

Southern African Migration Project

South African Immigration Law: A Gender Analysis

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Immigration Law: A Gender Analysis

1.0 Introduction

1.1 One of the last pieces of apartheid-era legislation to disappear from the South African statute books was the Aliens Control Act of 1991. Although amended in 1995, this Act was finally consigned to history only in March 2003, when the draft regulations implementing the new Immigration Act (no. 13 of 2002) came into effect (Republic of South Africa 2002 and 2003). While there is much in the new Act to be welcomed, and it certainly represents the advent of a more just and pragmatic immigration regime, many of its provisions give considerable cause for concern on gender grounds. The Act is carefully gender-neutral in its terminology and without any explicit gender discrimination in its definitions and clauses. Yet in practice, and through a variety of means, it will not only discriminate against certain individuals on the basis of their gender, but also create numerous problems for the personal and family relationships of male and female migrants.

1.2 As a well-established body of literature testifies, this situation is by no means unique to South Africa (for a sample see Morokvasic 1984; Bhabha et al. 1985; Simon and Brettell 1986; Fincher et al. 1994; United Nations Secretariat 1995; Fincher 1997; Kofman and England 1997; Kofman 1999; Hyndman 1999). The observation made by Brettell and Simon almost two decades ago holds equally true today:

There is no denying the importance of official policy, or the lack of official policy, in influencing the nature of immigration streams... – whether they are legal or clandestine, predominated by single or married migrants, by men or women, by workers or dependents. Even the auspices under which individuals emigrate – with the aid of kinsmen or friends, or with labor contracts – differ according to official policy. (Brettell and Simon 1986 p. 6)

1.3 Indeed given that migration is such a gendered process, no country has succeeded in putting in place immigration legislation or policy that is entirely gender-neutral in effect. Immigration rights are typically attached to legally-defined and – sanctioned social or biological relationships, such as spouse, dependant or family status, so that gender and gender relations inevitably play a part in determining who is admitted to a country, for how long and under what conditions. Nor is it unusual for the conditions of ‘family’ or ‘dependant’ migration to include a prohibition on work – a prohibition that in most countries affects more women than men.

1.4 With regard to employment-related migration, whether people in this category are admitted as permanent residents (e.g. Canada) or temporary ‘gastarbeiter’ (e.g. Germany) is an important determinant of the demographics, including the gender and marital status, of the migrants involved. Just as spousal or family immigration status often prohibits the holder from seeking employment, individuals admitted to

a country as temporary residents for employment purposes are commonly prohibited from bringing their spouses or other family members with them. Of course labour, like migration, is itself profoundly gendered, with particular sectors, levels and forms of employment being associated with predominantly male or female workers in particular historical and geographical contexts. 'Labour' (or 'skills') and 'family' criteria for determining immigration rights can thus act in numerous ways, separately or in conjunction, to discriminate against one gender or another, and to create gender-biased or even gender-specific migration streams.

- 1.5 Changes in immigration policy and legislation therefore have the power to shape and alter the gendering of migration in significant ways, and can have a dramatic effect on the lives and relationships of the men, women and families involved. In South Africa, one of the more invidious provisions of the old Aliens Control Act was that it gave residence rights to the foreign wives of male South African citizens but not to the foreign husbands of female South African citizens. This overt gender discrimination was eliminated when the Act was amended after the post-apartheid constitution came into effect in 1994. However, as this paper will argue, the new Immigration Act will perpetuate other, more subtle, but equally potent forms of gender discrimination, and will ultimately serve to entrench rather than erode a long-standing tradition of male-dominated regional labour migration.

2.0 Historical Context

- 2.1 Cross-border labour migration between South Africa and its neighbours dates back to the 19th century, with the founding of the South African diamond and gold mining industries. Indeed the history of regional cross-border migration has been predominantly one of labour migration (Crush 1987; Crush et al. 1991; Harries 1994). Given the long association of labour migration with the mining sector, a situation which continues to this day, both the reality and the perception of migration have been heavily male biased (Moodie 1994). The power of the regional labour migration paradigm, with its androcentric, 'kraal to compound' logic, has been put forward as one of the main explanations for the neglect of women in Southern African migration studies (Barnes 2002; Sunseri 1996), except as those 'left behind' (e.g. Murray 1981). As Barnes argues, this has produced 'a normative illusion which has practically become conventional wisdom: African women were "passive rural widows" who stayed put somewhere, practicing subsistence and, later, cash crop agricultural production while their men departed, perhaps never to return' (Barnes 2002 pp. 166-7).
- 2.2 The highly regulated, formalized and masculinized mine contract labour system represents only one end of a migration spectrum. Although not involving such large numbers, there have always been various alternative forms of less formal, less regulated movement across the region's borders. Many of these movements have involved some form of work, some of it legal but much of it clandestine. Many have also involved significant numbers of women. Far from being those 'left behind', or migrating merely as dependants, women have been practising

independent migration across the borders of Southern Africa for decades (Walker 1990b; Miles 1991; Cockerton 1995; Barnes 2002). Historical research such as Bonner's (1990) work on Basotho women on the Witwatersrand between 1920 and 1945 documents migrant women's activities in beer brewing, cooking, laundry and sex work. Miles (1991) and Cockerton (1995) document the migration and employment histories of women from colonial Swaziland and Bechuanaland (Botswana) who migrated to South Africa. As they and other authors make clear, African women from neighbouring countries have long been employed in various occupations in South Africa, for example as domestic workers or in commercial agriculture. Stricter controls on cross-border migration to South Africa and the deportation of illegal female migrants from the 1950s onward certainly curtailed women's movement (Bonner 1990; Miles 1991), but female cross-border migration in general and labour-related migration in particular is far from being an entirely new, post-apartheid phenomenon.

