

19 | Formalising Exclusion as the African Way

‘... that thought that someone may be excluded becomes mediated into our lives. The thought that somebody can be stigmatised, that someone may be alienated. And that’s how it is done, step by step, slowly, people begin to see that this is something normal.’

Marian Turski – former prisoner of the
Auschwitz-Birkenau concentration camp,
speech at 75th anniversary of the camp’s liberation

On 10 October 2013, in the quaint holiday town of White River in Mpumalanga, Deputy Trade and Industry Minister Elizabeth Thabethe did not mince her words. ‘The scourge of South Africans in townships selling and renting their businesses to foreigners unfortunately does not assist us as government in our efforts to support and grow these informal businesses,’ she informed an audience at a national small, medium and micro enterprises (SMMEs) summit.¹ She continued: ‘You still find many spaza shops with African names, but when you go in to buy you find your Mohammeds and most of them are not even registered.’ But all was not lost, she assured them. ‘To step in, the DTI has proposed the development of the informal business strategy which is envisaged to go a long way in advancing possible intervention programmes to assist these businesses.’

The DTI presented its informal business strategy to cabinet early the following year. The document politely and cautiously entered the

muddied waters of legislated exclusion. ‘International experience,’ it emphasised in a tone of scholarly neutrality, ‘has shown that countries like Ghana have experienced similar challenges, particularly in dealing with foreign businesses.’² As a result, the document goes on to state, Ghana passed the Ghana Investment Promotion Centre Act of 2013, which reserves wholly owned enterprises for Ghanaians only, and restricts petty trading and hawking to citizens only.

The DTI had been thrown a life vest. By identifying restrictions in Ghana, its proposals to legislate against foreign businesses in South Africa could be presented to the public as ‘pro-African’ rather than anti-African. In showing deference to the continent, their policy could be presented in a different light, one that did not reveal traces of xenophobia. As the current minister of small business development Khumbudzo Ntshavheni highlighted, ‘Countries within the continent are regulating this way. Why should it be xenophobic when it is applied in South Africa?’³ The discovery of Ghanaian legislation emboldened policymakers in the face of increasing African scrutiny of anti-foreigner sentiment in the country, and gave them tools to re-brand and normalise exclusionary proposals as the ‘African’ way. Those not in agreement could be inferred to be naive or not familiar with the workings of the continent.

Soon ‘Africa’ was the popular catchphrase in governance circles. On the eve of Human Rights Day in March 2016, the ANC’s secretary general Gwede Mantashe tried to justify calls by the North West premier to expel and prohibit foreigners from operating spaza shops in the province’s townships and villages. He explained that ‘in the past there are quite a number of countries in Africa which say small businesses must be the preserve of that nation’.⁴

The DTI was correct. Ghanaian legislation does strictly prohibit foreigners from engaging in the country’s informal retail sector. But the country’s policy primarily affects traders from neighbouring Nigeria, who are not for the most part refugees or asylum seekers, but immigrants living legally in the country under the auspices of the free

movement provisions of the Economic Community of West African States (ECOWAS). Moreover, although enacted in 2013, the Ghana Investment Promotion Centre Act has rarely been implemented, and all indications are that its provisions will likely be withdrawn. Although initially enjoying the full support of the Ghana Union of Traders Association, which praised the Act's potential to 'sanitise the retail industry',⁵ the few efforts made to enforce the Act quickly backfired.⁶ State attempts to close down Nigerian businesses in 2020 gave rise to conflicts between traders, protests by Ghanaian employees of Nigerian businesses, and the straining of diplomatic relations with Nigeria. It also jeopardised the livelihoods of hundreds of thousands of Ghanaians living within Nigeria's borders, the vast majority of whom lacked any documentation.⁷ The Nigerian high commissioner in Ghana issued a warning in 2019: 'There are several Ghanaians living in Nigeria and the Nigeria Immigration Service has never deported any of them, because of a sense of brotherliness between our two countries.'⁸

