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**EXPLANATORY MEMORANDUM: WHITE PAPER ON CITIZENSHIP, IMMIGRATION AND REFUGEE PROTECTION: TOWARDS A COMPLETE OVERHAUL OF THE MIGRATION SYSTEM IN SOUTH AFRICA**

 **Background**

1. On 10 November 2023, the Department of Home Affairs (“DHA”) published in the Government *Gazette* no 49690, the White Paper on Citizenship, Immigration and Refugee Protection: Towards A Complete Overhaul of the Migration System in South Africa for public comments.

2. The date for submission of comments was extended to 31 January 2024 by way of notice published in the Government notice no 4240, 8 January 2024.

3. The responses have been overwhelming. Individuals (citizens, asylum seekers and refugees), public interest groups, companies, national and local governments departments, Premiers, Research Institutes, political parties, International Commission of Jurists, United Nations High Commissioner for Refugees (“UNHCR”), International Organization for Migration (“IOM”), United Nations Children’s Fund (“UNICEF”) and many others made their voices heard.

4. The DHA team and the Minister conducted public hearings in all the nine provinces. They also conducted several radio and television interviews on the White Paper with participation by members of the public. The outcome of the engagements and public comments is that the policy positions adopted in the White Paper enjoy wide support. Only a handful public interest groups are opposed to selected policy positions such as, withdrawal from the 1951 Refugee Convention, the 1967 Protocol and re-acceding with reservations, proposed repeal of section 4 (3) of the South African Citizenship Act, including rights of children and the first safe country principle.

5. The DHA has carefully and duly considered all the oral and written submissions. This final White Paper is a product of the said robust engagements. The list of organizations and the number of individuals who made contributions is contained in the White Paper.

6. Cabinet approved the final White Paper on Wednesday, 10 April 2024. The White Paper has been published in the Government *Gazette* No 50530 on 17 April 2024. A copy of the *Gazette* is annexed hereto marked “**WP1”.**

7. A complimentary and integrated bill (based on the final White Paper) will be introduced in Parliament without any further delay**.**

 **Introduction**

8. The explanatory memorandum will focus mainly on the revised policy positions.

9. Conflicts, armed violence, disasters, pandemics, seeking better business and work opportunities and other factors force people to leave their countries of origin to other countries.

10. In response to the international migration an organisation known as Provisional Intergovernmental Committee for Movement of Migrants from Europe (“PICMME”) was established in 1951 and in 1989 its name was changed to International Organisation for Migration (“IOM”), a leading United Nations (“UN”) Agency in the field of Migration. Despite the outbreak of COVID-19, more than 82 million people were displaced globally because of economic factors.

11. After the advent of democracy, South Africa witnessed a surge in migrants coming to the country. In South Africa the crisis of migration has unfortunately led to violent clashes between foreign nationals and citizens. Many groups for and against migration are gaining momentum. The DHA bears the constitutional and legislative mandate to ensure that migration is properly regulated and result in economic development, effective borders management, refugee protection, peace and stability.

12. The government’s response to challenges posed by unlawful migration must be informed by the principle of Pan- Africanism and current international trends.

13. The Pan-Africanism philosophy, *inter alia*, formed the basis for the establishment of the Organization of African Unity (“OAU”) now African Union (“AU”) also led by Kwame Nkrumah of Ghana on 25 May 1963, with its aims, *inter alia*, to safeguard the interests of African states and independence of all African states. The role played by Zambia in hosting liberation movements from Mozambique, Zimbabwe, Namibia and South Africa was in furtherance of the principle of Pan – Africanism. The other countries that played a significant in the liberation of South Africa are Tanzania, Angola, Mozambique, Botswana, Cuba and many others.

14. It is upon this basis that over and above, the 1951 United Nations Refugees Convention (“1951 Convention”) and the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”), the OAU endorsed its own 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (“1969 OAU Convention”) in order to deal with the peculiar circumstances of migration and refugees in Africa. This was done in the spirit of Pan – Africanism.

15. The 1969 OAU Convention prohibited refusal of entry, expulsion or extradition of asylum seekers and refugees and also provides for certain exclusions on certain grounds. In fact, the refugee laws in most of the AU countries based on the 1969 OAU Convention are much more stringent than the Refugees Act in South Africa. The principle of Pan-Africanism does not promote illegal entry in the countries that are signatory to the 1969 OAU Convention.

