

**XENOPHOBIA AGAINST NON-NATIONAL ACADEMICS EMPLOYED AT HIGHER
EDUCATION INSTITUTIONS IN SOUTH AFRICA: A LEGAL PERSPECTIVE**

BY

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DEDICATION

This thesis is dedicated to my mother Shanta, whose quiet yet resilient spirit showed me how to be strong, who taught me that it is important to rise each day to face one's challenges without complaint or self-pity, who encouraged me to trust God in all things, who always prayed for me, and most of all who loved me unconditionally.

DECLARATION

I declare that this thesis is the product of my independent research carried out under the guidance of my supervisor. The thesis has not been submitted or presented, either in whole or in part, for the award of any degree in any university or institution of learning. I further declare that all anti-plagiarism rules have been complied with and all sources consulted or referred to have been duly acknowledged as appropriate.

Signed

A handwritten signature in blue ink, appearing to read 'A Naidoo', is shown within a light blue rectangular box.

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“When a stranger resides with you in your land, you shall not wrong him. The stranger who resides with you shall be to you as one of your citizens; you shall love him as yourself, for you were strangers in the land of Egypt.”¹

¹ Leviticus 19:33-34

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LIST OF ACRONYMS

ACHPR	African Charter on Human and People's Rights
ATDF	All Truck Drivers Forum and Allied South Africa
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CHE	Council for Higher Education
CORMSA	Consortium for Refugees and Migrants in South Africa
CRC	Convention on the Rights of the Child
CUT	Central University of Technology
DHA	Department of Home Affairs
DHET	Department of Higher Education and Training
ECRI	European Commission Against Racism & Tolerance
EFF	Economic Freedom Front
FTLRP	Fast Track Land Reform Programme
HCWG	Hate Crimes Working Group

HEIs	Higher Education Institutions
HSRC	Human Science Research Council
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
IFP	Inkatha Freedom Party
ILO	International Labour Organisation
LRA	Labour Relations Act
NATJOC	National Joint Operational Centre
NBCRFLI	National Bargaining Council for the Road Freight and Logistics Industry
nGAP	New Generation of Academics Programme
NUMSA	National Union of Metalworkers of South Africa
NWU	North West University
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SAMP	South African Migration Project
SAQA	South African Qualifications Authority

UCT	University of Cape Town
UDHR	Universal Declaration of Human Rights
UFS	University of the Free State
USA	United States of America

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- CENTRAL UNIVERSITY OF TECHNOLOGY (CUT) Transformation Plan 2021-2026.
- CENTRAL UNIVERSITY OF TECHNOLOGY (CUT) 2018 Position Paper on the Appointment of Foreign National Employees in terms of the Employment Equity Act.
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- UNIVERSITY OF THE FREE STATE (UFS) 2018 Anti-Discrimination, Promotion of Equality, and Social Justice Policy and Procedures.
- NORTH WEST UNIVERSITY (NWU) 2019 Policy on Employment Equity.
- NORTH WEST UNIVERSITY (NWU) 2021 Transformation Charter.
- UNIVERSITY OF CAPE TOWN (UCT) 2021 Staff Inclusivity Survey.

ABSTRACT

In this thesis I explore xenophobia against non-national academics at higher education institutions in South Africa, with a specific focus on the legal and policy protections afforded to them. Xenophobia is a national as well as a global phenomenon and manifests in South African society. Although much research has been conducted on xenophobia in general, the position of the non-national academic in relation to xenophobia has not been extensively investigated. In this thesis, therefore, I highlight first, the need to examine the non-national academics' experience of xenophobia within the higher education space and secondly, the legislative and policy protections available to this category of employee. Since xenophobia is a type of discrimination and is linked to issues of equality, I examine xenophobia against the background of existing scholarship on equality and discrimination. The theoretical approach to the study is located in the theories of Tajfel & Turner as well as Harris which focus on xenophobia and social exclusion. The conclusions drawn from the research are that xenophobia against non-national academics in the higher education context does exist and manifests in a covert or symbolic way instead of in a violent manner. While there exist international treaties, national laws, institutional policies, and case law which cater for the rights of non-national academics to some extent, these do not provide adequate legal protection for this group. I recommend the passing of xenophobic-specific legislation to enhance enforcement and accountability and for higher education institutions to specifically provide for xenophobia in its policies. I also conclude that non-national academics would best benefit from the notion of transformative substantive equality since this notion speaks to changes being made to structures within institutions to achieve equality.

CHAPTER 1

INTRODUCTION TO THE RESEARCH

1.1 RESEARCH PROBLEM

In this thesis, I explore the problem of xenophobia against non-national academics at South African higher education institutions. Specifically, I investigate and critically assess the protection against xenophobia that the law, at international, regional, and domestic South African level, provides to non-national academics. I do this against a discussion of the various approaches to the notion of equality to determine the standard of equality which best protects the rights of non-national academics.

1.2 ASSUMPTIONS

- 1.2.1 There is a problem with xenophobia against non-national academics at South African higher education institutions.
- 1.2.2 There is law and policy at domestic, regional, and international level that relates directly or indirectly to xenophobia.
- 1.2.3 The current law and policy are either insufficient for or are complicit in xenophobia against non-national academics if evaluated against a standard of equality.

1.3 RESEARCH QUESTIONS

To address the research problem, I explore the following research questions:

- 1.3.1 What is xenophobia and what is specific about it as compared to other types of discrimination?
- 1.3.2 Is there xenophobia against non-national academics at higher education institutions in South Africa, and if so, how does it manifest, and what is specific about it?
- 1.3.3 What approach to equality should be used to evaluate current law and policy concerning xenophobia against non-national academics?
- 1.3.4 What is the law and policy that relates to xenophobia against non-national academics at South African higher education institutions and what protection

do these instruments provide to non-national academics, whether generally or specifically?

- 1.3.5 Does the current law and policy identified, sufficiently regulate xenophobia against non-national academics? If not, in which ways does it not? Does it perhaps confirm or encourage attitudes of xenophobia?
- 1.3.6 In which ways can the current legal protection and policies be improved to better cater for the rights of non-national academics?

1.4 BACKGROUND TO THE STUDY

Most of the South African population see non-nationals as a threat.² Many also believe that non-nationals cause unemployment and other socio-economic challenges.³ The occurrence of xenophobia in South Africa is not a novel one and has been prevalent prior to 1994 in the form of hostile immigration laws introduced by the National Party government.⁴ The Covid-19 pandemic has also caused an increase in anti-immigrant behaviour.⁵

Scholars who have previously investigated xenophobia suggest that xenophobia and xenophobic violence are mainly bred out of poverty amongst locals and immigrants in low-income areas where there is competition for work. Immigrants are viewed as taking away the jobs and resources of the local people.⁶ Xenophobia has increased since the end of the 20th century due to the internationalization of the labour market during the post-colonial era which led to people migration.⁷ South Africa is a country that has been receiving migrants for many years.⁸ The pattern of migration in terms of the number and diversity of migrants has seen an increase post-1994.⁹ Being the most

² Human Science Research Council "Migration scholars release statement on International Migration situation in South Africa", <https://www.hsrc.ac.za/en/media-briefs/dces/migration-scholars-statement> (accessed on 18 April 2022).

³ Human Science Research Council "Migration scholars release statement on International Migration situation in South Africa", <https://www.hsrc.ac.za/en/media-briefs/dces/migration-scholars-statement> (accessed on 18 April 2022).

⁴ Mlambo 2021:34.

⁵ Human Science Research Council "Migration scholars release statement on International Migration situation in South Africa", <https://www.hsrc.ac.za/en/media-briefs/dces/migration-scholars-statement> (accessed on 18 April 2022).

⁶ Masiloane 2010:46.

⁷ Ayooluwa St. Emmanuel 2015:130.

⁸ Chiumbu & Moyo 2018:138.

⁹ Chiumbu & Moyo 2018:139.

industrialized country in Africa, South Africa attracts migrants from many other African countries as well as Pakistan and Bangladesh.¹⁰ However, newcomers are perceived by citizens from disadvantaged backgrounds as competitors for scarce resources such as jobs and social services.¹¹ There is also a nationalist view in that citizens believe that they should be given preferential treatment over non-nationals.¹² Non-nationals are also willing to work long hours for minimal wages and therefore present a threat to low-income earners.¹³ South Africans are extremely hostile toward non-nationals. This hostility sometimes results in violence and damage to the property of non-nationals.¹⁴ There has been an increase in xenophobic sentiment since 1994 and this conflicts with the aim of achieving inclusivity and diversity in the new democracy.¹⁵

In South Africa lives have been lost due to xenophobic violence in 2008, 2015, 2017, and 2019.¹⁶ The attacks of May 2008 and April 2015 were graphically displayed by the media both on the domestic and international fronts. Although these attacks have been labelled as xenophobic violence, the South African government chose to attribute the attacks to criminal elements and rather emphasized the need for social cohesion.¹⁷ Xenophobia is a human rights issue and poses a threat to security. It is usually prevalent where there is intimidation by the State, where immigrants are expelled, where employment opportunities and access to resources are restricted, and where the media reports on xenophobia using stereotypes.¹⁸ Although the media has played an important role in highlighting the problem of xenophobia, it has also been instrumental in the creation and perpetuation of stereotypes about non-nationals. This has been done using expressions and labels that promote exclusion instead of belonging.¹⁹ Mistaken beliefs about the number of non-nationals living in South Africa have also fuelled fears and anti-immigrant sentiment as there are rumours of 'tens of

¹⁰ Ojedokun 2015:169.

¹¹ Ayooluwa St. Emmanuel 2015:130.

¹² Ayooluwa St. Emmanuel 2015:131.

¹³ Masiloane 2010:46.

¹⁴ Tevera 2013:10.

¹⁵ Tevera 2013:10.

¹⁶ Akinola 2019:85.

¹⁷ Chiumbu & Moyo 2018:136.

¹⁸ Akinola 2019:86.

¹⁹ Chiumbu & Moyo 2018:149.

millions' of undocumented migrants living in South Africa.²⁰ However, information obtained from the recent Census statistics as well as the 2021 mid-year population estimates reveal approximately 3,95 million non-nationals living in South Africa and this figure includes all types of immigrants.²¹

Xenophobia is also evolving as it was once thought to be directed against Black people. However, in chapter 2 of this thesis, I explain how the year 2015 revealed a shift where Pakistani and Chinese non-nationals were also victims of xenophobia.²² The increase in coronavirus cases in January 2020 also caused an increase in xenophobia against Asian people.²³ With xenophobia, citizenship is used as a criterion to exclude people and to have boundaries between insiders and outsiders.²⁴ Xenophobia is often linked to racism but it is distinct from racism, as I discuss later in the thesis.²⁵ Xenophobia can also manifest itself in different ways and can covertly be expressed as in the case of institutional xenophobia.²⁶ Harris states that xenophobia is something that is 'ugly and unwanted' and must be eradicated from South African society.²⁷ The issues of discrimination and equality must also be debated as they are linked to xenophobia in that discrimination and inequality deprive a non-national of his or her rights.

1.5 MOTIVATION FOR THE STUDY

Xenophobia is a problem globally as well as within South African society. While xenophobia has been investigated generally in society, there is a paucity of research about the experience of xenophobia by non-national academics within the South African higher education context. Given the alarming incidence of xenophobia in other sectors of society, there is a need to investigate the experience of non-national

²⁰ Human Science Research Council "Migration scholars release statement on International Migration situation in South Africa", <https://www.hsrc.ac.za/en/media-briefs/dces/migration-scholars-statement> (accessed on 18 April 2022).

²¹ Stats SA "Erroneous reporting of undocumented migrants in South Africa", <https://www.statsa.gov.za/?p=14569> (accessed on 18 April 2022).

²² Mbekezeli & Mkhize 2018:5.

²³ Batova 2021:51.

²⁴ Adjai & Lazaridi 2013:194.

²⁵ See section 2.4 on contextualizing xenophobia. Footnotes 114-116.

²⁶ Soyombo 2008:86.

²⁷ Harris 2002:178.

academics and the legal protection afforded to this group of employees at higher education institutions in South Africa.

My interest in this topic is sparked by my personal experience. In 2010 my family and I relocated from Durban to the Free State. On arrival, I was taken aback by the stereotypical treatment that we received from the local people in Welkom. People assumed that we were Muslim as most of the town's Indian population is Muslim. Some enquired whether we were from India and whether we spoke 'Indian'. Having been born as a third-generation South African Indian, I began to think that historical and political events have shaped how people think. It has also shaped the way most people treat others who are different from themselves.

A brief look at the history of some of the exclusionary laws in the Free State Province shows that in 1891 the Statute law of the Orange Free State (now known as the Free State Province) prohibited Arabs, 'Chinamen', and any other Asiatic or Coloured person from carrying on business or farming in the Free State.²⁸ Following the passing of this law, such businesses were forced to close and owners were deported without compensation.²⁹ Even though these draconian laws were abolished in the new democracy, the political and social landscape still bears the scars of history.

Naidoo states that the apartheid policy did not only ensure racial segregation but also led to a social separation of races.³⁰ This meant that people of different races were unable to relate to each other on a social level. If one looks at the definition of xenophobia which I discuss in Chapter 2 of this thesis, this may imply that apartheid influenced how people related to each other and the long-term effect of apartheid is a catalyst for xenophobia. Xenophobic attacks have been encountered within the Welkom, Free State community as well. In 2012, an outbreak of violence resulted in 43 people being arrested for public violence following the looting of businesses owned by Bangladeshi nationals. The police could not rule out xenophobia as a possible

²⁸ Reprobate "The People of South Africa", <http://reprobate.co.za/the-people-of-south-africa-indian-south-africans/> (accessed on 3 November 2018).

²⁹ Reprobate "The People of South Africa", <http://reprobate.co.za/the-people-of-south-africa-indian-south-africans/> (accessed on 3 November 2018).

³⁰ Naidoo 2017:12.

cause for the looting.³¹ Following the incidents of 2015, the academic community held university assemblies in which they condemned xenophobic acts and expressed their support for the victims of xenophobic violence.³²

My personal experience has thus sensitized me to the issues of xenophobia. Xenophobia is a problem generally in South Africa. It also appears to be a problem at higher education institutions, particularly for non-national academics at these institutions.³³ The legal protection afforded to non-national academics against xenophobia at first glance seems ad hoc and inadequate. Although there is ample literature on xenophobia generally in South Africa, very little has been written on the legal aspects of xenophobia and the position in this respect, of non-national academics. There is, consequently, a need for a study of the legal position of non-national academics at South African institutions vis-à-vis xenophobia. Having outlined my personal experience, in the following section I provide an overview of the research methodology and theoretical approach used in my study.

1.6 RESEARCH METHODOLOGY AND THEORETICAL APPROACH

In broad terms, my thesis comprises a review of and critical engagement with primary legal sources (legislation, regional and international treaty law, case law, and policy documents) on discrimination, equality, and xenophobia, based on a review of and critical engagement with scholarship on equality and anti-discrimination theory and law. I consider the legal protection afforded non-national academics at domestic, regional, and international levels so that I follow neither international law nor a constitutional law approach exclusively – instead, both interchangeably.

During the study, I consider, of necessity, the issues that arise within the context of other domestic jurisdictions and so work comparatively, but this occurs in an ad hoc fashion and my study is not primarily a comparative one. I consider the prevalence of xenophobia in Germany since the anti-Semitic history of Germany provides a historic parallel to the apartheid movement in South Africa. Both countries provide a

³¹ News 24 “Possible xenophobic attacks in Welkom”, <https://www.news24.com/news24/possible-xenophobic-attacks-in-welkom-20120205> (accessed on 3 November 2018).

³² Central University of Technology “CUT says no to Xenophobia”, <http://www.cut.ac.za/students/cut-says-no-xenophobia/> (accessed on 26 October 2016).

³³ Otu 2017:136.

meaningful comparison as both have a history of discriminatory laws. Media reports indicate that Germany has also experienced incidents of xenophobia and Islamophobia,³⁴ hence it is worthwhile to consider their experience and whether Germany has legislated against xenophobic violence and behaviour. I also investigate whether xenophobia is prevalent in Canada. South Africa's constitution was modelled to a large extent on the Canadian Charter of Rights and Freedoms.³⁵ It is therefore useful to determine whether xenophobia features in Canadian society and whether there are laws in place which deal with xenophobia and its effects.

To the extent that I investigate an empirical phenomenon (xenophobia against non-national academics employed at South African universities), I inevitably engage with some empirical data and information. However, I in this respect rely on existing scholarship and research and do not perform fieldwork or case studies. My theoretical approach is informed by existing South African scholarship on equality, and xenophobia. I rely, for instance on Tajfel & Turner's work on the nature and causes of social exclusion. For them, individuals possess a personal identity, which is based on their sense of self, and a social identity, which is based on their membership in a certain group. When the social identity of the person is threatened, he or she may engage in in-group favouritism where he or she favours those in the in-group, or out-group derogation where the person will exclude or make negative statements about the out-group. This leads to a failure to recognize diversity in the out-group and fosters intolerance and discrimination.³⁶ I further draw on the work of writers such as Albertyn, Fredman, Botha, and Ackermann on substantive equality. Albertyn & Fredman propose that there is a need to address the social, economic, and political factors which incubate exclusion of the out-group. They believe that doing this will promote equality, which will thus help to further the dimension of substantive equality and overcome discrimination and inequality.³⁷

³⁴ Osborne "Islamophobia and xenophobia on the rise in Germany, new study claims", <https://www.independent.co.uk/news/world/europe/germany-islamophobia-xenophobia-racism-study-survey-extremism-a8622391.html> (accessed on 28 October 2019).

³⁵ Davis 2003:191.

³⁶ Weiten 2013:531.

³⁷ Albertyn & Friedman 2015:439.

1.7 OUTLINE OF CHAPTERS

My thesis consists of seven chapters. Apart from **Chapter 1**, which is an introduction and outline of the study, the other chapters comprise the following:

In **Chapter 2** I explore xenophobia based on a certain theoretical understanding of exclusion, discrimination, and equality. To do this I draw on the work of Harris who proposes that xenophobia involves more than a negative attitude and suggests that the definition of xenophobia should include a practice and a specific target.³⁸ I discuss what xenophobia is; what it entails - nationally and globally; and the different forms it can take. I also lean on the writing of Crush and Ramachandran who endorse Harris' view and who conclude that xenophobic perceptions are often accompanied by discriminatory treatment or violence.³⁹ To obtain a theoretical understanding of xenophobia, I examine the theories of xenophobia by Harris and Tajfel & Turner. This chapter then encompasses both a theoretical approach to understanding xenophobia as well as a description of the phenomenon as it occurs in society, both in a historical and political context and what is different about it as compared to other forms of discrimination. Having considered the views of various scholars of xenophobia I formulate my understanding of xenophobia. I conclude that xenophobia is a fluid and multi-faceted phenomenon that evolves depending on how it presents itself in different contexts. While it may be conflated with other types of discrimination like racism or Afrophobia, it is a distinct phenomenon. I put forward the view that interrogating xenophobia in this chapter is important as it lays the foundation for understanding how xenophobia affects non-national academics, which forms the discussion in Chapter 3.

In **Chapter 3** I engage in a discussion of how xenophobia manifests in academia or higher education institutions, how non-national academics encounter xenophobia in the workplace, and the extent to which it is prevalent. I also investigate the kinds of xenophobic treatment that non-nationals encounter, i.e., whether it is covert or overt xenophobia. I outline that very little research, including empirical work, has been carried out on the experience of xenophobia by non-national academics. In so doing I support the views of Nkomo and Maseko & Maweni in this regard.⁴⁰ In light of this, I

³⁸ Harris 2002.

³⁹ Crush & Ramachandran 2009.

⁴⁰ Nkomo 2018; Maseko & Maweni 2019.

discuss the work of Otu, Sorensen, Maseko & Maweni and others which focus on the experience of non-national students of xenophobia and allow me to draw a parallel between the experience of non-national students and non-national academics in the higher education context.⁴¹ I also examine the literature on xenophobia in higher education institutions in certain other countries. I discuss the work of Harry *et al* which focuses on the reasons why non-national academics migrate to South Africa and the challenges experienced by them.⁴² The history of transformation in higher education post-1994 is relevant to my thesis as it reveals the progress or lack thereof in the sector and is important to the issue of xenophobia in higher education as it is also a form of discrimination which impacts transformation. I highlight three incidents of racism at universities in South Africa and I discuss how these incidents have affected the transformation agenda of the institutions. This also provides a gateway to the discussion in Chapter 4 where I focus on the transformation and recruitment policies of two higher education institutions in the Free State province. Crucial to this chapter as well is a discussion of the studies on xenophobia against non-nationals at higher education institutions. These studies serve to confirm that xenophobia does occur at higher education institutions, and also confirm the ways in which it occurs.

I conclude the chapter by discussing xenophobia at higher education institutions in other countries such as Canada, Germany, the United Kingdom, and the United States of America. I draw on the work of writers such as Kreber & Hounsnell who also confirm that there is a lack of research on the lived experiences of non-nationals in the United Kingdom.⁴³ However, discrimination and inequality feature at higher education institutions although the term 'racism' is used as a general reference to include other types of discrimination such as xenophobia, racial violence and gender discrimination.

I explore in **Chapter 4** the various approaches to equality to determine the approach which should be used to evaluate current law and policy regarding xenophobia against non-national academics. I lean on the cases which have dealt with xenophobia concerning non-national academics as well as those which have dealt with other types of discrimination. These provide an understanding of the rules of discrimination and

⁴¹ Otu 2017; Sorensen 2012; Maseko & Maweni 2019.

⁴² Harry *et al* 2017:6.

⁴³ Kreber & Hounsnell 2014.

equality which have guided the courts in arriving at a decision. Among the cases, I discuss in some detail the decision in the recent *Rafoneke* case which highlights the plight of non-nationals in relation to the right to work and unfair discrimination on the grounds of nationality or social origin.⁴⁴ I engage in a discussion of the types of equality by drawing on the work of writers such as Albertyn, Fredman, Ackermann, Botha, Kruger, Currie & De Waal, and others.⁴⁵ Following an extensive discussion on dignity and how dignity is aligned with equality, discrimination and unfair discrimination, I put forward a view on the type of equality which provides the best protection for the rights of non-national academics against xenophobia.

As the experience of non-national academics is central to this study, in **Chapter 5** I focus on the legal protection that is currently afforded to non-national academics in terms of legislation. I examine in detail labour, employment, human rights legislation, and existing case law to reveal the protection given to non-national academics. Since South Africa until recently did not have xenophobic-specific legislation. I review the provisions of the Prevention and Combating of Hate Crimes & Hate Speech Bill and views on whether it adequately addresses the right of non-nationals. I mention the recent Bills which seek to exclude non-nationals without permanent residency from conducting business in township areas within South Africa. These Bills are the Gauteng Township and Economic Development Bill (hereafter referred to as the Gauteng Bill).⁴⁶ which has been recently passed into law and the Draft Free State Local Integrated Economic Development and Transformation Bill (hereafter referred to as the Free State Bill).⁴⁷ In this chapter, I also examine the anti-discrimination and other regulatory policies of the various higher education institutions within South Africa, the way these institutions prioritize the problem of xenophobia, and the

⁴⁴ *Rafoneke and Another v Minister of Justice & Correctional Services and Others* (FB) (unreported) case Numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 101.

⁴⁵ Albertyn & Fredman 2015; Currie & De Waal 2013; Botha 2009; Kruger 2011; Ackermann 2013.

⁴⁶ Chidombwe "The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships", <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022)..

⁴⁷ Republic of South Africa "Free State Economic Small Business Development, Tourism, and Environmental Affairs invites the public to comment on Draft Free State Local Integrated Economic Development & Transformation Bill", <https://www.gov.za/speeches/free-state-economic-small-business-development-tourism-and-environmental-affairs-invites-0> (accessed on 6 November 2022).

protection afforded to non-national academics. The internationalization strategies as well as the transformation and diversity agenda of the international office in higher education institutions are investigated to help gain an understanding of whether there is a sensitivity and awareness of xenophobia in the higher education context.

In **Chapter 6** I discuss the adequacy of the current legislation and policies which I describe in Chapter 5. I link Chapter 5 to this chapter by focusing on the failures or gaps in anti-discrimination legislation and policies and how such failures affect the rights of non-national academics. To do this I look at the Employment Services Act and recent legislative amendments such as the Gauteng Township and Economic Development Bill⁴⁸ and the Draft Free State Local Integrated Economic Development and Transformation Bill⁴⁹ which propose amendments that seek to differentiate between citizens and non-nationals in relation to employment rights. I highlight how the Promotion of Equality & Prevention of Unfair Discrimination Act and the Preventing and Combating of Hate Crimes and Hate Speech Bill are found to be lacking in catering specifically for xenophobia. I also include in the chapter a discussion of the cases highlighted in Chapter 5 and whether the decisions made adequately protected the rights of non-nationals. I discuss Immigration laws and the rules relating to critical skills list and skills transfer which specifically impact the ability of non-national academics to seek or maintain work in South Africa. I also mention the work of the Helen Suzman Foundation which argues that the quota system does not favour non-nationals and affects their job security.⁵⁰

Lastly, I analyse the government's denial of xenophobia and the recent attempts by the government and politicians to curb the rights of non-nationals through the introduction of quotas in certain business sectors and areas of work.

⁴⁸ Chidombwe "The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships", <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

⁴⁹ Republic of South Africa "Free State Economic Small Business Development, Tourism, and Environmental Affairs invites the public to comment on Draft Free State Local Integrated Economic Development & Transformation Bill", <https://www.gov.za/speeches/free-state-economic-small-business-development-tourism-and-environmental-affairs-invites-0> (accessed on 6 November 2022).

⁵⁰ Helen Suzman Foundation "Submission on the Employment Services Amendment Bill", 7 <https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf> (accessed on 6 November 2022).

Following the findings in Chapter 6, in **Chapter 7** I provide a summary of the research questions and the conclusions reached in the thesis. Following the overview of the research questions, I draw certain conclusions regarding xenophobia and how it manifests against non-national academics in the higher education environment. I summarise the research by looking at what has worked well in other countries, what protections can be offered to non-national academics through legislation and policy; the need for government to introduce or fast track xenophobic-specific legislation; and for higher institutions to prioritize their internationalization strategy and awareness. Finally, I make recommendations about the right to work, and the balancing of the right to work against the rights of citizens. I discuss the improvement of immigration laws, that some of these laws are restrictive, that there is a need to address delays and service delivery issues at the Department of Home Affairs and that there should be educational initiatives and policies on how to deal with xenophobia in the workplace. I highlight the need for policies in higher education which recognise and address xenophobia and which provide enforcement mechanisms when such violations do occur. The role of government and media and the need for the investigation and prosecution of cases involving xenophobia are also mentioned, which include the promotion of the rule of law, training of service providers where the rights of non-nationals have been breached, and the role of media in reporting on incidents of xenophobia responsibly and sensitively. Lastly, I discuss some of the initiatives undertaken by other countries such as Canada and Germany in addressing and curbing xenophobia.

CHAPTER 2

UNDERSTANDING XENOPHOBIA

2.1 INTRODUCTION

In this chapter, I explore xenophobia by defining it, and I examine what it entails, both globally and nationally. I also describe the different forms it can take. By employing a particular theoretical understanding of exclusion, discrimination, and equality I also focus on a description of the phenomenon as it occurs in society both in a historical and political context and how it differs from other forms of discrimination. The purpose of this chapter is to explore xenophobia and the various ways in which it manifests in society with reference to other countries as well as within the South African context. It is also to appreciate that xenophobia is a complex phenomenon, that it is fluid by nature depending on where and how it occurs, and that it can embody more than just hostility towards someone from another country. Interrogating the concept of xenophobia in this chapter is important as it also aids in understanding how non-national academics encounter xenophobia in the higher education context, an issue which I discuss in Chapter 3. I begin in section 2.2 by constructing a definition of xenophobia. I follow this in 2.3 by discussing the theories of xenophobia that apply to my thesis. In section 2.4 I provide a contextual perspective of xenophobia whereafter I discuss xenophobia in a global context in section 2.5, with a primary focus on selected countries. I conclude the chapter in section 2.6 with a discussion of xenophobia in South Africa.

2.2 DEFINING XENOPHOBIA

The term 'xenophobia' is derived from the words 'xenos'⁵¹ meaning 'stranger' and 'phobia' meaning 'an extreme or irrational fear or dislike of something'.⁵² It is also described as 'attitudes, prejudices, and behaviour that reject, exclude and often vilify persons based on the perception that they are outsiders or foreigners to the community, society or national identity'.⁵³ Xenophobia is a distinct phenomenon in

⁵¹ Soanes *et al* 2005:675.

⁵² Soanes *et al* 2005:1073.

⁵³ UNESCO "Learning to Live Together", <https://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/xenophobia/> (accessed on 6 November 2018).

which a non-national is feared, alienated, or subjected to violence on the basis that he or she is an outsider or a foreigner.⁵⁴ It has also been described as 'an unreasonable fear, distrust, or hatred of strangers, foreigners, or anything perceived as foreign or different and is often based on unfounded reasons and stereotypes'.⁵⁵ Xenophobia is described by Harris as depicting a negative attitude toward non-nationals, but she cautions against describing xenophobia as an attitude without looking at the consequences or effects that result from such attitudes or mindsets.⁵⁶ She argues that to do so would be misleading, as in South Africa it is not merely an attitude but rather one which results in tension and violence. Harris suggests that the definition of xenophobia be reworded to include *practice* since it involves an activity and not just an attitude towards non-nationals. Harris goes further to explain that this *practice* is a violent one that results in harm or damage to a specific target.⁵⁷

Crush and Ramachandran are of the view that xenophobia should be seen as a social or political phenomenon that alienates or marginalizes non-nationals rather than as a 'natural reaction' of citizens to non-citizens.⁵⁸ In essence, xenophobia can be described as being made up of extremely negative perceptions and practices perpetuated against non-national groups based on their nationality, and which affect all categories of migrant people.⁵⁹ These perceptions are often accompanied by discriminatory treatment, and in extreme cases may result in violence or aggression.⁶⁰ Xenophobia and discrimination against non-nationals have been on the rise in South Africa and are perceived to have increased significantly since the advent of the new democracy in 1994.⁶¹ Research on xenophobia in South Africa has revealed that South Africans are highly intolerant and hostile towards non-nationals, which sometimes manifests in violence being perpetrated against non-nationals, their property, or their livelihoods.⁶² Xenophobia may manifest itself through assault,

⁵⁴ Ayooluwa St Emmanuel 2015:130.

⁵⁵ Republic of South Africa "National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance," <http://www.justice.gov.za/docs/other-docs/NAP/NAP-20190313pdf> (accessed on 1 June 2020).

⁵⁶ Harris 2002:169-170.

⁵⁷ Harris 2002:170.

⁵⁸ Crush & Ramachandran 2009:6.

⁵⁹ Crush & Ramachandran 2009:6.

⁶⁰ Crush & Ramachandran 2009:6.

⁶¹ Fayomi *et al* 2015:1.

⁶² Tevera 2013:10.

murder, victimization, ethnic cleansing, and even eviction of non-nationals from a country.⁶³

Non-nationals are viewed negatively in the sense that they are seen as bringing infectious diseases such as yellow fever, cholera, and HIV as well as draining the already constrained resources of the country.⁶⁴ Of concern is the fact that anti-immigrant sentiment has increased in the post-apartheid era, which conflicts with the need to recognize inclusivity and diversity in the new dispensation.⁶⁵ The prevalence of xenophobia is increasing in South Africa and human rights violations have resulted due to a poor understanding of what xenophobia entails.⁶⁶

Xenophobia is also a global phenomenon that is caused by social and economic factors.⁶⁷ Mkhize & Makau believe that the term 'xenophobia' means different things to different people and needs to be deconstructed to be properly understood. It cannot simply be understood as a 'visible hostility towards strangers'.⁶⁸ As Peterie & Neil note:

Local manifestations of xenophobia should be understood as symptoms of a much broader disease rather than a discrete malady. It may be tempting to focus exclusively on local factors, for example, the prevalence of specific false beliefs, as such causal narratives appear to offer clear remedies, but to do so would oversimplify a complex and multifactorial phenomenon. An adequate account of xenophobia needs to resist the reductionist tendency to mono-dimensional explanations. Xenophobia is always a local and global phenomenon, a psychological and cultural phenomenon, and a problem that is simultaneously politically manufactured and constraining of political possibility.⁶⁹

Given this fact, simply defining xenophobia is academic if we fail to examine the consequences of the fear and hatred, which manifests in violence, abuse, ejection, displacement, and other forms of violence and maltreatment.⁷⁰

⁶³ Republic of South Africa "National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance", <http://www.justice.gov.za/docs/other-docs/NAP/NAP-20190313pdf> (accessed on 1 June 2020).

⁶⁴ Peberdy 2009: 158-159.

⁶⁵ Tevera 2013:10.

⁶⁶ Mkhize & Makau 2018:5.

⁶⁷ Tshishonga 2015:163.

⁶⁸ Mebekezeli & Mkhize 2018:4-5.

⁶⁹ Peterie & Neil 2020:32.

⁷⁰ Dassah 2015:128.

Another factor worth considering concerning xenophobia is that initially it was believed to be directed by black South Africans against black African migrants.⁷¹ However, in a 2008 report by the Human Science Research Council (HSRC) attacks were also noted against those of Chinese and Pakistani descent and South Africans from minority language groups.⁷² The attacks of 2015 also revealed a fundamental shift in the xenophobic mindset where Pakistani and Chinese non-nationals were also targeted in several cases.⁷³ This indicates a significant shift in how attacks take place in that where it was once believed that xenophobic violence primarily involved foreign versus indigenous persons, it has since evolved to include people from other ethnic groups and even South African minorities.⁷⁴ The arrival of the Coronavirus in late 2019 has also contributed to an increase in xenophobia. I discuss this later in the chapter in section 2.5.2 when I explore how Coronavirus has caused an increase in Anti-Asian sentiment in American society.⁷⁵ One might therefore argue that the definition of xenophobia is more fluid than it originally appeared to be and therefore various factors need to be considered when understanding it within society and in the context of the experience of non-national academics in higher education institutions.

In summary, my understanding of xenophobia is that in its simplest form xenophobia is understood to be the fear of strangers or the dislike of people from other countries.⁷⁶ It is expanded to include negative attitudes, prejudices, and hostile behaviour toward people on the basis that they are seen as outsiders to the community or society that they find themselves in.⁷⁷ As a result, xenophobia must also be seen as a human rights issue as it gives rise to discrimination against people based on their ethnic origin or nationality. It, therefore, breaches the right to equality and human dignity. It is human nature to be afraid of things that one is not familiar with, hence the coining of

⁷¹ Dassah 2015:128.

⁷² Human Science Research Council "Citizenship, Violence & Xenophobia in South Africa: Perceptions from South African Communities", <https://www.hsrc.ac.za/en/research-outputs/view/3583> (accessed on 1 June 2020).

⁷³ Mkhize & Makau 2018:5.

⁷⁴ Human Science Research Council "Citizenship, Violence & Xenophobia in South Africa: Perceptions from South African Communities", <https://www.hsrc.ac.za/en/research-outputs/view/3583> (accessed on 1 June 2020).

⁷⁵ Vachuska 2020:2.

⁷⁶ Soanes *et al* 2005:1073.

⁷⁷ UNESCO "Learning to Live Together", <https://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/xenophobia/> (accessed on 6 November 2018).

the phrase 'fear of the unknown'. Fears can often be irrational and unfounded based on myths and misinformation. However, the earlier discussion in this chapter reveals that xenophobia is not simply a fear or a negative attitude, especially in the South African context, where fear or hostility often leads to violent behaviour towards non-nationals.

Evolutionary thought tells us that the moral values of humans are entrenched in the human psyche, and these include anti-social leanings towards xenophobia. Daly states that these behavioural patterns or traits were directed toward the instinct to survive and were passed on to the next generation.⁷⁸ This school of thought posits that humans are tribal in nature and prone to groupishness to the exclusion of members of 'outside' tribes.⁷⁹ Dissidents of this school of thought rather believe that xenophobic attitudes differ depending on times and the periods when there is a crisis or when the political and media dialogue generates fear. This view leads one to see xenophobia as a social construct rather than a consequence of human evolution.⁸⁰ Some scholars also believe that the tribal nature of humans is linked to limited resources and that humans are more prejudiced towards members of outgroups when competing for resources. Non-nationals would therefore face a greater risk of xenophobia when the economy is poor.⁸¹

Xenophobia can thus be viewed as a phenomenon that occurs nationally, regionally, and globally, that affects both citizens and non-citizens, and it is also related to political, socio-economic, cultural, and psychological factors. As Peterie & Neil have stated, we must resist the tendency to look at xenophobia in a one-dimensional manner since it is much more than that.⁸² Coupled with this is that we cannot see xenophobia merely as an attitude since it sometimes gives way to discrimination and violent behaviour. It is therefore difficult in my understanding to pin a 'one size fits all' definition to xenophobia as it is multi-faceted and must be viewed from different perspectives. It is fluid and changes depending on the context and how it manifests. For example, in a low-income society like a township in South Africa, xenophobia

⁷⁸ Peterie & Neil 2020:28.

⁷⁹ Peterie & Neil 2020:28.

⁸⁰ Peterie & Neil 2020:28.

⁸¹ Peterie & Neil 2020:29.

⁸² Peterie & Neil 2020:32.

might present as hostility towards non-nationals because they are seen as taking away jobs and resources from citizens living in that township. This often leads to communities taking the law into their own hands through violent attacks on foreign-owned shops in the township or the policing of undocumented migrants as in the case of Operation Dudula, which I discuss in Chapter 1⁸³ and Chapter 6⁸⁴ of my thesis.

However, in the higher education context xenophobia may not manifest through violence. Research suggests that it is evident in higher education institutions using symbolic violence, psychological manipulation, exertion of power, and degrading and devaluing of non-nationals who are part of this sector.⁸⁵ Covert or symbolic violence may for example be in the form of non-national academics being overlooked for promotion, subjected to lower salary grades, being given greater workloads than their national counterparts or even being subtly excluded from social groups or gathering among their peers and work colleagues. I discuss this in greater detail in Chapter 3.

Lee summarizes it succinctly by stating that "xenophobia has never gone away. Like racism, it has simply evolved and adapted. Over the decades generations of immigrant leaders, politicians and citizens have moulded xenophobia to fit new contexts."⁸⁶ Going further than its literal interpretation there is no single universally accepted definition of the term as it is used in academic, human rights, and popular dialogue.⁸⁷ Psychologists will view it from the perspective of the psychology of fear, while sociologists will look at it as a social system that creates and maintains social boundaries.⁸⁸ This, therefore, alludes to the idea that we must not only examine xenophobia from the perspective of what it means but also what it has done.⁸⁹

⁸³ Makhaye "Operation Dudula launch march in KZN a damp squib", <https://www.dailymaverick.co.za/article/2022-04-11-operation-dudula-launch-march-in-kzn-a-damp-squib/> (accessed on 12 April 2022).

⁸⁴ Bhengu "'Dangerous thugs 'or 'providing a solution'?- Dudula movement clashes in Alexandra split SA", <https://www.timeslive.co.za/news/south-africa/2022-03-09-dangerous-thugs-or-providing-a-solution-dudula-movement-clashes-in-alexandra-splits-sa/> (accessed on 12 March 2022).

⁸⁵ Mudau & Khanare 2020:181.

⁸⁶ Lee 2020:5.

⁸⁷ Lee 2020:5.

⁸⁸ Lee 2020:5.

⁸⁹ Lee 2020:5.

2.3 THEORIES OF XENOPHOBIA

In this section, I discuss the relevant theories relating to xenophobia. While there are other theories to explain why xenophobia may occur in society, I have focused my discussion on the three theories or hypotheses formulated by Harris, namely the scapegoating hypothesis, the isolation hypothesis, and the biocultural hypothesis. I also discuss the social identity theory as advanced by Tajfel & Turner.

2.3.1 The scapegoating hypothesis

Three hypotheses or explanations for xenophobia have been identified by Harris. The first hypothesis is called the scapegoating hypothesis. This hypothesis identifies non-nationals as 'scapegoats' by blaming them for poverty, and the lack of resources experienced by citizens.⁹⁰ Non-nationals are seen as threats to resources such as jobs, housing, education, and healthcare. Post-1994, many South African citizens believed that life would be better following the many years of deprivation. Failure to have these expectations met and the competition with non-nationals for scarce resources have led to citizens feeling frustrated.⁹¹ Citizens feel deprived of what they believe they are entitled to and this leads to anger and resentment and may even lead to violence.⁹² A link can therefore be established between deprivation, xenophobia, and violence.⁹³ There is however little evidence to prove that non-nationals are responsible for draining national resources.⁹⁴ This theory or hypothesis explains xenophobia in the context of socio-economic factors.⁹⁵ Mkhize & Makau express the view that the frustration that has resulted, especially among the poor and unemployed, is due to the failure of the government to effectively deal with these social ills.⁹⁶

2.3.2 The isolation hypothesis

The isolation hypothesis is the second hypothesis postulated by Harris. This hypothesis looks at xenophobia in the context of the apartheid laws which led to South

⁹⁰ Harris 2002:171.

⁹¹ Dassah 2015:137.

⁹² Harris 2002:171.

⁹³ Dassah 2015:137.

⁹⁴ Dassah 2015:137.

⁹⁵ Harris 2002:171.

⁹⁶ Makau & Mkhize 2018:13.

Africa being isolated from the international community. Apartheid also saw boundaries being created between the different race groups in South Africa. This isolation led to South Africa being alienated from other countries in Africa.⁹⁷ The isolation hypothesis leans towards understanding xenophobia as a consequence of apartheid since it caused South Africans to view non-nationals as strangers or unknown people.⁹⁸ These fostered feelings of intolerance because South Africans find the differences threatening or dangerous. Once South Africa was accepted back into the international community the boundaries that existed previously were no longer present and South Africans had direct contact with non-nationals.⁹⁹ The isolation of South Africans from each other and the rest of the continent as well as the world has left them with little experience or knowledge of other people.¹⁰⁰ This resulted in negative interaction outcomes and hostility towards non-nationals which were simply based on the fact that they represented something different, and unknown.¹⁰¹

2.3.3 The biocultural hypothesis

The biocultural hypothesis of xenophobia uses physical features and cultural factors of African non-nationals as a reason for xenophobia. These markers or signifiers immediately signify the difference or foreignness between black South Africans and non-national Africans.¹⁰² These markers serve as prompts for xenophobic action as they indicate which non-nationals are disliked by South Africans and who should be targeted for xenophobic violence.¹⁰³ Harris indicates that the application of this hypothesis does not necessarily mean that other non-nationals are not prone to xenophobia, but they do appear to be at a lower risk for violence.¹⁰⁴ This hypothesis attempts to understand the reasoning and conditions for the extremely negative reaction towards non-nationals of African descent.¹⁰⁵

⁹⁷ Makau & Mkhize 2018:14.

⁹⁸ Harris 2002: 172.

⁹⁹ Harris 2002: 173.

¹⁰⁰ Dassah 2015:137.

¹⁰¹ Dassah 2015:137.

¹⁰² Harris 2002: 174.

¹⁰³ Harris 2002: 174.

¹⁰⁴ Harris 2002: 174.

¹⁰⁵ Makau & Mkhize 2018:14.

These hypotheses present reasons for xenophobia but do not deconstruct the term itself.¹⁰⁶ Further, they do not adequately explain why xenophobia in South Africa is directed mainly towards black non-nationals.

Quotes in newspapers and by the government also paint non-nationals in a negative light. Images of disease, criminality, and contamination are used to represent non-nationals thereby showing them to be a threat to the South African nation.¹⁰⁷ Harris states that there are two striking features. First, xenophobia is ugly and unwanted. Secondly, xenophobia must be removed from South African society as it is a cause for serious concern.¹⁰⁸ It is also shown as a pathology in the sense that it is something unwelcome and abnormal.¹⁰⁹ This is contrary to the depiction of the 'new South Africa' which, post 1994 prided itself on values of tolerance, peaceful co-existence and diversity.¹¹⁰ South Africa, in reality however is known as a violent society and xenophobia is seen as a threat to the post-apartheid agenda of tolerance and diversity. "Harris however argues that xenophobia should actually be seen as part of the social fabric of the 'new South Africa' and not separate from it. She says that 'it functions within the culture of violence to define the "New South Africa"'¹¹¹ Harris, it would seem encourages one to see xenophobia as a part of the new order instead just being a pathology that threatens the 'new South Africa'.

2.3.4 The social identity theory

Another theory, called the social identity theory has been advanced by Tajfel and Turner. This theory warrants some discussion about xenophobia as it deals with social exclusion. Tajfel & Turner's work on the nature and causes of social exclusion examine the fact that individuals possess a personal identity, which is based on their sense of self, and a social identity, which is based on their membership in a certain group. When the social identity of the person is threatened, he or she may engage in in-group favouritism where he or she favours those in the in-group, or out-group derogation where the person will exclude or make negative statements about the out-group. This

¹⁰⁶ Harris 2002:177.

¹⁰⁷ Harris 2002: 176.

¹⁰⁸ Harris 2002: 178.

¹⁰⁹ Harris 2002:178.

¹¹⁰ Harris 2002:178.

¹¹¹ Harris 2002: 180.

leads to a failure to recognize diversity in the out-group and fosters intolerance and discrimination.¹¹² Tajfel & Turner's theory can be applied to xenophobia as non-nationals are seen as the out-group and are excluded by citizens because they are perceived as threats to the in-group. Albertyn & Fredman propose that there is a need to address the social, economic, and political factors which incubate exclusion of the out-group. They believe that doing this will promote equality, which will thus help to further the dimension of substantive equality and overcome discrimination and inequality.¹¹³ The issues of equality and discrimination have been highlighted here to link them to xenophobia. Xenophobia and xenophobic violence are linked to issues of discrimination and equality as they seek to deprive an individual of their rights. I discuss these in greater detail in Chapter 4.

In addition to the hypotheses discussed above, many labels have been given to xenophobic violence such as criminality, Afrophobia, racism, and xenophobia. Several reasons have also been provided for the attacks such as socio-economic factors, cultural stereotyping, lack of political will and leadership, denialism, and criminal activity.¹¹⁴ However, it seems to emerge that xenophobia is a complex term that cannot be confined to a simple definition.¹¹⁵ Historical, political, institutional, and psychosocial factors are seen as the main drivers of violence.¹¹⁶ While these factors impact the occurrence of xenophobia by creating tension and discontent, they do not explain how or why these factors lead to collective xenophobic violence.¹¹⁷ A study conducted by Misago addressed this shortcoming and found that 'haranguing' and inciting crowds during mass community meetings, spreading false rumours, and asking members of the community to join together and defend themselves leads to mobilization of the community and eventually leads to collective xenophobic violence.¹¹⁸ In other words, he argues that the mobilization of discontent causes violence.¹¹⁹ It is thus evident that mobilization is a trigger for the xenophobic violence against non-nationals.

¹¹² Weiten 2013:531.

¹¹³ Albertyn & Friedman 2015:439.

¹¹⁴ Dassah 2015:139.

¹¹⁵ Dassah 2015:139.

¹¹⁶ Misago 2019:1.

¹¹⁷ Misago 2019:2.

¹¹⁸ Misago 2019:8.

¹¹⁹ Misago 2019:2.

Community leaders are responsible for using well-known strategies to incite crowds to inflict violence on targeted non-nationals.¹²⁰ It is also apparent that where mobilization does not occur, xenophobic violence is absent. Understanding the mobilization of discontent as the way xenophobic violence occurs is a significant step in understanding all the determinants of xenophobic violence and can be useful in finding measures to curb such violence.¹²¹ A study conducted by Claassens also found that participating in community meetings and not having access to employment during your working years increases xenophobia.¹²²

In summary, the hypotheses formulated by Harris help to shed light on the possible reasons why xenophobia is prevalent in South African society. The scapegoating hypothesis is relevant to the South African context as it is built around the belief that non-nationals are responsible for depriving citizens especially the poor of much-needed resources. The isolation hypothesis is also relevant to the South African context due to the country's isolation from the international community during the period of apartheid laws and policies. This led to xenophobic sentiment becoming prevalent when apartheid ended, and various race groups could interact with each other. The biocultural hypothesis explains how South Africans react negatively towards non-nationals of African descent based on physical features and cultural factors. Lastly, the social identity theory is linked to xenophobia as it deals with membership in what is referred to as 'in groups' and 'out groups'. Non-nationals are seen as members of the 'out group' and are therefore alienated or excluded. Having discussed the theories of xenophobia in the next section I examine the contextualizing of xenophobia.

2.4 CONTEXTUALIZING XENOPHOBIA

In this section, I provide a contextual perspective of xenophobia. Literature on xenophobia often tends to conflate it with other forms of discrimination like racism, Afrophobia, and Neo-nationalism. Some researchers even describe xenophobia as a 'type' of racism. The definition of xenophobia above also reveals that xenophobia can

¹²⁰ Misago 2019:7.

¹²¹ Misago 2019:8.

¹²² Claassens 2017:16.

be 'chameleon-like' in nature depending on the context in which it occurs. It is therefore important to place xenophobia in context and to understand it with the various nuances attached to it as a global and national phenomenon. The purpose of this thesis is also to understand xenophobia in terms of the experience of non-national academics in the higher education context. This will be looked at in Chapter 3.

Human rights violations have plagued societies and civilian groups since the early ages.¹²³ Examples of such violations in world history include the Jewish holocaust when approximately six million Jews were murdered in concentration camps; the lynching and murder of black families by the Ku Klux Klan in America during the early 1900s; the caste system in India which discriminated against the Dalits who were the poorest people in Indian society; the inhumane killing of several thousands of Tutsis in Rwanda in a period of a hundred days; and ethnic conflicts in the former Yugoslavia between Croats, Serbs, Bosniaks and Slovenes in the 1990s.¹²⁴

The Hague Convention IV of 1907 and the Treaty of Versailles were the first international instruments used to prosecute crimes against humanity.¹²⁵ In delivering the Edward A Smith Annual lecture at the Harvard Law School in 2003 Judge Edwin Cameron spoke of the six million Jews, gypsies, homosexuals, and other outcasts who were put to death in the concentration camps.¹²⁶ Although his message centred around Aids denialism, he illustrated the fact that minorities have been a vulnerable group in society since time immemorial and exposed to risk and ill-treatment. Victims of xenophobia are also a vulnerable group; however, they face prejudice because they are seen as outsiders based on their 'foreignness' or cultural incompatibility.¹²⁷ In effect, citizenship becomes the criterion for exclusion by creating boundaries between insiders and outsiders.¹²⁸

¹²³ Ayooluwa St. Emmanuel 2015:132.

¹²⁴ Thomas "Xenophobia- Examples in World History", <https://www.medindia.net/patients/patientinfo/xenophobia-examples.htm> (accessed on 12 June 2019).

¹²⁵ Ayooluwa St. Emmanuel 2015:132.

¹²⁶ Cameron 2003:526.

¹²⁷ Adam & Moodley 2015:21.

¹²⁸ Adjai & Lazaridis 2013:194.

Like xenophobia, these are all examples of human rights violations. However, xenophobia is a distinct phenomenon in that a non-national is feared, alienated, or subjected to violence on the basis that he or she is an outsider or a foreigner¹²⁹ This alienation or violence is not based on skin colour as in the case of racism perpetrated by the Ku Klux Klan, anti-Semitism as in the case of the Jews, or genocide of the Tutsis in Rwanda. Rather, the concept of xenophobia is linked to the perception that non-nationals represent the 'other', that they are foreign, and they hail from outside the community.¹³⁰ While all forms of discrimination involve 'othering' in this case it is based on their origin and not on their physical appearance.

Crush and Ramachandran are of the view that xenophobia is an ambiguous term that has been understood by scholars in several ways. It is often likened to or tied to racism, often being described as the 'new racism'. While xenophobia can be linked to racism, it is different since racism involves one group asserting itself over another group based on race.¹³¹ Racism involves a situation where the minority group oppresses or asserts itself over the majority group.¹³² While xenophobia is the fear or hatred of strangers, racism is broader in meaning as it deposits a belief that racial differences make one race superior to another.¹³³ Ayoolwa is also of the view that although racism and xenophobia may overlap, they are not the same in meaning. Xenophobia involves the notion or behaviour that a person who comes from outside a country is regarded as foreign while racism relates to differentiation based on skin colour and race.

Xenophobia is not only perpetrated against strangers. It can also occur where non-nationals have been living and integrating with a dominant group for a long period. One must distinguish between the 'in group' and the 'out group'. Locals being the in-group enjoy rights and express a sense of solidarity among the in-group. They are encouraged to distance themselves from the out-group.¹³⁴ The denial of health care

¹²⁹ Ayooluwa St Emmanuel 2015:130.

¹³⁰ Tafira 2011:115.

¹³¹ Soyombo 2008:86.

¹³² Soyombo 2008:86

¹³³ Merriam-Webster "'Xenophobia' vs 'Racism'", [https://www.merriam-webster.com/words-at-play/xenophobia-and-racism-difference#:~:text=Xenophobia%20is%20the%20fear%20and,be%20both%20xenophobic%20and%20racist.\(accessed on 15 November 2022\)..](https://www.merriam-webster.com/words-at-play/xenophobia-and-racism-difference#:~:text=Xenophobia%20is%20the%20fear%20and,be%20both%20xenophobic%20and%20racist.(accessed on 15 November 2022)..)

¹³⁴ Soyombo 2008:86.

services to non-nationals is another side of xenophobia which is different from physical attacks but is also violent.¹³⁵ This can, generally speaking be referred to as healthcare xenophobia. Non-nationals who are undocumented often live in poor communities where the chances of contracting diseases or being subjected to violence are high. When faced with assault or rape, such individuals are asked to file a report with the police before being given medical treatment. Many are afraid to do so because they fear being deported.¹³⁶ Hospitals are also found to deny non-nationals treatment or ask for exorbitant fees to treat them.¹³⁷

Xenophobia can also be institutional xenophobia where those in an institution express hatred towards members of another group. This is a more covert type of xenophobia.¹³⁸ This may also be the type of xenophobia that is manifested against non-national academics in higher education institutions. Non-national academics represent a minority group within South African society. They are also part of the higher education landscape where incidents of xenophobia have been featured. There is a need to investigate whether their minority status renders them vulnerable to xenophobia within the higher education sector.

South Africa is increasingly being viewed as a country that is hostile towards non-nationals from other African countries due to the number of xenophobic attacks that have taken place recently.¹³⁹ Xenophobia threatens the principles of human rights and as such destabilizes the relationship between human development and international migration. It further leads to the exploitation of the migrant population.¹⁴⁰ Having examined the contextual nature of xenophobia, in the next section I discuss xenophobia in a global context, with a particular focus on certain chosen countries.

2.5 XENOPHOBIA IN A GLOBAL CONTEXT

One of the greatest migrations of people since World War II took place in the first two decades of the twenty-first century. It was projected that by the end of 2020 over 65

¹³⁵ Idahosa & Vincent 2014:95.

¹³⁶ Idahosa & Vincent 2014:96.

¹³⁷ Idahosa & Vincent 2014:96.

¹³⁸ Soyombo 2008:86.

¹³⁹ Okem & Asuelime 2015:48.

¹⁴⁰ Crush & Ramachandran 2009:3.

million people or one in 135 people living on earth would be migrants.¹⁴¹ People move for reasons such as conflict, the safety of themselves and their families, environmental and climate changes as well as economic reasons.¹⁴² It is envisaged that as cultural and religious clashes as well as other humanitarian crises increase, more people will risk their lives and safety to migrate to other countries where they hope life will be better.¹⁴³

Xenophobia is a global issue brought about by the rapid globalization of society as migration takes place due to people seeking a better life in other countries.¹⁴⁴ Due to rising incidents of xenophobia and an increase in the number of migrants, many host countries are resistant to welcoming migrants into the country.¹⁴⁵ Anti-immigrant sentiment is extensively evident in the West and has also increased in developing countries.¹⁴⁶ Politicians in Europe have been motivated to close their borders to migrants.¹⁴⁷ In the United States, there have been requests by politicians to build walls to keep non-nationals out and in Asia and Africa many wait to be allowed into a country where they hope to find a home.¹⁴⁸ The sad reality is that many migrants who are seeking a better life may not find it due to economic and social pressures as well as being perceived as threats to the host country.¹⁴⁹

2.5.1 Xenophobia in African countries

In the 21st century, there are still many African countries that are described as developing nations. These developing nations grapple with issues of poverty and the basic elements for survival such as water, food, shelter, and electricity.¹⁵⁰ Tribalism, racism, and xenophobia are also realities that threaten the sustainable development of such African nations as survival is difficult in an environment where there is also hostility and hatred.¹⁵¹

¹⁴¹ Farmbury 2019:2.

¹⁴² Farmbury 2019:2.

¹⁴³ Farmbury 2019:2.

¹⁴⁴ Choane *et al* 2011:130.

¹⁴⁵ Farmbury 2019:3.

¹⁴⁶ Crush & Ramachandran 2009:2

¹⁴⁷ Farmbury 2019:3-4.

¹⁴⁸ Farmbury 2019:3-4.

¹⁴⁹ Farmbury 2019:3-4.

¹⁵⁰ Amodu 2019:5681.

¹⁵¹ Amodu 2019:5681.

Xenophobia is prevalent in many African countries and affects how countries relate to each other.¹⁵² Although there is an emphasis on globalization and the relaxing of borders to embrace multiculturalism, xenophobia has heightened ethnic and identity awareness which impacts human interaction across borders.¹⁵³ Xenophobia has not been sufficiently researched in developing countries. Information gathered through advocacy groups and anecdotal reports reveals that many citizens in such countries, who have previously experienced adverse treatment from Western countries are guilty of justifying the exploitation of non-nationals from other poor countries .¹⁵⁴

In this section, I discuss xenophobia in selected countries. I have chosen these countries for reasons which I will explain below. I first examine xenophobia in certain African countries, namely Ghana, Nigeria, Zambia, and Zimbabwe as these countries have a migrant population that has settled in South Africa. Zimbabwe also shares a border with South Africa. I briefly discuss how xenophobia manifests in these countries, in other words, whether these countries are prone to xenophobic violence as is mainly the case in South Africa or whether it has been presented through attitudes, negative sentiment, and or hostility. Some of these countries also share a history of a colonial past with South Africa, which has also had an impact on the occurrence of xenophobia in these countries.

Having a regional overview of xenophobia is relevant to my thesis as it allows for reflection on the relationship between South Africa and non-nationals from other countries. It illustrates how the practice of xenophobia has evolved due to historical and socio-economic factors, where at one time it was seen as Afrophobia because hostility was expressed by Black South Africans against Africans from other African countries. Since then, we have seen that xenophobia can also be perpetrated against other racial groups as well as against citizens who form part of a minority group. It reveals that these countries have also experienced xenophobia within their borders. Xenophobia is therefore not unique to South Africa as a country within the African diaspora. Many academics from these countries are also employed at higher education institutions in South Africa. Understanding some of the history of

¹⁵² Oni & Okunade 2018:38.

¹⁵³ Oni & Okunade 2018:38.

¹⁵⁴ Crush & Ramachandran 2009:2.

xenophobia in these countries may also help in understanding the experiences of non-national academics working at higher education institutions in South Africa.

Secondly, I have chosen to briefly focus on xenophobia in countries such as the United States of America, Germany, and Canada. The United States of America is said to have the highest number of immigrants in the world.¹⁵⁵ It is also viewed by some as the first country to recognize hate crimes and to pass hate crime legislation.¹⁵⁶ Even though it has often been hailed as one of the most progressive and democratic countries in the world, a land of opportunity for those seeking a better way of life, its history as well as the recent political agenda of the Trump administration has revealed a different picture. I therefore briefly examine the position of xenophobia in America. I also look at xenophobia in Germany and Canada, as this brief historical context supports the discussion in Chapter 7 where I discuss the laws and policies passed by these countries to address xenophobia. The discussion of these selected countries is not intended to be an in-depth discussion of the historical or political context of xenophobia as this is not the main focus of my thesis, rather it is intended to compare in an ad hoc fashion the similarities or differences with xenophobia in the South African context and to enhance the discussion of these countries concerning forthcoming chapters.

2.5.1.1 Ghana

Ghana made use of the Aliens Compliance Order of 1969 to expel migrants from the West African country when their rate of unemployment grew, and the price of cocoa fell. This was done even though their President, at the time of independence in the 1960s, had described Ghana as a home for all Africans. 191 000 non-nationals were expelled.¹⁵⁷ Before the order was introduced non-nationals were perceived as being the cause of high unemployment rates in Ghana.¹⁵⁸ Due to pressure from Ghanaian citizens, the government also introduced the Ghanaian Business (Promotion) Act 1970 meant to protect and preserve certain businesses for Ghanaians only.¹⁵⁹ Ghanaian

¹⁵⁵ World Population Review "US Immigration by country 2022", <https://worldpopulationreview.com/country-rankings/us-immigration-by-country> (accessed on 26 May 2022).

¹⁵⁶ Naidoo & Karels 2016:66.

¹⁵⁷ Dassah 2015:130.

¹⁵⁸ Oni & Okunade 2018:40.

¹⁵⁹ Oni & Okunade 2018:41.

citizens approved of such laws, which served to institutionalize xenophobia to ensure job security for Ghanaians.¹⁶⁰ This step by the Ghanaian government can also be compared to the introduction of the Gauteng Bill and the Free State Bill , introduced by the South African government to protect township business owners who felt threatened by non-nationals who are conducting businesses in the townships. I discuss the implications of these Bills in Chapter 6 of this thesis.¹⁶¹

2.5.1.2 Nigeria

A similar situation emerged during the oil boom of the 1970s when many Ghanaians migrated to Nigeria. In 1983 the oil revenue declined and the currency in Nigeria was devalued which led to the government using television as a medium to order more than a million non-nationals to leave Nigeria.¹⁶² All illegal unskilled foreigners were ordered to leave the country within two weeks.¹⁶³ Skilled immigrants were also ordered to leave the country but were given a longer period to do so.¹⁶⁴ The reasons advanced for the expulsion were economic recession, violent religious disturbances by non-nationals, maintaining the integrity of their immigration laws, and criminal elements.¹⁶⁵ Inevitably, Nigeria's expulsion of Ghanaians during the 1980s showed us a country that was hostile towards people from other countries.¹⁶⁶

It is relevant to note that the nature of xenophobia in Nigeria and Ghana was motivated by the government but was non-violent. It was perpetrated by the government through the passing of laws. There were no reports of violence, injury, death, or damage to property of the affected non-nationals. However, in contrast, xenophobia in South Africa is violent and is entrenched in apartheid legacies and the failure of the government to adequately cater for non-nationals.¹⁶⁷

¹⁶⁰ Oni & Okunade 2018:41.

¹⁶¹ See section 6.2.2.1.

¹⁶² Dassah 2015:

¹⁶³ Aremu 2013:340.

¹⁶⁴ Aremu 2013:341.

¹⁶⁵ Aremu 2013:341.

¹⁶⁶ Crush & Ramachandran 2009:2.

¹⁶⁷ Oni & Okunade 2018:45.

2.5.1.3 Zambia

Zambia began hosting refugees as far back as 1966 and has a large refugee population.¹⁶⁸ Although initially viewed as a country with no reports of ethnic or racial hatred, xenophobia has been on the increase in Zambia since 2005. There has been an increase in verbal abuse, violence, harassment, and arbitrary detention of refugees.¹⁶⁹ In 2016, riots motivated by xenophobia broke out in Zingalume when a ritual killing occurred which was believed to be committed by a Rwandan national. His shop together with another owned by a Rwandan in Zingalmue was subsequently looted.¹⁷⁰ The rioting and looting spread to other areas which caused the loss of lives and property.¹⁷¹ Locals justified the violence on the basis that the government had failed to prevent the ritual killing and had not made any arrests.¹⁷² However, it later transpired that the police charged four Zambians for the ritual killings and no Rwandan shop owner or other non-national was arrested or charged with the killings.¹⁷³

2.5.1.4 Zimbabwe

Zimbabwe achieved independence in 1980 in an environment where land distribution was configured along racial lines due to colonization by the British in 1890.¹⁷⁴ The unequal land structure was due to 41 years of colonial rule, the Land Apportionment Act of 1936, and 15 years of white minority rule under Ian Smith.¹⁷⁵ Post-independence resulted in Zimbabweans embarking on the Fast Track Land Reform Policy of 2000 which had xenophobic repercussions.¹⁷⁶ By 2000 the Fast Track Land Reform Programme (FTLRP) began a process of unlawful seizure and redistribution of commercial farms owned by white farmers, to Black citizens of African descent. Hence Zimbabwe experienced socio-political conflict which was characterized as xeno-ethnophobia as it involved hostility towards white farmers.¹⁷⁷ 'Ethnophobia' is defined as a form of "irrational phobia associated with one's hatred, discrimination or

¹⁶⁸ Bbaala & Mate 2016:628.

¹⁶⁹ Bbaala & Mate 2016:631.

¹⁷⁰ Bbaala & Mate 2016:632.

¹⁷¹ Bbaala & Mate 2016:635.

¹⁷² Bbaala & Mate 2016:635.

¹⁷³ Bbaala & Mate 2016:635.

¹⁷⁴ Shulika & Sabi 2018:153.

¹⁷⁵ Shulika & Sabi 2018:153.

¹⁷⁶ Shulika & Sabi 2018:154.

¹⁷⁷ Shulika & Sabi 2018:154.

resentment of another human being based solely, on ethnicity, despite being part of one's own country or society.”¹⁷⁸ In 2014 then President Robert Mugabe issued a declaration to the effect that all remaining white farmers were to leave Zimbabwe.¹⁷⁹ He referred to white farmers as ‘foreigners’ and requested black peasant farmers to refrain from leasing agricultural land to white Zimbabwean farmers.¹⁸⁰ As a result, this led to xenophobic invasions of land and property.¹⁸¹ The poor implementation of the FTLPR to supposedly redistribute land to achieve a balance along racial and national lines caused Zimbabweans (both black and white) to suffer, it has adversely affected the economy, increased unemployment levels, and inevitably caused many of the population to leave for other countries.¹⁸²

In 2016, 15 years after the adoption of the Durban Declaration and Programme of Action, four independent experts warned the UN General Assembly of a global rise in racism and xenophobia, especially against refugees, migrants, people of African descent, and others.¹⁸³ States were urged to implement legislation to curb racism and improve their anti-racism laws. The recommendation was made given the prevalence of hate speech and incitement to violence.¹⁸⁴ However, countries like the United States and the United Kingdom did not support the call and suggested less severe approaches.¹⁸⁵

¹⁷⁸ Shulika & Sabi 2018:158.

