

**The law and its interpretation do play a role in the
elimination of Xenophobia: A South African case study.**

By

***Hlako CHOMA**

Abstract

The examination of certain legal aspects of xenophobia has shown that the law and its judicial interpretation do on the one hand serve to safeguard against xenophobia and to eliminate it where it still prevails, on the other hand they can however serve to entrench it¹. It is believed that in future, South African courts will continue to be proactive in the elimination of xenophobic tendencies wherever they may be encountered in the legal context and that law reform will eradicate laws which generate the impression that they are xenophobically motivated.

-
- Senior Law Lecturer, University of Venda South Africa
 - 1. Hagenneier C, International Trade in Legal Services: Admission Rules for Foreigner Attorney in South Africa. Unpublished Paper presented on *Xenophobia Workshop - 21 February 2008 at Polokwane Landmark Protea Hotel Organized by Department of Justice, Limpopo Province: National Consultative Process Towards The Development of the National Action Plan To Combat Racism, Xenophobia and Related Intolerance.*

Introduction

Xenophobia may be defined as a fear or contempt of that which is foreign or unknown, especially of strangers of foreign peoples. The term is typically used to describe fear or dislike of foreigners or in general of people different from one's self. As with all phobias, a xenophobic person is aware of the fear, and therefore has to believe at some level that the target is in fact a foreigner. This arguably separates xenophobia from racism and ordinary prejudice in that someone of a different nationality. In various contexts, the terms 'xenophobia' and 'racism' seems to be used interchangeably, though they have wholly different meanings. Xenophobia being based on place of birth, racism is being based on ancestry. For example, to dislike a black person from France because they are black is racist. In xenophobia there are two main objects of the phobia. The first is a population group present within a society that is not considered part of that society. Often they are recent immigrants, but xenophobia may be directed against a group which has been present for centuries. This form of xenophobia can elicit or facilitate hostile and violent reactions, such as mass expulsion of immigrants or in the worst case, genocide.

The second form of xenophobia is primarily cultural, and the objects of the phobia are cultural elements which are considered alien. All cultural are subject to external influences but cultural xenophobia is often narrowly directed, for instance, at foreign loan words in a national language. It rarely leads to aggression against individual persons, but

can result in political campaigns for cultural or linguistic purification. Isolationism, a general aversion of foreign affairs, is not accurately described as xenophobia. Additionally, in the world of science fiction, xenophobia may refer to a fear or hatred of extraterrestrial cultures or beings.²

Xenophobia is identified as a major source of concern to human rights and democracy in South Africa. South Africa needs to send out a strong message that an irrational prejudice and hostility towards non-nationals is not acceptable under any circumstances.

Minimum Standard sets by international law regarding treatment of foreigners in South Africa.

South Africa is under international law in principle permitted to decide whom to permit into the country. It is only once a foreigner is in the country that he can avail himself of certain rights which are stemming from international law.³ Rights of aliens in South Africa arise both out of international conventions to which South Africa is a party and out of customary international law. Generally, South Africa is obliged to respect the basic human rights of any foreigner who has entered its territory. South Africa is a party to the United Nations Convention Relating to the Status of Refugees.⁴ Under the regime of this convention refugees have to be accorded certain minimum rights. South African law has

² <http://en.wikipedia.org/wiki/xenophobia>

³ Legal position confirmed in *The Union of Refugee Women et al v The Director: The Private Security Industry Regulatory Authority et al*, Case No. CCT 39/06

⁴ 1951 United Nations Convention Relating to the Status of Refugees.

given national effect to the countries international law obligations by virtue of the Refugee Act.⁵

One important rule of international law relating to refugees is the principle of *non-refoulement*. Under this legal rule states may not forcibly return a refugee to a state where She/he is likely to suffer persecution or danger to life or freedom. South African courts have accepted this rule of international law. Further, it has been recognized by South African courts that aliens must be treated with dignity and that their right to life and personal integrity has to be respected.⁶

The international Covenant on Civil and Political Rights, which has been ratified by South Africa and which is consequently binding on the states grants everyone the right to be free from arbitrary arrest or detention, the right to be treated with humanity and with respect, the right to equality before the courts and tribunals, the right to be recognized everywhere as a person before the law. It thereby safeguards the rights of aliens. The International Covenant on Social and Economic Rights entrenches socio-economic rights of aliens. All provisions of this Covenant have to be applied without discrimination on the basis of nationality.⁷ Unfortunately, South African has yet to ratify it, which means that it is not yet binding on it.