16. There have been consistent loud voices calling for effective policy measures and legislative interventions dealing with migration in South Africa. These voices grew louder as violent clashes between foreign nationals and citizens rear their ugly heads. This development threatens the security of the State.

**Legislation impacting on migration in South Africa**

17. South Africa has different pieces of legislation dealing with citizenship, immigration and refugee protection, namely the Citizenship Act[[1]](#footnote-1), Immigration Act[[2]](#footnote-2) and Refugees Act [[3]](#footnote-3) as amended. In fact, the South African Citizenship Act is a relic of the colonial era and a replica of the 1949 Citizenship Act[[4]](#footnote-4) under the Union of South Africa. In practice, these pieces of legislation in other instances, are not in harmony with each other. The implementation becomes cumbersome and difficult, resulting in:

17.1 Asylum seekers, refugees and foreign nationals acquiring permanent residence status, other visas and citizenship prematurely and irregularly.

17.2 Criminal syndicates, including human traffickers have the networks to exploit the refugee and immigration systems to carry out their nefarious activities with impunity.

17.3 The United Nations, International Residual Mechanism for Criminal Tribunal (relating to genocide) complained about granting of refugee status in South Africa to persons who are excluded in terms of 1951 Convention because they committed atrocities in their countries of origin.

17.4 The asylum regime is sometimes conflated with economic migrants, resulting in overburdening the asylum system. New legislation must provide for economic migrants and asylum seekers separately.

17.5 The many visas provided for in the Immigration Act are abused. In some instances, through corrupt activities involving officials of the DHA.

17.7 The enforcement and implementation of the said three pieces of legislation are weak and ineffective and passed during the first ten years of democracy.

**Refugee Protection**

19. The United Nations adopted the 1951 United Nations Refugees Convention (“1951 Convention”) and the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”). Meanwhile the Organization of African Unity (“OAU”) [now AU] endorsed its own 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (“1969 OAU Convention”) in order to deal with the peculiar circumstances of migration and refugees in Africa. This was done in the spirit of Pan – Africanism.

20. The 1969 OAU Convention (like the 1951 Convention) prohibits refusal of entry, expulsion or extradition of asylum seekers and refugees. However, the 1969 OAU Convention makes provision for exclusions on certain grounds, such as security of the State. Most of the AU countries built in the exceptions in their domestic law. These measures enable them to afford refugee protection to deserving cases without compromising peace and stability in their countries. Unlike South Africa. In most African countries, asylum seekers are accommodated in camps and their freedom of movement is severely curtailed while the asylum claims are processed by the authorities. In fact, the refugee laws in most of the AU countries based on the 1969 OAU Convention are much more stringent than the Refugees Act in South Africa. Furthermore, the principle of Pan-Africanism does not promote illegal entry in the countries that are signatory to the 1969 OAU Convention.

**Asylum during the apartheid era**

21. Asylum seekers and refugees were not recognized in South Africa until 1993. During the apartheid era, South Africa did not accede to any international and regional conventions relating to the status of refugees and asylum seekers.

22. South Africa administered its refugee policy on an *ad hoc* basis, granting refugee status mostly to white nationals from Zimbabwe, Portugal and Mozambique. The Aliens Control Act[[5]](#footnote-5) governed immigration during the apartheid era. The preference of whites over “*non-whites*” (blacks) became the focus of the immigration policy.

 **Asylum during the democratic era**

23. The Refugees Act[[6]](#footnote-6) was passed in 1998. In line with the 1951 Convention, the 1967 Protocol and the 1969 OAU Convention, the Refugees Act prohibits refusal of entry, expulsion or extradition of asylum seekers and refugees.

**Accession to international agreements**

24. In 1996, two years after the first democratic elections, South Africa acceded to various international agreements such as, the 1951 Convention, the 1967 Protocol[[7]](#footnote-7), the 1969 OAU Convention and other international instruments. This was done without the government having developed a clear policy on migration, including refugee protection.

25. Both the 1951 Convention and 1967 Protocol provide for reservations. In terms of article 42 of the 1951 Convention, any State may make reservations to articles of the Convention other than articles 1, 3, 4, 16(1), 33, 36-46 inclusive.

26. Article VII of the 1967 Protocol provides that any State may make reservations in respect of articles IV and 1 other than articles 1, 3, 4, 16(1) and 33.