¹⁷⁹ Shulika & Sabi 2018:162.

¹⁸⁰ Shulika & Sabi 2018:162.

¹⁸¹ Shulika & Sabi 2018:162.

¹⁸² Shulika & Sabi 2018:163.

¹⁸³ United Nations – General Assembly Third Committee- Seventy-First Session "Racism, Xenophobia increasing Globally, experts tell Third Committee, amid calls for laws to combat hate speech, concerns over freedom of expression, Nov 2016", www.un.org/press/en/2016/gashc4182.doc.htm (accessed on 22 November 2020).

¹⁸⁴ United Nations – General Assembly Third Committee- Seventy-First Session "Racism, Xenophobia increasing Globally, experts tell Third Committee, amid calls for laws to combat hate speech, concerns over freedom of expression, Nov 2016", www.un.org/press/en/2016/gashc4182.doc.htm (accessed on 22 November 2020).

¹⁸⁵ United Nations – General Assembly Third Committee- Seventy-First Session "Racism, Xenophobia increasing Globally, experts tell Third Committee, amid calls for laws to combat hate speech, concerns over freedom of expression, Nov 2016", www.un.org/press/en/2016/gashc4182.doc.htm (accessed on 22 November 2020).

2.5.2 Xenophobia in the Global North

2.5.2.1 United States of America

The United States of America is often viewed as a progressive country that celebrates democracy and freedom. However, it is also a country that has been plagued by xenophobia. During the period 1870-1930, the United States of America received more than 30 million immigrants. By 1930 there were more than 14 million immigrants in the United States, which represented 14,4% of the population.¹⁸⁶ This period from 1870-1930 was also defined by heightened xenophobia as many politicians, writers, and anti-immigrant organizations advanced the notion that immigrants were a threat to American society.¹⁸⁷ A host of immigration laws were also passed which prevented growing numbers of immigrants from coming into the country and allowed the government to detain, track or deport them.¹⁸⁸ It was only in 1965 when the United States banned quotas and discrimination in Immigration law.¹⁸⁹ During World War I and even after the war, many spoke out against immigration.¹⁹⁰

In 1917 the government passed the Immigration Act of 1917 which was seen as the 'epitome of anti-immigrant sentiment' as it banned all foreigners who did not have basic literacy in their home language. A tax called head tax was also imposed to restrict immigrants with disabilities or diseases or any trait that the government deemed would impede their ability to earn a living.¹⁹¹ In 1921 the Immigration Restriction Act was passed which restricted immigration to 355 000 and introduced quotas based on nationality. American xenophobia continued to grow as other groups were targeted and immigrant laws became more stringent in the late 19th and early 20th centuries.¹⁹² The Johnson-Reed Act was passed in 1924 following an increase in immigration in America. After World War I, there had been a growing sense of xenophobia, and several restrictive measures were implemented, one of which was the institution of immigration quotas.¹⁹³ Following the events of World War II, anti-

¹⁸⁶ Lee 2020:3.

¹⁸⁷ Lee 2020:3.

¹⁸⁸ Lee 2020:3.

¹⁸⁹ Lee 2020:4.

¹⁹⁰ Lee 2020:9.

¹⁹¹ Lee 2020:10.

¹⁹² Lee 2020:12.

¹⁹³ The Pluralism Project Harvard University Historical Perspectives "Xenophobia: Closing the Door", 1 https://www.pluralism.org/files/pluralism/files/xenophobia-closing_the_door.pdf (accessed on 23 May 2022).

immigrant sentiment increased and the Japanese bombing of Pearl Harbour increased xenophobia against Japanese immigrants in America, even though some of them were already second and third-generation immigrants.¹⁹⁴ America, under the leadership of President Roosevelt, was reluctant to offer assistance to European Jewish refugees and the War Refugee Board was only established in 1944 after President Roosevelt was faced with indisputable evidence of the killing of European Jews and the indifferent attitude of Americans towards the murders.¹⁹⁵

The topic of immigration is a contentious one in American society since some want the borders closed to immigrants and others want to allow entry to those seeking a better life.¹⁹⁶ America also led the way in identifying certain populations like African Americans, American Indians, Mexicans, Jews, and Asians as dangerous and problematic for White supremacy globally.¹⁹⁷ The election of Donald Trump was also fraught with xenophobic messages about immigration.¹⁹⁸ Trump described new immigrants as people with many problems, as bringing drugs and crimes into the country, and as rapists with some being 'good people', according to his assumption.¹⁹⁹

McCorkle believes that there is an "over-attachment" to the protection of borders and that antagonism towards non-nationals has led to the democracy of the country being put at risk.²⁰⁰ Shortly after beginning his term of office, Donald Trump passed an executive order which focused on enhancing border security and the procedure to return illegal immigrants.²⁰¹ Trump's argument for closing borders to immigrants was that immigrants were guilty of bringing crime and violence into the country. This resulted in a depiction of immigrants as 'the other' thereby aiming to justify the need

¹⁹⁴ The Pluralism Project Harvard University Historical Perspectives "Xenophobia: Closing the Door", 4 https://www.pluralism.org/files/pluralism/files/xenophobia-closing_the_door.pdf (accessed on 23 May 2022).

¹⁹⁵ The Pluralism Project Harvard University Historical Perspectives "Xenophobia: Closing the Door", 4 https://www.pluralism.org/files/pluralism/files/xenophobia-closing_the_door.pdf (accessed on 23 May 2022).

¹⁹⁶ McCorkle 2020:57.

¹⁹⁷ Lee 2020:12.

¹⁹⁸ Lee 2020:14.

¹⁹⁹ Black "Erika Lee on the enduring history of American xenophobia, drawn from a place of fear", <https://ezproxy.ufs.ac.za/newspapers/erika-lee-on-enduring-history-american-xenophobia/docview/2310687064/se-2?accountid=17207> (accessed on 30 May 2022).

²⁰⁰ McCorkle 2020:57.

²⁰¹ Farmbury 2019:95.

for stringent measures to deter and penalize immigrants.²⁰² By May 2018 the United States had also adopted a 'zero tolerance' approach to alien adults who arrived in the country with immigrant children. As a result, families were separated which resulted in a widespread outcry due to the trauma that this caused.²⁰³ The anti-immigrant sentiment became more prevalent due to former President Donald Trump's political agenda. The antagonism towards non-nationals filtered down from the government level to society and even within the education context where xenophobia was more openly perpetrated.²⁰⁴ Policies that were once seen as extreme became acceptable and it was normal to stereotype and discriminate against non-nationals in American society.²⁰⁵

In 2020 the Coronavirus had a huge impact on the world as many have been infected globally and many lives lost. Coronavirus first emerged in Wuhan, China in 2019 and has since led to an increase in Anti-Asian or Anti-Chinese sentiment in America.²⁰⁶ The increase in the number of Coronavirus cases in January 2020 also saw an increase in the number of cases of xenophobia reported against people of Asian descent.²⁰⁷ Vachuska postulates that Coronavirus has "triggered national insecurity, fear of foreigners and general xenophobia."²⁰⁸ In America four teenage girls were charged with committing a hate crime after they allegedly expressed anti-Asian statements and attacked a 51-year-old woman, accusing her of causing coronavirus and asking her why she was not wearing a mask.²⁰⁹ In another incident in Texas, an Asian-American family was attacked and their two-year-old daughter was stabbed by an attacker who told police that he tried to kill them because he believed they were infecting Americans with the Coronavirus.²¹⁰ There also appears to be a link between epidemic risk, xenophobia, and the global economy. There is evidence of verbal and

²⁰² Farmbury 2019:97.

²⁰³ Farmbury 2019: 96.

²⁰⁴ McCorkle 2020:59.

²⁰⁵ McCorkle 2020:58.

²⁰⁶ Vachuska 2020:2.

²⁰⁷ Batova 2021:51.

²⁰⁸ Vachuska 2020:5.

²⁰⁹ Andrew & Romine "Teens charged with hate crimes for attacking a woman on a bus and saying she caused coronavirus, NYPD says", <https://www.edition.cnn.com/2020/04/06/us/teens-attack-woman-caused-coronavirus-trnd/index.html> (accessed on 4 December 2020).

²¹⁰ Aziz "Anti-Asian racism must be stopped before it is normalized", <http://www.aljazeera.com/opinions/2020/4/16/anti-asian-racism-must-be-stopped-before-it-is-normalised/> (accessed on 7 December 2020).

physical attacks on Asians where the disease has been described as "the Chinese virus", thereby affecting the global economy where Asian stock on the stock market has even been sold off.²¹¹ The New York police department has created an Asian Hate Crime Task team due to 21 reported anti-Asian hate crimes being perpetrated since March 2020 because of Covid-19.²¹²

Historically cases of xenophobia have increased following the outbreak of pandemics. When the pandemic causes deaths, the resultant fear causes those at risk to blame another ethnic or religious group for spreading the sickness.²¹³ Americans feel threatened by non-nationals. Coronavirus has caused greater hostility and violence towards Asians who are perceived to be potential carriers of Coronavirus.²¹⁴ Vachuska hypothesizes that Coronavirus will cause an increase in xenophobic sentiment by Americans.²¹⁵

America is a country that espoused global liberal values, yet it has evolved into one which seeks to protect its borders by restricting the movement of immigrants to protect jobs at domestic level.²¹⁶ With the recent United States presidential election being won by the Democrats, it is however interesting to observe how the new administration approaches xenophobia and redresses the blatant anti-immigrant stance held by the Trump administration.

In March 2021 the newly elected President Biden announced a plan of action to address acts of violence against Asians and to ensure safety and inclusion for all affected minority communities.²¹⁷ In his first week of office, President Biden issued a document called the Memorandum Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the

²¹¹ White 2020:1251.

²¹² Romine "NYPD creates Asian Hate Crime Task Force after spike in anti-Asian attacks during Covid-19 pandemic", <https://www.edition.cnn.com/2020/018/us/nypd-asain-hate-crime-task-force/index.html> (accessed on 5 December 2020).

²¹³ Gover *et al* 2020:652.

²¹⁴ Vachuska 2020:5.

²¹⁵ Vachuska 2020:5.

²¹⁶ Caleb *et al* 2020:12.

²¹⁷ The White House "Fact Sheet: President Biden Announces Additional Actions to Respond to Anti-Asian Violence, Xenophobia and Bias", <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/30/fact-sheet-president-biden-announces-additional-actions-to-respond-to-anti-asian-violence-xenophobia-and-bias/> (accessed on 23 May 2022).

United States.²¹⁸ The Memorandum called on the government to acknowledge that it had played a role in spreading xenophobic sentiment through the behaviour of politicians and by referring to Covid 19 according to its place of origin.²¹⁹ This behaviour contributed to an increase in xenophobic hate crimes against Asian Americans and Pacific Islanders.²²⁰ The memorandum set out an order which incorporated the following:

- a) It called on the government to prevent xenophobia against everyone including Asian Americans and Pacific Islanders.
- b) The Secretary of Health & Human Services in conjunction with the Covid-19 Health Equity Task Force was tasked with issuing guidance on the best practice to improve sensitivity towards Asian Americans and Pacific Islanders in responding to Covid-19.
- c) Executive departments were to take steps to make sure that official actions, documents, and statements do not have evidence of or contribute to racism, xenophobia, and intolerance towards Asian Americans and Pacific Islanders.
- d) The attorney general was given the responsibility to look at opportunities to support efforts for the prevention of hate crimes and discrimination against Asian Americans and Pacific Islanders.²²¹

²¹⁸ The White House “Fact Sheet: President Biden Announces Additional Actions to Respond to Anti-Asian Violence, Xenophobia and Bias”, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/30/fact-sheet-president-biden-announces-additional-actions-to-respond-to-anti-asian-violence-xenophobia-and-bias/> (accessed on 23 May 2022).

²¹⁹ The White House “Memorandum Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States”, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-condemning-and-combating-racism-xenophobia-and-intolerance-against-asian-americans-and-pacific-islanders-in-the-united-states/> (accessed on 23 May 2022).

²²⁰ The White House “Memorandum Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States”, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-condemning-and-combating-racism-xenophobia-and-intolerance-against-asian-americans-and-pacific-islanders-in-the-united-states/> (accessed on 23 May 2022).

²²¹ The White House “Memorandum Condemning and Combating Racism, Xenophobia, and Intolerance Against Asian Americans and Pacific Islanders in the United States”, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-condemning-and-combating-racism-xenophobia-and-intolerance-against-asian-americans-and-pacific-islanders-in-the-united-states/> (accessed on 23 May 2022).

2.5.3 Germany

Xenophobia has also increased in Europe as the number of people migrating from the Middle East and Africa has increased dramatically since 2015 and 2016.²²² There appears to be a trend where government leaders are elected based on their willingness to normalize xenophobia.²²³ It seems that candidates appeal to citizens by promising to restrict the number of non-nationals entering the country and to prioritize the protection of borders.²²⁴

Germany receives the second largest number of immigrants after the United States which makes it the country that has the highest number of immigrants in Europe.²²⁵ Right-wing parties in Germany are not in favour of immigrants and Germany has seen the emergence of xenophobia since the reunification of Germany when asylum seekers sought entry into East Germany.²²⁶ However despite the return of economic stability, after reunification, xenophobia is still prevalent in Germany.²²⁷ A survey conducted at the University of Leipzig showed that xenophobia has increased in Germany where 36% of Germans believe that foreigners take advantage of the welfare state. 25% would send foreigners back to their country if jobs were in short supply.²²⁸ Germany is said to have the second most stable economy after Switzerland. However, despite this fact, Germany still shows a high level of violence and discrimination towards non-nationals and asylum seekers. In 2016 there were approximately 500 arson attacks on refugee shelters in Germany, with 1000 attacks being recorded in 2015.²²⁹ This situation in Germany would imply that there is therefore no correlation

²²² McCorkle 2020:59.

²²³ McCorkle 2020:59.

²²⁴ McCorkle 2020:59.

²²⁵ Pradana "The "Rise" of Xenophobia in Germany: Is it true that every social problem is Immigrants' Fault?"

https://www.researchgate.net/publication/340934247_The_Rise_of_Xenophobia_in_Germany_Is_it_True_that_Every_Social_Problem_is_Immigrants'_Fault/stats (accessed on 8 December 2020).

²²⁶ Pradana "The "Rise" of Xenophobia in Germany: Is it true that every social problem is Immigrants' Fault?" https://www.researchgate.net/publication/340934247_The_Rise_of_Xenophobia_in_Germany_Is_it_True_that_Every_Social_Problem_is_Immigrants'_Fault/stats (accessed on 8 December 2020).

²²⁷ Pradana "The "Rise" of Xenophobia in Germany: Is it true that every social problem is immigrants 'Fault?" https://www.researchgate.net/publication/340934247_The_Rise_of_Xenophobia_in_Germany_Is_it_True_that_Every_Social_Problem_is_Immigrants'_Fault/stats (accessed on 8 December 2020).

²²⁸ Werneberg "Almost every Third German takes Xenophobic Positions", <https://www.uni-leipzig.de/newsdetail/artikel/leipziger-autoritarismus-studie-2018-langzeitstudie-mit-aktuellen-ergebnissen-zu-autoritaeren-und-re-1/> (accessed on 10 December 2020).

²²⁹ EFF News Service "Refugee Shelter in eastern Germany hit by arson attack: Germany Xenophobia", <https://proquest.com/pg/academic/docview/1823857806> (accessed on 30 May 2022).

between a poor economy and xenophobic incidents.²³⁰ This is in contrast with the situation in South Africa where xenophobia seems to be more violent in low-income communities.

2.5.4 Canada

The legislation reflects that Canada also has a history of xenophobia. Laws such as The Continuous Journey Regulation prohibited entry to immigrants who had not travelled to Canada by a continuous journey from their home country. This mainly affected immigrants from India and Japan as there were no direct routes from these countries to Canada.²³¹ The Prime Minister at the time recommended that immigration from India be curtailed due to the poverty and unemployment rates of non-nationals.²³² The Chinese Immigration or 'Exclusion' Act came into effect in 1923 and prohibited the entry of Chinese immigrants except for students, children of Canadians, and investors. This was due in part to the hostility levelled against Chinese people following the war, where the economic downturn was blamed on minorities. Chinese people in Canada had to carry identification with their photos on it.²³³

During the period of the Great Depression Canada also removed 25 000 non-nationals from the country, justifying the removal on the grounds of sickness, ideology, and perceived morality.²³⁴ In May 2007 the Canadian Council of Refugees passed a resolution in which they noted that racism and xenophobia existed in Canada, especially against non-nationals and refugees. This was evident through laws, policy, and practice.²³⁵ It was resolved that the Canadian Council of Refugees would request

²³⁰ Pradana I "The "Rise" of Xenophobia in Germany: Is it true that every social problem is immigrants' Fault?" https://www.researchgate.net/publication/340934247_The_Rise_of_Xenophobia_in_Germany_Is_it_True_that_Every_Social_Problem_is_Immigrants'_Fault/stats (accessed on 8 December 2020).

²³¹ Algonquin College "Inclusion Infusions: History of Xenophobia in Canada", <https://www.algonquincollege.com/diversity/2020/04/24/inclusion-infusions-history-of-xenophobia-in-canada/> (accessed on 30 August 2022).

²³² Algonquin College "Inclusion Infusions: History of Xenophobia in Canada", <https://www.algonquincollege.com/diversity/2020/04/24/inclusion-infusions-history-of-xenophobia-in-canada/> (accessed on 30 August 2022).

²³³ Algonquin College "Inclusion Infusions: History of Xenophobia in Canada", <https://www.algonquincollege.com/diversity/2020/04/24/inclusion-infusions-history-of-xenophobia-in-canada/> (accessed on 30 August 2022).

²³⁴ Algonquin College "Inclusion Infusions: History of Xenophobia in Canada", <https://www.algonquincollege.com/diversity/2020/04/24/inclusion-infusions-history-of-xenophobia-in-canada/> (accessed on 30 August 2022).

²³⁵ Canadian Council of Refugees "Racism and Xenophobia", <https://ccrweb.ca/en/res/racism-and-xenophobia> (accessed on 9 December 2020).

the Canadian government to report on measures taken to overcome racism and xenophobia and to establish an independent body to review programs and policies which affected immigrants and refugees.²³⁶ The situation changed somewhat in Canada in 2016. While other countries were restricting the entry of immigrants, Canada became known for its "Canadian exceptionalism" when it welcomed 25 000 Syrian refugees. Although the decision was not initially supported by the majority, public opinion changed positively when the refugees did arrive. Many citizens helped by adopting a refugee family.²³⁷

In summary, xenophobia is a global phenomenon that has been perpetuated as people move from one place to another. The migratory nature of man as well as historical and political factors in each of these countries catalyse xenophobia. While South Africa has many immigrants from African countries choosing to find work or a better life in South Africa, we find that these countries also have a history of xenophobia. The United States of America and Germany have a large immigrant population since many migrants travel to these countries for better prospects. America, like South Africa, is seen as a democratic State, yet it has also been one of the countries to pass laws or policies which further entrench xenophobic attitudes by treating non-nationals differently from citizens. The recent arrival of the Coronavirus in the world has also increased the incidence of xenophobia, especially against people of Asian descent. Germany, like South Africa, has a history of legislated discrimination through its legacy from World War II. Canada while also showing itself to be a country that welcomes immigrants, and which is progressive in its bid to ensure multiculturalism has also seen the need to address xenophobia and to be sensitive to issues of diversity and inclusion. Having examined xenophobia in other countries, in the next section I examine xenophobia in the South African context.

2.6 XENOPHOBIA IN SOUTH AFRICA

The 2006 South African Migration Project (SAMP) survey revealed that South Africans are the least tolerant towards non-nationals and favour strict immigration

²³⁶ Canadian Council of Refugees "Racism and Xenophobia", <https://ccrweb.ca/en/res/racism-and-xenophobia> (accessed on 9 December 2020).

²³⁷ Beauchamp "Canada is the least xenophobic country in the Western World. Here's why", <https://www.vox.com/2016/6/8/11879482/ramadan-justin-trudeau-canada> (accessed on 16 December 2020).

restrictions.²³⁸ South Africa is regarded as one of the most hostile places in the world for non-nationals to migrate to.²³⁹ Many thousands of non-nationals have been the victims of attacks since 1994 because of their status as ‘foreigners’.²⁴⁰ However, for the purposes of this research, the xenophobic attacks of 2008, 2015, and 2019 will be highlighted. A community survey conducted by Statistics South Africa in 2016 revealed that the number of foreign-born persons in South Africa declined from 2,2 million in 2011 to 1,6 million in 2016.²⁴¹ Despite a progressive constitution, the incidence of xenophobia has increased alarmingly.²⁴² The African Centre for Migration recorded 428 verified xenophobic incidents from 1994–October 2018.²⁴³ This of course does not consider unreported incidents of xenophobia. The rise in xenophobia in South Africa in the 1990s must be seen against the political events at the time namely, apartheid laws, racist immigration policies, a siege mentality, and a feeling of being superior to the rest of Africa.²⁴⁴ South Africa’s past, which was highlighted by racial discrimination contributed to xenophobic violence as it caused people to dislike non-nationals, thereby leading to xenophobic attacks.²⁴⁵

Post-1990 we also witnessed more non-nationals entering South Africa, causing South Africans to blame them for crime, unemployment, and HIV/AIDS. Because of this, mass deportations took place.²⁴⁶ Between 1994-2002 South Africa lacked an active immigration policy and over a million people were deported without any due process having been followed.²⁴⁷

In 2008 more than 60 non-nationals were brutally killed and tens of thousands were displaced in a spate of xenophobic violence in South Africa. Several reasons were advanced for the attacks such as poverty, open borders, and political agendas.²⁴⁸

²³⁸ Crush (ed.) 2008:1.

²³⁹ Claassens 2017:1 .

²⁴⁰ Misago 2019:1.

²⁴¹ Statistics South Africa “Community Survey 2016”, 24 http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016-_Statistical-releas_1-July-2016.pdf(accessed on 2 March 2021).

²⁴² Mkhize & Makau 2018:2.

²⁴³ Misago 2019:1.

²⁴⁴ Crush (ed.) 2008:6.

²⁴⁵ Meda 2014:72.

²⁴⁶ Crush (ed.) 2008:6.

²⁴⁷ Crush (ed.) 2008:18.

²⁴⁸ Crush (ed.) 2008:11.

Politicians, bureaucrats and the media have been criticized for making the situation worse. Politicians have blamed xenophobia on criminal elements and the media has been blamed for inaccurate reporting.²⁴⁹ The police are also guilty of pretending to be unaware when non-nationals are subjected to ill-treatment by citizens.²⁵⁰

In Jeffrey's Bay, Somali shop owners were attacked by residents. In Choba two Zimbabweans were beaten to death by locals. 150 shacks and shops were burnt and 500 people sought refuge in other areas.²⁵¹ The attacks continued to spiral in many areas throughout the country and Safety and Security Minister Charles Ngakula responded by saying that the attacks were under control and arrests had been made. However, by this time 342 foreign shops were looted and 213 burnt down.²⁵² Minister Buthelezi openly raised the issue of 'illegal immigration', proposing drastic solutions to the problem.²⁵³ He stated that freedom of movement would be disastrous for South Africa.²⁵⁴ President Mbeki denied the existence of xenophobia by attributing the attacks to criminality rather than xenophobia. However, the statistics revealed a different picture in a study conducted by the SAMP. The findings revealed that 76% of South Africans said they favoured electrified borders, 65% wanted all refugees placed in camps near borders and 61% wanted non-nationals who had HIV/AIDs to be expelled. Crush expressed the view that xenophobia is deeply entrenched in South African society and cannot be blamed on a small number of poor people who are disgruntled by the government.²⁵⁵

In 2015 a series of xenophobic attacks in Durban lasted four days and resulted in hundreds of non-nationals seeking refuge at the local police station. The violence began when a group of South African youth began singing songs and saying that the Zulu King had ordered non-nationals to leave the country.²⁵⁶ In a rally at Pongola earlier in 2015, King Goodwill Zwelithini said that 'foreigners' were taking advantage

²⁴⁹ Crush (ed.) 2008:16.

²⁵⁰ Meda 2014:72.

²⁵¹ Crush (ed.) 2008:51.

²⁵² Crush (ed.) 2008:51.

²⁵³ Crush (ed.) 2008:17.

²⁵⁴ Crush(ed.) 2008:18.

²⁵⁵ Crush (ed.)2008:39.

²⁵⁶ Essa & Patel "Foreigners in South Africa fearful after xenophobic attacks", <http://www.aljazeera.com/news/2015/4/2/foreignersin-s-africa-fearful-after-xenophobia-attacks> (accessed on 2 March 2021).

of undisciplined citizens. He was quoted as allegedly saying “We urge all foreigners to pack their bags and leave.” Local leaders however denied allegations that the King’s statement led to the attacks and instead said that the violence erupted following a labour dispute at a local store.²⁵⁷ A subsequent investigation of the incident, led by Judge Navi Pillay, found that there was no evidence that the King’s comment played a role in the attacks. She stated that nobody had come forward to confirm that they had attacked non-nationals based on the King’s comment. Essa criticized the report stating that it is not expected of anyone to admit to attacking non-nationals or to agree that the King’s comments had led to the attacks.²⁵⁸ The wave of violence in April 2015 also led to the recall of the Nigerian ambassador and an outcry in the rest of Africa.²⁵⁹ The violence of 2008 and 2015 together with the hate crimes that are perpetrated every day is a serious human rights issue and has consequences for South Africans in a political, national and regional context.²⁶⁰

In 2019 Tinei Takawira, a Zimbabwean truck driver was stabbed in the stomach when a group began protesting against non-national truck drivers being given work in South Africa. The police watched but offered no assistance, and neither did they apprehend the perpetrators.²⁶¹ In September 2019 over 1000 Bangladeshi shops were looted by mobs.²⁶² A grade 10 Congolese pupil at a public school in Cape Town was severely beaten because she was elected class monitor. Her fellow students believed that as a non-national, she did not deserve to be elected to such a position. The education authorities failed to take any action against the offenders saying that they had expressed remorse for the incident.²⁶³

²⁵⁷ Essa “The danger of mixed messages on xenophobia”, [http://: www.news24.com/citypress/voices/the-danger-of-mixed-messages-on-xenophobia-20160415](http://www.news24.com/citypress/voices/the-danger-of-mixed-messages-on-xenophobia-20160415) (accessed on 2 March 2021).

²⁵⁸ Essa & Patel “Foreigners in South Africa fearful after xenophobic attacks”, [http://: www.aljazeera.com/news/2015/4/2/foreignersin-s-africa-fearful-after-xenophobia-attacks](http://www.aljazeera.com/news/2015/4/2/foreignersin-s-africa-fearful-after-xenophobia-attacks) (accessed on 2 March 2021).

²⁵⁹ Claassen 2017:1.

²⁶⁰ Claassen 2017:1.

²⁶¹ Mavhinga “Is South Africa prepared for the next wave of xenophobic violence? “, [http://: www.hrw.org/news/2020/10/09/south-africa-prepared-next-wave-xenophobic-violence](http://www.hrw.org/news/2020/10/09/south-africa-prepared-next-wave-xenophobic-violence) (accessed on 2 March 2021).

²⁶² Human Rights Watch “They have robbed me of my life. Xenophobic violence against Non-Nationals in South Africa”, [http://: www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south](http://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south) (accessed on 2 March 2021).

²⁶³ Human Rights Watch “They have robbed me of my life. Xenophobic violence against Non-Nationals in South Africa”, [http://: www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south](http://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south) (accessed on 2 March 2021).

Many observers have commented on the culture of xenophobia and violence in South Africa. It is imperative to analyse xenophobia within this culture while having regard for South Africa's socio-political context.²⁶⁴ Harris in Akinola says that xenophobia is a form of violence and violence is the key component of South African society.²⁶⁵ Even if xenophobia is perpetrated by a small percentage of the population, its effects are significant in terms of the lives and livelihoods that are lost. It is also important to see xenophobia against the nature of South African society which is a society plagued by violence ranging from domestic to political violence.²⁶⁶ During political transformation and a move towards democracy, South Africa experienced a surge in reported crime.²⁶⁷ In a study conducted by Gordon, two-thirds of the adult public agreed that non-nationals commit crimes, take jobs, spread disease, and usurp state resources. These findings indicate that majority of South Africans see non-nationals as a threat.²⁶⁸ Local leaders also often portray non-national communities as posing a 'threat' to locals depicting them as aliens who want to seize land and power. This type of behaviour tends to justify violence against non-nationals.²⁶⁹

Xenophobia is rife in South Africa and the existing policies and strategies have not been adequately implemented.²⁷⁰ Policies such as 'Roll Back Xenophobia' and the 'National Plan on Racism and Xenophobia' were passed by the government but were not effectively implemented.²⁷¹ The media also fuels xenophobia through exaggerated reporting on immigration statistics which adds to the negative attitudes and hostility towards the poor and marginalized in South African society, creating a fear that there are hordes of illegal immigrants coming into South Africa.²⁷² The government and the media have failed to sensitize or educate South Africans on the rights of non-nationals and to dispel the myths and false perceptions that have been created in the public domain.

²⁶⁴ Akinola 2017:9472.

²⁶⁵ Akinola 2017:9742.

²⁶⁶ Akinola 2017:9749.

²⁶⁷ Gordon 2015:85.

²⁶⁸ Gordon 2015:90.

²⁶⁹ Gordon 2015:81.

²⁷⁰ Mbecke 2015:72.

²⁷¹ Mbecke 2015:75.

²⁷² Mbecke 2015:76.

Non-national academics within the higher education sector, form part of this South African society and some live in communities where xenophobic attacks take place. Legal protection for such individuals is important and there is, therefore, a need to investigate whether the current legal policies and legislation afford academics sufficient protection within their work and home environments.

2.7 CONCLUSION

In this chapter, I define and contextualize xenophobia. The hypotheses underpinning xenophobia are discussed as well as the difference between xenophobia and other forms of discrimination. I focus on xenophobia within a global and national context. and the occurrence of xenophobia in selected African countries is highlighted. I also extend this discussion to other countries such as the United States of America, Germany, and Canada. I discuss xenophobia in South Africa, from a historical and political perspective, briefly highlighting the attacks of 2008, 2015, and 2019.

Following the discussion in Chapter 2, I conclude that xenophobia is more than just the fear of strangers. It also includes prejudices, negative attitudes and behaviour since non-nationals are viewed as outsiders to the community. Xenophobia is found to occur locally, regionally as well as at a global level where it can be seen to be present in other countries. It is a form of discrimination that deprives non-nationals of the right to equality. It should be viewed through a multi-dimensional lens as it affects both citizens and non-citizens and is linked to socio-economic, political, and psychological factors. I also draw the conclusion that xenophobia changes depending on the circumstances in which it occurs. The various theories discussed in this chapter also help to provide a more meaningful understanding of the possible reasons for the occurrence of xenophobia in society.

In Chapter 3 I focus on the experience of xenophobia by academics in the higher education sector.

CHAPTER 3

XENOPHOBIA AGAINST NON-NATIONAL ACADEMICS IN THE HIGHER EDUCATION CONTEXT

3.1 INTRODUCTION

In Chapter 2 I discuss xenophobia from a global and national perspective. I define xenophobia and examine the theories underpinning it, the various forms it may take, and how it manifests in society. In this chapter, I focus on xenophobia in the higher education context. There is a lack of literature on xenophobia against non-national academics in tertiary institutions and this is an area that requires further research.²⁷³ A preliminary literature review to place non-national academics within the context of xenophobia in the higher education sector has revealed that most studies focus on the experience of international students. In this regard see for example the studies by Otu,²⁷⁴ Sorensen²⁷⁵ and Maseko & Maweni,²⁷⁶ which I discuss later in this chapter. However recent developments indicate that more attention is being given to xenophobia in the higher education sector. This is indicated in an article by Professor Jonathan Jansen where he states that increasing levels of xenophobia pose a serious threat to higher education in South Africa. He is part of a research study now being undertaken across the 26 public universities in South Africa which investigates 'academic xenophobia' at these universities.²⁷⁷ I discuss Professor Jansen's comments later in this chapter.

Empirical studies on the experience of xenophobia by non-national academics in the higher education environment are also lacking. The empirical work on non-national academics tends to focus on other aspects of their experience such as diversity, inclusivity, transformation,²⁷⁸ academic mobility²⁷⁹ as well as leadership.²⁸⁰ Non-

²⁷³ Buthelezi 2009:7

²⁷⁴ Otu 2017:151.

²⁷⁵ Sorensen 2012:77.

²⁷⁶ Maseko & Maweni 2019:111.

²⁷⁷ Jansen "Xenophobia is threatening the future of the South African university", <https://www.universityworldnews.com/post.php?story=20221004102540205> (accessed on 9 November 2022).

²⁷⁸ Barnett 2020; Bailey *et al* 2021; Tamtik & Guenter 2019.

²⁷⁹ Greek & Jonsmoen 2021; Morley *et al* 2018.

²⁸⁰ Singh 2021.

national academics, however, form part of the South African social landscape. They find themselves living and working amid current political and economic uncertainty, as well as uncertainty in the workplace following the “FeesMustFall” protests. Non-national academics may also face challenges that are like those experienced by non-national students.²⁸¹

The purpose of this chapter is therefore to investigate the experience of non-national academics, how xenophobia manifests concerning this group of academics as well as what is specific about it, in other words, whether xenophobia is overt or covert within the higher education environment. Where there may be a gap in the literature as mentioned above, the experience of international students is used to draw inferences and comparisons concerning xenophobia against non-national academics. While my study is not a comparative one, in keeping with the global context of xenophobia I also examine how xenophobia manifests in higher education institutions in certain other countries.

In section 3.2, I provide an introductory discussion on xenophobia within the South African higher education context. I thereafter examine the history of transformation in higher education post-1994, in section 3.3. I discuss how the political context in South Africa has influenced transformation in higher education and how it has affected the position of non-national academics. I also focus on some of the incidents involving discrimination that have featured at higher education institutions, and which have had a bearing on the transformation agenda of these institutions. In section 3.4 I look at xenophobia against non-national academics. I conclude the chapter with a discussion in section 3.5 of xenophobia against non-national academics in countries like the United States of America, the United Kingdom, Germany, and Canada in order to compare whether xenophobia manifests in the same manner as in higher education institutions in South Africa.

3.2 XENOPHOBIA IN THE HIGHER EDUCATION CONTEXT IN SOUTH AFRICA

In this section I provide a brief introduction to xenophobia within the higher education context by highlighting some of the studies conducted at higher education institutions

²⁸¹ Hsieh 2012:372.

that set out the general challenges faced by non-national academics in the higher education space. This provides a context for later discussions where I examine how xenophobia manifests at higher education institutions.

Internationalization is a growing trend and a survey revealed that 87% of higher education institutions have internationalization as part of their strategic plan.²⁸² There has also been an increase in the appointment of non-national academics following the implementation of internationalization policies at higher education institutions (HEIs).²⁸³ Non-national academics seek work in other countries for various reasons such as better life prospects, advancement of their careers, and research opportunities.²⁸⁴ However, there are very few studies that focus on the needs of non-national academics, although an inclusive international environment should recognize and support the needs of all individuals.²⁸⁵

Although the purpose of this chapter is to examine xenophobia in the higher education context, a study by Di Paola found that little research has been conducted on xenophobia in the workplace in general.²⁸⁶ The study was conducted at the Marco Polo Bus factory in Ekurhuleni and concluded that xenophobia is prevalent in the workplace. However, there is a reluctance to investigate xenophobia in the work context as there is a belief that workers are not prone to express xenophobic sentiment because of their 'privileged' employment status.²⁸⁷ This study explored the relationship between different nationalities in the workplace and how the National Union of Metalworkers of South Africa (NUMSA) positioned itself in its interaction with workers of different nationalities.²⁸⁸ The study found that two factors emerge when explaining xenophobia in the workplace. First, there is a widespread anti-immigrant sentiment in society that impacts workers and the labour context. Secondly, the uncertain economic climate affects employee identity and solidarity.²⁸⁹ Unions have not developed an

²⁸² Hsieh 2012:371.

²⁸³ Rao et al 2019:599.

²⁸⁴ Rao et al 2019:599.

²⁸⁵ Hsieh 2012:372.

²⁸⁶ Di Paola 2012:12.

²⁸⁷ Di Paola 2012:12.

²⁸⁸ Di Paola 2012:13.

²⁸⁹ Di Paola 2012:94.

effective strategy to deal with xenophobia in the workplace. There is evidence of awareness campaigns to highlight xenophobia, but the results of these are minimal.²⁹⁰ Harry et al assert that it is worthwhile to consider xenophobia in the academic context, as South Africa has suffered a spate of xenophobic attacks since 1994 and it is prevalent in South Africa.²⁹¹ There is a wealth of literature on xenophobia as a phenomenon but there is still a need to research what the phenomenon entails, how it is manifested and how it can be addressed.²⁹² The study conducted by Harry et al found that poor political and economic conditions in their home countries prompted non-national academics to emigrate.²⁹³ These academics view South Africa as economically and politically favourable in comparison to their country and South Africa is also seen as having better schools, skilled academics, and a better work environment.²⁹⁴ Some of the challenges encountered in South Africa are a lack of accommodation, separation from family, being unable to adjust to the local culture and language, and discrimination from members of the community.²⁹⁵ They also faced discrimination from local staff members and subjection to a different salary scale in comparison to local academics.²⁹⁶

Otu also postulates that xenophobia does not only affect non-nationals working in the informal sector but also those employed in the formal sector, such as higher education institutions.²⁹⁷ This is seen as a covert type of xenophobia; however, the impact is evident. It affects professionalism and collegiality within the institution.²⁹⁸ The University of Pretoria has also reported receiving 200 fewer applications in 2017 from postgraduate international students who fear xenophobic attacks and long visa delays. This institution normally receives 1000 applications each year.²⁹⁹

²⁹⁰ Di Paola 2012:95.

²⁹¹ Harry et al 2017:2.

²⁹² Khozal et al 2021:117.

²⁹³ Harry et al 2017:5.

²⁹² Harry et al 2017:5.

²⁹⁵ Harry et al 2017:6.

²⁹⁶ Harry et al 2017:6.

²⁹⁷ Otu 2017:136.

²⁹⁸ Otu 2017:137.

²⁹⁹ News 24 "Xenophobia fears: 'Fewer African students enrolling at SA universities'", <https://www.news24.com/Africa/News/xenophobia-fears-fewer-africans-students-enrolling-at-sa-universities20170608> (accessed on 23 October 2018).

Literature, therefore, reveals that there is evidence to suggest that xenophobia does not only affect the poor and marginalized in South African society but also non-nationals in the higher education environment. Jansen questions whether xenophobia does exist in higher education. He states that this is an environment where one would find well-educated people instead of poor marginalised people competing for resources in areas such as Diepsloot and De Doorns.³⁰⁰ Jansen mentions these two places specifically as they have experienced xenophobic violence. In 2009, 3000 Zimbabwean non-nationals who were living in an informal settlement in De Doorns in the Western Cape were displaced due to xenophobic violence.³⁰¹ In 2008 violence erupted in Diepsloot and all non-nationals were evicted from the area regardless of occupation or nationality.³⁰² The local people looted and burnt the property and businesses of non-nationals. In the attacks of 2013, more than 150 non-nationals were again displaced after their businesses were looted following the killing of two men at a spaza shop.³⁰³

Bearing the preliminary views of these writers in mind, in the next section, I discuss transformation in the higher education sector and how the changes post-1994 have prompted the need for all higher education institutions to adopt a transformation agenda. I also discuss how, despite legislation and policy supporting transformation, incidents involving xenophobia and discrimination still feature at higher education institutions.

³⁰⁰ Jansen "Xenophobia is threatening the future of the South African university", <https://www.universityworldnews.com/post.php?story=20221004102540205> (accessed on 9 November 2022).

³⁰¹ South African History Online "Xenophobic violence in democratic South Africa", <https://www.sahistory.org.za/article/xenophobic-violence-democratic-south-africa> (accessed on 9 November 2022).

³⁰² Freedom House "Xenophobia and Outsider Exclusion. Addressing Frail Social Cohesion in South Africa's Diverse Communities. Diepsloot Case Study October 2017", 20 https://freedomhouse.org/sites/default/files/Diepsloot_ZA_Community_Case_Study_FINAL.pdf (accessed on 12 November 2022).

³⁰³ Freedom House "Xenophobia and Outsider Exclusion. Addressing Frail Social Cohesion in South Africa's Diverse Communities. Diepsloot Case Study October 2017", 21 https://freedomhouse.org/sites/default/files/Diepsloot_ZA_Community_Case_Study_FINAL.pdf (accessed on 12 November 2022).

3.3 TRANSFORMATION IN HIGHER EDUCATION IN SOUTH AFRICA POST-1994

Higher education institutions are seen as knowledge hubs and their role is to lead transformation and engagement to promote positive change and to ensure access to education by all races and classes of people.³⁰⁴ Policies are formulated that address inequality suffered by disadvantaged groups and curtail further discrimination.³⁰⁵ The preamble to the Higher Education Act 101 of 1997 provides that the Act will redress past injustices and ensure equal access, and representation.³⁰⁶

However, the death of Baraka Leonard Nefari, a PhD student at the University of Johannesburg in 2018 might have indicated otherwise. Nefari was killed in a hit-and-run accident outside the Auckland campus of the University of Johannesburg in 2018. He was a Tanzanian national and video footage of the accident revealed that the taxi which knocked into him had deliberately tried to run him over.³⁰⁷ His death shocked the academic community and raises the question of whether past injustices have been addressed. It also begs the question of whether non-nationals are denied equal access and representation by being subjected to xenophobic treatment within higher education institutions.³⁰⁸ This incident took place in 2018, 24 years post-democracy. It is therefore imperative to understand the history of transformation in the higher education environment post-1994 and the possible reasons for the slow pace of transformation within this environment.

3.3.1 Restructuring of higher education institutions

South Africa was excluded from the global academic community before 1994. The end of apartheid in 1994 led to South Africa becoming the chosen destination for scholars and students from other African countries.³⁰⁹ South Africa has also been impacted by migration in and out of the country following its globalization policy and its

³⁰⁴ Mzangwa 2019:5.

³⁰⁵ Mzangwa 2019:8.

³⁰⁶ *Higher Education Act 101/1997*: preamble.

³⁰⁷ Kajee "Friends, Colleagues demand Justice after death of UJ student", <https://ewn.co.za/2018/03/05/friends-colleagues-demand-justice-after-death-of-uj-student> (accessed on 27 April 2021).

³⁰⁸ Peter "UJ in shock after death of Tanzanian student, allegedly by a taxi driver", <https://citypress.news24.com/News/uj-in-shock-after-death-of-tanzanian-student-allegedly-by-a-taxi-driver-20180302> (accessed on 6 November 2018).

³⁰⁹ Sehoole *et al* 2019:213.

incorporation into the SADC.³¹⁰ The shift of power in South Africa following the transition to a democratic State also impacted the higher education sector.³¹¹ The advent of the new democratic dispensation in 1994 gave the government the task of eliminating all policies which promoted apartheid, exclusion, and discrimination along gender and ethnic lines. The higher education sector was included in this transformation process.³¹² Transformation is defined as...‘an overhaul of those structures and cultures that promote discrimination and allow for the persistence of attitudes and practices that sustain and perpetuate relations of domination.’³¹³

Before 1994 the higher education sector comprised 26 public universities, 15 technikons, 120 colleges of education, 11 agricultural colleges, and 24 nursing colleges. All of these provided different levels of quality in terms of academic offerings and infrastructure. They also differed in terms of the amount of funding and investment received from the government.³¹⁴ A subsequent re-organizing of higher education after 1994 resulted in a single coordinated system that was supposed to ensure diversity in the sector, and be sensitive to the needs both regionally and nationally taking into account socio-economic and cultural development.³¹⁵ By 2001 these efforts resulted in the closure or merger of some 36 institutions and as a result, there emerged 11 traditional research universities, 6 comprehensive universities, and 6 universities of technology.³¹⁶ Despite these imperatives and changes, the new coordinated system failed to address the historical inequalities adequately.³¹⁷ One of the reasons advanced for this is that higher education has to a large extent experienced corporatization where corporate values determine the trajectory of many institutions and the concept of management has substituted leadership.³¹⁸ Mzangwa is also of the view that decreasing the number of tertiary institutions was an error on the part of the government as it failed to address the challenge of access, equity and participation adequately. Instead, it was used as a political imperative to remove racial

³¹⁰ Sehoole *et al* 2019:219.

³¹¹ Sehoole *et al*; 2019:219.

³¹² Idahosa & Vincent 2018:13

³¹³ Idahosa & Vincent 2018:13.

³¹⁴ Davids 2016:1.

³¹⁵ Davids 2016:1

³¹⁶ Davids 2016:2.

³¹⁷ Davids 2016:2.

³¹⁸ Davids 2016:5.

inequalities.³¹⁹ This implies that the blanket approach to close or restructure certain universities did not provide the desired result as many pupils who completed school did not have access to appropriate institutions for further study. The closure or restructuring of higher education did not enhance value by increasing capacity nor did it achieve equality in terms of race issues.³²⁰

3.3.2 Changes to Education legislation and policy

The Higher Education Act was passed in 1997.³²¹ The purposes of the Act among others were to redress past discrimination and ensure equal access to education. It also aimed to encourage diversity and scholarship and promote academic freedom.³²² In addition, the Act made provision for the institution of an academic forum to promote and foster an institutional culture based on tolerance and respect for human rights.³²³

The Education White Paper was also passed in 1997. The paper provided for the transformation of higher education through various goals and strategies to redress inequalities and to provide for one coordinated national higher education system.³²⁴ The White Paper recognized that the current higher education system was skewed in terms of race, gender, class, and geography and that there was a lack of highly trained graduates in the fields of Science and Technology as well as Engineering.³²⁵ It also stressed the importance of South Africa being able to provide the education necessary to enable it to become a part of the global economy.³²⁶ Of importance is the fact that included in the transformation agenda was the need to create a higher education environment that promotes diversity, respects human rights, and dignity, and does not

³¹⁹ Mzangwa 2019:11.

³²⁰ Mzangwa 2019:11.

³²¹ *Higher Education Act* 101/ 1997.

³²² *Higher Education Act*: preamble.

³²³ *Higher Education Act*: sec. 31(1)(v).

³²⁴ Department of Education "Education White Paper 3- A Programme for Higher Education Transformation",⁷ <http://www.justice.gov.za/commissions/FeesHET/docs/1997-WhitePaper-HE-Transformation.pdf> (accessed on 5 March 2021).

³²⁵ Department of Education "Education White Paper 3- A Programme for Higher Education Transformation",⁸ <http://www.justice.gov.za/commissions/FeesHET/docs/1997-WhitePaper-HE-Transformation.pdf> (accessed on 5 March 2021).

³²⁶ Department of Education "Education White Paper 3- A Programme for Higher Education Transformation",⁹ <http://www.justice.gov.za/commissions/FeesHET/docs/1997-WhitePaper-HE-Transformation.pdf> (accessed on 5 March 2021).

tolerate violent behaviour.³²⁷ Three-year institutional plans were required to address equity goals, plans for research as well as academic and infrastructure development.³²⁸

All institutions were encouraged to create campus environments where harassment and hostility are discouraged on grounds of race, gender, national origin, language, etc.³²⁹ and to also promote cultural diversity that gives students the experience of other cultures and traditions.³³⁰ An examination of the South African higher education sector revealed a place in which the legacies of apartheid were entrenched and where universities were still divided along racial lines and dominated by white staff.³³¹ In 2001 the National Plan for Higher Education was passed. The plan set out a framework for the implementation and realization of the goals of the White Paper.³³² It also provided for the restructuring of the higher education system.³³³ The Plan identified five policy goals and objectives necessary to achieve the transformation of the higher education sector.³³⁴ These goals were:

- a) To allow access to education to all persons regardless of race, gender, age, or disability.

³²⁷ Department of Education “Education White Paper 3- A Programme for Higher Education Transformation”,¹⁰ <http://www.justice.gov.za/commissions/FeesHET/docs/1997-WhitePaper-HE-Transformation.pdf> (accessed on 5 March 2021).

³²⁸ Department of Education “Education White Paper 3- A Programme for Higher Education Transformation”¹⁹ <http://www.justice.gov.za/commissions/FeesHET/docs/1997-WhitePaper-HE-Transformation.pdf> (accessed on 5 March 2021).

³²⁹ Department of Education “Education White Paper 3- A Programme for Higher Education Transformation”¹² <http://www.justice.gov.za/commissions/FeesHET/docs/1997-WhitePaper-HE-Transformation.pdf> (accessed on 5 March 2021).

³³⁰ Department of Education “Education White Paper 3- A Programme for Higher Education Transformation”,⁴³ <http://www.justice.gov.za/commissions/FeesHET/docs/1997-WhitePaper-HE-Transformation.pdf> (accessed on 5 March 2021).

³³¹ Idahosa & Vincent 2018:13.

³³² Department of Education “National Plan for Higher Education”,² <https://www.justice.gov.za/commissions/feeshet/docs/2001-NationalPlanForHigherEducation.pdf> (accessed on 20 June 2022).

³³³ Department of Education “National Plan for Higher Education”,⁵ <https://www.justice.gov.za/commissions/feeshet/docs/2001-NationalPlanForHigherEducation.pdf> (accessed on 20 June 2022).

³³⁴ Department of Education “National Plan for Higher Education”,¹⁷ <https://www.justice.gov.za/commissions/feeshet/docs/2001-NationalPlanForHigherEducation.pdf> (accessed on 20 June 2022).

- b) To ensure redress of previous inequalities by making sure that the staff and student profile reflects the true nature of South African society.³³⁵
- c) To ensure that there is diversity within the institutional and organizational profile of the higher education system.³³⁶
- d) To build research capacity; and
- e) To create new institutional forms and identities through collaboration with other institutions in the region.³³⁷
- f) To build high-level research capacity to address the research and knowledge need of South Africa.
- g) To build new institutional and organizational forms and new institutional identities through regional collaboration between institutions.³³⁸

However, the government reminded universities that ‘transformation’ would imply more than simply addressing the issue of demographics in terms of racial and social segregation.³³⁹ It would also need to address day-to-day practices, values, curricula, architecture, and research agendas to address the way the legacies of colonialism, apartheid, and patriarchy continue to permeate institutional culture and result in discrimination, prejudice, and injustice.³⁴⁰

3.3.3 Incidents involving discrimination in higher education institutions post-1994

In this section, I examine some of the incidents involving discrimination that took place at universities after 1994. While there have been other incidents since the advent of the new dispensation, I focus on the Reitz 4 incident, the #FeesMust Fall and other

³³⁵ Department of Education “National Plan for Higher Education”,18
<https://www.justice.gov.za/commissions/feeshet/docs/2001-NationalPlanForHigherEducation.pdf>
 (accessed on 20 June 2022).

³³⁶ Department of Education “National Plan for Higher Education”,18
<https://www.justice.gov.za/commissions/feeshet/docs/2001-NationalPlanForHigherEducation.pdf>
 (accessed on 20 June 2022).

³³⁷ Department of Education “National Plan for Higher Education”,18
<https://www.justice.gov.za/commissions/feeshet/docs/2001-NationalPlanForHigherEducation.pdf>
 (accessed on 20 June 2022).

³³⁸ Department of Education “National Plan for Higher Education”,18
<https://www.justice.gov.za/commissions/feeshet/docs/2001-NationalPlanForHigherEducation.pdf>
 (accessed on 20 June 2022).

³³⁹ Vincent *et al* 2017:325.

³⁴⁰ Vincent *et al* 2017:325..

hashtag protests, and the most recent Stellenbosch incident which took place in 2022. While these incidents might be mostly related to discrimination based on race, the purpose of discussing them is to highlight the fact that discrimination and lack of transformation are still prevalent at institutions of higher learning.

3.3.3.1 The Reitz incident at the University of the Free State

In 2008 the Minister of Education established a ministerial committee on Progress Towards Transformation & Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions. The need for the report arose from an incident at the University of the Free State where a few students forced a group of cleaners to eat food in which one of them had urinated.³⁴¹ The video of the Reitz incident won first prize in a cultural competition held at the university residence. The students were allegedly protesting against the racial integration of what was once a White residence at the university.³⁴² The mandate of the Ministerial committee was to investigate discrimination in public higher education institutions, focusing on racism, and to make recommendations to eradicate discrimination and achieve social cohesion.³⁴³

While the focus of the report was on racism, the committee was also requested to report on other forms of discrimination as well such as ethnicity since racism is often linked to other forms of discrimination.³⁴⁴ In writing about the incident, Prof Amanda Gouws states that racism is often more subtle and is embedded in the behaviours and norms of institutional culture. She further states that these are very hard to amend and the struggle with this type of behaviour can be abstract, yet it is at the core of that which should be transformed at Afrikaans universities.³⁴⁵ Following an in-depth investigation, the Committee found that all universities in South Africa were facing

³⁴¹ Department of Education “Report of the Ministerial Committee on Transformation & Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions”, 24 <http://www.ukzn.ac.za/wp-content/miscFiles/publicationbs/ReportHEandTransformation.pdf> (accessed on 12 March 2021).

³⁴² Pillay 2019:151.

³⁴³ Department of Education “Report of the Ministerial Committee on Transformation & Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions”, 9 <http://www.ukzn.ac.za/wp-content/miscFiles/publicationbs/ReportHEandTransformation.pdf> (accessed on 12 March 2021).

³⁴⁴ Department of Education “Report of the Ministerial Committee on Transformation & Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions”, 9 <http://www.ukzn.ac.za/wp-content/miscFiles/publicationbs/ReportHEandTransformation.pdf> (accessed on 12 March 2021).

³⁴⁵ Gouws “From Racism to Valuing Diversity”, <https://www.universityworldnews.com/post.php?story=20080320160005293> accessed on 20 June 2022).

challenges with transformation and none of them could effectively say that they had transformed. While significant developments were noted regarding policy, it was found that there were sufficient grounds for concern that racial, gender, and other forms of discrimination exist within the higher education sector.³⁴⁶ Davids also confirms that the report indicated that although racism is a problem in the higher education sector, xenophobia, sexual harassment, and gender discrimination are also prevalent within the university space.³⁴⁷

3.3.3.2 #FeesMustFall, #RhodesMustFall and #RhodesSoWhite campaigns

Subsequent protests such as #FeesMustFall, #RhodesMustFall, and #RhodesSoWhite also revealed a lack of transformation and that universities are spaces where inequality and racism still exist.³⁴⁸ They are also spaces where conflict exists between those who motivate for change and those who resist it.³⁴⁹ Student protests have, in addition to outbreaks of violence included incidents of hate speech where for example at Wits University the phrase "Kill a Jew" was spray painted on the main building, and at the University of Cape Town the phrase "Kill all whites" was spray painted on university property.³⁵⁰ At Wits University, a statement was posted on social media stating that a white student would have to die to get Vice Chancellor Adam Habib's attention.³⁵¹ These phrases and statements are disturbing and reflect a culture of intolerance and hate. They also indicate that the higher education sector is sometimes a volatile space where non-national academics may be vulnerable as minorities and not always ensured of their safety in the workplace. Davids & Waghid state that student protests began in 1994 when students protested against the cost of higher education in South Africa. While these protests did not receive much media attention, the 2015-2016 protests in contrast were given much attention in local and

³⁴⁶ Department of Education "Report of the Ministerial Committee on Transformation & Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions", 116 <http://www.ukzn.ac.za/wp-content/miscFiles/publicationbs/ReportHEandTransformation.pdf> (accessed on 12 March 2021).

³⁴⁷ Davids 2019:63.

³⁴⁸ Idahosa & Vincent 2019:148.

³⁴⁹ Idahosa & Vincent 2019:148.

³⁵⁰ Davids 2019:64.

³⁵¹ Davids 2019:64.

international media. They believe that this is an indicator of the embedded nature of inequality in South Africa and that these have not been eradicated.³⁵²

In 2015 Chumani Maxwele, a #RhodesMustFall activist, and a group of students from the University of Cape Town (UCT) threw faeces on the statue of Cecil John Rhodes in their call for transformation at UCT. This prompted further protests across universities in South Africa seeking transformation of the higher education sector and historically White universities.³⁵³ Protest action by students has highlighted the need to address issues of coloniality and marginalism that still exist in higher education institutions.³⁵⁴ These protests also highlighted issues such as lack of funding, academic staff diversity, issues with the marginalization of black female academics, labour issues around work and outsourcing, and disabled students.³⁵⁵ Academics, civil society groups, and the media also joined the #RhodesMustFall movement, the Black Student Movement, and #OpenStellenbosch Collective in raising awareness about issues of transformation and illustrating the intersectional correlation between fee increases, alienating language policies, continuing institutional racism, and lack of spatial justice. They argue that all these factors reinforce the exclusion and non-belonging of Black students and academics.³⁵⁶

3.3.3.3 Incident at Stellenbosch University-Huis Marais Residence

In May 2022 an incident occurred at the Huis Marais Residence at Stellenbosch University. A white male student entered the room of a fellow Black student and urinated on the desk where he had his laptop and other possessions.³⁵⁷ When questioned as to why he was urinating on the desk, he stated “that’s what happens to black boys”.³⁵⁸ The incident sparked widespread anger and condemnation. In

³⁵² Davids & Waghid “History of South African student protests reflects inequality’s grip”, <https://theconversation.com/history-of-south-african-student-protests-reflects-inequalitys-grip-66279> (accessed on 5 June 2022).

³⁵³ Hlatswayo & Fomunyani 2019:61.

³⁵⁴ Hlatswayo 2020:164.

³⁵⁵ Hlatswayo & Fomunyani 2019:62.

³⁵⁶ Hlatswayo 2020:167.

³⁵⁷ Cupido “White supremacy at Stellenbosch University – is anyone listening?”, <https://www.dailymaverick.co.za/opinionista/2022-05-23-white-supremacy-at-stellensbosch-university-is-anyone-listening/> (accessed on 10 June 2022).

³⁵⁸ Cupido “White supremacy at Stellenbosch University – is anyone listening?”, <https://www.dailymaverick.co.za/opinionista/2022-05-23-white-supremacy-at-stellensbosch-university-is-anyone-listening/> (accessed on 10 June 2022).

response, the university instituted disciplinary action against the student.³⁵⁹ The university's Vice Chancellor also condemned the incident stating that such conduct would not be tolerated and that no student had the right to diminish another student's dignity.³⁶⁰ Following a disciplinary hearing, the Central Disciplinary Committee of the university expelled Theuns Du Toit and found that his utterance of "it's a white boy thing", to be racist.³⁶¹ The Minister of Justice, Ronald Lamola stated that there was no reason for a 21-year-old person to be accused of racism and that the incident was one too many in recent months.³⁶²

The South African Human Rights Commission chairperson, Advocate Bongani Majola also expressed concern over the incident, and President Ramaphosa in his weekly message stated that the country needed to have honest conversations about the incident.³⁶³ The Department of Sociology and Social Anthropology at Stellenbosch University issued a statement in which they raised the point that aside from deciding on the culpability of an individual, it is also important to address institutional practices that perpetuate rather than counter racism and its manifestations in our world.³⁶⁴ The statement went further to emphasize the importance of the institution taking steps to address the conditions which fostered the incident rather than simply preventing the behaviour from recurring as this would also allow for transformation at an institutional level.³⁶⁵

³⁵⁹ Cupido "White supremacy at Stellenbosch University – is anyone listening?", <https://www.dailymaverick.co.za/opinionista/2022-05-23-white-supremacy-at-stellensbosch-university-is-anyone-listening/> (accessed on 10 June 2022).

³⁶⁰ Africa News "South Africa: Anger over racism at top university", <https://www.africanews.com/2022/05/19/south-africa-anger-over-racism-at-top-university/> (accessed on 10 June 2022).

³⁶¹ Charles "Stellenbosch urine saga : Inside Theuns Du Toit judgment, panel guns for Huis Marais Transformation", <https://www.news24.com/news24/southafrica/news/stellenbosch-urine-saga-inside-theuns-du-toit-judgment-panel-guns-for-huis-marais-transformation-20220722> (accessed on 2 September 2022).

³⁶² Cupido "White supremacy at Stellenbosch University – is anyone listening?", <https://www.dailymaverick.co.za/opinionista/2022-05-23-white-supremacy-at-stellensbosch-university-is-anyone-listening/> (accessed on 10 June 2022).

³⁶³ Cupido "White supremacy at Stellenbosch University – is anyone listening?", <https://www.dailymaverick.co.za/opinionista/2022-05-23-white-supremacy-at-stellensbosch-university-is-anyone-listening/> (accessed on 10 June 2022).

³⁶⁴ Stellenbosch University Department of Sociology & Social Anthropology "Statement over Racist Incident at Huis Marais: Sunday 15 May 2022", <https://www0.sun.ac.za/sociology/wp-content/uploads/2022/05/Statement-from-Sociology-and-Social-Anthropology-on-15-May-Racist-Incident.pdf> (accessed on 10 June 2022).

³⁶⁵ Stellenbosch University Department of Sociology & Social Anthropology "Statement over Racist Incident at Huis Marais: Sunday 15 May 2022", <https://www0.sun.ac.za/sociology/wp-content/uploads/2022/05/Statement-from-Sociology-and-Social-Anthropology-on-15-May-Racist-Incident.pdf>

In an article written by Dr Gerald Ouma, he speaks about his experiences as a non-national post-doctoral fellow. He states that the racism he experienced at two higher education institutions was of a 'covert, insidious and subliminal nature.'³⁶⁶ While writing about racism, and being a non-national academic, perhaps what Dr Ouma was alluding to is covert xenophobic behaviour as he cites incidents where comments were made about the darkness of his skin in comparison to black South Africans, the strangeness of his accent which seemed incomprehensible to some.³⁶⁷ He was also repeatedly questioned about his country of origin and when he refused to answer assumptions were made that he was an illegal immigrant.³⁶⁸

In summary, it seems that even though higher education has undergone considerable change these changes have not resulted in the expected transformation. Following the student protests of 2015-2016, universities continue to struggle to respond to the demand for institutional transformation.³⁶⁹ Despite efforts made by the post-1994 government to amend higher education policy, these amendments have still not provided access to many previously disadvantaged black people in South Africa, especially concerning access, equity, and participation in the higher education environment.³⁷⁰ Some of the reasons advanced for this failure are inadequate implementation of policies, lack of monitoring, and therefore a failure to succeed in transforming the higher education sector and redressing inequality.

Universities, therefore, have a critical role to play in fostering social cohesion.³⁷¹ Universities also play an important role in globalization and the internationalization of higher education as these are important drivers for change to take place in this

[content/uploads/2022/05/Statement-from-Sociology-and-Social-Anthropology-on-15-May-Racist-Incident.pdf](https://www.universityworldnews.com/poost.php?story=20080320161640617) (accessed on 10 June 2022).

³⁶⁶ Ouma "Living with racism at two universities", <https://www.universityworldnews.com/poost.php?story=20080320161640617> (accessed on 20 June 2022).

³⁶⁷ Ouma "Living with racism at two universities", <https://www.universityworldnews.com/poost.php?story=20080320161640617> (accessed on 20 June 2022).

³⁶⁸ Ouma "Living with racism at two universities", <https://www.universityworldnews.com/poost.php?story=20080320161640617> (accessed on 20 June 2022).

³⁶⁹ Hlatwayo 2020:17.

³⁷⁰ Mzangwa 2019:2.

³⁷¹ Oloyede 2009:432.

sector.³⁷² There are deeper issues at play which are a result of colonization, alienation, and anger at a democracy that has failed to evolve as expected.³⁷³ Hlatswayo argues that higher education has done very little to transform the epistemic identity of universities in South Africa and the “natives of nowhere” continue to feel isolated and institutionally alienated.³⁷⁴ Changes in higher education institutions have also undoubtedly been affected by historical and political factors such as colonialism and democratization post-1990.³⁷⁵ Factors such as apartheid policies, post-apartheid policies, fiscal challenges, and historical backlogs have determined how universities evolve.³⁷⁶ The educational space is one in which violence, intimidation, and hate speech manifest and universities should not merely dismiss these social ills which threaten democracy.³⁷⁷ People from diverse backgrounds form part of an evolving society and everyone regardless of their social background should benefit from a higher education environment that is inclusive.³⁷⁸ It is also important that higher education institutions have strategies and policies in place that deal with xenophobia as a form of discrimination and which provide protection for the rights of those who are victims of xenophobia within the higher education space. I will examine the transformation and anti-discrimination policies of higher education institutions in South Africa in Chapter 4.

In the next section, I discuss the position of non-national academics within South African higher education institutions, a brief history of how non-national academics came to feature within these institutions, and how they experience xenophobia in the workplace.

³⁷² Rensburg *et al* 2020:92.

³⁷³ Davids 2019:66.

³⁷⁴ Hlatswayo 2020:170.

³⁷⁵ Rensburg *et al* 2020:92.

³⁷⁶ Rensburg *et al* 2020:92.

³⁷⁷ Davids 2019:67.

³⁷⁸ Mzangwa 2019:12.

3.4 XENOPHOBIA AGAINST NON-NATIONAL ACADEMICS IN SOUTH AFRICA

The studies mentioned earlier in this chapter which were conducted by Tinashe³⁷⁹ and Otu³⁸⁰ serve the preliminary purpose of identifying that xenophobia is a problem at higher education institutions and affects non-national academics in the higher education sector. Non-national academics are employed by all higher education institutions in South Africa and can be seen as a vulnerable group due to their minority status within this space. In this part of the chapter, I examine the studies that have been conducted about xenophobia at institutions of higher learning.