⁵ 130 of 1998

⁶ Hagenmeier C, *supra* quoting *Minister of Home Affairs v Watchenuka*, 2004

⁷ Article 2 of International Covenant on Social and Economic Rights.

Further provisions guaranteeing minimum standards for the protections of aliens are contained in the Covenant on the Rights of the Child, the Covenant on the Elimination of All Forms of Discrimination Against Women and in the African Charter on Human and People's Rights.

An important international instrument to prevent the worst forms of state-sponsored xenophobic tendencies is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁸ which *inter alia* prohibits any form of torture. While South Africa has ratified this Convention it has to date failed to ratify the Optional Protocol⁹ to the Convention which provides that Subcommittee on Prevention may conduct regular inspections and furthermore prescribes domestic monitoring by sophisticated National Preventative Mechanisms. The South African Human Rights Commission has urged the South African government to ratify this Optional Protocol and comply with its provisions.

In summary it can be said that international law ensures that South Africa could not easily adopt certain xenophobic laws without being held accountable for its actions in the international forums. International law provides an effective safeguard against xenophobically motivated laws.

⁸ 1984 Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See also *S v Makwanyane* 1995 (6) BCLR 665, 1995 3 SA 391 (CC)

⁹ 2000 Optional Protocol

South African judicial decisions in which courts succeeded in safeguarding individual from xenophobic laws.

Section 9 of the South African Constitution¹⁰ is against all forms of discrimination. South African is a signatory to the Convention on the Elimination of All forms of Discrimination Against Women. Section 10 provides that everyone has inherent dignity and the right to have their dignity respected and protected, while section 11 provides that everyone has the right to life.

The decision in *Mahlaule*¹¹ and *Khoza*¹² indicates the dedication and willingness of the South African courts in safeguarding individuals from xenophobia. *Mahlaule* challenged the constitutionality of sections 4(b) (i) and 4B (b) (ii) of the Welfare Act.¹³ *Khoza* challenges the constitutionality of section 3 (c) of Social Assistance Act.¹⁴ The Welfare Amendment Act reserved child support grants and care dependency grants respectively for South African citizens only, while Social Assistance Act reserved social grants for aged South African citizens only.

¹⁰ Act 108 of 1996

¹¹ *Mahlaule and Another v The Minister of Social Development and Others* – case 25453 / 02

¹² *Khoza and Others v The Minister of Social Development and Others* – case 25455 / 02

¹³ 106 of 1997

¹⁴ 59 of 1992

Factual backgrounds of these two cases.

The applicants in both matters (*Mahlaule & Khoza*) are Mozambican citizens who have acquired permanent residence in South Africa in terms of exemptions granted to them under the now repealed Aliens Control Act.¹⁵ All the applicants in both matters, save *Mahlaule*, *Khoza* fled Mozambique in the 1980's as a result of the outbreak of civil war and sought refuge in South Africa. They integrated in local community in the former Gazankulu territory in what is known as Limpopo Province. *Khoza* came to South Africa to work for the National Parks Board at Sekhukuza until his retirement in May 1992, he is also a permanent resident.

All of the applicants in both matters were destitute and would qualify for social assistance under the Act but for the fact that they are not South African citizens. In the *Khoza* matter, *Khoza* had applied for an old-age grant on the 1st September 1992 which was granted and eventually paid in November 1996. This grant was later withdraw in February 1998 during a 'pension clean-up' by the Northern Province provincial government in which the payment of some ninety four thousand (94 000) grants were discontinued. *Khoza* was thereafter not permitted to apply for a new grant under the Act since he lacked South African citizenship. The applications of other applicants in the same matter for old-age pension grants were refused since they were not South African citizens as required by the Act.

¹⁵ 69 of 1991

In the *Mahlaule* matter, *Mahlaule* attempted to apply for a child-support grant under section 4 of the Act, in respect of two of her children who were then below the age of seven, but she too was not permitted to apply for the grant on the basis that she lacks South African citizenship. Another of her children, age twelve, was diabetic and would qualify for a care, dependency grant under section 4 B (b) (ii). Section 2 (g) of the Act, which currently regulates the allocation of care-dependency grants, read with regulations 5 and 9 promulgated under the Act, does not expressly preclude non-citizens from receiving care-dependency grants.