- 2.3 Since the end of apartheid in 1994, there have been both changes and continuities in regional migration patterns. Formal contract labour migration to the mines of South Africa from Botswana, Lesotho, Mozambique, and Swaziland continues much as before, although there has been substantial downsizing in the mine workforce through mine closures and retrenchments (down from 376,000 in 1990 to 230,000 in 2000). Interestingly, however, a growing proportion of the mine workforce is non-South African (up from 47 percent in 1990 to nearly 60 percent by the late 1990s). Thus the decline in employment has been somewhat offset for migrant mine labour from neighbouring countries. Migrant mineworkers are still not permitted to bring their wives or family members with them to South Africa. The employment of foreign labour in agriculture also continues, although numbers and trends are difficult to specify. Significant numbers of foreign workers are employed in farming areas close to the borders with Zimbabwe, Mozambique and Lesotho (Crush 2000). Needless to say, the mine workforce remains almost 100% male, although there is a considerable female presence in migrant agricultural labour (Crush 2000). One notable post-apartheid change has been an increase in the flow of skilled migrants to South Africa from other African countries (Mattes et al. 2002) – although evidence suggests that this particular migration stream has a decidedly male bias (Dodson 2002).
- 2.4 The most obvious post-1994 change has been a dramatic increase in the numbers of people crossing South Africa's borders on visitor's permits, which allow entry for the purposes of visiting, tourism, or business. Small entrepreneurs involved in cross-border trade, particularly those who come to South Africa to purchase goods to sell back in their home countries, usually travel on visitor's permits. Thus the increase in the issue of visitor's permits to people from the Southern African region and the rest of the African continent reflects in large measure the increase in the number of small and medium entrepreneurs involved in formal and informal cross-border trade (Peberdy and Crush 1998). Many of these petty traders are African women from countries like Mozambique, Zimbabwe, Botswana and Lesotho. The

volume and value of goods traded, while not readily quantifiable, are certainly significant, not least in terms of people's (and particularly women's) livelihoods.

- 2.5 Undocumented or unauthorized migration has been part of regional migration to South Africa for decades and has at times even been sanctioned by the state and incorporated into labour supply. It is virtually impossible to know how many undocumented migrants there are in South Africa today. The numbers most often cited by the South African state are between four and eight million, but these figures are inflated and in fact have been officially withdrawn by the Human Sciences Research Council, where they originated. In addition to their number, it is also difficult to know exactly who clandestine migrants are or where they come from. Anecdotal evidence and our own casual encounters suggest that they come from a growing variety of countries, both on the African continent and beyond, from a wide range of economic and ethnic backgrounds, and for a multiplicity of reasons. They certainly include a significant proportion of women. The following extract describes one undocumented female migrant's experience:

Mrs Ndhlovu was born in 1955 in Kezi, a rural area of Matabeleland in southwestern Zimbabwe. By 1993 she was a divorcee with nine children, and in that year she decided to cross to South Africa in search of employment. She borrowed some South African currency, said good-bye to her children, and set out alone, on foot, without passport or visa, for the promised land. She paid a South African guide to get her through the border fences; she then made her way to Johannesburg, where she lodged with members of a network of distant relations until she found employment. After about a year she found a good job at a daycare center in central Johannesburg. Her employers did not ask for South African identification documents and she did not bring the subject up. She has since settled down, found a boyfriend, and acquired identity documents. In 1995 she gave birth to her tenth child. (Barnes 2002 p. 181)

- 2.6 This experience is strikingly similar to those described by Miles (1991) in her work on Swazi women migrants to South Africa in the period 1920-1970. The apparent increase in women's migration to South Africa over the 1990s thus perhaps represents more a return to a pattern that prevailed in the first half of the twentieth century than anything entirely new. It does, however, constitute a significant change from the predominance of males in labour migration in the 1960s, 1970s and 1980s, when other forms of cross-border migration were severely restricted by the apartheid state. It also needs to be emphasized that changes in female migration are closely related to changes in the volume and pattern of male migration, including the abovementioned reduction in the mine labour force. Women migrating from Lesotho to work on the farms of the eastern Free State, for example, do so in part to offset the loss of income from male household members retrenched from the mining industry (Ulicki and Crush 2000).

- 2.7 Forces driving migration from neighbouring countries, whether by women or men, similarly demonstrate both continuity and change. To the perennial ones of poverty, unemployment, political unrest and land shortage, HIV/AIDS and its impact have added a new set of push factors, including death or debilitation of income-earners. Despite sharing many of these problems, South Africa remains the region's economic powerhouse and thus an attractive destination for migrants, with legal and illegal employment opportunities for both women and men from neighbouring states. For both genders, but perhaps especially for women, migration is a means of problem-solving; a strategic response to their social, economic, environmental, political or personal circumstances. To many Southern African women, it can also be a means of escape from the patriarchal system of control that so constrains their lives (Walker 1990).
- 2.8 In order to gain some insight into the nature of contemporary migration, including any particular characteristics of women's migration as well as its household and gender dynamics, the Southern African Migration Project conducted a series of surveys asking men and women in neighbouring countries about their experiences of migration to South Africa. The results demonstrate that while men's migration is still undertaken largely for purposes of employment, women's migration is characteristically multi-purpose, and might include trade, shopping, visiting friends or family, as well as some form of employment (Dodson 1998). Indeed it is hard to separate 'labour migration' as a distinct category for female migrants, the patterns and strategies of their mobility reflecting the complex combination of productive and reproductive, paid and unpaid tasks that women typically perform. Even when it is undertaken primarily for purposes related to employment, most women's cross-border migration in Southern Africa is quite unlike the structurally and geographically rigid system of male mine labour, being far more varied in its geography and temporality and tenuous in its legality and security. Partly as a result, women's migration in general and labour migration in particular remain under-researched and poorly understood. What is clear is that cross-border migration constitutes an important livelihood strategy for individuals and households in the region, and one increasingly practised by women. South African immigration policy as enshrined in the 2002 Immigration Act thus has implications that are far-reaching, both geographically and figuratively; and a number of those implications are either gender-specific or gender-biased.