27. Many countries made reservations in respect of both the 1951 Convention[[8]](#footnote-8) and 1967 Protocol[[9]](#footnote-9).

28. South Africa did not make any reservations in respect of the 1951 Convention and 1967 Protocol. These reservations mainly deal with socio-economic rights such as, access to health, education, social welfare, right to work and trade and others. This was a fatal mistake on part of the government.

29. Most countries, particularly in the African continent regarded those provisions in the 1951 Convention relating to socio-economic rights as not binding on them.

30. It is not surprising that South African courts developed jurisprudence regarding asylum and refugees (in the absence of reservations and exceptions) which is unfavourable to the interests of government. The said jurisprudence is referred to in paragraphs 32 -38 of the White Paper.

 **What are the figures for asylum seekers and refugees in South Africa?**

31. There is much speculation regarding the actual numbers of asylum seekers and refugees in South Africa as compared to other countries in Africa. The incorrect figures supplied (sourced from the UNHCR 2023 Planning Figures) by the International Commission of Jurists (“ICJ”) in its comments on the White Paper are; South Africa has 66 596 refugees in 2022 and the total number of refugees and asylum seekers living in South Africa is 250 250.

32. Based on the said incorrect figures, the ICJ concludes the numbers in South Africa are “*not considerable*”[[10]](#footnote-10) as in 2022, Uganda has 1 463 523 refugees, Sudan 1 097 128, Ethiopia 879 598 and Chad 592 764.

33. The figures provided by the ICJ are not correct. First, the countries such as Uganda has an encampment system whereas South Africa does not. Second, when **Ruta** was heard by the Constitutional Court in November 2018, the figures in South Africa were extremely high. The Court said:

 “*At a time when the world is overladen with cross-border migrants, judges cannot be blithe about the administrative and fiscal burdens refugee reception imposes on the receiving country. South Africa is amongst the world’s countries most burdened by asylum seekers and refugees. That is part of our African history, and it is part of our African present. It is clear from cases this Court has heard in the last decade that the Department is overladen and overburdened, as indeed is the country itself. As the High Court noted in Kumah, the system is open to abuse, with ever-present risk of adverse public* *sentiment*”[[11]](#footnote-11).(Underlining supplied)

34. As of December 2023, the figures are 113 007 for refugees granted the refugee status and 81 086 active asylum seekers and 828 404 inactive asylum seekers. The inactive asylum seekers refers to those who were issued with asylum permits and later disappeared into thin air. They have not renewed their permits and the DHA has no idea as to their whereabouts. Thus, making a total of 1 334 174 of asylum seekers and refugees in South Africa.

 **Policy framework recommendations**

35. The White Paper proposes:

35.1 The Government of the Republic of South Africa must review and/or withdraw from the 1951 Convention and the 1967 Protocol with a view to accede to them with reservations like many other countries. The withdrawal will not affect the vested rights of asylum seekers and refugees granted under the old refugee regime. The withdrawal will not negate South Africa’s commitment to human rights

35.2. South Africa should make reservations as envisaged in the 1951 Convention[[12]](#footnote-12) as follows:

(a) Article 17 as a whole;

(b) Article 17, paragraph 2;

(c) Articles 7, 8, 9,13, 15 and 24.

**Articles in the 1967 Protocol: reservations to be made**

35.3 South Africa should make reservations as envisaged in the 1967 Protocol as follows:

(a) Article 24;

(b) Article 29.

35.4 The Refugee Protection and Immigration legislation must provide for reservations and exceptions as contained in the 1951 Convention and the 1969 OAU Convention. Particularly in that South Africa does not have the resources to grant the socio-economic rights envisaged in the 1951 Convention. In particular, the budget of the DHA for 2024/25 has been cut by an average of R400 million per annum for the next three years. In the South African context, reservations will play a significant role in the justification for limitation of constitutional rights due to non-availability of resources and other factors[[13]](#footnote-13). All constitutional rights are subject to justifiable limitation. The advantage of having reservations is that it gives the Government as in Mozambique and Zambia the space, depending on the availability of the resources, to grant some of the socio-economic rights to asylum seekers and refugees (if and when necessary)[[14]](#footnote-14). A simple example would be elective medical procedures, which are not medical emergencies. An example of a right that cannot be limited or curtailed would be treatment of infectious diseases which are meant to protect the individual concerned and the public. Simply put, there are rights of asylum seekers and refugees which cannot be curtailed, including the right to education.