These two cases were finalized in the Constitutional Court in 2004.¹⁶ The Constitutional Court upheld the challenge against provisions of Social Assistance Act excluding people with permanent residence status from access to social assistance, both on the basis that the exclusion violated section 27 (i) of the South African Constitution and discriminated unfairly against permanent residents in violation of section 9 of the South African Constitution.¹⁷

The South African courts are very emphatic about discrimination and would treat it as suspect. In *Harksen v Lane*¹⁸, Justice Goldstone, writing for the Court essentially laid out standards and stated:

“ What the specified grounds have in common is that they have been used or

¹⁶ *Khoza and Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC)

¹⁷ Choma HJ, South African decisions on xenophobia. Unpublished Paper Presented on *Xenophobia Workshop-21 February 2008 at Polokwane Landmark Protea Hotel, organized by Department of Justice Limpopo Province:*

¹⁸ 1998 (i) SA 300 (CC), 1997 (ii) BCLR 1489 (CC)

misused in the past to categorize, marginalize often oppressed persons who have been, who have had or been associated with these attributes or characteristics, these grounds have the potential, when manipulated to demean persons in their inherent humanity and dignity and it goes on basically talk about race, gender, sexual orientation ect, ect”

The Court is essentially telling us that these kinds of discrimination is unacceptable, it will not permit it and is essentially based on an impairment of human dignity and that the Court is not going to allow it. It must be noted that colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans, and people of African descent and people of Asian descent and indigenous peoples were victims of colonialism and continued to be victims of its consequences, hence xenophobic attitudes towards each other. Apartheid and genocide in terms of international law constitute crimes against humanity and are major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance and acknowledge the untold evil and suffering caused by these acts and affirm that wherever they occurred, they must be condemned and their recurrence prevented.¹⁹

Xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory,

¹⁹ Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in *Durban, South Africa 31 August – 8 September 2001*

xenophobic and racist practices.²⁰ It is submitted that poverty, underdevelopment, marginalization, social exclusion and economic disparities are closely associated with racism, racial discrimination, xenophobia and related intolerance and contribute to the persistence of racist attitudes and practices which in turn generate more poverty.

Critical analysis of xenophobic policies in other Countries

It is submitted that discrimination in general forms such as racism, sexism, ageism and religious intolerance may be deemed to be xenophobic practice. Social exclusion against cultures and against beliefs amounts to specific forms of xenophobia. Certain countries have policies of exclusion of virtually all foreigners and not merely an avoidance of foreign relations, Japan for instance, has a policy known as ‘national disclosure’ or *sakoku*. In the early 19th century, Mito, scholars advocated, the forceful, expulsion of ‘barbarians’, though almost no ‘barbarian’ existed in Japan. By the middle of the 19th century, with outside pressure mounting, some Japanese scholars and leaders tied ‘Western Learning’ and ‘Nativist Studies’ to a goal of nation building.²¹ The foreign citizens are now protected against Xenophobic practices by Japanese Constitution²² which states that “all of the people shall be equal under the law, and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status or family origin”.

²⁰ Report, *supra*

²¹ Wakabayashi, Bob Tadashi, Anti-Foreignism and Western Learning in Early – Modern Japan, *Concil on East-Asian Studies, Havard University, 1986*

²² Article 14 of the Constitution of Japan

In Dominican Republic there was a report by Amnesty International, the United Nations and The Human Rights Watch that Haitians were physically attacked from 1992 until 2006. The homes of suspected Haitians were sometimes burned to the ground. The police were also searching for arrest Haitian looking people on a regular basis.²³ The grandchildren and great grandchildren of Haitians were denied birth certificates, medical care, education and social services because of their race and decendancy. During the 2007 Swiss Federal election, the right-wing populist Swiss People's Party won considerable number of seats in parliament. The party was accused of increasing racism and xenophobic sentiment by publishing a controversial poster during its campaign, showing a white sheep kicking a black sheep off the Swiss flag. The poster was condemned by the United Nations²⁴. During the campaign the party also proposed a change to the penal code to allow judges to deport foreigners guilty of serious crimes once they have served their sentences. If the criminal is under the age of eighteen, the proposed law allows the entire criminal's family to be deported as soon as sentence is passed.²⁵ Any person in Thailand of a Caucasian appearance is often referred to as “*farang*”, which some non-natives believe to be a slang word similar in context to “*chink*” or “*nigger*” or a dehumanizing word such as “*mongoloid*”. The origins of “*farang*” are much disputed and although most Thais claim the word to be “context neutral”, it is still arguably xenophobic or racist when used as a generalization.²⁶