3.0 Gender and Labour in South Africa's New Immigration Policy

- 3.1 South Africa's transition to a new, post-apartheid immigration policy has been slow and tortuous, as indicated by the eight-year gap between the 1994 elections and the 2002 Immigration Act. Even in its final stages, the legislative process behind the Act was fraught with division and dissent, both within and beyond the ranks of the governing ANC party. Uncertainty and disagreement continue to dog the Act itself. In the year since its passage through parliament, both the actual legislation and its subsequent regulations have been subject to a number of legal and constitutional challenges. The long struggle to shape a new South African immigration regime is far from over.

- 3.2 The most positive aspect of the Act is its underlying premise, which is that immigration can be a positive tool of social and economic development, without compromising either the rights and economic status of South African nationals or the basic human rights of migrants. The Act promises a new openness to immigration and explicitly aims to address the country's serious skills shortage. Alongside issues of national security and border control, economic criteria are fundamental to the new immigration policy framework. The preamble states that the Act 'aims at setting in place a new system of immigration control which ensures that...the needs and aspirations of the age of globalization are respected' and 'the South African economy may have access at all times to the full measure of needed contributions by foreigners' (our italics); but also that 'the contribution of foreigners in the South African labour market does not adversely impact on existing labour standards and the rights and expectations of South African workers' and 'a policy connection is maintained between foreigners working in South Africa and our nationals' (Immigration Act 2002, Preamble).
- 3.3 Obviously immigration policy has to tread a fine line in a country with simultaneous skills shortages and high levels of unemployment, currently estimated at around 40%. Labour and skilled migration are thus seen as necessary to the development of the South African economy – but this is to be achieved largely through the mechanism of various forms of temporary residence permit, with foreign migrant labour treated as a stop-gap measure until South Africa can meet its skills and labour needs internally.
- 3.4 The underlying economic logic of the Act is further laid out in the 'Objectives and functions of immigration control' (Immigration Act 2002 section 2). Most significant for labour and skilled migration is the objective stated in section (2(1)), which states that in the administration of the Act, the Department shall pursue the following objectives:
- (i) regulating the influx of foreigners and residents in the Republic to –
 - (i) promote economic growth, *inter alia*, by –
 - (a) ensuring that businesses in the Republic may employ foreigners who are needed;
 - (b) facilitating foreign investments, tourism and industries in the Republic which are reliant on international exchanges of people and personnel;
 - (c) enabling exceptionally skilled or qualified people to sojourn in the Republic;
 - (d) increasing skilled human resources in the Republic;
 - (e) facilitating the movement of students and academic staff within the Southern African Development Community for study, teaching and research; and
 - (f) promoting tourism.
 - (ii) where applicable, encourage the training of citizens and residents by employers to reduce employer's dependence on foreigners' labour and promote the transfer of skills from foreigners to citizens and residents.

- 3.5 ‘Foreigners who are needed’, ‘exceptionally skilled or qualified people’ and ‘skilled human resources’ are categories difficult to delimit or define, and much of the required ‘fine print’ was left to the regulations rather than included in the Act itself. It is precisely in the detail of those definitions, and how ‘needed’ as opposed to ‘un-needed’ foreigners are to be determined, that the potential for gender discrimination exists. Who, for example, should qualify for temporary as opposed to permanent residence? What particular labour and skills categories should be admitted, and in what numbers? Which categories of labour migrant should be allowed to bring family members with them, and under what conditions? In the sections which follow, each relevant permit category laid out in the Act is subjected to a close gender analysis, through which each is demonstrated to have its own set of associated gender issues.

4.0 Temporary Residence Permits

- 4.1 Clearly the Act conceives of most labour migration, including skilled migration, in terms of temporary residents or ‘sojourners’. A number of different permits or ‘gates’ allow for entry under different terms and conditions, including any rights for family members. The most significant of the permit categories that allow employment in some form are the following: four different categories of work permit (quota, general, exceptional skills, and intra-company transfer); treaty permits; corporate permits; and business permits. Student, retirement and exchange permits allow only limited work activity under highly restrictive conditions, and asylum seekers are not allowed to work, study, or be self-employed until they are granted refugee status (although individuals can apply for special consideration to be allowed to work after six months). Visitor’s permits, cross-border passes and relative’s permits explicitly prohibit work, although the first two do allow the conduct of business, including trade.
- 4.2 *Quota work permit:* The first form of work permit set out in the Act is the quota work permit. Introduced at the eleventh hour in the parliamentary proceedings that led to the passage of the Act, this category has already caused considerable confusion and controversy. Categories and quotas are to be ‘determined by the Minister at least annually... after consultation with the Ministers of Labour and Trade and Industry’ (Immigration Act 2002 section 19(1)). In general, applicants have to already have an intended employer at the time of applying for the permit. The regulations published in Government Gazette no. 24587 of 14 March 2003 further specify that employers of quota-based foreign employees have to pay a quarterly training fee of 2% of the employee’s taxable income (regulation 28(3)). The regulations also lay out stringent certification and verification criteria. The prospective employer has to submit to the Department of Home Affairs certification from a chartered accountant ‘describing in general terms the job description’, ‘certifying that the job position falls within a relevant category’, ‘certifying that the position exists and is intended to be filled by such foreigner’, and ‘certifying that such foreigner possesses the legal qualifications required for the performance of the tasks called for by the job position’ (regulation 28(4)(a)(ii)). This bureaucratic and laborious procedure can hardly be said to represent a