The research reveals that many studies have highlighted the fact that this is an area where little research has been conducted specifically on the experience of non-national academics in the workspace. Many of the studies conducted focused on the experience of international students with xenophobia. I have also discovered that the current work on the experience of non-national academics specifically concerning xenophobia in the higher education sector is minimal and has mostly been conducted by non-national academics themselves who are employed at host universities. This may create a perception among locals that xenophobia is not a problem in higher education as it does not affect them directly. Hence, they may not be sensitive to the actual position of the non-national academic. It might also be easier to overlook the manifestations of xenophobia as they are covert rather than overt violent manifestations.

However, the literature indicates that xenophobia does exist and is experienced within universities, and it must be interrogated in the interests of promoting change and motivating changes in policy and legislation to protect the rights of non-national academics. As mentioned in the introduction to this chapter, a research study is currently being conducted across 26 public universities in South Africa to examine xenophobia at these institutions.³⁸¹ Jansen in writing about the study, confirms that xenophobia is a threat to the academic enterprise and questions why xenophobia poses such a threat. He is of the view that a university that indulges in 'nativist thinking' when making academic appointments cannot achieve academic and research

³⁷⁹ Harry *et al* 2017:2.

³⁸⁰ Otu 2017:2.

³⁸¹ See section 3.1.

excellence.³⁸² He speaks of how politically motivated messages are sent to universities requesting that universities engage in repeated searches when making academic appointments to ensure that a Black South African is appointed.³⁸³ Where this is not achieved the position should be left vacant. University Vice Chancellors are also given political messages emphasising that employment equity is meant for Black South Africans.³⁸⁴ In light of these statements, the results of the research study would certainly be useful in highlighting the issue of xenophobia at universities. Jansen like other scholars also points out that scholars from African countries make a valuable contribution to our higher education by training many Masters and Doctoral students who go on themselves to become academics at universities.³⁸⁵ Having established that xenophobia is present in the higher education context, I proceed in the next section to discuss how non-national academics came to feature in the South African higher education landscape.

3.4.1 The arrival of non-national academics in South Africa post-1994

Due to the lack of qualification and skill amongst Black South Africans after 1994, it became necessary to fill this gap with foreign skills.³⁸⁶ The South African government encouraged universities to employ non-nationals to provide redress for the skills shortage in higher education. The Education White Paper 3 of 1997 also encouraged institutions to recruit academics from other African countries to develop research and intellectual networks as well as to help change institutional culture.³⁸⁷ Many of these non-national academics were employed in previously disadvantaged universities of the former Black homelands. The employment of these academics was not met with proper diversity management and led to ethnic tensions and xenophobia. As a result,

³⁸² Jansen "Xenophobia is threatening the future of the South African university", <https://www.universityworldnews.com/post.php?story=20221004102540205> (accessed on 9 November 2022).

³⁸³ Jansen "Xenophobia is threatening the future of the South African university", <https://www.universityworldnews.com/post.php?story=20221004102540205> (accessed on 9 November 2022).

³⁸⁴ Jansen "Xenophobia is threatening the future of the South African university", <https://www.universityworldnews.com/post.php?story=20221004102540205> (accessed on 9 November 2022).

³⁸⁵ Jansen "Xenophobia is threatening the future of the South African university", <https://www.universityworldnews.com/post.php?story=20221004102540205> (accessed on 9 November 2022).

³⁸⁶ Mudau & Khanare 2020:178.

³⁸⁷ Nkomo 2018:2.

non-national academics found it difficult to work in a hostile environment.³⁸⁸ This led to fears and insecurity among both national and non-national academics.³⁸⁹

Most previous studies on xenophobia have been conducted in settings outside the university.³⁹⁰ Nkomo asserts that almost no scholarly work has been conducted to understand the experience of African immigrant academics.³⁹¹ Maseko & Maweni are also of the view that xenophobia at universities has not been adequately researched and most of the studies on xenophobia have been conducted within the context of the wider community.³⁹² Leepo & Maseng assert that although many studies have focused on the effects of African migrants on the economy through the skills they provide, very little research has been done on the research contribution of African immigrants at Higher Education institutions.³⁹³ The writers are of the view that African non-national academics contribute to an increase in the knowledge base through their research outputs in their faculties.³⁹⁴ By employing African non-national academics, the South African government is investing in human capital.³⁹⁵

3.4.2 Studies on xenophobia at higher education institutions

While xenophobic attacks are evident in South African communities, they have also taken place at universities and research indicates that such occurrences, affect development, both locally and globally.³⁹⁶ Institutions of higher learning are generally perceived as safe places where everyone is welcome and where xenophobia and discrimination do not exist. They are therefore spaces where you would not expect xenophobia to be prevalent.³⁹⁷ One must be cautious in assuming that a paucity of research specifically on xenophobia against non-national academics implies that it is not a problem encountered by non-national academics in South Africa. The studies discussed in the forthcoming sections indicate that xenophobia is a phenomenon at higher education institutions and because non-national academics work at these

³⁸⁸ Mafukata 2020:154.

³⁸⁹ Mudau & Khanare 2020: 178.

³⁹⁰ Obadire 2018:190.

³⁹¹ Nkomo 2018:30.

³⁹² Maseko & Maweni 2019:106.

³⁹³ Leepo & Maseng 2019:190.

³⁹⁴ Leepo & Maseng 2019:190.

³⁹⁵ Leepo & Maseng 2019:190.

³⁹⁶ Mudau & Khanare 2020:174.

³⁹⁷ Maseko & Maweni 2020:108.

institutions, they would also be affected by xenophobic sentiment or behaviour. In this regard one can look at the studies by Obadire, Maseko & Maweni, Harry, Dodd & Chinyamurindi discussed below.

Xenophobia has been prevalent at higher education institutions for some time and is a reality.³⁹⁸ Staffing in higher education is a contested workspace due to the number of White staff filling the majority of positions, followed by Black staff members. This, therefore, causes tension when non-nationals enter the same workspace. Marginalized local staff feel intimidated and threatened.³⁹⁹ When locals feel that their jobs are threatened, this creates division and marginalization. Non-nationals come to be regarded as 'invaders' or 'outsiders'.⁴⁰⁰ Ill-treatment, marginalization, and conflict can be overt, covert, or symbolic. Xenophobia in higher education is regarded as a category of symbolic violence where oppression or humiliation is psychological and involves exerting power over another which results in degrading or devaluing such persons and their right to expression.⁴⁰¹

A study conducted by Obadire at a rural-based university campus found that both staff and students were xenophobic regardless of their nationality, and that xenophobia existed in different forms and was expressed in various ways. Xenophobic tendencies were found to be more covert, and many stakeholders were reluctant to discuss xenophobia.⁴⁰²

Maseko & Maweni investigated xenophobia among international students at two higher education institutions. They found that many role players participated in the marginalization of non-nationals. These were academics, administrators, security personnel, and local students.⁴⁰³ Xenophobic acts were covert and subtle, prompted by competition for limited resources such as scholarships, jobs at universities, and accommodation. The institution also failed to have policies in place to counteract

³⁹⁸ Maseko & Maweni 2019:111.

³⁹⁹ Mudau & Khanare 2020:175.

⁴⁰⁰ Mudau & Khanare 2020:175.

⁴⁰¹ Mudau & Khanare 2020:181.

⁴⁰² Obadire 2018:195.

⁴⁰³ Maseko & Maweni 2019:111.

xenophobic practices.⁴⁰⁴ Those affected were subjected to verbal attacks, systems that discriminated against them, abusive language, and the use of derogatory names and negative attitudes. Instances of xenophobia were of a covert and subtle nature in the universities as compared to those in the public arena.⁴⁰⁵ The findings in this study revealed that xenophobic tendencies are manifested through hate speech, verbal abuse, social exclusion, and denial of access to services.⁴⁰⁶

Harry, Dodd, and Chinyamurindi used narratives in their study to explore the motivational factors and experiences of self-initiated academic expatriates in South Africa. They identified that discrimination and in particular xenophobia are prevalent at South African universities where both staff and students encountered xenophobia.⁴⁰⁷ Non-national academics reported that they encountered discrimination both at work and in the communities where they lived, stemming from the fact that they were immigrants. Discrimination at work meant a lack of career and personal development. This impacted their ability to integrate themselves into the workplace.⁴⁰⁸

A study was conducted at the University of KwaZulu-Natal exploring the perceptions of xenophobia and racism by non-national academics and students. The study found that both xenophobia and racism were prevalent within the academic environment which had the potential to affect working relationships within the university.⁴⁰⁹ Xenophobic and racist attitudes were found to be prevalent in the use of language, accent, delays in the supervision of postgraduate students, and the low grading of marks. In instances where xenophobia was expressed covertly, it was asserted that its impact was still of crucial significance.⁴¹⁰ The studies described above illustrate that xenophobia does feature in higher education institutions and can manifest in various ways.

⁴⁰⁴ Maseko & Maweni 2019:112.

⁴⁰⁵ Maseko & Maweni 2019:115.

⁴⁰⁶ Maseko & Maweni 2019:119.

⁴⁰⁷ Harry *et al* 2017:2.

⁴⁰⁸ Harry *et al* 2017:6.

⁴⁰⁹ Otu 2017:151.

⁴¹⁰ Otu 2017:151.

The findings of a study conducted at Nelson Mandela Metropolitan University among international students revealed that students experienced xenophobia by experiencing outright discrimination as well as by being ignored by others. None of the students experienced any violence related to xenophobia. However, the sample size was only four students, and this factor should be taken into consideration.⁴¹¹ The university has made attempts to combat xenophobia and held a campaign in 2008 to foster the acceptance of non-nationals. This took place following an incident where a student group displayed offensive xenophobic posters on campus.⁴¹²

In 2017 the South African Human Rights Commission (SAHRC) was requested to examine Unisa's employment equity plan and affirmative action measures.⁴¹³ An investigation that involved the College of Law revealed an over-representation of white males and females at the professor level. There were only two African males and one female employed at the full professor level. There was one Indian male and no female Indian full professors. There were no Coloureds employed as full professors. On the non-national front, there were three non-nationals employed as full professors.⁴¹⁴

The report of the Commission revealed that there was insufficient racial transformation at Unisa and recommended a review of Unisa's governance models to remove barriers to transformation.⁴¹⁵ The number of professors within the higher education sector is shrinking and cannot be replenished to keep pace with the growth in the sector.⁴¹⁶ In line with the Constitution and the Employment Equity Act, universities have to redress past injustices and achieve equity in the workplace by accounting for race and gender representativity.⁴¹⁷ While the investigation conducted at Unisa did not deal specifically with xenophobia it did indicate a lack of transformation in the appointments made and by inference, this would also impact non-national academics in the workplace.

Xenophobia is about more than the irrational fear of strangers. It entails the relationship between the state and its citizens, citizens, and non-nationals, as well as

⁴¹¹ Sorensen 2012:77.

⁴¹² Sorensen 2012:2.

⁴¹³ Geldenhuys 2020:65.

⁴¹⁴ Geldenhuys 2020:67.

⁴¹⁵ Geldenhuys 2020:69.

⁴¹⁶ Subbaye 2017:249.

⁴¹⁷ Subbaye 2017:251.

the state and non-nationals.⁴¹⁸ Non-nationals have rights such as the right to equality, humanity, and the right not to be arbitrarily arrested or detained, among others. However, many non-nationals are subjected to a violation of these rights by state actors such as the police.⁴¹⁹ The scarcity of resources and jobs creates a competitive atmosphere between local citizens and non-nationals and is a breeding ground for xenophobia. The lack of political will by the government, coupled with competition for resources by locals and non-nationals, as well as the role of the media in reporting on xenophobia, are all factors that contribute to the problem within our society. Violence against non-nationals increases when the state fails to address socio-economic and political issues and will continue to spread unless it is dealt with by the government and citizens.⁴²⁰ Non-nationals come to South Africa for educational opportunities, due to an unstable political and economic climate in their home country, to experience a new way of life, and to access better resources in South Africa.⁴²¹ While universities in most countries have been aiming to attain global status through rankings and assessment practices across borders, South African higher education institutions act to the contrary by failing to welcome foreign skills. This influences the development and internationalization of institutions of higher learning.⁴²² Baloyi & Reynolds are of the view that the post-apartheid university has to construct a university space that is based on democracy and social responsibility, and which is free from discrimination based on tribalism and ethnicity.⁴²³

To summarise the discussion of the studies on xenophobia in higher education, it is evident that xenophobia does feature in higher education institutions and can manifest in various ways. Mostly it appears to occur covertly or symbolically. Xenophobia, while not overt or violent in higher education institutions, finds its expression through various behaviours such as:

- a) ill-treatment, marginalization – overt, covert, or symbolic.

⁴¹⁸ Khoza *et al* 2021:102.

⁴¹⁹ Khoza *et al* 2021:113.

⁴²⁰ Khoza *et al* 2021:114-115.

⁴²¹ Harry *et al* 2017:7.

⁴²² Mudau & Khanare 2020:182.

⁴²³ Mafukata 2020:159.

- b) symbolic violence in the form of oppression, humiliation, devaluing of a person's right to expression;⁴²⁴
- c) competition for university resources, scholarships, jobs at the university, and accommodation;⁴²⁵
- d) hate speech, verbal abuse, social exclusion, and denial of access to services;⁴²⁶
- e) lack of career and personal development;⁴²⁷
- f) xenophobic attitudes expressed regarding the use of language, accent, delays in the supervision of postgraduate students, and the low grading of marks.⁴²⁸

Although there may be little indication of physical violence when xenophobia does occur at higher education institutions, it is a prevalent phenomenon within this sector. The studies also reveal that xenophobia manifests among both staff and students. Where it occurs among staff members, it is prevalent both in the support and academic departments. It is also evident that it affects non-nationals as individuals, their well-being as well as their prospects for career advancement.

3.5 XENOPHOBIA AGAINST NON-NATIONAL ACADEMICS IN OTHER COUNTRIES

At this juncture in the chapter, I consider the prevalence or experience of xenophobia by non-national academics in other countries to determine whether their challenges are like those encountered by non-nationals in the South African context. Research particular to non-national academics specifically was again found to be minimal and most studies in other countries looked at the experience of international students. and other aspects affecting the work experience of non-national academics. Kreber & Hounsnell state that while there is growing research on student mobility, studies that focus on non-national academic staff are rare and there is little knowledge about the lived experience of this category of employee in the United Kingdom.⁴²⁹ Bailey et al

⁴²⁴ Mudau & Khanare 2020:181.

⁴²⁵ Maseko & Maweni 2019:112.

⁴²⁶ Maseko & Maweni 2019:119.

⁴²⁷ Harry *et al* 2017:6.

⁴²⁸ Otu 2017:151.

⁴²⁹ Kreber & Hounsnell 2014:10.

also confirm that there is growing research that expresses concern over the lack of studies that focus on non-national academics.

On examining xenophobia in countries such as the United Kingdom, Germany, and Canada the literature revealed that most of the studies and reports focused on racism in the university space. However, in some cases, the term "racism" is used as a broad term to include other types of discrimination such as xenophobia, racial violence, and gender discrimination. As in the South African context, very little has been written about xenophobia in the academic context, specifically in some countries. The studies that are discussed below were therefore examined to illustrate that the higher education sector is not immune to incidents of discrimination and inequality and that xenophobia, as well as other forms of discrimination, are likely to manifest in the university space, although it may be referred to as a subtle form of racism or ethnic discrimination.

In the following part of the chapter, I provide a summary of some of the studies conducted in countries like the United Kingdom, Germany, and Canada. A detailed discussion of xenophobia in the United States of America (USA) was undertaken in Chapter 2, with specific reference to the impact of Covid 19 as well. Therefore, in this chapter, xenophobia in the USA higher education sector is briefly mentioned and the focus is placed mainly on research conducted in the United Kingdom, Germany, and Canada.

3.5.1 United States of America (USA)

In 2019 there were more than one million international students in the United States of America (USA) and research indicates that non-national students of colour are victims of what is referred to as multifaceted discrimination.⁴³⁰ Brexit and the policies of the Trump administration have also affected academia. There has been a decline in the enrolment of international students in the USA since 2016.⁴³¹ It is believed that the current political climate and unfriendly visa and immigration laws have influenced

⁴³⁰ S Jiang 2020:1.

⁴³¹ O'Malley "Decline of international graduate enrolment quadruples", 1-2 <http://www.universityworldnews.com/article.php?story=20181005200448286> (accessed on 10 August 2018).

the decline in enrolments.⁴³² More than a third of international students in the USA are Chinese.⁴³³ At the beginning of 2018, the Trump administration proposed a ban on Chinese students studying in the United States. The reason for the proposed ban was that the government was afraid of intellectual property theft and although the ban was not approved, international students were monitored in terms of their class attendance and dropout at universities.⁴³⁴ A study of 80 higher education institutions in the USA conducted in 2012 revealed that 75% of them included the term 'diversity' in their mission statements. However, the prevailing literature on the negative experiences of students of colour at predominantly White institutions indicates that this reflects a 'cosmetic' attempt at inclusion and fails to reflect a true commitment to such students.⁴³⁵

3.5.2 The United Kingdom

A study conducted at British universities drew on the experiences of respondents who were from various racial, ethnic, and religious groups including South Asian, Afro-Caribbean, Eastern European, Muslim, Taiwanese, and the South Pacific.⁴³⁶ It was found that the university space is one where more subtle forms of racism occur as compared to that which occurs in public spaces and it was found that insults were rather replaced by what is termed the 'politics of exclusion'.⁴³⁷ Challenging racism at the university was prioritized in the case of students as failure to do so may impact the recruitment and reputation of the university.⁴³⁸ However, when it involved staff members it was not viewed as a priority and if addressed, it was done superficially.⁴³⁹

⁴³² O'Malley "Decline of international graduate enrolment quadruples",1-2
<http://www.universityworldnews.com/article.php?story=20181005200448286> (accessed on 10 August 2018).

⁴³³ O'Malley "White House discussed unilateral ban on Chinese students"1-3
<http://www.universityworldnews.com/article.php?story=20181004180117952>(accessed on 10 August 2018).

⁴³⁴ O'Malley "White House discussed unilateral ban on Chinese students"1-3
<http://www.universityworldnews.com/article.php?story=20181004180117952>(accessed on 10 August 2018).

⁴³⁵ Barnett 2020:21.

⁴³⁶ Sian 2017:1.

⁴³⁷ Sian 2017:4.

⁴³⁸ Sian 2017:10.

⁴³⁹ Sian 2017:11.

To comply with the requirements of the Race Relations (Amendment) Act 2000 British universities have a range of diversity and equality policies. However, despite these plans and policies being in place; racism and gender inequality have not decreased. Black minority and ethnic groups are often less likely to be promoted in comparison to white staff members.⁴⁴⁰ Job stability for non-national academics is challenging due to issues with visas and sponsorships. This fosters further exclusion and challenges in securing positions at such institutions.⁴⁴¹

The employee is in an unequal position as well since the employer can withdraw the sponsorship at any stage. Most non-national academics are employed on fixed-term contracts that can be terminated according to the employers' discretion and create a sense of uncertainty and dependency.⁴⁴² It emerged from this study that there is a lack of or limited support and mentoring for academics of colour or difference which causes these persons to feel invisible and excluded. They experience ridicule, harassment, and belittling causing them to live in fear.⁴⁴³

A report based on a research study conducted at another British university investigated the role of race in the experience of Black and minority ethnic students.⁴⁴⁴ Although the intention was also to examine the experience of staff members from Black minority and ethnic groups, it was not supported. Some staff members did however express their views separately to the researcher.⁴⁴⁵ The report also looked at hate crime reporting and found that students were more confident to report incidents of racism than hate crimes since these are more covert as they are harder to prove and more difficult to articulate.⁴⁴⁶ The respondents in the study confirmed that race

⁴⁴⁰ Sian 2017:19.

⁴⁴¹ Sian 2017:21.

⁴⁴² Sian 2017:22.

⁴⁴³ Sian 2017:23.

⁴⁴⁴ Akel "Insider-Outsider The role of race in shaping the experiences of black and minority ethnic students", 5 <https://www.gold.ac.uk/media/docs/reports/Insider-Outsider-Report-191008.pdf> (accessed on 18 November 2022).

⁴⁴⁵ Akel "Insider-Outsider The role of race in shaping the experiences of black and minority ethnic students", 7 <https://www.gold.ac.uk/media/docs/reports/Insider-Outsider-Report-191008.pdf> (accessed on 18 November 2022).

⁴⁴⁶ Akel "Insider-Outsider The role of race in shaping the experiences of black and minority ethnic students", 8 <https://www.gold.ac.uk/media/docs/reports/Insider-Outsider-Report-191008.pdf> (accessed on 18 November 2022).

plays a central role in their experiences at the university.⁴⁴⁷ Students face many forms of racism and almost 43% showed that they experienced a more subtle form of racism referred to as micro-aggressions.⁴⁴⁸ Micro-aggressions are defined as:

everyday verbal, non-verbal, and environmental slights, snubs, or insults, whether intentional or unintentional that communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership.⁴⁴⁹

3.5.3 A comparison study of universities in Germany and the United Kingdom

Barbara Krahe et al, in their study, examined perceived discrimination experienced by international visitors to universities in Germany and the United Kingdom. By using Allport's 1954 analysis of 'The Nature of Prejudice', the study developed a more fine-tuned approach to examining perceived discrimination instead of making a broad inquiry. The focus questions looked at four main categories. The first category was called antilocution which looked at verbal comments that depict antagonism and patronizing comments. The second was avoidance which examined avoiding contact with rejected groups that makes foreigners feel hurt but does not involve physical harm or abuse. The third category was direct discrimination which involved denying foreigners equal treatment and social rights and privileges. The fourth category dealt with the threat of physical harm because a person is part of a rejected out-group.⁴⁵⁰

More than a quarter of international students in Germany, 10% of international students in the United Kingdom, and just over 10% of visiting academics in Germany reported having experienced assault or fear of assault at least occasionally.⁴⁵¹ Those visitors who were more easily identifiable as non-nationals reported experiencing more serious discrimination. However, having good personal interaction with citizens of the host country promoted a feeling of security and made them less sensitive to their status

⁴⁴⁷ Akel "Insider-Outsider The role of race in shaping the experiences of black and minority ethnic students", 42 <https://www.gold.ac.uk/media/docs/reports/Insider-Outsider-Report-191008.pdf> (accessed on 18 November 2022).

⁴⁴⁸ Akel "Insider-Outsider The role of race in shaping the experiences of black and minority ethnic students", 25 <https://www.gold.ac.uk/media/docs/reports/Insider-Outsider-Report-191008.pdf> (accessed on 18 November 2022).

⁴⁴⁹ Barnett 2020:25.

⁴⁵⁰ Krahe *et al* 2005:265.

⁴⁵¹ Krahe *et al* 2005:275.

as foreigners or to possible discrimination.⁴⁵² Germany and the United Kingdom are two countries that have experienced many cases of violence towards non-nationals. International students and academics have also been exposed to violence and ethnic discrimination.⁴⁵³ In a press release response in 2015 to racist violence and physical attacks in Germany, the member universities of the German Rectors conference adopted a stance against xenophobia. They expressed a determination to work together against xenophobia and in support of a democratic, enlightened and tolerant society.⁴⁵⁴

3.5.4 Canada

Canada has over decades become a racially and ethnically diverse society. Several systemic barriers are faced by members of various groups who seek equity in the workplace such as racialized minorities, indigenous people, and women.⁴⁵⁵ Although there has been much research on equity in higher education, there is a lack of research on discrimination such as racism racialization, and indigeneity.⁴⁵⁶ It is said that efforts to address these issues are mainly cosmetic and indifference persists in the modern university.⁴⁵⁷ This study examined the effectiveness of equity programs in 12 universities by focusing on representation in recruitment, promotion practices, attitudes of administrators responsible for equity policies, mechanisms in place to ensure inclusion, discourses about exclusion and how these were used to inform the institution about its practices.⁴⁵⁸ The findings of the study indicated that indigenous faculty members experienced limited control over their working conditions and found that institutional barriers negatively affected their scholarly potential and productivity.

These are typically associated with what is called a 'precarious work situation'.⁴⁵⁹ It is called a precarious work situation because they find themselves in a constant battle against marginalization, racialization, tokenization, and alienation. They are expected

⁴⁵² Krahe *et al* 2005:276.

⁴⁵³ Krahe *et al* 2005:264.

⁴⁵⁴ HRK German Rectors Conference The Voice of the Universities "Universities against Xenophobia", <https://www.hrk.de/home/universities-against-xenophobia> (accessed on 29 May 2021).

⁴⁵⁵ Henry *et al* 2017:300..

⁴⁵⁶ Henry *et al* 2017:300.

⁴⁵⁷ Henry *et al* 2017:300.

⁴⁵⁸ Henry *et al* 2017:301.

⁴⁵⁹ Henry *et al* 2017:302.

to meet an academic standard that inevitably devalues the transformative knowledge that they bring to the scholarship of the university.⁴⁶⁰ The development of equity initiatives differed across universities. Universities may have a broad scope of mechanisms catering for harassment and discrimination, but these were identified to be ineffective and rendered unsatisfactory results. Subsequently, most universities tended to deal with such issues informally which was also ineffective.⁴⁶¹

In another study conducted at a Canadian university the experience of non-national students was examined and how these influenced their transitioning and integration into society.⁴⁶² The participants travelled to Canada believing that Canadian society would be welcoming and friendly only to find that discrimination was the main reason that they failed to secure employment in their chosen occupation. When applying for work there is often a requirement that the applicant must have Canadian work experience. They believed that being told that they needed Canadian work experience was a form of xenophobia.⁴⁶³ As is the case in South Africa, some participants in the study stated that immigrants were seen as taking away the jobs of Canadian citizens.⁴⁶⁴

Literature concerning xenophobia at higher education institutions in other countries therefore reveals that discrimination is prevalent at universities. As in the South African context, non-national academics experience xenophobia as a subtle form of discrimination. It is more covert rather than direct and often takes the form of micro-aggressions and other non-violent xenophobic sentiments or behaviour. Non-national academics also encounter institutional barriers to their scholarly progress as well as marginalization and alienation.

In summary, I note that despite having equity policies in place for four decades, universities still need to transform into a more diverse society due in part to discriminatory practices and structural impediments. The changes have also been lacking due to a subtle bias that is not acknowledged. This bias favours the needs of

⁴⁶⁰ Henry *et al* 2017:311.

⁴⁶¹ Henry *et al* 2017:308.

⁴⁶² Sinacore *et al* 2011:168.

⁴⁶³ Sinacore *et al* 2011:177.

⁴⁶⁴ Sinacore *et al* 2011:177.

dominant insider groups.⁴⁶⁵ These systemic failures also affect the quality of the academic program which inevitably fails to prepare students to deal with the colonial history and the power dynamic that determines the conversation within the university space.⁴⁶⁶ A public dialogue series held by the Alliance for African Partnership called 'Race and Ethnicity in Africa and the Diaspora' urged universities to take the lead in the struggle for anti-racist societal systems that are inclusive and diverse. Universities were urged not to be 'colour blind', 'race-neutral guardians' of 'elitism and meritocracy'. It was also stressed that universities need to be creative in dealing quickly with racial tensions and ethnic stereotypes.⁴⁶⁷ In speaking about the South African context, Professor Norman Duncan highlighted that despite progress made post-1994, institutional cultures must be broadened to embrace diversity and to achieve a just and equitable higher education system.⁴⁶⁸ Jansen explains it succinctly by saying that we do not spend time teaching about what a university is. He says:

that it is a place of higher learning. That it is not a religious organisation requiring commitment to a shared dogma. That it thrives on reason, not rage. That is not an extension of the school or home. That it is a public institution open to all. That it is not a racial or ethnic or sectarian possession. That it values independence of thought. Most of all that a university has open borders that welcomes ideas and inventions from anywhere and by anyone in the world. When such core values fall away, a university is simply a training institute that produces automatons for the local markets without any sense of conscience towards a broader humanity.

3.6 CONCLUSION

In this chapter, I discuss how xenophobia manifests in higher education institutions and the way it is encountered by academic staff. I examine the history of the transformation of higher education post-1994. I discuss some of the incidents involving discrimination that have taken place at universities and which have influenced the transformation agenda of the higher education sector. I also look at xenophobia

⁴⁶⁵ Henry *et al* 2017:311.

⁴⁶⁶ Henry *et al* 2017:312.

⁴⁶⁷ Kigotho "Academics should lead in battle against racism", <https://www.universityworldnews.com/post.php?story=20210517161538602#:~:text=Universities%20across%20the%20world%20have,guardians%20of%20elitism%20and%20meritocracy> (accessed on 21 May 2021).

⁴⁶⁸ Kigotho "Academics should lead in battle against racism", <https://www.universityworldnews.com/post.php?story=20210517161538602#:~:text=Universities%20across%20the%20world%20have,guardians%20of%20elitism%20and%20meritocracy> (accessed on 21 May 2021).

against non-national academics employed at South African higher education institutions. In instances where there has been a scarcity of information on academics specifically, the experience of non-national students has been considered to determine whether xenophobia as a phenomenon does feature in the higher education sector. The experiences of students and academics at universities in other countries are also highlighted to illustrate that the university space whether locally or globally is a space where various types of discrimination occur.

In discussing xenophobia in the higher education sector, I draw the following conclusions. Apartheid affected transformation of the sector in that universities still experience fragmentation due to racial laws and policies. The three incidents of discrimination at universities which I discuss in the chapter lead one to the understanding that higher education institutions still grapple to address and eliminate issues of discrimination. This affects their transformation agenda. Literature concerning xenophobia at higher education institutions in other countries revealed that discrimination is prevalent at universities. As in the South African context, non-national academics experience xenophobia as a subtle form of discrimination. It is covert rather than overt and often takes the form of micro-aggressions and other non-violent xenophobic sentiments or behaviour. Non-national academics also encounter institutional barriers to their scholarly progress as well as marginalization and alienation.

In the next chapter I focus on the legislation, policy, and case law that are in place to deal with xenophobia.

CHAPTER 4

APPROACHES TO EQUALITY

4.1 INTRODUCTION

In chapter 3 I focus on xenophobia concerning non-national academics in the higher education context. I examine how xenophobia features in the university sector, whether it is overt, covert, symbolic, or institutional and how it is experienced by non-national academics. I also look at the history of transformation in higher education post-1994, together with a discussion of some of the incidents involving discrimination at universities. The purpose of this chapter is to explore the various approaches to equality to determine the approach which should be used to evaluate current law and policy regarding xenophobia against non-national academics.

The right to equality is provided for in the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution) but it cannot be viewed in isolation.⁴⁶⁹ The discussion in this chapter illustrates that the notion of equality is linked to other important concepts such as dignity, differentiation, unfair discrimination as well as the different types of equality. In defining and discussing dignity, differentiation, and discrimination, I also lean on some of the cases which have dealt specifically with these issues. While there is a plethora of constitutional court cases that deal with various aspects of the topic, I attempt to highlight those cases which are closest to the issue of xenophobia concerning non-national academics. Although the cases of *Baloro v University of Bophuthatswana*⁴⁷⁰ and *Khumalo v University of Johannesburg*⁴⁷¹ which I discuss later in this chapter and in Chapter 5 deal specifically with discrimination against non-national academics based on nationality, there is a paucity of other cases that deal with xenophobia against non-national academics. Bearing this in mind, I also include cases that have dealt with other grounds of discrimination, but which go towards allowing for understanding discrimination from a constitutional perspective. I discuss the different types of equality such as formal equality, substantive equality, and transformative substantive equality. In my discussions on equality, I draw on the views

⁴⁶⁹ Constitution Act 108/1996:sec. 9.

⁴⁷⁰ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B).

⁴⁷¹ *Khumalo v University of Johannesburg* (JS533/16)[2018] ZALCJHB31 (6 February 2018).

and critical analyses of legal writers such as Catherine Albertyn, Sandra Fredman, Laurie Ackermann, Henk Botha, Rosaan Kruger, Currie & De Waal and Devenish, and others. These writers have written extensively on the topic of equality and discrimination and the chapter highlights their analyses of equality and discrimination.

In section 4.2 I introduce the concept of equality, locating its meaning within the Constitution, and referring to how it is interpreted in the South African context, post-1994. I follow this in section 4.3 with a discussion on the meaning of dignity and how dignity is aligned with equality. In section 4.4 I discuss the concepts of discrimination and unfair discrimination. I discuss the test laid out in *Harksen's* case for discrimination as well as the criticisms of the test. I deal with cases involving discrimination on the grounds of nationality and race. In section 4.5 I discuss the notions of formal and substantive equality with reference to the views of various legal writers. Towards the end of the chapter, I engage in a discussion of transformative substantive equality in section 4.6 and how it relates to non-national academics. In section 4.7 I conclude the chapter by identifying the approach to equality that best aligns with the rights of non-national academics concerning xenophobia.

4.2 EQUALITY

The idea of equality was born out of the political, social, and economic struggles that occurred during the days of apartheid, colonialism, and patriarchy.⁴⁷² As a result, South Africa's transition to democracy was not a smooth process. The political and legal system during apartheid rule was founded on inequality and discrimination.⁴⁷³ Socio-economic resources were unevenly distributed with preference given to members of the white race group thereby prejudicing other race groups.⁴⁷⁴ However, since the collapse of apartheid, various government policies have been passed and subsequently, there has been an increase in intra-racial inequality and a decrease in inter-racial inequality.⁴⁷⁵ South Africa's post-apartheid society has ushered in a group that is referred to as the 'black elite' and which adds a new dynamic to the challenge of achieving equality in society. In essence, one can no longer look at race as the only

⁴⁷² Albertyn 2018:443.

⁴⁷³ Currie & De Waal 2013:211.

⁴⁷⁴ Currie & De Waal 2013:211.

⁴⁷⁵ Currie & De Waal 2013:212.

factor when discussing equality. Instead, class has also become a reference point when discussing equality.⁴⁷⁶ This would also imply that we cannot embark on an exercise where we simply repeal racist laws ensuring that such laws are not implemented in the future. If we were to do so we would have a society that has formal equality, but which still has inequalities in other areas which make it substantively unequal.⁴⁷⁷

The right to equality is entrenched in Section 9 of the *Constitution*, which provides that everyone is equal before the law and has the right to equal protection and benefit of the law.⁴⁷⁸ Neither the state nor any other person may discriminate against another person on certain listed grounds unless such discrimination is determined to be fair.⁴⁷⁹ Unfair discrimination on the grounds of ethnicity, social origin, language, and culture are some of the listed grounds, which imply that non-national persons - which includes non-national academics - should also enjoy the protection of rights contained in Section 9. Deciding whether a law or conduct that differentiates amounts to unfair discrimination involves an inquiry into whether it violates the person's right to human dignity.⁴⁸⁰

4.3 DIGNITY

Ackermann states that all human beings, irrespective of their differences are equal regarding their dignity and may not be subjected to discrimination that adversely affects their dignity.⁴⁸¹ Dignity was defined in detail by Ackermann as follows:

Human dignity (worth) is the capacity for and the right to respect as a human being and arises from all those aspects of the human personality that flow from human intellectual and moral capacity; which in turn separates humans from the impersonality of nature, enables them to exercise their judgment; to have self-awareness and a sense of self-worth, to exercise self-determination, to shape themselves and nature, to develop their personalities and to strive for self-fulfilment in their lives.⁴⁸²

⁴⁷⁶ Currie & De Waal 2013:212.

⁴⁷⁷ Currie & De Waal 2013:212.

⁴⁷⁸ *Constitution Act* :sec. 9(1).

⁴⁷⁹ *Constitution Act* :sec. 9(3)(4) & (5).

⁴⁸⁰ Botha 2009:212.

⁴⁸¹ Ackermann 2013:19-20.

⁴⁸² Ackermann 2006:602.

Dignity is also more simply defined as 'an attribution of equal moral worth and the right to be treated with equal concern and respect'.⁴⁸³ This provides the link with equality. Dignity focuses on the individual and the idea of social prejudice, which is an injury to self-worth is seen as being against individuals rather than systemically against a group, entrenched in societal structures or systems.⁴⁸⁴ Dignity has been placed at the centre of the right to equality by the Constitutional Court.⁴⁸⁵ Botha is of the view that taking the dignity-based approach allowed courts to present a judicial philosophy that celebrates differences.⁴⁸⁶ Respect for dignity includes respect for different cultures and religions, which make individuals unique and prevents the comparing of equality with the coalescence of beliefs and behaviour.⁴⁸⁷

Aligning dignity and equality also helped to successfully challenge cases of material disadvantage where certain vulnerable groups were excluded from welfare and housing plans and programs.⁴⁸⁸ More recently, however, it has been agreed that the dignity-based approach caters to an analysis of equality that caters to context. Botha is also of the view that in certain cases the Constitutional Court has not paid sufficient attention to structural disadvantage and has made conservative assumptions concerning issues relating to choice, marriage, family, and consent, failing to take proper account of plurality and difference.⁴⁸⁹ The debate surrounding this suggests that the focus should be placed on the context in which methods of analysis work well and on the interaction between recognition and redistribution, dignity and systemic discrimination, equality, diversity, and participation.⁴⁹⁰ Kruger also agrees that the courts' use of the dignity-centred approach has resulted in academic debate revolving around the court being criticized for creating what is termed a 'base-less core' for the equality right and for depriving the right to equality of its correct meaning in terms of the *Constitution*. The jurisprudence has raised concerns about issues of diversity, identity, and difference but these have been looked at under the idea of dignity.⁴⁹¹ The

⁴⁸³ Janse Van Rensburg 2010:198.

⁴⁸⁴ Albertyn & Fredman 2015:435.

⁴⁸⁵ Botha 2009:212.

⁴⁸⁶ Botha 2009:213.

⁴⁸⁷ Botha 2009:213.

⁴⁸⁸ Botha 2009:213.

⁴⁸⁹ Botha 2009:214.

⁴⁹⁰ Botha 2009:214.

⁴⁹¹ Albertyn & Fredman 2015:434.

dignity-centred approach was also seen as being too individualistic thereby failing to see the intersection and complex natures of the societal inequalities and thereby failing to broker transformation and eradicate systemic inequalities.⁴⁹²

Chaskalson CJ and Ackerman J have however defended the role of dignity, with Chaskalson having regard for the link between substantive equality and dignity.⁴⁹³ Cowen is in favour of the dignity-based approach, relying on the view that it places individuals as rational agents who can make their own choices and be a part of society and public life. She states that this view allows for the 'transformatory approach' to complaints of inequality. Instead of allowing prevailing norms and hierarchies to be perpetuated, it shifts the power dynamic.⁴⁹⁴ However, Pieterse views the dignity-centred approach as focusing the spotlight on the subjective experience of the complainant, effectively alienating him or her from the larger social group and how they experience the discriminating conduct.⁴⁹⁵ Nonetheless, Cowen also makes the point that every human being has a social dimension as well and that dignity relates to collective concerns as well as to individual concerns. The interests of the broader group can therefore also be considered instead of highlighting just the plight of the individual.⁴⁹⁶

*Brink v Kitshoff NO*⁴⁹⁷ was the first equality case heard by the Constitutional Court where it was decided that the purpose of equality was to remedy systemic disadvantage.⁴⁹⁸ However, De Wet criticized the court for limiting its inquiry around the right to equality to whether the affected persons, subject to discriminatory measures or treatment would be regarded as historically disadvantaged or vulnerable and whether there was consequently a breach of human dignity comparable to those suffered by previously disadvantaged groups.⁴⁹⁹ Nonetheless, the cases that followed *Brink v Kitshoff* however made dignity the centre of the right to equality with everyone

⁴⁹² Kruger 2011:499.

⁴⁹³ Kruger 2011:500.

⁴⁹⁴ Kruger 2011:500.

⁴⁹⁵ Kruger 2011:501.

⁴⁹⁶ Kruger 2011:501.

⁴⁹⁷ *Brink v Kitshoff NO* 1996 (6) BCLR 752 CC; 196 (4) SA 197 (CC).

⁴⁹⁸ Albertyn & Fredman 2015:430.

⁴⁹⁹ De Wet 1998:29.

being entitled to equal dignity and worth and to be treated equally with respect.⁵⁰⁰ According to the writers, this view by the courts failed to take into account the angle of systemic disadvantage, redressing these disadvantages, promoting differences, and encouraging voice participation.⁵⁰¹ They believed that relying solely on dignity results in a failure to take into account the other dimensions of equality and how to overcome conflicts between dignity and other elements of substantive equality.

4.4 DISCRIMINATION AND UNFAIR DISCRIMINATION

The *Constitution* provides that neither the state nor any other person may discriminate against another person on certain listed grounds unless such discrimination is determined to be fair.⁵⁰² Ethnicity, social origin, language, and culture are some of the listed grounds which would affect non-national academics and imply that they should enjoy the protection of Section 9 of the *Constitution* and should not be subject to discrimination on these grounds. It is therefore important to define discrimination. Further to that, a differentiation must be drawn between discrimination and unfair discrimination as the equality clause only prohibits unfair discrimination.⁵⁰³

Discrimination is defined as differentiation on legitimate grounds as set out in Section 9(3) of the *Constitution*.⁵⁰⁴ Currie & De Waal provide that unfair discrimination occurs where there is a differential treatment that is 'hurtful and demeaning' and 'when law or conduct for no good reason, treats some people as inferior or incapable or less deserving of respect than others.' They point out that unfair discrimination can also occur when the law fails to remedy a situation where there is a prevailing disadvantage or marginalization.⁵⁰⁵ Unfair discrimination adversely affects the vulnerable in society as it impairs their dignity.⁵⁰⁶ It also implies that a person's right to equality has been breached because of unfair discrimination. The case of *Harksen v Lane No*⁵⁰⁷ sets out the inquiry for the violation of the equality clause.

⁵⁰⁰ Albertyn & Fredman 2015:430.

⁵⁰¹ Albertyn & Fredman 2015:431.

⁵⁰² *Constitution Act* :sec. 9(3)(4) & (5).

⁵⁰³ Currie & De Waal 2005:244.

⁵⁰⁴ Currie & De Waal 2005:243.

⁵⁰⁵ Currie & De Waal: 2013:223.

⁵⁰⁶ Currie & De Waal 2005:246.

⁵⁰⁷ *Harksen v Lane NO* 1998 (1) SA 300 (CC): par. 53.

4.4.1 The Harksen Test

The *Harksen* case dealt with the constitutionality of certain provisions of the Insolvency Act 24 of 1936.⁵⁰⁸ In discussing the case reference is made to the equality clause as contained in Section 8 of the interim Constitution⁵⁰⁹ (hereafter the *interim Constitution*) and which subsequently became Section 9 in the Constitution. Mr. Harksen's estate was sequestrated in 1995 and he was married to Jeanette Harksen out of community of property at the time.⁵¹⁰ Mrs. Harksen, the Applicant in the case, challenged Sections 21, 64, and 65 of the *Insolvency Act* on the basis that they conflicted with the Bill of Rights as her property and affairs as a solvent spouse were affected by the sequestration of her spouse.⁵¹¹ Section 20 of the *Insolvency Act* allowed for the vesting of the estate of a solvent spouse living with an insolvent spouse in the Master of the High Court.⁵¹² Mrs. Harksen alleged that this provision of the Act breached her right to equality as it amounted to unequal treatment and discrimination against the solvent spouse.⁵¹³ She also alleged that it imposed unfair burdens on the solvent spouse as compared to other persons who were close to the insolvent through dealings or whose property the insolvent held in his possession.⁵¹⁴

The court set out the stages of an inquiry for the violation of the right to equality. Firstly, one must enquire whether the law or conduct in question differentiates between people or categories of people.⁵¹⁵ If it does differentiate between people or categories of people, then there must be a rational link between the differentiation and a legitimate governmental purpose that it was designed to achieve. If there is such a link then it does not fall foul of Section 8(1) of the *interim Constitution*.⁵¹⁶ If there is no rational connection between the differentiation and a legitimate governmental purpose, then it breaches Section 8(1) of the *interim Constitution* (now section 9(1) of the *Constitution*).⁵¹⁷

⁵⁰⁸ *Harksen v Lane NO* 1998 1 SA 300 (CC): par. 1.

⁵⁰⁹ *Constitution of the Republic of South Africa* 200/1993.

⁵¹⁰ *Harksen v Lane NO* 1998 1 SA 300 (CC) : par. 2.

⁵¹¹ *Harksen v Lane NO* 1998 1 SA 300 (CC) : par. 7.

⁵¹² *Ngcukaitobi et al* 2012:195.

⁵¹³ *Ngcukaitobi et al* 2012:195.

⁵¹⁴ *Ngcukaitobi et al* 2012:195.

⁵¹⁵ *Harksen v Lane NO* 1998 1 SA 300 (CC):par. 52.

⁵¹⁶ *Harksen v Lane NO* 1998 1 SA 300 (CC):par. 42.

⁵¹⁷ *Harksen v Lane NO* 1998 1 SA 300 (CC): par. 44.

If a rational connection can be established it is then necessary to determine whether the differentiation amounts to discrimination or unfair discrimination, despite the rationality.⁵¹⁸ In defining unfair discrimination Goldstone J⁵¹⁹ drew on Prinsloo's case where unfair discrimination was defined as 'treating persons differently in a way which impairs their fundamental dignity as human beings'.⁵²⁰

Discrimination can also occur on a ground that is not specified as a listed ground if it is based on characteristics that impair a person's dignity or exposes them to adverse treatment.⁵²¹ If it can be established that there was discrimination it is then necessary to determine whether the discrimination is 'unfair'. The following factors were suggested for consideration concerning whether the discrimination was unfair:

- a) The position that the complainant held in society, whether they have suffered from patterns of disadvantage in the past and whether the discrimination is based on a listed ground or not.⁵²²
- b) The nature of the provision and the purpose or power that is aimed to be achieved by it.⁵²³
- c) Any other relevant factors, the extent to which the discrimination has impacted the rights of the complainants, and whether it has impaired their dignity.⁵²⁴

When determining whether discrimination is unfair, it is necessary to question whether the dignity of a human being has been impacted. If discrimination has occurred in terms of one of the listed grounds, then the court will assume that such discrimination is unfair. The lawmaker or the party relying on the classification is responsible to rebut this assumption.⁵²⁵ If discrimination occurs on an analogous, rather than a listed ground, or where it impairs an individual's sense of dignity, then the unfairness is not presumed and the complainant bears the burden of proof to

⁵¹⁸ *Harksen v Lane* NO 1998 1 SA 300 (CC): par. 44.

⁵¹⁹ *Harksen v Lane* NO 1998 1 SA 300 (CC): par. 46.

⁵²⁰ *Prinsloo v Van Der Linde & Another* 1997 3 SA 1012 CC; 1997 6 BCLR 759 (CC).

⁵²¹ *Ngcukaitobi et al* 2012:197.

⁵²² *Harksen v Lane* NO 1998 1 SA 300 (CC):par. 51(a).

⁵²³ *Harksen v Lane* NO 1998 1 SA 300 (CC) par. 51(b).

⁵²⁴ *Harksen v Lane* NO 1998 1 SA 300 (CC):par. 51(c).

⁵²⁵ *Motala & Ramaphosa* 2002:269.

show that such discrimination is unfair.⁵²⁶ If the discrimination is found to be unfair then it will amount to a breach of Section 8(2) of the *interim Constitution* (now section 9(3) of the *Constitution*).

A final inquiry would involve determining whether the provision can be justified in terms of S33 of the *interim Constitution* (now known as Section 36 of the *Constitution*).⁵²⁷ De Wet has criticized the court for deciding that solvent spouses could not be seen as a vulnerable group that suffered discrimination and that the potential prejudice did not violate the spouse's fundamental dignity.⁵²⁸ She says that the judgment failed to justify the different treatment that the spouse received as compared to other people closely associated with the insolvent and who could also collude with creditors.⁵²⁹

Kruger also levels criticism against the Harksen test by stating that the test combines the analyses concerning Section 9(1) and Section 9(3), implying that both analyses can be used in all cases where the right to equality is in question. Her criticism also focused on placing dignity at the centre of the equality debate but stated that it failed to show how unfair discrimination affects the dignity of the complainant. Kruger suggests refining the Harksen test so that it can be used as a practical guide in litigation or adjudication regarding cases dealing with equality and unfair discrimination.⁵³⁰ She suggests that Section 9(1) and Section 9(3) be seen as representing different but related parts of the right to equality resulting in distinct analyses, that a more holistic two-stage approach be used in complaints of unfair discrimination, and that the dignity-centred approach be retained but refined, focusing on critical questions around inequality and indignities related to it.⁵³¹ Another case that dealt with discrimination and the right to equality is that of *City Council of Pretoria v Walker*. I discuss the facts and judgment in the case below.

⁵²⁶ Motala & Ramaphosa 2002:269.

⁵²⁷ *Harksen v Lane NO* 1998 1 SA 300 (CC):par. 52.

⁵²⁸ De Wet 1998:30.

⁵²⁹ De Wet 1998:30.

⁵³⁰ Kruger 2011:480.

⁵³¹ Kruger 2011:512.

4.4.2 *City Council of Pretoria v Walker*

In *City Council of Pretoria v Walker*⁵³² the court also had to decide whether the conduct of the city council amounted to unfair discrimination. The City Council of Pretoria had sued Mr. Walker for payment of arrear service charges. Mr. Walker, the respondent did not deny liability but he refused to make payment alleging that the council had violated his constitutional right to equality.⁵³³ His argument was based on the fact that the council had levied electricity and water charges on a differential basis in that the residents of Old Pretoria were charged for actual consumption measured by meters on each property while the residents of Mamelodi and Atteridgeville did not have meters installed and were charged a uniform rate by the city council.⁵³⁴

The respondent argued that the uniform rate charged to Mamelodi and Atteridgeville residents was lower than the metered rate charged to residents of Old Pretoria. He also argued that the differential rate continued even after meters were installed on some properties in Mamelodi and Atteridgeville.⁵³⁵ According to the respondent, only certain residents were sued for arrears in Old Pretoria and there was a policy of non-enforcement in Mamelodi and Atteridgeville. In essence, he argued that the actions of the city council amounted to unfair discrimination and a breach of his right to equality.⁵³⁶ Counsel for the respondent argued that there was no rational connection between the discriminatory measure and a legitimate governmental purpose. The applicant however contended that there was a legitimate governmental purpose in them trying to phase in changes that would bring about equality between residents in different areas.⁵³⁷

In deciding the case the court found that the council's conduct in choosing to enforce debt collection selectively amounted to unfair discrimination. The court, in its majority judgment stated that it was indirect discrimination as it was not the intention of the council to harm the respondent or the Pretoria residents.⁵³⁸ However, regarding the

⁵³² *City Council of Pretoria v Walker* 1998 2 SA 363 (CC).

⁵³³ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC):par. 1.

⁵³⁴ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC):par. 5.

⁵³⁵ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC):par. 6.

⁵³⁶ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC):par. 6.

⁵³⁷ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC):par. 27.

⁵³⁸ *City Council of Pretoria v Walker* 1998 2 SA 363(CC):par. 91.

issue of cross-subsidization, Judge Langa stated that cross-subsidization 'is an inevitable and unobjectionable aspect of modern life'.⁵³⁹ As the tariff of the municipality provided for subsidized rates and was in line with how electricity was supplied in South Africa, it did not amount to unfair discrimination.⁵⁴⁰ He also found that there was no evidence that the respondent had been affected adversely or materially by the flat rate in the tariff.⁵⁴¹ In his dissenting judgment, Justice Sachs disagreed with the part of the judgment that dealt with selective reinforcement of debt recovery by the Council.⁵⁴² He was of the view that the aim of selective debt recovery was not taken because the Pretoria residents were white. These measures did not adversely affect them or their sense of dignity or self-worth.⁵⁴³ If a council, in its aim to overcome patterns of disadvantage, uses differential treatment of its residents, this is justifiable.⁵⁴⁴ However, it is necessary to adopt a strategy that promotes substantive equality.⁵⁴⁵ Ngwena, in analysing the decision, notes that while disadvantage and vulnerability can be attributed to historical patterns they can also be encountered by people or groups who were not previously disadvantaged.⁵⁴⁶

4.4.3 *President of the Republic of South Africa & Another v Hugo*

In *President of the Republic of South Africa & Another v Hugo*,⁵⁴⁷ the respondent, Hugo was serving a prison sentence of 15 ½ years. He was a single parent with a minor child.⁵⁴⁸ In 1994 the President allowed for a remission of sentences for certain categories of prisoners.⁵⁴⁹ The remission only made provision for 'all mothers in prison on 10 May 1994, with minor children under the age of 12 years.' The respondent did not qualify simply because he was the father and not a mother.⁵⁵⁰ The respondent applied for an order declaring the President's conduct unconstitutional on the basis that it breached Section 8(1) & (2) of the *Constitution* as it discriminated against him

⁵³⁹ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC):par. 63.

⁵⁴⁰ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC):par. 64.

⁵⁴¹ *City Council of Pretoria v Walker* 1998 2 SA 363(CC):par. 65.

⁵⁴² *City Council of Pretoria v Walker* 1998 2 SA 363 (CC):par. 100.

⁵⁴³ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC):par. 132.

⁵⁴⁴ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC):par. 140.

⁵⁴⁵ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC):par. 140.

⁵⁴⁶ Ngwena 2010:356.

⁵⁴⁷ *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC).

⁵⁴⁸ *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC):par. 1.

⁵⁴⁹ *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC):par. 2.

⁵⁵⁰ *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC):par. 2.

based on sex or gender and indirectly against the minor child because his parent that was in prison was male and not female.⁵⁵¹ The court a quo found in the respondent's favour and the appellant appealed the decision.

In deciding the appeal, the court noted that because male prisoners outnumber females by fiftyfold, a release of all fathers would mean that many male prisoners would have been released. This would lead to a public outcry given the high crime levels in the country. The President therefore could not release fathers in the same manner as mothers.⁵⁵² This decision by the President did not prevent prisoners from making an individual application to the President for a remission of their sentence in light of special circumstances.⁵⁵³ The court found that the president exercised his discretion fairly and in line with the interim constitution.⁵⁵⁴ The conduct of the President did not amount to unfair discrimination on the grounds of sex or gender.⁵⁵⁵ Currie and De Waal in summarising the case, state that the actions by the President went towards accomplishing an important goal for society in that the remission of the sentences benefitted three vulnerable groups, namely, mothers of young children, the disabled, and young people. In the case of mothers of young children and the disabled, these were people who had suffered discrimination in the past while fathers could not be shown to have suffered past discrimination. Therefore, these considerations lent credence to the court's decision that the discrimination against fathers was not unfair.⁵⁵⁶

4.4.4 Discrimination on analogous grounds - *Larbi-Odam v MEC for Education (North West Province)*

Discrimination can also occur on a ground that is not specified as a listed ground if it is based on characteristics that impair a person's dignity or exposes them to adverse treatment.⁵⁵⁷ If it can be established that there was discrimination it is then necessary to determine whether the discrimination is 'unfair' The case of *Larbi-Odam v MEC for*

⁵⁵¹ *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC):par. 3.

⁵⁵² *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC):par. 46.

⁵⁵³ *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC):par. 47.

⁵⁵⁴ *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC):par. 52.

⁵⁵⁵ Ngcukaitobi *et al* 2012:170.

⁵⁵⁶ Currie & De Waal 2013:225.

⁵⁵⁷ Ngcukaitobi *et al* 2012:197.

*Education (North West Province)*⁵⁵⁸ dealt with a situation where the discrimination complaint related to citizenship which is not one of the listed grounds for discrimination. The facts of this case involved Regulation 2(2) of the Regulations regarding terms and conditions of employment of Education contained in Government Gazette 16814 GN1743 of 13 November 1995 and whether it was inconsistent with Section 8(2) of the Constitution and therefore invalid.⁵⁵⁹

The regulation related to educators and provided that only South African citizens could be appointed as an educator in a permanent capacity.⁵⁶⁰ The appellants who were non-national teachers were appointed as educators in temporary posts. These posts were subsequently advertised by the first respondent and the appellants were given notices of termination.⁵⁶¹ The appellants alleged that they were unfairly discriminated against as they were not eligible to be appointed in a permanent capacity.⁵⁶² The appellants were from Ghana, Swaziland, Zimbabwe, and Uganda. Some were permanent residents, and some were married to South Africans and had children born in South Africa. Some of the appellants had also been living in South Africa for more than 10 years.⁵⁶³ The court referred to the decisions and reasoning in *Harksen's* case as well as the *Prinsloo* and *Hugo* cases which have been mentioned or discussed earlier in this chapter.

Since the group that suffered a disadvantage were non-nationals, and as citizenship is not a listed ground for discrimination, the court had to determine whether differentiation on the ground of citizenship amounted to discrimination.⁵⁶⁴ The judge made the following observations:

- a) "Non-nationals represent a minority in all countries, and they do not possess much political strength or power."⁵⁶⁵ He quoted Wilson J in the Canadian

⁵⁵⁸ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC).

⁵⁵⁹ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 1.

⁵⁶⁰ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 2.

⁵⁶¹ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 3.

⁵⁶² *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 3.

⁵⁶³ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 4.

⁵⁶⁴ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 19.

⁵⁶⁵ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 19.

Supreme Court case of *Andrews v Law Society of British Columbia*⁵⁶⁶ who said that

Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending'.⁵⁶⁷

- b) "Citizenship is a personal characteristic which is challenging to change".⁵⁶⁸
- c) There were incidents of intimidation and threats against non-national teachers which were brought to the attention of the court.⁵⁶⁹

In arriving at a decision, the court found that differentiation against someone based on citizenship as contained in Regulation 2(2) had the potential to adversely affect the human dignity of non-nationals impacted by the regulation.⁵⁷⁰ Denying someone the right to security of tenure affects his ability to plan his life and build his family, career, and social relationships.⁵⁷¹ The regulations amounted to unfair discrimination against permanent residents as it excluded them from employment opportunities.⁵⁷² South African citizens and permanent residents should be viewed in the same manner in regard to reducing unemployment.⁵⁷³ The regulation was therefore found to be inconsistent with the *Constitution* and therefore invalid.⁵⁷⁴

De Wet was of the view that the court correctly found in favour of the non-national teachers but questioned their position had they not been regarded as a vulnerable group whose right to fundamental dignity had been violated.⁵⁷⁵ She felt that the courts adopted a restrictive or narrow interpretation of equality since only those who were seen to be vulnerable or whose dignity was impaired could succeed in a claim of unfair discrimination. De Wet recommended that the court needed to create what she referred to as 'artificial constructions of vulnerable groups or artificial connections

⁵⁶⁶ *Andrews v Law Society of British Columbia* 1989 56 DLR (4TH) 1 at 32.

⁵⁶⁷ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 19.

⁵⁶⁸ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 19.

⁵⁶⁹ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 20.

⁵⁷⁰ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 20.

⁵⁷¹ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 23.

⁵⁷² *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 25.

⁵⁷³ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 31.

⁵⁷⁴ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC):par. 49.

⁵⁷⁵ De Wet 1998:31.

between discriminatory measures and fundamental dignity of affected persons' so it could provide recourse to members of society.⁵⁷⁶

4.4.5 *Khoza v Minister of Social Development & others*

The decision in *Khoza v Minister of Social Development & others*⁵⁷⁷ where the applicants challenged the constitutionality of Section 3 (c) of the *Social Assistance Act 59 of 1996* which reserved social grants for aged South African citizens was also an important decision for non-nationals. The court in this case decided that the Bill of Rights is reserved for everyone and does not refer to 'citizens' only. It also highlighted unfair discrimination against non-nationals as being contrary to the spirit of the *Constitution*. What made Khoza's case unique in comparison to other Constitutional Court cases was that the issue of social security initiated by the State in terms of its obligation in terms of Section 27 of the *Constitution* became an equality issue. The scheme violated Section 9 of the *Constitution* by failing to allow permanent residents from other countries to have access to social grants.⁵⁷⁸ In his minority view, however, Ngcobo J believed that the state was justified in limiting social assistance to citizens only. The State had raised arguments around rising costs, reducing the incentive for non-nationals to immigrate to South Africa and to naturalize as well as the need for non-nationals to be self-sufficient.⁵⁷⁹ Ngcobo J saw citizenship as being part of an 'exclusive membership in a community' while the majority viewed citizenship as a 'lawful residence'.⁵⁸⁰

4.4.6 *Baloro v University of Bophuthatswana*

Another case that deals with the issue of discrimination based on citizenship or ethnic and social origin are *Baloro v University of Bophuthatswana*.⁵⁸¹ The four applicants were non-national academics from various countries employed at the University of Bophuthatswana. All applicants were married and had children.⁵⁸² The respondents were the university, its acting Vice Chancellor, and the university staff association.⁵⁸³

⁵⁷⁶ De Wet 1998:31.

⁵⁷⁷ *Khoza v Minister of Social Development* 2004 (6) SA 505 (CC).

⁵⁷⁸ Klaaren 2010:102.

⁵⁷⁹ Klaaren 2010:103.

⁵⁸⁰ Klaaren 2010:103.

⁵⁸¹ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B).

⁵⁸² *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 1-5.

⁵⁸³ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 6-8.

The applicants applied for promotion and alleged that their applications had been frustrated since they were non-nationals.⁵⁸⁴ In 1994 the applicants were requested to apply to renew their work and residence permits.⁵⁸⁵ In a written submission to the Department of Home Affairs, the university staff association alleged that the positions occupied by non-nationals were not widely advertised and that non-nationals did not go through a proper interview process.⁵⁸⁶

The association also alleged nepotism and an 'uncontrolled inflow' of non-nationals.⁵⁸⁷ They requested that the work and residence permits for secretarial and administrative posts not be renewed; that academic posts be advertised; and that no tenure should be awarded to non-national academics.⁵⁸⁸ They also requested that if a suitable citizen could not be found for these positions then non-nationals should be appointed on a contractual basis only.⁵⁸⁹ In response, the non-national employees formed a steering committee.⁵⁹⁰ In July of 1994, all academic members of staff had been invited to apply for promotion.⁵⁹¹ All of the applicants applied for promotion.⁵⁹² When the applicants were presented before the staffing committee the committee decided to place a moratorium on the applications of non-national staff.⁵⁹³ Nonetheless, the applications of South African staff members were addressed by the committee.⁵⁹⁴ The applicants alleged that they were unfairly discriminated against based on their nationality and origin.⁵⁹⁵ In response, the respondent denied that the applications of the applicants were frustrated and said that the applications depended on a decision by the council concerning policy. The decision was pending the establishment of a new council.⁵⁹⁶

⁵⁸⁴ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 10.

⁵⁸⁵ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 16.

⁵⁸⁶ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 19.

⁵⁸⁷ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 19.

⁵⁸⁸ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 19.

⁵⁸⁹ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 19.

⁵⁹⁰ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 21.

⁵⁹¹ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 25.

⁵⁹² *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 26.

⁵⁹³ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 31-32.

⁵⁹⁴ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 32.

⁵⁹⁵ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 33.

⁵⁹⁶ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 40.

The court had to decide

- a) Whether the applicants have a constitutional right not to be discriminated against based on their national origin.
- b) Whether they can be contractually protected against discrimination.
- c) Whether they had suffered prejudice and unfair discrimination.⁵⁹⁷

The applicant's case revolved around Section 8(2) of the *interim Constitution*.⁵⁹⁸ The respondents argued that the university is an independent body and has the right to decide on appointments and how it administers the affairs of the institution⁵⁹⁹ including promotions of ex-patriate academic staff.⁶⁰⁰

Friedman JP decided the case by stating that the moratorium on the promotion of non-national staff while promoting South African staff members was a gross violation of Section 8(2) of the *Constitution*.⁶⁰¹ The judge reasoned that the applicants had valid contracts of employment and they should not have been subjected to the moratorium while other staff members were promoted based on being South African citizens.⁶⁰² He also found that the applicants were discriminated against because they were not South Africans,⁶⁰³ and that criteria for appointment to staff should be on merit and suitability for the position and not based on national origin.⁶⁰⁴ If certain groups were identified for special treatment based on ethnic or national origin this would place academic freedom and the aims of the university at risk.⁶⁰⁵ The court ordered that Section 8 of the *Constitution* had been violated.⁶⁰⁶

⁵⁹⁷ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 58.

⁵⁹⁸ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 59.

⁵⁹⁹ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 66.

⁶⁰⁰ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 67.

⁶⁰¹ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 246.

⁶⁰² *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 246.

⁶⁰³ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 246.

⁶⁰⁴ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 247.

⁶⁰⁵ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 248.

⁶⁰⁶ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 248.

4.4.7 *Rafoneke and Another v Minister of Justice and Correctional Services and Others*⁶⁰⁷

This case involved applications by RC Rafoneke and Sefoboko Tsuinyane. It concerned the constitutionality of Section 24(2)(b) read with Section 115 of the *Legal Practice Act*.⁶⁰⁸ The matters were heard simultaneously. The facts of the matter are that the applicants were both citizens of Lesotho. They had obtained their LLB degrees at the University of the Free State, subsequently served articles of clerkship, and passed the practical attorneys examination.⁶⁰⁹ They applied to be admitted and enrolled as attorneys of the High Court. Their applications were denied on the basis that they were not South African citizens nor were they permanent residents.⁶¹⁰

Section 24 of the *Legal Practice Act* provides that a person may only be admitted and enrolled to practice as an attorney if he or she is a South African citizen or a permanent resident in the Republic.⁶¹¹

The Applicants argued that Section 24(2) and Section 115 of the Legal Practice Act breached their right to equality on the basis that it differentiates unfairly between South African citizens, permanent residents, and non-nationals. They alleged that there was no rational relationship between the differentiation and a legitimate governmental purpose.⁶¹² Further, if such a relationship did exist, it would still result in unfair discrimination against them.⁶¹³ The applicants also alleged that Section 115 was discriminatory as it allowed legal practitioners from designated countries to be admitted as attorneys in South Africa without being citizens or permanent residents. Even though they had obtained their qualifications in South Africa they were not

⁶⁰⁷ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021.

⁶⁰⁸ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 1.

⁶⁰⁹ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 6.

⁶¹⁰ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 6.

⁶¹¹ *Legal Practice Act* 28 of 2014:sec. 24(2).

⁶¹² *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 23.