35.5 The structures (immigration and refugee protection), including appeal bodies are not occupied by suitably qualified persons to carry out efficiently their statutory duties, resulting in mistakes committed by officials and the delays that are caused in the main by the economic migrants and asylum seekers, who have already been rejected.

35.6 The Refugees Act must be repealed in its entirely as it is outdated and not taking into consideration the emerging international trends and exceptions provided for under International Law.

 International Experience and Study

Canada

37. The Immigration and Refugee Protection Act, 2001 (Canada) makes provision for the Immigration and Refugee Board, consisting of the Refugee Protection Division. Refugee Appeal Division, Immigration Division and Immigration Appeal Division or Special Immigration Appeals Commission[[15]](#footnote-15) (as in the United Kingdom).

38. The Canadian equivalent of the Refugee Status Determination Officers (“RSDOs”) is the Refugee Protection Division (“RPD”). This is a statutory body charged with the responsibility of taking decisions on asylum applications. In order to avoid backlogs, its members are appointed on full-time basis in terms of the Canadian Public Service Act. In other words, the RPD performs functions that are assigned to the RSDOs in terms of the Refugees Act. The RPD conducts proper hearings with asylum seekers being afforded the right to legal representation. This will obviate the long-winded and tedious appeal process under the current legislative framework, with appeals taking more than 13 years.

39. A party that is aggrieved by the decision of the RPD must appeal to the Refugee Appeal Division with majority members being appointed on full-time basis and 10% of whom must be members of the bar or attorneys for at least a period of five years.

40. Furthermore, the Canadian legislation clearly makes a distinction between economic immigrants and refugees. The same approach is adopted in the White Paper.

 United Kingdom

41. In the United Kingdom[[16]](#footnote-16) (“UK”), adjudicators (equivalent of RSDOs) must be members of the Bar or attorneys for a period of seven years. The strict qualifications requirements in Canada and UK are because asylum matters are by their nature complex and involve international refugee law.

 Further Policy framework: Proposals (Refugee Protection)

42. The White Paper proposes:

42.1 The new policy framework and legislative measures will include the establishment of structures such as in Canada. The decision-making powers will be quick and virtual hearing can be introduced at the ports of entry as in Netherlands.

 42.2 Consideration will be given and provided for in the new integrated legislation to appoint either serving judges or retired judges or Senior Counsel as chairpersons of the appeal bodies.

42.3 The new structures and highly qualified persons to serve on them will assist in fast-

tracking the asylum process. The unacceptable state of affairs in which asylum seekers who do not deserve to be granted refugees status sojourn in the Republic for a long time (up to 13 years) will be avoided. While they await the outcome of the appeal process, they continue to access rights such as, health, housing and others. Thus, competing for scarce resources with South African citizens, permanent residents and genuine refugees.

42.4 The unacceptable situation in which asylum seekers and refugees camped in the

 Streets in Brooklyn, Pretoria and Central Methodist Church in Cape town should

 not be allowed to happen. They caused nuisance, disturbing peace and stability

and making unrealistic demands. The police had to divert their resources to deal with them. The courts issued orders to remove them[[17]](#footnote-17). The ringleaders were ultimately deported to their country of origin, Democratic Republic of Congo (“DRC”). The said ringleaders waited for 13 years for the appeal outcome. Upon arrival in the DRC, they did not face any “*persecution*” as they had indicated in their asylum claim in South Africa. On the contrary, one of them (a former militia) announced that he had formed a political party to contest elections in the DRC.

 Different treatment of refugees

43. In instances of unlawful entry into the Republic, an additional requirement must be introduced that they must show good cause for their unlawful entry or presence.

44. The Minister should be empowered to declare an asylum claim made by an asylum seeker who has a connection to a first safe country invalid. In other words, the first safe country principle must be strictly applied. This will include a person who may apply to be recognized as a refugee in that State[[18]](#footnote-18).

45. This is an important principle which must be applied[[19]](#footnote-19). The Government is fully entitled to enact legislation in this regard as the case in Australia.