streamlining of the administration of labour migration. A second version of quotas is laid out in regulation 28(4)(e). This states that the Department of Home Affairs ‘may issue a quota work permit to a foreigner who has skills or qualifications which fall within a category determined by the Minister... on recommendation of the Board and after consultation with the Ministers of Labour and Trade and Industry’, even when the foreigner issued with such a permit does not have a prospective employer, should there be ‘certain intense needs of the economy’.

- 4.3 The gender implications of the quota permit category depend on the bases for establishing the annual quotas as well as how ‘intense needs of the economy’ are identified. The regulations state that: ‘In determining categories and quotas..., the Minister shall endeavour to provide for access to all foreigners potentially needed by the Republic’s economy both at the lower and higher ends of the skills or qualifications spectrum, taking into account that often certain needed skills, such as entrepreneurship, craftsmanship or management, are not shown through qualifications’ (regulation 28(4)(g)). The current quotas, as presented in Government Gazette no. 24953 of 24 February 2003, are based on experience and training rather than particular sectors of the economy, and are extremely broad, even arbitrary, in their definitions and scope. There is essentially a bimodal distribution, with peaks in the ‘high’ and ‘low’ skills categories. The highest quota, of 90,000 permits each, is provided to two categories: ‘Employment opportunities in respect of which the relevant employer justifiably requires a post-graduate degree and at least 5 years of professional experience’ at the ‘top’ end of the skills spectrum, and ‘Employment opportunities in respect of which the relevant employer justifiably requires at least 5 years of experience showing skills acquired through training’ at the ‘bottom’ end. A quota of 75,000 permits each is provided for ‘Employment opportunities in respect of which the relevant employer justifiably requires a graduate degree and at least 5 years of professional experience’ and ‘Employment opportunities in respect of which the relevant employer justifiably requires at least 5 years of experience showing entrepreneurship, craftsmanship or management skills’. In between is a sliding scale of qualifications, skills and experience level, with the main variables being level of degree or certificate and years of relevant experience. There are ten categories in all, most of them allocated a quota of 70,000 permits, giving a total of 740,000 quota permits annually.
- 4.4 This complicated system is likely to prove at least unwieldy to administer, if not entirely unworkable. Many of the criteria are far from watertight, and they are certainly open to interpretation and manipulation. In gender terms, there is likely to be a male bias in practically every quota category. Women in general, and certainly those in Southern Africa, tend to have lower levels of post-secondary education, and certainly fewer have post-graduate or graduate degrees. Women’s labour is commonly less formalized than male labour, and they are therefore less likely to be in employment that provides recognized, certified records of performance and experience. Furthermore, due to their administrative complexity and the 2% ‘training tax’, quota permits are most likely to be taken up by formally established

companies, and in particular sectors of acute and acknowledged skills shortage, such as information technology. These factors in themselves are likely to exacerbate the male bias. The single quota category that does not require some form of formal training, degree or certificate is that based on ‘entrepreneurship’, ‘craftsmanship’ and ‘management’, but here subjective and possibly sexist interpretations of those terms by either prospective employers or the officials approving permit applications may serve to discriminate against women in practice.

- 4.5 Not only is there likely to be a male bias in the people admitted under quota work permits, but these permits do not bring any residence rights for the family members of permit-holders. They may apply for admission on a visitor’s permit, which has to be renewed every three months. Holders of a visitor’s permit are prohibited from conducting work while in South Africa. International precedent suggests that such a prohibition on employment is likely to apply to far more women than men, with more women migrating as ‘accompanying persons’. This prohibition will itself contribute to a male bias in migration flows, as social norms continue to stigmatise ‘unemployed’ males and thus to discourage migration by a couple or family if such migration involves the female becoming the sole breadwinner. Given that the partners of skilled migrants, whatever their gender, are themselves likely to be of a similar level of skills or education, barring them from living and working in the country is surely not in the interests of the South African economy. Another demographic implication of the lack of residence and employment rights for spouses or family members is that it will encourage migration of single individuals rather than married couples. Thus the single male is the implicit normative migrant.
- 4.6 For migrants without accompanying partners, the temporary nature of the permits, which terminate upon termination of employment, will make it difficult to form and sustain long-term relationships in South Africa. As experience elsewhere has shown, however, the inevitable formation of partnerships and in many cases birth of children in the host country creates complicated and often fraught transnational family networks, particularly as people entering a country under a temporary work permit often leave behind a spouse or children in their country of origin (Bhabha et al. 1985; Phizacklea 2000).
- 4.7 Gender considerations in labour migration thus go far beyond the simple male/female balance in migrant demographics, but have to take account of men and women as members of couples, families and households that are often stretched across space through the very process of migration. Policy that treats migrants simply as individualised ‘labour units’ or bearers of ‘needed skills’, as is the case in South Africa’s new Act, inevitably creates a host of problems relating to the gender and kinship-based ties of labour migrants. Nor, given the persistent gendering of education, training and employment, can any narrowly economically-driven policy claim gender neutrality.
- 4.8 *General work permit:* A second category of work permit is simply named the ‘general work permit’. These ‘may be issued... to a foreigner not falling within a