⁶¹³ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 23.

allowed the same treatment.⁶¹⁴ In their argument, they submitted that the differentiation was 'arbitrary and irrational' and that the sections of the Act unfairly discriminated against them based on their social origin and nationality.⁶¹⁵

The 1st, 4th and 5th respondents argued that there is a rational relationship between the differentiation and a legitimate governmental purpose.⁶¹⁶ The respondents based their argument on provisions of the *Immigration Act 13 of 2002* and the *Employment Services Act 4 of 2014*.⁶¹⁷ The judge also mentioned Section 22 of the *Constitution* which reserves the right to choose a trade, occupation, or profession for citizens only.⁶¹⁸ The judge commented that the provisions of the *Legal Practice Act*, *Immigration Act*, and *Employment Services Act* indicate the government's position that work that does not involve a scarce skill should be reserved for South African citizens or permanent residents. The legal profession was not regarded as a scarce skill.⁶¹⁹

The court found that there was a rational nexus between the prohibition in Section 24(2)(b) and the objective of government.⁶²⁰ The issue in question was whether a person who came into South Africa on a study visa could be allowed to bypass immigration and other legal hurdles.⁶²¹ The court however stated that the applicants could work in the country as non-practicing legal practitioners. The court felt that this would allow them the opportunity to work.⁶²² As regards the element of discrimination based on social origin or nationality, the court found that the section in the *Legal Practice Act* is founded on the characteristics that have the potential to breach the

⁶¹⁴ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 24.

⁶¹⁵ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 25.

⁶¹⁶ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 26.

⁶¹⁷ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 32.

⁶¹⁸ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 34.

⁶¹⁹ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 48.

⁶²⁰ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 49.

⁶²¹ *Rafoneke and Another v Minister of Justice and Correctional Services and Others*: (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 62.

⁶²² *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 89.

human dignity of non-citizens and that the applicants had established discrimination based on nationality.⁶²³

As to whether the discrimination was unfair, the judge referred to *Hugo's* case and accepted that the refusal to admit them to practice resulted in hardship and affected their professional development.⁶²⁴ The judge however took cognizance of the reality of the unemployment situation in South Africa and the government's attempts to remedy this.⁶²⁵ The court again referred to Section 22 of the *Constitution* and the court found the discrimination to be fair but said that Section 24(2) was inconsistent with the *Constitution* as it did not allow citizens to be allowed to be admitted as non-practicing legal practitioners.⁶²⁶

The court ordered that the legislative defect be cured and said that the interim relief would help non-citizens but would not prejudice the policy of the government or those practicing legal professionals.⁶²⁷ In passing judgment the court reasoned that:

Admitting and authorizing the enrolment of such a person would be tantamount to changing such a person's status from student to worker without the intervention of the Department of Home Affairs. The court would then be part of a process that short circuits a legal process. That cannot be right.⁶²⁸

In analysing the court's judgment Cassette et al disagreed with the judgment on the basis that it did not consider the applicant's argument that the court was persuaded by the Ministers submission that the applicants were trying to bypass immigration and employment legislation, but it did not consider that this confused the issue of employment with admission. Once a non-national was admitted as a legal practitioner,

⁶²³ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 101.

⁶²⁴ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 103.

⁶²⁵ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 103.

⁶²⁶ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 115.

⁶²⁷ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 116.

⁶²⁸ *Rafoneke and Another v Minister of Justice and Correctional Services and Others* (FB) (unreported) case numbers.3609/2020 and 4065/2020 of 16 September 2021:par. 107.

he would still need to meet the requirements of employment and immigration law.⁶²⁹ They were also of the view that the court failed to acknowledge the impact of not allowing the non-nationals who had studied for many years in South Africa and lived in the country for a long period to practice law. There was also no rational basis for the position where non-nationals could use university resources and take up positions of articles of clerkship and pupillage when at the end of this period, they are not allowed to practice their profession.⁶³⁰ The matter was subsequently taken to the Constitutional court and on 24 February 2022, the court heard argument on the constitutionality of Section 24(2) of the *Legal Practice Act*.⁶³¹ Since the initial hearing of the Rafoneke case, there has also been another matter brought by three Zimbabwean nationals who challenged the same provision of the *Legal Practice Act* in the Constitutional court. The Court has reserved judgment in this case.⁶³²

The discussion of the above cases illustrates that non-nationals have experienced discrimination based on citizenship. It has also highlighted how the courts have decided these cases and exposed the vulnerability of those who are not South African citizens. In seeking to attain an 'indigenous jurisprudence of equality', the Constitutional Court highlights that to achieve the goal of an equal society we need to think about 'difference' differently.⁶³³ The differences among human beings must be viewed using a different approach or mindset.⁶³⁴ Ngwena & Pretorius speak of recognizing 'inclusive citizenship' as well as the need to include rather than exclude others based on their differences and the fact that they do not necessarily meet

⁶²⁹ Cassette *et al* "Pro Bono & Human Rights Alert So close yet so far: An analysis of Rafoneke v Minister of Justice and the issue of admitting foreigners into the legal profession",4 <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2021/Probono/Downloads/Pro-Bono-Human-Rights-Alert-1-October-2021.pdf> (accessed on 26 July 2022).

⁶³⁰ Cassette *et al* "Pro Bono & Human Rights Alert So close yet so far: An analysis of Rafoneke v Minister of Justice and the issue of admitting foreigners into the legal profession",5 <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2021/Probono/Downloads/Pro-Bono-Human-Rights-Alert-1-October-2021.pdf> (accessed on 26 July 2022).

⁶³¹ Dera "Exclusion of foreign nationals from legal profession goes to court", <https://www.wits.ac.za/news/sources/cals-news/2022/exclusion-of-foreign-nationals-from-legal-profession-goes-to-constitutional-court.html> (accessed on 27 July 2022).

⁶³² South African Lawyer "Should foreigners be allowed to practice law?" www.southafricanlawyer.co.za/artcile/2022/04/should-foreigner-be-allowed-to-practice-law/ (accessed on 26 July 2022).

⁶³³ Ngwena & Pretorius 2012:83.

⁶³⁴ Ngwena & Pretorius 2012:83.

societal norms.⁶³⁵ What must be achieved is a lived equality rather than an abstract sense of equality.⁶³⁶

Having examined some of the cases which have dealt with the rights to equality concerning non-nationals, I now focus on a discussion of the various types of equality and the discussion surrounding the approach of the courts to these notions of equality. I specifically focus the discussion on formal equality, substantive equality, and transformative substantive equality.

4.5 FORMAL AND SUBSTANTIVE EQUALITY

The right to equality may be entrenched in our law but disadvantage is still experienced by vulnerable groups such as women, ethnic minorities, and people with disabilities.⁶³⁷ Different notions of equality exist, and these are interrelated and interwoven with each other.⁶³⁸ The concept of equality is difficult to understand and is sometimes controversial.⁶³⁹ For example, should all people in similar situations be treated in the same manner? On the other hand, is it justifiable to treat one group differently from the other, while still being able to justify such different treatment based on Section 9 of the *Constitution*?⁶⁴⁰

Currie & De Waal answer these questions by suggesting that one needs to be able to differentiate between the notions of formal and substantive equality.⁶⁴¹ They proceed to define formal equality as “sameness of treatment: the law must treat individuals in like circumstances alike” while substantive equality “requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal”.⁶⁴² Substantive equality seeks to affirm difference whereas formal equality uses difference as a basis for exclusion.⁶⁴³ Interpreting formal equality would therefore imply that the same rights and freedoms must be accorded to all persons using the same norm or

⁶³⁵ Ngwena & Pretorius 2012:83.

⁶³⁶ Ngwena & Pretorius 2012:83.

⁶³⁷ Fredman 2016:713.

⁶³⁸ Janse Van Rensburg 2010:180.

⁶³⁹ Currie & De Waal 2005:230.

⁶⁴⁰ Currie & De Waal 2005:231.

⁶⁴¹ Currie & De Waal 2005:232.

⁶⁴² Currie & De Waal 2005:232-233.

⁶⁴³ Janse Van Rensburg 2010:184.

standard or measurement.⁶⁴⁴ Formal equality, unlike substantive equality, does not take into account the social or economic discrepancies between groups of people in society.⁶⁴⁵ Formal equality premises that all people should be treated in an identical manner, which in Devenish's view is too simplistic and has the effect of compounding prevailing inequalities in South African society.⁶⁴⁶ Bonthuys & Albertyn premise that formal equality presumes everyone to be equal and that subjecting people to different treatment on any of the listed grounds in the *Constitution* is irrational. The formal equality approach cannot see differences as promoting equality in any way and views it as discrimination, for example, affirmative action and maternity benefits.⁶⁴⁷ The authors conclude that formal equality can therefore best be described as 'the abstract prescription of equal treatment for all persons regardless of their circumstances.'⁶⁴⁸ They provide that real equality requires remedial action and promote substantive equality on the basis that it is inclusive and helps the vulnerable and those who have been disadvantaged.⁶⁴⁹

Substantive equality examines whether there is equality after taking into account the socio-economic circumstances of the affected persons.⁶⁵⁰ Substantive equality recognizes the current injustices as a result of discrimination and that those who were previously disadvantaged can be given preferential treatment in certain instances for equality to be achieved in South Africa.⁶⁵¹ This may necessitate a practice whereby a distinction is drawn between groups and individuals to cater for their specific needs. Substantive equality aims to eliminate systemic inequalities by recognizing the effect that structural inequality has on fuelling the disadvantage and marginalization suffered by certain groups of people in our society. We need to recognize differences and affirm these differences such as socio-cultural and biological differences in a way that serves to ensure that they do not lead to the stigmatization or marginalization of certain groups but rather empower such groups to become equal citizens in society.⁶⁵² Substantive

⁶⁴⁴ Currie & De Waal 2005:233.

⁶⁴⁵ Currie & De Waal 2005:233.

⁶⁴⁶ Devenish 1999:39.

⁶⁴⁷ Bonthuys & Albertyn 2007:87.

⁶⁴⁸ Bonthuys & Albertyn 2007:88.

⁶⁴⁹ Bonthuys & Albertyn 2007:90-91.

⁶⁵⁰ Currie & De Waal 2005:233.

⁶⁵¹ Devenish 1999:39.

⁶⁵² Ngwena & Pretorius 2012:84-85.

equality also seeks to address social, economic, and political exclusion.⁶⁵³ This would apply to non-national academics who can be seen as members of the outgroup and therefore face exclusion and xenophobia. Individuals are by nature social beings and alienating them from social life is dehumanizing.⁶⁵⁴ There is a need to address the challenges that come with being a member of the outgroup as this is a critical purpose of equality. Allowing for inclusion will go towards overcoming discrimination and inequality.⁶⁵⁵ The concept of substantive equality has been developed by the court and has four characteristics that have been endorsed by the court to allow for transformation. These characteristics are:

- a) an emphasis on understanding inequality within its social and historic context;
- b) a primary concern with the impact of the alleged inequality on the complainant;
- c) recognition of difference as a positive feature of society; and
- d) attention to the purpose of the right and its underlying values in a manner that evinces a direct or indirect concern with remedying systemic subordination or disadvantage.⁶⁵⁶

Albertyn & Fredman argue that there should be a multi-dimensional approach to equality and takes other facets into account such as redressing stigma, and socio-economic disadvantage and accommodating difference through structural change.⁶⁵⁷ Albertyn & Fredman suggest a four-part framework to better explore and understand equality. This framework consists of addressing stigma and prejudice, stereotyping and violence, facilitating participation, valuing, and accommodating difference through structural change; and redressing socio-economic disadvantages.⁶⁵⁸ This approach is not an attempt at a definition but a framework to be used to assess and help in changing policies and practices to attain substantive equality. However, MacKinnon has challenged this framework and stated that substantive equality should not be

⁶⁵³ Albertyn & Fredman 2015:438.

⁶⁵⁴ Albertyn & Fredman 2015: 439.

⁶⁵⁵ Albertyn & Fredman 2015:439.

⁶⁵⁶ Albertyn 2007:258.

⁶⁵⁷ Albertyn & Fredman 2015:431.

⁶⁵⁸ Albertyn & Fredman 2015:432.

identified as a principle and the social hierarchy is its identifying principle.⁶⁵⁹ In her view, MacKinnon posits that the first part of the framework (redressing disadvantage) does not provide guidelines or instructions; that the second part of the framework (countering prejudice, and stigma...) is a list of types of social disadvantage and not a separate dimension. She goes on to state that Fredman should 'enhance voice and participation as against exclusion'.⁶⁶⁰ MacKinnon views the last approach (accommodating difference and achieving structural change) as needing a guide, failing which it could be seen as an excuse for 'special treatment'.⁶⁶¹

Fredman is of the view that formal equality as a notion has failed to adequately address issues of social disadvantage. The writer suggests the notion of substantive equality as an alternative concept that calls upon the state to act in promoting equality.⁶⁶² She suggests that substantive equality involves a duty to provide and identifies two objectives namely equality of opportunity and equality of results.⁶⁶³

Equality of opportunity involves removing obstacles and taking positive measures to ensure access by all persons to social opportunities.⁶⁶⁴ Equality of results also requires positive provision and enlarging of resources for all instead of simply distributing existing resources until they are finished.⁶⁶⁵ Positive duties do not merely involve giving compensation to victims of discrimination. It also requires planning for the re-organization or re-structuring of institutions to promote change and address inequality.⁶⁶⁶ Janse Van Rensburg states that according to Albertyn & Goldblatt, the *Van Heerden* case was the first to recognize the link between the right to equality and the value of the right to equality; ie that it involves positive action to remedy material inequality through a redistribution of economic resources.⁶⁶⁷ Decisions on how to prioritize resource allocation have to be made from the angle of politics and not law and decisions have to be made by policymakers and not the courts.⁶⁶⁸ However one has to also take cognizance of the fact that those who suffer discrimination often do

⁶⁵⁹ MacKinnon 2016:740.

⁶⁶⁰ MacKinnon 2016:740.

⁶⁶¹ MacKinnon 2016:741.

⁶⁶² Fredman 2005:163.

⁶⁶³ Fredman 2005:167.

⁶⁶⁴ Fredman 2005:167.

⁶⁶⁵ Fredman 2005:167.

⁶⁶⁶ Fredman 2005:168.

⁶⁶⁷ Janse Van Rensburg 2010:199.

⁶⁶⁸ Fredman 2005:168.

not have access to politicians and political means, such as minorities which would include non-national academics.⁶⁶⁹ Judges make decisions in court but do not have the power to effect change. It is the State which is the elected decision-maker, and which has the power to allocate resources to make a difference.⁶⁷⁰

Albertyn is of the view that although the *Constitution* entrenches the values of dignity, equality, and freedom within its provisions, equality and freedom have not been adequately developed by the Constitutional Court. She suggests a more transformative vision of substantive equality which would involve a 'real equality' and 'not just equality as a right or theory.'⁶⁷¹ To achieve transformation and equality, it will be necessary to endure unequal treatment.⁶⁷² The right to equality does not simply mean that all people should be treated alike in all circumstances. In fact, substantive equality requires one to recognize the difference and act accordingly.⁶⁷³ The writers propose that there is a need to address the social, economic, and political factors which incubate exclusion of the out-group. They believe that doing this will promote equality, which will thus help to further the dimension of substantive equality and overcome discrimination and inequality.⁶⁷⁴

4.6 TRANSFORMATIVE SUBSTANTIVE EQUALITY

Ackermann regarded substantive equality as "an imprecise and contested expression in the *Constitution*". He expressed the view that the court favours remedial or restitutionary equality.⁶⁷⁵ Albertyn agrees that substantive equality is a contested subject.⁶⁷⁶ In writing about equality Albertyn & Fredman state that:

exclusion can be viewed more broadly as the social and economic exclusion of persons based on their group membership. This aspect of substantive equality recognizes that individuals are essentially social, and marginalization from social life is particularly dehumanizing.⁶⁷⁷

⁶⁶⁹ Fredman 2005:168.

⁶⁷⁰ Fredman 2005:164.

⁶⁷¹ Albertyn 2018:460.

⁶⁷² Currie & De Waal 2013:214.

⁶⁷³ Devenish 1999:43.

⁶⁷⁴ Albertyn & Fredman 2015:439.

⁶⁷⁵ Ackerman 2006:605.

⁶⁷⁶ Albertyn 2018:443.

⁶⁷⁷ Albertyn & Fredman 2015:439.

The value of substantive equality has more recently evolved in equality cases to incorporate positive measures and a restitutionary equality.⁶⁷⁸ According to the Constitutional court, the idea of restitutionary equality is recognized through section 9(2) of the *Constitution* which speaks of 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'.⁶⁷⁹ The South African version of substantive equality places a strong emphasis on transformative, remedial, redistributive, and restitutionary equality.⁶⁸⁰

Janse Van Rensburg states that:

Transformative substantive equality is the element that supports the ongoing transformation process, and thereby eventually realise the society envisaged in the Constitution. Remedial substantive equality foresees measures to remedy the past injustice and inequality of status and systemic indignity. Substantive equality as a vehicle to drive redistribution and restitution seeks to remedy economic injustice and disadvantage. The achievement of equality ideally hopes to fulfill the South African Constitution's vision of a society based on social justice.⁶⁸¹

As highlighted earlier in the chapter, Ngwena cautions against viewing disadvantage and vulnerability in terms of our historical context. He summarises his views on this and remedial substantive equality by stating:

In short, while history ought to be an invaluable guide when thinking about remedial substantive equality it should at the same time not become a blunderbuss that is inherently incapable of netting new categories of disadvantage and vulnerability for the reason that it is tied to the logic of prior recognition.⁶⁸²

Judges and lawyers must take into consideration the fact that transformative substantive equality requires an understanding of inequality as it occurs within a context that is made up of complex social, legal, and political conditions. These conditions must be examined with reference to substantive arrangements that dictate the position of a group within the socio-economic context as well as the relationship

⁶⁷⁸ Janse Van Rensburg 2010:199.

⁶⁷⁹ Currie & De Waal 2013:214.

⁶⁸⁰ Janse Van Rensburg 2010:199.

⁶⁸¹ Janse Van Rensburg 2010:200.

⁶⁸² Ngwena 2010:357.

dynamics between the stronger group and less powerful groups.⁶⁸³ Concerning non-national academics this may entail an examination of the inequality that is experienced by non-national academics within the employment as well as the social context of the higher education environment; how non-national academics are positioned as a group within the university; whether they are regarded as a vulnerable or less powerful group; and how their experience of xenophobia is linked to these factors.

Therefore, transformative substantive equality requires an understanding of the complex intersectional, structural, and relational inequalities which are complex and relate to matters such as patriarchy, racism, capitalism, and hetero-normativity.⁶⁸⁴ Albertyn agreed with Fredman's approach of dealing with inequality through competing and complementary principles as a transparent way in which to render flexibility across the varying aspects of inequality. However, Albertyn did not believe that disadvantage can be limited to four principles but should rather be seen as intersectional to achieve a fair outcome.⁶⁸⁵ To achieve transformative equality within the context of the South African Constitution it is necessary to develop principles that encapsulate constitutional values of dignity, redistribution, participation, and freedom.⁶⁸⁶

Albertyn is of the view that equality is often open to different interpretations and is subject to political, economic, and legal debate.⁶⁸⁷ She suggests that a model of equality called the socio-democratic/liberal egalitarian model of substantive equality emerged in the early days of democracy. This model was based on 'sufficiency' initially as it emerged from the prevailing political and legal ideas at the time and it framed redistributive policies that addressed welfare benefits, social needs, and affirmative action in the employment context.⁶⁸⁸ It also found its way into the courts and jurisprudence where, although it was 'inclusive', it was not necessarily 'transformative'.⁶⁸⁹ It addressed the inequalities but did not address redistribution.⁶⁹⁰

⁶⁸³ Albertyn 2018:464.

⁶⁸⁴ Albertyn 2018:465.

⁶⁸⁵ Albertyn 2018:466.

⁶⁸⁶ Albertyn 2018:466.

⁶⁸⁷ Albertyn 2018:442.

⁶⁸⁸ Albertyn 2018:442.

⁶⁸⁹ Albertyn 2018:442.

⁶⁹⁰ Albertyn 2018:442.

In examining South Africa's history of equality, one finds cases involving equality in the 20th century were fought based on administrative law principles ie. whether the law permitted classification based on race.⁶⁹¹ It was very rare to find judgments that looked at whether differentiation based on race was unreasonable or immoral.⁶⁹² In the society of that time, even formal equality was a big ask. With the new *Constitution* there emerged new thinking on equality with reference to external sources and new case law on substantive equality which was a response to formal equality which was being viewed as being too limited in other jurisdictions.

Albertyn's view is that the *Constitution* has not relied on formal equality in judicial interpretation of constitutional writings. According to her the court has approached equality by developing a substantive equality which she says can best be described as liberal egalitarian.⁶⁹³ The liberal egalitarian approach places dignity at the centre of its inquiry into equality. It is tied to the idea that everyone has equal worth and the right to equal concern and respect.⁶⁹⁴ This thinking is in line with Ronald Dworkin's view on substantive equality which focuses on the right to be treated as an equal with equal concern and respect and not the right to equal treatment.⁶⁹⁵ This provides authority for outsider groups who are defined by gender, nationality, sexual orientation, and race.

Although this led to the courts enforcing inclusion, extended rights, and even material remedies for those disadvantaged it did not address the changing of the status quo and the eradication of prevailing norms.⁶⁹⁶ Cases such as *Government of RSA v Grootboom* put forward the view that basic needs such as housing should be provided for in addition to the right to dignity, equality, and freedom.⁶⁹⁷ In essence, the goal was to ensure a minimum standard of provision to ensure dignity for the poor.⁶⁹⁸ In socio-economic jurisprudence, the notion of equal concern and respect is not linked to the

⁶⁹¹ Albertyn 2018:456.

⁶⁹² Albertyn 2018:456.

⁶⁹³ Albertyn 2018:456.

⁶⁹⁴ Albertyn 2018:457.

⁶⁹⁵ Albertyn 2018:457.

⁶⁹⁶ Albertyn 2018:457.

⁶⁹⁷ *Government of the Republic of South Africa & Others v Grootboom & Others* (CCT11/00) [2000] ZACC 19; 2001(1) SA 46; 2000(11) BCLR 1169 (4 October 2000).

⁶⁹⁸ Albertyn 2018:457.

provision of goods and better conditions for the poor, but rather to a process that is fair and reasonable and provides for government accountability and citizen involvement in achieving the desired outcome.⁶⁹⁹ Albertyn describes this as a jurisprudence that was 'powerfully inclusive' but not always 'transformative'.⁷⁰⁰

Due to the existence of serious systemic socio-economic inequalities that persist there is therefore a need to find a transformative means of addressing equality.⁷⁰¹ Albertyn argues for an understanding of equality that relates to more than ensuring inclusion and provision of basic needs, one which is transformative in the sense that it motivates systemic justice and comprehensive reform.⁷⁰² She also suggests that the idea of equality might be developed further by developing the idea of the 'equality of condition' which entails changing social structures and their norms that perpetuate inequality.⁷⁰³ Conditions must be introduced which seek to advance choices and opportunities available to individuals such as those related to work, education, and healthcare for instance.⁷⁰⁴ It speaks to addressing the challenges with systems, processes, and structures that breed inequality.⁷⁰⁵ Albertyn concludes by saying that remedying inequality requires that there is an understanding of the need to eradicate structural disadvantage in a manner that guarantees freedom and does not cause people to become trapped in systems of dependence, patronage, or protection.⁷⁰⁶

In developing a substantive egalitarian notion of equality, the court has used various resources such as the ideas developed by political and women's groups, legal scholarship on liberal egalitarianism, and Canadian jurisprudence. The writer states that substantive equality law is

the recognition that equality is not a formal requirement of equal treatment that equates differential treatment to irrational discrimination Rather it is a concern with the actual impact or

⁶⁹⁹ Albertyn 2018:457.

⁷⁰⁰ Albertyn 2018:459.

⁷⁰¹ Albertyn 2018:459.

⁷⁰² Albertyn 2018:460.

⁷⁰³ Albertyn 2018:461.

⁷⁰⁴ Albertyn 2018:462.

⁷⁰⁵ Albertyn 2018:462.

⁷⁰⁶ Albertyn 2018:468.

results of social and legal classifications the problem is not differentiation, per se but the systemic harm that might flow from it.⁷⁰⁷

Constitutional values guide the inquiry as to whether differentiation is harmful in a 'constitutional' sense.⁷⁰⁸ Substantive equality relates to an inquiry into the context, the values aimed at, and the remedies needed to overcome the gap between inequality and the intended result.⁷⁰⁹ Davis questions whether the *Constitution* has promoted the development of all who live in South Africa or whether it has impeded development.⁷¹⁰ Delport is harsher in his view and raises the fact that many people in South Africa still live in conditions that do not guarantee them material ability and formal participation.⁷¹¹ This indicates that the *Constitution* has not guaranteed the development of people in community life. Delport goes further to state that the fact that living conditions have not materially improved shows that the *Constitution* has not addressed these conditions from a substantive perspective.⁷¹²

Having examined the various types of equality and the nature of these notions of equality, in the next section I discuss the approach to equality that best aligns with the challenges faced by non-national academics concerning xenophobia as a form of discrimination and a breach of their right to equality.

4.7 BEST APPROACH TO EQUALITY FOR NON-NATIONAL ACADEMICS

Currie & De Waal state that equality 'is a difficult and deeply controversial social ideal'.⁷¹³ Contrary to the early days of South African democratic rule the issue of equality is linked to more than just issues of race.⁷¹⁴ The cases discussed in this chapter reflect that non-nationals including non-national academics have been discriminated against based on nationality as set out in *Baloro v University Bophuthatswana*, *Khoza v Minister of Social Development*, and *Rafoneke v Minister of Justice & Correctional Services*.

⁷⁰⁷ Albertyn 2018:456.

⁷⁰⁸ Albertyn 2018:457.

⁷⁰⁹ Albertyn 2018:457.

⁷¹⁰ Davis 2018:360.

⁷¹¹ Davis 2018:364.

⁷¹² Davis 2018:364.

⁷¹³ Currie & De Waal 2013:210.

⁷¹⁴ Currie & De Waal 2013:212.

The purpose of this chapter is to identify the approach to equality that should be used when assessing the legislation and policy concerning protection against xenophobia for non-national academics. Currie & De Waal state that a part of the commitment to equality entails recognizing the changing nature or patterns of equality. In chapter 3 I examine the nature of xenophobia against non-national academics to reveal that xenophobia in higher education institutions manifests in covert and symbolic ways rather than in overt violence. It is also institutional where it is perpetuated through practices that foster xenophobic treatment or behaviour. This finding is in keeping with the statement that xenophobia can change depending on the context in which it occurs.

Most of the cases discussed in this chapter involved discrimination against non-nationals. The guidelines set out in the *Harksen* case can be applied contextually to the issue of unfair discrimination against non-nationals by taking note of the following:

- a) Non-nationals have a right to equality and dignity which is provided for in the *Constitution*.
- b) Non-nationals have a right not to be discriminated against either on listed or analogous grounds.
- c) The cases discussed reveal that non-nationals have been discriminated against based on nationality or citizenship, in some cases in the higher education space.
- d) Nationality or citizenship, while not a listed ground in the Constitution is recognized in *Larbi v Odam* as an analogous ground for discrimination as it has the potential to impair the dignity of non-nationals.
- e) In determining whether the discrimination is unfair, the cases illustrate the negative impact that the denial of employment, social rights, and other rights have on the lives of non-nationals.
- f) There is a need to recognize, and address systemic disadvantages experienced by non-national academics.

While the State and other parties argue that there is a rational connection between the differentiation and a legitimate governmental purpose, one must question the

'legitimacy' of the government purpose. This is more so given the proposed amendments to existing laws and proposed bills before parliament which seek to further curtail the employment opportunities available to non-nationals together with the proposed introduction of quota systems which seems to aim for the greater good of society by reserving jobs and resources for South African citizens. This begs the question of whether history is not repeating itself as in the days of apartheid where laws were passed under the guise of protecting the minority or fulfilling a political agenda or motive.

That said, however, regard must also be had to the fact that differentiation does not always amount to unequal treatment.⁷¹⁵ Government must ensure the protection of all who live in South Africa, whether citizen or non-citizen. One could argue that in discriminating against non-nationals in the above cases, the government was trying to achieve a societal goal of protecting the rights of citizens to work. In *Hugo's* case mothers of young children, disabled prisoners, and young people were seen as vulnerable groups whose rights needed to be protected. Non-nationals can also be seen as vulnerable even though they were not regarded as being historically disadvantaged. Is there a justification to discriminate against non-nationals who can prove that a denial of the right to equality results in hardship for them? Added to this is the fact that in many instances the option to return to their country of origin is also fraught with challenges. Further, some have lived in South Africa for many years and regard South Africa as home.

In *Baloro's* case, the university association mentioned the 'uncontrolled flow' of non-nationals and the fact that they were not in favour of the renewal of permits for certain posts, going so far as to suggest that non-national staff only be appointed on a contractual basis if a suitable South African candidate could not be found to fill a position.⁷¹⁶ The court found that the applicants experienced discrimination because they were not South Africans.⁷¹⁷ The court also found that the appointments should be on merit and suitability instead of nationality.⁷¹⁸ However legislative provisions such

⁷¹⁵ Currie & De Waal 2013:218.

⁷¹⁶ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 19.

⁷¹⁷ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 246.

⁷¹⁸ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B):par. 246.

as those relating to affirmative action in the *Employment Equity Act*⁷¹⁹ and critical skills in the *Employment Services Act*⁷²⁰ do not allow the employer the freedom to appoint non-nationals based on merit and suitability.

There is therefore a disjuncture between the formal laws and the real-life experiences of non-nationals in South Africa. Although there is a legislative framework and judicial precedent which protects the rights of non-nationals, this exists within a public space that is still fraught with xenophobia and a state administration that does not recognize legal rules and precedent, rendering non-nationals vulnerable to arrest, detention, and deportation.⁷²¹

The rights of non-nationals are also affected by cultural, structural, and political factors which deny them proper legal protection and access to democratic accountability.⁷²² In other words, the rights of non-nationals are treated with less seriousness and regard than that which is required from a constitutional democracy.⁷²³ Bearing this disjuncture in mind, the question that arises is whether dignity can allow a place for non-nationals and in particular non-national academics to be treated with equal respect and concern.⁷²⁴ Is it not the case that perhaps the rights of non-nationals are a watered down version of the rights of citizens and which denies them real membership within a community? Botha refers to non-nationals as only having a 'bare humanity' to rely on.⁷²⁵ Botha discusses certain cases which have dealt with the rights of non-nationals and which protect their rights to be free from abuse of power by the state and free of degradation and indignity.⁷²⁶ However, in making this point he echoes Arendt's question as to whether non-nationals due to being denied membership in a political community, may also be denied a place in a world where they can conquer subordination.⁷²⁷

⁷¹⁹ *Employment Equity Act* 55/1998.

⁷²⁰ *Employment Services Act* 4/2014.

⁷²¹ Botha 2013:845.

⁷²² Botha 2013:846.

⁷²³ Botha 2013:846.

⁷²⁴ Botha 2013:856.

⁷²⁵ Botha 2013:856.

⁷²⁶ Botha 2013:858.

⁷²⁷ Botha 2013:858.

As highlighted above and in Chapter 3 of this thesis, xenophobia against non-nationals in the academic environment takes place in covert, institutional and symbolic ways.⁷²⁸ Having regard to the discussion above on dignity and equality, it is evident that both are relevant and crucial to the protection of the rights of non-national academics. As highlighted in previous chapters, xenophobia is a form of unfair discrimination based on nationality which affects migrants.⁷²⁹ In this chapter I illustrate that this type of unfair discrimination is a breach of the non-national academic's right to equality and dignity. At face value the non-national academic will benefit from the notions of both formal and substantive equality. Since formal equality allows for the same rights and freedoms to be accorded to all people this should mean that non-nationals are treated in the same manner as citizens. However, the challenge with formal equality is that it does not promote remedial action as rights do not necessarily mean redress, which was recommended by Bonthuys and Albertyn.⁷³⁰

Substantive equality on the other hand recognizes that systemic inequalities promote marginalization of vulnerable groups and that these groups need to be empowered rather than marginalized.⁷³¹ Non-national academics would benefit from this view of substantive equality as they experience marginalization due to being members of an outgroup. Allowing them to be included would help to overcome inequality and discrimination against this group.⁷³² Fredman argued that substantive equality involves a duty to provide equality of opportunity as well as an equality of results.⁷³³ Providing non-national academics with the same rights as South African citizens would not always result in the opportunity to also offer redress or results for example providing non-nationals with access to the same health care rights does not necessarily guarantee that they receive treatment at hospitals due to the issues I outline in Chapter 5 of this thesis.⁷³⁴ Providing non-national academics with the same right to employment opportunities would not necessarily help if such academic institutions maintain a policy to only employ non-national academics on fixed term

⁷²⁸ See section 3.4.2.

⁷²⁹ See section 2.2.

⁷³⁰ Bonthuys & Albertyn 2007:90-91.

⁷³¹ Ngwena & Pretorius 2012:84-85.

⁷³² Albertyn & Fredman 2015:439.

⁷³³ Fredman 2005:167.

⁷³⁴ Zihindula *et al* 2015:2.

contracts as is the position with the recruitment policy of the CUT, outlined in Chapter 5.⁷³⁵

Janse Van Rensburg speaks of transformative substantive equality as that segment of equality that supports the transformation process with the aim of realising a society that was visualised in the *Constitution*.⁷³⁶ To achieve this type of transformative substantive equality for non-national academics one needs to recognize the legislative, institutional, and policy provisions which are systemic inequality feeders and which affect the rights of non-nationals to live in an equal society with equal access to rights. Albertyn goes a step further to speak of the need to develop the idea of inequality to incorporate an 'equality of condition'.⁷³⁷ This entails a commitment to change structures and norms which engender inequality.⁷³⁸

However, non-national academics are often seen as members of an outgroup, rendering them liable to exclusion and ultimately victims of a system that has historically promoted discrimination and inequality. As stated earlier, equality should be a real equality that recognizes difference and promotes it instead of using it as means of exclusion and discrimination. The nature of xenophobia and the current lived reality of non-national academics in South Africa would therefore imply that they would best benefit from the notion of transformative substantive equality. This view will help non-national academics as it speaks to addressing the systems and institutional policies that perpetuate inequality.⁷³⁹

Non-national academics would therefore benefit more from transformative substantive equality which is in line with the thinking that the right to equality must be accompanied by the right to an equality of opportunity as well as equality of results or conditions.

4.8 CONCLUSION

In this chapter, I discuss the right to equality. I explore the meaning and place of dignity within the equality provisions of the *Constitution*, highlighting the contested views

⁷³⁵ Central University of Technology 2018:8.

⁷³⁶ Janse Van Rensburg 2010:200.

⁷³⁷ Albertyn 2018:461.

⁷³⁸ Albertyn 2018:461.

⁷³⁹ Albertyn 2018:462.

around the dignity-centred approach. I also examine the cases which dealt with equality, and the distinction between discrimination and unfair discrimination. Of further relevance are the cases dealing with discrimination based on citizenship as I perceive these to be relevant to the experience of non-national academics, in particular, *Khoza v Minister of Social Development*; *Baloro & Others v University of Bophuthatswana* and *Larbi-Odam v MEC for Education (North West Province)*. The different types of equality are also examined concerning the views of the writers mentioned in the introduction to the chapter. The fact that equality is a contested subject is evident in the differing views of the writers who define and explain the types of equality and link it to the *Constitution* and the South African context.

Having regard to the various notions of equality, what each entail and how they apply or fail to apply to the rights of non-national academics, I conclude that non-national academics would best benefit from the principles of transformative substantive equality. I arrive at this conclusion since transformative substantive equality aims to address systems or structures that perpetuate inequality and to provide redress for such. If this is applied to the higher education sector, I conclude that it would imply a restructuring of structures and systems within institutions. This would in all likelihood provide greater protection for the rights of non-national academics against xenophobia.

In Chapter 5, I examine the legal instruments, policy, and case law at domestic, regional, and international level and I discuss the protection that they afford to non-national academics.

CHAPTER 5

LEGISLATION, POLICY, AND CASE LAW ADDRESSING XENOPHOBIA

5.1 INTRODUCTION

In Chapter 4 I discuss the various approaches to equality to determine the approach which should be used to evaluate current law and policy regarding xenophobia against non-national academics.

In this chapter, I discuss the current law and policy that deals with xenophobia. I provide a comprehensive discussion of the legislative sources that address xenophobia either directly or indirectly concerning non-national academics. I examine the legal instruments, policy, and case law at domestic, regional, and international level to determine whether they adequately protect the rights of non-national academics. The purpose of this chapter is to examine the legislative provisions and other protections afforded to non-national academics to determine whether these provide adequate protection of their rights, especially in relation to xenophobia.

In the following sections, the provisions of the legal framework are discussed.

The relevant provisions of international treaties, domestic legislation, case law, and higher education policies are outlined to determine whether there exist provisions that will serve to protect the rights of non-national academics. I begin in section 5.2 where I provide a brief outline of the position of non-nationals living in the current South African political and social context. In section 5.3 I discuss the international treaties and agreements to which South Africa has subscribed and that are relevant for the protection of the rights of non-nationals. In section 5.4. I examine the provisions of the Constitution and how these protect or fail to protect the rights of non-national academics. I use section 5.5.1 to examine the provisions of the Labour Relations Act and the case of *Discovery Health Limited v CCMA & others* which addresses the important issue of whether a non-national can be regarded as an employee. In sections 5.5.2 and 5.5.3 I examine the provisions of the Employment Equity Act and the Employment Services Act, focusing on how these affect the rights of non-national academics. Immigration laws form the focus of section 5.6 together with amendments to the Act. In Section 5.7 I discuss the relevant anti-discrimination laws such as the

Promotion of Equality and Prevention of Unfair Discrimination Act and the Prevention and Combatting of Hate Crimes and Hate Speech Bill. I use section 5.8 to look at the case law relevant to non-national academics. Finally, in section 5.9 I discuss the employment, transformation, and anti-discrimination policies that have been made available to me from the Central University of Technology, the University of the Free State, North West University, and the University of Cape Town and how these relate to and protect the rights of non-national academics concerning xenophobia.

5.2 NON-NATIONALS IN THE CURRENT SOUTH AFRICAN POLITICAL AND SOCIAL CONTEXT

A legal obligation rests on the South African state to protect all persons who reside in the country from a breach of their rights to liberty and security of the person.⁷⁴⁰ This includes the obligation to protect victims against xenophobic violence. However, on the evidence of the xenophobic attacks that have taken place over the last several years, the question arises whether the South African government has not failed to fulfil these legal obligations.⁷⁴¹

In 2011, a government official from the Department of Home Affairs made a public statement that non-nationals were responsible for depleting resources. The official questioned the use of human rights law and the *Constitution* in accommodating non-nationals. The official was also of the view that non-nationals should not be given a place in South Africa.⁷⁴² This statement caused civil society organizations to speak out and while an apology was issued, such statements inevitably serve to promote and normalize negative perceptions in the public domain.⁷⁴³ Prince Mangosuthu

⁷⁴⁰ Centre for Human Rights, University of Pretoria “The Nature of South Africa’s Legal Obligations to combat xenophobia”, 3 https://www.chr.up.ac.za/images/publications/centrepublishments/documents/south_africa_legal_obligations_combat_xenophobia.pdf (accessed on 10 July 2021).

⁷⁴¹ Centre for Human Rights, University of Pretoria “The Nature of South Africa’s Legal Obligations to combat xenophobia”, 3 https://www.chr.up.ac.za/images/publications/centrepublishments/documents/south_africa_legal_obligations_combat_xenophobia.pdf (accessed on 10 July 2021).

⁷⁴² UNHCR “An Evaluation of UNHCR’s Regional Office for Southern Africa’s Xenophobia Related Programmes”,²² <https://www.unhcr.org/55cb153f9.pdf>. (accessed on 10 July 2021).)

⁷⁴³ UNHCR “An Evaluation of UNHCR’s Regional Office for Southern Africa’s Xenophobia Related Programmes”,²³ <https://www.unhcr.org/55cb153f9.pdf>. (accessed on 10 July 2021).

Buthelezi, who was the first Minister of Home Affairs in the new democracy referred to non-nationals as 'aliens' and stated that if South Africans were to compete against non-nationals for scarce resources, the Reconstruction and Development Programme would be something that they could say farewell to.⁷⁴⁴ Since then in 2020 the Inkatha Freedom Party (IFP) proposed that a quota system be used for the employment of non-nationals.⁷⁴⁵ In 2021 the popularity of the African National Congress declined by 50% for the first time since 1994.⁷⁴⁶ During the 2021 local government elections campaigns, political parties were seen using anti-immigrant rhetoric to obtain votes by blaming immigrants for poor service delivery.⁷⁴⁷ Gayton McKenzie of the Patriotic Alliance political party spoke freely about migrants, stating that his party would 'get rid' of all illegal foreigners if the party was in control of the metros. He went further to state that migrants represented new slaves of white businesses and that local citizens were being deprived of employment as they belonged to unions.⁷⁴⁸

In January 2022 the Economic Freedom Front (EFF) party also took it upon themselves to visit businesses to enquire about the number of non-nationals employed by such businesses.⁷⁴⁹ Another political party, Action SA also promised to rid towns of illegal foreigners and condemned South Africa's immigration policy. In response, CORMSA (Consortium for Refugees and Migrants in SA) spoke out against the use of hate speech and xenophobic statements to garner votes. They referred to it as 'undemocratic and unacceptable' and were concerned that it would fuel further

⁷⁴⁴ Institute for Justice & Reconciliation "Social Cohesion among South Africans and foreigners Evidence from the South African Reconciliation Barometer 2017", 8 <https://www.ijr.org.za/portfolio-items/social-cohesion-among-south-africans-and-between-south-africans-and-foreigners/> (accessed on 1 August 2021).

⁷⁴⁵ eNCA "IFP proposes quota system for foreign nationals", <https://www.enca.com/news/ifp-proposes-quota-system-foreign-nationals> (accessed on 30 August 2022).

⁷⁴⁶ Daily Maverick "SA Politicians stoke the flames of xenophobia in macabre spectacle to woo back voters", <https://www.dailymaverick.co.za/article/2022-03-21-sa-politicians-stoke-the-flames-of-xenophobia-in-macabre-spectacle-to-woo-back-voters/> (accessed on 23 June 2022).

⁷⁴⁷ Isilow "South African politicians play up anti-foreigner sentiments to win votes", <https://www.aa.com.tr/en/africa/south-african-politicians-play-up-anti-foreigner-sentiments-to-win-votes/> (accessed on 4 July 2022).

⁷⁴⁸ Isilow "South African politicians play up anti-foreigner sentiments to win votes", <https://www.aa.com.tr/en/africa/south-african-politicians-play-up-anti-foreigner-sentiments-to-win-votes/> (accessed on 4 July 2022).

⁷⁴⁹ Daily Maverick "SA Politicians stoke the flames of xenophobia in macabre spectacle to woo back voters", <https://www.dailymaverick.co.za/article/2022-03-21-sa-politicians-stoke-the-flames-of-xenophobia-in-macabre-spectacle-to-woo-back-voters/> (accessed on 23 June 2022).

xenophobic attacks.⁷⁵⁰ Following the violence of looting and civil unrest that took place in South Africa in July 2021, we have also seen the emergence of Operation Dudula which is an organization that also wants to remove all undocumented non-nationals from South African society. I mention Operation Dudula in Chapter 1⁷⁵¹ and discuss their actions in greater detail in Chapter 6 of this thesis.⁷⁵² The level of xenophobic violence and sentiment in South African society puts the spotlight on the strategies and interventions employed to overcome xenophobia in our society and raises the question of whether they are adequate.

The current context, which has been outlined above provides a backdrop against which non-national academics are living and working in South Africa. The dilatoriness or failure by the government to adequately address the issues surrounding xenophobia such as the passing of xenophobic specific legislation and the need to educate and sensitize South African society on the rights of non-nationals also impacts the rights and freedoms of non-national academics in the Higher Education space.

5.3 INTERNATIONAL TREATIES AND AGREEMENTS

South Africa subscribes to various international treaties for the elimination of discrimination and the promotion of equality. Some of the international covenants ratified by South Africa are the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the International Labour Organisation's Convention concerning Discrimination in respect of Employment and Occupation.⁷⁵³ From a regional perspective, the African Charter on Human and

⁷⁵⁰ Isilow "South African politicians play up anti-foreigner sentiments to win votes", <https://www.aa.com.tr/en/africa/south-african-politicians-play-up-anti-foreigner-sentiments-to-win-votes/> (accessed on 4 July 2022).

⁷⁵¹ Makhaye "Operation Dudula launch march in KZN a damp squib", <https://www.dailymaverick.co.za/article/2022-04-11-operation-dudula-launch-march-in-kzn-a-damp-squib/> (accessed on 12 April 2022).

⁷⁵² Bhengu "'Dangerous thugs 'or 'providing a solution'?- Dudula movement clashes in Alexandra split SA", <https://www.timeslive.co.za/news/south-africa/2022-03-09-dangerous-thugs-or-providing-a-solution-dudula-movement-clashes-in-alexandra-splits-sa/> (accessed on 12 March 2022).

⁷⁵³ Centre for Human Rights, University of Pretoria "The Nature of South Africa's Legal Obligations to combat xenophobia", 2 https://www.chr.up.ac.za/images/publications/centrepublishings/documents/south_africa_legal_obligations_combat_xenophobia.pdf (accessed on 10 July 2021).

Peoples' Rights (ACPHR) is also relevant. It must be pointed out that there are currently no international instruments that deal specifically with xenophobia. It is, therefore, necessary to examine provisions of existing treaties which may be relevant and provide guidance.⁷⁵⁴ However, there are certain international standards prescribing how non-nationals should be treated and all states have to comply with these.⁷⁵⁵ For this chapter, I discuss the international treatises that are relevant to the rights and experiences of non-nationals and in particular, non-national academics.

5.3.1 Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights provides that all individuals are entitled to the right to life, liberty, and security of person;⁷⁵⁶ the right to privacy in respect of his home and family and to be protected against any interference or attacks.⁷⁵⁷ Article 7 provides for the protection against discrimination and violence as well as the enjoyment of remedies provided by competent tribunals where fundamental rights have been breached.⁷⁵⁸ The rights contained in the African Charter on Human & People's Rights also echo the provisions of the Universal Declaration of Human Rights in that it enshrines the rights to equality.⁷⁵⁹ The rights of non-national academics in the workplace are also provided for in that the declaration provides that every individual has the right to work and the freedom to choose his employment. Individuals are also entitled to fair and favourable working conditions, to be protected against unemployment, and to equal pay for equal work.⁷⁶⁰ In a similar vein, the International Convention on the Elimination of all forms of Racial Discrimination also provides

⁷⁵⁴ Centre for Human Rights, University of Pretoria "The Nature of South Africa's Legal Obligations to combat xenophobia", 50.

https://www.chr.up.ac.za/images/publications/centrepublishments/documents/south_africa_legal_obligations_combat_xenophobia.pdf (accessed on 10 July 2021).

⁷⁵⁵ Centre for Human Rights, University of Pretoria "The Nature of South Africa's Legal Obligations to combat xenophobia", 52.

https://www.chr.up.ac.za/images/publications/centrepublishments/documents/south_africa_legal_obligations_combat_xenophobia.pdf (accessed on 10 July 2021).

⁷⁵⁶ United Nations "Universal Declaration of Human Rights", art. 3 https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf. (accessed on 10 July 2021).

⁷⁵⁷ United Nations "Universal Declaration of Human Rights", art. 12 https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf. (accessed on 10 July 2021).

⁷⁵⁸ United Nations "Universal Declaration of Human Rights", art. 7 https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf. (accessed on 10 July 2021).

⁷⁵⁹ African Commission on Human & Peoples' Rights "African Charter on Human & Peoples' Rights", art. 3(1)&(2) <https://www.achpr.org/legalinstruments/detail?id=49> (accessed on 16 July 2021).

⁷⁶⁰ United Nations "Universal Declaration of Human Rights", art. 23 https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf. (accessed on 10 July 2021).

similar provisions addressing racial discrimination and the right of all people to be protected from discrimination based on colour, race and national or ethnic origin, etc.⁷⁶¹ This covenant also ensures that all persons shall be entitled to basic socio-economic rights⁷⁶² and the right to just and favourable working conditions and equal pay for equal work.⁷⁶³

5.3.2 International Covenant on Civil & Political Rights (ICCPR)

The International Covenant on Civil & Political Rights was ratified by South Africa in 1998 and states that are parties to the covenant undertake to respect and ensure the rights of all persons within its territory without differentiation on the grounds of sex, race, colour, language, national or social origin, etc.⁷⁶⁴ Every human being has the right to life,⁷⁶⁵ the right not to be subjected to torture or cruel and degrading treatment or punishment,⁷⁶⁶ the right to liberty and security of person,⁷⁶⁷ and the right to receive equal treatment without discrimination.⁷⁶⁸ Article 27 of the covenant provides that persons of ethnic, religious, and linguistic minorities shall have the right to practice their own culture, religion, or language in community with other members of their group.⁷⁶⁹ These collective rights, which are also echoed in other international instruments provide the foundation for the protection of the rights of non-national academics living and working in South Africa.

⁷⁶¹ United Nations “International Covenant on the elimination of all forms of racial discrimination”, art. 5 <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx> (accessed on 15 July 2021).

⁷⁶² United Nations “International Covenant on the elimination of all forms of racial discrimination”, art. 5(iv). <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx> (accessed on 15 July 2021).

⁷⁶³ United Nations “International Covenant on the elimination of all forms of racial discrimination”, art. 5 (e)(i) <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx> (accessed on 15 July 2021).

⁷⁶⁴ United Nations “International Covenant on Civil & Political Rights”, art. 2 <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> . (accessed on 6 July 2021).

⁷⁶⁵ United Nations “International Covenant on Civil & Political Rights”, art. 6 www.ohchr.org/en/professionalinterest/pages/ccpr.aspx . (accessed on 6 July 2021).

⁷⁶⁶ United Nations “International Covenant on Civil & Political Rights”, art. 7 www.ohchr.org/en/professionalinterest/pages/ccpr.aspx . (accessed on 6 July 2021).

⁷⁶⁷ United Nations “International Covenant on Civil & Political Rights”, art. 9 www.ohchr.org/en/professionalinterest/pages/ccpr.aspx . (accessed on 6 July 2021).

⁷⁶⁸ United Nations “International Covenant on Civil & Political Rights”, art. 26 www.ohchr.org/en/professionalinterest/pages/ccpr.aspx . (accessed on 6 July 2021).

⁷⁶⁹ United Nations “International Covenant on Civil & Political Rights”, art. 27 www.ohchr.org/en/professionalinterest/pages/ccpr.aspx . (accessed on 6 July 2021).

5.3.3 Declaration on Fundamental Principles & Rights at Work

In terms of the Declaration on Fundamental Principles & Rights at Work, member states undertake to promote equal opportunity and treatment in the workplace to eradicate discrimination in the employment context.⁷⁷⁰ Discrimination is defined in the Declaration as:

any distinction, exclusion, or preference made 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.

5.3.4 United Nations World Conference Against Racism, Racial Discrimination, Xenophobic & Related Intolerance

Globally people still experience xenophobia and other types of discrimination and intolerance.⁷⁷¹ Xenophobia manifests in various ways and causes conflict and discrimination thereby requiring States and the international community to take immediate action to combat it.⁷⁷² Legal systems and institutions also contribute to discrimination because they fail to fit into the multi-ethnic and pluricultural population.⁷⁷³ There is therefore a need to eradicate impunity for transgressions of fundamental human rights and freedoms of individuals and groups of individuals who experience xenophobia and other discrimination.⁷⁷⁴ In keeping with international norms and standards, states should examine their legal instruments, Constitutions, and policies to detect and remove xenophobia, whether it is explicit or implicit.⁷⁷⁵ States should avoid marginalizing sectors within their societies and ensure that their political and legal systems recognize the diverse and multicultural nature of their

⁷⁷⁰ International Labour Office “Declaration on Fundamental Principles & Rights at Work”, art. 2 https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_85_en.pdf (accessed on 15 July 2021).

⁷⁷¹ United Nations “World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance”, 3 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

⁷⁷² United Nations “World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance”, 10 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

⁷⁷³ United Nations “World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance”, 19 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

⁷⁷⁴ United Nations “World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance”, 20 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

⁷⁷⁵ United Nations “World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance”, 53 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

societies.⁷⁷⁶ States should also take steps to remove xenophobia against workers in the workplace and ensure that they enjoy equality before the law including labour law.

Barriers to opportunities such as training, collective bargaining, employment contracts, etc., should be eradicated.⁷⁷⁷ States should avoid marginalizing sectors within their societies and ensure that their political and legal systems recognize the diverse and multicultural nature of their societies.⁷⁷⁸ Steps should be taken to develop and implement national policies and action plans to deal with and eradicate xenophobia, including legislation and administrative policies to address situations where employees are victims of xenophobia in the workplace.⁷⁷⁹ Law enforcement agencies should develop policies and programs to address prevention, detection, and accountability for misconduct where law enforcement officers are guilty of xenophobia and other types of racial discrimination and intolerance.⁷⁸⁰ States must create workplaces that are free from discrimination through public education, communication, and civil rights enforcement.⁷⁸¹

5.3.5 African Charter on Human & Peoples' Rights (ACHPR)

The African Charter on Human & Peoples' Rights provides that everyone is entitled to the right to equality and equal protection,⁷⁸² the right to liberty and security of person,⁷⁸³ and the right to be free from torture, inhuman, and degrading treatment.⁷⁸⁴ Non-nationals who are residing legally in a country may not be expelled from it unless

⁷⁷⁶ United Nations "World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance", 67 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

⁷⁷⁷ United Nations "World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance", 55 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

⁷⁷⁸ United Nations "World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance", 67 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

⁷⁷⁹ United Nations "World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance", 69 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

⁷⁸⁰ United Nations "World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance", 70 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

⁷⁸¹ United Nations "World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance", 83 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

⁷⁸² African Commission on Human & Peoples' Rights "African Charter on Human & Peoples' Rights", art. 3(1)&(2) <https://www.achpr.org/legalinstruments/detail?id=49> (accessed on 16 July 2021).

⁷⁸³ African Commission on Human & Peoples' Rights "African Charter on Human & Peoples' Rights", art. 4 <https://www.achpr.org/legalinstruments/detail?id=49> (accessed on 16 July 2021).

⁷⁸⁴ African Commission on Human & Peoples' Rights "African Charter on Human & Peoples' Rights", art. 5 <https://www.achpr.org/legalinstruments/detail?id=49> (accessed on 16 July 2021).

in accordance with the law⁷⁸⁵ and mass expulsion of non-nationals aimed at national, religious, racial or ethnic groups is prohibited.⁷⁸⁶ The charter also provides that every person shall have the right to work in satisfactory conditions and be given equal pay for equal work.⁷⁸⁷

The international covenants and treaties recognise and protect the rights of non-nationals. Member states are encouraged to implement laws that are in accordance with these international laws, and which ensure the protection of the rights of non-nationals. The challenge however lies in the fact that while these rights may be agreed upon by most countries, they are not always applied practically due to political agendas, and the prevalence of stereotypical attitudes within South African society. I evaluate the efficacy of international treaties in Chapter 6 and I comment on whether it aids in the protection of the rights of non-nationals.

5.4 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

Section 7 of the *Constitution* recognizes the Bill of Rights as the cornerstone of our democracy, which protects the rights of all people in accordance with the principles of human dignity, equality, and freedom.⁷⁸⁸ The *Constitution* therefore protects the rights of citizens as well as non-nationals. The Bill of Rights ensures the protection of the rights of everyone living in South Africa.⁷⁸⁹ Mangu asserts that the use of words such as 'everyone', 'no one be subject to', and 'no one may be clearly deprived of' illustrates that these rights apply to all persons regardless of their citizenship or immigration status.⁷⁹⁰ This interpretation extends to other rights such as the right to equality, life, dignity, freedom, and security of the person, privacy, freedom of religion, belief, and opinion, freedom of expression, assembly, demonstration, picket and petition, freedom of association, freedom of movement and residence, fair labour practices, clean and healthy environment, property, housing, security, education, access to information,

⁷⁸⁵ African Commission on Human & Peoples' Rights "African Charter on Human & Peoples' Rights", art. 12(4) <https://www.achpr.org/legalinstruments/detail?id=49> (accessed on 16 July 2021).

⁷⁸⁶ African Commission on Human & Peoples' Rights "African Charter on Human & Peoples' Rights", art. 12(5) <https://www.achpr.org/legalinstruments/detail?id=49> (accessed on 16 July 2021).

⁷⁸⁷ African Commission on Human & Peoples' Rights "African Charter on Human & Peoples' Rights", art. 15 <https://www.achpr.org/legalinstruments/detail?id=49> (accessed on 16 July 2021).

⁷⁸⁸ *Constitution Act 108/1996*:sec. 7(1).

⁷⁸⁹ Muchiri 2016:101.

⁷⁹⁰ Mangu 2020:6.

just administrative action, and access to the courts.⁷⁹¹ How these rights are formulated in the Bill of Rights indicate that no one may be deprived of these rights, subject of course to the limitation contained in Section 36 of the *Constitution*.⁷⁹² Section 36 of the *Constitution* allows for the limitation of the rights contained in the Bill of Rights if it is reasonable and justifiable to do so based on principles of human dignity, equality, and freedom, taking into account certain relevant factors.⁷⁹³

Section 7(2) provides that the State has to protect, promote and fulfill the rights contained in the Bill of Rights.⁷⁹⁴ The provisions of Section 7(2) imply that the State does not have a discretion concerning the application of the Bill of Rights, however not all rights in the Bill of Rights apply to non-nationals.⁷⁹⁵ Political rights contained in Section 19, citizenship rights in terms of Section 20, residency and passport rights in terms of Section 21(3) & (4), and freedom of trade, occupation, and profession in terms of Section 22 do not apply to non-nationals.⁷⁹⁶

Sections 9 and 12 provide for equality and the freedom and security of person.⁷⁹⁷ The right to freedom and security of the person includes the right not to have one's freedom taken away arbitrarily,⁷⁹⁸ the right to be free from all forms of violence in either the public or private sphere,⁷⁹⁹ the right not to be tortured in any way,⁸⁰⁰ and the right not to be subjected to cruel, inhuman, or degrading treatment.⁸⁰¹ Xenophobia amounts to an express breach of the human rights set out in the Bill of Rights. Xenophobia violates the right to life, the right not to be tortured in any way, the right to be free from all forms of violence, and the right not to be punished in a cruel and degrading manner.⁸⁰²

⁷⁹¹ Mangu 2020:6.

⁷⁹² Mangu 2020:7.

⁷⁹³ *Constitution Act 108/1996*:sec. 36(1).

⁷⁹⁴ *Constitution Act 108/1996*:sec. 7(2).

⁷⁹⁵ *Mavenika et al* 2014:154.

⁷⁹⁶ *Mavenika et al* 2014:154.

⁷⁹⁷ *Constitution Act 108/1996*:secs. 9(1), 12(1)(c)(d) & 7(e).

⁷⁹⁸ *Constitution Act 108/1996*:sec. 12(1)(a).

⁷⁹⁹ *Constitution Act 108/1996*:sec.12(1)(c).

⁸⁰⁰ *Constitution Act 108/1996*:sec.12(1)(d).

⁸⁰¹ *Constitution Act 108/1996*:sec.12(1)(e).

⁸⁰² Tirivangasi & Rapanyane 2021:73.

The socio-economic rights which are most relevant to non-nationals living in South Africa are the right to equality before the law, the right to life, the right to access housing, food, water, and healthcare services, the right to access basic education, and the right to access the courts.⁸⁰³ The South African *Constitution* provides that 'everyone' has the socio-economic rights enshrined in it and there is no distinction between any groups of persons.⁸⁰⁴ These rights must be interpreted in conjunction with international laws.⁸⁰⁵ Regardless of their status, non-nationals cannot be denied their basic human rights and any response to xenophobia must take this into account.⁸⁰⁶ It is, however, a much-held view among officials, politicians, and ordinary people that non-nationals are not entitled to the rights contained in the Bill of Rights. These rights are seen as the preserve of South African citizens.⁸⁰⁷

One example of this is the xenophobic views and practices which are cited as a challenge to the provision of healthcare services for non-nationals and institutionalized medical xenophobia is a feature of the South African medical landscape.⁸⁰⁸ Although States are parties to international treaties they are only obligated to provide non-nationals with access to healthcare if directed to do so in terms of their domestic laws.⁸⁰⁹ Three Acts guide the right of non-nationals to access health care services. These are the National Health Act 61 of 2003, the Immigration Act 13 of 2002, and the Refugee Act 130 of 1998. However, these Acts have been criticized for contradicting each other concerning the rights of non-nationals to health care. This further compounds the problem for patients and medical personnel.⁸¹⁰ The *Constitution* provides that everyone has the right to access health care services including

⁸⁰³ Muchiri 2016:101.

⁸⁰⁴ Centre for Human Rights, University of Pretoria "The Nature of South Africa's Legal Obligations to combat xenophobia", 57
https://www.chr.up.ac.za/images/publications/centrepublishations/documents/south_africa_legal_obligations_combat_xenophobia.pdf (accessed on 10 July 2021).

⁸⁰⁵ Centre for Human Rights, University of Pretoria "The Nature of South Africa's Legal Obligations to combat xenophobia", 68
https://www.chr.up.ac.za/images/publications/centrepublishations/documents/south_africa_legal_obligations_combat_xenophobia.pdf (accessed on 10 July 2021).

⁸⁰⁶ Centre for Human Rights, University of Pretoria "The Nature of South Africa's Legal Obligations to combat xenophobia", 56
https://www.chr.up.ac.za/images/publications/centrepublishations/documents/south_africa_legal_obligations_combat_xenophobia.pdf (accessed on 10 July 2021).

⁸⁰⁷ Mangu 2020:4.

⁸⁰⁸ Zihindula *et al* 2015:3.

⁸⁰⁹ Alfaro-Velcamp 2017:54.

⁸¹⁰ Alfaro-Velcamp 2017:58.

reproductive health care.⁸¹¹ Alfaro-Velcamp points out that the emphasis on the word ‘everyone’ makes one wonder whether the original intention of the drafters of the *Constitution* was to include non-nationals among those who have access to socio-economic rights.⁸¹²

Non-nationals who seek access to health care services are faced with maltreatment, and verbal abuse by healthcare workers and are charged higher fees which is unlawful.⁸¹³ The denial of healthcare services to non-nationals is a breach of the rights of non-nationals under domestic law and the failure of the State to enforce these laws amounts to a violation of domestic and international law.⁸¹⁴ However in the recent case of *Alem Ereselo v CE: Helen Joseph Hospital & Others*,⁸¹⁵ a non-national, Alem Ereselo approached Lawyers for Human Rights for assistance when the Helen Joseph hospital threatened to stop her dialysis treatment because she was not a South African. She had been in the country for 9 years as an asylum seeker and was waiting for her status to be determined.⁸¹⁶ The court refused the application stating that it was the duty of the medical practitioners to decide who received medical treatment. The court would only intervene if this decision was unreasonable. The court could find no reason that the hospital acted unfairly and stated that the doctors had gone out of their way to assist the applicant as best they could.⁸¹⁷

However, in *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & others* the court mentioned that the Constitution grants all fundamental rights contained in the Bill of Rights to non-nationals except for those which are reserved for South African citizens.⁸¹⁸ This view was reiterated in *Kiliko & Others v Minister of Home Affairs* where the court stated that non-nationals are entitled

⁸¹¹ *Constitution Act 108/1996*:sec. 27(1)(a).

⁸¹² Alfaro-Velcamp 2017:58.

⁸¹³ Zihindula *et al* 2015:2.

⁸¹⁴ Zihindula *et al* 2015:3.

⁸¹⁵ *AE v Chief Executive Officer Helen Joseph Hospital and Others* (19/15448) [2019] ZAGPJHC 379 (7 October 2019).

⁸¹⁶ Lawyers for Human Rights “Urgent appeal to support LHR client after high court judgment”, <https://www.lhr.org.za/lhr-news/lhr-appeals-to-public-to-support-dying-client-after-high-court-judgment/> (accessed on 4 July 2022).

⁸¹⁷ *AE v Chief Executive Officer Helen Joseph Hospital and Others* (19/15448) [2019] ZAGPJHC 379 (7 October 2019):par. 35.

⁸¹⁸ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 46.

to the fundamental rights contained in the Bill of Rights and that as a result, the Department of Home Affairs had violated the rights of asylum seekers by failing to meet their obligations when processing only 20 asylum refugee applications per day.⁸¹⁹

The right to work is a pre-requisite for the enjoyment of the right to freedom of association and the right to fair labour practices. The right to fair labour practices is important in the employment context as it requires all conduct to be tested for fairness.⁸²⁰ However, although provided for in international instruments, the Constitution does not guarantee the right to work for non-nationals.⁸²¹ Although an integral employment right, no reason is advanced for its exclusion from the Bill of Rights in respect of non-nationals.⁸²² It is evident from *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & others* however that the court exercised its discretion when it accorded refugees the right to work as private security providers.⁸²³ The court stated that refugees could not be excluded from working as such purely based on their refugee status as this would be contrary to the constitution and would perpetuate a climate of xenophobia.⁸²⁴ In *Lawyers for Human Rights & Other v Minister of Home Affairs & Other* the court contended that the rights contained in Sections 12(2) and 35(2) apply to everyone and that 'persons within our territorial boundaries have the protection of our courts'.⁸²⁵ In this case, the applicants sought an order to declare certain provisions of the Immigration Act unconstitutional.⁸²⁶ These provisions dealt with the detention and deportation of illegal foreigners.

In 2020 the Gauteng Provincial Government introduced the Gauteng Township Economic Development Bill which seeks to further exclude non-nationals by providing that non-nationals are not allowed to operate certain businesses in the township areas

⁸¹⁹ *Kiliko & Others v Minister of Home Affairs & Others* 2006 (4) SA 114 C:headnote.

⁸²⁰ Geldenhuys 2020:8.

⁸²¹ Mangu 2020:6.

⁸²² Mangu 2020:6.

⁸²³ Mangu 2020:6.

⁸²⁴ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 122.

⁸²⁵ *Lawyers for Human Rights & Other v Minister of Home Affairs & Other* (CCT 18/03) [2004] ZACC 12:par.27.

