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LETTERS

Have your say in the next issue of *Crossings* by writing to the Editor, *Crossings*, at the above address.

WOMEN MIGRANTS PLAY POSITIVE ROLE

Research into the experience of women migrants has debunked a number of myths about the stereotypical migrant. BELINDA DODSON found women migrants are generally older, better educated and responsible, law-abiding citizens who are driven to migrate for trading and retail activities that benefit South Africa and the source country.

THERE are three dominant stereotypes of migration to South Africa from other Southern African countries. The first is the image of the long-standing system of migrant mine labour from countries like Lesotho and Mozambique. The second is of an uncontrolled invasion of unauthorized immigrants seeking a better life in post-apartheid South Africa. A third stereotype is that all migrants are young males.

New research by the Southern African Migration Project (SAMP) calls the latter two stereotypes into question by examining the experiences of women migrants from five neighbouring states -- Lesotho, Mozambique, Zimbabwe, Botswana and Namibia.

The research shows that the migration experiences of women differ in significant ways from that of men. This has important policy implications and shows up a number of shortcomings in current policy approaches to the migration issue.

The SAMP research leads to two inescapable conclusions. Firstly, the migration experience in Southern Africa is deeply and profoundly gendered. To a long-established tradition of male labour migration is being added a growing stream of female migrants who are coming to South Africa for a number of different reasons, social and economic. Secondly, the different motives and patterns of male and female migration arise out of fundamental social and economic forces in source and recipient countries. Any sound migration policy therefore has to go hand-in-hand with regional socio-economic development.

Although women have a lower incidence of personal migration experience to South Africa compared to men, more than a third have been to South Africa (36% compared to 48% of men). Women migrants tend to be married, older and more educated than their male counterparts.

The "typical" female migrant is married, between the ages of 25 and 44, and has completed at least some years of high school -- far removed from the common stereotype of the unskilled, illiterate, irresponsible, young, single, male migrant.

Men and women migrate to South Africa for very different reasons. Men go primarily to work, whereas women are driven by a wide range of social and personal factors in addition to economic incentives. Women go to South Africa to buy food, medicine, clothing and school supplies; to sell handicrafts and other wares; and to visit friends and relations working there. Very few female respondents go to South Africa to work or look for work (3% compared to 24% of males).

Women make more frequent and shorter visits than men do -- days or weeks rather than months or years. They are also more likely than men to migrate legally and to return home within the prescribed period. Gender differences in migration behaviour thus have clear gender-specific policy implications.

Also significant for policy formulation is the nature of the decision-making process behind women's migration. Although women's migration cannot be seen merely as an adjunct to male migration, women's migration is still commonly tied to that of men, with many women travelling to South Africa for the express purpose of visiting male family members. Policy should thus be formulated in terms of partners, families and households rather than individuals.

Gender differences extend into the social and economic behaviour of migrants, reflecting the different motivations and patterns of male and female migration. Men are more likely to have established personal relationships and social networks in South Africa. Women's migration experience is shaped more by the temporary and contingent social and economic interactions involved in trading and retail activity.

Few women migrants express any desire to acquire South African residence or citizenship, and even fewer wish to retire or be buried in South Africa. For both genders, but especially for women, there is thus little basis for the perception of hordes of would-be immigrants threatening to engulf the country. People in neighbouring countries are realistic rather than idealistic about life in South Africa and most, especially women, would prefer to stay where they are.

Female migration is a response to difficult circumstances in their home countries, but it is a temporary expedient rather than a permanent relocation. Expanded job opportunities in the places they live in, social and economic upliftment and improved availability of goods and services would remove much of the motivation for female and male migration, serving to reunite divided households and allow men and women from Lesotho, Mozambique and Zimbabwe to remain at home where they wish to be.

A number of gender-sensitive guidelines for policy on migration are suggested by the research findings. Firstly, female migrants are for the most part law-abiding, responsible, enterprising and resourceful, engaging in cross-border movement as a mechanism for their own and their families' betterment. Current migration policy, together with a host of entrenched social norms and practices, discriminates against women in all sorts of ways, limiting their life choices and restricting their physical and socio-economic mobility. Migration policy should be formulated not in terms of atomistic, genderless "people" but in terms of men and women with specific biological, legal and social relationships.