46. This policy framework would discourage asylum seekers who deliberately fail to apply for asylum at the safe country, which is a signatory to the 1951 Convention, the 1967 Protocol and the 1969 OAU Convention. Furthermore, it would deter economic migrants who come to South Africa disguising as asylum seekers. If the first safe country principle is applied, the difficulties encountered in the case of 22 Afghanistan nationals would be a thing of the past.

47. The objectives of the refugee policy framework are to ensure that genuine refugees are recognized. Legislative loopholes that allow persons without a legitimate asylum claim will be closed. Furthermore, legislation will provide for effective monitoring of asylum seekers awaiting the outcome their applications to avoid the high number of asylum seekers who just disappear without trace.

**Citizenship**

 Genesis of the 1949 Citizenship Act, Citizenship Act, 1995 and other laws

48. The past citizenship laws in South Africa are controversial.

49. The current citizenship legislation has its roots in the 1949 Citizenship Act[[20]](#footnote-20) (“1949 Act”) and other relevant successive laws governing citizenship. The 1949 Act and other relevant laws were not only discriminatory on the basis of race and sex but the “*natives*” (black people) were totally excluded from the South African citizenship regime.

50. The South African Citizenship Act provides for three main forms of citizenship, namely, citizenship by birth, citizenship by descent and citizenship by naturalization. This piece of legislation was rushed through Parliament after the 1994 democratic elections to provide for common citizenship to all. Given the urgency, public participation was minimal.

51. Attempts to close the gaps through amendments such as section 4 (3) of the Citizenship Act proved to be a futile exercise

Policy framework: Proposals (Citizenship)

52. The White Paper makes radical proposals regarding citizenship:

52.1 Section 4 (3) of the Citizenship Act requires to be reviewed, together with other sections, including those relating to citizenship by naturalization during the legislative process. Section 4 (3) of the South African Citizenship provides for citizenship by naturalization to persons born in South Africa to foreign parents who have attained the age of 18 years. This includes children whose parents are asylum seekers and refugees. Asylum seekers after exhausting all their remedies may have their asylum claims rejected and be deported to their country of origin. The parents who are refugees may have their refugee status terminated. In both instances, the parents will have a child (who has attained the age of 18 years) remaining a South African citizen. This would pave a way for the parent (deported or refugee status terminated) coming back to South Africa now to join a relative/child who would become a South African citizen.

52.2 The United States of America, Canada, Switzerland and Britain are developed countries with resources that far exceed those of South Africa, have developed strict immigration, citizenship and refugee laws in order to protect the rights of their citizens.

52.3 The Citizenship Act and Births and Deaths Registration Act must be repealed in their entirely and be included in the single legislation dealing with citizenship, immigration and refugee protection. This will remove contradictions and loopholes in the paths towards citizenship as is now the case with the three pieces of legislation.

52.4 The criteria for granting any form of citizenship must be strictly in accordance with the law.

52.5 A proper register should be kept for all persons granted citizenship by naturalization by the Minister. The register must be tabled every year in Parliament by the Minister.

52.6 New legislation must provide for proper criteria for granting citizenship by naturalization by the Minister. The current criteria contain elements borrowed from the 1949 Citizenship Act. This will avoid citizenship by naturalization being granted to controversial figures and fugitives from justice.

 **Immigration**

53. Before the Immigration Act 13 of 2002 was enacted, the applicable legislation was the Aliens Control Act[[21]](#footnote-21) and the Aliens Control Amendment Act[[22]](#footnote-22).

54. The Aliens Control Act provided for, *inter alia*, for appointment and functions of immigration officers, delegation of powers, exemptions, declaration of prohibited persons, passports and visas, establishment of the Immigrants Selection Board and permits for permanent residence.

**Genesis of exemptions**

55. Exemptions for various purposes have been in existence since 1913 and were regulated in terms of the Immigration Regulation Act[[23]](#footnote-23). This Act was amended several times and later replaced by the Admission of Persons to the Republic Act[[24]](#footnote-24). The power of exemption with widest effect was under the 1937 Aliens Act[[25]](#footnote-25) prior to the said legislation.

56. The purpose of the 1937 Aliens Act was enacted with the purpose of*, inter alia*, to regulate the admission, residential status of those citizens from Commonwealth countries, who previously had unrestricted right of entry into and residence in the country when the then citizens of the Union were still citizens of the Commonwealth.