²³ <http://www.amnestyusa.org/document.php.lang=e&id=ENGUSA 20070321002>

²⁴ Right – Wing People's Party Win Swiss Elections (<http://www.dw-world.de/dw/article/0,2144,2834523,00.html>), Deutsche Welle, 22-10-2007.

²⁵ Elaine Sciolino. “Far-right Swiss party divides nation on immigrant issue (<http://www.ihf.com/articles/2007/10/07/news/swiss.php>). International Herald Tribune, 7-10-2007

²⁶ Wiesensthal centre demands action against Thai school

Unlawful procedures and acts in the arrest, detention and deportation of undocumented foreigners in South Africa.

The Immigration Act, as amended by the Immigration Amendment Act, defines a “foreigner” as an individual who is not a citizen and an “illegal foreigners” to mean a foreigner who is in south Africa in contravention of the Act.²⁷ Section 34 of the Immigration Act, as amended by the Immigration Amendment Act, governs the procedures for the arrest, deportation and detention of “illegal foreigners”. Lawyers for Human Rights challenged the constitutionality of parts of section 34 in the Pretoria High Court²⁸ and sought confirmation in the Constitutional Court of the High Court’s order with respect to those provisions that the High Court ruled to be unconstitutional.²⁹ Despite these constitutional challenges, section 34 remains intact.

Human Rights Watch researched on violations of the procedures for the arrest, detention and deportation of “illegal foreigners” by police and immigration officials. These violations have been documented in other research and must be understood as widespread

(<http://www.wiesenthal.com/site/apps/s/content.asp?C=fwLyk=nN8LzH&b=253162&ct=4494183>)

²⁷ Immigration Act, as amended by Immigration Amendment Act, section 1

²⁸ *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2003 (8) BCLR 891 (T)

²⁹ Constitutional Court of South Africa. *Lawyers for Human Rights v Minister of Home Affairs*, Case CCT 18/03. The Constitutional Court, Para 45, found only section 34(8) to be inconsistent with the Constitution, and “in a very limited way”. The Court ordered that section 34(8), which deals with foreign nationals who enter South Africa illegally by air or sea, be read with the following: “A person detained in terms of this section may not be held in detention for longer than thirty calendar days without an order of a court which may extend the detention for an additional period not exceeding ninety calendar days on a reasonable grounds”.

and systematic rather than idiosyncratic and anecdotal.³⁰ Human Rights Watch also became aware of legal gaps in Immigration Act and the Immigration Amendment Act, arising from the administration of the corporate permit provisions and the arrest, detention and deportation process.

The treatment of refugees in South Africa and policies toward foreigners.

South African policies towards foreigners who seek refuge in the country have for many years been ambivalent. On the one hand South Africa's Refugee Act is exemplary in that it provides for the mandatory issuing of Asylum Seeker permits to asylum seekers. Refugees, i.e. people who have been successful with their applications for asylum, enjoy privileges which by far exceed what is required by international law. They enjoy the right to work and can in principle receive social benefits in South Africa. Some of those rights are extended to asylum seekers.

³⁰ <http://www.hrw.org/reports/2006/southafrica086/7.htm>. Landau, Ramjathan - Keogh and Singh, "Xenophobia in South Africa and Problems Related to it", Forced Migration Study Programme et al; "Crossing Borders, Assessing Rights and Detention" and Human Right Watch, "Living on the Margin: Inadequate Protection for refugees and Asylum Seekers in Johannesburg", *A Human Rights Watch Report*, vol 17 No 15 (A) November 2005, <http://hrw.org/reports/2005/southafrica1105/southafrica1105.pdf>. For similar abuses under the Aliens Control Act, see *Human Right Watch*, "Prohibited Persons": Abuse of Undocumented Migrants, <http://www.hrw.org/reports98/sareport>.