Secondly, one category of female migrant that should be actively encouraged is those women who come to South Africa for the purposes of trading and shopping. They certainly make a positive contribution to the South African economy, and while there are complaints that foreign informal-sector traders undercut their South African counterparts, this competition must surely be part of the movement towards freer trade in the Southern Africa Development Community region.

Thirdly, in the formulation and drafting of policy and legislation, care must be taken to ensure that adopting gender-neutral language does not serve unintentionally to discriminate against women. Gender-sensitive should not imply gender-blind.

Finally, the pattern of "to-and-fro" migration practised by Southern African women could facilitate positive socio-economic change in both places. Far from being a threat, many of these activities benefit the South African economy. Women's migration also provides benefits to their families and communities at home. Allowing women freer temporary access to South Africa would encourage the exchange of goods, services and ideas that constitute the very engine of development. There is little to suggest that a more open migration policy would result in an unmanageable influx of women (or men) into the country. Indeed female migration to South Africa could be a mechanism for reducing inequalities in the region, empowering women to become agents of development in their home countries and in South Africa.

*Dr Belinda Dodson, formerly of the University of Cape Town,
is a research associate of the Southern African Migration Project.*

THE BUSY LIFE OF A TRADER

MARY Moyo (not her real name) has a stall selling stone and wood carvings. She travels regularly to and from Zimbabwe and South Africa. Visa permitting she spends a month in both countries. She brings stone carvings and other curios and takes back a range of goods. The last time she went home she took "ironing boards, electric stoves, wines, and groceries". Mary canvasses customers for orders, "white people in Zimbabwe give me a list of things to bring."

With her extra profits she buys goods like ironing boards and stoves for which there is a ready market in Zimbabwe.

Mary started coming to South Africa in 1984 when she brought doilies and took back wine for white Zimbabweans. She had made her contacts with the white Zimbabwean community when she worked as a domestic worker. Although she started out by trading in doilies, she has since abandoned knitting and started a curio business two years ago.

She says that selling curios in Harare is not profitable as "there are not enough tourists in Zimbabwe" and because the cross-border trade "is part of my business".

Mary also has other interests. Some years ago she established a small poultry business with 100 to 150 chickens at a time. She is working on building the chicken farm so that she does not have to travel to South Africa as often as she presently does.

The curio business fluctuates with the tourist season but her earnings are about R1 000 per week. Usually she is able to take out about R3 000 worth of goods every time she goes back to Harare. Customs duties amount to about R300-R400 depending on the goods brought into South Africa and taken into Zimbabwe. Her living costs in South Africa, rent (she shares accommodation with friends), food and so on, amount to about R1 500 for three weeks. For someone with only a Standard 6 education, Mary is acutely aware of the fluctuations in the rand/Zim dollar exchange rate as it affects her business.

Locating her trading activities in Cape Town adds extra costs in travel and time, but is preferable to trading in Durban which was not sufficiently profitable, and Johannesburg which is "too noisy". She works seven days a week; weekends at Green Point and weekdays in Claremont.

The biggest problem faced by Mary, and many other women traders like her, is getting an appropriate visa. Sometimes she is only issued with a visa which is valid for a few days or a couple of weeks, making it difficult for viable cross-border trade.

But most irksome is that traders are issued with visitors' visas which theoretically do not allow them to trade.

As Mary said: "What I want to ask, is they give us these visas and then they make us pay duties on these things when we bring them in. But when we are here they say we cannot sell them or trade. Why do they let us bring them and pay duty? If they want us to come on holiday they should just let us bring our handbags and that's it."

Mary is aged between 35 and 40. She has seven children, six of whom are at school in Harare and who are cared for by her husband who is paralyzed and stays at home and her baby travels with her. She also contributes to the support of two sisters who are in Zimbabwe.

SILENT EPIDEMIC STRIKES FORMER MINERS

Research has shown dramatic levels of gold mining-related lung disease in the rural areas of the region and highlights the significant social costs borne by the traditional labour-supplying communities. ANNA TRAPIDO asks: What is the extent of the problem? Who is responsible? What can be done about it? She suggests that the cost of compensation should be shifted to the industry itself, which may prompt action to curb dust levels.

THE reef formations of the South African gold mines are characterized by exceptionally high silica content. Silica makes up 60-80% of virgin rock and approximately 30% is free silica -- with dust particles that are small enough to penetrate the alveolar region of the lungs and pose a health risk. The respiratory diseases associated with occupational exposure to silica in gold mining include simple chronic bronchitis, emphysema, chronic airways obstruction, tuberculosis and silicosis.

