

Language as a Tool of Divisive Politics: Perspectives on Foreign Nationals in South Africa

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Online ISSN
1727-3781

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Date Submitted

2 February 2023

Date Revised

9 October 2023

Date Accepted

9 October 2023

Date Published

29 February 2024

Guest Editors

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Journal Editor

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How to cite this contribution

Agbor A "Language as a Tool of
Divisive Politics: Perspectives on
Foreign Nationals in South Africa"
PER / PELJ 2024(27) –
DOI <http://dx.doi.org/10.17159/1727-3781/2024/v27i0a15552>

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DOI
<http://dx.doi.org/10.17159/1727-3781/2024/v27i0a15552>

Abstract

The role of language in a diverse and democratic society is critical for many reasons: first, it serves as a vital tool for the realisation of the right to freedom of expression. Secondly, it brings into confluence two other rights: the rights to dignity and equality. When language has the potential to cause hurt or harm, or incite others towards hatred, discrimination, or violence, then law as an instrument must be relied upon to regulate it. Political rhetoric uttered by top politicians in South Africa does not reflect the truth from a policy perspective; it incites hatred towards foreign nationals, shatters communities as fear and suspicion fill individuals who target foreign nationals and is counterproductive when one thinks of nation-building. The rhetoric exceeds the limits of legally protected speech. In addition, scapegoating foreign nationals for the country's socio-economic woes is not only dishonest but is a form of political corruption.

Keywords

Xenophobia; poisonous pedagogues; foreign migrants; immigration; hate speech; freedom of speech.

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1 Introduction

In 2015 and 2016 the Republican primaries in the United States presidential race served as a public podium for Donald Trump to utter controversial and divisive remarks regarding specific demographics.¹ Launching his bid for the White House on 17 June 2015, Donald Trump (Trump) made the following remarks:

The U.S. has become a dumping ground for everybody else's problems. [Applause] Thank you. It's true, and these are the best and the finest. When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.²

Those remarks were further echoed and amplified during Republican primaries in 2016 and the general election in the Autumn of that same year. Trump would say Mexicans are perpetrators of the most violent crimes. He labelled Mexicans as criminals who rape and murder Americans.³ As such, they should not be in the United States. He called Muslims from numerous Arab countries jihadists or terrorists.⁴ Specific groups of individuals were targeted because of their religion (Muslims from Arab and African countries) or nationality (for example, Mexicans). Eventually elected to the presidency, he used his administration to echo such unfounded and divisive statements, which to a greater extent guided and informed some of his policies. For example, in the first one hundred days of his administration the 45th President of the United States would ban Muslims from specific Muslim-dominated African and Arab countries (simply because of their religion) from traveling to the United States.⁵ Syrian refugees were banned indefinitely, while some

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¹ Lind 2015 <https://www.vox.com/2015/12/9/9872908/donald-trump-muslims>.

² Benkler, Faris and Roberts *Network Propaganda* 105.

³ Yount 2017 <https://www.asc.upenn.edu/news-events/news/study-finds-troubling-consequences-anti-muslim-and-anti-mexican-attitudes-and-actions>. Also see Kteily and Bruneau 2017 *Personality and Social Psychology Bulletin* 87.

⁴ Lind 2015 <https://www.vox.com/2015/12/9/9872908/donald-trump-muslims>; Kteily and Bruneau 2017 *Personality and Social Psychology Bulletin* 87-104; and Yount 2017 <https://www.asc.upenn.edu/news-events/news/study-finds-troubling-consequences-anti-muslim-and-anti-mexican-attitudes-and-actions>.

⁵ Kteily and Bruneau 2017 *Personality and Social Psychology Bulletin* 87-104 and Yount 2017 <https://www.asc.upenn.edu/news-events/news/study-finds-troubling-consequences-anti-muslim-and-anti-mexican-attitudes-and-actions>.

countries were red-flagged for restricted entry into the United States.⁶ Those with different sexual orientations, such as gays, lesbians, transgenders, were not spared.⁷ Such harsh rhetoric spewed by the leader of a democratic country founded on equality, liberty and human rights would create not just a toxic environment for everyone but also incite anti-Islam and anti-foreigner sentiments. Specific groups such as Muslims, foreign nationals and sexual minorities nurtured a deepened sense of insecurity as those utterances would adversely influence policy and social cohesion, and probably expose them to hate crimes.⁸ With the murder of George Floyd that sparked the Black Lives Matter Movement,⁹ numerous social tensions gained national and international attention, and eventually dominated US socio-legal and political discourse.¹⁰

Trump's actions and comments were not without precedent. History records that in Nazi Germany, propaganda authored by Julius Streicher and Hans Fritzsche filled the newspapers and airwaves, stirring anti-Semitic sentiments and creating a fecund environment for the perpetration of atrocities.¹¹ About five decades later Rwandan Hutu fundamentalists used media outlets, books and weekly magazines to demean, debase, dehumanise and discredit an ethnic group, the Tutsis.¹² With persecutory acts committed against specific individuals and groups based on their race and ethnicity, the massacre of millions of people would not have been possible without the involvement of a few individuals who operated remotely and used the media to whip negative sentiments, and orchestrate the planning, preparation and commission of atrocities.¹³

⁶ Pierce and Meissner 2017 <https://www.migrationpolicy.org/sites/default/files/publications/Trump-EO-Refugees-TravelBan-FINAL.pdf> 1-6; Anon 2017 <https://www.bbc.com/news/world-us-canada-38777437>.