category contemplated in subsection (1) [i.e. quotas] if the prospective employer – (a) satisfies the Department in the manner prescribed that despite diligent search he or she has been unable to employ a person in the Republic with qualifications equivalent to those of the applicant; (b) produces certification from a chartered accountant that the terms and conditions under which he or she intends to employ such foreigner, including salary and benefits, are not inferior to those prevailing in the relevant market segment for citizens and residents’ (Immigration Act 2002 section 19(2)). The onus falls on the employer to prove that they have conducted a diligent search for a qualified South African candidate, including advertising in the national print media, and then to provide certified proof of the qualifications of the foreigner for the position together with an employment contract, signed by both employer and employee, showing that the conditions of employment meet the criteria of prevailing market conditions for equivalent South African labour. The wording of this section of the Act and the fact that it comes only after the ‘quota permit’ section suggests that the latter is intended as the primary channel for skilled migration. Much of the actual ‘labour migration’ will in fact take place under the ‘treaty permit’ or ‘corporate permit’ categories (discussed below), leaving the ‘general work permit’ as something of a back-up for individual cases not covered by the quota, corporate or treaty allocations.

- 4.9 Any gender implications of the general work permit will be seen only as the Act and its regulations take effect. In theory, this permit category could be of benefit to migrant women in certain sectors of employment, although in the categories in which many migrant women are presently employed in South Africa, such as agricultural labour and domestic service, it would be impossible to claim that there was no South African citizen or resident with the required qualifications. Nor are these low-level jobs the types of position for which advertisements are placed in the national print media. The implication is that these permits are targeted at ‘high-skills’ employment, meaning that those who do enter through this particular ‘gate’ will be highly-qualified and specialised and therefore, as with the high-skill quota category, more likely to be male.
- 4.10 Much also depends on where prospective migrants come from, as the gender bias in education, training and employment varies widely from country to country. If, as seems to be the case, Africa continues to be a growing source of skilled immigrants to South Africa (Mattes et al. 2002), a male bias is virtually assured. Gender bias in general work permit allocations will also depend on the gender bias of prospective employers, which will vary by sector and corporate culture. Kofman (1999 and 2000) and Raghuram (2000) have examined skilled women’s international migration in several countries, concluding that the gendering of education in the source country and of employment in the destination country leads to a corresponding gendering in skilled migration flows that varies geographically and changes over time. Almost everywhere, the ‘caring’ professions are typically associated with women, while sectors such as engineering and technology are still dominated by men. In many countries, child care, nursing and teaching are common categories of employment to which female immigrants have been

admitted or even deliberately attracted, but in the South African case any skills shortage in these categories could be met through training of the domestic labour pool rather than importing foreign labour.

- 4.11 Similar complications apply as for the quota permit category discussed above concerning the formation of relationships and birth of children in the host country and separation from family members at 'home'. As with quota permits, general work permits in South Africa's new Act carry no associated rights of residence for family members, except under a visitor's permit, in which case they have to renew their permit every three months and may not conduct work. Both quota and general work permits thus perpetuate the idea of the normative migrant being either an unaccompanied single person – in practice probably male - or a male accompanied by a dependent female partner. Certainly neither permit will be gender-neutral in effect.
- 4.12 *Exceptional skills permit*: A third category of work permit: is the 'exceptional skills' work permit, which 'may be issued by the Department to an individual of exceptional skills or qualifications' (Immigration Act 2002 section 19(4)). Again, depending on how 'exceptional skills' are determined, this is likely to produce a *de facto* male bias. This is the only category of work permit to include residence rights to members of the holder's immediate family. This begs the question why it should be only the 'exceptionally skilled' who are automatically allowed to bring their spouses family members to live with them in South Africa. It certainly suggests that migration under this permit category is anticipated to be low in volume.
- 4.13 Neither the Act nor the regulations say whether such family members are themselves allowed to work, or in what capacity. Regulation 28(8) specifies that 'the immediate family members... shall be those who are dependent on such permit holder, provided that the Department may issue an extended visitor's permit to other members of such immediate family'. This implies that the permit-holder's dependants are entitled to work in South Africa, while 'other members', holding only visitor's permits, can be present in the country but not be employed. Whatever the case, the attachment of family residence rights to this category of permit indicates that it is only at this elite level that South Africa regards itself as having to make immigration an attractive option, while other classes of skilled and labour migrants face either separation from their families or restrictions on their family members' residence and employment in South Africa.
- 4.14 *Intra-company transfer permit*: The fourth and final category of work permit is the intra-company transfer permit, which 'may be issued ... to a foreigner who is employed abroad by a business operating in the Republic in a branch, subsidiary or affiliate relationship and who by reason of his or her employment is required to conduct work in the Republic for a period not exceeding two years' (Immigration Act 2002 section 19(5)). The regulations stipulate that the holders of such permits have to depart forthwith on completion of their tour of duty. As with quota and general work permits, they bring no rights for family members, except under a

visitor's permit, in which case they may not conduct work. Kofman (2000) has noted that intra-company transfers in transnational corporations 'remain resolutely male-dominated' (p. 45), especially in the upper echelons, and there is little to suggest that the South African case would be any different. Thus all four categories of work permit are likely to produce male-dominated migration streams and, with the exception of the 'exceptional skills' permit, will exclude accompanying partners or family members from seeking employment.

