



A Creeping Defeat of the Ends of Justice

1. Introduction

A deeply disturbing trend has developed over the past few years with regard to mobile communities in South Africa, more especially with regard to undocumented people. This manifests itself in officials making decisions that effectively exclude undocumented people or asylum seekers, and oftentimes even refugees with the requisite documentation, from accessing social benefits or legal protection to which they are entitled under either the Constitution or specific legislation.

The xenophobic culture that has taken root in South Africa seems now to be so hegemonic that these aberrations mostly pass unchallenged and are regarded as an acceptable part of our social fabric. We have seen examples of this in the fields of education and healthcare, where officials have made *ad hoc* exclusionary decisions that they were not entitled to make and, despite their illegality and indeed clear instructions from their authorities to the contrary, these have taken root and spread. Only robust advocacy and legal interventions have kept the intentions of the law and best practice at the forefront. The following excerpt gives some understanding of the dynamics which frame the negative, xenophobic, arbitrary decisions made by what the writer rather helpfully calls 'street level bureaucrats'.

"South Africa's post-apartheid immigration regime confers a range of legal rights on documented migrants. But the shifting practices of the Department of Home Affairs (DHA) – the bureaucracy charged with managing migration – indicate an official reluctance to bestow these rights through documentation. Instead, the DHA has increased the barriers or denied documentation to many foreign migrants. Ensuring that these migrants remain undocumented fulfils the DHA objective of facilitating their removal, but it also

undercuts the administration's ability to know who is in the country, another expressed DHA goal. This article highlights these conflicting purposes, identifying many of the DHA's administrative strategies and practices to withhold or deny documentation, and hence legal rights, to foreign migrants even when its stated goal is documentation. These practices also underscore the ways in which street-level bureaucrats can influence documentation policy and practice by determining who gets access to documentation."¹

2. A Case in Point

Recent reports confirm that there is a burgeoning onslaught against undocumented people, particularly in the matter of undocumented people being prevented from reporting crime, especially domestic violence and abuse, to the police simply because they are undocumented. They are made to believe that reporting crime is dependent on status. "Undocumented immigrants are even too afraid to seek assistance or to report any crime, because they fear the police will victimise them," according to Lawyers for Human Rights' Detention Monitoring Unit.²

A culture has emerged in some police stations that claims that undocumented people have no right to lay charges. This means that already vulnerable groups – especially women and children – are deprived of the protection and security they desperately need in order to ward off violent attacks and the other serious dangers which they are subjected to.

It would appear that xenophobia trumps the fight against gender-based violence and criminality, something which President Ramaphosa has often highlighted as a priority.³ Victims of violence and crime generally are unwilling to

report these incidents to the police for fear of extortion and deportation.⁴ This, in a country where domestic violence, femicide and violence against women and children is astronomical. Mobile women, and especially undocumented women, are the most vulnerable group within this already vulnerable sector. Police Minister Bheki Cele reported that between April and June 2023, 855 women were killed, and over 11 855 cases of gender-based violence against women were reported, including 9 516 cases of rape.⁵ President Ramaphosa has many times declared that eradicating gender-based violence is a national priority: “It is not enough for perpetrators to be apprehended, tried, convicted and sentenced. We must work together to address the drivers of gender-based violence in our communities, including patriarchal attitudes and practices. Eradicating gender-based violence demands that we act together as a people.”⁶ Barring people from reporting such crimes allows a culture of impunity to thrive, rather than assisting positively to eradicate this scourge. This is obviously contrary to what the President is urging. And it is not only the refusal to allow undocumented persons from laying charges that causes concern – for some time now there have also been strong allegations against the police for extortion, bribery and the like.⁷

3. Confidential Reporting of Crimes

A spokesperson for the SA Police Service, Captain Mavela Masondo, has said that “with regards to undocumented foreign nationals we are partnering with Home Affairs. People should report any wrongdoing by police at the nearest police or at the IPID [the Independent Police Investigative Directorate]. Remember as police we do not investigate ourselves which is done by IPID. A case can be opened, then investigated by the IPID. Although undocumented foreigners may be arrested for not having documents they have the right to report.”⁸ What is most needed in this regard is a directive assuring undocumented people that whatever personal details they give to SAPS will not be shared with the DHA. This would be similar to the declaration given to undocumented people when first enrolling for the vaccine during the COVID pandemic.⁹ Even then, however, despite assurances of confidentiality by the Department of Health, there was still widespread suspicion that these would not be honoured. Accordingly, the co-operation between SAPS and the DHA to which Captain Masondo

refers should include strong, unambiguous public messaging assuring undocumented that they have a right to report crimes; that their status has nothing to do with the matter; and that their personal information will not be shared with any department or security agency.