⁷ Cahill, Wang and Jenkins 2019 https://fenwayhealth.org/wp-content/uploads/Trump-Administration-Impact-on-LGBTs-Year-Two-Brief_Web.pdf 1-30.

⁸ See, for example, Elsheikh and Sisemore 2021 <https://belonging.berkeley.edu/sites/default/files/2021-10/Islamophobia%20Through%20the%20Eyes%20of%20Muslims.pdf> 15.

⁹ Sobo, Lambert and Heath 2020 *Anthropology and Medicine* 243-248; Cornelius 2020 *Equality, Diversity and Inclusion* 8-30.

¹⁰ Christián, Erdős and Háló 2022 *Cogent Social Sciences* 1-17; Heaney 2020 *J Int'l Aff* 195-208; Reny and Newman 2021 *Am Pol Sci Rev* 1499-1507; Beaman 2021 *Journal of Common Market Studies* 103-114. See also Nguyen *et al* 2021 *SSM-Population Health* 1-9; and Cornelius 2020 *Equality, Diversity and Inclusion* 8-30.

¹¹ Artz 1994-1995 *NY L Sch J Hum Rts* 689-758.

¹² Des Forges "Call to Genocide" 41-54.

¹³ See generally the following: Artz 1994-1995 *NY L Sch J Hum Rts* 689-758; Des Forges "Call to Genocide" 41-45.

As witnessed recently, some South African politicians are intentionally putting the country on a similar path, orchestrating discrimination, hostility and violence against specific groups of individuals. The only difference with the South African experience is that such individuals belong neither to a race nor to an ethnicity. National origin is the key factor here.¹⁴ Speeches emitted by politicians in South Africa have placed the spotlight on migrants broadly, and foreign nationals of African descent specifically.¹⁵ They have become the subjects and targets of irresponsible, divisive and toxic political rhetoric that does not in any way build the much-intended social cohesion amongst South African communities. Rather, such rhetoric hardens the disdain and fuels the suspicion that South Africans nurture about foreigners, destabilises the communities, adds to the stark ignorance on the importance of migration and often results in the perpetration of the selective victimisation of foreign nationals in different communities, especially shop owners.

There have been numerous instances of prominent politicians who utter words and phrases that have undoubtedly resulted in the perpetration of xenophobic acts.¹⁶ In isolated events, politicians have expressed discontent with foreign nationals, sparking the commission of hostilities against foreign nationals. Lately foreign national have been blamed for everything that has gone wrong in the country.¹⁷ Such utterances tend to provoke violence, hatred and tension.¹⁸ In some cases foreign nationals and their assets have

¹⁴ The discriminatory acts perpetrated against foreign nationals are based solely on the fact that they are foreign nationals.

¹⁵ For some, the fact that the targets in such rhetoric and perpetration of violence are limited to black African migrants has triggered the perception that the motive is "Afrophobia": intense and irrational hatred of Africans.

¹⁶ Mazarura 2022 <https://www.dailymaverick.co.za/opinionista/2022-03-16-the-political-agency-of-xenophobia-and-xenophobic-violence-in-south-africa-a-call-for-responsible-leadership/>. Also see Welle 2022 <https://frontline.thehindu.com/dispatches/south-africa-new-campaign-reignites-xenophobic-rhetoric/article65396102.ece>.

¹⁷ For example, the Limpopo MEC for Health, Dr *Phophi Ramathuba* blamed foreign nationals for overbearing the public healthcare system in Limpopo: see Rall 2022 <https://www.iol.co.za/news/south-africa/limpopo/limpopo-health-mec-causes-stir-on-social-media-calling-on-hospital-to-charge-foreigner-for-treatment-d2463c86-6971-4c36-adfb-faf2598e46d7>. Similar remarks have been made by prominent politicians with regard to the scarcity of jobs in the country: Myeni 2022 <https://www.aljazeera.com/news/2022/6/16/s-africa-minister-suggests-foreigners-to-blame-for-no-jobs>.

¹⁸ Mazarura 2022 <https://www.dailymaverick.co.za/opinionista/2022-03-16-the-political-agency-of-xenophobia-and-xenophobic-violence-in-south-africa-a-call-for-responsible-leadership/>. Also see Welle 2022 <https://frontline.thehindu.com/dispatches/south-africa-new-campaign-reignites-xenophobic-rhetoric/article65396102.ece>.

been targeted following such comments.¹⁹ As such, there is little room to doubt the link between such hate-induced and hate-filled rhetoric and the ensuing political violence perpetrated against foreign nationals. This raises two key questions: firstly, whether there would be any form of accountability for such speeches, and secondly, whether the values and principles upon which the country is founded extend to foreign nationals and if so, whether the South African Human Rights Commission would have the requisite will to investigate such scenarios.