⁸²⁶ *Lawyers for Human Rights & Other v Minister of Home Affairs & Other* (CCT 18/03) [2004] ZACC 12:par.2.

if they do not possess permanent residency status.⁸²⁷ The government has denied that the Bill can be viewed as advocating protectionism.⁸²⁸ Civil society organizations have criticized the Bill saying that it will incite xenophobic violence as it reinforces the perception that non-nationals are responsible for taking jobs from locals.⁸²⁹ In discussing the constitutionality of the Bill, reference was made to Section 155 of the Constitution which empowers provincial governments to oversee the monitoring and support of municipalities.⁸³⁰ David Makhura, the Premier of Gauteng argued that the Bill falls within the confines of the Constitution, however, another view was that it can be seen as unfair discrimination based on nationality in terms of Section 9 of the Bill of Rights.⁸³¹ Such discrimination would threaten the fundamental human dignity of non-national persons as it seeks to prevent them from earning a living by operating businesses in these areas.⁸³²

An inquiry would also need to be made into whether the Bill is justified under Section 36 of the Constitution.⁸³³ The provisions of international law would also be relevant in

⁸²⁷ Chidombwe “The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships”, <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

⁸²⁸ Chidombwe “The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships”, <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

⁸²⁹ Chidombwe “The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships”, <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

⁸³⁰ Chidombwe “The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships”, <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

⁸³¹ Chidombwe “The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships”, <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

⁸³² Chidombwe “The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships”, <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

⁸³³ Chidombwe “The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships”, <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

such an inquiry as the relevant treaties which are discussed below provide for the right to work, the right to choose employment, and the right to fair and favourable working conditions. This type of proposed legislation is not unique to South Africa and similar restrictive laws have been passed in other countries such as Malaysia where foreign migrants are not allowed to operate shops in Kuala Lumpur, in Ghana where non-nationals are prohibited from conducting business in retail, and Nigeria where visas are refused to non-national workers if their skills are available in Nigeria.⁸³⁴

In 2022 the Free State Provincial legislature introduced a similar bill for public comment. The Draft Free State Local Integrated Economic Development & Transformation Bill (hereafter the Free State Bill) aims to make provision for economic development in the Free State region by regulating business licences and allowing for specified businesses to be operated by citizens only.⁸³⁵ The bill aims to limit the ownership by non-nationals by providing that local municipalities must ensure that ownership by non-nationals does not exceed 20%. Large retailers are to support locally produced goods in terms of a 30% quota and township-based enterprises are to be developed.⁸³⁶ 28 economic activities in the bill are reserved for those with permanent residency status. Some of the targeted businesses are cell phone repair shops, courier services, bars, nightclubs, tuckshops, panel beaters, etc.⁸³⁷ The political party known as the Democratic Alliance (DA) issued a statement in February 2022 in which it rejected the proposed bill. They argued that the bill will restrict a wider range of business activities reserving these solely for those with permanent residency status and ultimately crippling the economy.⁸³⁸ The DA criticized the bill as being

⁸³⁴ Chidombwe "The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships", <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022)..

⁸³⁵ Republic of South Africa "Free State Economic Small Business Development, Tourism, and Environmental Affairs invites the public to comment on Draft Free State Local Integrated Economic Development & Transformation Bill", <https://www.gov.za/speeches/free-state-economic-small-business-development-tourism-and-environmental-affairs-invites-0> (accessed on 5 August 2022).

⁸³⁶ Khumalo & Mdakane "Free State moots bill to limit foreign business ownership", <https://sundayworld.co.za/business/free-state-moots-bill-to-limit-foreign-business-ownership/> (accessed on 5 August 2022).

⁸³⁷ Khumalo & Mdakane "Free State moots bill to limit foreign business ownership", <https://sundayworld.co.za/business/free-state-moots-bill-to-limit-foreign-business-ownership/> (accessed on 5 August 2022).

⁸³⁸ Free State DA "DA rejects Free State Local Economic Development & Transformation Bill as economic sabotage", <https://content.voteda.org/free-state/2022/02/da-rejects-free-state-local-economic-development-and-transformation-bill-as-economic-sabotage/> (accessed on 5 August 2022).

'draconian' in its application as it gives too much discretion to the MEC to regulate businesses and it is feared that the bill may also impact investment and entrepreneurship negatively.⁸³⁹

Of concern, is the fact that the Gauteng Township Economic Development bill has since been signed into law in July 2022 by the Gauteng Premier, David Makhura.⁸⁴⁰ Barring opposition through public comment, it may only be a matter of time before the Free State bill is also passed as law.

Section 9(2) of the *Constitution* also requires the government to pass legislation to prevent discrimination in the future.⁸⁴¹ With a few exceptions, the *Constitution* provides comprehensive protection of the rights of both citizens and non-citizens alike. These rights should provide a foundation for non-national academics to be able to enjoy many of the same freedoms as those enjoyed by South African citizens. However, the prevalence of xenophobic violence in South African society causes one to question whether these rights can be enforced in situations where rights are threatened or denied.

Having examined the provisions of the *Constitution* it is evident that the *Constitution* recognizes many of the rights of non-nationals in the same vein as it does for citizens. In this regard non-nationals are accorded many of the socio-economic rights that are also available to citizens. However, the right to work which is an important right for non-national academics is not accorded to non-nationals in the *Constitution* and was challenged in the Constitutional Court in *Union of Refugee Women & Others V Private Security Industry Regulatory Authority & others*.⁸⁴² It is necessary to examine the provisions of other legislation relevant to the rights of non-nationals to establish the legal protection afforded to this group of workers. In the following section, I, therefore,

⁸³⁹ Free State DA "DA rejects Free State Local Economic Development & Transformation Bill as economic sabotage", <https://content.voteda.org/free-state/2022/02/da-rejects-free-state-local-economic-development-and-transformation-bill-as-economic-sabotage/> (accessed on 5 August 2022).

⁸⁴⁰ Free State DA "DA rejects Free State Local Economic Development & Transformation Bill as economic sabotage", <https://content.voteda.org/free-state/2022/02/da-rejects-free-state-local-economic-development-and-transformation-bill-as-economic-sabotage/> (accessed on 5 August 2022).

⁸⁴¹ Currie & De Waal 2005:233.

⁸⁴² *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006].

discuss the provisions of relevant labour laws and whether these protect non-national academics employed in the higher education sector.

5.5 LABOUR LAWS

5.5.1 *Labour Relations Act 66 of 1965*

The *Labour Relations Act* was passed in 1995 to give effect to the rights provided for in Section 27 of the *interim Constitution*.⁸⁴³ I examine the relevant provisions of the Labour Relations Act to determine the legal position of the non-national academic in the workplace. I ask, in other words, whether the Act recognizes the non-national academic as an employee, and whether he or she is entitled to the same rights as those applicable to citizens. Even though the *Constitution* does not accord the right to work to everyone, it does make provision for the right to fair labour practices.⁸⁴⁴ It accords the right to fair labour practices to 'everyone' and gives 'everyone' the right to join and form a trade union as well as the right to participate in the activities of a trade union and the right to strike.⁸⁴⁵

The Labour Relations Act defines an 'employee' as:

any person excluding an independent contractor, who works for another person or for the State and who receives or is entitled to receive, any remuneration; and any person who in any manner assists in carrying on or conducting the business of an employer'.⁸⁴⁶

This definition does not specifically state that employees must be South African citizens, as it simply refers to 'any person'. The Act is therefore not clear on whether it covers non-national employees, nor does it go further to distinguish between the various categories of immigrant employees. This issue was however addressed in *Discovery Health Limited v CCMA & Others*. In this case, the court dealt with the question of whether a foreign national who is employed without a work permit issued under the *Immigration Act* is an employee as per the definition in the *Labour Relations Act*.⁸⁴⁷ The applicant, Lanzetta, a citizen of Argentina was employed by Discovery

⁸⁴³ Mangu 2020:2.

⁸⁴⁴ Mangu 2020:15.

⁸⁴⁵ Mangu 2020:6.

⁸⁴⁶ *Labour Relations Act* 66/1965: sec. 213(a) & (b).

⁸⁴⁷ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC):par. 1.

Health in 2005 based on a temporary residence permit.⁸⁴⁸ Discovery Health terminated his employment in December 2005 when they discovered that he did not have a valid work permit.⁸⁴⁹ It was argued on behalf of the applicant that the definition of 'employee' in the *Labour Relations Act* implied an employment relationship that goes above the contract and that even though the employment contract entered into with the non-national is invalid due to lack of a valid work permit, the employment relationship itself is not invalid.⁸⁵⁰

The Commissioner held that while an employer cannot be held to an employment contract where the work permit is invalid this does not preclude the employee from benefitting from the protections afforded to employees in the *Labour Relations Act*.⁸⁵¹ On review, the court found that there was good reason to interpret Section 38(1) of the *Immigration Act* in such a manner that it does not limit the right to fair labour practices. The reason given was that if Section 38(1) rendered the contract of employment void due to the lack of a valid work permit, this might allow an unscrupulous employer the chance to refuse to pay an employee at the end of his contract based on the invalidity of the contract, leaving the employee without a remedy.⁸⁵²

In the circumstances, the court found that the contract concluded between Discovery Health and Lanzetta was valid, and it remained valid until terminated in 2006. Lanzetta was therefore regarded as an employee as defined in the *Labour Relations Act* and the CCMA was regarded as competent to handle the unfair dismissal dispute.⁸⁵³ The court also looked at Section 23(1) of the *Constitution* which provides that everyone has the right to fair labour practices as Lanzetta's application related to his right to fair labour practices in the sense that it related to his work security.⁸⁵⁴ It is therefore important to determine how the definition of 'employee' in the *Labour Relations Act* should be interpreted in light of the term 'everyone' in Section 23(1) of the *Constitution*.

⁸⁴⁸ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC):par. 5.

⁸⁴⁹ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC):par. 9.

⁸⁵⁰ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC):par. 13.

⁸⁵¹ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC):par. 13.

⁸⁵² *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC):par. 30.

⁸⁵³ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC):par. 32.

⁸⁵⁴ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC):par. 38.

The court also stated that the *Constitution* requires that international law be considered when interpreting South African legislation.⁸⁵⁵ Finally, after taking into account Section 23(1) of the *Constitution*, relevant international standards, and more recent interpretations of 'employee' by this court, it was decided that the definition of employee in Section 213 of the *Labour Relations Act* is not necessarily rooted in an employment contract.⁸⁵⁶ Therefore a person who works for another on terms other than those recognized as employment by the common law may be regarded as an 'employee' in terms of the definition.⁸⁵⁷ The judge stated that:

Because a contract of employment is not the sole ticket for admission into the golden circle reserved for 'employees' the fact that Lanzetta's contract was contractually invalid only because Discovery Health has employed him in breach of Section 38(1) of the *Immigration Act*, did not automatically disqualify him from that status.⁸⁵⁸

The decision made in the Discovery Health case was subsequently followed in the 2010 case of *Kylie v CCMA*⁸⁵⁹ where the Labour Appeal court reiterated that the absence of a valid employment contract does not deprive the worker of his rights in terms of the *Labour Relations Act* even if the work done itself is illegal.⁸⁶⁰ The more recent case of *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others*⁸⁶¹ also confirmed the decision in the Discovery Health case where the employee was dismissed on the basis that she could not lawfully tender her services as she did not have a work permit. In this case, the Commissioner also held that there was room for an argument that the failure by the employer to assist the employee to regularise his status could amount to an unfair labour practice.⁸⁶²

⁸⁵⁵ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC):par. 38.

⁸⁵⁶ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC):par. 49.

⁸⁵⁷ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC):par. 49.

⁸⁵⁸ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC):par. 49.

⁸⁵⁹ *Kylie v CCMA & Others* (CA10/08) [2010] ZALAC 8; 2010 (4) SA 38 (LAC); 2010 (1) BCLR 1029 (LAC): [2010]7 BLLR 705(LC)(26 MAY 2010).

⁸⁶⁰ Fiona Leppan "No visa required for employment claim", <https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2011/no-visa-required-for-employment-claim.html> (accessed on 18 July 2022).

⁸⁶¹ *Southern Sun Hotel Interests (Pty) Ltd IRO Southern Sun Waterfront Hotel v CCMA and Others* (C255/09); (C362/09) [2011] ZALCCT 14; (2011) 32 ILJ 2756 (LC) (21 June 2011).

⁸⁶² Fiona Leppan "No visa required for employment claim", <https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2011/no-visa-required-for-employment-claim.html> (accessed on 18 July 2022).

Another case that dealt with the right to work and the right to choose one's trade or occupation is *Somali Association & Others v Limpopo Department of Economic Development Environment & Tourism & Others*.⁸⁶³ However, what is also important to note is that this case also dealt with xenophobia and how it affects the right of non-nationals to work or to practice their trade or profession. In *Somali Association & Others v Limpopo Department of Economic Development Environment & Tourism & Others*⁸⁶⁴ the appellants who were Somali and Ethiopian nationals argued that the right to equality and the right to practice a trade should also apply to non-nationals. The court in deciding the case had regard to the provisions of the Constitution which related to South African citizens only and those which extended to non-nationals. The court stated that Section 22 of the *Constitution* does not prevent refugees from seeking employment.

The appellants also alleged that the police, as part of their 'Operation Hardstick' closed businesses operated by Somali and Ethiopian nationals regardless of whether they were licensed to trade or not.⁸⁶⁵ They also alleged that the police took bribes and did not take action against South African traders who were not licensed.⁸⁶⁶ The court found that asylum seekers and refugees are entitled to conduct a trade and should be allowed to apply for a business licence to do so. To deny the appellants this right may render them destitute, and this would be contrary to the values entrenched in the *Constitution*. In the circumstances, the court found that there is no 'blanket provision' that prevents asylum seekers and refugees from seeking employment and no legislative restriction that prohibits foreign nationals from being granted licences to operate a tuck shop or a spaza shop.⁸⁶⁷ Despite the decision in this case we now see provincial legislature as in the case of Gauteng and the Free State seeking to pass laws that will restrict the ability of non-national traders to operate tuckshops and spaza

⁸⁶³ *Somali Association & Others v Limpopo Department of Economic Development Environment & Tourism & Others* 2015(1) SA 151 SCA.

⁸⁶⁴ *Somali Association & Others v Limpopo Department of Economic Development Environment & Tourism & Others* 2015(1) SA 151 SCA.

⁸⁶⁵ *Somali Association & Others v Limpopo Department of Economic Development Environment & Tourism & Others* 2015(1) SA 151 SCA:par.8.

⁸⁶⁶ *Somali Association & Others v Limpopo Department of Economic Development Environment & Tourism & Others* 2015(1) SA 151 SCA:par.8.

⁸⁶⁷ *Somali Association & Others v Limpopo Department of Economic Development Environment & Tourism & Others* 2015(1) SA 151 SCA:par.43.

shops in the township areas. I discuss the provisions of these bills earlier in the chapter.

South Africa is also party to international covenants that protect workers' rights.⁸⁶⁸ This would therefore imply that non-nationals and in particular, non-national academics who are employed in South Africa would be entitled to the rights afforded in the *Labour Relations Act*. Foreign workers are migrant workers engaged in remunerated activities outside their countries of citizenship, with or without the necessary authorization of the relevant authorities of the receiving countries.⁸⁶⁹ Non-national employees who do not have valid work permits also enjoy the protection afforded by labour legislation. They are also protected against unfair dismissal and unfair labour practices.⁸⁷⁰ However, the legal status of non-national workers is often uncertain and this uncertainty renders them vulnerable in the workplace and opens them to exploitation by the employer.⁸⁷¹ They are also often disadvantaged as they may lack communication skills and training and are often subjected to unequal treatment and unequal opportunities, thereby rendering them open to discrimination in the workplace.⁸⁷²

The *Constitution* and national labour legislation provide a legal framework for the protection of the rights of migrant workers. These however must be measured against international standards and the Bill of Rights.⁸⁷³ The definition of 'employee' in the *Labour Relations Act*, the *Basic Conditions of Employment Act*, and the *Occupational Health and Safety Act* implies that non-national workers enjoy equal rights and protection as afforded to South African citizens.⁸⁷⁴ However, accessibility and implementation of these rights for non-nationals is a challenge due to various factors. When deciding cases, the labour courts which are established in terms of the *Labour Relations Act* must also uphold the tenets of the *Constitution* and the law. They should also consider the international treaties that bind South Africa.⁸⁷⁵

⁸⁶⁸ Mangu 2020:8.

⁸⁶⁹ Mangu 2020:5.

⁸⁷⁰ Albertyn "Do SA Labour Laws apply to foreign nationals", [https:// www.labourman.co.za/do-sa-labour-laws-apply-to-foreign-nationals/](https://www.labourman.co.za/do-sa-labour-laws-apply-to-foreign-nationals/) (accessed on 30 August 2021).

⁸⁷¹ Meyer 2009:382.

⁸⁷² Meyer 2009:832.

⁸⁷³ Meyer 2009:833.

⁸⁷⁴ Meyer 2009:835.

⁸⁷⁵ Mangu 2020:15.

I have discussed cases which dealt with the right to work, and the relevant provisions of the *Constitution* while the other cases about non-nationals are discussed later in the chapter. Related to the right of the non-national to work are laws that are in place which intentionally exclude non-nationals from its operation. I refer here to the relevant provisions of the *Employment Equity Act 55 of 1998* and the *Employment Services Act 4 of 2014*. These acts contain specific provisions like affirmative action and those related to scarce or critical skills, and which inevitably limit the employment opportunities available to non-nationals and non-national academics. I discuss the provisions of these Acts in the following sections.

5.5.2 *Employment Equity Act 55 of 1998*

Section 5 of the *Employment Equity Act* provides that all employers must take steps to provide equal opportunities in the workplace and to eliminate unfair discrimination that may be prevalent in policies or practices in the workplace.⁸⁷⁶ The Act also provides that no one may unfairly discriminate against any employee based on certain listed grounds, which include ethnicity, social origin, and culture.⁸⁷⁷ Affirmative action measures are to be implemented for designated groups and this is set out in Chapter 3 of the Act.⁸⁷⁸ Designated groups are to be allowed equal opportunities and representation in all categories and levels of the workforce.⁸⁷⁹ However, 'designated groups' are defined in the Act to include black people, women, and people with disabilities.⁸⁸⁰ The term 'black people' is a generic term referring to Africans, Coloureds, and Indians. Non-nationals may be accounted for in reports submitted by employers, but they cannot be included as members of 'designated groups'.⁸⁸¹ This would imply that non-national academics would not be eligible to be considered for any affirmative action appointments as they are not recognized as being part of the designated group even if they meet the other criteria such as being a Black person or

⁸⁷⁶ *Employment Equity Act 55/1998:sec. 5.*

⁸⁷⁷ *Employment Equity Act 55/1998:sec. 6.*

⁸⁷⁸ *Employment Equity Act 55/1998:sec. 13(1).*

⁸⁷⁹ *Employment Equity Act 55/1998:sec. 15(1).*

⁸⁸⁰ *Employment Equity Act 55/1998:sec. 1.*

⁸⁸¹ Department of Labour "What employers and workers need to know about employment equity", <https://www.labour.gov.za/DocumentCenter/Publications/Employment%20Equity/What%20employers%20and%20workers%20need%20to%20know%20about%20Employment%20Equity/EE%20pamphlet%20opt%20red.pdf>(accessed on 30 August 2022).

a woman. Two cases that have come before the court which specifically deal with employment equity and affirmative action are discussed below, as they illustrate how the court interpreted the provisions of the university's employment equity policy and also whether discrimination based on race, or ethnic or social origin did occur.

The case of *Auf Der Heyde v University of Cape Town*⁸⁸² dealt with discrimination based on race, however, I discuss it at this juncture as it occurred in the university context, is relevant to the discussion on employment equity and it also refers to ethnic or social origin as a factor in choosing a suitable candidate for the position. The second case which I discuss is *Khumalo v University of Johannesburg*.⁸⁸³ The facts and the decision, in this case, relate more specifically to a claim for discrimination based on ethnic or social origin. I will however proceed with the *Auf Der Heyde* case first.

In *Auf Der Heyde v University of Cape Town*, the applicant alleged that the university's failure to appoint him in a permanent position in its Chemistry department, alternatively its failure to renew his fixed-term contract, amounted to an automatically unfair dismissal as he had a reasonable expectation of the appointment or renewal.⁸⁸⁴

The applicant alleged that the university's failure or refusal to do so was due to the university unfairly applying its equal opportunity employment policy, alternatively discriminating against him based on his race.⁸⁸⁵ In his evidence, the applicant alleged that two other colleagues, a Dr Naidoo and Dr Chibale had been appointed yet he alleged that he was more qualified than the two colleagues and also contended that Dr Chibale was not a South African citizen, the university employment equity policy does not apply to non-South African citizens. The policy, he stated, should only apply to previously disadvantaged South Africans in terms of the Constitution and the Labour Relations Act.⁸⁸⁶

⁸⁸² *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000).

⁸⁸³ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018).

⁸⁸⁴ *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000):par. 11.

⁸⁸⁵ *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000):par. 11.

⁸⁸⁶ *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000):par. 12.

The Respondent in its defence contended that the appointment of Dr Chibale was according to the Employment Equity Policy as well as on merit.⁸⁸⁷ Neither Dr Naidoo nor Dr Chibale were appointed to the position that the applicant has applied for.⁸⁸⁸

In deciding the case, the court found that the applicant had a reasonable expectation of renewal of the fixed-term contract due to the wording of the advertisement as well as the letter of appointment.⁸⁸⁹ However, the court also stated that there was no basis on which Dr Chibale could qualify as a member of a previously disadvantaged group who was subject to societal discrimination, and therefore the affirmative action policy did not apply to him. However, the court added that there was no evidence adduced by the Applicant to show that this was an unfair labour practice.⁸⁹⁰

In the circumstances, the court found that the Applicant was not unfairly discriminated against as there was no basis to confirm that the Applicant would have been appointed if Dr Chibale was not appointed due to his non-national status.⁸⁹¹

The latter case of *Khumalo v University of Johannesburg* dealt with the issue of discrimination based on ethnic or social origin. In this case, Khumalo sought an order from the court that her dismissal by the University of Johannesburg is declared to constitute unfair discrimination based on Section 6 of the *Employment Equity Act*.⁸⁹² Section 6 of the *Employment Equity Act* prohibits discrimination against an employee based on certain listed grounds which include ethnic or social origin.⁸⁹³ Khumalo alleged that the university had dismissed her on the grounds of her social origin or citizenship. The university's version was that she had been dismissed for gross dishonesty.⁸⁹⁴ In 2015 the university had advertised an academic position in the faculty of management.⁸⁹⁵ Khumalo, in applying for the position recorded that she was a South African citizen. In a statistical data sheet, she stated that she was a South

⁸⁸⁷ *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000):par. 19.

⁸⁸⁸ *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000):par. 20.

⁸⁸⁹ *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000):par. 40-41.

⁸⁹⁰ *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000):par. 72.

⁸⁹¹ *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000):par. 73.

⁸⁹² *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 1.

⁸⁹³ *Employment Equity Act* 55/1998:sec. 6.

⁸⁹⁴ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 1.

⁸⁹⁵ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 3.1.

African citizen with residential status.⁸⁹⁶ She interviewed for the position, was successful and was offered the position in September 2015 which she accepted.⁸⁹⁷ The appointment was conditional on Khumalo providing the university with confirmation of a valid work visa or permanent residency.⁸⁹⁸ Khumalo replied in writing confirming that she was a South African citizen by virtue of her marriage to Mokhele John Khumalo who was a South African by birth.⁸⁹⁹

The university subsequently brought misconduct charges against Khumalo on the basis that she had misrepresented that she was a South African citizen, alternatively on the grounds of impossibility of performance as the Immigration Act did not lawfully permit her appointment by the university.⁹⁰⁰ The disciplinary inquiry resulted in the dismissal of Khumalo.⁹⁰¹ Following an unsuccessful appeal and a failed attempt at conciliation at the CCMA, the matter was taken to the Labour Court.⁹⁰² At the Labour Court Khumalo alleged that the university's letter of appointment did not require her to be a South African citizen.⁹⁰³ She also believed that the university's letter of appointment did not reserve the position for people from previously disadvantaged groups.⁹⁰⁴ Khumalo alleged that she was not certain of the meaning of the terms 'employment equity' and 'affirmative action' and she was not aware that non-nationals could not be classified as employment equity or affirmative action candidates.⁹⁰⁵ In her online application, she had declared that she was a South African citizen, however, the copy of her identity document reflected her as being a 'non-citizen' of the Republic.⁹⁰⁶ The university on the other hand alleged that the advertisement indicated that this was an affirmative action/employment equity position⁹⁰⁷ Further, during the interview process Khumalo confirmed that she was a South African citizen.⁹⁰⁸ The

⁸⁹⁶ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 4.
⁸⁹⁷ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 5-6.
⁸⁹⁸ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 10.
⁸⁹⁹ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 8.
⁹⁰⁰ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 9.
⁹⁰¹ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 10.
⁹⁰² *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 11-12.
⁹⁰³ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 13.3.
⁹⁰⁴ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 13.5.
⁹⁰⁵ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 13.6.
⁹⁰⁶ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 13.7.
⁹⁰⁷ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 14.1.
⁹⁰⁸ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 14.3.

university also alleged that it had not discriminated against Khumalo on the basis that it had also appointed another non-national.⁹⁰⁹

The court had to decide whether a case for discrimination had been made out based on Khumalo's social origin. If so, whether the discrimination was unfair and whether it breached Section 6 of the *Employment Equity Act*.⁹¹⁰ The court relied on the test in *Harksen's case*.⁹¹¹ In deciding the case the court stated that it was not clear about the basis on which Khumalo alleged that she had been discriminated against as two requirements had to be met, namely that the university would give preference to previously disadvantaged persons⁹¹² and certain requirements had to be met by non-South African residents.⁹¹³

Concerning the first requirement the court said that Khumalo had acknowledged that the disclaimer in the advertisement even though she said that she did not understand what employment equity and affirmative action entailed. Her contention that the advertisement had not required her to be a South African citizen was rejected and the court was of the view that to qualify for the position she had to fall into the definition of 'designated group' which she did not.⁹¹⁴ The court found that Khumalo could not complain of being subject to discrimination when such treatment arose from legislation or regulation and she was entitled to challenge the validity of this on constitutional grounds.⁹¹⁵ She had also not corrected the 'error' pertaining to her identity document where she was labelled 'non-citizen'.⁹¹⁶ The *SA Citizenship Act* provides that:

A married person shall, subject to the provisions of this Act, be capable of acquiring and losing South African citizenship in all respects as if he or she were an unmarried person shall acquire or lose South African citizenship by reason merely of a marriage contracted by him or her.

⁹⁰⁹ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018);par. 14.6.

⁹¹⁰ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018);par. 15.

⁹¹¹ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018);par. 16.

⁹¹² *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018);par. 18.

⁹¹³ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018);par. 19.

⁹¹⁴ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018);par. 23.

⁹¹⁵ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018);par. 25.

⁹¹⁶ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018);par. 34.

In concluding the case the court found that there was no reason to find that Khumalo had been dismissed due to discrimination based on her social origin.⁹¹⁷ The applicant's claim of unfair discrimination was dismissed, and the dismissal was found to be unfair.⁹¹⁸

Auf Der Heyde and *Khumalo's* cases both dealt with unfair discrimination, the first one based on race and the second one based on ethnicity or social origin. In these cases, the court had to examine whether the universities had breached their employment equity policies or failed to apply their provisions fairly. The cases have relevance to non-national academics as it illustrates how the court interprets disputes involving unfair discrimination against academics in the case of *Auf Der Heyde* and non-national academics in the *Khumalo's* case. It inevitably would also provide a sort of guideline or basis in other cases where non-national academics are subjected to xenophobia in the higher education environment. In the next section, I discuss the provisions of the *Employment Services Act* and how it relates to non-national academics.

5.5.3 *Employment Services Act 4 of 2014*

The *Employment Services Act* came into effect in 2015. One of the purposes of the Act is the facilitation of the employment of non-nationals in the South African economy.⁹¹⁹ The Act refers to non-nationals as 'foreign nationals'. A 'foreign national' is defined as an individual who is not a South African citizen or does not have a permanent residence permit issued in terms of the Immigration Act.⁹²⁰ The Act provides that an employer can only employ a foreign national if there are no South African permanent residents with the necessary skills or qualifications who could be appointed.⁹²¹ Further, foreign nationals can only be employed where their contribution is required in a manner that gives effect to Section 23 of the Constitution⁹²² concerning fair labour practices and if it does not adversely affect the rights and expectations of

⁹¹⁷ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 40.

⁹¹⁸ *Khumalo v University of Johannesburg* (JS533/16) [2018] ZALCJHB31 (6 February 2018):par. 42.

⁹¹⁹ *Employment Services Act* 2014:sec. 2(1)(h).

⁹²⁰ *Employment Services Act* 2014.

⁹²¹ *Employment Services Act* 2014:sec. 8(2)(a).

⁹²² *Employment Services Act* 2014:sec. 2(1)(h)(i).

South African workers, labour standards⁹²³ and promotes the training of South African citizens and permanent residents.⁹²⁴

Regulations for the employment of foreign nationals include the requirement that employers are to be satisfied that there are no other suitable persons in South Africa possessing the necessary skills who can be recruited.⁹²⁵ Employers are also required to use the services of public employment services or private recruitment agencies to find a South African citizen or permanent resident to fill the position.⁹²⁶ These provisions will impact the entry of non-national academics into higher education institutions unless it can be shown that there are no suitable South African candidates to fill the position. It also affects the rights of the non-national and in particular the right to work which is provided for in international covenants and treaties. Ironically the *Employment Services Act* also provides that in interpreting the Act, effect must be given to the Constitution,⁹²⁷ its purpose⁹²⁸ and South Africa's obligations in respect of international labour treaties and standards.⁹²⁹ South Africa's immigration laws tend to be restrictive, and this has also contributed to the skills shortage that the country has experienced.⁹³⁰

The high rate of unemployment in South Africa coupled with the large number of non-nationals employed in lower occupation levels has prompted the government, in 2020, to introduce the *Employment Services Amendment Bill* to parliament. This Bill aims to introduce measures by the State to control certain sectors of the workforce where non-nationals are being employed over South African citizens without justifying such employment based on skills.⁹³¹ Concern was expressed that there are too many non-nationals being employed in the unskilled sector and the draft bill requires employers to confirm that there are no suitable South African citizens who

⁹²³ *Employment Services Act* 2014:sec. 2(1)(h)(ii).

⁹²⁴ *Employment Services Act* 2014:sec. 2(1)(h)(iii).

⁹²⁵ *Employment Services Act* 2014:sec. 8(2)(a).

⁹²⁶ *Employment Services Act* 2014:sec. 8(2)(b).

⁹²⁷ *Employment Services Act* 2014:sec. 3(b).

⁹²⁸ *Employment Services Act* 2014:sec. 3(a).

⁹²⁹ *Employment Services Act* 2014:sec. 3(3).

⁹³⁰ Muchiri 2016:114.

⁹³¹ Staff writer "New Bill aims to limit the hiring of foreign workers in South Africa", <https://businesstech.co.za/news/business/456450/new-bill-aims-to-limit-the-hiring-of-foreign-workers-in-south-africa/> (accessed on 24 July 2021).

can be hired in the particular position before the employer hires a non-national instead of deferring such measures to the regulations.⁹³²

Concerns about the constitutionality of the bill relate to Section 7, which provides that non-nationals who do not have permanent residency may not own or operate designated businesses in a designated township.⁹³³ Section 7 of the bill can be viewed as a breach of the right to equality of non-nationals as it will affect the right of refugees and asylum seekers to seek employment as well as those who have the necessary visas from operating a business. In this way, these categories of persons will not be able to earn a living.⁹³⁴ In *Minister of Home Affairs & Others v Watchenuka*⁹³⁵ which involved the rights of asylum seekers to work or study while waiting to be recognized as refugees, the court found that the right to choose a trade or profession is limited to citizens only in the Bill of Rights.⁹³⁶ However, the court went on to find that such a limitation deprives a non-national of the right to work and may also threaten to humiliate or degrade such an individual as he or she may resort to begging or crime to survive.⁹³⁷

The Department of Labour & Home Affairs is also looking to introduce legislation to address the employment of non-nationals in all sectors including road freight, hospitality, restaurants, security, and farm and agriculture.⁹³⁸ Employment and Labour Minister Thula Nxesi, however, raised the issue that the bill would have to comply with the *Constitution* and the international conventions which also protect the rights of non-nationals. Consideration is being given to the introduction of quotas in the identified

⁹³² Staff writer "New Bill aims to limit the hiring of foreign workers in South Africa", <https://businesstech.co.za/news/business/456450/new-bill-aims-to-limit-the-hiring-of-foreign-workers-in-south-africa/> (accessed on 24 July 2021).

⁹³³ Catherine Kruger "Gauteng Bill infringes on rights of foreign nationals", <https://www.grounup.org.za/article/gauteng-bill-infringes-rights-foreign-nationals/> (accessed on 26 July 2021).

⁹³⁴ Catherine Kruger "Gauteng Bill infringes on rights of foreign nationals", <https://www.grounup.org.za/article/gauteng-bill-infringes-rights-foreign-nationals/> (accessed on 26 July 2021).

⁹³⁵ *Minister of Home Affairs & Others v Watchenuka & Another* (2004) 1 All SA 21 (SCA).

⁹³⁶ *Minister of Home Affairs & Others v Watchenuka & Another* (2004) 1 All SA 13 (SCA).

⁹³⁷ *Minister of Home Affairs & Others v Watchenuka & Another* (2004) 1 All SA 14 (SCA).

⁹³⁸ Staff writer "New Bill aims to limit the hiring of foreign workers in South Africa", <https://businesstech.co.za/news/business/456450/new-bill-aims-to-limit-the-hiring-of-foreign-workers-in-south-africa/> (accessed on 24 July 2021).

sectors.⁹³⁹ In implementing such laws government has the unenviable task of balancing the rights of citizens with the rights of non-nationals. Protecting the rights of citizens might result in the limitation of the rights of non-nationals and may fall foul of the provisions of the *Constitution* and international laws.

In the next section, I discuss the immigration laws and the proposed changes to these laws and how they impact the rights of non-national academics.

5.6 IMMIGRATION LAWS

The 2013 United Nations population report states that 3 percent of the human population are migrants who have crossed borders to live in other countries for a year or longer, due to various reasons.⁹⁴⁰ The *Immigrants Regulation Act of 1913* was the first immigration law passed in South Africa which had a nationwide effect. It was intended to exclude Indian immigrants from entering South Africa. Indians were seen as a threat to white supremacist rule following the arrival of indentured Indian labourers in 1860.⁹⁴¹ The supply of cheap labour was encouraged by the apartheid government which overlooked surreptitious migration practices but did not welcome black migrants who applied for citizenship.⁹⁴² During the apartheid era, immigration laws tended to favour white immigrants, especially skilled immigrants while unskilled labour was sourced from African countries, mainly for use in the mines.⁹⁴³ Since 1994 there have been efforts to develop immigration policy and legislation which included the drafting of the *Green Paper on International Migration in 1997*, a *White Paper on International Migration*, the *Refugee Act in 1998*, and the *Immigration Act in 2002*.⁹⁴⁴

⁹³⁹ Staff writer “Controversial law to restrict foreign workers in South Africa”, <https://businesstech.co.za/news/business/473630/controversial-law-to-restrict-foreign-workers-in-south-africa/> (accessed on 24 July 2021).

⁹⁴⁰ Department of Home Affairs 2016 “Green Paper on International Migration for South Africa”, 8 http://www.dha.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf (accessed on 6 June 2019).

⁹⁴¹ Department of Home Affairs 2016 “Green Paper on International Migration for South Africa”, 20 http://www.dha.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf (accessed on 6 June 2019).

⁹⁴² Department of Home Affairs 2016 “Green Paper on International Migration for South Africa”, 20 http://www.dha.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf (accessed on 6 June 2019).

⁹⁴³ Rasool *et al* 2013:399.

⁹⁴⁴ Department of Home Affairs 2016 “Green Paper on International Migration for South Africa”, 21 http://www.dha.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf (accessed on 6 June 2019).

Post-apartheid immigration legislation took seven years to develop. The *Immigration Act No.13 of 2002* replaced the *Aliens Control Act 96 of 1991*, which was passed during the apartheid dispensation.⁹⁴⁵ Criticism was levelled at the government for the lack of consultation during the drafting of the *Immigration Act 2002*.⁹⁴⁶ The *Immigration Amendment Act 19 of 2004* and the *Immigration Regulations of June 2005* were subsequently passed.⁹⁴⁷ Consultation took place with stakeholders before the passing of these amendments and certain changes and clarifications were made in a positive light.⁹⁴⁸ However, this did not imply that South Africa had a well-implemented immigration policy as certain provisions relating to applications by skilled non-nationals and businesses still presented challenges.⁹⁴⁹

Despite the passing of these laws the rules relating to immigration were still restrictive concerning work permits, backlogs with applications, evaluation of qualifications, and police clearance requirements.⁹⁵⁰ This did not help to alleviate the skills shortage prevalent in South Africa at the time.⁹⁵¹ By 2002 government had realized that there was a need to address the skills shortage, especially in areas such as information technology, engineering, and finance.⁹⁵² This, therefore, affected South Africa's ability to attract and retain skilled professional workers from other countries.⁹⁵³ Although the *Immigration Act* provides that a non-national shall 'enjoy all the rights, privileges, duties and obligations of a citizen, it also contains a limitation which provides that the non-national shall not be entitled to the rights reserved for citizens in the *Constitution* or other legislation. The employment of citizens over non-nationals is therefore prioritized by the legislation.⁹⁵⁴

The *Green Paper on International Migration 2016* highlighted the need for pro-active changes to immigration laws and the implementation of laws that are respectful of the

⁹⁴⁵ Adjai & Lazaridis 2013:201.

⁹⁴⁶ Rasool *et al* 2013:404.

⁹⁴⁷ Rasool *et al* 2013:400.

⁹⁴⁸ Rasool *et al* 2013:404.

⁹⁴⁹ Rasool *et al* 2013:404.

⁹⁵⁰ Rasool *et al* 2013:400.

⁹⁵¹ Rasool *et al* 2013:400.

⁹⁵² Rasool *et al* 2013:404.

⁹⁵³ Rasool *et al* 2013:400.

⁹⁵⁴ Horn & Harper "Foreign Nationals and Affirmative Action", <https://www.chmlegal.co.za/foreign-nationals-affirmative-action-cowan-harper-attorneys> (accessed on 20 November 2022).

human rights of all persons.⁹⁵⁵ It also highlighted that the current immigration policy needed to be replaced as it does not balance the need for South Africa to embrace global opportunities with the need to ensure national security and sovereignty.⁹⁵⁶

There appears to be a conflict between those who believe in stricter immigration controls and those who seek to see the relaxation of control measures. This conflict or debate is fuelled by stereotypes, strong emotions, and statistics that are challenged. It results in an 'us' versus 'them' mentality, pitting the rights of citizens against the rights of immigrants.⁹⁵⁷ The *White Paper on International Migration*, which was published in June 2017, recognized that South Africa lacks a strategic policy to attract and retain immigrant employees in scarce skill areas.⁹⁵⁸ The *Refugees Act* does not make provision for xenophobia and other hate crimes and does not provide any protection for victims of such offences.⁹⁵⁹

The best way to remedy the shortfall of the *Refugees Act* is to amend it to include a section that prohibits the xenophobic treatment of asylum seekers and refugees.⁹⁶⁰ One of the objectives of the Department of Home Affairs is to promote a human rights culture in government and society with regard to immigration control,⁹⁶¹ and to prevent xenophobia.⁹⁶² However, criticisms levelled against the *Immigration Act* include a view that the Act is anti-migratory and is focused on excluding and controlling immigrants rather than effectively managing immigration. This is seen to promote xenophobia rather than reduce it.⁹⁶³ There is a close link between immigration policies and xenophobia. A distinction must be drawn between immigration laws that cause fear

⁹⁵⁵ Department of Home Affairs 2017 "White Paper on International Migration for South Africa", <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf> (accessed on 6 June 2019).

⁹⁵⁶ Department of Home Affairs 2016 "Green Paper on International Migration for South Africa", 9 http://www.dha.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf (accessed on 6 June 2019).

⁹⁵⁷ Department of Home Affairs 2016 "Green Paper on International Migration for South Africa", 9 http://www.dha.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf (accessed on 6 June 2019).

⁹⁵⁸ Department of Home Affairs 2016 "Green Paper on International Migration for South Africa", http://www.dha.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf (accessed on 6 June 2019).

⁹⁵⁹ Muchiri 2016:110.

⁹⁶⁰ Muchiri 2016:112.

⁹⁶¹ *Immigration Act* 13/2002:sec. 2(1)(a).

⁹⁶² *Immigration Act* 13/2002:sec. 2(1)(e).

⁹⁶³ Muchiri 2016:113.

and hostility and are used as a security control measure and those that are aimed at legitimately managing migration.⁹⁶⁴

While the *Immigration Act* does provide for the recruitment of highly skilled or qualified people⁹⁶⁵, promoting skilled resources⁹⁶⁶, and the movement of students and academic staff within the SADC region for educational and research⁹⁶⁷, it also provides that employers should train citizens to reduce reliance on foreign labour.⁹⁶⁸ An employer is allowed to employ a non-national if the employer can satisfy the department that a diligent search has been made for a South African who had the same qualifications as the non-national and has proved unsuccessful.⁹⁶⁹ The employer in terms of the Act must also provide a certificate from a chartered accountant to confirm that the salary and benefits offered to the non-national is not inferior to that prevailing within the current market for citizens and residents.⁹⁷⁰

Subsequent regulations to the *Immigration Amendment Act* went on to introduce stricter rules for the employment of non-nationals. In terms of these regulations, the employer has to procure a certificate from the Department of Labour, instead of a chartered accountant, to confirm that the employer could not recruit a citizen or permanent resident with the same skills or qualifications as the non-national and further, that the applicant has the necessary skills and qualifications for the position.⁹⁷¹ These provisions can be seen as being contradictory as on the one hand it encourages the recruitment of skilled workers from other countries while on the other hand it places a duty on employers to train South African citizens so that there is no need to recruit skilled persons from outside the country. Another challenge facing skilled non-national workers is that they must have their qualifications evaluated by the South African

⁹⁶⁴ Centre for Human Rights, University of Pretoria “The Nature of South Africa’s Legal Obligations to combat xenophobia”, 21
https://www.chr.up.ac.za/images/publications/centrepublishments/documents/south_africa_legal_obligations_combat_xenophobia.pdf (accessed on 10 July 2021).

⁹⁶⁵ *Immigration Act* 13/2002:sec. 2(1)(cc).

⁹⁶⁶ *Immigration Act* 13/2002:sec. 2(1)(dd).

⁹⁶⁷ *Immigration Act* 13/2002:sec. 2(1)(ee).

⁹⁶⁸ *Immigration Act* 13/2002:sec. 2(1)(ii).

⁹⁶⁹ *Immigration Act* 13/2002:sec. 19(2)(a).

⁹⁷⁰ *Immigration Act* 13/2002:sec. 19(2)(b).

⁹⁷¹ *Immigration Amendment Act* 2014:sec. 18(3) a(i) &(ii).

Qualifications Authority (SAQA).⁹⁷² The influx of applications causes delays and frustration for skilled workers as they are unable to apply for jobs until their qualifications have been evaluated by SAQA.⁹⁷³ A challenge for the employer is also the time it takes to first attempt to find South African candidates to fill the position before being able to consider applications from non-national workers.⁹⁷⁴ The restrictions in these immigration laws would impact non-national academics who apply for positions within the higher education sector. According to the provisions outlined above non-national academics would only be considered if there were no suitable South African candidates.

There is no consensus on how South Africa should deal with international immigration at legislative, policy, and strategic levels. The restrictive nature of South Africa's immigration laws has caused a serious skills shortage in the country, rendering South Africa less competitive in the global skills market.⁹⁷⁵ *The Green Paper on International Migration* suggested a managed approach to migration that must be strategic and proactive to address nation-building, economic growth, and national security.⁹⁷⁶ The National Development Plan provides that the acquisition of skills including international skills should be prioritized, however, an adequate strategy to attract and recruit skilled non-nationals is lacking. It was envisaged that by 2020 there would be 40 million fewer workers with a university degree than what is required by the global economy.⁹⁷⁷ To build the country's skill and knowledge base, South Africa should have a strategy in place to attract skilled migrants who are seen as key resources for industrialized countries. Xenophobia is a critical area of concern for the safety and well-being of non-nationals. *The Immigration Act* also provides for liaison with the police to educate communities on the rights of non-nationals and to conduct initiatives to prevent xenophobia.⁹⁷⁸

⁹⁷² Rasool *et al* 2013:405.

⁹⁷³ Rasool *et al* 2013:406.

⁹⁷⁴ Rasool *et al* 2013:405.

⁹⁷⁵ Muchiri 2016:114.

⁹⁷⁶ Department of Home Affairs 2016 "Green Paper on International Migration for South Africa", 9 http://www.dha.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf (accessed on 6 June 2019).

⁹⁷⁷ Department of Home Affairs 2016 "Green Paper on International Migration for South Africa", 42 http://www.dha.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf (accessed on 6 June 2019).

⁹⁷⁸ *Immigration Act* 2002:sec. 2(2)(e).

However, the prevalence of xenophobic attacks within South African society indicate that such initiatives by law enforcement are lacking or ineffective. Those who draft legislation should therefore ensure that laws consider the right to safety and security of all who live in South Africa.

Having examined the provisions of Immigration laws and how they impact the rights of non-national academics, in the next section I discuss anti-discrimination laws as these Acts have been implemented to protect against discrimination. I look at the anti-discrimination legislation to determine whether they cater for protection against xenophobia.

5.7 ANTI-DISCRIMINATION LAWS

5.7.1 *Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)*

The *Promotion of Equality and Prevention of Unfair Discrimination Act* (hereinafter PEPUDA) was passed by the government to curb the effects of racial oppression and is an example of anti-discrimination legislation.⁹⁷⁹ The Act was passed following Section 9 of the *Constitution* which provides for legislation to be passed specifically dealing with the prohibition of unfair discrimination and the promotion of equality.⁹⁸⁰ The Act prohibits discrimination in almost all sectors of society such as education, labour, healthcare services, housing, etc.⁹⁸¹ Some of the objects of the Act are the promotion of equality and the equal enjoyment of all rights and freedoms by every person.⁹⁸²

‘Equality’ is defined in the Act as including

the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes de jure and de facto equality and also equality in terms of outcomes.

⁹⁷⁹ Kok 2017:26.

⁹⁸⁰ *Promotion of Equality & Prevention of Unfair Discrimination Act* 4/2000: Preamble.

⁹⁸¹ Kok 2017:26.

⁹⁸² *Promotion of Equality & Prevention of Unfair Discrimination Act* 4/2000:sec. 2(b)(i) & (ii).

In a study conducted concerning social cohesion among South Africans and foreigners, inequality was rated as the greatest source of division while race and political parties ranked second and third respectively.⁹⁸³ Inequality was said to be prevalent not just where economic outcomes were concerned but also in matters relating to opportunities, power relations, and access to resources.⁹⁸⁴

One of the aims of the Act is to facilitate compliance with the obligations held by South Africa in terms of international law and in particular with the Convention on the Elimination of all forms of Racial Discrimination (CERD) and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).⁹⁸⁵ CERD obliges states to declare acts of violence or incitement to commit violence against groups of persons of another ethnic origin a punishable offence.⁹⁸⁶ South Africa currently does not have hate crime legislation and the hate speech prohibition only provides for civil enforcement. Botha and Kok state that the hate speech prohibition in the Act should be interpreted because certain kinds of expressions are supposed to be a criminal offence if South Africa is to comply with its obligations under international law.⁹⁸⁷

The Act also aims to achieve the protection of human dignity, the prevention of unfair discrimination, hate speech, and the advocacy of hatred based on ethnicity.⁹⁸⁸ The Act acknowledges that unfair discrimination is still deeply entrenched in our society and our institutions, therefore there is a need to address these issues to achieve the Constitutional guarantee of freedom, equality, and social justice for all.⁹⁸⁹ From a reading of the Act, however, the Act specifically mentions the prohibition of unfair discrimination concerning race, gender, and disability.⁹⁹⁰ Aside from mentioning

⁹⁸³ Institute for Justice & Reconciliation "Social Cohesion among South Africans and foreigners Evidence from the South African Reconciliation Barometer 2017", 2 <https://www.ijr.org.za/portfolio-items/social-cohesion-among-south-africans-and-between-south-africans-and-foreigners/> (accessed on 1 August 2021).

⁹⁸⁴ Institute for Justice & Reconciliation "Social Cohesion among South Africans and foreigners Evidence from the South African Reconciliation Barometer 2017", 3 <https://www.ijr.org.za/portfolio-items/social-cohesion-among-south-africans-and-between-south-africans-and-foreigners/> (accessed on 1 August 2021).

⁹⁸⁵ Botha & Kok 2019:5.

⁹⁸⁶ Botha & Kok 2019: 5.

⁹⁸⁷ Botha & Kok 2019:5.

⁹⁸⁸ *Promotion of Equality & Prevention of Unfair Discrimination Act 4/2000:sec. 2(b)(ii) (iv) & (v).*

⁹⁸⁹ *Promotion of Equality & Prevention of Unfair Discrimination Act 4/2000:Preamble.*

⁹⁹⁰ *Promotion of Equality & Prevention of Unfair Discrimination Act 4/2000:secs. 7,8 & 9.*

xenophobia in the definition of 'nationality', the Act is silent on discrimination arising out of xenophobic sentiment.⁹⁹¹ Section 28 of the Act does not expand on the notion of 'nationality of origin' and does not provide that the prosecution of crimes motivated by xenophobia should allow for nationality to be considered as an aggravating factor.⁹⁹² Failure to do so means that victims of xenophobic violence cannot rely on Section 28 of the Act when seeking to enforce their rights.⁹⁹³

In an illustrative list of unfair practices, the Act includes the failure to provide for diversity in education reasonably and practically, as an unfair practice. This implies that accommodation for the diversity that non-national academics bring to the academic space should be embraced. However, the presence of xenophobia would negate this goal and instead add to the exclusion and alienation of non-national academics. This would imply that the Act as part of our current legal framework may be lacking in providing non-national academics with adequate protection from xenophobia. Further, although this is a vital piece of legislation dealing with unfair discrimination, there have not been cases coming before the court and the Act has not been tested in cases of xenophobic violence.⁹⁹⁴

It has been 21 years since the enactment of PEPUDA. Although the Act was implemented for the realization of rights and for people to access the Equality Courts, the fact of the lack of implementation of the provisions of the Act illustrates that PEPUDA may not be the only solution to the issues of discrimination and equality.⁹⁹⁵ The South African Research Chair in Equality, Law, and Social Justice at the School of Law at the University of the Witwatersrand made certain submissions on amendments to the Act. I discuss their submissions in Chapter 6.⁹⁹⁶

The following discussion on the *Prevention & Combatting of Hate Crimes and Hate Speech Bill* highlights the provisions of the Bill which is intended to legislate against xenophobia.

⁹⁹¹ *Promotion of Equality & Prevention of Unfair Discrimination Act 4/2000:sec. 1.*

⁹⁹² Muchiri 2016:106.

⁹⁹³ Muchiri 2016:107.

⁹⁹⁴ Muchiri 2016:107.

⁹⁹⁵ Powys 2016:38.

⁹⁹⁶ See Section 6.2.4.1.

5.7.2 Preventing and Combatting of Hate Crimes and Hate Speech Bill

Xenophobia is not a criminal offence in our existing criminal law framework.⁹⁹⁷ Crimes relating to xenophobia are dealt with in terms of existing criminal laws. For example, if a person was charged with murder and the crime was motivated by xenophobia, he or she would be charged criminally for murder, and the fact that the crime was motivated by xenophobia would be dealt with as an aggravating factor during sentencing.⁹⁹⁸ This position should change once the *Preventing of Hate Crimes and Hate Speech Bill* is passed into law.⁹⁹⁹

The Bill was first introduced for approval by Parliament in 2016. In 2017 the Hate Crimes Working Group made submissions to Parliament on the draft *Prevention and Combating of Hate Crimes and Hate Speech Bill*. The submissions made centred around the wording of provisions in the Bill, some of which were implemented in the amended 2018 Bill.¹⁰⁰⁰ The Bill aims to provide for the prevention of hate crimes and hate speech as well as effective enforcement measures.¹⁰⁰¹ Due to the increasing prevalence of hate crime in South Africa, there is an urgent need for the passing of hate crime legislation.¹⁰⁰² In 2009 the Convention on the Elimination of all forms of Racial Discrimination (CERD) recommended that South Africa implement legislation and other measures to punish, prevent and combat hate crimes and hate speech.¹⁰⁰³ This took place after the CERD had expressed concern about the frequency of hate crimes and hate speech in South Africa, noting that the current prevention measures are inadequate to prevent such crimes from occurring.¹⁰⁰⁴ This Bill is yet to be passed into law and there is a need to examine the provisions of the Bill to determine whether it will afford protection to non-national academics. Below in this thesis I also evaluate whether there is a need to develop guidelines for hate crimes legislation so that police

⁹⁹⁷ Muchiri 2016:117.

⁹⁹⁸ Naidoo 2017:14-15.

⁹⁹⁹ *Prevention and Combating of Hate Crimes and Hate Speech Bill* 2018.

¹⁰⁰⁰ Hate Crimes Working Group "Submission of the Hate Crimes Working Group: Prevention and Combatting of Hate Crimes and Hate Speech Bill", <https://www.hcwg.org.za/resources/> (accessed on 17 September 2021).

¹⁰⁰¹ *Prevention and Combating of Hate Crimes and Hate Speech Bill* 2018:sec. 2 (c) &(d).

¹⁰⁰² Botha & Govindjee 2014:118.

¹⁰⁰³ Botha & Govindjee 2014:133.

¹⁰⁰⁴ Botha & Govindjee 2014:133.

and prosecutors will know how to implement the legislative provisions of the Act, once passed.¹⁰⁰⁵

South Africa committed to adhere to the Declaration which was adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance which took place in Durban.¹⁰⁰⁶ The International Convention on the Elimination of all forms of Racial Discrimination also requires all member states to declare acts of violence or incitement to such acts, against persons of another ethnic origin or race, punishable by law.¹⁰⁰⁷ In light of the above, some of the objects of the Bill are to give effect to the obligations imposed by international law concerning prejudice and intolerance as well as the prevention of hate crimes and hate speech.¹⁰⁰⁸ The Bill reiterates the relevance of Sections 9, 10 & 16 of the *Constitution* as well as the relevant provisions of the *Promotion of Equality and Prevention of Unfair Discrimination Act*, which prohibit unfair discrimination, hate speech, and harassment.¹⁰⁰⁹

Bearing in mind that the definition of xenophobia is closely linked to hate crimes and hate speech, it is pertinent to examine the definitions of these terms in the Bill. In dealing firstly with hate crimes, a 'hate crime' is defined as a recognizable offence that is motivated by a person's prejudice or intolerance towards the victim of the offence of one or more of the characteristics listed in the Bill, and which include race, nationality, migrant or refugee status and ethnic or social origin.¹⁰¹⁰ From the definition of a hate crime it would seem that xenophobia would be classified as a type of hate crime and victims of xenophobia should therefore benefit from the protections offered in the Act. Any person who commits a hate crime is guilty of an offence and liable on conviction to a sentence specified in Section 6(1) of the Act.¹⁰¹¹ A hate crime is regarded as a victim-led offence because it is only seen as a hate crime when the victim is targeted due to his group identity. If this is not present, it will be any 'ordinary crime' such as

¹⁰⁰⁵ Breen & Nel 2011:38.

¹⁰⁰⁶ *Prevention and Combating of Hate Crimes and Hate Speech Bill* 2018:Preamble.

¹⁰⁰⁷ *Prevention and Combating of Hate Crimes and Hate Speech Bill* 2018:Preamble.

¹⁰⁰⁸ *Prevention and Combating of Hate Crimes and Hate Speech Bill* 2018:sec. 2 (a)&(c).

¹⁰⁰⁹ *Prevention and Combating of Hate Crimes and Hate Speech Bill* 2018: Preamble.

¹⁰¹⁰ *Prevention and Combating of Hate Crimes and Hate Speech Bill* 2018: sec.3 (1)(g)(k)(n).

¹⁰¹¹ *Prevention and Combating of Hate Crimes and Hate Speech Bill* 2018:sec.3(2).

rape, robbery, or assault.¹⁰¹² Scholars of hate crimes refer to hate crimes as being directed at people who are part of the outgroup and who are stigmatized by society.¹⁰¹³ Hate crimes are perpetrated based on an individual's personal characteristics such as ethnicity and amount to a violation of the right to equality.¹⁰¹⁴ Botha is of the view that societal structures create power groups that then target subordinate groups through hate crimes, thereby causing the proliferation of inequalities and hierarchies. Due to their vulnerability, these individuals become soft targets for violence and harassment.¹⁰¹⁵

'Hate speech' is also defined in the Bill and relates to any communication made to incite harm or promote hatred against a person or group of persons based on the listed characteristics, which include ethnic or social origin, nationality, and migrant or refugee status.¹⁰¹⁶ Section 9 of the Bill places a duty on the government, the South African Human Rights Commission, and the Commission for Gender Equality to develop education and information campaigns aimed at preventing and prohibiting hate crimes and hate speech, to provide help and advice to a person who wants to complain about the commission of a hate crime or hate speech and to train public officials on the prevention and combating of hate crimes and hate speech.¹⁰¹⁷

In a statement released in 2018 by the Department of Justice and Constitutional Development, the Deputy Minister, John Jeffreys stated that the passing of the Bill will serve to eradicate not only racism but all forms of discrimination, as such occurrences were prevalent in South Africa.¹⁰¹⁸ Criticism has been levelled against the government for the delay in passing the Bill into law. The department defended itself by stating that it required time to consider the Bill carefully in light of its complex and sensitive

¹⁰¹² Botha 2019:781.

¹⁰¹³ Botha 2019:784.

¹⁰¹⁴ Naidoo 2016:647.

¹⁰¹⁵ Botha 2019:785.

¹⁰¹⁶ *Prevention and Combating of Hate Crimes and Hate Speech Bill* 2018:sec.4(1)(a).

¹⁰¹⁷ *Prevention and Combating of Hate Crimes and Hate Speech Bill* 2018:sec.9(1)&(2).

¹⁰¹⁸ Ramotsho "Prevention and Combating of Hate Crimes and Hate Speech Bill Approved", <https://www.derebus.org.za/prevention-and-combating-of-hate-crimes-and-hate-speech-bill-approved/> (accessed on 8 September 2021).

nature.¹⁰¹⁹ The Hate Crimes Working Group made a submission again in 2019 to Parliament on suggested changes to the Bill.¹⁰²⁰ In April 2021 the Hate Crimes Working Group wrote a letter to Parliament in which it expressed concern regarding the lack of progress in the passing of hate crime legislation following the passing of the Bill.¹⁰²¹ The challenges surrounding the proposed Bill are discussed in greater detail in Chapter 6, which focuses on the inadequacies of current legislation and policies. The passing of the Bill into law is vitally important to protect the rights of non-nationals against xenophobia as it will criminalize xenophobia and provide for the prosecution of xenophobic crimes.

In section 5.8 below I examine in some detail the cases which have come before the court, dealing with xenophobia against non-nationals. An examination of the case law in this area is important as it serves to shed light on how the court treats xenophobic violence and behaviour since it is not regarded as a crime in South Africa but is prevalent in South African society.

5.8 CASE LAW

While there have been cases involving the plight of non-nationals seeking asylum or the right to practise a trade or business in South Africa which also highlighted xenophobic treatment by government officials, there is a paucity of case law pertaining specifically to xenophobia against non-national academics. The cases discussed above in this chapter and those which are discussed below serve to highlight unfair discrimination against non-nationals in general as non-nationals represent a minority in all countries. As a result, they are vulnerable since they do not have much political strength and their rights to respect and equal concern can be overlooked.¹⁰²² Other cases which deal with the right to equality are examined in Chapter 4, which focuses on equality, discrimination, and xenophobia.

¹⁰¹⁹ Ramotsho “Prevention and Combating of Hate Crimes and Hate Speech Bill Approved”, <https://www.derebus.org.za/prevention-and-combating-of-hate-crimes-and-hate-speech-bill-approved/> (accessed on 8 September 2021).

¹⁰²⁰ Hate Crimes Working Group “Submission of the Hate Crimes Working Group: Prevention and Combatting of Hate Crimes and Hate Speech Bill”, <https://www.hcwg.org.za/resources/> (accessed on 17 September 2021).

¹⁰²¹ Hate Crimes Working Group “Letter to Parliament Grave Concern Regarding lack of Progress in passing the Prevention and Combatting of Hate Crimes & Hate Speech Bill”, 1 <https://www.hcwg.org.za/resources/> (accessed on 17 September 2021).

¹⁰²² Currie & De Waal 2005:259.

5.8.1 *Osman v Minister of Safety and Security & Others*¹⁰²³

Osman's case involved a complaint about unfair discrimination on the grounds of ethnicity and social origin in terms of Section 20 of the *Promotion of Equality and Prevention of Unfair Discrimination Act*.¹⁰²⁴ The Act defines nationality, which is one of the prohibited grounds for unfair discrimination as 'ethnic or national origin and includes practices associated with xenophobia and other adverse assumptions of a discriminatory nature but does not include rights and obligations normally associated with citizenship.'¹⁰²⁵

In 2008 xenophobic violence broke out in Dunoon. The Plaintiff alleged that his store was destroyed during the violence. According to him, he had requested assistance from the police to remove goods from his shop, but the police had failed to assist him.¹⁰²⁶ The Plaintiff alleged that the police did not come to his assistance because 'he was a "foreign national" who did not deserve the same protection as South African citizens'. He claimed that the conduct of the police amounted to xenophobia and he sought an order from the court for damages of R 515 000-00.¹⁰²⁷ Davis J stated that xenophobia was central to the events which gave rise to the dispute and it was troubling that the plaintiff lost his livelihood which he had used to provide for his family.¹⁰²⁸ The police testified that attempts were made to monitor the situation and to despatch assistance to the shops that were in danger of being destroyed.¹⁰²⁹ It was also stated that the police enjoyed a good relationship with the foreign community and they had not received any complaints from them of discriminatory behaviour by the police.¹⁰³⁰ The court in deciding the case said that there was no entry in the police occurrence book of a complaint having been received about the looting of the plaintiff's shop and that it was difficult to determine a 'general approach by the police to discriminate against Somali's by virtue of their identity.'¹⁰³¹ The court dismissed the

¹⁰²³ *Osman v Minister of Safety* 2008 (EC09/2008) [2010] ZAEQC1.

¹⁰²⁴ *Osman v Minister of Safety* 2008 (EC09/2008) [2010] ZAEQC1:par. 25.

¹⁰²⁵ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000:sec. 1(1).

¹⁰²⁶ *Osman v Minister of Safety* 2008 (EC09/2008) [2010] ZAEQC1:par. 5.

¹⁰²⁷ *Osman v Minister of Safety* 2008 (EC09/2008) [2010] ZAEQC1:par. 10.

¹⁰²⁸ *Osman v Minister of Safety* 2008 (EC09/2008) [2010] ZAEQC1:par. 5.

¹⁰²⁹ *Osman v Minister of Safety* 2008 (EC09/2008) [2010] ZAEQC1:par. 5.

¹⁰³⁰ *Osman v Minister of Safety* 2008 (EC09/2008) [2010] ZAEQC1:par. 20.

¹⁰³¹ *Osman v Minister of Safety* 2008 (EC09/2008) [2010] ZAEQC1:par. 15.

plaintiff's case. It stated that because the plaintiff was a single witness, it was difficult to decide without further evidence to support the plaintiff's version and that the plaintiff had provided varying versions of how the looting had taken place.¹⁰³² The plaintiff's legal representative stated that the plaintiff would have been reluctant to complain about the police with the police themselves.¹⁰³³ The court however did recognize that the violence had caused serious loss to the plaintiff and no order was made as to costs in order not to penalize the plaintiff any further.¹⁰³⁴

5.8.2 *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others*¹⁰³⁵

This case involved an application by refugees concerning their right to work in the security industry.¹⁰³⁶ The applicants, except the first applicant, had applied to be registered as security service providers in terms of the *Private Security Industry Regulation Act* (hereafter the *Security Act*).¹⁰³⁷ They subsequently received notice that their registrations would be withdrawn as they were neither citizens nor permanent residents of South Africa.¹⁰³⁸ They lodged an appeal to the Appeal Committee relying on Section 23(6) of the *Security Act* and the *Constitution*, stating that their rights to equality, dignity, and non-discrimination had been violated.¹⁰³⁹ Their appeals were dismissed because the Authority had made an error in registering them and the applicants had failed to show good cause as to why they should be registered.¹⁰⁴⁰ The applicants approached the High Court for relief. The High Court denied their application saying that a high level of trust is required from private security officers and there should be strict criteria in deciding who should qualify for those positions.¹⁰⁴¹

¹⁰³² *Osman v Minister of Safety* 2008 (EC09/2008) [2010] ZAEQC1:par. 10.

¹⁰³³ *Osman v Minister of Safety* 2008 (EC09/2008) [2010] ZAEQC1:par. 15.

¹⁰³⁴ *Osman v Minister of Safety* 2008 (EC09/2008) [2010] ZAEQC1:par. 5.

¹⁰³⁵ *Union of Refugee Women & Others v Director, Private Security Regulatory Authority & Others* (CCT 39/06) [2006].

¹⁰³⁶ *Union of Refugee Women & Others v Director, Private Security Regulatory Authority & Others* (CCT 39/06) [2006]:par. 4.

¹⁰³⁷ *Private Security Industry Regulation Act* 56/2001.

¹⁰³⁸ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 8.

¹⁰³⁹ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 12.

¹⁰⁴⁰ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 13.

¹⁰⁴¹ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 18.