There can be a long latency period between exposure to risk factors on the mines and detectable occupational lung disease in mineworkers. As a result, former mineworkers can manifest occupational lung disease in the areas to which they return long after leaving mine employment.

Recent research is beginning to reveal the sheer scale and magnitude of the burden of mine-related occupational lung disease and physical disability in the rural areas. The studies all show the considerable, long-term medical, social and economic consequences of risks to health in the workplace.

Two recent surveys of the prevalence of occupational lung disease amongst a random sample of former gold mineworkers were conducted in the Kweneng district of Botswana and the Libode magisterial district, Eastern Cape Province. In Kweneng the overall prevalence of pneumoconiosis was 26 to 31%. Twenty six percent of the miners had a reported history of tuberculosis. In Libode, the prevalence of pneumoconiosis was 22 to 37%. Thirty three percent of the Libode miners had a reported history of tuberculosis.

Both studies were able to demonstrate that there is a statistically significant association between total length of service on the gold mines and pneumoconiosis. In addition, studies of the quality of life of mineworkers who have been permanently disabled by mine accidents describe a systematic transfer of the consequences of occupational injury to the communities from which the migrant workers originate.

If the results of the Botswana and Eastern Cape studies are replicated in other mine-sending areas (as one might fully expect them to be) there is a massive problem that cannot be avoided. The recent White Paper on Minerals and Mining Policy clearly recognizes that the burden of occupational health amongst former miners is a significant practical and developmental challenge.

Compensation for occupational lung disease in mineworkers is provided in terms of the South African Occupational Diseases in Mines and Works Act, (ODMWA) number 78 of 1973 (as amended by act number 205, 1993). The ODMWA is a "no fault" compensation system which makes provision for compensation for the following diseases: pneumoconiosis, pneumoconiosis with tuberculosis, permanent obstruction of airways, progressive systemic sclerosis and any other permanent cardio-respiratory organs attributable to risk work.

RISK WORK

The ODMWA applies to all people who perform or who have performed risk work at a controlled mine or works in South Africa. There are over 450 controlled mines and works in South Africa (i.e. the majority of companies in the mining industry). Provision is made under the ODMWA for the level of risk in each controlled mine and works to be assessed by means of periodic dust sampling. The concentration of specific airborne particles is assessed and, on the basis of this assessment, a levy is raised from each employer. The levy enables the ODMWA Compensation Commissioner to pay compensation in respect of every person who performs risk work at or in connection with that mine or works and who is found to have a compensable disease.

All current and ex-miners are covered by the ODMWA regardless of citizenship. Not all disease is sufficiently severe to merit compensation. The ODMWA defines disability due to compensable disease in various ways. Compensation under ODMWA is wage based with payments equivalent to either 18 months or three years salary, depending on the severity of the disability.

The identification and compensation of occupational disease was racially-determined under apartheid. South Africa has had mining-related compensation legislation and a state run medical facility for occupational lung disease since 1916. However, access to this facility was reserved for white workers until the 1993 ODMWA. Excluded from the state's occupational disease surveillance systems at the Medical Bureau for Occupational Diseases (MBOD), black miners had to rely on mine doctors paid by mining companies for their occupational health surveillance. White ex-miners had lifelong access to the MBOD while their black counterparts had to rely on district surgeons to assess their health status. Compensation payments were also based on race and favoured whites over blacks.

There was, and continues to be, a low level of awareness of and compliance with the provisions of the ODMWA by rural health workers. The Libode study referred to above found that 26% are eligible for compensation for pneumoconiosis. Of those cases certified as eligible for compensation, 62% had no previous history of compensation, 35% had been previously compensated but their disease had progressed and they were entitled to additional compensation, and only 2% had been paid in full.

The average payment for the less severe cases was R22,888, while more severe cases averaged R45,508. The researchers estimate that there is a liability of R6,775 million in unpaid compensation owing to living ex-mineworkers who are South African citizens. This liability rises to R9,678 million when one includes compensation owing to living ex-miners in neighbouring states.

In addition to the cost of unpaid compensation, there are the costs of occupational health care for current and former gold miners. Costs of occupational lung disease health care internalized by the mining industry include contributions to compensation fund, costs of medical surveillance and treatment for in-service workers, and costs relating to loss of output for men with occupational disease. The estimated annual cost is R344 million, or about 4-5% of the total wage bill.