- 4.15 *Treaty permits*: One of the briefest sections contained in the Act, and yet actually one of the most significant in terms of labour migration, is the treaty permit. These permits 'may be issued to a foreigner conducting activities in the Republic in terms of an international agreement to which the Republic is a party' (Immigration Act 2002 section 14(1)). What this essentially refers to are the bilateral labour treaties between South Africa and the neighbouring countries of Botswana, Lesotho, Swaziland and Mozambique (Crush and Tshitereke 2001). These are the treaties on which the migrant mine labour system has long been based, and their inclusion in the Act signals a major victory for the mining industry in securing continued access to foreign sources of labour. For although the treaties did not specifically designate the mining industry as the sole beneficiary, no other employer (with the partial exception of commercial agriculture) has ever been allowed to access labour under the treaties (Crush and Tshitereke 2001). The predominance of the mining industry in accessing treaty labour means, of course, an overwhelming male majority in the make-up of the workforce; and as the treaty permit category brings no associated residence rights for workers' families, there is no parallel flow of accompanying female partners, except on short-term visitor's permits.
- 4.16 The treaty labour system is operated by a sophisticated recruiting and employment agency, The Employment Bureau of Africa or TEBA, which recruits labour from rural areas of South Africa as well as from neighbouring states. Its employment services include 'the procurement and engagement of unskilled, semi-skilled and skilled labour from South Africa, Mozambique, Lesotho, Swaziland and Botswana in compliance with customer requirements and predetermined criteria'; 'facilitating the return from leave of long distance commuters [and] employees from foreign countries, to their place of employment, in compliance with all governmental requirements and border post formalities'; and 'the development and maintenance of strong links with all local and foreign government representatives on behalf of all clients' (TEBA 2003). While TEBA claims to be seeking to 'serve a wider customer base, beyond the mining sector' (TEBA 2003), there is as yet little evidence of such expansion, nor of any change to the overwhelmingly male-dominated composition of its labour recruits.
- 4.17 The whole system on which TEBA is based, and which it has been a key agent in creating and sustaining, is one in which the 'migrant worker' is assumed to be a male, usually leaving behind a wife and other rural dependants. For all its other benefits and ills, treaty labour migration as it currently operates is clearly a system of entrenched gender discrimination. On the positive side, miners' remittances

continue to play a crucial economic role in the region, and form the basis of the livelihoods of hundreds of thousands of households. Many Southern African women do 'benefit' from male migrant labour, and the consequences of mineworker retrenchment have been extremely damaging to the economic welfare of the households affected. But treaty labour is simultaneously a system of Orwellian social control and systemic social dislocation (Moodie 1994). Mineworkers form personal and sexual relationships and often have second 'wives' and families near their South African places of employment, and the association between migrant mine labour and HIV/AIDS is well documented (e.g. in Campbell 1997 and 2003).

- 4.18 Critics have long urged that the migrant labour system be radically reformed or entirely dismantled, but nothing in the new Act suggests that there will be any fundamental changes. Significantly, unlike the general work permit category, there is no requirement in the section on treaty permits that foreign employees should be employed at the same standards as South African citizens, suggesting that migrant workers in this category will continue to be denied the same rights and protections as South African workers. And while nothing in the Act or regulations says so specifically, the mining industry looks set to continue to monopolise treaty labour, thereby perpetuating the male dominance in migrant labour recruitment.
- 4.19 *Corporate permit:* A similar category of permit to the treaty permits just described is that of corporate permits. These 'may be issued by the Department to a corporate applicant to employ foreigners who may conduct work for such corporate applicant' (Immigration Act 2002 section 21(1)). They are effectively a form of 'block' or 'group' work permit, allocated to an employer permitting them to employ a certain number of foreigners rather than to individual foreign applicants. This is one of the more controversial provisions of the Act, as it effectively privatizes immigrant selection and immigration management, much along the lines of TEBA's system of operation, giving powers to corporations that are usually reserved for organs of the state. It constitutes an extremely fuzzy and potentially problematic combination of corporate independence and state intervention. Also potentially problematic is that workers in this category are entirely dependent on their employer for the security of both their residence status and their employment. While it may remove red tape for corporate employers and streamline their recruitment and hiring process, it gives them enormous power over the lives of their employees and is open to abuse by the unscrupulous.
- 4.20 In granting such a permit, the Department of Home Affairs consults with the Departments of Labour and Trade and Industry to determine the number of foreigners who can be employed by a corporate applicant. Management and administration of the particular labour migration process, including the allocation of work permits to individuals, then becomes the responsibility of the corporation. Otherwise this category has similar provisions to the general work permit category regarding conditions of employment being not inferior to those offered to citizens and permanent residents, along with a requirement to prove the need to employ

foreign labour. The regulations likewise contain provisions of a ‘training tax’ and training programme ‘aimed...at reducing the corporate applicant’s dependency on foreign labour and/or at transferring skills from foreigners to residents and citizens’ (regulation 30(8)(a)).