Laying bare some of the undeniable facts about foreign migrants in South Africa, this paper investigates some of those contentious issues that surround the unwittingly problematised migration in South Africa. Taking an evidence-based approach, the paper picks a few snippets of speeches made by prominent politicians in South Africa regarding foreign nationals and shows how such speeches played a contributory role to the perpetration of violence against foreign nationals in South Africa. This is followed by a discussion on the regulation of migration in South Africa, backed by data collated from Statistics South Africa (Stats SA). The paper then evaluates the contents and context of those speeches in the legal framework: domestic legislation such as the *Constitution*,²⁰ the *Promotion of Equity and Prevention of Unfair Discrimination Act* (PEPUDA),²¹ international and regional human rights documents such as the *Universal Declaration of Human Rights* (UDHR),²² the *International Covenant on Civil and Political Rights* (ICCPR),²³ the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)²⁴ and the *African Charter on Human and Peoples' Rights* (the *Banjul Charter*).²⁵ Culling from the aforementioned instruments, the paper argues that such speeches, because of their contents, context and ramifications, do not qualify as legally protected speech. The paper further argues that in view of the link between those speeches and the violence perpetrated against foreign nationals, they may be considered to qualify as advocacy for hatred and violence. In conclusion, the paper highlights the

¹⁹ On the contributory role played by South Africa's politicians to xenophobic violence, see the following: Landau 2015 <https://www.washingtonpost.com/news/monkey-cage/wp/2015/05/11/political-rhetoric-and-institutions-fuel-xenophobic-violence-in-south-africa/>.

²⁰ *Constitution of the Republic of South Africa, 1996* (the *Constitution*).

²¹ *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (PEPUDA).

²² *Universal Declaration of Human Rights* (1948).

²³ *International Covenant on Civil and Political Rights* (1966).

²⁴ *International Convention on the Elimination of All Forms of Racial Discrimination* (1965).

²⁵ *African Charter on Human and Peoples' Rights* (1981) (Banjul Charter).

urgent need to hold honest and rigorous debates on thematic issues such as migration which may help allay the anxieties harboured by South African citizens towards foreign nationals.

2 The facts

South Africa's history has been embroiled in significant economic and political developments over the decades which, arguably, have been both positive and negative: an apartheid policy, discredited for many decades, was dismantled. The black majority was enfranchised and took the reins of political leadership, and a constitutional democracy was founded on the premises and promises of equality, human rights, the rule of law, good governance and accountability.²⁶ With crumbling infrastructure, a rise in violent crime, a struggling economy and corruption that has gone rife in the public sector, pessimistic views about South Africa have experienced a surge with some holding that South Africa is just like any other African country. In other words, it was a matter of time for questions of governance, political leadership, integrity, corruption, and the decadence of socio-economic and political institutions to kick in. In such a complex and beleaguered situation, the very pillars of the Constitution have been put to the test: whether the country is living up to its creed of a South Africa for everyone, built on non-racism and non-sexism, amongst other things.²⁷ Race and sex or gender, unfortunately, are not the only key demographics in South Africa which may shake the foundational values of the country. There are religious groups and foreign nationals also.

Developments in the socio-economic, legal, and political arenas in South Africa have not only questioned the same premises upon which South African democracy is built, but the values have been compromised and constitutional institutions defied. The political leadership has lost its credibility, social cohesion amongst the people has been brought to the lowest level and suspicion breeds amongst them. Political corruption resulting in the grand theft of public resources has been rife; an economy that works for a few only with sky-rocketing prices which make the cost of living unbearable. There is a widening gap between the rich and the poor, millions of people are consigned to despair, the provision of prisons is the fastest growing industry in the land due to the surge in crime, many more people are now on welfare (or are receiving social grants, to be euphemistic), the economy is shrinking as investors seek alternative venues for investment,

²⁶ See s 1(a) of the *Constitution*.

²⁷ Section 1(b) of the *Constitution*.

service delivery is poor, social injustice is rife, and the legal, political and social systems are bereft of the much-needed trust from the people in order to thrive and operate. Infrastructural decadence and collapse have made it a huge challenge to provide even the most basic of services needed for a stable mental life. The provision of electricity is irregular and potable drinking water is a luxury. These issues are compounded by a nation-wide resentment and disappointment manifested through poor work attitudes.

Honest political debates are necessary to address the foregoing issues and to keep the broader South Africa informed, share the facts, and find sustainable solutions to these problems. The economy, the infrastructure (roads, water, electricity), the social services (hospitals, public schools, etc.); crime, socio-economic rights; social and economic injustices, good governance, combatting corruption and political leadership are some of the critical issues that warrant rigorous, honest and non-partisan debate.