The laudable legislative framework provided by Refugee Act³¹ stands in stark contrast to the daily ordeals which many asylum seekers in South Africa experience. The Human Rights Watch³² and Amnesty International³³ both criticized the treatment of refugees and asylum seekers in South Africa. Whilst it is impossible to say what the true motivation of those responsible for such atrocities is, it can safely be said that they created the impression of the prevalence of xenophobia. It is beyond the scope of this paper to examine all facets of this phenomenon.

Few examples of asylum seekers who for a prolonged period sought entry to the Cape Town refugee reception office in order to obtain temporary residence permit asylum seeker is entitled. *De Gaulle Kiliko et al v The Minister of Home Affairs et al*³⁴, applicants, after spending weeks camping outside the offices of Home Affairs, approached the Cape High Court for assistance to compel the Minister of Home Affairs to accept their applications. The crux of their plight was that an asylum seeker is basically without any legal protection until he/she obtains an asylum seekers permit if she/he has crossed the border illegally. He / she is an illegal immigrant until such time she/he can be arrested and deported.

The Court held that “the state, under international law, is obliged to respect the basic human rights of any foreigner who has entered its territory and any such person is under

³¹ Refugee Act of 1998

³² World Report 2008

³³ Report 2007

³⁴ 2006 (4) SA 114 (C)

the South African Constitution entitled to all fundamental rights entrenched in the Constitution, save those rights expressly restricted to South African citizens”. The Court further held that the administrative process, i.e. the extreme slowness, was inconsistent with the Constitution and granted a structured interdict requesting the Respondents to provide a detailed report to Court.³⁵

The matter was postponed pending the consideration of the report. It came again before the Cape High Court this week, it was heard on Monday, 18 February 2008. The Applicants argued that “home affairs had failed to answer the questions” in its report, and that this amounted to ‘an insult to the applicants and also to an insult to the Court’. The Honourable judge expressed his dissatisfaction with the department’s submissions in the hearing but reserved judgment. While it remains to be seen which order the Court will make it is clear that our judiciary is prepared to provide effective safeguards against what could be perceived as conduct motivated by the dislike for other nationals by the government departments.³⁶

³⁵ Hagenmeier C, referred to above

³⁶ Hagenmeier C, referred to above

Conclusion

South Africa has experienced a different history from other nations in Africa because of early immigration from Europe and the strategic importance of the Cape Sea Route. European immigration began shortly after Dutch East India Company founded a station at what would become Cape Town in 1652. The closure of the Suez Canal during the Six-Day War highlighted its significance to East-West trade. The country's relatively developed infrastructure made its mineral wealth available and important to Western interests, particularly throughout the late nineteenth century and, with international competition and rivalry, during the Cold War.³⁷ South Africa is ethnically diverse, with the largest Caucasian, Indian and racially mixed communities in Africa. Racial strife between the white minority and the black majority has played a large part in South Africa's history and politics, culminating in *apartheid*.³⁸

The equality clause entrenched in the South African Constitution is respected by the South African courts and is used to eradicate certain unjust laws which entrenches discriminatory practices. The law and its judicial interpretation will continue to address and eliminate xenophobic practices. This paper has shown the progressive achievement in eliminating xenophobia by courts in South Africa. The doctrine of *stare decisis* is part of

³⁷ <http://en.wikipedia.org/wiki/South-Africa>

³⁸ *Apartheid* was instituted in 1948 by the National Party (although segregation existed before that time). The laws that defined *apartheid* began to be repealed or abolished by the National Party in 1990, after a long and sometimes violent struggle (including economic sanctions from the international community) by Black majority as well as many White, Coloured and Indian South Africans.

South African legal system and therefore courts will stand by the discussed previous judgment to redress xenophobic tendencies. It is unfortunate that xenophobic practices cannot be criminalized. Xenophobia is an attitude and it would be difficult to formulate elements of xenophobia in criminal law, however, the ultimate results of xenophobia are punishable and may form elements of a particular crime, such as assault, for instance if one may assault someone because he / she does not like the victim since the victim is a foreigner, or insult the victim since the victim is a foreigner, *crimen injuria* may be laid against the perpetrators.

Resume

Name : Advocate Hlako Choma

Position : Senior Lecturer, Department of Public &
International Law

Institution : University of Venda
Private Bag X 5050
Thohoyandou, 0950. South Africa

Tel : 27 - 15 962 8354

Fax : 27 – 15 962 8045

Email : advchoma@yahoo.co.uk