Externalized costs of occupational lung disease fall to state health services and individual ex-mineworkers, their families and their communities. Externalized costs of occupational lung disease for former mineworkers resident in South Africa alone are estimated at R186 million per annum. The total annual cost of gold mining-related occupational lung disease is therefore an estimated R530 million. This represents fully 0.1% of South Africa's 1996 GDP and 2.6% of gold mining's contribution to GDP. There has as yet been no research into the externalized costs of occupational lung disease being borne by countries outside South Africa.

Bobby Godsell, Chief Executive of AngloGold, has stated that "South Africa may have to chose between requiring the industry to compensate for past injustices and protecting present jobs" implying that these positions are tradeable.

Setting compensation for occupational disease against preservation of jobs fails to recognize that the situation is not only a past problem but a current reality. The logical conclusion of approaching unpaid compensation and externalized costs in this way is that the burden of occupational disease amongst ex-workers and labour-sending communities should be written off as bad debt or treated as obsolete capital. If the gold mining industry does not accept liability for unpaid compensation and externalized costs who will?

UNDIAGNOSED

The available research shows that there is a high prevalence of previously undiagnosed and uncompensated occupational lung disease in former mineworkers. Their rights under the ODMWA are hidden because many are unaware of their entitlement and health service providers have not recognized the realities of migrancy and disease latency.

The costs of externalizing the burden of occupational lung disease are extremely damaging for individuals, households and communities in labour-sending areas. In a context of low levels of education and high levels of dependency on physical labour as a source of employment, even a minor degree of disability can be a major impediment to future employment.

Occupational lung disease can destroy a livelihood and result in a household becoming permanently poorer. It is inefficient for the country as a whole to take on the costs of mining-related occupational lung disease. Placing the cost of disease on the industry would almost certainly result in measures being taken to reduce dust levels with a consequent reduction in disease incidence and therefore a reduction in the costs to society of ex-miners.

Furthermore, redressing the unpaid compensation liability would result in a distribution of income, by legal entitlement, to one of the poorest sectors of the population, which would reduce societal inequalities.

Anna Trapido is with the Epidemiology Research Unit in Johannesburg.

MIGRANT LABOUR MUST END, SAYS WHITE PAPER

Jonathan Crush and Wilmot James

DEBATE on the White Paper on Minerals and Mining Policy has focused on who owns South Africa's mineral rights, to the exclusion of other policy issues. Chapter 3, for example, addresses various critical "people issues" including the thorny question of foreign migrant labour on the mines. Unfortunately, the White Paper's reflections on the future of labour migration remain ambiguous.

The government, according to the White Paper, is to phase out migrant labour as well as allow non-citizens access to the mine labour market "on an acceptable basis". The system will also apparently be reformed to protect the interests of migrant mineworkers and to manage the effects on neighbouring countries. Here the White Paper fails to take into account the recommendations of the Green Paper on International Migration, which has a great deal to say about these issues.

How the government can abolish migrant labour without wrecking the wealth-producing capacity of the mines has always been unclear. Incremental change seems to be the only way forward. In 1996, permanent residence was offered to all foreign miners who had worked in South Africa for at least 10 years. More than 100,000 miners (and their families) could acquire permanent residence, a significant step in the phasing out of migrant labour.

Knowledge of the terms and conditions of this offer was very prevalent among miners from neighbouring states. However, they did not embrace the offer with any great enthusiasm. In most of the so-called supplier states -- such as Mozambique and Lesotho -- less than 50% of eligible miners applied. Why, if the migrant labour system is so iniquitous, did fewer than half of the miners accept the chance to step out of it?

Two recent reports by the Southern African Migration Project (SAMP) -- based on extensive interviews with miners in Mozambique and Lesotho -- help answer the question. The minority who applied cited four main reasons for doing so: they could receive all their wages in South Africa; they could seek alternative work if they lost their jobs; they would be able to avoid harassment by the South African police; and they could purchase consumer goods on credit. Fewer than 10% wanted to move permanently and even fewer wanted to bring their families with them.

Foreign miners hold overwhelmingly negative views of South Africa and very positive opinions of their home countries. Most Mozambicans could not bring themselves to mention any advantage -- other than a job -- of living in South Africa. What may surprise many South Africans, especially those who assume that all Mozambicans and Basotho cannot wait to move here, is that most simply do not care for the lifestyle that their comparatively rich neighbour offers.