The applicants subsequently appealed to the Constitutional Court and leave to appeal was granted. The court in deciding the case mentioned the following:

- a) Refugees are a vulnerable group in society, and they should be treated with compassion.
- b) Refugees have had to flee from their home countries due to conflict or human rights violations and have also been victims of violence.¹⁰⁴²
- c) The applicants set out that Section 23(1) of the Security Act discriminated against them based on their refugee status.¹⁰⁴³
- d) “Discrimination is differentiation on illegitimate grounds or on grounds that have historically been associated with patterns of disadvantage.”¹⁰⁴⁴
- e) Our Constitution accords all the fundamental rights in the Bill of Rights to foreigners except those limited to South African citizens only as in the case of the right to choose a vocation which is accorded to citizens only.¹⁰⁴⁵

The court had to consider whether discrimination against refugees, in this case, seriously infringed their rights.¹⁰⁴⁶ Refugees are people who have had to flee from their home country due to persecution and they cannot return. Mokgoro J and O'Regan J said that to discriminate against refugees would amount to discrimination against a vulnerable group and would result in a serious impairment of their dignity and rights.¹⁰⁴⁷ To exclude refugees from working as private security providers simply because of their refugee status would perpetuate a climate of xenophobia and would not be in line with the vision of our *Constitution*. It would not only result in social stigma but would also have a material effect on refugees as they would need to find work to

¹⁰⁴² *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 28.

¹⁰⁴³ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 32.

¹⁰⁴⁴ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 43.

¹⁰⁴⁵ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 46.

¹⁰⁴⁶ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 113.

¹⁰⁴⁷ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 113.

take care of themselves and their families.¹⁰⁴⁸ As a result, the majority judgment of the court proposed an order to declare Section 23(1) (1) of the *Security Act* to be inconsistent with Section 9(3) of the *Constitution* in that it omitted the words “or refugee status in terms of the *Refugees Act 130 of 1998*”.¹⁰⁴⁹

5.8.3 *Kiliko & Others v Minister of Home Affairs & Others*¹⁰⁵⁰

An application was made by Congolese citizens who had come to South Africa as asylum seekers. They applied to the Western Cape Refugee Reception Centre for asylum or refugee status, but the centre had a practice of only dealing with 20 applications per day. This delayed the processing of their applications and they alleged that this breached their rights in terms of the *Refugees Act 130 of 1998*, sections 9,10,12, and 33 of the *Constitution*, and also violated international law.¹⁰⁵¹ The applicants sought an order from the court to the effect that the procedure of the centre is declared invalid and unconstitutional and that the applications of asylum seekers should be dealt with within a reasonable time.¹⁰⁵²

The court held that foreigners are entitled to all fundamental rights except for those specifically reserved for South African citizens. An asylum seeker is regarded as an ‘illegal foreigner’ until granted an asylum-seeker permit and can be deported or detained in terms of the *Immigration Act 13 of 2002*, as a result impairing his or her right to dignity and freedom and security of person.¹⁰⁵³ The court found that the Department had failed to meet its obligations and the delays had violated the fundamental rights of asylum seekers. In addition, it was held that the practice of only processing 20 applications per day conflicted with the fundamental rights of illegal foreigners and the respondents had to provide the court with a report which addressed the aspects dealt with by the court.¹⁰⁵⁴

¹⁰⁴⁸ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 122.

¹⁰⁴⁹ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]: par. 125.

¹⁰⁵⁰ *Kiliko & Others v Minister of Home Affairs & Others* 2006 (4) SA 114 C.

¹⁰⁵¹ *Kiliko & Others v Minister of Home Affairs & Others* 2006 (4) SA 114 C:headnote.

¹⁰⁵² *Kiliko & Others v Minister of Home Affairs & Others* 2006 (4) SA 114 C:headnote.

¹⁰⁵³ *Kiliko & Others v Minister of Home Affairs & Others* 2006 (4) SA 114 C:headnote.

¹⁰⁵⁴ *Kiliko & Others v Minister of Home Affairs & Others* 2006 (4) SA 114 C:headnote.

5.8.4 *Ruta v Minister of Home Affairs*¹⁰⁵⁵

Ruta, the applicant in this case was a Rwandan national who had crossed the border from Zimbabwe into South Africa illegally and without a visa. In terms of the Immigration Act 13 of 2002, this rendered him an illegal foreigner.¹⁰⁵⁶ Fifteen months later Ruta was arrested for certain traffic violations. He was convicted and imprisoned. While in prison the Department of Home Affairs began deportation proceedings to deport Ruta. Ruta then applied for asylum status under the *Refugees Act 130 of 1998*, saying that if he returned to Rwanda he would face death.¹⁰⁵⁷

The Department argued that he had applied too late and should therefore be deported.¹⁰⁵⁸ He succeeded in the High Court but the decision was reversed in the Supreme Court of Appeal.¹⁰⁵⁹ The Supreme Court of Appeal found that asylum seekers do not have an indefinite time to apply for asylum, rather they have a reasonable time to do so.¹⁰⁶⁰ The case was subsequently taken on appeal to the Constitutional Court. It was highlighted that the issues of human dignity, life, and liberty were at stake in this case.¹⁰⁶¹ The issue that the court had to decide on was whether an 'illegal foreigner' who applies for asylum should be allowed to apply under the *Refugees Act* or the *Immigration Act* and whether the 15-month delay in making the application and the applicant's arrest preclude him from applying for refugee status. Can a person wait months to apply and only insist on the right to apply when confronted with the law?¹⁰⁶²

Indeed, non-nationals do not have the right to enter, remain or reside anywhere in South Africa as this is the right of citizens only. South Africa also has the right to regulate who enters the country.¹⁰⁶³ International law also does not accord non-nationals the right to enter and reside in South Africa by contravening the laws of the country.¹⁰⁶⁴ The *Immigration Act* defines an 'illegal foreigner' while the *Refugees Act*

¹⁰⁵⁵ *Ruta v Minister of Home Affairs* [2018] ZACC.

¹⁰⁵⁶ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 1.

¹⁰⁵⁷ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 1.

¹⁰⁵⁸ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 1.

¹⁰⁵⁹ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 2.

¹⁰⁶⁰ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 5.

¹⁰⁶¹ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 12.

¹⁰⁶² *Ruta v Minister of Home Affairs* [2018] ZACC:par. 14.

¹⁰⁶³ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 37.

¹⁰⁶⁴ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 38.

deals with who may apply for asylum and who is entitled to refugee status.¹⁰⁶⁵ The judge stated that both these statutes have to be read alongside each other to make sense of them and one cannot supersede the other.¹⁰⁶⁶ The *Immigration Act* gives an Immigration officer the discretion to arrest or detain an illegal foreigner but this discretion must be exercised in deference to the provisions of the *Refugee Act* which allows for an application for refugee status to be decided upon.¹⁰⁶⁷ It was also said that the argument by the Minister did not take into account the many asylum seekers who in fact do apply for asylum within the time limits stipulated by the Immigration Act.¹⁰⁶⁸ The court cited *Union of Refugee Women V Director: Private Security Industry Regulatory Authority*¹⁰⁶⁹ and *Ahmed & Others v Minister of Home Affairs & Another*¹⁰⁷⁰ where it was recognized that refugees are vulnerable people who are fleeing human rights abuses and are therefore traumatized.¹⁰⁷¹ The court found that the delay in making an application did not disqualify the applicant from applying for asylum.¹⁰⁷² The appeal was granted with costs.¹⁰⁷³

5.8.5 Ahmed & Others v Minister of Home Affairs & Another¹⁰⁷⁴

In *Ahmed's* case, the court had to decide whether asylum seekers including persons whose applications for refugee status have been refused, can apply for other visas and immigration permits in terms of the *Immigration Act*.¹⁰⁷⁵ An Application was also made for an order to set aside the directive of Home Affairs which provided that departmental officials could refuse all applications for temporary and permanent residence visas made by the person holding an asylum seeker permit.¹⁰⁷⁶ The directive implied that asylum seekers would have to return to their country of origin to apply for a permanent residence permit, possibly leaving their families behind to do

¹⁰⁶⁵ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 41.

¹⁰⁶⁶ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 42.

¹⁰⁶⁷ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 46.

¹⁰⁶⁸ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 48.

¹⁰⁶⁹ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006].

¹⁰⁷⁰ *Ahmed & others v Minister of Home Affairs & Another* [2018] ZACC:39.

¹⁰⁷¹ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 48.

¹⁰⁷² *Ruta v Minister of Home Affairs* [2018] ZACC:par. 56.

¹⁰⁷³ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 61.

¹⁰⁷⁴ *Ahmed & others v Minister of Home Affairs & Another* [2018].

¹⁰⁷⁵ *Ahmed & others v Minister of Home Affairs & Another* [2018] ZACC:par. 1.

¹⁰⁷⁶ *Ahmed & others v Minister of Home Affairs & Another* [2018] ZACC:par. 1.

so.¹⁰⁷⁷ The court said that a directive that has not been made public through publication in the Government Gazette and is simply an operational guide for immigration officials cannot be said to qualify as law and it is therefore unfair and unlawful to require applicants to leave the country to apply for a visa. The Directive was set aside in part.¹⁰⁷⁸ The court held that the *Immigrant Directive 21 of 2015* was inconsistent with regulation 23 of the *Immigration Regulations, 2012* which prohibited asylum seekers from applying for permanent residence permits while within South Africa.¹⁰⁷⁹

5.8.6 *Abdi v Minister of Home Affairs*¹⁰⁸⁰

The appellants alleged that they had fled from Somalia to South Africa but due to fears of xenophobia in South Africa, they had decided to go on to Namibia. They left South Africa without informing the South African authorities and were subsequently arrested and deported.¹⁰⁸¹ While being deported from Namibia to Somalia the appellants decided that they wanted to remain in South Africa and sought assistance from a protection officer at the United Nations High Commissioner for Refugees in South Africa.¹⁰⁸² They made an application for an order to be allowed to remain in South Africa but were unsuccessful. The matter was taken on appeal. The court upheld the appeal and declared that the first applicant could remain in South Africa, pending a decision on his application for asylum and the second applicant could remain in South Africa according to his status as a refugee.¹⁰⁸³ The judge mentioned that Section 7 of the *Constitution* imposes a duty on State organs to 'respect, promote and fulfill the rights in the Bill of Rights and that the officials of the respondent had not met this obligation, having little regard for the fears expressed by the appellants for their safety were they to be sent back to Somalia.¹⁰⁸⁴ In an article about the role of law in curbing xenophobia, that appeared in *De Rebus* in 2015, Judge Mojapelo said that "the case confirmed the right of foreign nationals, in the face of xenophobic attacks, not to be

¹⁰⁷⁷ *Ahmed & others v Minister of Home Affairs & Another* [2018] ZACC:par. 53.

¹⁰⁷⁸ *Ahmed & others v Minister of Home Affairs & Another* [2018] ZACC:par. 62.

¹⁰⁷⁹ *Ahmed & others v Minister of Home Affairs & Another* [2018] ZACC:par. 67.

¹⁰⁸⁰ *Abdi v Minister of Home Affairs* (734/10) [2011] ZASCA.

¹⁰⁸¹ *Abdi v Minister of Home Affairs* (734/10) [2011] ZASCA:par. 6.

¹⁰⁸² *Abdi v Minister of Home Affairs* (734/10) [2011] ZASCA:par. 7.

¹⁰⁸³ *Abdi v Minister of Home Affairs* (734/10) [2011] ZASCA:par. 38.

¹⁰⁸⁴ *Abdi v Minister of Home Affairs* (734/10) [2011] ZASCA:par. 33.

deported to dysfunctional home countries. This is an important right, which enjoys international protection”.¹⁰⁸⁵

5.8.7 *Nanduta & Others v Minister of Home Affairs & Others*¹⁰⁸⁶

This case required the court to determine whether it was constitutional to compel foreign spouses who had visitor visas and the children of citizens to have to leave South Africa to apply to change their visa status.¹⁰⁸⁷ The applicants contended that this requirement infringed their rights to dignity and the rights of children as set out in the *Constitution*.¹⁰⁸⁸ The effect of this rule would be that the affected spouse of the South African citizen would have to remain outside South Africa until a decision is made concerning the application.¹⁰⁸⁹ This would result in families being separated.¹⁰⁹⁰ It was said that such a limitation would go to the core of marital rights and reciprocal obligations and hence amount to a limitation of the right to dignity.¹⁰⁹¹ It was argued that it would also affect the rights of children which are enshrined in Section 28(1)(b) & (2) of the *Constitution*.¹⁰⁹² The respondents argued that the Minister has a right to waive procedural requirements under Section 31 (2)(c) of the *Immigration Act*, implying that the applicant could apply by asking the Minister to waive the requirement that the application for a change of visa status is made from outside South Africa.¹⁰⁹³ The court found that the provision of the Act should be declared invalid as it was not consistent with the *Constitution* since it resulted in a limitation that was not reasonable or justifiable.¹⁰⁹⁴

The discussion of the above cases illustrates that xenophobia can be seen as an underlying factor where litigants seek redress for acts of discrimination and a denial of their basic rights to equality and to be treated fairly. In most instances, the courts have

¹⁰⁸⁵ O'Reilly “The role of law in curbing xenophobia”, <https://www.derebus.org.za/role-law-curbing-xenophobia/> (accessed on 14 September 2021).

¹⁰⁸⁶ *Nanduta & Others v Minister of Home Affairs and Others* [2019] ZACC.

¹⁰⁸⁷ *Nanduta & Others v Minister of Home Affairs and Others* [2019] ZACC:par. 24.

¹⁰⁸⁸ *Nanduta & Others v Minister of Home Affairs and Others* [2019] ZACC:par. 25.

¹⁰⁸⁹ *Nanduta & Others v Minister of Home Affairs and Others* [2019] ZACC:par. 57.

¹⁰⁹⁰ *Nanduta & Others v Minister of Home Affairs and Others* [2019] ZACC:par. 58.

¹⁰⁹¹ *Nanduta & Others v Minister of Home Affairs and Others* [2019] ZACC:par. 59.

¹⁰⁹² *Nanduta & Others v Minister of Home Affairs and Others* [2019] ZACC:par. 60.

¹⁰⁹³ *Nanduta & Others v Minister of Home Affairs and Others* [2019] ZACC:par. 64.

¹⁰⁹⁴ *Nanduta & Others v Minister of Home Affairs and Others* [2019] ZACC:par. 81.

denounced xenophobia violence and sentiment recognizing that such behaviour causes loss and harm to the victims affected by it.

The final aspect of this chapter looks at the policies and strategies of the Central University of Technology (CUT) and the University of the Free State (UFS) to determine how xenophobia is addressed as an issue in these institutions'; policies that deal with the employment of non-national academics and how these policies and strategies affect the rights of non-national academics.

5.9 POLICIES AT HIGHER EDUCATION INSTITUTIONS

In South Africa, the internationalization of the Higher Education sector is a response to globalization and since 1994 the sector has engaged in transformation through internationalization, albeit with certain challenges.¹⁰⁹⁵ Institutions have signed post-apartheid exchange and cooperation agreements and engage in collaborative research and mentorships.¹⁰⁹⁶ However, some of the challenges around internationalization are that it is still largely unregulated and uncoordinated.¹⁰⁹⁷ The government has also been dilatory in prioritizing internationalization despite the Council for Higher Education (CHE) having identified internationalization as a critical issue facing higher education.¹⁰⁹⁸ Further, not all institutions are engaging in internationalization at the same pace and not all institutions have an international office to coordinate the process.¹⁰⁹⁹

Below I examine the internationalization, anti-discrimination, and employment policies at certain higher education institutions in South Africa. I have chosen to examine the policies and strategies specifically at the Central University of Technology (CUT) and the University of the Free State (UFS) to determine how the rights of non-national academics are protected. In the following discussion, I will outline the relevant sections of policies and strategies at CUT and UFS.

¹⁰⁹⁵ Rouhani 2007:470.

¹⁰⁹⁶ Rouhani 2007:472.

¹⁰⁹⁷ Rouhani 2007:472.

¹⁰⁹⁸ Rouhani 2007:473.

¹⁰⁹⁹ Rouhani 2007:474.

5.9.1 CENTRAL UNIVERSITY OF TECHNOLOGY

5.9.1.1 *Internationalisation Strategies*

The 2013 Internationalisation Strategy of the Central University of Technology, Free State (CUT) provided that internationalization aims to strengthen the academic enterprise and to add value to the academic program.¹¹⁰⁰ The strategy recognized that internationalization would provide increased exposure to academics as well as increase research outputs.¹¹⁰¹ This strategy was revised in 2019 by CUT to incorporate all stakeholders and a Global Engagement Strategy was formulated. In terms of this strategy CUT recognized that the future of higher education is affected by an unpredictable external environment.¹¹⁰² Changes imply that people in higher education will have to interact with people from other societies and cultures that were previously unknown.¹¹⁰³ The Fourth Industrial Revolution is also impacting the needs of the workplace and the higher education sector will also have to adapt to the changing needs of the external environment. The transfer of knowledge and skills will also have to empower graduates to adapt to an ever-changing work environment.¹¹⁰⁴

In the circumstances CUT developed the Global Engagement Strategy. The strategy highlights several key areas for change. Of relevance to this study is the need to expose individuals to the process of cultural understanding and interaction to enable people to appreciate the similarities and differences between cultures and to promote social justice and communication among diverse groups.¹¹⁰⁵ Academics contribute to the knowledge and research capital of these institutions and South Africa at large. Higher Education institutions should therefore be places of teaching and learning which recognize, promote, and protect diversity among staff and students. They would benefit from the implementation of the global engagement strategy. One of the objectives was to develop a policy on the appointment of non-national employees. The decision to implement such a policy was made in 2018. The development of this policy

¹¹⁰⁰ Central University of Technology 2013:1.

¹¹⁰¹ Central University of Technology 2013:1.

¹¹⁰² Central University of Technology 2020- 2024:3.

¹¹⁰³ Central University of Technology 2020- 2024:3.

¹¹⁰⁴ Central University of Technology 2020- 2024:3.

¹¹⁰⁵ Central University of Technology 2020- 2024:6.

was addressed in a position paper on the employment of non-nationals, which is discussed below.

5.9.1.2 *Policy on Recruitment and Selection*

According to CUT's policy on recruitment and selection, it aims to recruit staff to promote diversity and employment equity. Further, there shall be no discrimination in this process, based on any of the listed grounds such as sex, gender, ethnic or social origin, culture, etc.¹¹⁰⁶ The purpose of the policy is to provide guidelines for the recruitment of staff at CUT; to provide an 'inclusive' and 'value-driven organizational culture'; and to ensure protection from discrimination, fairness, compliance with legislation, and confidentiality.¹¹⁰⁷ The policy sets out that recruitment and selection of staff will be in line with the equity and diversity policies of the institution.¹¹⁰⁸ All appointments would be made in accordance with the policy and the Employment Equity policy.¹¹⁰⁹

5.9.1.3 *Employment Equity Plan 2021-2026*

As an employer CUT must comply with the Employment Equity Act 55 of 1998, take steps to promote affirmative action, and eliminate unfair discrimination in any of its policies or practice relating to employment. It also has to develop an Employment Equity Plan.¹¹¹⁰ This plan shows the university's employment equity goals and objectives for the period January 2020 to December 2024.¹¹¹¹ In terms of the numerical goals and targets and the current workforce profiles as of December 2019 CUT had 64 non-national males and 38 non-national females employed at various levels.¹¹¹² Although non-nationals are not included in the Economically Active Population (EAP) statistics, the university has reflected a target of 10 percent representation by non-nationals in line with its internationalization strategy. If there are areas where there is over-representation by non-nationals, then no further

¹¹⁰⁶ Central University of Technology, 2.

¹¹⁰⁷ Central University of Technology, 5.

¹¹⁰⁸ Central University of Technology, 6.

¹¹⁰⁹ Central University of Technology, 6.

¹¹¹⁰ Central University of Technology 2020-2024:1.

¹¹¹¹ Central University of Technology 2020-2024:1.

¹¹¹² Central University of Technology 2020-2024:15.

appointments will be made.¹¹¹³ The plan also provides for the establishment of an Employment Equity committee, which deals with complaints relating to discrimination or harassment.¹¹¹⁴

5.9.1.4 Transformation Plan 2021-2026

Following a review of its 2016-2020 Transformation Plan, CUT developed its Transformation Plan (2021-2025).¹¹¹⁵ One of the aims of the Transformation Plan (2021-2025) is to respond to the recommendation of the Report on the Recruitment, Retention, and Progression of Black South African Academics in South Africa, by the Minister of Higher Education, which seeks to formulate a broad definition of transformation in the higher education space and particularly the notion of staff transformation.¹¹¹⁶ The Transformation Plan outlines that transformation at CUT is necessary, given the opportunities brought about by Covid 19. Five goals have been identified which are consistent with CUT's Vision 2030. These are equity, redress, effectiveness & efficiency, academic freedom, accountability, and development.¹¹¹⁷ The goal of equity and access is broadened and explained as follows:

- a) 'To promote equity of access and outcomes and to redress past inequalities through ensuring that student and staff profiles reflect the demographic composition of South African society.'
- b) 'To promote human capital development through programs that are responsive to the social, political, economic and cultural needs of the country and which meet the best standards of academic scholarship and professional training.'¹¹¹⁸

The plan sets out that equity and redress can be achieved by the eradication of 'unfair discrimination' and 'redressing past inequalities'. To achieve this, the aim is to ensure that the profiles of staff and students reflect the demographic makeup of South African society. One of the proposed strategic themes that guided the Transformation plan is

¹¹¹³ Central University of Technology 2020-2024:27.

¹¹¹⁴ Central University of Technology 2020-2024:1.

¹¹¹⁵ Central University of Technology 2021-2026:4.

¹¹¹⁶ Central University of Technology 2021-2026:4.

¹¹¹⁷ Central University of Technology 2021-2026:7.

¹¹¹⁸ Central University of Technology 2021-2026:7.

to develop and retain staff and maintain and commit to transformation, training, and re-training of staff, and ensure staff wellness.¹¹¹⁹

5.9.1.5 *Position Paper on the Appointment of Foreign National Employees in terms of the Employment Equity Act.*

Following repeated issues around the appointment of non-nationals at CUT, it was agreed that a benchmarking exercise is undertaken with other higher education institutions regarding policy on the appointment of non-national employees.¹¹²⁰ It was proposed that each faculty appoint a maximum of 10 percent non-national employees.¹¹²¹ The matter was subsequently discussed in Senate in 2018 and it was noted that the Department of Labour requires universities to report separately on the number of non-nationals employed at the institution.¹¹²² It was also noted that there should be at least one international staff member per academic department, as per the Management Committee's (MANCOM) recommendation. The challenge around this was that the Department of Labour would only approve the residence permit of the non-national person if he or she possessed scarce skills.¹¹²³ The matter was referred back to the Deputy Vice-Chancellor: Resources & Operations for further consultation.

The matter was subsequently discussed at the Senate in June 2018.¹¹²⁴ It was again proposed that the target for appointment of non-nationals in positions at CUT should be 10 percent.¹¹²⁵ It was resolved that there should be consultation with all stakeholders on how CUT would implement its decision to appoint 10 percent of non-nationals.¹¹²⁶ In October 2018 the Human Resources Council (HRC) decided that the appointment of non-nationals should be at a senior level; that non-nationals make a huge contribution in terms of research, innovation, and academic progress at the institution; and that there must be a balance between growing the international staff

¹¹¹⁹ Central University of Technology 2021-2026:18.

¹¹²⁰ Central University of Technology 2018:1.

¹¹²¹ Central University of Technology 2018:1.

¹¹²² Central University of Technology 2018:2.

¹¹²³ Central University of Technology 2018:2.

¹¹²⁴ Central University of Technology 2018:2.

¹¹²⁵ Central University of Technology 2018:2.

¹¹²⁶ Central University of Technology 2018:3.

component with legislative requirements such as the Employment Equity Act, Department of Labour guidelines, the National Development Plan and Department of Higher Education and Training Documents.¹¹²⁷

There are four faculties at CUT and the position paper analysed the number of non-national employees in each of these faculties. The Faculty of Engineering & Information employs 22 non-national males and 2 non-national females, while the non-nationals expressed as a percentage of full-time academic employees in the department is 19,64 percent (non-national males) and 1,79 percent (non-national females).¹¹²⁸ The Faculty of Health & Environmental Sciences has 0 non-national males and 2 non-national females while the non-nationals expressed as a percentage of full-time employees in the department is 0 percent (non-national males) and 3,92 percent (non-national females).¹¹²⁹ The Faculty of Humanities employs 0 non-national males and 3 non-national females while the non-nationals expressed as a percentage of full-time academic employees in the department is 10,13 percent (non-national males) and 3,8 percent (non-national females).¹¹³⁰ The Faculty of Management Sciences has 3 non-national males and 3 non-national females while the non-nationals expressed as a percentage of full-time academic employees is 3,45 percent (non-national males) and 2,3 percent (non-national females).¹¹³¹ The rest of CUT in other sections or departments employs 5 non-national males and 2 non-national females out of a total of 518 employees.¹¹³²

According to CUT's 2014-2018 Employment Equity Plan, the numerical targets for 2018 were 1,44 percent for non-national males and 0,57 percent for non-national females.¹¹³³ It was submitted in the plan that these targets or percentages indicated that academic employees were over-represented in terms of non-national males and non-national females to a greater or lesser extent. In some faculties, there was a greater concentration of non-national employees, and it was said that this created a

¹¹²⁷ Central University of Technology 2018:4.

¹¹²⁸ Central University of Technology 2018:5.

¹¹²⁹ Central University of Technology 2018:5.

¹¹³⁰ Central University of Technology 2018:6.

¹¹³¹ Central University of Technology 2018:6.

¹¹³² Central University of Technology 2018:7.

¹¹³³ Central University of Technology 2018:7.

risk for the university. If the permits of these employees were not renewed by Home Affairs, there would be several vacancies in these departments.¹¹³⁴ It was noted that there is a skills shortage in South Africa and that the only way to address this challenge is to appoint non-nationals.¹¹³⁵ The definition in the *Employment Equity Act* however is narrow and does not provide for permanent residents or naturalized citizens.¹¹³⁶ It was finally recommended that the university give effect to its internationalization strategy through the adoption of an overall representation of 10 percent of non-national academic employees, such employees to be appointed at the senior level.¹¹³⁷ All future appointments of non-nationals in departments where appointments are already greater than 10 percent would be for a fixed-term non-renewable contract of 5 years with the appointee to participate in mentorship or skills transfer programs to ensure succession.¹¹³⁸

The policies and strategies currently in place at CUT illustrate a move toward developing firm guidelines for the appointment of non-national employees. However, the transformation policies do not explicitly recognize or highlight xenophobia as an issue at the institution. A document or policy which specifically addresses the need to recognize and support the rights and issues affecting non-national staff and students is necessary to support this vulnerable group and to promote the transformation agenda of the university.

5.9.2 UNIVERSITY OF THE FREE STATE

5.9.2.1 *Internationalisation Report*

The University of the Free State (UFS) also issued an Internationalisation Report in 2018 in terms of which their internationalization strategy was adopted by the council for 2018-2022. The primary focus of the strategy is international students; focus is given to improving services such as immigration and medical aid information.¹¹³⁹ The number of international students enrolled at the institution had decreased from 2102

¹¹³⁴ Central University of Technology 2018:7.

¹¹³⁵ Central University of Technology 2018:8.

¹¹³⁶ Central University of Technology 2018:8.

¹¹³⁷ Central University of Technology 2018:8.

¹¹³⁸ Central University of Technology 2018:8.

¹¹³⁹ University of the Free State 2018:1.

students in 2013 to 1754 students in 2018.¹¹⁴⁰ There is little or no data on non-national academics and matters affecting this category of employee.

5.9.2.2 *Employment Policy & Procedure*

In 2019 UFS implemented a policy known as the UFS Employment Policy and Procedure. Although this policy provides that the institution strongly supports the recruitment of non-nationals, there are stringent conditions imposed on non-nationals for them to be appointed to positions within the institution and such persons may not be granted preference over South African candidates unless they meet the definition of designated groups within the Employment Equity Act.¹¹⁴¹

5.9.2.3 *University of the Free State Anti-Discrimination, Promotion of Equality, and Social Justice Policy and Procedures.*

The UFS commits to protecting the rights and freedoms of all staff and students, especially the right to dignity, equality, and non-discrimination and it acknowledges that these rights are entrenched in *PEPUDA* and the *Employment Equity Act*, which form the cornerstone of its policy.¹¹⁴² 'Unfair discrimination' is defined as 'any conduct which either directly or indirectly discriminates unjustifiably between persons or classes of persons based on listed grounds' in the *Constitution*, the *Employment Equity Act*, and *PEPUDA*.¹¹⁴³ It is positive to note that while the policy recognizes the listed grounds of discrimination, it has also provided for certain unlisted analogous grounds one of which is xenophobia, and undertakes to protect the bases of these unlisted grounds as well.¹¹⁴⁴ The unlisted grounds provided for are physical features, health status, and xenophobia.¹¹⁴⁵ This implies that the institution has acknowledged that these types of discrimination are prevalent within the higher education sector and has deemed it necessary that they are provided for in a written document.

¹¹⁴⁰ University of the Free State 2018:129.

¹¹⁴¹ University of the Free State 2018:4.

¹¹⁴² University of the Free State 2018:1.

¹¹⁴³ University of the Free State 2018:4.

¹¹⁴⁴ University of the Free State 2018:1.

¹¹⁴⁵ University of the Free State 2018:11.

The term 'equality' is defined as meaning 'in relation to the UFS, a multi-faceted substantive approach to equality as advanced by the *Constitution*, requiring social and occupational change by addressing inequality'.¹¹⁴⁶ This definition recognizes that equality needs to be viewed from different perspectives for transformation to take place. The definition of 'staff' also includes all categories of employees, full-time, part-time as well as *ad hoc* employees at the institution.

The objectives of the policy are to advance an understanding of equality, social justice, and unfair discrimination within the staff and student sector and to identify practices that promote unfair discrimination to aim to eradicate these.¹¹⁴⁷

There is a duty on all staff and students to help in creating and maintaining an institutional culture and work environment that promotes social justice and equality and obliges them not to engage in any conduct that encourages or amounts to unfair discrimination.¹¹⁴⁸ Contraventions of the policy may lead to disciplinary action.¹¹⁴⁹ A positive and innovative aspect of the policy is that staff have to undergo Equality & Social Justice training within 6 months after being appointed in a managerial position.¹¹⁵⁰ This can be seen as a practical way in which the institution seeks to implement its policy in a way in which transformation can be seen to take place.

As stated earlier, the policy provides for certain unlisted analogous grounds for discrimination, and these are dealt with in Annexures to the policy. Xenophobia is discussed in Annexure E of the policy. It is acknowledged that citizenship is a ground for exclusion as it creates a boundary between citizens and non-citizens. The right to access state resources is also dependent on citizenship and the provisions of legal instruments. As a result, not all rights are accorded to non-citizens.¹¹⁵¹ The policy acknowledges the current situation in South Africa; that there is a lack of accountability, a lack of prompt investigation and prosecution for acts of xenophobia. The lack of interventions creates a feeling of distrust and victims are reluctant to report

¹¹⁴⁶ University of the Free State 2018:2.

¹¹⁴⁷ University of the Free State 2018:4.

¹¹⁴⁸ University of the Free State 2018:5.

¹¹⁴⁹ University of the Free State 2018:5.

¹¹⁵⁰ University of the Free State 2018:7.

¹¹⁵¹ University of the Free State 2018:62.

xenophobic incidents. This may lead people to believe that such acts are not taking place.¹¹⁵²

The policy provides for the reporting of incidents of xenophobia and sets out the procedure to be followed for the resolution of the complaint or dispute.¹¹⁵³ It also highlights behaviours or conduct which will amount to unfair discrimination, such as failing to assist or provide managerial support to staff or a student who is a non-national, based on their nationality; physical and verbal abuse as well as threatening behaviour or spreading malicious rumours about a person based on their nationality.¹¹⁵⁴ Managers, support staff, student leadership, and academics can prevent acts of xenophobia by :

- a) Monitoring the relevant policies of the institution and how they impact individuals.
- b) Providing clear procedures to investigate complaints.
- c) Rendering training to staff and students who must deal with complaints about xenophobia.
- d) Encouraging everyone to report acts of xenophobia.¹¹⁵⁵

The institution has a duty in terms of existing legislation to provide a welcoming and safe working environment for staff and students, which promotes a teaching and learning environment based on respect and which must also provide support to non-national staff and students.¹¹⁵⁶

To gain a broader view of the position in higher education institutions in South Africa, concerning their transformation and recruitment policies, I briefly examine the relevant policies at North-West University (NWU) and the University of Cape Town (UCT). In comparison to the CUT and UFS, the NWU also has a policy on employment equity that aims to promote a culture of diversity and is aware of South Africa's history of discrimination which has impacted the ability of black people, women, and disabled

¹¹⁵² University of the Free State 2018:63.

¹¹⁵³ University of the Free State 2018:64.

¹¹⁵⁴ University of the Free State 2018:65.

¹¹⁵⁵ University of the Free State 2018:65.

¹¹⁵⁶ University of the Free State 2018:65.

people from having access to employment opportunities.¹¹⁵⁷ The policy also rejects discrimination on all listed grounds including ethnic and social origin.¹¹⁵⁸ Like CUT and the UFS, the institution aims to have an employee profile that is reflective of the national demographic composition.¹¹⁵⁹ However, preference will be given to candidates who are identified as being part of the designated group in terms of the Employment Equity Act.¹¹⁶⁰

In terms of their recruitment and selection policy, the policy is clear that if there is a choice between a South African candidate and a non-national, the South African candidate must be given preference in terms of the Employment Equity Act. Non-nationals may only be employed if they possess critical skills, and a South African candidate could not be found.¹¹⁶¹ Non-nationals without permanent residence may only be employed for 5 years subject to having a valid visa or work permit.¹¹⁶²

In 2021 NWU approved a transformation charter in which it expressed a commitment to social justice and a broader interpretation of transformation that does not only address issues of race and gender but also looks at promoting a diverse community.¹¹⁶³ In paragraph 4 of the charter, the university commits to the values set out in the Constitution and relevant legislation, however, it does not delve further into identifying a broader definition of transformation and the other issues besides race and gender which also need to be addressed within the university space.

The charter sets out broad principles of transformation, increased social inclusion, inclusivity and diversity but does not practically interrogate the way this will be done. The charter does state that transformational goals can only be achieved through 'clear, measurable and well-communicated strategies, plans and projects.'¹¹⁶⁴ The monitoring and compliance of these strategies and plans as well as reporting on the progress made is an important indicator as to whether transformation is taking place

¹¹⁵⁷ North West University 2019: par. 3.1-3.2.

¹¹⁵⁸ North West University 2019: par. 5.2.1.

¹¹⁵⁹ North West University 2019: par. 5.2.2.

¹¹⁶⁰ North West University 2019: par. 5.2.3.

¹¹⁶¹ North West University 2019: par. 4.6.3.

¹¹⁶² North West University 2019: par. 4.6.5.

¹¹⁶³ North West University 2021: 1.

¹¹⁶⁴ North West University 2021: 3.

in the institution. There is however no mention made in the charter of xenophobia or discrimination based on nationality as a specific type of discrimination, neither does the charter define various types of discrimination.

UCT also has a similar employment equity policy which aims to promote equal opportunities and to ensure fair treatment by eliminating unfair discrimination ¹¹⁶⁵

Unfair discrimination is defined, and 'ethnic and social origin' is included as a ground for discrimination.¹¹⁶⁶ It also includes victimization and harassment as a ground for discrimination which could result in disciplinary action.¹¹⁶⁷ The university has an office for inclusivity and change whose mandate is to take care of monitoring and compliance and conducting of equity audits and progress reports of employment equity.¹¹⁶⁸

In 2021 the UCT community engaged in a staff inclusivity survey. 25% of respondents who participated in the survey that they felt that there were bullied and discriminated against, also citing the prevalence of conscious and unconscious bias which many were not aware of.¹¹⁶⁹ The findings of the survey identified areas where misunderstandings and errors and blame take place. and one of the conditions that amplify these areas is xenophobia.¹¹⁷⁰ The report says that if these areas including xenophobia are not in an inclusivity report, then the report is lacking.¹¹⁷¹

In essence, each of the higher education institutions discussed above has employment, recruitment, and transformation policies that cater for employment matters as well as issues relating to discrimination and equality. I have summarised the relevant provisions of these policies and examined how these policies cater for non-national academics and discrimination arising from xenophobia. In Chapter 6, I highlight the challenges in these policies concerning the protection of the rights of non-national academics employed in the higher education sector.

¹¹⁶⁵ University of Cape Town2021:6.

¹¹⁶⁶ University of Cape Town2021:8.

¹¹⁶⁷ University of Cape Town2021:8.

¹¹⁶⁸ University of Cape Town2021:11.

¹¹⁶⁹ University of Cape Town2021:7.

¹¹⁷⁰ University of Cape Town2021:11.

¹¹⁷¹ University of Cape Town:2021:11.

5.10 CONCLUSION

In this chapter, I focus on the legal protections provided to non-national academics from a domestic, regional, and international perspective. I also examine the policies and strategies at the Central University of Technology and the University of the Free State, both of which employ non-national academics. To a minor extent, I also discuss the policies of two other institutions, namely NWU and UCT. I aim to outline the legal instruments, case law, and policies to determine the extent to which they protect the rights of non-national academics.

Following an extensive discussion of international instruments, relevant legislative provisions pertaining to non-national academics, case law and institutional policies of the CUT and UFS, I draw the broad conclusion that in essence most of these legal instruments cater for the basic rights of non-nationals as they do for citizens. There are certain exceptions however, when it comes to protection specifically against xenophobia. There is no xenophobic-specific legislation in South Africa and crimes motivated by xenophobia are dealt with under existing criminal law.¹¹⁷² I discuss the issues surrounding this in greater detail in Chapter 6.¹¹⁷³ Rights such as the right to work are not accorded to non-nationals. Other rights which are linked to the right to work as discussed in the *Employment Equity Act*¹¹⁷⁴ and the *Employment Services Act*¹¹⁷⁵ serve to restrict the ability of non-nationals to access employment opportunities. The cases discussed have, in the main, recognised and protected the rights of non-nationals. The courts have condemned xenophobia and have recognised that it causes harm and loss to victims. In relation to the policies of the higher education institutions, I draw the conclusion that while these policies recognise the need for transformation, and provide strategies for dealing with issues of discrimination, xenophobia however is not specifically catered for. The UFS policies, to some extent recognise xenophobia as a type of discrimination, under analogous grounds, however policies which mention xenophobia specifically are lacking.¹¹⁷⁶

¹¹⁷² See section 5.7.2.

¹¹⁷³ See section 6.5.

¹¹⁷⁴ *Employment Equity Act* 55/1998.

¹¹⁷⁵ *Employment Services Act* 4/2014.

¹¹⁷⁶ University of the Free State 2018:1.

Chapter 6 focuses on the inadequacies or challenges of the legal instruments, case law, and policies discussed in Chapter 5.

CHAPTER 6

THE INADEQUACIES OF CURRENT LEGISLATION, CASE LAW AND POLICY CONCERNING XENOPHOBIA

6.1 INTRODUCTION

In chapter 5 I discuss the provisions of current legislation, case law, and policy that address the rights of non-national academics concerning xenophobia. I examine the legal instruments at international, regional, and domestic level to determine the protection afforded to non-national academics I also discuss the cases concerning xenophobia against non-national academics and those which have dealt with xenophobia and discrimination against non-nationals in general.

In this chapter, I examine whether the current law and policy sufficiently regulate xenophobia against non-national academics. I refer to the relevant sections of legislation and policy which do not adequately protect the rights of non-national academics. The discussion in Chapter 5 and in earlier chapters also point to the role of government in the passing of xenophobic specific legislation as well as the passing of new laws which seek to restrict the rights of non-nationals to work or conduct business in South Africa. Considering these recent legal developments, I also focus on the role of government in addressing the challenge of xenophobia and the interventions or lack of interventions that inevitably affect the legal protection afforded to non-national academics.

The purpose of this chapter is therefore to highlight the relevant international laws, legislation, case law, and institutional policies of the CUT and UFS, which relate to the rights of non-nationals. In doing so, the focus is placed mainly on the areas where these instruments fail to provide adequate protection against xenophobia for non-national academics. The relevant provisions of these legal instruments are discussed in detail in Chapter 5. This chapter serves to highlight the inadequacies or inconsistencies of the legal instruments in protecting non-nationals in the higher education sector. Where the rules of law or policy appear to be skewed in favour of citizens, I endeavour to identify whether such imbalances are legal and justifiable or whether they unfairly discriminate against non-nationals.

In section 6.2 I discuss the inadequacies of international, regional, and domestic laws concerning xenophobia. Within this section, I examine the international treaties, in section 6.2.1, and the legislative restrictions on the right to work in section 6.2.2. Concerning the right to work I discuss the proposed new laws that restrict the non-national's right to work. This I do in section 6.2.2.1 together with the Employment Equity Act and the Employment Services Act in 6.2.2.2. In section 6.2.3. I examine immigration laws and how these affect the rights of non-nationals. In section 6.2.4 I focus on the anti-discrimination laws such as *PEPUDA* in section 6.2.4.1 and the *Preventing and Combating of Hate Crimes and Hate Speech Bill* in 6.2.4.2. I thereafter analyse the case law that was discussed in Chapters 4 and 5, in 6.3. In section 6.4 I discuss the challenges with institutional policies of the CUT and UFS. I conclude the chapter with a discussion of denialism by the government in dealing with xenophobia in section 6.5.

6.2 INADEQUACIES OF INTERNATIONAL, REGIONAL AND DOMESTIC LAWS CONCERNING XENOPHOBIA

6.2.1 International treaties and agreements

South Africa has ratified several international treaties to promote equality. However, there is currently no international law or treaty dedicated to addressing xenophobia specifically. Guidelines for the treatment of non-nationals are provided for in existing treaties and all member states are bound to adhere to these.¹¹⁷⁷ An example of such is the right to equality, which is enshrined in the African Charter on Human and Peoples Rights as well as the Universal Declaration of Human Rights.¹¹⁷⁸

The Universal Declaration of Human Rights protects the rights of the non-national to work, to choose employment, to enjoy fair and favourable working conditions, to equal pay for equal work, and to be protected against unemployment.¹¹⁷⁹ The International Convention on the Elimination of all forms of Racial Discrimination protects against

¹¹⁷⁷ Centre for Human Rights, the University of Pretoria "The Nature of South Africa's Legal Obligations to combat xenophobia", 52.
https://www.chr.up.ac.za/images/publications/centrepublishments/documents/south_africa_legal_obligations_combat_xenophobia.pdf (accessed on 10 July 2021).

¹¹⁷⁸ African Commission on Human & Peoples' Rights "African Charter on Human & Peoples' Rights", art. 3(1)&(2) <https://www.achpr.org/legalinstruments/detail?id=49> (accessed on 16 July 2021).

¹¹⁷⁹ United Nations "Universal Declaration of Human Rights", art. 23
https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf. (accessed on 10 July 2021).

discrimination based on national or ethnic origin.¹¹⁸⁰ A similar provision is also contained in the International Covenant on Civil and Political Rights.¹¹⁸¹ The Declaration on Fundamental Principles and Rights at Work speaks to employers ensuring equal opportunities for all employees in the workplace, to eradicate discrimination.¹¹⁸² However, the recent passing of the *Gauteng Township Economic Development Bill* into law, the still pending similar *Draft Free State Local Integrated Economic Development and Transformation Bill*, and the *Employee Services Amendment Bill* have already introduced or sought to introduce provisions that will serve to distinguish and differentiate between citizens and non-nationals. Local citizens are to be prioritized in the establishment of small businesses in the township areas. Employment in certain employment sectors is to be regulated by quotas in terms of the number of non-nationals to be employed in that sector. It is therefore questionable whether such laws will not result in discrimination against non-nationals based on nationality, thereby denying non-nationals the right to equality in the workplace.

The United Nations World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance urged countries to examine their legal systems to ensure that xenophobia is addressed and eradicated.¹¹⁸³ States were also encouraged to cater to a diverse and multicultural society.¹¹⁸⁴ The Declaration also called for laws to be implemented which would address instances where employees were subjected to xenophobia in the employment context.¹¹⁸⁵ It recommended that workplaces could be transformed into spaces that are devoid of discrimination through public education and awareness and the enforcement of civil rights.¹¹⁸⁶

¹¹⁸⁰ United Nations “International Covenant on the elimination of all forms of racial discrimination”, art. 5 <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx> (accessed on 15 July 2021).

¹¹⁸¹ United Nations “International Covenant on Civil & Political Rights”, art. 2 <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> . (accessed on 6 July 2021).

¹¹⁸² International Labour Office “Declaration on Fundamental Principles & Rights at Work”, art. 2 https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_85_en.pdf (accessed on 15 July 2021).

¹¹⁸³ United Nations “World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance”, 53 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

¹¹⁸⁴ United Nations “World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance”, 67 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

¹¹⁸⁵ United Nations “World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance”, 69 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

¹¹⁸⁶ United Nations “World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance”, 83 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

It can therefore be seen that this declaration together with the other treaties highlighted in this chapter and discussed in Chapter 5 does protect the basic rights of non-nationals. However, discussions in this chapter highlight these rights but also indicate the challenges faced in the implementation of these rights for non-nationals. The action by the government in seeking to curtail the rights of non-nationals through the proposed new laws and amendments to existing laws, serve to create further distinctions between citizens and non-nationals. Lack of political will, lack of accountability of law enforcement agencies, and denialism by the government are some of the factors which covertly deny non-nationals the legal protections needed by them, and provided for in international treaties. I discuss these factors in greater detail in section 6.5 of this thesis.

6.2.2 Legislative restrictions on the right to work

Although contained in international instruments such as the African Charter for Human & Peoples Rights and the International Covenant on Economic, Social and Cultural Rights (ICESR), the South African *Constitution* does not extend the right to work to non-nationals.¹¹⁸⁷ Mangu argues that despite this, the right to work is catered for implicitly through the right to fair labour practices, but he states that the right should be expressly provided for in the *Constitution*.¹¹⁸⁸ The fact that the right of non-nationals to work is not expressly provided for in the *Constitution* creates a somewhat embedded distinction between non-national academics and South African academics in the Higher Education context. Although the *Labour Relations Act* does not specifically mention non-nationals as being included in the definition of 'employee', the matter was decided in favour of non-nationals in the case of *Discovery Health Limited v CCMA & others*.¹¹⁸⁹ This decision was endorsed in subsequent cases and provides some reparation for the gap in the *Labour Relations Act*. However, this is insufficient as the lack of a definite stance in the legislation renders the position of non-national academics uncertain and places them in a vulnerable position, making them open to exploitation by the employer.¹¹⁹⁰

¹¹⁸⁷ Mangu 2020:4.

¹¹⁸⁸ Mangu 2020:6.

¹¹⁸⁹ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC).

¹¹⁹⁰ Meyer 2009:382.

6.2.2.1 *Proposed new laws restricting the non-national's right to work*

Further, recent media reports on the amendments to labour laws indicate that government seeks to further curtail, in some respects, the right of the non-national to work in South Africa. In chapter 5 I discuss the *Gauteng Township Economic Development Bill*, which provides that non-nationals must possess permanent residency status to conduct certain businesses in township areas.¹¹⁹¹ Civil society organizations have spoken out against the Bill, claiming that it will further lead locals to believe that non-nationals are taking their jobs and will therefore foster xenophobic violence.¹¹⁹² There is also the view that the Bill amounts to unfair discrimination based on nationality and therefore contravenes Section 9 of the *Constitution*.¹¹⁹³ It is also arguable as to whether the passing of the bill could be justified in terms of Section 36 of the *Constitution*¹¹⁹⁴ and in terms of international laws which were outlined in Chapter 5, and which include the right to work, the right to choose employment, and the right to fair and favourable working conditions.¹¹⁹⁵ Nonetheless, recent reports indicate that on 29th April 2022 the *Gauteng Township Economic Development Bill* became law and seeks to transform the township and mainstream economy.¹¹⁹⁶ One of the initial concerns about the Bill revolved around Clause 7 which reserved certain business

¹¹⁹¹ Chidombwe "The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships", <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

¹¹⁹² Chidombwe "The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships", <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

¹¹⁹³ Chidombwe "The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships", <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

¹¹⁹⁴ Chidombwe "The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships", <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

¹¹⁹⁵ Chidombwe "The codification of xenophobia: South Africa seeks to ban foreign nationals from doing business in townships", <https://www.humanrightspulse.com/mastercontentblog/the-codification-of-xenophobia-south-africa-seeks-to-ban-foreign-nationals-from-doing-business-in-townships> (accessed on 20 November 2022).

¹¹⁹⁶ O' Regan "New law promises a boost to Gauteng's township businesses- but could it spark more xenophobic attacks?", <https://www.dailymaverick.co.za/article/2022-05-05-new-law-promises-a-boost-to-gautengs-township-businesses-but-could-it-spark-more-xenophobic-attacks/> (accessed on 8 August 2022).

activities for citizens and permanent residents.¹¹⁹⁷ Clause 7 has since been found to constitute unfair discrimination against non-nationals and has been removed from the Bill as it was seen to be a violation of their right to equality.¹¹⁹⁸

Pro-migrant lobby organizations described the comments made by the Gauteng Premier, David Makhura at the passing of the bill into law, as ‘discriminatory rhetoric’ and said that they would be ready to approach the court for relief if the rights of non-nationals are infringed. David Makhura in addressing township business owners in Soweto stated that the Act would make it possible for local government to support township businesses, particularly those owned by South Africans.¹¹⁹⁹ Amir Sheikh of the African Diaspora Forum stated that the irresponsible discriminatory statements made by the Gauteng Premier were of more concern than the Act itself and may open the door to further xenophobic attacks.¹²⁰⁰ On a visit to Orange Farm, the premier called on citizens to ‘take back’ spaza shops without causing violence to non-nationals.¹²⁰¹

What is also important to note is that there is a similar development bill pending in the Free State Provincial legislature which I discuss in Chapter 5. The passing of the *Free State Bill* into law will further serve to cement the government's stance on promoting the development of South African-owned township businesses, over similarly owned non-national businesses. If these laws are implemented in a manner that promotes exclusion and discrimination of non-national-owned businesses in township areas, this

¹¹⁹⁷ Constitutional Hill Blog “The Gauteng Township Economic Development Bill”, <https://www.constitutionhill.org.za/blog/the-gauteng-township-economic-development-bill> (accessed on 31 August 2022).

¹¹⁹⁸ Constitutional Hill Blog “The Gauteng Township Economic Development Bill”, <https://www.constitutionhill.org.za/blog/the-gauteng-township-economic-development-bill> (accessed on 31 August 2022).

¹¹⁹⁹ O’Regan “New law promises a boost to Gauteng’s township businesses- but could it spark more xenophobic attacks?”, <https://www.dailymaverick.co.za/article/2022-05-05-new-law-promises-a-boost-to-gautengs-township-businesses-but-could-it-spark-more-xenophobic-attacks/> (accessed on 8 August 2022).

¹²⁰⁰ O’Regan “New law promises a boost to Gauteng’s township businesses- but could it spark more xenophobic attacks?”, <https://www.dailymaverick.co.za/article/2022-05-05-new-law-promises-a-boost-to-gautengs-township-businesses-but-could-it-spark-more-xenophobic-attacks/> (accessed on 8 August 2022).

¹²⁰¹ O’Regan “New law promises a boost to Gauteng’s township businesses- but could it spark more xenophobic attacks?”, <https://www.dailymaverick.co.za/article/2022-05-05-new-law-promises-a-boost-to-gautengs-township-businesses-but-could-it-spark-more-xenophobic-attacks/> (accessed on 8 August 2022).

could mean a resurgence of xenophobic violence. Even if discriminatory provisions have been removed from the *Gauteng Act*, it is disturbing that political parties use the legislation to gain the confidence of township voters and to pit citizens against non-nationals to enhance a political agenda. This situation may place non-national academics in a more vulnerable position as this may have a ripple effect in other communities which house or employ non-nationals. It might also necessitate litigation by pro-migrant lobby groups and human rights organizations to challenge the discrimination that these laws may bring to non-nationals.

There have also been other recent attempts by the government to restrict the number of non-nationals employed in South Africa. In February 2022, the Department of Labour sued the company Huawei for employing 90% of non-national employees in contravention of the Employment Equity Act. According to the Department of Labour, Huawei should only have employed 40% of non-nationals and was therefore in contravention of the Employment Equity Act regulations.¹²⁰²

In January 2022 the Department of Employment & Labour announced the development of a new National Labour Migration Policy and proposed amendments to the *Employment Services Act*. One of the areas that the amendments will address is the introduction of quotas for the maximum number of non-nationals with work visas who can be employed within certain economic sectors.¹²⁰³ Amendments to the *Small Business Act* will also restrict non-nationals from setting up SMME's in certain business sectors. The Department of Higher Education & Training also released a list of scarce and critical skills. The list can only be applied to non-nationals as a last resort with conditions on non-nationals regarding the transfer of skills to locals and a limitation on the duration of their permits.¹²⁰⁴

¹²⁰² Dlodla "South Africa takes Huawei's local unit to court over hiring", <https://www.reuters.com/technology/south-africa-takes-huawei-local-unit-court-over-employment-rule-breaches-2022-02-11/> (accessed on 23 February 2022).

¹²⁰³ Staff writer "New rules planned for foreign workers in South Africa", <https://www.businesstech.co.za/news/business/552948/new-rules-planned-for-foreign-workers-in-south-africa/> (accessed on 23 February 2022).

¹²⁰⁴ Staff writer "New rules planned for foreign workers in South Africa", <https://www.businesstech.co.za/news/business/552948/new-rules-planned-for-foreign-workers-in-south-africa/> (accessed on 23 February 2022).

The right of the non-national to work has also been seriously affected in the trucking industry where xenophobic attacks and behaviour have been rife. There have been many attacks against truck drivers specifically, with 84 attacks being recorded between April to November 2020.¹²⁰⁵ The violence stems from protests against the hiring of non-national truck drivers in South Africa. In a report by the South African Human Rights Commission, it was noted that 200 non-nationals who were employed in the road freight industry lost their lives due to violence.¹²⁰⁶

An organization called the All Truck Drivers Forum & Allied South Africa (ATDF) alleged that trucking companies employ non-nationals because they are prepared to work at reduced rates for longer hours. However, Economist Mike Schussler refutes these claims stating that the National Bargaining Council for the Road Freight & Logistics Industry (NBCRFLI) have 300 inspectors who would be able to verify whether non-nationals were being paid less than their South African counterparts.¹²⁰⁷ Although the ATDF has alleged that non-nationals are taking the jobs of South Africans, the NBCRFLI has verified that of the total number of truck drivers employed in the industry 44 021 were South Africans and 6756 were non-nationals.¹²⁰⁸

The ATDF also alleged that non-nationals were being hired illegally and in contravention of labour laws as driving is not a “scarce skill”.¹²⁰⁹ In 2019 the cabinet security cluster ministers highlighted plans to address anti-immigrant violence and attacks on truck drivers. However, the Minister of Defence, Ms. Nosiviwe Mapisa-Nqakula said that the attacks were motivated by criminality and not because these were non-nationals.¹²¹⁰ At the end of 2020, the premier of KwaZulu-Natal addressed the issue by stating that government would ensure that action is taken against non-nationals who were working illegally in South Africa.¹²¹¹ However, since then further attacks on truck drivers have taken place and little has been done to eradicate this problem which has been ongoing since 2013.¹²¹²

¹²⁰⁵ Geldenhuys 2021:16.

¹²⁰⁶ Geldenhuys 2021:17.

¹²⁰⁷ Geldenhuys 2021:17.

¹²⁰⁸ Geldenhuys 2021:17.

¹²⁰⁹ Geldenhuys 2021:18.

¹²¹⁰ Geldenhuys 2021:20.

¹²¹¹ Geldenhuys 2021:20.

¹²¹² Geldenhuys 2021:21.

This section highlights the challenges faced by non-nationals concerning the right to work. Existing legislation like the *Constitution* and the *Labour Relations Act* does not expressly accord the right to work to non-nationals. However, the interpretation of this right as well as the definition of an employee in the cases mentioned above provide a tacit recognition of the right of non-nationals to work and to be recognized as an employee. Of concern is the passing of new laws by the government and the proposed new bills and policies which seek to further curtail the ability of non-nationals to choose their trade or occupation in South Africa. The proposed amendments to the *Employment Services Act* identify four major labour sectors for the implementation of quotas, Agriculture, Tourism, Hospitality, and Construction.¹²¹³ One of the reasons cited for the quotas is the high unemployment rate in South Africa.

While these sectors do not directly affect the work of non-national academics, the restrictions in these areas may indirectly affect them by perhaps affecting their family members who may seek employment in these areas. The release however of the critical skills list by the Department of Higher Education and Training (DHET) affects non-national academics. While the 'scarce skills' rule has already been provided for in labour legislation, the government through the amendments to the *Employment Services Act* seeks to impose various obligations on the employer and non-nationals regarding the transfer of skills to locals and the issue of permits for a specific duration.¹²¹⁴

Some higher education institutions as I outline in Chapter 5 have a policy in place to employ non-nationals on fixed-term contracts usually for five years.¹²¹⁵ Such policies and the proposed amendments discussed above may create uncertainty for non-national academics who regard South Africa as their home and who do not have any intention of returning to their home countries. A non-national academic who brings specialized skills to the institution is also not guaranteed security of tenure nor can the

¹²¹³ Staff writer "New rules planned for foreign workers in South Africa", <https://www.businesstech.co.za/news/business/552948/new-rules-planned-for-foreign-workers-in-south-africa/> (accessed on 23 February 2022).

¹²¹⁴ Staff writer "New rules planned for foreign workers in South Africa", <https://www.businesstech.co.za/news/business/552948/new-rules-planned-for-foreign-workers-in-south-africa/> (accessed on 23 February 2022).

¹²¹⁵ Central University of Technology 2018:8.

institution plan of retaining or further developing those skills in the long term. The skills transfer plan however if implemented properly will ensure that the non-national academic transfers those skills to local staff during the fixed term period. This however can be seen as a one-sided exercise as it does not provide real benefit to the non-national academic but does benefit local staff as well as the institution. This is evident from the *Employment Services Act* which I discuss in the next section, and which provides that the appointment of a non-national must not negatively impact the rights of local employees and should promote their training.¹²¹⁶ In the following section, I discuss the challenges with the *Employment Equity Act* and I discuss in greater detail the issues around the *Employment Services Act* which have been briefly mentioned above.

6.2.2.2 *The Employment Equity Act and The Employment Services Act*

The *Employment Equity Act* requires all employers to ensure equal opportunities for employees in the workplace¹²¹⁷ and requires that steps be taken to eliminate policies and practices that promote unfair discrimination.¹²¹⁸ The Act also provides for affirmative action to be implemented for designated groups.¹²¹⁹ However, non-nationals do not fall within the definition of designated groups and are therefore unable to apply for jobs that are affirmative action appointments. They may only be accounted for in reports submitted by the employer.¹²²⁰ In the case of non-national academics, this would imply that they would not be considered for lecturing or management positions that were identified by the institution to be affirmative action appointments.

As of July 2022, CUT had a total of 1182 full-time employees. of this number, 32 employees were non-national males and 11 non-national females employed at various levels.¹²²¹ The UFS has a total of 131 non-national employees of which 37 were temporary employees and 94 full-time employees. The *Employment Services Act*

¹²¹⁶ *Employment Services Act* 4/2014:sec. 2(1)(h)(ii) & sec. 2(1)(h)(iii).

¹²¹⁷ *Employment Equity Act* 55/1998:sec. 5.

¹²¹⁸ *Employment Equity Act* 55/1998:sec. 5.

¹²¹⁹ *Employment Equity Act* 55/1998:sec. 13(1).

¹²²⁰ Department of Labour “What employers and workers need to know about employment equity”, <https://www.labour.gov.za/DocumentCenter/Publications/Employment%20Equity/What%20employers%20and%20workers%20need%20to%20know%20about%20Employment%20Equity/EE%20pamphlet%20opt%20red.pdf> (accessed on 30 August 2022).

¹²²¹ Email from Ms. Helene Kotze Deputy Director HR Central University of Technology dated 26 August 2022.

allows an employee to employ a non-national only if there are no South African candidates with the necessary skill or qualifications who could be appointed.¹²²² The appointment made must not negatively impact the rights of South African employees and should promote their training.¹²²³ The CUT aims as part of its numerical goals and targets to employ a total of 10% of senior academic employees who are non-nationals to bring an international research perspective to the institution and to ensure the transfer of skills to junior academics. However, rules such as those mentioned above would likely have the effect of limiting the appointment of non-nationals to positions within the higher education sector as the appointment could only be justified on the basis that it was a “scarce skill”. This point was also illustrated in two of the cases which dealt with employment equity, affirmative action, and discrimination based on race. I discuss these cases in Chapter 5.

In the *Auf Der Heyde* case, the facts revolved around how the university applied its employment equity policy, whether it was fair and whether the applicant was discriminated against based on race.¹²²⁴ The applicant also argued that the university had appointed a non-national over him and in contravention of its employment equity policy.¹²²⁵ The court found that the employment equity policy did not apply to the non-national who was appointed as he was not from a previously disadvantaged group and could not benefit from the affirmative action policy. That said, however, the court did not view this appointment as an unfair labour practice.¹²²⁶ This case also illustrates how the court confirmed the legal position of non-national academics concerning employment equity and affirmative action. In this case, the non-national academic was fortunate to have been appointed, by the university arguing that he was appointed on merit and not in the position that the applicant had applied for.

In the university context, non-national academics are not likely to be appointed over a South African candidate as the provisions of the *Employment Equity Act* only allow for it if the non-national offers a scarce skill and no suitable South African candidate can

¹²²² *Employment Services Act* 4/2014:sec. 8(2)(a).

¹²²³ *Employment Services Act* 4/2014:sec. 2(1)(h)(ii) & sec 2(1)(h)(iii).

¹²²⁴ *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000):par. 11.

¹²²⁵ *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000):par. 12.

¹²²⁶ *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000):par. 72.

be found to fill the position. The *Auf Der Heyde* case illustrated this point even though the main complaint in the case was of racial discrimination.

The more recent case of *Khumalo v University of Johannesburg* dealt specifically with discrimination based on ethnic or social origin. In this case, due to misrepresentation on the part of the applicant, and an oversight on the part of the university, the applicant was appointed to an academic post but later dismissed for gross misconduct when the university discovered that the applicant did not have permanent residency. The university also argued against the applicant on the basis that the *Immigration Act* did not allow her appointment.¹²²⁷ The court in this case relied on the provisions of the legislation in finding that Khumalo had not been discriminated against. The court said that the employer had complied with the legislation by giving preference to previously disadvantaged groups.¹²²⁸

These two cases illustrate how the courts have dealt with cases involving discrimination in the university employment setting as well as concerning non-national academics. The legislation provides measures for the institution to 'legally' discriminate against non-national academics when making appointments, without viewing it as xenophobia. The institutional policies are in place which set out the university's commitment to transformation and the need to eradicate discrimination. Yet in instances where appointments are justified based on employment equity and a commitment to affirmative action, it begs the question of whether this cannot be seen as covertly xenophobic. Bearing in mind that institutions are also faced with delays in the processing of work permits and necessary visas, this may also be seen as a deterrent when considering applications by non-national academics.

The passing of the *Employment Services Amendment Bill* may also cause further hardship and uncertainty to non-nationals and non-national academics when applying for work in South Africa. The *Employment Services Amendment Bill* was introduced in Parliament in 2020 to address the issue of non-nationals being employed in certain sectors without complying with the scarce skills requirement. The proposed bill aims

¹²²⁷ *Khumalo v University of Johannesburg* (JS533/16)[2018] ZALCJHB31 (6 February 2018):par. 9.

¹²²⁸ *Khumalo v University of Johannesburg* (JS533/16)[2018] ZALCJHB31 (6 February 2018):par. 18.

to balance the expectations of South Africans concerning employment opportunities in the face of increasing unemployment and the belief that non-nationals are taking the jobs of locals.¹²²⁹ While this is a legitimate concern for all South Africans, it must also be noted that South Africa is a signatory to international treaties regarding the rights of migrants. Interventions such as these need to be in line with treaties and the *Constitution* to protect the rights of non-nationals.¹²³⁰ The bill however seeks to ensure that non-nationals can only be employed in terms of proposed quotas in certain sectors, occupational categories, or geographical areas.¹²³¹ In terms of the bill, the employer also has to confirm that there are no suitable local candidates who possess the necessary skill for the position.¹²³² The bill has been criticized as being problematic and likely to cause a surge in xenophobia. It is also said to be contrary to the provisions of the *Constitution* and existing labour laws.¹²³³ Research in fact shows that migrants have, in broad terms made a positive impact on the South African economy and labour sector.¹²³⁴ Section 23 of the *Constitution* provides for the right to fair labour practices which applies to both citizens and non-nationals. The proposed bill is therefore incongruent with Section 23 as it seeks to further curtail their rights which it can be argued, amounts to an unfair labour practice.¹²³⁵

In cases that have come before the court such as the *Watchenuka* case which I discuss in Chapter 5, the court allowed non-nationals the right to work on the basis that a failure to do so would be a breach of their fundamental right to human dignity.¹²³⁶ In this case, it was argued that the right to work is a part of the right to dignity. The

¹²²⁹ Parliamentary Monitoring Group “Draft National Labour Migration Policy & Employment Services Amendment Bill”, <https://www.pmg.org.za/call-for-comment/1138/> (accessed on 11 August 2022).

¹²³⁰ Parliamentary Monitoring Group “Draft National Labour Migration Policy & Employment Services Amendment Bill”, <https://www.pmg.org.za/call-for-comment/1138/> (accessed on 11 August 2022).

¹²³¹ Parliamentary Monitoring Group “Draft National Labour Migration Policy & Employment Services Amendment Bill”, <https://www.pmg.org.za/call-for-comment/1138/> (accessed on 11 August 2022).

¹²³² Staff writer “New Bill aims to limit the hiring of foreign workers in South Africa”, <https://businesstech.co.za/news/business/456450/new-bill-aims-to-limit-the-hiring-of-foreign-workers-in-south-africa/> (accessed on 24 July 2021).