- 4.21 The full gender implications of corporate permits will become evident only with time, but in general, more formalized and corporate employment is likely to be male-dominated, whereas informalization tends to go hand in hand with the feminization of labour. The institutional and financial capacity required to secure and maintain a corporate permit is more likely to be found in larger corporations, another factor which may prove to favour sectors with male-dominated employment. Entrants under corporate permit entrants are therefore arguably more likely to be men. A possible exception is the short-term ‘seasonal’ category of employment dealt with in section 21(4)(c). Reference to seasonal employment suggests the commercial agriculture sector, in which migrant women are already employed in some number (Crush 2000). Assessing the gender breakdown of labour migration under this category will, however, require sector-by-sector monitoring and analysis.
- 4.22 Other conditions pertain as for general work permits. There are no rights of residence for the family members of labour migrants under corporate permits. As already discussed, this is likely to reinforce the male bias in migration flows and to bring with it a range of difficulties related to gender and family relations.
- 4.23 *Business permit:* Entrepreneurial migration is encouraged by the creation of a business permit which ‘may be issued...to a foreigners intending to establish, or invest in, a business in the Republic in which he or she may be employed’ (Immigration Act 2002 section 15(1)). While not discriminatory *de jure*, this is likely to prove so *de facto*, as more men than women have the required business experience or levels of assets or capital to invest. The conditions are set out in the regulations (24(2)) as meeting at least two of the following criteria: having R2,500,000 to invest; a business track record with proven entrepreneurial skill; proof that the business contributes to the geographical spread of economic activity; proof that at least five South African citizens or residents will be employed; in certain prescribed sectors (information and communications technology, clothing and textiles, chemicals and biotechnology, agro-processing, metals and minerals, automotives and transport, tourism, and crafts); having export potential; involving the transfer of technology to South Africa; and being financially viable. Of the sectors listed, only textiles, tourism and crafts commonly include significant numbers of women.
- 4.24 The ‘work’ that may be conducted by the holder of a business permit is limited to any work related to the relevant business activities. Like the ‘exceptional skills’ permit, business permits extend rights of residence to member’s of the holder’s immediate family, but with the proviso that their employment is restricted to the ‘family business’. Women accompanying men migrating in this category are thus

limited in their employment options and tied to a dependent position. Again, the exact gender consequences will be discernible only after a few years of the Act's operation, but a strong male bias in the primary applicants for business permits can be predicted.

4.25 *Cross-border passes*: Although not for labour migration *per se*, cross-border passes are of particular significance to women in the region (Immigration Act 2002 section 24). These are equivalent to a multiple admission visitor's permit, and are intended for foreigners who are citizens of prescribed foreign countries which share a border with South Africa, but do not hold passports. As with a visitor's permit, these will allow 'stays for all temporary purposes, *not including work*, other than those purposes for which the Act contemplates a different permit, and shall include, but not be limited to tourism, *business*, education shorter than three months, medical treatment shorter than three months [and] visit of a relative shorter than three months' (regulation 19, *our italics*). Migrant women in South Africa are involved in almost all of the above activities, often in a single trip (Dodson 1998). Cross-border passes will be especially significant for cross-border trade. Trade has been the biggest 'growth area' in land-border entrants to the country since 1994, and is widely practised by women from neighbouring countries. These passes will facilitate their cross-border movement and entrepreneurship, and are one of the few sections of the Act which can genuinely be said to be of benefit to women.

4.26 To summarise the temporary residence permits for labour migration, there are effectively six 'gates' for the entry of migrant labour: four different types of work permit, treaty permits, and corporate permits. Business permits for the self-employed add a seventh. Each has different implications for the gender composition of the resultant migration streams and for the lives of male and female migrants, as well as for their partners and family members. Male-dominated labour migration is the likely outcome in most categories, whether at the skilled or unskilled end of the labour spectrum. With the exception of business and 'exceptional skills' permits, most of the temporary resident categories do not bring any rights of admission or residence for spouses or family members of permit-holders. This is likely in practice to discriminate against women, who will either be discouraged from entering the country or, if they come as accompanying persons on visitor's permits, be forced to remain unemployed. Restrictions on family migration are bound to prove socially disruptive and personally problematic for holders of temporary residence permits, and thus to act as a major impediment to attracting 'needed foreigners' of either gender into the country.

5.0 Permanent Residence

5.1 Women fare little better in the Act's provisions for permanent residence (Immigration Act 2002 section 26). Here there are two primary categories: 'direct residence' and 'residence on other grounds'. There are two sets of criteria for qualification for direct residence: employment in South Africa under a work permit, including those issued under corporate permits, for a period of five years, together with an offer of permanent employment; and being the spouse or child of a

citizen or permanent resident. While the ‘spouse or child’ category has no inevitable gender bias, the fact that the employment qualifications for permanent residence relate directly to the temporary work permit categories already discussed means that the inherent male bias will be continued or even magnified.