The rhetoric spewed out by prominent politicians in South Africa, blaming African foreign nationals for all the challenges faced by the country, breeds suspicion, bias, hate and violence in the communities in which those foreign nationals live.²⁸ In view of the perpetration of violence immediately after such speeches, it would be difficult to deny the link between the two (the speech and the violence that followed). Migration has been conceptualised and depicted as one of the biggest issues facing South Africa: blamed for hijacking economic opportunities and poor service delivery, the feeble-minded and ignorant have subscribed to such nonsensical ideologies and taken upon themselves the obligation to kick foreign nationals of African descent out of the country. They have further built coalitions with nation-wide reach, one of which is *Operation Dudula*, a vigilante organisation with xenophobic undertones whose goal is to get rid of illegal migrants in South Africa.²⁹ They fail to understand the importance of migration to their economy and the role most lawful migrants play, and they confuse migrants who commit crimes in South Africa and those who make a significant contribution to the multicultural dimension and economic growth of the country.³⁰ Politicians, one could say, should take the blame completely, because they

²⁸ It could be argued that such a status quo was triggered by the statements made by some political figures.

²⁹ Myeni 2022 <https://www.aljazeera.com/features/2022/4/8/what-is-operation-dudula-s-africas-anti-immigration-vigilante>.

³⁰ Mazarura 2022 <https://www.dailymaverick.co.za/opinionista/2022-03-16-the-political-agency-of-xenophobia-and-xenophobic-violence-in-south-africa-a-call-for-responsible-leadership/>. See also Welle 2022 <https://frontline.thehindu.com/dispatches/south-africa-new-campaign-reignites-xenophobic-rhetoric/article65396102.ece>.

produced the harsh rhetoric and have never been willing to have an open, frank and engaged debate in which the data and contribution of migrants are shared and discussed. By blaming foreign nationals for the current situation in the country, they fuel anti-foreigner sentiments and advocate hatred, and when violence and discriminatory acts are perpetrated against foreigners the perpetrators are quickly labelled as xenophobic: the most profound of irrational biases against "strangers".

The question, however, is whether the statements made by politicians square with the truth. If foreign nationals have stolen the economic opportunities in the country, why then should those same politicians preserve the laws that bring and keep them in the country? Why enact laws that define the various paths to migrating to South Africa? If the politicians genuinely believe that foreign nationals are responsible for all the social upheavals and disastrous economic structures, policies, and performances of South Africa, then they must go back to the drawing board and revisit the same laws that they enacted and do what is right. Obviously, such a path cannot be pursued because their allegations are not backed by any evidence. It is the crudest form of political dishonesty, as they say one thing to their political constituencies and do another thing in Parliament.

2.1 The migration data

The rhetoric vented by politicians would make sense had South Africa a law or policy that prohibits the admission of foreign nationals, whether on a temporary or permanent basis. The reality is different. One of the pillars of a true democracy is the right to form, hold and express opinions.³¹ For a constitutional democracy like South Africa's, it would be understandable and acceptable to have opinions as varied and many as the people living in the country. A democracy will tolerate differences in opinions, we know, for that is what makes a democracy, but the facts cannot be different. Let the facts inform the opinions and not *vice versa*. To say foreign nationals are stealing jobs meant for South Africans and robbing them of other various socio-economic opportunities is a dishonest fabrication that is refutable by looking at the relevant national law that regulates the admission of foreign nationals into South Africa. The *Immigration Act* 13 of 2002 (the *Immigration Act*)³² at least conveyed the intention of Parliament when it adopted this piece of

³¹ The right to freedom of expression is well entrenched in the *Constitution*, in s 16. As discussed earlier, international and regional human rights instruments recognise the right to freedom of expression.

³² *Immigration Act* 13 of 2002 (the *Immigration Act*).

legislation. The Preamble thereto tells the purpose of the *Immigration Act* which, amongst other things, is aimed at:

setting in place a new system of immigration control which ensures ... that temporary and permanent residence permits are issued as expeditiously as possible and on the basis of simplified procedures and objectives, predictable and reasonable requirements and criteria, without consuming excessive administrative capacity; border monitoring is strengthened to ensure that the borders of the Republic do not remain porous and illegal immigration through them may be effectively detected, reduced and deterred; the South African economy may have access at all times to the full measure of the needed contributions by foreigners; 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; a policy connection is maintained between foreigners working in South Africa and the training of our nationals; immigration control is performed within the highest applicable standards of human rights protection, and xenophobia is prevented and countered both within Government and civil society.³³

To give effect to the vision encapsulated in the Preamble, the *Immigration Act* stipulates the general provisions on temporary residence permits.³⁴ Sections 11 to 24 (inclusive) spell out the different kinds of temporary residence permits: visitor's permits,³⁵ diplomatic permits,³⁶ study permits,³⁷ treaty permits,³⁸ business permits,³⁹ crew permits,⁴⁰ medical treatment permits,⁴¹ relative's permits,⁴² work permits,⁴³ retired persons permits,⁴⁴ corporate permits,⁴⁵ exchange permits,⁴⁶ asylum;⁴⁷ and cross-border and transit passes.⁴⁸ In addition to such temporary residence permits, permanent residence permits can be obtained directly on the basis a certain criteria, such as having held a work permit for five years and having received an offer of permanent employment, being the spouse of a citizen or permanent resident, or being a child of a citizen or a permanent resident. There are also

³³ See Preamble (a)-(m) of the *Immigration Act*.