57. The Aliens Act of 1937 also provided exemptions which were granted in terms of section 7bis and also provided for exclusion from or withdrawal of exemptions. These exclusions and withdrawals could be done individually or per category.

 **Continuation of the exemption regime under the Aliens Controls Act 96 of 1991**

58. Section 28 provided the continuation of the exemption regime.

 **Aliens Control Amendment Act 76 of 1995**

59. The powers of exemption by the Minister is provided for in section 15 of the Aliens Control Amendment Act with a slight amendment to the effect that the Minister must be satisfied that there are “*special circumstances* *which justify his or her decision*”.

60. Effectively, the then Minister of Home Affairs exercised the powers bestowed upon him or her in terms of section 5(3) and 4(a) of the Aliens Act, 1991.

**Continuation of the exemption regime under section 31 of the Immigration Act 13 of 2002**

61. Section 31 of the Immigration Act provides for the continuation of the exemption regime.

**Exemptions granted in terms of section 31 (2) (b) of the Immigration Act to Zimbabwean, Lesotho and Angolan nationals**

62. Since 2009, exemptions were granted to Zimbabwean, Lesotho and Angolan nationals by successive Ministers of Home Affairs. However, in September 2021, the current Minister decided not to extend (withdraw) the exemptions granted to Zimbabwean nationals anymore and extend the validity of the permits to 31 December 2023 in order to give an opportunity to the affected individuals to apply for one or other visas provided for in the Immigration Act.

63. The exemptions afforded the Zimbabwean, Lesotho and Angolan nationals who would otherwise not qualify, an opportunity to work and sojourn in the Republic.

64. The Minister’s decision not to extend the exemption regime is subject of a fierce litigation in **Helen Suzman Foundation and Another v Minister of Home Affairs** **and Others**[[26]](#footnote-26). Two other parties have since intervened in the proceedings with leave of the court[[27]](#footnote-27).

65. The Minister has applied for leave to appeal the negative judgments of the Full Court. The applications have been dismissed. The Minister has now applied for leave to appeal to Supreme Court of Appeal.

 **Immigration Act (“Act”)**

 **Illegal foreigners**

66. South Africa is today a great place to live in and many people in the world aspire to live, work or to be citizens of South Africa. In the result, many foreign nationals come to South Africa and stay in the country illegally.

67. No one can account for all undocumented migrants.

68. The DHA has no idea as to how many illegal immigrants are in South Africa. However, Immigration Services deports between 15 000 - 20 000 illegal foreigners every year. This number is on the increase.

69. The establishment of the Border Management Authority (“BMA”) should significantly reduce the risk of illegal foreigners entering the country illegally[[28]](#footnote-28).

70. The Immigration Act introduced fundamental changes (albeit controversial) and a host of visas such as, temporary visa, study visa, business visa, critical skills visa, corporate visa, spousal visa[[29]](#footnote-29), retired persons visa, relative visa, intra company visa and permanent residence.

 **Policy framework: Proposals (Immigration)**

71. The White Paper proposes:

71.1 Border control must be coupled with immigration. The United Kingdom Parliament introduced in November 2021, the Nationality and Borders Bill.

71.2 The Border Management Authority Act must be reviewed to align it with Immigration, Citizenship and Refugee Protection new policy framework.

**Immigration Board: Proposals**

71.3 The policy framework must provide for the establishment of the Advisory Board which comprise representatives of the Departments of Trade, Industry and Competition, Labour and Employment, Tourism, Education, South African Police Service, South African Revenue Service, Education, International Relations & Cooperation, Defence & Military Veterans and Director- General of the DHA[[30]](#footnote-30).

71.4 The Board must also comprise representatives of organized labour, including four individuals on the grounds of expertise in administration, regulatory matters or immigration law, control, adjudication and enforcement, appointed by the Minister.

71.5 Given the over-arching services rendered by the DHA that cuts across many departments, the composition of the Immigration Board as proposed is the most appropriate step. Today the country is facing challenging immigration issues which cannot be resolved by the DHA alone. Already groups in support and against migration are being formed. In other areas, violent clashes between citizens and foreign nationals are occurring on daily basis..

 **Critical Skills List (section 19 (4) of the Immigration Act): August 2022**

71.6 The current Minister has published the new Critical Skills List in August 2022. The Critical Skills List is important to attract foreign skills list for the South African economic development.