Miners from Mozambique and Lesotho are, relatively speaking, an economic elite in their home districts. Most own land and have invested resources in livestock and agriculture. These provide powerful ties to home. Their affection for home is in no way diminished by the fact that they are migrants. What they want is to dip in and out of the South African labour market, which is what many have been doing successfully for decades.

Ironically, the migrant labour system carries the seeds of its own perpetuation. A voluntary effort to phase out foreign labour on the mines was a resounding failure. The dilemma facing the South African government is as acute now as it was in 1994: resort to less voluntary methods to get rid of the migrant labour system or leave it alone, in which case the volume of foreign labour on the mines will remain sizeable and, in all likelihood, increase.

The dilemma is as acute as ever and the White Paper provides little guidance on how to resolve it. The Green Paper on International Migration recommends maximum flexibility of choice, consistent with the Constitution and Bill of Rights, enabling migrant workers to get the full protection of International Labour Organization conventions and South African labour law. It specifically recommends that the government renegotiate the bilateral agreements that govern migration to restore dignity to those who work the mines.

In fact, to end migrant labour arbitrarily would ruin South Africa's neighbours and bring about unacceptable dislocation at the mines. To leave things as they are is simply wrong. What is required is a slow but deliberate phasing out of labour migration, by a strategic tinkering with the system, anticipating all of the consequences. Somebody ought to give some thought to what that strategy

ought to be.

Dr Jonathan Crush and Dr Wilmot James are co-directors of the Southern African Migration Project, an Idasa/Queen's University partnership.

ASSISTED RETURNEES GOING HOME TO STAY

Since July last year the Refugee Research Programme (RRP) at Wits University has assisted more than 500 refugees in returning to Mozambique.

A Wits University research project has been instrumental in helping hundreds of Mozambicans return to their homeland. ACHIM RIZMANN reports.

"It is better to work for yourselves than for a bag of mealiemeal." This statement sums up the opinion of many refugees who have chosen to return to Mozambique with the "Assisted Voluntary Return Pilot Project" of the Refugee Research Programme (RRP) and the Comité Eçumenico para a Desenvolvimento Social (CEDES-RRR).

More than 500 people have returned to Mozambique to farm again for themselves, something that was not possible in the densely populated former homeland areas of South Africa. They are a few of the 220,000-250,000 refugees that remained on South African soil five years after the end of the civil war in Mozambique, despite "the largest reparation exercise ever undertaken in Africa" by the United Nations High Commissioner for Refugees (UNHCR). After the UNHCR operation and the signing of the Cessation Clause for refugee status in December 1996 these people are no longer officially recognized as refugees and are therefore particularly vulnerable, subject to exploitation in the labour market and other areas.

They return with hope but also anxiety to relatives and friends in a country they were forced to leave six to 15 years ago due to civil war. They hope to revive life in Mapulanguene, Mahele, Panjane and all the other villages in the areas bordering the Kruger Park.

RRP was approached by the refugees in 1996 while conducting research into the SADC amnesty in the Bushbuckridge area to assist them in transporting their household back to Mozambique.

A subsequent pilot study in three refugee settlements showed that approximately 25% wanted to repatriate. RRP lobbied for small-scale operations over a longer period of time involving both Mozambicans and South Africans, including former refugees, in transport and facilitation.

This was based on the low turnout of the UNHCR operation, where it became clear that, "yes I want to go back" in a survey does not necessarily mean "now". The final decision is based on complex socio-economic survival strategies.

The pilot project proposal was supported by the Association of West European Parliamentarians for Africa (AWEPA), who lobbied international funders. The Department of Home Affairs, Mpumalanga and Northern Province; the Mozambican Consulate, and the Nucleo de Apoio aos Refugiados (NAR) in Maputo, assisted the process. On the Mozambican side, CEDES/RRR supplied the reintegration support, consisting of seeds, tools and housing materials.

In the three projects carried out so far in July 1997, January 1998 and August 1998, RRP helped 574 refugees to return to Mozambique.

Meanwhile RRP has monitored the reintegration of the returnees from the first two convoys to assess the success of an "assisted return" project. All returnees have settled in Mozambique and 90% said the return improved their spiritual and material well being. They obtained either their original land or preferred land nearby without any difficulties.