³⁴ Section 10 of the *Immigration Act*.

³⁵ Section 11 of the *Immigration Act*.

³⁶ Section 12 of the *Immigration Act*.

³⁷ Section 13 of the *Immigration Act*.

³⁸ Section 14 of the *Immigration Act*.

³⁹ Section 15 of the *Immigration Act*.

⁴⁰ Section 16 of the *Immigration Act*.

⁴¹ Section 17 of the *Immigration Act*.

⁴² Section 18 of the *Immigration Act*.

⁴³ Section 19 of the *Immigration Act*.

⁴⁴ Section 20 of the *Immigration Act*.

⁴⁵ Section 21 of the *Immigration Act*.

⁴⁶ Section 22 of the *Immigration Act*.

⁴⁷ Section 23 of the *Immigration Act*.

⁴⁸ Section 24 of the *Immigration Act*.

indirect grounds for the acquisition of permanent residence.⁴⁹ Statistics collated by Stats SA give us numerical details of the different permits issued to foreign nationals, both within and outside of South Africa's borders. Even though the data have not been updated recently (they are available only up to 2015), the trends in issuing permits, both temporary and permanent, between 2012 and 2015, indicate not only the application of the *Immigration Act* but also the work by the relevant administrative units in ensuring that the vision in the *Immigration Act* is realised. In 2012 the number of visitors' visa was 44,828.⁵⁰ That number declined significantly in 2013 and 2014.⁵¹ With regard to work permits, 33,253 were issued to foreign nationals in 2012.⁵² That number dropped to 24,027 in 2013.⁵³ It declined further in the following two years, It stood at 18,184 in 2014⁵⁴ and 12,354 in 2015.⁵⁵ Permanent residence permits based on work fluctuated in the same period (2012 to 2015). In 2012 the number was 441.⁵⁶ It increased to 2,152 in 2013,⁵⁷ dropped to 1,228 in 2014,⁵⁸ and increased to 4,354 in 2015.⁵⁹

2.2 Give the devil her due – comparative analysis of migration in Africa

The statistics above reveal three important things: first, and contrary to what some politicians say in public, permits are issued to foreign nationals. Sub-categorised under temporary or permanent residence permits, all of them have different requirements and prescribed processes for their approval and issuance.⁶⁰ That means that all applicants would have met the prescribed requirements and followed the processes in place for a permit to be issued. Secondly, the various permits indicate the pathways that one can take to settle in South Africa, from temporary residence to permanent residence (and ultimately to citizenship). Thirdly, and based on the foregoing, South Africa offers more ways of migrating to and settling in the country than any other African country. Foreign nationals in academic institutions receive financial

⁴⁹ Section 27 of the *Immigration Act*.

⁵⁰ Stats SA *Documented Migrants in South Africa, 2012* 14.

⁵¹ In 2013 the number was 33,186, and in 2014 it was 21,350: see Stats SA *Documented Migrants in South Africa, 2013* 16; Stats SA *Documented Migrants in South Africa, 2014* 16.

⁵² Stats SA *Documented Migrants in South Africa, 2012* 14.

⁵³ Stats SA *Documented Migrants in South Africa, 2013* 16.

⁵⁴ Stats SA *Documented Migrants in South Africa, 2014* 16.

⁵⁵ Stats SA *Documented Migrants in South Africa, 2015* 7.

⁵⁶ Stats SA *Documented Migrants in South Africa, 2012* 29.

⁵⁷ Stats SA *Documented Migrants in South Africa, 2013* 36.

⁵⁸ Stats SA *Documented Migrants in South Africa, 2014* 37.

⁵⁹ Stats SA *Documented Migrants in South Africa, 2015* 29.

⁶⁰ See ss 11-27 of the *Immigration Act*.

aid like their South African counterparts, especially those pursuing postgraduate qualifications. They also compete with and successfully occupy substantive academic positions in the universities where they engage in teaching and learning, conducting research and engaging with the community.

2.3 Facts versus rhetoric: a cancerous distortion of the truth

Prominent politicians and public servants in various parts of the country have in recent times scapegoated foreign nationals for the social and economic woes facing the country. In Limpopo a Zimbabwean national in need of medical attention was told that Zimbabweans and other foreign nationals were overburdening the already incapacitated healthcare system in the country.⁶¹ On another occasion, South Africans were told that foreign nationals were stealing their economic opportunities, especially their jobs.⁶² In other instances, foreign nationals were blamed for the rising crime rate in the country.⁶³

No one would question the impact of those statements. The immediate aftermath was the perpetration of violence against foreign nationals and their property. Shops belonging to foreign nationals were looted.⁶⁴ Foreign nationals were also chased from their homes and communities.⁶⁵ In one instance a group of foreign nationals gathered together with weapons to confront and defeat the South African nationals who were threatening them. Law enforcement personnel and the national government sat on their hands while the foreign nationals were subjected to such planned violence.