¹²³³ Kiewit “Is IFP job reservation Bill constitutional?”, <https://www.capetalk.co.za/articles/437320/ifp-s-proposed-bill-barring-migrant-workers-from-jobs-fueling-xenophobia-in-sa> (accessed on 13 March 2022).

¹²³⁴ Helen Suzman Foundation “Submission on the Employment Services Amendment Bill”, 4 <https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf> (accessed on 19 August 2022).

¹²³⁵ Helen Suzman Foundation “Submission on the Employment Services Amendment Bill”, 13 <https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf> (accessed on 19 August 2022).

¹²³⁶ See section 5.5.2.

Helen Suzman Foundation also made submissions on the proposed amendments to the *Employment Services Act* which in the main, expressed concern about the enforcement of quotas and the probability of it amounting to a general prohibition of employment which would be against the *Constitution*. Another concern expressed by the foundation is that the proposed quota system is not supported by any research or data which shows the effect of non-national on the labour market.¹²³⁷ As a result, this may lead to judicial review of the system in the future on the basis that it is an irrational exercise of authority by the Minister.¹²³⁸

While the bill proposes to introduce the quota system, the Draft National Labour Migration Policy has made it clear that there is no evidence to support a quota system, rather to the contrary it has been shown that non-nationals make a positive contribution to the economy in that non-nationals:¹²³⁹

- a) are integrated into the labour sector and do not seem to displace citizens;
- b) have a positive impact on the gross domestic product per capita and estimates reveal that they may raise the South African income by up to 5%;
- c) have a positive effect on the South African fiscal system as they pay more taxes;
- d) display a prevalence of self-employment among their group where self-employment represents 25% of the total jobs for non-nationals compared to 16% in the case of citizens.¹²⁴⁰

The fact that the proposed quota system is not supported by any research or data that shows the purported effect of non-nationals on the labour market may lead to judicial

¹²³⁷ Helen Suzman Foundation "Submission on the Employment Services Amendment Bill", 4
<https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf>
(accessed on 19 August 2022).

¹²³⁸ Helen Suzman Foundation "Submission on the Employment Services Amendment Bill", 12
<https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf>
(accessed on 19 August 2022).

¹²³⁹ Helen Suzman Foundation "Submission on the Employment Services Amendment Bill", 7
<https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf>
(accessed on 19 August 2022).

¹²⁴⁰ Helen Suzman Foundation "Submission on the Employment Services Amendment Bill", 7
<https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf>
(accessed on 19 August 2022).

review of the system in the future on the basis that it is an irrational exercise of authority by the Minister.¹²⁴¹

The Helen Suzman Foundation (HSF) cited the *Watchenuka* case when arguing against the imposition of quotas by pointing out that the court found that the prohibition imposed on asylum seekers during their first 180 days of asylum prevented them from seeking employment was unconstitutional as it limited their right to human dignity and to benefit from the freedoms associated with employment.¹²⁴² The HSF argued that the introduction of the quota system would have the same effect as it would prevent them from entering the workforce for some time or even permanently in certain cases.¹²⁴³ If employers cannot comply with the quota requirements, some non-nationals may lose their jobs. It would also create uncertainty for non-nationals as their jobs would be permanently at risk.¹²⁴⁴

Further challenges with the bill are that it applies broadly to sectors or occupational categories but fails to consider the human resource demands of individual employees.¹²⁴⁵ As a result, the imposition of the quota system may also cause additional burdens for employers. The bill also requires the employer to ensure that there are no persons in the Republic with suitable skills to fill a position before the employer can employ a non-national. However, it does not provide any guidelines as to how this must be done by the employer. This may present a challenge for higher education institutions that have to first look for academics with the requisite skill before employing a non-national academic. The bill also does not provide for consultation by the Minister with role players who will be affected by the quota system, employers,

¹²⁴¹ Helen Suzman Foundation "Submission on the Employment Services Amendment Bill",4 <https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf> (accessed on 19 August 2022).

¹²⁴² Helen Suzman Foundation "Submission on the Employment Services Amendment Bill",9 <https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf> (accessed on 19 August 2022).

¹²⁴³ Helen Suzman Foundation "Submission on the Employment Services Amendment Bill",9 <https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf> (accessed on 19 August 2022).

¹²⁴⁴ Helen Suzman Foundation "Submission on the Employment Services Amendment Bill",9 <https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf> (accessed on 19 August 2022).

¹²⁴⁵ Helen Suzman Foundation "Submission on the Employment Services Amendment Bill",14 <https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf> (accessed on 19 August 2022).

employees, or with the Parliamentary Portfolio Committee. This may imply that the Minister will have very wide powers when implementing the provisions of the bill regarding quotas.¹²⁴⁶

While it is evident that non-nationals do not have unlimited rights to work in South Africa, and government must ensure that workers have the required legal status to work in South Africa, this can be achieved without the quota system being imposed.¹²⁴⁷ A rights-based approach should be used to protect all workers in South Africa which is in keeping with international laws, regional and SADC commitments, the Constitution, and labour legislation. This approach should be guided by the principle of equal treatment for all.¹²⁴⁸

In a study conducted by Cinnini & Mkhize which investigated the safety and security experiences of African non-nationals in Durban, the participants identified the Broad-Based Black Economic Empowerment Policy as affecting their ability to obtain employment.¹²⁴⁹ This study also identified that non-nationals experience challenges in trying to obtain microcredit loans for those in a low-income bracket if they do not have a fixed income, credit history, or security. This serves to further add to their economic challenges.¹²⁵⁰

Although the passing of the *Employment Services Amendment Bill* will not directly impact the work of non-national academics as it specifically targets non-nationals wishing to operate businesses in designated townships, it is nonetheless indicative of a mindset or trend by the government to implement laws that 'legitimately' restrict the activities and employment options available to non-nationals. This concern can be further justified as the Department of Labour seeks to introduce legislation to examine

¹²⁴⁶ Helen Suzman Foundation "Submission on the Employment Services Amendment Bill",14 <https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf> (accessed on 19 August 2022).

¹²⁴⁷ Helen Suzman Foundation "Submission on the Employment Services Amendment Bill",10 <https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf> (accessed on 19 August 2022).

¹²⁴⁸ Helen Suzman Foundation "Submission on the Employment Services Amendment Bill",10 <https://hsf.org.za/publications/submissions/hsf-employment-services-amendment-bill-submission.pdf> (accessed on 19 August 2022).

¹²⁴⁹ Cinnini & Mkhize 2021:33.

¹²⁵⁰ Cinnini & Mkhize 2021:34.

the employment of non-nationals in other sectors of the economy such as hospitality, restaurant, security, farming, road freight, and agriculture.¹²⁵¹ However, in passing new laws, the government has to ensure that the rights of citizens do not inevitably encroach on the rights of non-nationals, regard being had to the tenets of the Constitution and international laws and treaties. In the next section, I examine the challenges encountered by non-nationals with immigration laws which are central to living and working legally in South Africa.

6.2.3 Immigration laws

It took seven years for post-apartheid immigration legislation to be developed. Some of the challenges with immigration legislation are related to backlogs with applications, police requirements, evaluation of qualifications, and work permits.¹²⁵² The Immigration Act has been criticized as being anti-migratory, focusing largely on how to restrict immigrants rather than on how to manage migration.¹²⁵³ The subsequent amendments to the Immigration Act have further sought to restrict employment of non-nationals as the requirements have become more onerous such as the evaluation of qualifications by the South African Qualifications Authority (SAQA).¹²⁵⁴ This requirement implies that non-nationals cannot apply for work until their qualifications are approved by SAQA.

While it is accepted that the legislation is in place for a legitimate purpose as the entry of non-nationals into the workforce must be carefully regulated, the challenge is the time it takes to have the compliance requirements met, and the delays which are caused will unfairly prejudice non-nationals seeking to work and earn a living in the country. The prospective employer is also faced with the challenge of having to spend time first trying to recruit a suitable South African candidate.¹²⁵⁵ Added to this is the fact that there is currently a skills shortage in South Africa's labour sector which affects

¹²⁵¹ Staff writer "New Bill aims to limit the hiring of foreign workers in South Africa", <https://businesstech.co.za/news/business/456450/new-bill-aims-to-limit-the-hiring-of-foreign-workers-in-south-africa/> (accessed on 24 July 2021).

¹²⁵² Rasool *et al* 2013:400.

¹²⁵³ Muchiri 2016:113.

¹²⁵⁴ Rasool *et al* 2013:406.

¹²⁵⁵ Rasool *et al* 2013:405.

the growth prospects of the country's economy.¹²⁵⁶ Muchiri is of the view that one of the reasons for South Africa's skills shortage is its restrictive immigration laws.¹²⁵⁷ Covid 19 has also had a debilitating effect on the labour market and as of the end of 2020, 1,35 million fewer people were in employment as compared to the first quarter of 2020.¹²⁵⁸ The unemployment rate was at 34,9% in the third quarter of 2021.¹²⁵⁹ The Green Paper on International Migration raised the need for immigration laws to consider the human rights of all people.¹²⁶⁰ It recommended a strategic approach to managing migration that focuses on building economic growth and national security.¹²⁶¹ However, the recent trend in South African society places more focus on restricting the work prospects available to non-nationals. This can be seen through the recent initiative by the Limpopo Provincial Education Department. In December 2021, the department decided not to renew the contracts of about 254 non-national teachers.¹²⁶²

The decision was made not to renew the employment contracts of educators who did not have permanent residency status. This was done to comply with the provisions of the *Employment Services Act* aimed at limiting the number of non-nationals being employed in South Africa. Some of the affected teachers were teaching subjects such as Maths and Science and some possessed valid permanent residency permits but were replaced by locals.¹²⁶³ The Department of Education denied practicing discrimination and stated that people are employed based on their fulfilling the

¹²⁵⁶ Ntingi "Foreign skilled workers needed", <https://www.news24.com/fin24/finweek/foreign-skilled-workers-20210323>. (accessed on 2 March 2022).

¹²⁵⁷ Muchiri 2016:114.

¹²⁵⁸ Ntingi "Foreign skilled workers needed", <https://www.news24.com/fin24/finweek/foreign-skilled-workers-20210323>. (accessed on 2 March 2022).

¹²⁵⁹ Department of Statistics South Africa "Quarterly Labour Force Survey (QLFS)-Q3:2021", <http://www.statssa.gov.za/?p=14957#:~:text=The%20official%20unemployment%20rate%20was,2021%20to%2014%2C3%20million>. (accessed on 14 March 2022).

¹²⁶⁰ Department of Home Affairs 2016 "Green Paper on International Migration for South Africa", 8 http://www.dha.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf accessed on 6 June 2019).

¹²⁶¹ Department of Home Affairs 2016 "Green Paper on International Migration for South Africa", 8 http://www.dha.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf accessed on 6 June 2019).

¹²⁶² Govender "We're shooting ourselves in the foot : Foreign educators given the boot", <https://www.timeslive.co.za/sunday-times/news/2022-02-13-were-shooting-ourselves-in-the-foot-foreign-educators-given-the-boot/> (accessed on 1 March 2022).

¹²⁶³ Govender "We're shooting ourselves in the foot : Foreign educators given the boot", <https://www.timeslive.co.za/sunday-times/news/2022-02-13-were-shooting-ourselves-in-the-foot-foreign-educators-given-the-boot/> (accessed on 1 March 2022).

minimum requirements. The Basic Education Minister, Angie Motshekga stated that provinces should hire young South African teachers over non-national teachers. However, some provinces like the Northern Cape could not find teachers with Maths and Science experience.¹²⁶⁴

In 2020 a memorandum of agreement was signed between the Department of Higher Education & Training and the Department of Home Affairs to facilitate the development of the critical skills list. Minister Blade Nzimande stated that other countries like Canada, the United Kingdom, and Australia also applied critical skills lists as a basis for recruiting non-nationals for jobs that form part of the critical skills needed in the country.¹²⁶⁵

Skills shortages within the labour sector are often caused by economic shifts. These economic shifts are the result of globalization and other factors such as the mitigation of climate change and digital transformation. Imbalances or shortages in the labour sector may harm production due to the time it takes to embrace new technology.¹²⁶⁶ The reasons set out above can therefore justify the hiring of non-nationals who have the necessary scarce skill and who can meet the demands of the labour market in cases where the employer is unable to meet these needs from the domestic labour supply.¹²⁶⁷ The Immigration Act provides for this by stating that:

An exceptional [critical] skills work permit/visa may be issued by the Department of Home Affairs to an individual with exceptional skills or qualifications.¹²⁶⁸

However, the technical report also stated that it is important that the term ‘critical skills’ is clearly defined and used appropriately to develop criteria for the hiring of non-nationals. A balance must be struck between hiring too many non-nationals which may

¹²⁶⁴ Govender “We’re shooting ourselves in the foot : Foreign educators given the boot”, <https://www.timeslive.co.za/sunday-times/news/2022-02-13-were-shooting-ourselves-in-the-foot-foreign-educators-given-the-boot/> (accessed on 1 March 2022).

¹²⁶⁵ Centra “Technical Report on critical skills list published”, <https://www.centralnews.co.za/technical-report-on-critical-skills-list-published/> (accessed on 1 March 2022).

¹²⁶⁶ Department of Higher Education & Training “A Technical Report for the 2020 Critical Skills List”, 10 <https://www.dhet.gov.za/SiteAssets/Latest%20News/November%202020/A%20Technical%20Report%20for%20the%202020%20Critical%20Skills%20List.pdf> (accessed on 30 August 2022).

¹²⁶⁷ Department of Higher Education & Training “A Technical Report for the 2020 Critical Skills List”, 10 <https://www.dhet.gov.za/SiteAssets/Latest%20News/November%202020/A%20Technical%20Report%20for%20the%202020%20Critical%20Skills%20List.pdf> (accessed on 30 August 2022).

¹²⁶⁸ *Immigration Act* 13/2002:sec19(4).

be seen as depriving South Africans of jobs and a situation where permits are too difficult to obtain due to strict controls which may affect the closing of the skills gap and ultimately the economy of the country.¹²⁶⁹

Critical skills are defined by the Department of Home Affairs (DHA) as:

skills that are regarded, through labour market availability and analysis, to be critical for improvement in economic growth and without which certain projects and work could not be undertaken, as well as high-level skills that will enhance the skills pool in the economy which in turn will encourage and potentially accelerate growth in the economy. (DHA, 2019)

Looking at the position of 'university lecturer' within the Critical Skills List of the report, initially, the position was excluded from the list. However, after examining the evidence, it was included but based on the Classification of Education Subject Matter which sets out certain fields where university lecturers are in short supply.¹²⁷⁰ The report however mentioned that it is uncertain as to whether lecturers are in short supply as the evidence concerning this is ambiguous. On the one hand, various academics are of the view that there are many graduates with PhDs in South Africa who could take up lecturing positions. On the other hand, some studies indicate that South Africa has a shortage of lecturers.¹²⁷¹

Dugmore predicted that by 2020, 23 of South Africa's universities would be short of an estimated 7000 academics with 50% of that number being professors who are due to retire.¹²⁷² This would impact the number of academics needed in the Higher Education Sector. To address the shortage Government implemented the New Generation of Academics Programme (nGAP), in terms of which the Department of Higher Education & Training (DHET) would fund new nGAP lecturing posts. 80% of these posts were to

¹²⁶⁹ Department of Higher Education & Training "A Technical Report for the 2020 Critical Skills List", 10 <https://www.dhet.gov.za/SiteAssets/Latest%20News/November%202020/A%20Technical%20Report%20for%20the%202020%20Critical%20Skills%20List.pdf> (accessed on 30 August 2022).

¹²⁷⁰ Department of Higher Education & Training "A Technical Report for the 2020 Critical Skills List", 96 <https://www.dhet.gov.za/SiteAssets/Latest%20News/November%202020/A%20Technical%20Report%20for%20the%202020%20Critical%20Skills%20List.pdf> (accessed on 30 August 2022).

¹²⁷¹ Department of Higher Education & Training "A Technical Report for the 2020 Critical Skills List", 96 <https://www.dhet.gov.za/SiteAssets/Latest%20News/November%202020/A%20Technical%20Report%20for%20the%202020%20Critical%20Skills%20List.pdf> (accessed on 30 August 2022).

¹²⁷² Dugmore "Universities facing dire staffing crisis", <https://www.ru.ac.za/latestnews/archives/2015/universitiesfacedirestaffingcrisis.html> (accessed on 13 March 2022).

be allocated to black and/or female South Africans.¹²⁷³ In effect, the nGAP program as well as the proposed amendments to existing laws will make it more challenging for non-national academics to secure work in the Higher Education system.

These laws tacitly prefer local citizens over non-nationals and any relaxation of the restrictions is there to address skills shortages and place onerous requirements on the part of the employer before a non-national can be employed. As discussed earlier in this chapter legislation provides that the employer must ensure that a suitable South African candidate cannot be found to fill the position. It is only then that the employer can employ a non-national to fill the vacancy.¹²⁷⁴ In addition to this, the long delays experienced by non-nationals in obtaining work permits and visas might also deter potential employers from recruiting non-nationals into their organizations. At the end of 2021, the government announced that it would not renew the temporary permits of about 250000 Zimbabweans living in South Africa.¹²⁷⁵ In 2009 these non-nationals were granted a four-year temporary work visa to assist those fleeing political and economic unrest.¹²⁷⁶ The visas were subsequently renewed on repeated occasions. However, the government has since the announcement in 2021 given all affected persons 12 months to apply for alternative visas, failing which they will have to return to Zimbabwe or face deportation.¹²⁷⁷

This directive has caused panic and uncertainty for Zimbabweans living in South Africa and several civil society organizations have joined together in an appeal to the government to reconsider this decision.¹²⁷⁸ Concerns were expressed about the delay

¹²⁷³ Dugmore “Universities facing dire staffing crisis”, <https://www.ru.ac.za/latestnews/archives/2015/universitiesfacedirestaffingcrisis.html> (accessed on 13 March 2022).

¹²⁷⁴ Rasool *et al* 2013:405.

¹²⁷⁵ Africa News “South Africa says NO to renewal of work permits for 250 000 Zimbabweans”, <https://www.africanews.com/2021/11/25/south-africa-says-no-to-renewal-of-work-permit-for-250-000-zimbabweans/> (accessed on 19 August 2022).

¹²⁷⁶ Africa News “South Africa says NO to renewal of work permits for 250 000 Zimbabweans”, <https://www.africanews.com/2021/11/25/south-africa-says-no-to-renewal-of-work-permit-for-250-000-zimbabweans/> (accessed on 19 August 2022).

¹²⁷⁷ Africa News “South Africa says NO to renewal of work permits for 250 000 Zimbabweans”, <https://www.africanews.com/2021/11/25/south-africa-says-no-to-renewal-of-work-permit-for-250-000-zimbabweans/> (accessed on 19 August 2022).

¹²⁷⁸ Centre for Applied Legal Studies “letter on refusal to extend Zimbabwean Exemption Permit”, <https://www.wits.ac.za/news/sources/cals-news/2021/letter-on-refusal-to-extend-zimbabwean-exemption-permit.html> (accessed on 19 August 2022).

in the issuing of the alternative permits during the 12-month period and the status of people without a permit despite having applied during the 12-month period.¹²⁷⁹ Employers may decide not to renew employment contracts of non-nationals who do not have a valid visa to remain in the country, children face not being admitted to schools and banks may decide to close the bank accounts of such individuals.¹²⁸⁰

In summary, the challenges affecting non-national academics concerning immigration laws related to the delays in obtaining the relevant permits, police clearances, and evaluation of qualifications as outlined above. The implementation of the critical skills list as well as the decision by the government not to renew exemption permits in the case of Zimbabwean non-nationals are also indicators that point to the difficulties faced by non-nationals who wish to live and work in South Africa. The next section focuses on a discussion of the anti-discriminatory laws and the limitations of these laws in protecting the rights of non-national academics.

6.2.4 Anti-discrimination laws

6.2.4.1 *Promotion of Equality & Prevention of Unfair Discrimination (PEPUDA)*

The Act aims to protect human dignity, and prevent unfair discrimination, hate speech, and advocacy of hatred based on ethnicity.¹²⁸¹ However, the Act does not directly address xenophobia. Instead, it deals with it impliedly under the definition of nationality.¹²⁸² Section 28 of the Act also does not elaborate on the meaning of 'nationality of origin', nor does it provide for the situation that if a crime is motivated by xenophobia, this must be treated as an aggravating factor.¹²⁸³ Non-nationals who experience discrimination based on xenophobia will not find adequate protection in terms of the Act.

¹²⁷⁹ Centre for Applied Legal Studies "letter on refusal to extend Zimbabwean Exemption Permit", <https://www.wits.ac.za/news/sources/cals-news/2021/letter-on-refusal-to-extend-zimbabwean-exemption-permit.html>. (accessed on 19 August 2022).

¹²⁸⁰ Centre for Applied Legal Studies "letter on refusal to extend Zimbabwean Exemption Permit", <https://www.wits.ac.za/news/sources/cals-news/2021/letter-on-refusal-to-extend-zimbabwean-exemption-permit.html>. (accessed on 19 August 2022).

¹²⁸¹ *Promotion of Equality & Prevention of Unfair Discrimination Act 4/2000*:sec. 2(b)(ii)(iv) & (v).

¹²⁸² *Promotion of Equality & Prevention of Unfair Discrimination Act 4/2000*:sec. 1.

¹²⁸³ Muchiri 2016:106.

The South African Research Chair in Equality, Law, and Social Justice at the School of Law at the University of the Witwatersrand compiled submissions regarding amendments to the Act. I discuss these submissions below.

Albertyn *et al* firstly examined the definition of discrimination and suggest that the definition be amended to include ‘ a policy, practice or situation which causes prejudice or undermines the dignity of any person on one or more of the prohibited grounds.’¹²⁸⁴ Further, the prohibited grounds mentioned in the Act include 'ethnic or social origin' and also incorporate any other ground where discrimination based on that other ground undermines human dignity, causes systemic disadvantage, or affects the enjoyment of a person's rights.¹²⁸⁵ However, Albertyn *et al* propose the view that although the Act lists ‘ethnic or social origin’ as a ground for discrimination it narrowly caters for ethnicity and discrimination based on one’s ethnicity for example if someone is discriminated against for being Zulu or Jewish.¹²⁸⁶

The writers propose that the broader term 'nationality' be explicitly included in the Act to address discrimination based on how people are stigmatized based on their nationality such as being Nigerian or Kenyan etc.¹²⁸⁷ The National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Racial Intolerance notes that this type of discrimination leads to violence and marginalization of people based on

¹²⁸⁴ Albertyn *et al* “Submission to the Department of Justice and Constitutional Development on Amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000”, 2 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/sarchi-equality-chair/SARChISubmission.pdf> (accessed on 30 August 2022).

¹²⁸⁵ *Promotion of Equality & Prevention of Unfair Discrimination Act 4/2000*:sec. 1(a) & (b)(i)(ii)&(iii).

¹²⁸⁶ Albertyn *et al* “Submission to the Department of Justice and Constitutional Development on Amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000”, 9 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/sarchi-equality-chair/SARChISubmission.pdf> (accessed on 30 August 2022).

¹²⁸⁷ Albertyn *et al* “Submission to the Department of Justice and Constitutional Development on Amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000”, 9 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/sarchi-equality-chair/SARChISubmission.pdf> (accessed on 30 August 2022)..

their nationality.¹²⁸⁸ Currently 'prohibited grounds' are defined as including ethnic or social origin but not nationality.¹²⁸⁹

The Act at Section 34(1) made provision for the Minister to consider including nationality as a prohibited ground, but this power was not exercised and no formal recommendation was made in this regard by the Equality Review Committee.¹²⁹⁰ Albertyn *et al* suggest that 'nationality' be included in the definition of prohibited grounds in the Act.¹²⁹¹ They believe that in so doing nationality will symbolically be identified as a cause of substantial discrimination and it will also allow for a claim for unfair discrimination which is a practical remedy to address it. They also suggest the inclusion of 'the eradication of stigma, stereotype and marginalization, vulnerability and exploitation' and the 'removal of disadvantage' to promote the ideas fundamental to the attainment of equality through the elimination of discrimination and inequality.¹²⁹²

If the suggested amendments and inclusions are adopted, it may assist in providing greater protection for victims of xenophobia as the broader definitions as well as the inclusion of nationality as a prohibited ground will cater for crimes relating to xenophobic violence or treatment.

¹²⁸⁸ Albertyn *et al* "Submission to the Department of Justice and Constitutional Development on Amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000",2 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/sarchi-equality-chair/SARChISubmission.pdf> (accessed on 30 August 2022)..

¹²⁸⁹ *Promotion of Equality & Prevention of Unfair Discrimination Act 4/2000*:sec. 1(1).

¹²⁹⁰ Albertyn *et al* "Submission to the Department of Justice and Constitutional Development on Amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000",5 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/sarchi-equality-chair/SARChISubmission.pdf> (accessed on 30 August 2022)..

¹²⁹¹ Albertyn *et al* "Submission to the Department of Justice and Constitutional Development on Amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000",11 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/sarchi-equality-chair/SARChISubmission.pdf> (accessed on 30 August 2022)..

¹²⁹² Albertyn *et al* "Submission to the Department of Justice and Constitutional Development on Amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000",5 <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/sarchi-equality-chair/SARChISubmission.pdf> (accessed on 30 August 2022)..

6.2.4.2 *Preventing and combatting of Hate Crimes and Hate Speech Bill 2018*

As outlined in Chapter 5 of this thesis South Africa does not have xenophobic specific legislation.¹²⁹³ Crimes motivated by xenophobia are dealt with by applying existing criminal law.¹²⁹⁴ It is a stark reality that the South African *Constitution* is inadequate in upholding the rights and values contained in it if it is not supported by other legislation. This is evident when one considers the *Preventing and Combating of Hate Crimes and Hate Speech Bill* which is supposed to render protection to those who are vulnerable based on race, nationality, religion, sexual orientation, etc.¹²⁹⁵ The passing of the bill into law is a much-needed step by the government to protect the vulnerable. The passing of the legislation will also help to hold perpetrators of xenophobic violence accountable and to provide victims with access to legal protection through the criminal justice system.¹²⁹⁶

Botha criticizes the *Hate Crimes Bill* by stating that the objectives do not align with the preamble of the bill. The preamble focuses on protecting the victims of hate crimes while the objectives mainly focus on the practical implementation and enforcement measures.¹²⁹⁷ The writer states that there is a lack of insight into the real purpose of hate crime legislation and that the identity characteristics listed in the bill are not the same as those set out in the Equality Act and Section 9(3) of the *Constitution* although the preamble to the bill speaks of an alignment with both of these.¹²⁹⁸ The identity characteristics are also more in number than those listed in hate crime legislation of other countries.¹²⁹⁹

Further, the Bill does not provide for the recognition of analogous grounds as provided for in the Equality Act.¹³⁰⁰ Botha also states that only clause 2(a) highlights the need to eradicate prejudice and the international obligations of the Republic to enact hate

¹²⁹³ See section 5.7.2.

¹²⁹⁴ Muchiri 2016:117.

¹²⁹⁵ Pieterse *et al* 2018:31-32..

¹²⁹⁶ Pieterse *et al* 2018:41.

¹²⁹⁷ Botha 2019:795.

¹²⁹⁸ Botha 2019: 796.

¹²⁹⁹ Botha 2019:796.

¹³⁰⁰ Botha 2019:796.

crime legislation.¹³⁰¹ The writer stresses that this inconsistency points to a lack of insight into the real purpose of hate crime legislation as well as the importance of a rational link between the definitional limits of the offence and how it can be successfully implemented.¹³⁰² If the offences in the bill are too broadly framed it may be difficult to ultimately achieve the objectives set out in the bill.¹³⁰³

The passing of hate crime legislation must also be a coordinated exercise between government institutions, civil society actors, and international organizations.¹³⁰⁴ There should be objective criteria for the victims who should enjoy protection. Marital status, pregnancy, conscience, and belief have been left out of the bill.¹³⁰⁵ Occupation and trade and/or political affiliation are included. There may be objections to these because the bill is being used as political grounds for the passing of hate crime legislation. This would negatively impede the materiality of the bill and the need for hate crime laws.¹³⁰⁶ Bearing in mind that substantive equality is central to our constitutional standard, it would be acceptable to provide vulnerable groups with enhanced protection to realize equality. To have an extensive list would mean that anyone could claim to be a victim of a hate crime and the hate crime concept might be whittled down and lose its place within the legislative framework.¹³⁰⁷ It is, therefore, necessary that the legislation is carefully framed with support from institutions such as the police, hospital, social workers, prosecutors, and correctional facilities.¹³⁰⁸ There is a need for hate crime legislation to help overcome hate crime in South African society.¹³⁰⁹ It is recommended that the approach used is the vulnerability approach, which takes into account that hate crimes are intertwined with historical and socio-political factors and which aligns with the *Constitution*.¹³¹⁰

Hate crime legislation, if passed will only be effective if it receives the support of political and public role-players. Leaders need to consistently speak out against hate

¹³⁰¹ Botha 2019:795-796.

¹³⁰² Botha 2019:796.

¹³⁰³ Botha 2019:796.

¹³⁰⁴ Botha 2009:797.

¹³⁰⁵ Botha 2009:797.

¹³⁰⁶ Botha 2009:799.

¹³⁰⁷ Botha 2009:801.

¹³⁰⁸ Botha 2009:802.

¹³⁰⁹ Botha 2009:809.

¹³¹⁰ Botha 2009:810.

crimes such as racism and xenophobia.¹³¹¹ Hate crimes do not align themselves with the values of equality and human rights; nor do they represent the image of a 'rainbow nation'.¹³¹² Current legislation is inadequate to address and minimize hate crimes from taking place. It requires a multi-faceted response involving diversity awareness in communities and education and training programs aimed at service providers.¹³¹³ There is a need for South Africa to prioritize the development of legislation pertaining to hate crime.¹³¹⁴ An enactment of hate crime legislation would ensure that crimes such as murder, robbery, assault etc. are regarded as hate crimes when motivated by personal characteristics and therefore attract harsher penalties.¹³¹⁵ It will also inform society that hate crimes and discrimination will not be tolerated and will help law enforcers to prosecute perpetrators.¹³¹⁶

A concern regarding the Bill concerning this thesis and the protection it affords to non-national academics is that it does not mention xenophobia specifically as an offence. The introduction to the bill mentions that the bill aims to enforce the obligations of the Republic in terms of international law and the *Constitution* concerning racial discrimination, racism, and xenophobia and to provide for offences of hate crime and hate speech. In this regard, the bill does mention xenophobia specifically.¹³¹⁷ Further to this, the bill does not specifically make provision for a hate crime based on xenophobia, however, the definition of hate crime and hate speech can be interpreted to include xenophobia as it provides for an offence which is motivated by prejudice or intolerance based on nationality, migrant or refugee status.¹³¹⁸ The bill also includes prejudice or intolerance on the basis of ethnic or social origin.¹³¹⁹ Since xenophobia is linked to prejudice or intolerance based on a person's nationality or ethnic/social origin it would mean that victims of xenophobia could be classified as victims of hate crime and therefore entitled to protection in terms of the bill.

¹³¹¹ Breen & Nel 2011:39.

¹³¹² Breen & Nel 2011:39.

¹³¹³ Breen & Nel 2011:39.

¹³¹⁴ Breen & Nel 2011:39.

¹³¹⁵ Naidoo 2016:648.

¹³¹⁶ Pieterse *et al* 2018:41.

¹³¹⁷ *Preventing & Combating of Hate Crimes & Hate Speech Bill* 2018.

¹³¹⁸ *Preventing & Combating of Hate Crimes & Hate Speech Bill* 2018 sec3(1)(k)&4(1)(k).

¹³¹⁹ *Preventing & Combating of Hate Crimes & Hate Speech Bill* 2018:sec. 3(1)(g) & 4(1)(gg).

Scholars of hate crime are of the view that hate crimes are perpetrated against people who are as seen as being part of the 'outgroup', who face stigma, and who are not valued by society.¹³²⁰ The victim's status is not important to the perpetrator, rather the focus is on who the victim represents and that he or she is seen as the 'other'.¹³²¹ Hate crimes are also seen as a social construct that is influenced by culture or social/political factors and which accords a particular status to a group of people because of their vulnerability.¹³²²

I have outlined the provisions of *PEPUDA* and the *Preventing and Combating of Hate Crimes and Hate Speech Bill*. While these Acts set out provisions that cater to discriminatory practices, they do not address xenophobia specifically. Protection against xenophobia can be inferred from the broad definitions in the Acts or by interpreting provisions such as those relating to hate crime and hate speech to include xenophobic crimes. Xenophobia is a form of discrimination that is prevalent in society. There is therefore a clear need for lawmakers to create legislation that specifically addresses xenophobia and provides mechanisms to deal with it. If this is not done, it is then left to the interpretation of the courts in cases that are brought before it. Having examined in detail the challenges or inadequacies of labour legislation, proposed new bills and amendments to existing legislation as well as anti-discrimination legislation, in the next section, I analyse the cases which I discussed in previous chapters, particularly in Chapters 4 and 5.

6.3 CASE LAW

In Chapter 5 I state that there is a lack of case law that specifically deals with non-national academics. and xenophobia. The cases which I discuss in Chapter 5 deal mainly with the plight of non-nationals generally concerning their right to equality, the right to work, the right to be treated fairly, and not to be discriminated against. In most cases the courts have consistently applied the provisions of the *Constitution* in favour of non-nationals, recognizing that they are deserving of legal protection in cases where their rights have been infringed.

¹³²⁰ Botha 2019:784.

¹³²¹ Botha 2019:784.

¹³²² Botha 2019:784.

In this section, I analyse the cases that I have discussed in detail in Chapters 4 and 5. I look at the issues that they address concerning non-nationals and whether the decisions of the courts have protected the rights of non-nationals or not. I do not discuss the cases in chronological order but rather in terms of the type of discrimination that forms the basis of the complaint in each case. The first few cases that I mention below relate to the rights of refugees and asylum seekers. In *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others*¹³²³ the court recognized that refugees are vulnerable and need to be treated with compassion since some of them have had to flee their own countries due to violence.¹³²⁴ The court stated that to deny refugees work purely based on their refugee status would serve to foster xenophobia and would be contrary to our Constitutional vision.¹³²⁵ In this case, the court made important observations regarding the right to dignity and the treatment of refugees.¹³²⁶

*Ruta v Minister of Home Affairs and Others*¹³²⁷ dealt with the right to dignity, life, and liberty.¹³²⁸ While the court recognized that non-nationals do not have an automatic right to enter the country or to reside or remain in South Africa and that international law reiterates this position as well, the court found that refugees are a vulnerable group, often fleeing situations of violence.¹³²⁹ Many refugees do not apply for asylum timeously but the court found that they could not be summarily disqualified from applying for asylum.¹³³⁰

The cases of *Abdi v Minister of Home Affairs*¹³³¹ and *Nanduta & Others v Minister of Home Affairs*¹³³² also saw the court recognizing that the *Constitution* requires state

¹³²³ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006].

¹³²⁴ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par. 28.

¹³²⁵ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par.122.

¹³²⁶ *Union of Refugee Women & Others v Director, Private Security Industry Regulatory Authority & Others* (CCT 39/06) [2006]:par.125.

¹³²⁷ *Ruta v Minister of Home Affairs* [2018] ZACC.

¹³²⁸ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 12.

¹³²⁹ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 48.

¹³³⁰ *Ruta v Minister of Home Affairs* [2018] ZACC:par. 56.

¹³³¹ *Abdi v Minister of Home Affairs* (734/10) [2011] ZASCA.

¹³³² *Nanduta & Others v Minister of Home Affairs and Others* [2019] ZACC.

organs to uphold the provisions of the Bill of Rights.¹³³³ In *Nanduta's* case, the court went so far as to declare a law invalid as it was not in line with the *Constitution* since it amounted to an unreasonable limitation of the right of the applicants and could not be justified.¹³³⁴ While most of the cases mentioned above dealt with the rights of refugees and asylum seekers, I also discuss cases in Chapters 4 and 5 which relate to the rights of other categories of non-nationals such as permanent residents or those having work permits.

The cases discussed can be broadly grouped firstly into those which deal generally with non-nationals who sought relief from the court concerning xenophobic treatment as in the case of *Osman v Minister of Safety and Others*¹³³⁵ where the applicant claimed that the conduct of the police amounted to xenophobia and that he was discriminated against based on ethnicity or social origin. Secondly, I discuss cases in Chapter 4 which focus on unfair discrimination based on ethnic or social origin, nationality, or citizenship. Cases such as *City Council of Pretoria v Walker*,¹³³⁶ *President of the Republic of South Africa & Another v Hugo*,¹³³⁷ *Larbi Odam v MEC for Education (North-West Province)*¹³³⁸ and *Khoza v Minister of Social Development and Others*.¹³³⁹ The decisions of the courts in these cases provided important guidelines on the interpretation of the right to equality and whether the complainants had been unfairly discriminated against on the grounds of nationality or ethnic /social origin. These decisions while not dealing specifically with non-national academics do indicate how the court interprets the rights affecting non-nationals who face unfair discrimination.

The third category of cases that I dealt with specifically relates to the right of non-nationals to work, their employment status where their immigration status is uncertain, the right to choose a trade, profession, or occupation, and the right to fair labour practices. Some of these cases were those involving non-national academics or those

¹³³³ *Abdi v Minister of Home Affairs* (734/10) [2011] ZASCA:par. 33.

¹³³⁴ *Nanduta & Others v Minister of Home Affairs and Others* [2019] ZACC:par. 81.

¹³³⁵ *Osman v Minister of Safety* 2008 (EC09/2008) [2010] ZAEQC1.

¹³³⁶ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC).

¹³³⁷ *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC).

¹³³⁸ *Larbi-Odam v MEC for Education (North West Province)* 1998 SA 745 (CC).

¹³³⁹ *Khoza v Minister of Social Development* 2004 (6) SA 505 (CC).

employed within the higher education sector. The cases of *Discovery Health Limited v CCMA & Others*¹³⁴⁰ and *Somali Association & Others v Limpopo Department of Economic Development Environment & Tourism*¹³⁴¹ dealt with the right to work and the right to choose a trade, profession, or occupation.

The *Discovery Health* case dealt with the critical question of who an employee is since the *Labour Relations Act* does not include non-nationals in the definition of 'employee'. In this case, the court had to decide whether the person who was employed without a work permit can be regarded as an employee. The decision of the court is important as it tacitly recognized non-nationals as employees even though they may not have a valid work permit.¹³⁴² Being recognized as an employee is important as it determines whether such a person would have recourse to the CCMA as well as to the other rights concerning the employment relationship and the dispute that arose with the employer. If for example a non-national academic employed at a university finds themselves in a position where their employment contract is terminated by the institution and the non-national academic disputes the right to do so, and they are in a position where their work permit has expired it would be arguable whether the non-national academic has the status of an employee to seek recourse at the CCMA or Labour Court. The decision in the *Discovery Health* case however confirmed that a person who works for another on terms other than those recognized by the common law may be regarded as an employee in terms of the definition.

The decision in *Somali Association & Others v Limpopo Department of Economic Development Environment & Tourism* is also relevant to non-national academics as it allowed asylum seekers the right to choose their trade, occupation, or profession. Even though the Constitution only accords this right to citizens, the court stated that there is no law that prevents non-nationals from being granted licenses to operate spaza shops.¹³⁴³ However, since this case government has passed or introduced two bills that seek to curtail the right of non-nationals to work. In this regard, I discuss the

¹³⁴⁰ *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC).

¹³⁴¹ *Somali Association & Others v Limpopo Department of Economic Development Environment & Tourism & Others* 2015(1) SA 151 SCA.

¹³⁴² See discussion in section 4.1 above.

¹³⁴³ See the discussion of the case in Chapter 5. above.

Gauteng Economic Development Bill and the *Free State Bill* in Chapter 5 which both express an intention that is contrary to the decision in the *Somali Association* case. Thirdly, concerning xenophobia or discrimination against non-national academics specifically in the higher education context, I discuss the cases of *Baloro v University of Bophuthatswana*,¹³⁴⁴ *Auf Der Heyde v University of Cape Town*¹³⁴⁵ and *Khumalo v University of Johannesburg*.¹³⁴⁶ In *Baloro's* case which dealt with discrimination based on citizenship or ethnic/social origin, the court found that the non-national staff was discriminated against because they were not South Africans and the criteria for appointment should be on merit and not based on national origin. The decision, in this case, would present some difficulty however given the provisions relating to affirmative action in the *Employment Equity Act* since the Act provides that preference must be given to South African candidates over non-nationals. This was evident in the cases of *Auf Der Heyde v University of Cape Town* and *Khumalo v University of Johannesburg*. In *Khumalo's* case, the court found that Khumalo could not complain about being discriminated against when it was brought about by legislation but that she was entitled to challenge this in the court. These cases are relevant as they indicate how the rights of non-national academics are likely to be interpreted or protected in disputes involving xenophobia or discrimination in the higher education sector.¹³⁴⁷

The most recent case that I discuss in Chapter 5 concerning non-nationals and the right to work is that of *Rafoneke & Another v Minister of Justice & Correctional Services*¹³⁴⁸ where the applicants argued that the provisions of the *Legal Practice Act* violated their right to equality on the basis that it discriminated between South African citizens, permanent residents, and non-nationals. The judge looked at Section 22 of the *Constitution* which reserves the right to choose a trade, occupation, or profession for citizens only, and stated that the provisions of the *Legal Practice Act*, the *Immigration Act*, and the *Employment Services Act* echoed the government's position that work which is not categorized as a scarce skill should be reserved for South

¹³⁴⁴ *Baloro & Others v University of Bophuthatswana & Others* 1995 4 SA 197 (B).

¹³⁴⁵ *Auf Der Heyde v University of Cape Town* (603/98) [2000] ZALC 30 (5 May 2000).

¹³⁴⁶ *Khumalo v University of Johannesburg* (JS533/16)[2018] ZALCJHB31 (6 February 2018).

¹³⁴⁷ See detailed discussion of these cases in Chapter 5.

¹³⁴⁸ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29;par. 45.

African citizens or permanent residents. Although the court agreed that the applicant had established discrimination based on nationality, it found that the discrimination was fair. It only found that Section 24(2) of the *Legal Practice Act* was inconsistent with the *Constitution* as it did not allow the applicants to be admitted as non-practicing legal practitioners. The decision was criticized for confusing the issue of employment with that of admission. The matter was taken on appeal to the Constitutional Court.

At the Constitutional court, the applicants argued that there was no rational nexus between the differentiation and a legitimate governmental purpose.¹³⁴⁹ Although immigration law allows non-nationals to be employed, the *Legal Practice Act* does not allow them to be admitted as practicing attorneys.¹³⁵⁰ The applicants argued that the differentiation amounted to discrimination on the ground of social origin and the analogous ground of citizenship. This adversely affected their dignity and their ability to gain employment in the legal profession.¹³⁵¹ The Minister in response submitted that the impugned sections of the *Legal Practice Act* were in accordance with the obligations of the government which aimed to ensure that non-nationals were not admitted to practice law while only having a student visa, thereby circumventing labour laws.¹³⁵² The Minister stated further that the applicants should have been aware of their legal position and the requirements of the *Legal Practice Act* when they decided to pursue a career in law.¹³⁵³ He alleged that they failed to prove their vulnerability, that they were inevitably employed in South Africa and therefore did not suffer hardship.¹³⁵⁴ The amicus curiae argued that the provisions affected the dignity of the applicants and served to foster xenophobia against them, thereby contributing to their marginalization.¹³⁵⁵

¹³⁴⁹ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29:par. 45.

¹³⁵⁰ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29:par. 45.

¹³⁵¹ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29:par. 46.

¹³⁵² *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29:par. 52.

¹³⁵³ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29:par. 53.

¹³⁵⁴ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29:par. 55.

¹³⁵⁵ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29:par. 64.

It was also pointed out that the ICESR, ICCPR, and the African Charter all impose a duty on States to allow all people irrespective of their citizenship status to have the right to work.¹³⁵⁶ In deciding the case the court had to consider whether Section 24(2) of the *Legal Practice Act* sought to regulate the legal profession in a manner that was arbitrary and showed a preference that did not have a legitimate governmental purpose.

The court referred to Section 22 of the *Constitution*. Counsel for the amici had argued that the provisions of Section 22 of the *Constitution* and Section 24(2) of the *Legal Practice Act* be extended to include non-nationals who are ordinarily resident in South Africa since they, like permanent residents regard South Africa as their home and do not intend returning to their country of origin.¹³⁵⁷ The court however took the view that some non-nationals may still wish to return to their countries once circumstances change, that they were permitted to live in South Africa for a limited time and purpose and therefore do not have a 'fixity of connection' to South Africa, nor the right to work here permanently.¹³⁵⁸ The court also mentioned that the meaning of the term 'ordinarily resident' was not clear or how this would be tested in a court.¹³⁵⁹

Concerning the issue of citizenship and ethnic/social origin as the grounds on which the applicants alleged, they were discriminated against, the court was not convinced that citizenship may be classified under social origin and stated that citizenship is also not a listed ground for discrimination.¹³⁶⁰ In this regard the judge said:

I am not persuaded that citizenship may be classified as falling under social origin as the applicants contend. Currie & De Waal suggest that social origin refers to concepts such as class, clan, or family membership. Citizenship, on the other hand, defines a relationship between a person and a state. Citizenship may occur because of birth, ties of blood,

¹³⁵⁶ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29;par. 66.

¹³⁵⁷ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29;par. 79.

¹³⁵⁸ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29;par. 81.

¹³⁵⁹ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29;par. 81.

¹³⁶⁰ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29;par. 93.

naturalization, and the like. But it is not a matter of social origin but national origin. People of diverse social origins may be citizens of the same state.¹³⁶¹

The court finally decided that even if the right to dignity was at stake, the restrictions in terms of the *Legal Practice Act* did not prohibit them from ever working in South Africa and by working in the legal sector in jobs that do not require admission as a legal practitioner. The restriction, the court said is only about being admitted as a legal practitioner.¹³⁶² The court said that they were not 'left destitute and with no alternative source of employment'.¹³⁶³

The court found that the applicant sought the protection of the right to choose their vocation and denying this could not be seen as unfair discrimination as this right was not available to non-nationals in terms of the *Constitution*.¹³⁶⁴ As a result, the court found that the discrimination was not unfair and that Sections 9(3) and(4) of the *Constitution* had not been breached.¹³⁶⁵ The court as a result did not confirm that declaration made by the High Court to the effect that Section 24(2) of the *Legal Practice Act* was unconstitutional and invalid in the sense that it did not make provision for non-nationals to be admitted as non-practicing legal professionals.

The cases discussed above and in Chapter 4, have illustrated how the rights of non-nationals have been infringed due to their status as 'foreigners'. The courts have in most cases applied the provisions of the *Constitution* and have recognized that non-nationals are entitled to have their rights protected by the judicial system. The decision in *Rafoneke's* case however seems to mirror in some ways the current position of government in seeking to curtail rather than recognize the right of non-nationals to choose their trade, profession, or occupation. While the court justified its decision on the basis that the right was not accorded to non-nationals in the *Constitution*, it failed

¹³⁶¹ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29:par. 93.

¹³⁶² *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29:par. 47.

¹³⁶³ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29:par. 101.

¹³⁶⁴ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29:par. 101.

¹³⁶⁵ *Relebohile Cecilia Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29: par. 102.

to recognize the broader issues affecting non-nationals who have lived in South Africa and regard it as their home, who are faced with delays in obtaining the necessary work permits from the Department of Home Affairs or that the alleged threat to the jobs of South Africans has not been conclusively proven through research.

Having examined the challenges with international law, domestic legislation, and case law concerning xenophobia against non-national academics, in the next part of this chapter I focus on the institutional policies of the Central University of Technology and the University of the Free State and to what extent these cater for the protection of the rights of non-national academics.

In the final part of this chapter, I examine the stance of the government in dealing with xenophobia. I highlight that government leaders have chosen to deny that South African Society is xenophobic and have used the division created between citizens and non-nationals to further their political agendas.

6.4 POLICIES AT HIGHER EDUCATION INSTITUTIONS: THE CENTRAL UNIVERSITY OF TECHNOLOGY AND THE UNIVERSITY OF THE FREE STATE

In Chapter 5 I mention that the internationalization agenda of higher education institutions has been the driver for the appointment of non-national academics.¹³⁶⁶ However, although internationalization is imperative in higher education, the government has delayed the prioritization of internationalization.¹³⁶⁷ Iwara & Matshidze define a university as

that which provides time and space for people of different cultures to convene on one platform, learn, interact and network beyond their academic, socio-cultural, and tribal lines.¹³⁶⁸

This definition of a university implies the university environment to be one where cultural diversity is welcomed and where new knowledge is created, and open conversation can take place in safe spaces. It appears to be a space where individuals can learn and grow. The studies which have been highlighted in earlier chapters

¹³⁶⁶ Rouhani 2007.

¹³⁶⁷ Rouhani 2007:473.

¹³⁶⁸ Iwara & Matshidze 2019:297.

present a different picture and indicate that higher education institutions have also experienced incidents of xenophobia.

Exclusionary practices are promoted in a diverse university community where there is a lack of cultural understanding, especially where there are minority groups.¹³⁶⁹ In 2016, during the #Feesmustfall campaign, non-national students were attacked at higher education institutions.¹³⁷⁰ There is a perception among local students that non-national students are usurping resources and opportunities that they could be enjoying.¹³⁷¹

In the following discussion, I examine the policies and strategies at the Central University of Technology and the University of the Free State and whether they are of help in overcoming the challenges presented in transforming the higher education space.

6.4.1 Policies at Central University of Technology (CUT)

The Central University of Technology (CUT) has several policies in place which deal with issues affecting non-national academics. The first policy which I discuss in detail in Chapter 5 is the 2013 Internationalization Strategy, which was revised and replaced with the Global Engagement Strategy.¹³⁷² This strategy highlighted the importance of cultural understanding and diversity in promoting social justice and communication among the various groups of people in the institution.¹³⁷³

CUT also has a Policy on Recruitment & Selection which provides guidelines for the recruitment of staff, ensures that there is no discrimination and that there is an 'inclusive' and 'value-driven organizational culture' in the institution.¹³⁷⁴ Concerning employment, CUT has the Employment Equity Policy 2021-2026. CUT has to ensure that it complies with all relevant legislation including the Employment Equity Act 55 of

¹³⁶⁹ Iwara & Matshidze 2019:297.

¹³⁷⁰ Iware *et al*: 174.

¹³⁷¹ Iware *et al*: 174.

¹³⁷² Central University of Technology 2020- 2024:3.

¹³⁷³ Central University of Technology 2020- 2024:6.

¹³⁷⁴ Central University of Technology: 5.

1998.¹³⁷⁵ The Employment Equity Plan sets numerical goals and a target to have 10% representation by non-nationals in keeping with its Internationalization Strategy. The policy also caters for the establishment of an Employment Equity Committee to deal with complaints concerning discrimination and harassment.¹³⁷⁶

In line with the need to embrace transformation within Higher Education CUT has formulated a Transformation Plan 2021-2026 which sets out five goals namely equity, redress, effectiveness & efficiency, academic freedom, accountability, and development.¹³⁷⁷ These goals have been defined in Chapter 5. In terms of these goals, the Transformation Plan aims to commit to transformation, eradicate discrimination, and redress past inequalities.¹³⁷⁸ Following a benchmarking exercise with other institutions, CUT also undertook to investigate issues surrounding the employment of non-nationals. It was resolved that non-nationals make an important contribution to the academic project and there should be appointments of non-nationals made at the senior level while ensuring a balance between increasing the non-national staff complement and complying with legislation.¹³⁷⁹

While it is laudable that CUT has engaged around issues of transformation and the appointment of non-nationals, the policies do not speak specifically to xenophobia as an issue affecting non-nationals in the institutions. Unlike at the University of the Free State xenophobia has not been addressed in the transformation or internationalization strategies. However, from the studies highlighted in Chapter 3, it is evident that xenophobia is prevalent at higher education institutions in South Africa. The reality of xenophobia within the higher education sector implies that non-national academics will have to rely on broad policies, strategies, and current legislation to protect and enforce their rights. Fataar says that ‘transformation in higher education is complex and multi-faceted. It involves integrated processes on continuous institutional change in all

¹³⁷⁵ Central University of Technology 2020-2024:1.

¹³⁷⁶ Central University of Technology 2020-2024:1.

¹³⁷⁷ Central University of Technology 2021-2026:7.

¹³⁷⁸ Central University of Technology 2021-2026:18.

¹³⁷⁹ Central University of Technology 2018:4.

aspects of the university's functioning'.¹³⁸⁰ Having a policy that specifically speaks to xenophobia will serve to sensitize all groups of people within the institution to the plight of non-nationals and will go towards enhancing the transformation and internationalization agenda of the institutions. It might also provide greater security for non-national academics if awareness is created about the issue of xenophobia.

6.4.2 Policies at the University of the Free State (UFS)

In 2018 the UFS issued an internationalization report. However, this report focused mainly on international students and contained little or no data on non-national academics. Non-national academics are important role-players as they contribute to the core function of the institution as well as to its research agenda. They should therefore be taken cognizance of within the internationalization strategy. While the UFS also has an Employment Policy and Procedure in place which encourages the recruitment of non-nationals, it must be noted that institutions are also restricted by legislative provisions when making appointments. They must comply with the *Employment Equity Act* and other labour legislation.¹³⁸¹

In line with the provisions of *PEPUDA* and the *Employment Equity Act*, UFS formulated an Anti-Discrimination, Promotion of Equality, & Social Justice Policy & Procedure. This document recognizes the need to address xenophobia and commits to the protection of the rights of all staff and students.¹³⁸² The policy aims to identify and eradicate unfair discrimination.¹³⁸³ It also provides for enforcement measures through disciplinary action¹³⁸⁴ and for social justice training for managers.¹³⁸⁵ These interventions are progressive in the sense that they cater for practical ways in which monitoring and compliance can take place instead of having a paper-based strategy that lacks practical application.

¹³⁸⁰ Fataar "Advancing transformation as the university's strategic heart", 2 <https://www.universityworldnews.com/posp.phb?story=2022020201123373> (accessed on 10 March 2022).

¹³⁸¹ University of the Free State 2019:4.

¹³⁸² University of the Free State 2018:1.

¹³⁸³ University of the Free State 2018:4.

¹³⁸⁴ University of the Free State 2018:5.

¹³⁸⁵ University of the Free State 2018:7.

Of critical importance is that the policy also acknowledges that xenophobia is a problem within the greater South African context ie. the lack of accountability, investigation, and prosecution in respect of xenophobic acts, and that people may be led to believe that xenophobia does not exist. The policy defines acts that would amount to unfair discrimination in the university context such as failing to assist non-national staff or students based on their nationality; abuse, both verbal and physical, threatening behaviour, and false rumours being spread about the nationality of a person.¹³⁸⁶ It also sets out how staff and other staff members can prevent acts of xenophobia, through monitoring, investigations, and training in respect of xenophobia.¹³⁸⁷

While CUT has made attempts through its policies and strategies to address transformation and to provide for the hiring of non-national employees, more needs to be done to specifically formulate a policy on xenophobia and other forms of discrimination. This will serve to raise awareness of discrimination and the need to create a university space where cultural diversity is promoted and the university space is seen as a place where teaching, learning, and career growth can take place in a safe space. The University of the Free State has an anti-discrimination policy. However, the university needs to make provisions for non-national academics to be included in its internationalization strategy.

In the final part of this chapter, I examine the stance of the government in dealing with xenophobia. I highlight that government leaders have chosen to deny that South African society is xenophobic and have used the division created between citizens and non-nationals to further their political agendas.

6.5 DENIALISM OF XENOPHOBIA BY GOVERNMENT

The South African government has a legal duty to protect everyone who lives in the country, from a breach of their human rights.¹³⁸⁸ The State must also protect all

¹³⁸⁶ University of the Free State 2018:65.

¹³⁸⁷ University of the Free State 2018:65.

¹³⁸⁸ Centre for Human Rights, University of Pretoria “The Nature of South Africa’s Legal Obligations to combat xenophobia”, 3
https://www.chr.up.ac.za/images/publications/centrepublishments/documents/south_africa_legal_obligations_combat_xenophobia.pdf (accessed on 10 July 2021).

persons against xenophobic violence. Sections 7,9 and 12 of the *Constitution* protect the rights of all persons living in South Africa.¹³⁸⁹ However, there is evidence of xenophobic attitudes and behaviour which are prevalent in South African society, and which indicate that efforts to overcome the problem have been largely unsuccessful. Xenophobia undermines the human rights contained in the Bill of Rights and has resulted in a national crisis that requires urgent intervention by the government.¹³⁹⁰

Nonetheless, the government's response has been characterized by the view that xenophobic behaviour can be attributed to 'normal' crime and there is, therefore, no need for interventions that specifically target xenophobia. Following the xenophobic violence in 2008, the government formed committees and task teams to investigate the violence. However, once the violence abated, the resolve of the government also waned.¹³⁹¹ The social awareness interventions by civil society organizations have also failed to foster peace and reduce violence.¹³⁹² Mangu is of the view that non-nationals are not seen as 'legitimate recipients' of the rights contained in the Bill of Rights as they still encounter xenophobia.¹³⁹³

Following the 2015 xenophobic attacks, the government presented a 27-point plan to deal with xenophobia by:

- a) registering all non-nationals who had been displaced due to violence, with the government;
- b) repatriating all non-nationals who were illegally residing in South Africa;
- c) sending troops to areas that were hotspots for xenophobia;
- d) establishing special courts to prosecute cases involving xenophobic attacks to address the fact that South Africa has a low record of dealing with cases involving xenophobia against non-nationals;

¹³⁸⁹ *Constitution Act 108/1996:sec.7,9 & 12.*

¹³⁹⁰ Tirivangasi & Rapanyane 2021:58.

¹³⁹¹ UNHCR "Protection from xenophobia An evaluation of UNHCR's regional office for Southern Africa's Xenophobia related programmes", 25 <https://www.unhcr.org/55cb153f9.pdf> (accessed on 22 November 2022).

¹³⁹² Misagoet *al* 2015:25.

¹³⁹³ Mangu 2020:4.

- e) holding awareness and education initiatives about xenophobia; and
- f) implementing biometric data capture for non-nationals entering or leaving the country.¹³⁹⁴

In 2019 the South African government accepted the National Action Plan to Combat Racial Discrimination, Xenophobia & Related Intolerance. The plan generated much debate on whether xenophobia should have been included in the plan. Although xenophobia has been researched by scholars, South Africa has failed to take action, and the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia & Related Intolerance has not been effective in addressing xenophobia and leans more towards addressing the issue of racism.¹³⁹⁵ The plan deals with xenophobia in a cursory manner and does not examine the nature and extent of xenophobia. Proposals on how xenophobia can be remedied are dealt with in a reactive rather than a proactive manner.¹³⁹⁶

The efforts of the South African government to curb xenophobia have been ineffective on the ground. This failure or inefficiency is primarily due to the denialist attitude of state officials who themselves harbour negative attitudes towards non-nationals. As a result, xenophobic violence is viewed by authorities as ordinary criminal activity.¹³⁹⁷ There is a lack of trust in the police and the criminal justice system as the police tend to favour local citizens over non-nationals when dealing with cases.¹³⁹⁸

Interestingly enough, non-nationals are of the view that crimes against non-nationals are not viewed as crimes but as xenophobia, and to them, it feels as if it is not treated with any seriousness as xenophobia is not legislated against in our current law.¹³⁹⁹ Although non-nationals have the right to access housing, this is a political issue in South Africa and is a challenge for non-nationals as it is not afforded to them by the

¹³⁹⁴ Iware *et al* 2018:178.

¹³⁹⁵ Tirivangasi & Rapanyane 2021:60.

¹³⁹⁶ Crush 2020:2.

¹³⁹⁷ Mkhize & Makau 2018:17.

¹³⁹⁸ Cinnini & Mkhize 2021:37.

¹³⁹⁹ Cinnini & Mkhize 2021:38.

State.¹⁴⁰⁰ Non-nationals also experience discrimination from health care personnel when trying to access free health care services at public health institutions.¹⁴⁰¹

Incidents involving Covid 19 related xenophobia have increased in the south and have served to draw attention to xenophobia and the politics related to it, especially the role that local and national states play in its development, replication, and reinforcement.¹⁴⁰² In South Africa, less focus has been placed on the responses of government, how we speak about xenophobia at national, provincial, and municipal levels of government, and whether the government's responses serve to increase xenophobia and acts of violence.¹⁴⁰³ Crush questions whether the responses by the State are responsible for intensifying or mitigating xenophobia or whether it indicates an attitude of indifference.¹⁴⁰⁴ He suggests that the response of the government can be described as one of denial and displacement. This view is justified by referring to several statements or inferences by past State Presidents where they either denied the existence of xenophobia as in the case of President Mbeki, positing the view that acts of violence against non-nationals were acts of criminality rather than being motivated by xenophobia.¹⁴⁰⁵ Compounded to this is the fact that the rate of arrests and prosecution for these crimes has been extremely poor.¹⁴⁰⁶

In the past 20 years, we have seen a South African government that is unwilling to acknowledge that hate crime and violence exist in its society.¹⁴⁰⁷ Past Presidents Mbeki and Zuma made public statements claiming that South Africans are not xenophobic.¹⁴⁰⁸ There have been efforts under President Ramaphosa's leadership to deal with the challenge of xenophobia, with the adoption of the National Action Plan to Combat Racism and related intolerance in 2019.¹⁴⁰⁹ South Africa is a violent society and the government's failure to deal with xenophobic incidents has led citizens to take

¹⁴⁰⁰ Cinnini & Mkhize 2021:38.

¹⁴⁰¹ Cinnini & Mkhize 2021:44.

¹⁴⁰² Crush 2020:4.

¹⁴⁰³ Crush 2020:4.

¹⁴⁰⁴ Crush 2020:4.

¹⁴⁰⁵ Crush 2020:14.

¹⁴⁰⁶ Crush 2020:14.

¹⁴⁰⁷ Gordon 2020:2.

¹⁴⁰⁸ Gordon 2020:2.

¹⁴⁰⁹ Gordon 2020:3.

the law into their own hands. The lack of resources and lack of initiative by the police will affect the success of any government-led initiatives to combat xenophobia.¹⁴¹⁰

The government is also criticized for failing to promote migration in a positive light and how it can influence development. A strategic plan on how to use migration to develop the country is lacking. The *2017 White Paper on International Migration* has still not been implemented but it still focuses on the control and monitoring of migration.¹⁴¹¹ Crush concludes by stating that if government projects a view that xenophobia does not exist and there is nothing we need to overcome or speak out against, then this stance will be detrimental to non-nationals.¹⁴¹²

A statement made by the leader of the Patriotic Alliance in January 2022 called for the expulsion of 'illegal foreigners' from Johannesburg. This raised concern from other countries that this would result in a resurgence of xenophobic attacks.¹⁴¹³ The call to expel non-nationals must consider that due to Covid 19 in March 2020, the Department of Home Affairs ceased to operate its refugee reception services. This harmed asylum seekers who have been identified as undocumented.¹⁴¹⁴ As entrenched in international treaties and domestic laws, South Africa has a legal obligation to protect the rights of non-nationals.¹⁴¹⁵

Operation Dudula began in March 2022, when locals visited non-national owned businesses in Alexandra Township requiring them to produce valid immigration documents. Residents were dissatisfied with the number of alleged undocumented

¹⁴¹⁰ Gordon 2020:3.

¹⁴¹¹ Crush 2020:18.

¹⁴¹² Crush 2020:20.

¹⁴¹³ Centre for Human Rights-University of Pretoria "Centre for Human Rights calls for a robust response from the government of South Africa to prevent xenophobic violence", 1 <https://www.chr.up.ac.za/latest-news/2923-press-statement-centre-calls-for-a-robust-response-from-the-government-of-south-africa-to-prevent-xenophobic-violence> (accessed on 3 March 2022).

¹⁴¹⁴ Centre for Human Rights-University of Pretoria "Centre for Human Rights calls for a robust response from the government of South Africa to prevent xenophobic violence", 2 <https://www.chr.up.ac.za/latest-news/2923-press-statement-centre-calls-for-a-robust-response-from-the-government-of-south-africa-to-prevent-xenophobic-violence> (accessed on 3 March 2022).

¹⁴¹⁵ Centre for Human Rights-University of Pretoria "Centre for Human Rights calls for a robust response from the government of South Africa to prevent xenophobic violence", 2 <https://www.chr.up.ac.za/latest-news/2923-press-statement-centre-calls-for-a-robust-response-from-the-government-of-south-africa-to-prevent-xenophobic-violence> (accessed on 3 March 2022).

non-nationals who are carrying on business when they should be the ones to benefit from such economic activity.¹⁴¹⁶ The feeling that the government has failed to take action in this situation has caused the clash between non-nationals and South African citizens.¹⁴¹⁷ Operation Dudula traded on the term 'illegal foreigners' stating that they welcome migrants who are in the country legally, that their operation is peace-loving and they aim to have a South Africa that is free from illegal immigrants.¹⁴¹⁸

High unemployment rates, poverty, rampant State corruption, lack of accountability, and lack of trust are some of the reasons advanced for the situation of xenophobia, and as a result of which Operation Dudula gained momentum in Alexandra township in March 2022.¹⁴¹⁹ With the next general election just two years away, there are fears that political parties will use the message of divisive politics to garner the votes of citizens.¹⁴²⁰ Many poor South Africans feel disenfranchised and have taken the law into their own hands by turning against non-nationals in Alexandra township.¹⁴²¹ The economic impact of Covid 19 has also contributed to a rise in xenophobic sentiment against non-nationals and is driven by the fear that non-nationals are here to usurp resources that should be the preserve of poor South Africans.¹⁴²² Political parties such

¹⁴¹⁶ Bhengu "'Dangerous thugs 'or 'providing a solution'?- Dudula movement clashes in Alexandra split SA", <https://www.timeslive.co.za/news/south-africa/2022-03-09-dangerous-thugs-or-providing-a-solution-dudula-movement-clashes-in-alexandra-splits-sa/> (accessed on 12 March 2022).