Of the 10% whose lives have not improved, some have returned to areas where the land is used for commercial agriculture by mainly South African farmers, making subsistence agriculture almost impossible. With no employment opportunities, many are thinking of returning to South Africa.

Others want to stay, but complain about the lack of schools and water in the areas they have returned to, a situation, which is being addressed by the Mozambican authorities and NGOs.

Assisted return is a viable possibility for many refugees who see Mozambique as the better option for their future. There will still be many more wanting to return as living conditions in Mozambique improve and feedback is given from those who have already settled in their home country.

STRATEGIES DEVELOPED AT BOTSWANA TRAINING INSTITUTE

THE International Training Programme in Population and Sustainable Development, based at the University of Botswana, was established in 1995 to help formulate and implement national development strategies based on interrelationships among the population, national resources, the environment and sustainable development.

First located at the Institute of Social Studies (ISS) in The Hague, the programme was brought to Botswana because of the country's widely acknowledged political stability, economic viability and policies of transparency and accountability - compared with other countries in sub-Saharan Africa.

The programme's immediate objectives include creating a team trained in the integration of population and sustainable development. It will also undertake appropriate and relevant research activities aimed at supporting training, as well as publish and disseminate outstanding teaching materials and research findings. The programme also aims to stimulate, encourage and support the establishment and strengthening of population and development training activities and units within the university and academic and training institutions elsewhere.

Mid-career government personnel and Non-Governmental Organization officers from developing countries, with diverse professional backgrounds in population and sustainable development, are also being trained by the programme.

"Our students are chosen through their national governments who nominate them for United Nations fellowships," says programme co-ordinator Professor John Oucho.

Previously director of the Population Studies and Research Institute of the University of Nairobi, where he was also professor of demography and population studies, Oucho finds his position with the programme challenging. However, he is concerned that "our students, given their backgrounds and work experiences, can hardly cope with rigorous academic pursuits".

INTERNATIONAL CENTRES

The programme has five international centres -- in Cairo (Egypt), Rabat (Morocco), Trivandrum (India), Santiago (Peru) and Gaborone (Botswana).

It has considerable scope for training and research and for catalyzing population and sustainable development activities in Southern Africa. For example, the services of the programme have been

enlisted for the short-term training of Southern African researchers, planners and programme implementers in the field of population, food and the environment.

"The future of the programme is bright," says Oucho.

ARCHAIC LABOUR AGREEMENTS NEED ATTENTION

The bilateral labour treaties between South Africa and its neighbouring states benefit the countries but not the migrant workers. CLARENCE TSHITEREKE reports.

THE employment contracts of citizens from South Africa's neighbouring states to work on the mines are governed by inter-governmental agreements, also known as the Bilateral Labour Treaties. Currently, such agreements exist between South Africa and Botswana (1973), Lesotho (1973), Malawi (1967), Mozambique (1964) and Swaziland (1975). These bilateral agreements are the subject of heated discussion between players within the mining industry and in terms of South African immigration policy in general. Forms a key part in the debate about South Africa's two gates system of admitting people to the country.

The Aliens Control Act controls the entry of skilled people in general. The bilaterals are specifically designed to enable citizens from the neighbouring states to work as contract labourers on the mines. Under the Aliens Control Act, a foreigner who has a skill needed by South Africa may apply for and obtain a temporary work permit or permanent residence. If granted permanent residence, he or she may apply after five years for South African citizenship. Such persons are also entitled to bring members of their family into the republic and have access to schools, medical care and other social and welfare services.

The *raison d'etre* of the original agreements was to curb undesirable permanent immigration of unskilled black people from the neighbouring countries and elsewhere. Those admitted under the bilateral labour treaties are employed on a contract basis and have to return home when their contracts expire. The contracts are renewable on a 12- or 18-month basis. As a consequence of the temporary nature of their contracts, they can never acquire permanent residence, irrespective of the total length of time they have worked in South Africa.

Although the Chamber of Mines is adamant that their workers are now permanent employees, the bilaterals prevent miners from accessing the benefits and freedoms of such states.

Contract mineworkers are also not allowed to bring their families with them. A particularly controversial aspect of the bilateral agreements is the stipulation that 30-60% of their salaries be deferred to their home countries on a monthly basis. Attempts to terminate this system have failed dismally, partly because the system is reinforced by the bilaterals and as such can be repealed only by the governments concerned and not the unions. Complicating the issue further is the reluctance of the sending countries to repeal or terminate these agreements. This has prevented a convincing argument in favour of repealing the agreements to the South African government.