In view of the socio-economic realities and appalling incidence of violence against foreign nationals, it could be argued that anti-foreigner rhetoric produced by political figures may directly lead to or contribute to the perpetration of further acts of violence against foreign nationals. Such rhetoric, it is argued, because of its propensity to spark violence or

⁶¹ Rall 2022 <https://www.iol.co.za/news/south-africa/limpopo/limpopo-health-mec-causes-stir-on-social-media-calling-on-hospital-to-charge-foreigner-for-treatment-d2463c86-6971-4c36-adfb-faf2598e46d7>.

⁶² Myeni 2022 <https://www.aljazeera.com/news/2022/6/16/s-africa-minister-suggests-foreigners-to-blame-for-no-jobs>.

⁶³ Zulu 2019 <https://mg.co.za/article/2019-08-16-00-strangers-are-blamed-for-our-burdens/>.

⁶⁴ Myeni 2022 <https://www.aljazeera.com/news/2022/6/16/s-africa-minister-suggests-foreigners-to-blame-for-no-jobs>.

⁶⁵ Mazarura 2022 <https://www.dailymaverick.co.za/opinionista/2022-03-16-the-political-agency-of-xenophobia-and-xenophobic-violence-in-south-africa-a-call-for-responsible-leadership/>.

discrimination against specific groups of people, may fall beyond the limits of legally protected speech.

3 Rhetoric beyond the limits and its ramifications

The right to freedom of expression is not only recognised in South Africa's legislative framework but forms a fundamental feature of its constitutional democracy.⁶⁶ It is a value that has been reaffirmed by the Constitutional Court in cases that have dealt with the issue. In *Qwelane v South African Human Rights Commission* the Constitutional Court recognised the right to freedom of expression as "the benchmark for a vibrant and animated constitutional democracy",⁶⁷ deemed it to be of "the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm",⁶⁸ and described it as "an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability".⁶⁹

The right to freedom of expression in South Africa, as in most other democracies, is not an absolute right. It is subject to legal restrictions. Citing the case of *Khumalo v Holomisa*⁷⁰ the Constitutional Court held that "although freedom of expression is fundamental to our democratic society, it is not a paramount value".⁷¹ One of the exceptions to legally protected speech is hate speech, which the Constitutional Court described as constituting an "antithesis of the values envisioned by the right to free speech – whereas the latter advances democracy, hate speech is destructive of democracy".⁷²

Two important national instruments restrict the right to freedom of expression in South Africa. First there is the *Constitution*, under Section 16(2). The kinds of speech that are prohibited in the constitutional framework include "incitement of imminent violence" or "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause

⁶⁶ See s 16 of the *Constitution*.

⁶⁷ *Qwelane v South African Human Rights Commission* 2021 6 SA 579 (CC) para 67.

⁶⁸ *Qwelane v South African Human Rights Commission* 2021 6 SA 579 (CC) para 68, citing *S v Mamabolo* 2001 3 SA 409 (CC) para 37.

⁶⁹ *Qwelane v South African Human Rights Commission* 2021 6 SA 579 (CC) para 68, citing *Economic Freedom Fighters v Minister of Justice and Correctional Services* 2021 2 SA 1 (CC) para 1.

⁷⁰ *Qwelane v South African Human Rights Commission* 2021 6 SA 579 (CC) para 74.

⁷¹ *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 25.

⁷² *Qwelane v South African Human Rights Commission* 2021 6 SA 579 (CC) para 78, citing *Vejdeland v Sweden* Application No 1813/07 (ECtHR) 9 February 2012, concurring opinion of Spielmann J joined by Nussberger J, para 5.

harm".⁷³ The second national instrument is the PEPUDA. One of the kinds of speech prohibited by the PEPUDA is hate speech.⁷⁴ On the one hand the *Constitution* recognises three crucial rights: the right to equality,⁷⁵ the right to human dignity⁷⁶ and the right to freedom of expression.⁷⁷ In addition, it imposes clear restrictions on the right to freedom of expression. On the other hand, and complementing the *Constitution*, hate speech is prohibited by the PEPUDA. In summary, it can be argued that these two instruments bring to legal confluence complex issues such as the rights to equality, dignity, freedom of expression and hate speech. Politicians are entitled to form, hold, and disseminate their opinions through any platform, but the question is whether the statements made by them, in which they dehumanise migrants, go beyond the limits of legally protected speech and constitute the incitement of imminent violence or hatred.

The incitement of imminent violence is an inchoate crime, meaning that liability for it is imposed irrespective of whether it results in the commission of a crime or not. In legal parlance incitement may take different forms, including words, speeches or cartoons calling for or suggesting that unlawful acts be perpetrated. In the context of (mass) atrocities in which specific groups of people are targeted, such incitement is rarely direct.⁷⁸ However, in assessing the contribution that is made by a particular speaker, a few factors are taken into consideration: the stature of the speaker, the words used, the audience, the existing context and the time when which those words were used.⁷⁹ Politicians undoubtedly have an immense stature in any social context, and their words and speeches would therefore have an impact on the listeners. Secondly, the words used are also scrutinised. Most politicians in contemporary politics would avoid making direct calls for the perpetration of violence because they know the legal ramifications that might ensue. However, when they blame an individual or group of people for the challenges in a society, then they tactfully and indirectly poison the minds of

⁷³ See s 16(2)(b)-(c) of the *Constitution*.