There is support for this approach in a recent judgement of the Gauteng High Court, which ordered the Department of Health to publicly confirm that all lactating mothers, pregnant women, and children under the age of six are entitled to free medical care, except where they benefit from medical aid or the like, or where they have entered the country solely for the purpose of accessing medical care. This is true for everyone, irrespective of nationality or documentation status. With this precedent it is well within reason to call for something similar in this analogous situation.¹⁰

This problem is by no means unique to South Africa; reports from the USA, for instance, show the same trends and fears:

“Victims of sexual and domestic violence face many barriers to reporting including: fears of deportation for themselves or others; witness intimidation, such as threats of being reported to ICE; lack of legal representation; unfamiliarity with the legal system; language barriers; expectations of not being believed; and distrust of the government to protect their rights. The implications are clear. For undocumented immigrants who experience sexual and domestic violence, these barriers are compounded by threats of exposing their immigration status and threats as well as fear of being separated from their families. When the community and law enforcement are not engaged, we miss opportunities to interrupt current and future violence. As a result, everyone’s public safety is put at risk.”¹¹

4. The Need for Equitable and Non-Discriminatory Policing

It is clear from the above that the emergence of this trend of denying undocumented people the right to lay charges not only exacerbates already out of control violence against women and children, but it also allows police officers to act with impunity and to create a culture of discriminatory policing with regard to foreign nationals. Indeed, such discriminatory practices are in fact a symptom of a bigger dysfunction in the polic-

ing system. Louise Edwards and Laura Freeman, in a well-argued article, make the point:

“The Preamble to the Constitution of the Republic of South Africa, 1996 (the Constitution), reflects on the country’s history of inequality and injustice and expresses the belief that South Africa belongs to all people who reside within it, ‘united in our diversity’. Equality and non-discrimination are among the foundational elements of South Africa’s democratic transformation; they apply not only as stand-alone rights, but also as a benchmark against which the achievement of other fundamental human rights can be measured. This includes the rights to life, dignity, privacy and security, the enjoyment of which is not qualified by a person’s citizenship status. However, since the advent of democracy, xenophobic violence and related hate crimes against non-nationals have exposed a fault line in the country’s commitment to ending discrimination and promoting social cohesion.”¹²

They continue: “Overall, the constitutional, legislative and policy framework for policing in South Africa imposes a clear obligation on the SAPS to ensure equitable service delivery to non-nationals, as well as the effective prevention and detection of, and response to, xenophobic violence and related hate crimes.”¹³

It is clear then that there is a Constitutional obligation to enhance the dignity of all and to ensure the security of everyone regardless of status. There is also a commitment to non-discriminatory policing, and together these should provide a sufficient foundation for contesting creeping anti-migrant practices. There are also two specific Standard Operating Procedures (SOPs) that speak directly to the obligation to provide services to non-nationals. National Instruction 5 of 2014 and SOP 1 of 2016 are instructive regarding what is expected of the SAPS in the treatment by its members of non-nationals, and both are framed in terms of the SAPS’ constitutional obligations. SOP 1, in particular, is unequivocal and states as follows:

“The South African Police Service ... is responsible for [the] safety and security of all inhabitants of South Africa, including officials or citizens [sic] of foreign countries. Therefore, the South African Police Service has a mandate to protect and serve ... foreign nationals.

All foreign nationals [irrespective] of their status [legal or illegal] in the country should be treated with respect and dignity at all times in accordance with the Constitution of the Republic of South Africa. The SAPS Codes of Conduct and Ethics similarly reflect the broad obligations established in the Constitution and the SAPS Act. The Code of Conduct is signed by every police officer, and failure to comply with it is treated as serious misconduct. The Code of Conduct requires every police officer to commit to, *inter alia*, creating: a safe and secure environment for all people in South Africa by preventing actions which may threaten the safety and security of any community, investigating criminal conduct which has endangered the safety and security of the community and bringing the perpetrators thereof to justice.”¹⁴