Reluctance on the part of the sending countries is understandable on the grounds that the deferred pay of mineworkers in South Africa represents a significant portion of their much-needed foreign exchange earnings and, unlike loans from the IMF and the World Bank, does not have to be paid back. Since the establishment of the National Union of Mineworkers (NUM) in 1982, some of the provisions in the bilaterals are no longer observed. They have to a large extent been superseded by union agreements with the mining industry, including the terms of employment of migrant workers. The bilaterals still regard them as temporary employees.

Although the Chamber of Mines is adamant that their workers are now permanent employees, the bilaterals prevent miners from accessing the benefits and freedoms of such status. The bilaterals reinforce the contract migrant labour system to the mines, which is mutually advantageous to the sending countries and South Africa. The sending states benefit from remittances and South Africa from much-needed additions to its labour force. Secondly, the sending states export a barren pool of their population (with enormous human potential) that would otherwise remain unemployed. Finally, South Africa benefits from having at its disposal labour reserve for which it is only responsible for the duration of their contracts. Instead of bargaining to repeal the bilaterals, most governments have given South African mining recruiting agencies a stamp of approval to recruit as many of their nationals as possible. The logic is simple; the more people contracted from a particular country, the higher the remittance package.

The Labour Market Commission, the Draft Green Paper on International Migration, the South African Department of Labour and the NUM have called for the bilaterals to be scrapped. They argue that: the agreements are obsolete; they do not conform in many respects to International Labour Office (ILO) norms and standards; they are not applied uniformly; they are discriminatory on the basis of colour and skill and that the system of compulsory deferred pay prevents miners from enjoying maximum benefits of their toil and that this undermines basic human rights; they give

special privileges to certain South African employers which should be enjoyed by all.

On the whole, then, the provisions of the bilateral agreements are inconsistent with the values enshrined in South Africa's Constitution and Bill of Rights, and either need to be scrapped or revised in a substantial manner. Let the negotiations begin.

Clarence Tshikireke is programme co-ordinator with SAMP.

COURTS TAKE A STAND AGAINST HOME AFFAIRS

JONATHAN KLAAREN explains how the judicial system has the potential to safeguard the rights of foreign nationals in South Africa who struggle for legitimacy in their adopted country.

COURTS are notoriously bad at social reform. Legislatures and executive departments can set up the proper institutions to get the job done, but courts cannot really design policy responses to fast-moving and complex issues.

What courts can do, however, is point out when the political and legislative process has stalled or gone wrong. Even the most ardent South African supporters of majoritarian democracy would allow the judiciary the power to safeguard individual rights. In addition, by safeguarding individual rights, the courts have an important role to play in signaling a warning, so that the political process can be alerted to its failings.

President Arthur Chaskalson of the Constitutional Court said in *S v Makwanyane*: "The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.

"Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and weakest among us that all of us can be secure that our own rights will be protected."

Migration policy in South Africa could be a textbook example of this role for the courts. The courts are faced with a political process that is, at the least, stalled and that is arguably failing to protect human rights and promote the growth of the South African economy. While their response is not comprehensive or systematic (which is the job of the legislature), individual courts are responding.

Indeed, the Department of Home Affairs has suffered a number of high-profile defeats in South African courts over the past six months.

On 20 May 1998, in *Handmaker and Another v Minister of Home Affairs*, civil society prevailed. Here the department refused to extend the work permits of two non-South Africans who were working in the area of refugee law and policy and who were training a South African to take over that task. However, the court found that it would not be fair to expel the two workers while an application for review to the Minister of Home Affairs was pending. The fact that a foreigner was able to rely on the Bill of Rights, including the right of administrative justice, was specifically noted by the judge.

The following day it was the turn of the media. In *Kasiyamhuru v Minister of Home Affairs*, the department attempted to revoke the equivalent of permanent residence for the wife of a journalist who had been outspoken in his criticism of the government. The attempt failed largely because the department was unable to produce clear documentation of the delegated administrative authority of the official who took the decision. The journalist's wife was able to stay in the country.