⁷⁴ See s 10(1) of PEPUDA, which deals specifically with the issue of hate speech.

⁷⁵ Section 9 of the *Constitution*.

⁷⁶ Section 10 of the *Constitution*.

⁷⁷ Section 16 of the *Constitution*.

⁷⁸ Where incitement is direct and public, and when specific elements are present, then that may attract criminal liability.

⁷⁹ In the view of the Constitutional Court, several factors that are critical in curtailing the right to freedom of expression in international law include the following: "the prevailing social and political context ... the status of the speaker in relation to the audience ... the existence of a clear intent to incite ... the content and form of the speech ... the extent and reach of the speech ... and the real likelihood and imminence of harm": see *Qwelane v South African Human Rights Commission* 2021 6 SA 579 (CC) para 89.

their listeners, who in turn target and victimise those individuals and groups. Subsequent to those speeches, foreign nationals and their assets become the targets of attacks. That raises the question whether there is a causal link between those speeches and the attacks that take place after them, or if such speeches played a contributory role in those attacks. South Africa is currently undergoing a huge economic crisis that has resulted in shrinking job opportunities, inflation that has resulted in skyrocketing prices for basic goods and services and a toxic political environment that is marked by dishonesty and victimisation. In this context fabrications and distortions have been deployed as the national currency, with tribes and political factions turning against one another. In such a volatile political environment all influential individuals, especially politicians, must choose and calibrate their words carefully and exercise caution in the way they are disseminated. To attribute fault to any group for the ongoing crises in the country would be tantamount to saying that the group should be victimised. That is what the politicians and their rhetoric have done; they have succeeded in brainwashing their naïve and shallow-minded constituents into believing that their economic and social problems are caused entirely by the presence of foreign nationals in South Africa.

Followers of history have no difficulty in understanding and sharing the details of some of the worst atrocities documented by mankind in the past century: the Nazi persecution of the Jews in Germany and the Hutu massacre of Tutsis in Rwanda in 1994.

The freedom to form, hold and disseminate opinions constitutes one of the crucial pillars of a democratic society. The functional importance of the right to freedom of expression has been the focus of numerous scholarly works and policy documents developed by intergovernmental institutions.⁸⁰ If democracy dies in darkness, then the right to freedom of expression and the exercise thereof becomes functional in the survival and growth of a democracy. As such, opinions on issues may vary but the facts on which they are based should remain the same. Based on the foregoing, the data, and opinions on immigrants in South Africa present two complex and extreme realities: the politicians' perspectives are not matched and backed by the facts presented and published by Statistics South Africa.

⁸⁰ The literature on the right to freedom of expression is extensive and impressive, with different scholars' views shaped to a greater extent by the legal and political context from which they emanate. International and regional human rights instruments that recognise the right to freedom of expression include the ICCPR and the *Banjul Charter*. For scholarly works, see the following: Stotzky 2002 *U Miami L Rev* and Finkelman 2002 *Wm & Mary Bill Rts J*. Also see Van Vollenhoven 2015 *PELJ*.

The perception that foreign migrants are responsible for the social and economic woes that have befallen the country has been disseminated publicly to the broader South African society, and this kind of statement excites anti-foreigner sentiment in the feeble minded which, as has been seen, often leads to the perpetration of xenophobic attacks.⁸¹ The contributions of migrants have been devalued, discounted and denied from public podiums by prominent politicians whose main goals are to distract their constituencies from focusing on the obvious: government's poor economic policies and unsustainable social programmes, and the rife corruption within the circles of top political figures, all of which have contributed to the failing social and economic development of the country.

The argument raised in defence of such kinds of speeches is that they fall within the zone of legally protected speech. The counterargument, obviously, is that speech that has the potential to incite hatred based on any ground, or targets a socially identifiable group of individuals, falls beyond the contours of free speech. Looking at the speeches made by political figures and the ensuing perpetration of violence against foreign nationals and their belongings, can one deny a causal link between those two? Therefore, such speech can be classified as hate speech. This becomes one of the clear cases where language, unchecked, contravenes the law. In such instances the law itself, as a regulator and guarantor of civil liberties, displays an unwillingness to embrace, condone or endorse inappropriate and divisive language with the potential to fuel hostile sentiments in a community.

Beyond the national frontiers there is a strong international and regional human rights framework regulates the right to freedom of expression and the limits thereto.⁸² The right to freedom of expression its normative content, international prescripts and the precise contours thereto rest on a contentious, controversial and unregulated body of argumentation representing a complex intersection of at least three fundamental rights: the right to freedom of thought; the right to freedom of expression itself; and the right to equality, including the prevention of discrimination. The UDHR is the

⁸¹ Mazarura 2022 <https://www.dailymaverick.co.za/opinionista/2022-03-16-the-political-agency-of-xenophobia-and-xenophobic-violence-in-south-africa-a-call-for-responsible-leadership/>. Also see Welle 2022 <https://frontline.thehindu.com/dispatches/south-africa-new-campaign-reignites-xenophobic-rhetoric/article65396102.ece>.