- 5.2 In the language of the Act (section 26(a)), the permanent residence option applies explicitly to *work permits*, including corporate permits. If such a permit-holder is successful in securing an offer of permanent employment and thus permanent resident status, he or she can then bring a foreign spouse and children into the country, also as permanent residents. The lengthy five-year qualification period still makes this a far-from-easy accomplishment, but for those who stay the distance, there is at least the prospect of resuming a normal marital and family life. As in many other jurisdictions, there is a proviso that a ‘good faith spousal relationship exists’, and further that the spouse’s residence rights will lapse ‘if at any time within three years...the good faith spousal relationship no longer subsists, save for the case of death’ (section 26(b)). Having one’s immigration status dependent on one’s marital status can serve to trap people, especially women, in unhappy or abusive relationships, making this provision potentially problematic if there is no mechanism for appeal. For proof of a good faith spousal relationship, the regulations allow, amongst other things, ‘inspection in loco of the applicant’s place of residence’ (regulation 33(5)(d)), a potentially intrusive invasion of privacy. One progressive aspect of the Act is that spousal relationships can include same-sex partnerships, in keeping with the non-discrimination clauses in the country’s constitution.
- 5.3 Significantly, the option of an ‘upgrade’ to permanent residence after five years in the country on a temporary work permit does not appear to apply to treaty permits, suggesting that the single most significant group of foreign migrant workers, viz. the miners, are not envisaged as ever qualifying for permanent residence, nor for the associated entitlement to bring their wives and families to live with them in South Africa. This practically guarantees the perpetuation of a migrant worker system based on unaccompanied males, with all its attendant social problems.
- 5.4 ‘Residence on other grounds’ (section 27) is available to a ‘foreigner of good and sound character’ who ‘has received an offer of permanent employment’, provided that ‘the application falls within the yearly limits of available permits prescribed from time to time for each sector of industry, trade and commerce, after consultation with the Departments of Trade and Industry, Labour, and Education’. This is effectively a second type of quota, but these are considerably more tightly defined in the regulations than those for temporary quota work permits. As set out in regulation 33(10), the annual quotas for permanent residence are:
- (a) 5000 in respect of the clothing and textile industry professions;
 - (b) 10000 in respect of chemicals and biotechnology professions;
 - (c) 10000 in respect of information and communication technology professions;

- (d) 10000 in respect of tourism professions;
 - (e) 15000 in respect of academic research professions;
 - (f) 10000 in respect of teaching professions;
 - (g) 50000 in respect of other professions; and
 - (h) 100000 in respect of other activities which considering the nature of the qualification, training and experience required cannot be regarded as a profession.
- 5.5 Depending on which professions or employment activities are included in the latter two catch-all categories, there is again likely to be a male bias in the overall migration flows under this section of the Act. Certainly chemicals and biotechnology, information and communication technology and academic research remain male-dominated professions. As with temporary work permits, any gender bias will become evident only after the Act has been in operation for a year or more, requiring regular gender monitoring and perhaps gender-based quotas if gender equity is to be achieved.
- 5.6 Other criteria for admission as a permanent resident include extraordinary skills, business or capital investment, refugee status, retirement and 'net worth'. Most, again, can be predicted to have a male bias.

6.0 Conclusions

- 6.1 South Africa's new Immigration Act is not generally beneficial to women, nor is it without serious gender-related problems for migrants of either gender and at any point along the unskilled-skilled labour spectrum. It seems almost inevitable that the Act will create a gender bias in favour of male migrant workers, at both 'skilled' and 'unskilled' ends of the spectrum. Most of the hurdles for either temporary work permits or permanent residence are effectively higher for women, especially those from other Southern African countries. Thus while there is no overt gender discrimination, South Africa's new immigration policy is a classic case of 'state masculinism' (Westwood and Phizacklea 2000). The two normative models implicit within it are of a skilled male worker with a dependent female spouse and children; and an 'unskilled' male migrant worker unaccompanied by spouse or family. The stereotype of the male migrant worker is widely held internationally, and is reinforced rather than challenged by this legislation, despite its superficial gender neutrality.
- 6.2 Looking at the reality of female labour migration in the region, there is little in the Act that will make life easier for the Zimbabwean domestic worker in Johannesburg, the Basotho farmworker in the Free State, or the wife of the Mozambican mineworker. Where is the flexibility that might facilitate the multi-purpose migration practised by Southern African female migrants, migration that might include some work even if not undertaken primarily for the purposes of employment? The Act is out of step with the reality of migrants' lives and needs, and especially of female migrants' lives and needs.

- 6.3 Restrictions on rights to admission, residence and employment for the spouse and other family members of migrants will itself act as a major disincentive to prospective skilled migrants of either gender, thus defeating the Act's putative aim of serving the interests of the national economy. These restrictions will also, in all likelihood, affect more women than men, and will be a particular disincentive to female migration. There is little that will encourage the female IT specialist, biotechnologist or engineer, especially if she happens to be married.
- 6.4 In our view, all categories of temporary work permit, treaty permit, corporate and business permit should bring associated rights, at least of admission and residence, to spouses and children (as in the 'exceptional skills' category). Spouses of work permit-holder should themselves be allowed to seek work, their employment being determined by labour market need combined with the requirement to employ foreigners under the same conditions as South African workers. In an economically competitive and human rights-conscious global environment, no country's immigration legislation can any longer operate under an assumption of a genderless, atomistic 'worker' or 'person with skills', nor continue with the notion of the labour migrant as a (male) primary breadwinner accompanied by an unemployed spouse and dependants. As Harzig (2001) has observed, new, transnational forms of mobility bring new demands on immigration policy:

Any legal arrangement providing for the individual migrant with (labour) marketable skills which fails to account for the mental maps of transnational migrants, the multiple layers of decision-making strategies and the complexities of transnational communities, will be unable to control migration "waves". An immigration policy which considers family sponsorship and family unification the exceptional form of entry rather than the rule does not reflect the realities of transmigrants' lives. It inevitably has to fail. (Harzig 2001 p. 25).

- 6.5 The gender implications of the Act are fundamental to its success or failure, even on its own economic terms; and their correction demands more than mere window-dressing. Adapting policy to make it more gender-equitable in practice will simultaneously, we argue, facilitate the economic stimulation that is at the very foundation of the 2002 Immigration Act.

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