The most recent case was one decided in Durban on 16 October 1998 in a matter brought by the Legal Resources Centre. In *Tetty v Minister of Home Affairs*, a Ghanaian citizen entered the country illegally and obtained papers fraudulently. However, he soon turned himself in to the Department of Home Affairs. Officials there promised to regularize his status if he assisted them in their investigations into those who provided him with illegal papers. Three years after he had given evidence on its behalf, the department attempted to remove Tetty. In part, the department argued that "an alien who applied for residence within the republic has no rights, interests, or legitimate expectations that are affected by a decision to refuse to issue a permit".

The court rejected this argument and found the departmental promise gave rise to a protected legitimate expectation. As the court stated, "there is nothing in the Constitution to indicate that an alien is not entitled to procedurally fair administrative action". The court ordered that the department could not deport Tetty pending the outcome of further proceedings. The case is significant for overturning the line of reasoning that an alien had no constitutional rights worthy of protection.

One of the interesting aspects of these high-profile defeats for the department is that these cases are not those of refugees. In that policy area, the department has engaged legislatively with the issues. This year, after a white paper process, Home Affairs passed the Refugees Act. Even here there have still been some important recent court actions brought by refugee rights advocates. For instance, the Cape Town Legal Resources Centre has at least temporarily succeeded in getting the government to

agree not to deport asylum applicants whose section 41 permits have expired.

However, most of the above high-profile cases concern immigration not refugee policy. Here, the department has a huge hole in terms of legislation. There are, of course, some cases going the other way. For instance, in a case involving a Tai citizen, the court reasoned that a wife's right of residence in the republic did not include a right to have her husband, who had no immigration status, to stay with her. It also ruled in the department's favour on a number of other points. While moved by the applicant's plight, the court more or less accepted Home Affairs' migration policy. On the whole, and especially where fairness is in issue (unlike in the Tai case), Home Affairs is being hammered in the courts.

Indeed, it should be noted that the legal decisions going against the department are mostly technicalities. The department is losing because it is having trouble getting its administration correct. What this means is that issues of principle and matters of immigration policy are rarely addressed. The department is losing on procedural and technical grounds, but the courts have not yet got to the substantive policy debate.

Looking at a number of court actions pending, that substantive policy debate may soon be entering the courts. The *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* case raises the issue of the constitutionality of the newly instituted departmental practice of treating applications for permanent residence by same-sex partners of South African citizens less favourably than the applications of married couples. In *Dawood v Minister of Home Affairs*, the issue is whether it is constitutionally reasonable for the department to charge persons married to South African citizens the usual fee (presently R7 750) for an application for permanent residence. In both cases, pending court action, the applicants are relying on the provisions of the Bill of Rights to have the courts declare either administrative actions or sections of the Aliens Control Act unconstitutional.

Whether procedural or substantive, these judicial losses pose a danger for the Department of Home Affairs. This department can either proactively construct a legislative response to the problems of administration and policy that the courts are identifying or the department can have policy changes thrust on it by the judges. Policy can be made by declaring administrative actions and laws unconstitutional or policy can be made rationally and progressively. The department must decide.

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LAUNCH OF ANTI-XENOPHOBIA CAMPAIGN

In an attempt to combat what appears to be a growing and very troubling increase in xenophobia in South Africa, the National Consortium on Refugee Affairs hosted a workshop on 18 November in Johannesburg to plan a "Roll Back Xenophobia" public education campaign. The campaign will be launched on 10 December 1998, which coincides with the 50th anniversary of the United Nations Declaration of Human Rights.

Representatives from organized labour, the media, non-governmental organizations, universities, embassies and the unemployed were among the more than 70 people who attended the workshop. The National Consortium on Refugee Affairs chairperson, Jody Kollapen, opened the discussions by saying that South Africa needs to send out a strong message that irrational prejudice and hostility toward non-nationals is unacceptable.

This message was followed by a summary of findings from a recent national survey of South Africans by David McDonald of the Southern African Migration Project (SAMP). It concluded that a large majority of South Africans are indeed anti-immigrant and xenophobic -- but that there are grounds for optimism and positive change.

The workshop then broke up into working groups to develop educational "plans of action" for those groups deemed most critical to an anti-xenophobia campaign. The plight of foreign workers (in the informal and formal sectors) and that of refugees and asylum seekers was deemed to require special treatment - by way of an education campaign.

The same applied to the treatment of foreign nationals by police and civil servants and the role that has been played by the media and educators.

The December campaign launch will be the start of a much longer-term initiative to address and understand xenophobia. SAMP will have significant input in this process.