It is thus clear that the obnoxious practices outlined in this paper are against the ethos of the Constitution and explicitly contrary to procedures of the Police Service itself. As Edwards and Freeman conclude: “In addition, the SAPS Code of Ethics commits police officers to the rule of law and the provision of equitable policing services for all. In particular, the Code outlines five key principles critical for policing: integrity, respect for diversity, obedience to the law, service excellence, and public approval. Significantly, the Code also commits police officers to ‘always show respect for the cultural and other diversities in the community’ and to ‘treat every person with equal respect and honour their rights as inhabitants of South Africa’.”¹⁵

5. Conclusion

One cannot but notice that the thrust of the SOPs and the Code of Ethics has a very strong resonance with the teaching of Pope Francis in his 2023 Message for the World Day of Migrants and Refugees. He says: “The important thing is that there always be a community ready to welcome, protect, promote and integrate everyone, without distinctions and without excluding anyone.”¹⁶ That line echoes the pleas for non-discrimination and for protection, both of which are key functions of the Police Service and both of which are seriously undermined by the treatment received by undocumented people seeking protection in police stations and in dangerous situations.

Contemporary papal teaching on protection of mobile people is predicated on the principle that protection is not dependant on status. As far back as 2017, Pope Francis spoke of the protection of the undocumented or, put another way, those who arrive through irregular methods, as a moral imperative. He said, “it is a moral imperative to protect migrant workers and among these particularly men and women in irregular situations as well as those exiled and seeking asylum or victims of trafficking.”¹⁷ Moreover, he said, “defending their inalienable rights, ensuring their fundamental freedoms and respecting their dignity are duties from which no one can be exempted.”¹⁸ There is “a duty of solidarity” in the face of tragedies, such as conflicts, persecutions, violence, that take the lives of so many migrants

and refugees. “Solidarity is born precisely from the capacity to understand the needs of our brothers and sisters who are in difficulty and to take responsibility for these needs.” It is clear from the broader picture, the wider context, and the consistent interpretation of these principles, that violence is not merely understood as one of the triggers that compel migration; nor is it simply a reference to the harsh, often fatal conditions that are part of the journey, but it also has reference to the experiences in the countries in which migrants settle. In the light of this clear point any obstacles to dealing with this violence must be seen as a failure of the moral imperative, and thus a fundamentally disordered or evil occurrence. We are therefore compelled to expose it and counter it robustly.

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¹ http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0259-01902014000100012

² <https://allafrica.com/stories/202212020432.html>

³ <https://www.aa.com.tr/en/africa/violence-against-women-is-like-second-pandemic-in-south-africa-president/2427879>

⁴ <https://allafrica.com/stories/202212020432.html>

⁵ <https://www.hrw.org/world-report/2023/country-chapters/south-africa>

⁶ <https://www.timeslive.co.za/politics/2022-08-02-society-must-help-fight-gbv-president-ramaphosa-urges/>

⁷ <https://www.groundup.org.za/article/we-are-no-longer-afraid-of-thieves-instead-we-fear-the-police-they-keep-coming-and-taking-money/>

⁸ <https://allafrica.com/stories/202212020432.html>

⁹ <https://allafrica.com/stories/202212020432.html>

¹⁰ <https://www.scalabrini.org.za/court-order-right-of-all-pregnant-and-lactating-women-and-children-under-6-to-access-free-health-care/>

¹¹ <https://www.wbur.org/cognoscenti/2017/09/22/undocumented-immigrants-report-crimes-debra-j-robbin>

¹² <https://apcof.org/wp-content/uploads/policing-and-non-nationals-report.pdf>

¹³ <https://apcof.org/wp-content/uploads/policing-and-non-nationals-report.pdf>

¹⁴ <https://apcof.org/wp-content/uploads/policing-and-non-nationals-report.pdf>

¹⁵ <https://apcof.org/wp-content/uploads/policing-and-non-nationals-report.pdf>

¹⁶ <https://www.vatican.va/content/francesco/en/messages/migration/documents/20230511-world-migrants-day-2023.html>

¹⁷ <https://www.americamagazine.org/politics-society/2017/02/21/pope-francis-protecting-worlds-migrants-and-refugees-moral-imperative>

¹⁸ <https://www.americamagazine.org/politics-society/2017/02/21/pope-francis-protecting-worlds-migrants-and-refugees-moral-imperative>