71.7 Policy and legislative interventions are required to tighten the procedures and strengthening the monitoring capacity by introducing integrated IT systems capable of flagging fraudulent activities in the issuing of visas, identity documents, marriage certificates and passports. This include giving wide statutory powers to the existing Anti- Corruption Unit within the DHA.

71.8 The new policy must provide that members of the Anti- Corruption should be seconded from the South African Police Service (“SAPS”). The rationale being that members of the SAPS enjoy wide statutory powers, including search and arrest without a warrant.

71.9 The current system in which members of the Anti- Corruption Unit are appointed by the DHA has serious limitation regarding the effective exercise of their statutory powers.

**Immigration officers and Inspectorate**

71.10 Immigration officers and Inspectorate play an important enforcement role. The DHA deports between 15 000 to 20 000 illegal foreigners every year. This is just a fraction of the illegal foreigners in the country.

71.11 New legislation must be introduced to strengthen the powers of immigration officers and Inspectorate and make continuing training compulsory. The majority of members of the Inspectorate must have legal qualifications and policing experience.

71.12 The recent publication of the National Labour Migration Policy introducing quotas for employment of foreign nationals will go a long way in defusing simmering tensions between South African citizens and foreign nationals.

 **Immigration Division and Immigration Appeal Division**

71.13 New policy framework and legislative intervention is required to establish the Immigration Division whose members are duly qualified to deal with granting of various visas. The current system is unworkable as staff members are overworked. Appeals/ review are dealt with by the DG and Minister. Given the responsibilities that the two have, it is impossible for them to deal with the appeals/reviews.

71.14 Through the establishment of the Immigration Division, the process of issuing visas would be fast-tracked. Speedy issuing of visas forms part of the backbone for economic development. Appeals/reviews of negative decisions of the Immigration Division would be heard and finalized by the Immigration Appeal Division.

71.15 Members new statutory bodies would be highly qualified and equipped to perform their statutory duties.

 **Immigration Courts**

71.16 When the Immigration Act was enacted, provision was made for the establishment of Immigration Courts. However, the Immigration Act was amended in 2004 to remove the establishment of such courts.

71.17 There is merit in considering establishing Immigration Courts. The current legislative arrangement is untenable and leads to long delays in finalizing immigration matters, including deportations. In many instances, illegal foreigners launch High Court proceedings on urgent basis to halt impending deportations. They later disappear into thin air and fail to pursue the review proceedings.

71.18 Some of these persons end up finding a way into the system either through corrupt activities or other means.

 **Minister’s statutory powers to grant exemptions (special permits)**

71.19 The powers of the Minister to grant exemptions such as given to the Zimbabwean and Lesotho nationals must be reviewed during the legislative process. The current economic realities to do not justify retention of the powers initiated during the colonial and apartheid era.

**Exemptions and economic migrants**

72. Given the challenges of economic migrants, the exemptions should be retained and the Minister must exercise such powers in exceptional cases.

73. AGRI SA in its comments on the White Paper[[31]](#footnote-31) agrees with the policy options but proposes that the special exemptions should be granted to the agricultural sector which has for years also relied on unskilled foreign labour. The DHA is ready and willing to enter into public-private partnership with organizations such AGRI SA to tackle the issue of economic migrants by agreeing to quotas as proposed in the Labour Migration Policy submitted by the Department of Labour and Employment and the DHA to NEDLAC. The provision for special exemptions will cater for economic migrants and reduce the number of economic migrants who come posing as asylum seekers and refugees. Furthermore, it will address the burning issue of employers resorting to hiring illegal migrants.

**Informal Shops (“Spaza Shops”)**

 74. The Spaza Shops owned by foreign nationals requires effective regulation. In a workshop held in October 2023 attended by Houses of Traditional Leaders, District and Metro Mayors, South African Local Government Association (“SALGA”) and relevant government departments, firm resolutions were adopted to conduct an audit of all Spaza Shops in the country by municipalities. This is with a view to have all Spaza Shops registered and establish the immigration status of the owners. Furthermore, municipalities will introduce by-laws to regulate the location and other requirements such as, health and safety. Traditional leaders will play an important role in respect of informal shops located in communal land.

