NASWU	Dikgale Tribal Authority	Woman of Wisd	NW Office of the Premier	Municipality	Mpumalanga Agriculture
COSATU	SAPS	Restaurant bargaining council	Dept of Higher Education	Beerseun Boerdery	Sol Plaatje UniversityKalag adi Mines	NW Chamber of Commerce		Gert Sibande TVET
MEDIA	Van Niekerk Accountants	Numsa Bargaining Councilor in catering and res	NASUWA	Dikgale Tribal Authority	NC-Provincial government	Manappe College		Department of Social Development
Mkhulu And Khubuleli Hospitality	Department of Agricultural Land Reforms and Development	Employer Rep	KZN Disability Forum	Mosehla Zebediela Forum.Mosehla Zebediela Forum		Construction SETA		Department of Agriculture
Private Enterprise		Civic Movement Operation Dudula	SAPAWU	Lawyers for Human Rights (Musina office).Agri-Letaba		Dr KK Acting District Coordinator		NAFCOC
Private Sector		Organised labour SAEWA	TASWU	SASSANyawa Boerdery		Chairperson COSATU		Mpumalanga Agriculture
Le Pearl Boutique Hotel		Business/ enterprise Rep (Security industry + Agri-SA)	MPOFANA MUNICIPALITY	Agri-LetabaAgri-Limpopo		SALGA Senior Advisor on International Relations		Gert Sibande TVET
Fidelity Security Services		Civil Society Society (Forgotten People)	COSATU	Nyawa Boerdery		Kopano Muraputse		Department of Social Develo
DHA		Civil Society (Operation Dudula)	Office Of The premier	Indigo Farming		Tawlika Mine		COSATU
ANC Constituency management committee		Civil Society(Put South Africa first)	NTDF	Weipi Farming		Luzuko Ledwaba		EMPLOYER
Local government Sector		Employer/ business / enterprise rep (health + wellness)	PFS	Agri-Letaba		Distribution companyOffice of the Executive Mayor: Bojanala District Municipality		YOUTH CENTRE
Falcon Security		Enterprise / consultant	Pietermaritzburg resident	Salom Agri		Impala Platinum		COGTA
Dept. of Health		Immigration Attorneys rep	Resident of Pietermaritzburg			Rustenburg Local Municipality		Department of Health
AMCU		Enterprise Rep	Chershire Homes			Siganisho		
EFF		Employer/Business enterprise - Energy sector (Solar)	Dept of Home Affairs			Reagetswe Mining Services		
Best Home and Electricity			Dept of Home Affairs			TTS Supply Services		
KFC			Chershire Homes					
SAPS			Tongaat Hullet					
SASSA			Resident of Esikhaleni					
Dept. of Economic			KwaCele Farming					
Development and Tourism			Umhlathuze Municipality					
Vukani EMSCCMA			Home Affairs					
Enterprise			HWSETA					
Owned enterprise			USLC					
Dept. of Correctional Services			SARS					
Traditional Affairs			Statistics SA					
Imbewu Steel								
Vukuzenzele Special School								
Zanelizwe Primary School								

TOTAL NUMBER OF WRITTEN COMMENTS FROM VARIOUS ORGANISATIONS AND PUBLIC HEARINGS CONDUCTED IN 9 PROVINCES:668

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