⁸² See Article 19 of the ICCPR and Art 11 of the *Banjul Charter*. Also see Art 20 of the ICCPR and Art 4 of the ICERD.

first instrument at international level that grants recognition to the right to freedom of expression.⁸³ This is followed by the ICCPR.⁸⁴

Two core instruments in the United Nations (UN) human rights regime deal with the issue of clearly prohibited speeches: the *ICCPR* and the *ICERD*. While Article 19 of the *ICCPR* recognises and delineates the right to freedom of expression in international law, Article 20 thereto sets two limits to this right. Under Article 20(1), "any propaganda for war shall be prohibited by law". In addition, any "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".⁸⁵ By giving State Parties to the *ICCPR* the latitude to prohibit such kinds of speech in their domestic systems, the right to freedom of expression in essence and effect becomes not an absolute right but is subject to specific limitations, and those limitations must be prescribed by law.

The *ICERD* also deals with the issue of hate speech and urges its State Parties to

condemn all propaganda and all organizations which are based on ideas or theories of the superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form ...⁸⁶

In evaluating the regulation of hate speech in the UN human rights architecture, it is necessary to look at the wording used in Article 20(2) of the *ICCPR* and Article 4 of the *ICERD*. These instruments place limits on the right to freedom of expression.⁸⁷ One category of speech excluded from international legal protection is advocacy of hatred (national, religious, or racial) that constitutes incitement to hostility, discrimination or violence, a concept which constitutes the bedrock of intellectual debates on what would qualify as hate speech even though the instruments themselves do not make use of the words hate speech. If it is accepted that the *ICCPR* and the *ICERD* both stand as the cornerstones of the exclusion of specific kinds of speeches in international law, then any analysis of them should precede the divergent scholarly voices which also acknowledge those instruments as a point of departure. When revisiting the parts of those speeches that are disseminated to different South African communities to foment them against

⁸³ Article 19 of the UDHR.

⁸⁴ Article 19 of the *ICCPR*.

⁸⁵ Article 20(2) of the *ICCPR*.

⁸⁶ Article 4 of the *ICERD*.

⁸⁷ See generally Arts 19 and 20 of the *ICCPR* and Art 4 of the *ICERD*.

foreign nationals, one would struggle to deny that they do not amount to advocacy for national hatred.⁸⁸ Falling short of calling for discriminatory acts to be committed against foreign nationals, those speeches excite and incite many listeners who are unable to evaluate their rationality. Rather, the sentiments of the listeners are excited and what ensues is the perpetration of discriminatory and hostile acts directed towards foreign nationals. There is a clear and direct link between the violence, discrimination, looting of private property and societal tensions that have been committed against foreign national and the speeches made by politicians. If that direct and causal link is undeniable, then it is clear that the speeches by South African politicians denigrating, demonising and scapegoating foreign nationals amount to advocacy for national hatred, if I were to be euphemistic. Bluntly, such language is hate speech.

4 Conclusion

Like many other African countries South Africa is miserably mired in complex socio-economic and political issues. Scapegoating foreign nationals for these issues has been the safe and expedient political choice made by politicians. Their language regarding foreign nationals has been an amalgam of distortions, fabrications, and manipulations, depicting foreign nationals as the problem. Such customary fabrications, distortions and manipulations are a common feature of biased societies. History tells us about the fate of Jews in Germany during the Nazi reign, the fate of the Tutsis in Rwanda during the Hutu-dominated regime, etc. In a diverse community language can foster cohesion and unity or it can be used to foment bigotry, division, hatred, and suspicion. When language is used as a medium to orchestrate lawlessness, the language of the law comes into play to ensure that such lawlessness, and those responsible for it, are held accountable. The language of human rights, which is also the language of the law, requires that individuals be cautious in the use of language. By setting limits to the right to freedom of expression the law seeks to exclude specific kinds of speeches from legal protection, thereby exposing those who act beyond the remit of the law. Without any iota of doubt, the language used by prominent politicians in scapegoating foreign nationals goes well beyond the limit of legally protected speech, constitutes advocacy for hatred against national groups, and does not help to build the social cohesion needed in today's South Africa.

In recent years, the South African public has been bewildered by the nature and extent of the looting of state resources by top political figures. In addition

⁸⁸ See the examples of such speeches provided earlier.

to the shocking amounts stolen, details of the syndicated theft of state resources have been exposed. Honest discussion on the ramifications of the grand corruption perpetrated by top South African political figures has been avoided. The question that remains unanswered is this: between corruption and migration, what is killing the economy? Probably there is a need for some research to provide an answer to that question.

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List of Abbreviations

Am Pol Sci Rev	American Political Science Review
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
J Int'l Aff	Journal of International Affairs

NY L Sch J Hum Rts	New York Law School Journal of Human Rights
PELJ	Potchefstroom Electronic Law Journal
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
Stats SA	Statistics South Africa
U Miami L Rev	University of Miami Law Review
UDHR	Universal Declaration of Human Rights
UN	United Nations
Wm & Mary Bill Rts J	William and Mary Bill of Rights Journal