¹⁴¹⁷ Bhengu "'Dangerous thugs 'or 'providing a solution'?- Dudula movement clashes in Alexandra split SA", <https://www.timeslive.co.za/news/south-africa/2022-03-09-dangerous-thugs-or-providing-a-solution-dudula-movement-clashes-in-alexandra-splits-sa/> (accessed on 12 March 2022).

¹⁴¹⁸ Ntuli "Operation Dudula aims to create a better South Africa", <https://www.sowetanlive.co.za/opinion/letters/2022-03-10-operation-dudula-aims-to-create-a-better-sa/> (accessed on 12 March 2022).

¹⁴¹⁹ Editorial "Stop Dudula madness before it's too late", <https://www.news24.com/news/24/southafrica/news/editorial-stop-the-dudula-madness-before-its-too-late-20220308> (accessed on 12 March 2022).

¹⁴²⁰ Editorial "Stop Dudula madness before it's too late", <https://www.news24.com/news/24/southafrica/news/editorial-stop-the-dudula-madness-before-its-too-late-20220308> (accessed on 12 March 2022).

¹⁴²¹ Editorial "Stop Dudula madness before it's too late", <https://www.news24.com/news/24/southafrica/news/editorial-stop-the-dudula-madness-before-its-too-late-20220308> (accessed on 12 March 2022).

¹⁴²² Friday Briefing "Behind the hate: Are African Migrants really such a threat to South Africans' livelihood", <https://www.news24.com/news24/opinions/fridaybriefing/friday0briefing-behind-the-hate-are-african-migrants-really-such-a-threat-to-south-africans-livelihood-20220225> (accessed on 12 March 2022).

as the Patriotic Alliance, Action SA and Economic Freedom Fighters (EFF) have used negative sentiment against non-nationals to further their political ends.¹⁴²³

Dr Mamphela Ramphele of Reimagine SA and Tinyiko Maluleke, the Vice Chancellor of Tshwane University of Technology have cautioned South Africa that State corruption and failing governance cannot be attributed to migrants as they are some of the most vulnerable in society. Further, the failure to enforce the law and to provide adequate protection to non-nationals gives citizens tacit permission to proliferate xenophobic actions.¹⁴²⁴ Herman Mashaba, the leader of a political party stated that citizens were entitled to be angry, but their anger should be directed towards the ANC government which has failed to manage immigration. The Department of Home Affairs is also said to be blamed for delays in issuing documentation to non-nationals.

Mr. Mashaba also criticized the government for failing to effectively manage borders and points of entry into South Africa.¹⁴²⁵

While there may be challenges with the current legal instruments and the protections that these afford to non-national academics, the above discussion indicates the role that government has also played in the manner in which non-nationals are perceived by citizens. The discussion also illustrates that the statements or actions of political leaders might be seen as intensifying xenophobia within South African society instead of helping to overcome it.

6.6 CONCLUSION

In this chapter, I link the discussion of the legal instruments in Chapter 5 to this chapter and I discuss whether these instruments, namely legislation, policy, and case law adequately protect the rights of non-national academics. I discuss the pitfalls of the current legal position concerning non-nationals and national academics. I also discuss

¹⁴²³ Friday Briefing “Behind the hate: Are African Migrants really such a threat to South Africans’ livelihood; <https://www.news24.com/news24/opinions/fridaybriefing/friday0briefing-behind-the-hate-are-african-migrants-really-such-a-threat-to-south-africans-livelihood-20220225> (accessed on 12 March 2022).

¹⁴²⁴ Friday Briefing “Behind the hate: Are African Migrants really such a threat to South Africans’ livelihood”; <https://www.news24.com/news24/opinions/fridaybriefing/friday0briefing-behind-the-hate-are-african-migrants-really-such-a-threat-to-south-africans-livelihood-20220225> (accessed on 12 March 2022).

¹⁴²⁵ Nkanjeni “Blame the ANC’: Mashaba tells citizens to stop scapegoating foreigners”, <https://www.timeslive.co.za/politics/2022-03-10-blame-the-anc-mahaba-tells-citizens-to-stop-scapegoating-foreigners/> (accessed on 12 March 2022).

proposed new legislation that further seeks to restrict the rights of the non-national academic especially concerning the right to work. I briefly deal with some of the cases which have come before the courts and how the courts have dealt with xenophobia against non-nationals. Since Chapter 5 examines the policies and strategies of CUT and UFS and how these have made provision for xenophobia, I set out the gaps in their policies and the need to revise them in certain areas to grant greater protection and awareness of the rights of non-national academics. Finally, I discuss how the government's denialist stance on xenophobia and the political strategies of various political leaders have further fuelled xenophobia in South African society.

I conclude from the discussion in this chapter that the various international instruments provide protection for the basic human rights of non-nationals.¹⁴²⁶ The right to work, while not specifically accorded to non-nationals is tacitly provided for through the decisions in the cases that I discuss in the chapter.¹⁴²⁷ However, proposed new legislation seeks to further curtail the right of non-nationals to work, as is evident through the passing of the Gauteng Township Economic Development Bill and the Draft Free State Local Integrated Economic Development and Transformation Bill which is still pending approval.¹⁴²⁸ I submit that these new laws would amount to a breach of the right to equality as it can be viewed as discrimination on the basis of nationality. Passing of new restrictive laws may also increase the vulnerability of non-nationals if one were to consider the recent xenophobic attacks on truck drivers in the truck driving industry¹⁴²⁹, proposed amendments to the Employment Equity Act and the Employment Services Act,¹⁴³⁰ the critical skills list issued by the Department of Higher Education and Training.¹⁴³¹ All of these affect the rights of non-nationals to secure employment in South Africa.

The cases of *Auf Der Heyde*¹⁴³² and *Khumalo*¹⁴³³ also highlight the fact that preference will be given to South African candidates when appointments are made in the higher

¹⁴²⁶ See section 6.2.1.

¹⁴²⁷ See section 6.3.

¹⁴²⁸ See section 6.2.2.1

¹⁴²⁹ See section 6.2.2.1.

¹⁴³⁰ See section 6.2.2.2.

¹⁴³¹ See section 6.2.2.1.

¹⁴³² *Auf Der Heyde v University of Cape Town* (603/98)[2000] ZALC 30 (5 May 2000).

¹⁴³³ *Khumalo v University of Johannesburg* (JS533/16)[2018] ZALCJHB31 (6 February 2018).

education sector. I conclude that these and other restrictions mentioned can be seen as tacitly or covertly xenophobic. I discuss immigrations laws as well in this chapter which pose further challenges to non-nationals in the form of delays with service delivery, issuing of work and other permits, police clearances and evaluation of their qualifications.¹⁴³⁴ These gaps in the implementation of the legislation also impact the protections afforded to non-nationals. Anti-discriminatory laws while catering for many types of discrimination do not specifically cater for xenophobia¹⁴³⁵. A lack of such as well as enforcement mechanisms for crimes relating to xenophobia impact the protection afforded to victims of xenophobic crimes as well as the accountability of perpetrators.¹⁴³⁶ Although one can argue that protection against xenophobia is implied from the broad definitions of unfair discrimination and in a generous interpretation of the provisions relating to hate crimes, I draw the conclusion that there is still a need for government to prioritize the passing of xenophobic-specific legislation.¹⁴³⁷ Xenophobia is prevalent in the higher education sector. I discuss the transformation plans, internationalisation strategies and recruitment policies of the CUT and the UFS and conclude that while the UFS policy does to some extent cater for xenophobia as a type of discrimination, it does not provide for non-national academics specifically in its internationalisation policies. The transformation plans of the CUT do not specifically address xenophobia which would therefore impact the protections afforded to non-national academics¹⁴³⁸. Universities are also restricted by legislation when considering appointment of non-nationals. Non-nationals must rely on broad provisions and policies to protect them against xenophobia. Lastly, I conclude that the South African government has adopted the stance that xenophobia can be seen as 'normal crime' and government's attempts to curb xenophobia have thus far proven to be fraught with challenges. Recent statements by political leaders which express anti-immigrant sentiment can also be seen as feeders for xenophobic behaviour or violence¹⁴³⁹.

¹⁴³⁴ See section 6.2.3.

¹⁴³⁵ See section 6.2.4.

¹⁴³⁶ See section 6.2.4.2

¹⁴³⁷ See section 6.2.4.2.

¹⁴³⁸ See section 6.4.

¹⁴³⁹ See section 6.5.

Chapter 7 is the concluding chapter. In Chapter 7 I focus on recommendations for the improvement of current law and policy concerning xenophobia as encountered by non-national academics.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

7.1 INTRODUCTION

In this thesis, I investigate xenophobia against non-national academics at South African higher education institutions. I specifically explore and critically assess the protection against xenophobia that the law, at international, regional, and domestic South African, level, provides to non-national academics. In assessing these legal protections, I examine the various notions of equality to determine the type of equality that best caters for the rights of non-national academics.

The research questions that emanate from this main research problem are first, what is xenophobia and what is specific about it as compared to other types of discrimination? I examine this research question in Chapter 2. The second research question addresses the issue of whether there is xenophobia against non-national academics at higher education institutions in South Africa, and if so, how it manifests, and what is specific about it? The issues arising from this research question are discussed in Chapter 3. Chapter 4 focuses on the third research question in which I discuss the approach to equality that should be used to evaluate current law and policy concerning xenophobia against non-national academics. To answer the fourth research question, I examine in chapter 5 the law and policy that relates to xenophobia against non-national academics at South African higher education institutions and the protection that these instruments provide to non-national academics, whether generally or specifically. The fifth research question addresses whether the current law and policy identified, sufficiently regulate xenophobia against non-national academics. If not, I examine in which ways does it not and whether it perhaps confirms or encourages attitudes of xenophobia. The final research question focuses on how the current legal protection and policies can be improved to better cater for the rights of non-national academics. This is answered in Chapter 7 of this thesis.

In this chapter, I provide a brief overview of my exploration of each of the research questions in section 7.2 and the conclusions I arrive at concerning each. I refer to each of the research questions by introducing them in the form of a thematic analysis. I draw

some general conclusions in section 7.3. In section 7.4 I conclude by making tentative recommendations for the improvements of current law and policy concerning xenophobia as encountered by non-national academics. I focus on the protections that can be offered to non-national academics through legislation and policy; the need for government to introduce or fast track xenophobic specific legislation; and for higher institutions to revise their internationalization strategies and recruitment policies to better incorporate the rights of non-national academics. I conclude in section 7.5 by looking at what has worked well in other countries.

7.2 OVERVIEW OF ENGAGEMENT WITH RESEARCH QUESTIONS

7.2.1 Understanding xenophobia and comparing it to other types of discrimination.

The research question linked to chapter 2 asks what xenophobia is and what is specific about it as compared to other types of discrimination. To answer this question, I explore xenophobia based on a certain theoretical understanding of exclusion, discrimination, and equality. I discuss what xenophobia is; what it entails - nationally and globally; and the different forms it can take. This chapter encompasses both a theoretical approach to understanding xenophobia as well as a description of the phenomenon as it occurs in society, both in a historical and political context and what is different about it as compared to other forms of discrimination.

In examining this research question, I draw certain conclusions concerning xenophobia as a phenomenon in society. First, xenophobia involves more than just a fear of strangers.¹⁴⁴⁰ Rather, it includes negative attitudes as well as hostile behaviour towards people who are seen as outsiders to a community.¹⁴⁴¹ Second, xenophobia is a human rights issue as it unfairly discriminates against persons based on their ethnic origin or their nationality. It is also a national, regional, and global phenomenon that affects both citizens and non-citizens.

¹⁴⁴⁰ Soanes *et al* 2005:675&1073.

¹⁴⁴¹ UNESCO "Learning to Live Together", <https://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/xenophobia/> (accessed on 6 November 2018).

Xenophobia is multi-faceted and must be understood from different perspectives depending on how it manifests in society. I discuss the theories underpinning xenophobia in and which provide reasons for the occurrence of xenophobia in society, in chapter 2. I also conclude that xenophobia may overlap with other forms of discrimination such as racism but that it is unique in the sense that xenophobia discriminates against someone based on their country of origin while racism involves discrimination based on skin colour or race. Racism occurs when the minority group oppresses the majority group.¹⁴⁴² Xenophobia can also be institutional, which is a more covert type of xenophobia.¹⁴⁴³ From a preliminary reading of the literature in chapter 2, institutional xenophobia affects non-national academics.

7.2.2 Non-national academics' experience of xenophobia at higher education institutions

In Chapter 3 the research question posed was whether there is xenophobia against non-national academics at higher education institutions in South Africa, and if so, how does it manifest and what is specific about it? Chapter 3 is devoted to a discussion of how xenophobia manifests in academia or higher education institutions, how non-national academics encounter xenophobia in the workplace, and the extent to which it is prevalent. I also investigate the kinds of xenophobic treatment that non-nationals encounter, i.e., whether it is covert or overt xenophobia. Following the discussions in Chapter 3, I conclude that while higher education institutions have evolved, transformation has not materialized as expected. The incidents involving the #FeesMustFall protests as well as the Reitz Four and Huis Marais incidents reveal that discrimination is still prevalent and hampers institutional transformation.

There is a paucity of research concerning xenophobia against non-national academics at higher education institutions. Nonetheless, xenophobia exists at higher education institutions and has to be investigated in the interests of transformation and the interests of the rights of non-national academics.¹⁴⁴⁴ Xenophobia manifests at higher education institutions covertly or symbolically. It is not overt or violent but is rather

¹⁴⁴² Soyombo 2008:86.

¹⁴⁴³ Soyombo 2008:86.

¹⁴⁴⁴ See discussion at section 3.3.2.

expressed through behaviours such as ill-treatment, marginalization, oppression, humiliation, or devaluing of a person's right to expression.¹⁴⁴⁵ It also affects non-nationals concerning competition for university resources, jobs, and career progression.¹⁴⁴⁶ Xenophobia is also prevalent in higher education institutions in other countries such as the United Kingdom, Germany, and Canada. As in the case of South Africa, non-national academics experience xenophobia in more subtle ways such as microaggressions and non-violent xenophobic behaviour or sentiment.

7.2.3 Equality approaches to evaluate law and policy concerning xenophobia against non-national academics

In chapter 4 the research question focused on equality and what approach to equality should be used to evaluate current law and policy concerning xenophobia against non-national academics. I discuss the various approaches to equality to determine the approach which should be used to evaluate current law and policy regarding xenophobia against non-national academics. In chapter 4 I discuss the different notions of equality. Equality is a contested subject due to the differing views and interpretations of the various writers. The cases that I examine in this chapter reveal that non-nationals have been discriminated against based on nationality or citizenship. Nationality or citizenship has been recognized in *Larbi v Odam* as an analogous ground for discrimination. Non-nationals have a right to equality and a right not to be discriminated against. The right to dignity and equality are crucial in protecting the rights of non-national academics. Inequality in the case of non-nationals is linked to legislative, institutional, and policy provisions which perpetuate inequality. There is a need to change structures and norms which feed such inequalities.¹⁴⁴⁷ Equality should be a real equality that acknowledges and enhances differences instead of using it as a means of exclusion and discrimination. In the circumstances, non-national academics would benefit from a notion of transformative substantive equality.

¹⁴⁴⁵ Mudau & Khanare 2020:181.

¹⁴⁴⁶ See discussion at section 3.4.

¹⁴⁴⁷ Albertyn 2018:461.

7.2.4 Legal and policy protections for non-national academics at higher education institutions

The research question linked to chapter 5 asked what is the law and policy that relates to xenophobia against non-national academics at South African higher education institutions and what protection do these instruments provide to non-national academics, whether generally or specifically. As the experience of non-national academics is central to this study, in Chapter 5 I focus on the legal protection that is currently afforded to non-national academics in terms of legislation. I examine in detail labour, employment, human rights legislation, and existing case law to reveal the protection given to non-national academics. Since South Africa does not have xenophobic specific legislation that has been passed by parliament, I review the provisions of the Prevention and Combatting of Hate Crimes & Hate Speech Bill and views on whether it adequately addresses the rights of non-nationals.

In this chapter, I also examine the anti-discrimination and other regulatory policies of the two higher education institutions that I focus on within South Africa and whether these institutions prioritize the problem of xenophobia and the protection afforded to non-national academics. I discuss the internationalization strategies as well as the transformation and diversity agenda of the international office in these institutions to gain an understanding of whether there is a sensitivity and awareness of xenophobia in the higher education context.

Aside from the right to work and a few other rights which are reserved for citizens only, the Constitution protects the rights of non-nationals. Even though the Constitution does not accord non-nationals the right to work, it does recognize the right to fair labour practices for non-nationals.¹⁴⁴⁸ The Labour Relations Act does not specifically include non-nationals in the definition of the term 'employee'. Nonetheless, the matter was decided in favour of non-nationals in the *Discovery Health* case. Legislation such as the *Employment Equity Act* and the *Employment Services Act* mostly cater for the rights of citizens where for example affirmative action provisions do not apply to non-nationals and critical skills provisions also limit the eligibility of non-nationals for employment in the South African labour sector. Aside from existing legislation

¹⁴⁴⁸ Mangu 2020:15.

government plans to introduce new laws to further restrict the right of non-nationals to work. In this regard, I discuss the *Gauteng Township Economic Development Bill* the *Free State Bill*, and the decision in *Rafoneke's* case. Institutional policies provide for the recognition and promotion of diversity and, except in the case of UFS, the policies do not specifically address xenophobia or provide mechanisms for dealing with xenophobia in the institution. Anti-discrimination legislation does not speak directly to xenophobia, but this can be inferred from an interpretation of relevant provisions of the Act.

7.2.5 Sufficiency or inadequacy of current law and policy in regulating xenophobia against non-national academics

Chapters 5 and 6 are linked to each other and the research question to be answered focus on the current legislation and policies which were covered in Chapter 5. In Chapter 6 I focus on the failures or gaps in anti-discrimination legislation and policies and how such failures affect the rights of non-national academics. Some of the conclusions in this chapter may overlap with those already mentioned above concerning chapter 5.

Firstly, international laws and treaties set out the protections for non-nationals. However, challenges exist in the implementation of these at domestic level. Laws passed by the government that seek to curtail the rights of non-nationals especially create further distinctions between citizens and non-nationals and effectively deny non-nationals the legal protections recognized in international instruments. The lack of adequate legislative protection for non-nationals and the passing of new laws which further restrict the rights of non-nationals can be seen as covertly xenophobic. Contrary to popular belief, non-nationals make a positive contribution to the economy and as yet there is no research to counteract this in support of the view that non-nationals are a threat to South African citizens or to justify the implementation of quotas in certain identified labour sectors.

Hate crime legislation does not cater for xenophobia specifically but protection against xenophobia can be inferred through interpretation of the term 'hate crime', since it

provides for an offence motivated by prejudice based on nationality.¹⁴⁴⁹ However, there is a need for xenophobic-specific legislation to be passed that addresses xenophobia and sets out mechanisms to deal with it. The efforts of the South African government have been largely ineffective in dealing with xenophobia. The government has also played a role in influencing how citizens perceive non-nationals. This is illustrated through the media statements of political leaders and may lead to an increase in xenophobia. Institutional policies of higher education institutions while speaking to transformation broadly do not cater for xenophobia specifically or for how it should be addressed in the higher education sector.

7.3 GENERAL CONCLUSIONS

The purpose of this thesis is to investigate xenophobia against non-national academics at South African higher education institutions and to assess the legal protections, at domestic South African, regional, and international level, provided to non-national academics. I do this by discussing the various types of equality to find the type of equality that which best caters for the rights of non-national academics. Following the literature review in the previous chapters, I conclude that xenophobia does manifest itself at higher education institutions against both non-national staff and students. Although the literature concerning non-national academics is sparse, there is evidence of xenophobia in the form of covert xenophobia or symbolic violence against non-national academics. The legislation, policy, and case law which are discussed, provide some protections to non-national academics but these can be improved to better cater for the rights of non-national academics in the higher education context.

Considering the above conclusions, I discuss the recommendations which are set out below.

¹⁴⁴⁹ *Preventing & Combating of Hate Crimes & Hate Speech Bill 2018* sec3(1)(k)&4(1)(k).

7.4 RECOMMENDATIONS

7.4.1 The right to work.

It is important for all people to have the right to work, including non-nationals. The right to work and earn a livelihood is linked to one's right to dignity. The recently passed and proposed amendments to labour laws in the form of the *Gauteng Township Economic Development Bill* and the *Employment Services Act* would however conflict with this statement as the suggested amendments serve to further restrict rather than empower non-nationals in the employment sector. In Chapter 6, I also highlight the plight of non-nationals in various employment sectors such as Road transport and truck drivers, small businesses in townships, and other sectors where government proposes to introduce quotas. It will be necessary to examine whether the right of non-nationals to earn a living by conducting business in the townships can be justifiably restricted in terms of Section 36 of the Constitution.

The provisions of the Bills also fall foul of international laws and treaties which protect the right to work and the right to choose employment. In implementing these amendments government must balance the rights of citizens against the rights of non-nationals to work and earn a living. The cases which I discuss in Chapter 5 have in most instances given effect to the right of non-nationals to work and support their families.¹⁴⁵⁰ In essence it is impliedly provided for in the Constitution when one considers that the right to fair labour practices is accorded to all persons and not just citizens and should therefore be applied in favour on non-nationals.¹⁴⁵¹ This view was endorsed in Joint Submission to the United Nations Committee on Economic , Social and Cultural rights where it was proposed that the right to work and the right to just and favourable conditions of work although not expressly provided for in the Constitution, be implicitly acknowledged in the Constitution. This would help non-nationals to have the right to work and the right to just and favourable conditions of work.¹⁴⁵²

¹⁴⁵⁰ See section 5.5.1.

¹⁴⁵¹ *Constitution Act 108/1996* sec 23(1).

¹⁴⁵² Joint Submission to the United Nations Committee on Economic, Social and Cultural Rights "Economic, Social and Cultural Rights in South Africa", 3-4
https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT_CESCR_CSS_ZAF_32156_E.pdf (accessed on 13 November 2022).

7.4.2 Immigration laws and service delivery

South Africa's immigration laws have been described as restrictive and anti-migratory. Regulations to the Immigration Amendment Act have introduced stricter rules when employing non-nationals. I have discussed these in Chapter 4. The scarce skills criteria in the Employment Services Act and the critical skills list issued by the Department of Higher Education and Training impact non-national academics as well. Non-national academics are only considered for employment if a suitable South African cannot be found to fill the positions after the onerous requirements mentioned in Chapter 5 have been met. This exacerbates the skills shortage in the country. Government must develop strategic plans and policies that will address nation-building, economic growth, the need to attract those with scarce skills into the country, and the need to be competitive within the global skills market. A balance must be achieved between meeting the skills shortage and addressing high unemployment levels affecting South African citizens.

Meaningful engagements with all stakeholders are also critical to this process. Employers should develop educational workshops, awareness initiatives, and discrimination policies for the workplace which cater for xenophobia and set out how complaints of xenophobic behaviour or violence will be dealt with. Education and communication in the workplace are key to eliminating discrimination.¹⁴⁵³ Current immigration laws must be more sensitive to the human rights of non-nationals. Further, the Department of Home Affairs and the Department of Labour should engage with organized labour to debunk the myth that non-nationals are here to take away the jobs of citizens.¹⁴⁵⁴ The Department of Home Affairs must set time frames within which documents are provided to non-nationals such as refugees and asylum seekers. The department also needs to establish public awareness and education initiatives to promote the rights of non-nationals.¹⁴⁵⁵ The poor level of service delivery by the Department of Home Affairs needs to be addressed and the lack of border control also

¹⁴⁵³ United Nations "World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance", 83 <https://www.un.org/WCAR/durban.pdf> (accessed on 15 July 2021).

¹⁴⁵⁴ South African Human Rights Commission "Equality Round Table Dialogue Report", 17 <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf> (accessed on 31 March 2022).

¹⁴⁵⁵ South African Human Rights Commission "Equality Round Table Dialogue Report", 22 <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf> (accessed on 31 March 2022).

needs to be investigated to introduce better control mechanisms for entry into the country.¹⁴⁵⁶

In Chapter 5 I highlight the fact that the *Refugee Act* fails to provide for xenophobia or protections for victims of xenophobic violence. Consideration should be given to the amendment of the Act to cater for the protection of non-nationals who encounter xenophobic violence. We must also be able to differentiate between immigration laws that provoke fear and hostile behaviour and those laws which are legitimate measures to manage migration and serve as security controls.¹⁴⁵⁷

7.4.3 Passing of xenophobic specific legislation.

The South African government, political leaders, communities, and the media need to recognize that xenophobia is a crime. The *Preventing and Combating of Hate Crimes and Hate Speech Bill* was first introduced to parliament in 2016. It has still not been passed to date. In March 2022 the Hate Crimes Working Group (HCWG) addressed Parliament's Portfolio Committee on Justice and Correctional Services on the *Prevention and Combating of Hate Crimes and Hate Speech Bill* which is being considered for promulgation. The HCWG expressed concerns about certain weaknesses that are still prevalent in the bill and made the following statement:

We want to illustrate the unacceptably high and ongoing cost in human life, equality, and dignity of the long delay in finalizing a hate crimes law in our country. We want to promote informed decisions and law-making, based on lived experiences and instill a sense of urgency in our lawmakers about the need to finalize this law.¹⁴⁵⁸

¹⁴⁵⁶ Good Governance Learning Network "When Xenophobia rears its ugly head: A challenge to responsible and responsive Governance",³² https://www.ggln.org.za/images/solg_reports/Sold_2015.pdf#page=26 (accessed on 1 April 2022).

¹⁴⁵⁷ Centre for Human Rights, University of Pretoria "The Nature of South Africa's Legal Obligations to combat xenophobia", 21 https://www.chr.up.ac.za/images/publications/centrepublishments/documents/south_africa_legal_obligations_combat_xenophobia.pdf (accessed on 10 July 2021).

¹⁴⁵⁸ Hate Crimes Working Group "HCWG addresses Parliament on long-awaited hate crimes law", <https://www.hcwg.org.za/wp-content/uploads/2022/03/Media-Statement-HCWG-addresses-Parliament-on-long-awaited-hate-crimes-law-29-March-2022.pdf>. (accessed on 30 March 2022).

The HCWG also issued an advocacy report to illustrate to the government the instances of hate crimes and hate speech encountered by their member organizations in 2021.¹⁴⁵⁹

The HCWG is hopeful that the Bill will:

- a) Send a strong message that hate, and prejudice are unacceptable in our society.
- b) Assist the police and prosecutors in investigating, charging, and prosecuting hate crimes and hate speech.
- c) Give courts meaningful sentencing guidelines.
- d) Allow for the effective recording of statistics, so we can better understand the nature of the problem and create successful interventions.¹⁴⁶⁰

The HCWG gathered information through their monitoring form after consultation with various stakeholders namely civil society, universities, private sector individuals, and government departments.¹⁴⁶¹ The following statistics illustrate the position regarding hate crimes in South African society. 62% of hate crimes between 2013-2017 involved Black/Africans, 11% Whites, 8% Ethiopia, 1% Eritrean, 6% Somali, 7% Asian, 4% Coloured, and 1% South Africans of Indian descent.¹⁴⁶² 7% of the offenders were members of the South African Police Service, 4% were public officials, 2% were individuals from school or college staff and 1% were medical professionals.¹⁴⁶³ 34%

¹⁴⁵⁹ Hate Crimes Working Group “HCWG addresses Parliament on long-awaited hate crimes law”, <https://www.hcwg.org.za/wp-content/uploads/2022/03/Media-Statement-HCWG-addresses-Parliament-on-long-awaited-hate-crimes-law-29-March-2022.pdf>. (accessed on 30 March 2022).

¹⁴⁶⁰ Hate Crimes Working Group “HCWG addresses Parliament on long-awaited hate crimes law”, <https://www.hcwg.org.za/wp-content/uploads/2022/03/Media-Statement-HCWG-addresses-Parliament-on-long-awaited-hate-crimes-law-29-March-2022.pdf>. (accessed on 30 March 2022).

¹⁴⁶¹ Hate Crimes Working Group “The Hate and Bias Crimes Monitoring Form Project Final Report (January 2013-September 2017)”,¹ https://www.hcwg.org.za/wp-content/uploads/2018/02/HCWG-HateBias-Crime-Monitoring-project-Infographics_2017.pdf (accessed on 30 March 2022).

¹⁴⁶² Hate Crimes Working Group “The Hate and Bias Crimes Monitoring Form Project Final Report (January 2013-September 2017)”,² https://www.hcwg.org.za/wp-content/uploads/2018/02/HCWG-HateBias-Crime-Monitoring-project-Infographics_2017.pdf (accessed on 30 March 2022).

¹⁴⁶³ Hate Crimes Working Group “The Hate and Bias Crimes Monitoring Form Project Final Report (January 2013-September 2017)”,³ https://www.hcwg.org.za/wp-content/uploads/2018/02/HCWG-HateBias-Crime-Monitoring-project-Infographics_2017.pdf (accessed on 30 March 2022).

of the offenders were known to the victim and 34% were from the victim's community.¹⁴⁶⁴

50% of victims reported previous prejudice-based incidents of whom 61% were non-nationals.¹⁴⁶⁵ Two out of three cases were not reported to the police and 66% of cases involved the police as accomplices. In 20% of all crimes reported, police witnessed the reported crimes and in 22 of these cases, they did not provide any assistance.¹⁴⁶⁶ Some of the reasons given for not reporting cases were fear of victimization, undocumented non-nationals being afraid of getting arrested, and lack of trust in the police service. They were also told that the South African Police Service serves South African citizens only. The court decided 62 of 89 cases but only 16 cases included convictions where the element of hate crimes was considered in conviction or sentencing.¹⁴⁶⁷

While the statistics indicate that most hate crime cases were against people of Black/African descent, it is also evident that hate crimes are being perpetrated against other races and nationalities within South Africa. It is being committed by public officials and members of the police services as well. It is also disturbing to note that 66% of cases involved the police as accomplices and often they did not aid victims as is their duty.

It is therefore imperative that the Act is passed as soon as possible and that perpetrators of xenophobic violence are prosecuted. State officials must also be held accountable for being complicit or silent in cases involving xenophobia. Current and future legislation should be sensitive to the plight of non-nationals, the issues

¹⁴⁶⁴ Hate Crimes Working Group "The Hate and Bias Crimes Monitoring Form Project Final Report (January 2013-September 2017)",³ https://www.hcwg.org.za/wp-content/uploads/2018/02/HCWG-HateBias-Crime-Monitoring-project-Inforgraphics_2017.pdf (accessed on 30 March 2022).

¹⁴⁶⁵ Hate Crimes Working Group "The Hate and Bias Crimes Monitoring Form Project Final Report (January 2013-September 2017)",⁵ https://www.hcwg.org.za/wp-content/uploads/2018/02/HCWG-HateBias-Crime-Monitoring-project-Inforgraphics_2017.pdf (accessed on 30 March 2022).

¹⁴⁶⁶ Hate Crimes Working Group "The Hate and Bias Crimes Monitoring Form Project Final Report (January 2013-September 2017)",⁶ https://www.hcwg.org.za/wp-content/uploads/2018/02/HCWG-HateBias-Crime-Monitoring-project-Inforgraphics_2017.pdf (accessed on 30 March 2022).

¹⁴⁶⁷ Hate Crimes Working Group "The Hate and Bias Crimes Monitoring Form Project Final Report (January 2013-September 2017)",⁶ https://www.hcwg.org.za/wp-content/uploads/2018/02/HCWG-HateBias-Crime-Monitoring-project-Inforgraphics_2017.pdf (accessed on 30 March 2022).

concerning them, and the protection of their rights. Anti-discrimination legislation must specifically cater for xenophobia as a type of discrimination. It is not sufficient to educate individuals as this will not change attitudes or behaviour towards non-nationals. Hate crime legislation is necessary as it will hold perpetrators accountable. It will send a message to all that xenophobia is a crime and that there is a law in place to protect victims and to ensure that the law is applied when such crimes are committed.

7.4.4 International treaties to be implemented.

The National Action Plan to Combat Racism, Racial Discrimination, and Xenophobia is a document that was formulated to complement existing legislation, policies, and programs and to address discrimination. The challenges with the plan are set out in Chapter 6 and the government must take greater measures to fully implement the plan to eradicate xenophobia and other forms of discrimination.¹⁴⁶⁸

In January 2015, after a 20 hiatus, South Africa finally ratified the International Covenant on Economic, Social and Cultural Rights (ICESR).¹⁴⁶⁹ The Commission urged the South African government to ensure that provisions that are in the treaty but not in the Constitution or other legislation be given effect to. The adoption of the ICESR should assist in the realisation of socio-economic rights for the poor and vulnerable which would include non-nationals¹⁴⁷⁰. This will help to hold government responsible for enforcing the law against those who commit xenophobic violence. It is also

¹⁴⁶⁸ Republic of South Africa “National Action Plan to combat Racism, Racial Discrimination, Xenophobia & Related Intolerance”,¹² https://www.gov.za/sites/default/files/gcis_document/201903/national-action-plan.pdf (accessed on 8 April 2022).

¹⁴⁶⁹ Right to Education “South Africa Ratifies the International Covenant on Economic, Social and Cultural Rights”, <https://www.right-to-education.org/news/south-africa-ratifies-international-covenant-economic-social-and-cultural-rights#:~:text=In%20the%20statement%20of%20Declaration,the%20framework%20of%20its%20National> (accessed on 13 November 2022).

¹⁴⁷⁰ Right to Education “South Africa Ratifies the International Covenant on Economic, Social and Cultural Rights”, <https://www.right-to-education.org/news/south-africa-ratifies-international-covenant-economic-social-and-cultural-rights#:~:text=In%20the%20statement%20of%20Declaration,the%20framework%20of%20its%20National> (accessed on 13 November 2022).

imperative that these treaties are implemented as they affect the lives of all people, especially the marginalized and vulnerable.¹⁴⁷¹

Legislation about discrimination must also be dealt with together and not in isolation. Implementation must be done in such a way that the impact of the implementation must be measurable and capable of being monitored.¹⁴⁷² As has been done in Canada and Germany, data should be collected on xenophobic violence and crime to determine its prevalence in society and to better manage the impact that it has both on citizens and non-nationals.

7.4.5 The higher education context and the experience of non-national academics

"Universities should be safe spaces for all that not only impart academic knowledge but teach the value of human rights, equality for all, and tolerance."¹⁴⁷³ Non-national academics go through a process whereby they reconstruct their professional identity in the higher education context and within the host institution. This process is influenced by various considerations.¹⁴⁷⁴ Mahlick & Walker in Vandeyar et al have confirmed that while there is a great deal of research on aspects of migration, not much has been said about the experiences of non-national staff and immigrant scholars.¹⁴⁷⁵ As stated in Chapter 3, most of the research on xenophobia in higher education focuses on the experiences of students. There is little written about the work experience of non-national academics, and this should be an area for future research.

A recent study by Vandeyar et al examined how Black non-national academics recreate their professional identity at a South African higher education institution, the transitional factors of migration that affect the non-national academics personally and

¹⁴⁷¹ South African Human Rights Commission "Equality Round Table Dialogue Report", 18 <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf> (accessed on 31 March 2022).

¹⁴⁷² South African Human Rights Commission "Equality Round Table Dialogue Report", 22 <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf> (accessed on 31 March 2022).

¹⁴⁷³ Hate Crimes Working Group "HCWG condemns hate during break recent violent protests on campus", <https://www.hcwg.org.za/press-release-hcwg-condemns-hate-during-break-recent-violent-protests-on-campus/> (accessed on 30 March 2022).

¹⁴⁷⁴ Vandeyar *et al* 2019:226.

¹⁴⁷⁵ Vandeyar *et al* 2019:226.

professionally, and how they navigate collegiate and student relations as well as being included or excluded in society and the institution.¹⁴⁷⁶ The study specifically focused on the experiences of a Black female non-national academic. The findings indicated xenophobic statements made by colleagues within the professional arena, for example, some opposed the appointment of non-national academics implying that they have taken jobs meant for South Africans.¹⁴⁷⁷ The participant in this study also reported that she had a high workload and felt that she was not treated fairly when work was distributed. This resulted in a dispute with her head of department. When chosen to act in a managerial role her colleagues were resistant to the idea. She attributed the treatment received to the fact that she was viewed as an outsider.¹⁴⁷⁸ The participant's relationship with her colleagues did not extend beyond the work environment and she did not share any positive reports of interactions with colleagues. Instead, there were reports of differing viewpoints and hostile behaviour.¹⁴⁷⁹ Colleagues would speak in a language she did not understand and referred to her as 'makwerekwere'.¹⁴⁸⁰

More emphasis was placed on her origin rather than on her contribution to work.¹⁴⁸¹ In line with these findings, in my thesis, I also outline that xenophobia at higher education institutions consists more of a type of covert xenophobia or symbolic violence where ill-treatment or discrimination is psychological and involves degrading of the person through the assertion of power or authority.¹⁴⁸²

Generally, in South Africa, xenophobia is also not limited to the 'fear or dislike of foreigners but also includes harassment and abuse by citizens, employers, and agents of law enforcement'.¹⁴⁸³ In the higher education context consideration must be given to the experience of the non-national academic and how this group of employees can be effectively managed considering their personal experience of discrimination in the workplace and the challenges that they face due to migration. Institutions must

¹⁴⁷⁶ Vandeyar *et al* 2019:226.

¹⁴⁷⁷ Vandeyar *et al* 2019:232.

¹⁴⁷⁸ Vandeyar *et al* 2019:232.

¹⁴⁷⁹ Vandeyar *et al* 2019:232.

¹⁴⁸⁰ Vandeyar *et al* 2019:233.

¹⁴⁸¹ Vandeyar *et al* 2019:234.

¹⁴⁸² Mudau & Khanare 2020:181.

¹⁴⁸³ Vandeyar *et al* 2019:236.

formulate and implement policies on institutional language policy, professional collegiality, and avenues for social interaction to create an environment of belonging. There should be opportunities for staff to interact socially through social cohesion projects like art exhibitions, lunch hour concerts, having a staff cafeteria, and social media platforms where staff can interact.¹⁴⁸⁴ In 2013, the Centre for Human Rights at the University of Pretoria issued a press release in which it was recommended that higher education institutions include xenophobia in their curricula and create greater awareness about xenophobia and the protection offered by the Constitution to citizens and non-nationals.¹⁴⁸⁵ The nGap program for example, offered in higher education institutions does not apply to non-national academics as it only caters for South African citizens. This will tend to influence the internationalization strategies of higher education institutions that seek to attract scarce skills and improve their research agendas. Consideration should be given to making programs such as the nGap program available to prospective non-national academics as well.¹⁴⁸⁶

The Council for Higher Education (CHE) criticized the government for delays in prioritizing internationalization. Internationalization should be fast-tracked for both non-national staff and students at higher education institutions. Institutions that are lacking international offices must create such spaces to provide support to non-national staff and students and help them to integrate smoothly into the institution. It has been outlined that internationalization will strengthen the academic program by providing greater exposure for academics and will also increase research outputs. The realization of this goal will also impact the well-being of non-national academics in the workplace.

Recruitment policies must include the need to promote non-discrimination, diversity, and cultural awareness. Higher education institutions should ensure that their organizational culture is inclusive and promotes cultural awareness, understanding, and diversity.¹⁴⁸⁷ Transformation plans must prioritize strategies to deal with

¹⁴⁸⁴ Vandeyar *et al* 2019:236.

¹⁴⁸⁵ Centre for Human Rights University of Pretoria “Multi-pronged response required to curb xenophobia’, 1 <https://www.chr.up.ac.za/news-archive/2013/1580-multi-pronged-response-required-to-curb-xenophobia> (accessed on 31st March 2022).

¹⁴⁸⁶ Central University of Technology 2013:1.

¹⁴⁸⁷ Central University of Technology, 5.

xenophobia. There should be a specific guiding document that addresses xenophobia and other types of discrimination affecting non-national academics and students to promote transformation and equality. International strategies must also address the issues affecting non-national academics in a meaningful way that promotes positive change. For this to happen in a meaningful way, there must be monitoring of compliance with such strategies and policies and their impact on individuals. A clearly defined process for the lodging of complaints and the procedure for investigation in cases of xenophobia must be set out. All staff and students should receive information and training on how to deal with incidents of xenophobia. Everyone should be aware of what xenophobia entails and how it should be reported.¹⁴⁸⁸

The notion of transformative substantive equality must be used as the foundation for the creation of policies and strategies for transformation and addressing xenophobia. Non-national academics are often regarded as members of the outgroup making them vulnerable to exclusion and discrimination. In Chapter 4 I highlighted that equality should be a real equality that celebrates differences and promotes diversity instead of using it to discriminate. Non-nationals would benefit from the inclusion of the principles of transformative substantive equality in higher education policies and practices.

7.4.6 The role of government and the media

The impact that xenophobia has had on society requires the government to engage widely with stakeholders to devise policies and strategies to overcome xenophobia.¹⁴⁸⁹ South Africa needs responsible leadership if it is to curb hate crimes.¹⁴⁹⁰

The South African government has made certain attempts to curb xenophobic violence through various strategies. These strategies can be categorized as follows:

- (a) Policy strategies
- (b) Legal and Constitutional strategies
- (c) Citizenship empowerment & educational strategies
- (d) Technical and media-related strategies

¹⁴⁸⁸ University of the Free State 2018:65.

¹⁴⁸⁹ Tirivangasi & Nyahunda 2020:210.

¹⁴⁹⁰ Hate Crimes Working Group "The Hate and Bias Crimes Monitoring Form Project Final Report (January 2013-September 2017)",¹ https://www.hcwg.org.za/wp-content/uploads/2018/02/HCWG-HateBias-Crime-Monitoring-project-Infographics_2017.pdf (accessed on 30 March 2022).

- (e) State-civil partnership
- (f) Inter-governmental strategies¹⁴⁹¹

In April 2015 former President Jacob Zuma met with businesses, the sport and art fraternities, trade unions, religious leaders, and community representatives to discuss migration policies and how the government could partner with these stakeholders to promote better relations between citizens and non-nationals.¹⁴⁹² The National Joint Operational Centre (NATJOC) was formed to coordinate the response of the government to xenophobia and to closely monitor cases of xenophobic attacks.¹⁴⁹³ State interventions often fail since they do not look at the prevention of future attacks.¹⁴⁹⁴

The response is reactionary. Simply labelling incidents of xenophobic attacks as a crime instead of addressing the cause of the problem also hamper South Africa's ability to overcome the problem of xenophobia and create workable strategies.¹⁴⁹⁵ The government does not have a policy that deals specifically with the protection of non-nationals and the government is often caught off guard when the attacks take place. The government needs to lead in the fight against xenophobia by addressing the causes, developing a meaningful plan of action to respond to xenophobic violence, and supporting communities that have been displaced.

Those who perpetrate xenophobic violence must be prosecuted and face punishment as this would serve to counteract the incidence of violence against non-nationals.¹⁴⁹⁶ For this to materialize the police and the Department of Justice & Correctional Services need to work together to identify the causes of violence against non-nationals and how justice is to be administered when their rights are infringed.

¹⁴⁹¹ Tirivangasi & Nyahunda 2020:209.

¹⁴⁹² Tirivangasi & Nyahunda 2020:210.

¹⁴⁹³ Tirivangasi & Nyahunda 2020:217.

¹⁴⁹⁴ Tirivangasi & Nyahunda 2020:217.

¹⁴⁹⁵ Tirivangasi & Nyahunda 2020:222.

¹⁴⁹⁶ South African Human Rights Commission "Equality Round Table Dialogue Report", 17 <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf> (accessed on 31 March 2022).

Government and the South African Police Service should ensure that xenophobic crimes are timeously and thoroughly investigated, and that measures are implemented for the protection of non-nationals.¹⁴⁹⁷ Efforts to address xenophobic violence require more than awareness initiatives or attempts to appeal to the morality of individuals. It requires initiatives that are all well-coordinated and sustainable.¹⁴⁹⁸ There must be buy-in and support from politicians and a greater understanding of the specific drivers of violence. More must be done to overcome the lack of accountability by promoting the rule of law and placing greater emphasis on conflict resolution strategies that are community-based, provided they respect the provisions of the Constitution. Ultimately an approach must be used that considers different social and political factors as well as the history of the conflict.¹⁴⁹⁹

Courts need to use the principles of transformative substantive equality when deciding cases involving xenophobic violence as this will ensure that we achieve a real equality that provides redress to the victims of xenophobic crimes. The Round Table on Equality was formed to reflect on progress made by South Africa in achieving substantive equality. At the end of the financial year 2014, the SAHRC received complaints about equality, 10% of these relating to ethnic or social origin.¹⁵⁰⁰ The Round Table Dialogue raised the importance of continuing education for judicial officers in the Equality courts. Training of clerks and front-line service providers is also important so that people who approach the Equality court do not feel alienated.¹⁵⁰¹ Appropriate training for judicial officers is needed to ensure effective remedies where the right to equality has been violated and to advance substantive equality and non-discrimination.¹⁵⁰² The promotion and protection of the rights of non-nationals are

¹⁴⁹⁷ Centre for Human Rights University of Pretoria “Multi-pronged response required to curb xenophobia”, 2 <https://www.chr.up.ac.za/news-archive/2013/1580-multi-pronged-response-required-to-curb-xenophobia> (accessed on 31st March 2022).

¹⁴⁹⁸ Misago 2016:463.

¹⁴⁹⁹ Misago 2016:463.

¹⁵⁰⁰ South African Human Rights Commission “Equality Round Table Dialogue Report”, 8 <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf> (accessed on 31 March 2022).

¹⁵⁰¹ South African Human Rights Commission “Equality Round Table Dialogue Report”, 14 <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf> (accessed on 31 March 2022).

¹⁵⁰² South African Human Rights Commission “Equality Round Table Dialogue Report”, 14 <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf> (accessed on 31 March 2022).

essential in achieving the right to equality. The public must be educated so that they understand the obligation of the State toward the different categories of migrants (documented and undocumented).¹⁵⁰³

The media has a huge role to play in how they reflect news articles about non-nationals. The media must be sensitive to how non-nationals are described when reporting on xenophobic incidents. The use of derogatory language or reporting that serves to fuel xenophobia needs to be eliminated in media reports. For example, the use of the term 'foreigner' although not offensive in normal English usage has a negative connotation when used to describe people from other countries. The use of the term non-national which has been used in this thesis reflects a greater sensitivity when describing someone who originates from another country. This term should be used, rather than 'foreigner' when describing such persons in news articles, and social media posts.

7.4.7 The role of communities and civil society

Hate crimes have an effect on South African society that is drastically underestimated at the level of the individual citizen and even concerning the country's economy.¹⁵⁰⁴ Roman & Saga state that "immigrant bashing has become a blood sport among xenophobic circles that become empowered when certain cultural and economic factors align."¹⁵⁰⁵ Poverty and income inequality are some of the main causes of tension between locals and non-nationals. Many countries have failed to develop sustainable responses to xenophobia for example the issue of income equality and the need to integrate migrants into the local economy.¹⁵⁰⁶

Governance assumes a pivotal role in instances of xenophobic violence as it allows for political opportunity structure to use political means to proliferate xenophobic

¹⁵⁰³ South African Human Rights Commission "Equality Round Table Dialogue Report", 16 <http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf> (accessed on 31 March 2022).

¹⁵⁰⁴ Hate Crimes Working Group "The Hate and Bias Crimes Monitoring Form Project Final Report (January 2013-September 2017)", 9 https://www.hcwg.org.za/wp-content/uploads/2018/02/HCWG-HateBias-Crime-Monitoring-project-Inforgraphics_2017.pdf (accessed on 30 March 2022).

¹⁵⁰⁵ Roman & Sagas 2020:22.

¹⁵⁰⁶ Naidu *et al* "When Xenophobia rears its ugly head: A challenge to responsible and responsive Governance", 24 https://www.ggln.org.za/images/solg_reports/Sold_2015.pdf#page=26 (accessed on 1 April 2022).

violence instead of taking steps to curb it.¹⁵⁰⁷ Community leadership is often responsible for enabling members of the community to 'legitimately' instigate xenophobic violence. In areas where strong community leadership is lacking, this role is fulfilled by non-state actors who use violence as a means to restore the socio-economic and political order.¹⁵⁰⁸ Poor or absent community leadership structures allow for opportunities for xenophobic violence by failing to effectively resolve conflicts and tensions before violence is used and where there is a lack of accountability by those who engage in xenophobic violence.¹⁵⁰⁹ Members of the community who have lost faith in the police and justice system take the law into their own hands. Many are frustrated because structures such as the police, ward councilors, and community policing forums cannot address their concerns about non-nationals in their communities.¹⁵¹⁰

South African society must re-examine thinking around national belonging and citizenship.¹⁵¹¹ An inter-ministerial committee was established to look at migration and to safely re-integrate non-nationals into communities. This committee comprised the police service, business owners, educational bodies, the Department of Home Affairs, and the Department of Justice & Correctional Services.¹⁵¹² Following the 2015 xenophobic attacks, modern technology was used to address the problem of xenophobia by launching a mobile application called 'We are Africans'. This application helps to create awareness about xenophobia and allows the public to support the initiative and report incidents of violence or incitement. The application improves the response time of security agencies to prevent loss of life and property of non-nationals.

Civil society's input in curbing xenophobia needs to extend beyond relief efforts. It must extend to examining the causes of xenophobia and ways to deal with the challenges of poverty, unemployment, corruption by State officials, and unfair

¹⁵⁰⁷ Misago 2019:58.

¹⁵⁰⁸ Misago 2019:60.

¹⁵⁰⁹ Misago 2019:65.

¹⁵¹⁰ Misago 2019:65.

¹⁵¹¹ Tirivangasi & Nyahunda 2020:212.

¹⁵¹² Tirivangasi & Nyahunda 2020:213.

business competition between citizens and non-nationals.¹⁵¹³ Civil society should engage organize and engage in dialogue between themselves and migrant organizations to allow for migrants to express their experiences.¹⁵¹⁴ Media outlets should be used to highlight the efforts by civil society to combat xenophobia.¹⁵¹⁵ The state should be lobbied to develop anti-xenophobia policies that will promote skills development among those that are vulnerable in society.¹⁵¹⁶

Chief Justice Mogoeng Mogoeng stated that both citizens and non-nationals must respect fundamental human rights and not threaten the lives of others. People need to live together peacefully irrespective of where they come from. He also stated that the justice system exists to help resolve disputes in a way that upholds the *Constitution* and where there are disputes concerning non-nationals these should be dealt with through the justice system.¹⁵¹⁷ Everyone should live peacefully with one another and the xenophobic violence that ended lives and caused loss of property and displacement should be rejected.¹⁵¹⁸

The Centre for Human Rights at the University of Pretoria summarized what has been stated above quite succinctly by stating that curbing xenophobia required a multi-pronged approach and recommended that:

- a) Thorough investigations take place.
- b) Offenders should be rigorously prosecuted.
- c) The information must be shared concerning those who have been prosecuted.
- d) The fundamental causes of xenophobia should be comprehensively investigated by the media.

¹⁵¹³ Naidu *et al* "When Xenophobia rears its ugly head: A challenge to responsible and responsive Governance", 31 https://www.ggln.org.za/images/solg_reports/Sold_2015.pdf#page=26 (accessed on 1 April 2022).

¹⁵¹⁴ Naidu *et al* "When Xenophobia rears its ugly head: A challenge to responsible and responsive Governance", 27 https://www.ggln.org.za/images/solg_reports/Sold_2015.pdf#page=26 (accessed on 1 April 2022).

¹⁵¹⁵ Naidu *et al* "When Xenophobia rears its ugly head: A challenge to responsible and responsive Governance", 29 https://www.ggln.org.za/images/solg_reports/Sold_2015.pdf#page=26 (accessed on 1 April 2022).

¹⁵¹⁶ Naidu *et al* "When Xenophobia rears its ugly head: A challenge to responsible and responsive Governance", 31 https://www.ggln.org.za/images/solg_reports/Sold_2015.pdf#page=26 (accessed on 1 April 2022).

¹⁵¹⁷ Tirivangasi & Nyahunda 2020:216.

¹⁵¹⁸ Tirivangasi & Nyahunda 2020:216.

- e) A reflection must take place in higher education and other institutions regarding how xenophobia may be addressed through educational programs.
- f) Government leaders such as the State President and politicians should use their voices to speak out against xenophobia and should ensure that it is prioritized.¹⁵¹⁹

7.5 THE EXPERIENCE OF OTHER COUNTRIES IN CURBING XENOPHOBIA

In Chapter 1 I outlined that while my study is not a comparative one, I would refer on an ad-hoc basis to the issues arising in other domestic jurisdictions. For reasons set out in Chapter 1, I undertook to examine whether countries such as Germany and Canada have legislated against xenophobia. In this part of the chapter, I discuss the most recent legal developments in Germany and Canada to determine what has worked well in curbing xenophobia and whether there are still issues that need to be addressed.

7.5.1 Germany

In 2015 the leader of the AfD, an anti-immigrant party called on Chancellor Angela Merkel to resign due to her asylum policy which the party believed was causing too many migrants to enter Germany.¹⁵²⁰ Merkel promised however to abide by her open door refugee policy and called for a multi-pronged solution to the matter which focused on working with other countries in the European Union.¹⁵²¹ In the following discussion,, I highlight the positive attempts made to reduce the incidence of hate crimes in Germany.

The European Commission Against Racism and Intolerance (ECRI) is an independent body that monitors human rights issues in member states and makes

¹⁵¹⁹ Centre for Human Rights University of Pretoria “Multi-pronged response required to curb xenophobia’, 2 <https://www.chr.up.ac.za/news-archive/2013/1580-multi-pronged-response-required-to-curb-xenophobia> (accessed on 31 March 2022).

¹⁵²⁰ NASR “Leader of German anti-immigrant party calls on Merkel to resign”, <https://www.reuters.com/article/uk-germany-politics-idUKKBN0THOHL20151128> (accessed on 13 November 2022).

¹⁵²¹ NASR “Leader of German anti-immigrant party calls on Merkel to resign”, <https://www.reuters.com/article/uk-germany-politics-idUKKBN0THOHL20151128> (accessed on 13 November 2022).

recommendations for dealing with such issues.¹⁵²² The ECRI took note of the following progress made by Germany in addressing discrimination and human rights issues.¹⁵²³ Non-nationals who are referred to as 'irregularly present migrants' are protected by what are called firewalls that schools, teachers, and doctors do not have to report to immigration control.¹⁵²⁴ In 2018 the government passed the *Network Enforcement Act* which requires social network providers to remove hate speech from their domains within 24 hours. As a result, it was found that this reduced the amount of hate speech posts on social media platforms.¹⁵²⁵ A fine of 50 million Euros can be imposed for breaking this law.¹⁵²⁶

Higher Education institutions in South Africa could also look at banning hate speech and xenophobic statements or expressions from their social media platforms such as websites, social media sites, and online chat groups. As the online platform is largely used for communication at universities since the outbreak of Covid, this will be a good way to send a clear message to users of these platforms that hate, and discrimination will not be tolerated. Germany's National Action Plan on Integration will incorporate a section that deals with the media and encourages that steps be taken to curb the spread of messages and hate speech that fuels racism and xenophobia.¹⁵²⁷

¹⁵²² European Commission against Racism and Intolerance "ECRI Report on Germany (sixth monitoring cycle)", foreword <https://www.das-netzt.de/publikationen/ecri-report-germany-6th-evaluation> (accessed on 5 April 2022).

¹⁵²³ European Commission against Racism and Intolerance "ECRI Report on Germany (sixth monitoring cycle)", 5 <https://www.das-netzt.de/publikationen/ecri-report-germany-6th-evaluation> (accessed on 5 April 2022).

¹⁵²⁴ European Commission against Racism and Intolerance "ECRI Report on Germany (sixth monitoring cycle)", 7 <https://www.das-netzt.de/publikationen/ecri-report-germany-6th-evaluation> (accessed on 5 April 2022).

¹⁵²⁵ European Commission against Racism and Intolerance "ECRI Report on Germany (sixth monitoring cycle)", 7 <https://www.das-netzt.de/publikationen/ecri-report-germany-6th-evaluation> (accessed on 5 April 2022).

¹⁵²⁶ European Commission against Racism and Intolerance "ECRI Report on Germany (sixth monitoring cycle)", 21 <https://www.das-netzt.de/publikationen/ecri-report-germany-6th-evaluation> (accessed on April 2022).

¹⁵²⁷ European Commission against Racism and Intolerance "ECRI Report on Germany (sixth monitoring cycle)", 22 <https://www.das-netzt.de/publikationen/ecri-report-germany-6th-evaluation> (accessed on 5 April 2022).

The ECRI recommended that human rights education be introduced in the Education Acts and the curricula of schools.¹⁵²⁸ In the health care sector, asylum seekers benefit from having immediate access to medical treatment, and doctors are not allowed to disclose data on such immigrants.¹⁵²⁹

The German government has also recommended that a law be passed which will halt the public financing of political parties that have a racist agenda.¹⁵³⁰ The German criminal code was amended to the effect that crimes that have a racist or xenophobic motive are to be seen as aggravating circumstances; resulting in the amendment of guidelines for the police and prosecution. Judges and prosecutors must also attend training programs that have been introduced by the Federal Ministry and the German Institute of Human Rights.¹⁵³¹ In September 2021 a law was passed in Germany amending German criminal law in various areas.¹⁵³² One of the new laws criminalises 'degradation based on national, racial, religious or ethnic origin, ideology, disability or sexual orientation'.¹⁵³³ The criminal offence is called 'inflammatory insult' and behaviour that aims to slander or abuse any group on the basis of the abovementioned grounds may result in imprisonment of up to two years or a fine.¹⁵³⁴ Finally, Germany has a five-phase process to promote the inclusive integration of non-nationals into German society. These phases are known as - the one before migration, initial integration, integration, growing together, and cohesion. This seems to offer a holistic

¹⁵²⁸ European Commission against Racism and Intolerance "ECRI Report on Germany (sixth monitoring cycle)", 13 <https://www.das-netz.de/publikationen/ecri-report-germany-6th-evaluation> (accessed on 5 April 2022).

¹⁵²⁹ European Commission against Racism and Intolerance "ECRI Report on Germany (sixth monitoring cycle)", 13 <https://www.das-netz.de/publikationen/ecri-report-germany-6th-evaluation> (accessed on 5 April 2022).

¹⁵³⁰ European Commission against Racism and Intolerance "ECRI Report on Germany (sixth monitoring cycle)", 22 <https://www.das-netz.de/publikationen/ecri-report-germany-6th-evaluation> (accessed on 5 April 2022).

¹⁵³¹ European Commission against Racism and Intolerance "ECRI Report on Germany (sixth monitoring cycle)", 25 <https://www.das-netz.de/publikationen/ecri-report-germany-6th-evaluation> (accessed on 5 April 2022).

¹⁵³² Bundesministerium der Justiz "New Criminal offense punishes inflammatory insults", https://www.bmj.de/SharedDocs/Artikel/DE/2021/0921_Neue_Strafvorschriften.html (accessed on 13 November 2022).

¹⁵³³ Bundesministerium der Justiz "New Criminal offense punishes inflammatory insults", https://www.bmj.de/SharedDocs/Artikel/DE/2021/0921_Neue_Strafvorschriften.html (accessed on 13 November 2022).

¹⁵³⁴ Bundesministerium der Justiz "New Criminal offense punishes inflammatory insults", https://www.bmj.de/SharedDocs/Artikel/DE/2021/0921_Neue_Strafvorschriften.html (accessed on 13 November 2022).

approach to inclusive integration, which may begin even before the non-national arrives in Germany. The five-phase plan also addresses new topics, one of which is anti-discrimination.¹⁵³⁵

7.5.2 Canada

During the period October 2018 until March 2019, Canadians were invited to participate in an online poll and survey which allowed them to provide input on their lived experiences with racism and discrimination. This was done to enable the government to formulate an anti-racism strategy.¹⁵³⁶ The strategy is called Building a Foundation for Change: Canada's Anti-Racism Strategy 2019-2022 and involves a \$45 million investment toward combatting racism and discrimination in Canada.¹⁵³⁷ \$4.6 million has been earmarked to set up an Anti-racism Secretariat within the Department of Canadian Heritage. This department, supported by inter-departmental committees will address racism and the effects of discrimination. The impact of new and existing policies will also be examined, and new initiatives will be developed.¹⁵³⁸ The financial investment will also be made to develop a National Public Education & Awareness Campaign. The goal of the campaign will be to develop an understanding and awareness among the public about racism and its impact on indigenous people and minorities.¹⁵³⁹

According to Statistics Canada in the year 2017, Canada experienced a 47% increase in hate crimes motivated by religion, race, or ethnicity.¹⁵⁴⁰ Online hate speech has also

¹⁵³⁵ European Commission against Racism and Intolerance "ECRI Report on Germany (sixth monitoring cycle)", 26 <https://www.das-netz.de/publikationen/ecri-report-germany-6th-evaluation> (accessed on 5 April 2022).

¹⁵³⁶ Canadian Heritage "Building a Foundation for Change Canada's Anti-Racism Strategy 2019-2022", 3 <https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html> (accessed on 5 April 2022).

¹⁵³⁷ Canadian Heritage "Building a Foundation for Change Canada's Anti-Racism Strategy 2019-2022", 3 <https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html> (accessed on 5 April 2022).

¹⁵³⁸ Canadian Heritage "Building a Foundation for Change Canada's Anti-Racism Strategy 2019-2022", 7 <https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html> (accessed on 5 April 2022).

¹⁵³⁹ Canadian Heritage "Building a Foundation for Change Canada's Anti-Racism Strategy 2019-2022", 15 <https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html> (accessed on 5 April 2022).

¹⁵⁴⁰ Canadian Heritage "Building a Foundation for Change Canada's Anti-Racism Strategy 2019-2022", 17 <https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html> (accessed on 5 April 2022).

been spreading and has caused concern. Online platforms are used to spread hate and incite violence. Canada, in collaboration with Christchurch's Call to Action, has pledged to eradicate online hate.¹⁵⁴¹ To this end, Canada's Digital Charter was enacted in 2019. Highlighted in the charter is the government's commitment to work with the digital industry and social media platforms to address the use of the internet to spread online hate, extremist, and terrorist motives.¹⁵⁴² Data will be collected to determine the efficacy of government initiatives and community programs.¹⁵⁴³ Data obtained from the Canadian immigration ministry revealed that during 2020-2021 the number of students choosing to study in Canada had doubled. Due to the civil unrest in South Africa in 2021, more parents are choosing Canada as a study destination for their children.¹⁵⁴⁴

In March 2022 the Dismantling of Racism & Hate Act was introduced in Nova Scotia, Canada. The Act aims to address systemic racism, hate, and inequity. The government also committed to formulating a provincial strategy and health equity framework by 2023.¹⁵⁴⁵ This is the first time that such a bill has been introduced in Canada and it indicates the willingness of citizens and the government to address hate and racism. Some of the provisions of the Bill also relate to working with marginalized communities and monitoring systemic hate, inequity, and racism by developing data standards. The Minister must also provide an annual report in which progress on anti-racism and inequity measures are outlined.¹⁵⁴⁶

¹⁵⁴¹ Canadian Heritage "Building a Foundation for Change Canada's Anti-Racism Strategy 2019-2022",¹⁷ <https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html> (accessed on 5 April 2022).

¹⁵⁴² Canadian Heritage "Building a Foundation for Change Canada's Anti-Racism Strategy 2019-2022",¹⁸ <https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html> (accessed on 5 April 2022).

¹⁵⁴³ Canadian Heritage "Building a Foundation for Change Canada's Anti-Racism Strategy 2019-2022",¹⁹ <https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html> (accessed on 5 April 2022).

¹⁵⁴⁴ University World News "After unrest more, South Africans opt to study in Canada", <https://www.universityworldnews.com/post.php?story=20220330110227986#:~:text=Avramis%20said%20that%20since%20the,abroad%20for%20study%20each%20year> (accessed on 5 April 2022).

¹⁵⁴⁵ Office of Equity & Anti Racism Initiatives "Legislation will address Systemic Racism, Hate and Inequity", <https://novascotia.ca/news/release/?id=20220324002> (accessed on 5 April 2022).

¹⁵⁴⁶ Office of Equity & Anti Racism Initiatives "Legislation will address Systemic Racism, Hate and Inequity", <https://novascotia.ca/news/release/?id=20220324002> (accessed on 5 April 2022).

The initiatives and progress made by Germany and Canada which I outlined above mirror to some extent the progress made in South Africa. While South Africa may not have the same resources or budgetary allowances to fund its initiatives, all available avenues must be used to educate the public about the causes and effects of xenophobia, motivate the government towards responsible leadership in this area, to infuse the higher education space with the need to embrace cultural diversity and overall, in essence, to motivate communities not to see non-nationals as a threat to their livelihood, property, and spaces, and in essence to finally work together to eradicate hatred from our society. Ultimately thinking about non-nationals should include sensitivity to their circumstances and an appreciation for the fact that everyone is a 'foreigner' somewhere.

7.6 CONCLUSION

In this chapter, I provide a summary of the discussions carried out in the thesis to address the research questions. I also make certain conclusions based on an exploration of the literature on the topic. In summary, the two main conclusions arrived at are, firstly, that non-national academics are exposed to xenophobia in the workplace through covert and symbolic behaviours or attitudes. Secondly, the current law and policy in place, while providing some form of protection to non-national academics, need to be improved in order to enhance the protection afforded to non-national academics in the higher education sector. Finally, I make some recommendations that could be considered to curb xenophobia in South Africa in the higher education sector, thereby providing greater protection for non-national academics. These recommendations are namely that:

- a) Acknowledging the right to work for non-nationals would help in further protecting their right and their legal position in society.
- b) There is a need for immigration laws that are more sensitive to the needs of non-nationals as well as better service delivery on the part of the Department of Home Affairs.
- c) There is a need to pass xenophobic specific legislation to protect victims of xenophobic violence.
- d) Anti-discrimination legislation should specifically include xenophobia.
- e) International treaties should be practically implemented.

- f) The experience of non-national academics in relation to xenophobia should be highlighted.
- g) Transformation policies should foster principles of inclusion and an awareness of xenophobia.
- h) Internationalisation should be prioritized in the higher education sector.
- i) Government should be proactive in vigorously confronting and addressing xenophobia in society.

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