 **Single legislation**

75. Single legislation will be introduced dealing with citizenship, immigration and refugee protection.

**DR PA MOTSOALEDI, MP**

**MINISTER OF HOME AFFAIRS**

**DATE: 17 APRIL 2024**

1. Act 88 of 1995. [↑](#footnote-ref-1)
2. Act 13 of 2002. [↑](#footnote-ref-2)
3. Act 130 of 1998. [↑](#footnote-ref-3)
4. Act 44 of 1949. [↑](#footnote-ref-4)
5. Aliens Control Act 96 of 1991. [↑](#footnote-ref-5)
6. Refugees Act 130 of 1998. [↑](#footnote-ref-6)
7. Ratified on 12 January 1996. [↑](#footnote-ref-7)
8. Countries that made reservations, include but not limited to Angola, Australia, Botswana, Ethiopia

 France, Malawi, Namibia, Mozambique, Netherlands, Somalia, Sweden, Uganda, Zambia,

 Zimbabwe, United Kingdom and Ireland, [↑](#footnote-ref-8)
9. Countries that made reservations in respect of the 1967 Protocol, include but not limited to Angola,

 Botswana, Congo, eSwatini, China, Malawi, Netherlands, Portugal, United States of America and

 United Kingdom and Ireland. [↑](#footnote-ref-9)
10. ICJ submission on the White Paper on Citizenship, Immigration and Refugees Protection: Towards a

 Complete overhaul of the Migration System in South Africa, 31 January 2024. [↑](#footnote-ref-10)
11. **Ruta,** para 58. [↑](#footnote-ref-11)
12. Comments by Thabo Mbeki Foundation and International Commission of Jurists, 31 January 2024. [↑](#footnote-ref-12)
13. Section 36 of the Constitution. [↑](#footnote-ref-13)
14. See section 27 (2) of the Constitution. [↑](#footnote-ref-14)
15. Nationality and Borders Bill, 2021 (United Kingdom). [↑](#footnote-ref-15)
16. Nationality, Immigration and Asylum Act, 2002 (United Kingdom). [↑](#footnote-ref-16)
17. See **City of Cape Town v Balus and Others** [2020] ZAWCHC 22, paras 18-23; Parliamentary Monitoring

Group Verification by DHA: The City of Cape Town v JP Balus, Pay Sukami, Sylvia Nahmana amd Protestors

(Case no: 21616/19). [↑](#footnote-ref-17)
18. See section 21(1B) of the Refugees Act, read with Regulation 8 (3). [↑](#footnote-ref-18)
19. See **Lembore and Others v Minister of Home Affairs and Others** Case no 2023-097427,

097272,097111, 097076, 100081 and 100526, High Court, Gauteng Division, Johannesburg. The Full

Court reaffirmed Ashebo and ruled that the mere expression of intention to apply for asylum does not entitle any person to be released from detention where such person is detained for contravening the Immigration Act (sections (9 (1) and 49 (1). [↑](#footnote-ref-19)
20. Act 44 of 1949. [↑](#footnote-ref-20)
21. Act 95 of 1991. [↑](#footnote-ref-21)
22. Act 76 of 1995. [↑](#footnote-ref-22)
23. Act 22 of 1913. [↑](#footnote-ref-23)
24. Act 1 of 1972. [↑](#footnote-ref-24)
25. Act 59 of 1937. [↑](#footnote-ref-25)
26. Case number.: 32323/22, Gauteng Division, Pretoria; See also: Marvin Charles “Helen Suzman

Foundation in court bid to challenge decision to terminate Zimbabwe Exemption Permit”, News24, June

16, 2022; “Government challenged in court over termination of Zim Special Permits”, IOL, June 21, 2022. [↑](#footnote-ref-26)
27. Consortium for Refugees and Migrants in South Africa (“CORMSA”) and All Trucks Drivers Forum and

Allied South Africa. [↑](#footnote-ref-27)
28. The BMA was established in terms of the Border Management Authority Act 2 0f 2020. [↑](#footnote-ref-28)
29. This is the most abused visa of them all. Bogus marriages are entered into and the new trend is that

Life Partnership Agreements are concluded. [↑](#footnote-ref-29)
30. Paragraph 9.1.10 of the Resolution of the 55th ANC National Conference, held on 16-20 December

2022 and 5 January 2023. [↑](#footnote-ref-30)
31. AGRI SA comments on the White Paper, 31 January 2024 [↑](#footnote-ref-31)