

The role of law in curbing xenophobia

By Kevin O' Reilly

In August, Deputy Judge President Phineas Mojapelo delivered an address at the South African chapter of the International Association of Women Judges conference at Unisa titled 'xenophobia and South African law'.

With the recent upsurge of attacks on foreign nationals, Judge Mojapelo noted it had placed this issue on the agenda. He also noted that South Africa's democracy was born 21 years ago, however, it has an adequate legal framework to deal with xenophobia, such as the Constitution which states: 'Everyone has the right to freedom and security of the person.'

Other legislation of relevance in dealing with xenophobia are the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, Refugees Act 130 of 1998, the Protection from Harassment Act 17 of 2011 and the Immigration Act 13 of 2002.

Judge Mojapelo noted these Acts prohibit things such as –

- discrimination on grounds of race, gender or disability;
- hate speech; and
- harassment.

Case law

Judge Mojapelo noted the case of *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C) at para 28 where the court held:

'The state, under international law, is obliged to respect the basic human rights of any foreigner who has entered its territory, and any such person is under the South African Constitution, entitled to all the fundamental rights entrenched in the Bill of Rights, save those expressly restricted to South African citizens.'

Judge Mojapelo said that there is no law against xenophobia so it 'hides' behind other crimes such as murder, robbery, theft, assault, and defamation etcetera.

Another case Judge Mojapelo noted was the much publicised case of *S v Smith en Andere* [2002] JOL 9242 (T), which saw the conviction of four Northeast Rand police dog unit policemen who videotaped themselves assaulting two Mozambican men in 1998.

A more recent case reminiscent of the *Smith* case was that of Mozambican taxi driver, Mido Macia, who was dragged while handcuffed to a police van, which was heard in the Pretoria High Court on 25 August 2015. This incident was videotaped as well.

Judge Mojapelo said Mr Macia's murder had an 'eerie reminiscence' of the murder of another Mozambican, Ernesto Nhamuave, who was set alight by a mob in 2008.

As no one was arrested for his murder, Judge Mojapelo said: 'Justice failed him and his family'. Judge Mojapelo also noted the killing of another Mozambican, Emmanuel Sithole, who was attacked by men in Alexandra township in Johannesburg this year.

In the case of *Mamba and Others v Minister of Social Development* (T) (unreported case no 36573/08, 12-8-2008) (Makgoba J), Judge Mojapelo said that: '[I]t is sometimes challenging, even to the courts, when it comes to the type of socio-economic remedy to be awarded when a constitutional infraction has been found'.

The applicants were foreigners who were victims of xenophobic violence and provided three months housing in a temporary camp as required under the Disaster Management Act 57 of 2002.

The government planned to dismantle the temporary camps on 15 August 2008. The applicants then approached the court to interdict the government from dismantling the camps. The court found that the government was not required to provide accommodation. The application was dismissed with costs.

In *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA) the appellants, Somali citizens, fearing xenophobia, left South Africa for Namibia. The Namibian authorities deported them to Somalia via South Africa. Once in South Africa they launched an urgent application for an interdict prohibiting the respondents forcing them to be sent to Somalia. They also sought to obtain a *mandamus* to force the Minister and Director-General of

Home Affairs to facilitate the appellants' readmission to the Republic. Their application was dismissed.

The order of the court *a quo* was set aside by the Supreme Court of Appeal (SCA) and the respondents were directed to release the applicants from detention. The first applicant was allowed to remain in the country pending a decision on an application for asylum and the second applicant was allowed to remain in accordance with his status as a refugee.

Judge Mojaelo said: 'The case confirmed the right of foreign nationals, in the face of xenophobic attacks, not to be deported to dysfunctional home countries. This is an important right, which enjoys international recognition.'

Another recent case is that of *Somali Association of South Africa and Others v Limpopo Department of Economic Development, Environment and Tourism and Others* 2015 (1) SA 151 (SCA). In the *Somali* case, Musina spaza shop owners were told they would need a permit to continue operating. The police closed shops and confiscated stock of owners who did not produce permits. The police even closed businesses where valid permits were presented. The applicants, therefore, approached the High Court with an application of declaration –

- for their right to earn a living by self-employment;
- the right to apply for and to renew licences and permits in terms of the applicable legislation and land-use scheme; and
- that closure of businesses run by asylum seekers and refugees with valid permits were unlawful.

The SCA held that:

- asylum seekers/refugees are entitled to apply for or renew new business or trading licences; and
- the closure of businesses owned by refugees/refugees with permits is unlawful.

Judge Mojaelo said: 'This case has been lauded as a great victory for foreign national who run informal businesses as a means of living'.

In conclusion, Judge Mojaelo stated: 'We must apply the laws which are there so that as the judiciary we may play our part in confronting and combatting the ugly scourge of xenophobia'.

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