Mantashe was also accurate when he pointed out that a number of African countries had curtailed small foreign-owned businesses in the past. Ghana's 2013 legislated prohibitions were not entirely new. They can be traced back, not to Africa, but to the government of King George VI of England, which, in 1947, first barred 'Aliens' from starting or expanding their businesses in the country.⁹ The foreign retailers affected at the time were mainly Lebanese, Syrian and Indian traders whose activities were viewed as unproductive and 'detrimental to the economic development of the inhabitants of the Gold Coast'.¹⁰

In 1969 and 1970, a decade after independence, Ghana found itself grappling with the challenges of nation building, economic decline and political instability.¹¹ Against this post-independence backdrop, on 18 November 1969 Prime Minister Kofi Busia issued the 'Aliens Compliance Order' and instructed undocumented foreigners to leave the country within a period of two weeks.¹² At the time, paperwork in West Africa was largely absent, much as it still is today. People had moved throughout the region for centuries unencumbered by colonially

imposed borders.¹³ But abruptly, and with little warning, hundreds of thousands of West African immigrants were forced to pack their wares and flee Ghana's territory, abandoning their homes and businesses. At least half of these evacuees were Nigerians concentrated in trade and small enterprise sectors.¹⁴

The Aliens Compliance Order was accompanied by the Ghanaian Business Promotion Act of 1970. The Act prohibited 'Aliens' from operating in the country's small and medium business sectors, and in wholesale trade.¹⁵ It targeted both medium-scale businesses operated primarily by Lebanese, Syrian and Indian nationals, as well as small businesses carried on by nationals from other African countries, particularly Nigerians. Large European businesses were for the most part unaffected. It was believed that expelling foreigners would advance economic opportunities for Ghanaian citizens, who could take over and occupy vacated businesses and professions.¹⁶

However, the expulsions resulted in few of the claimed economic benefits. Lynne Brydon notes that those who fled the country took capital with them, and Ghanaians struggled to take over and reconstruct businesses that had been abandoned.¹⁷ In the aftermath of the expulsions, the government implemented retrenchments and wage restraints, cut army and civil service benefits, and ordered a devaluation of the currency.¹⁸ By January 1972, Busia's government had been overthrown in a coup d'état, one of the reasons for his downfall being that he had completely failed to rescue the country's deteriorating economy.¹⁹

It wasn't long before Nigeria reciprocated. By the early 1980s the oil boom in Nigeria was over and the country was buckling from an economic downturn. At the same time attitudes towards foreigners within its borders became increasingly hostile. On 17 January 1983, Nigeria's leader Shehu Shagari ordered the expulsion of approximately two million West African immigrants, half of whom were Ghanaians. The deadline given to leave was 31 January, with the president declaring, 'Illegal immigrants, under normal circumstances, should not be given any notice whatsoever.'²⁰ The move had major humanitarian consequences, with

large crowds of evacuees stranded at border points without food, water and shelter, and others trampled in stampedes or drowned as a result of overcrowded boats.²¹ The expulsion led to harsh diplomatic fallings-out between governments and deeply held misgivings between the inhabitants of the neighbouring countries, which have lasted for generations. Trauma and bitterness still exist on both sides of the border.

Legislated curtailments, deportations and expulsions of foreign national businesses were not limited to Ghana and Nigeria. They characterised many post-independence states in Africa. Frantz Fanon describes how Africa's post-independence working classes and small artisans followed the nationalist ambitions of the continent's new elites by agitating against non-national Africans – especially those engaged in petty trade.²² Taking up the calls of their leaders, these groups turned against Africans from other countries, whom they saw as their competition. He states that 'On the Ivory Coast these competitors are the Dahomans; in Ghana they are the Nigerians; in Senegal, they are the Soudanese.'²³

The most well known African example of curbing foreign traders is that of President Idi Amin in Uganda, whose government passed the Trade Licensing Act in 1969. In doing so it followed the lead of Kenya's Trade Licensing Act of 1967, which had fuelled an exodus of much of Kenya's Indian population in the late 1960s and early 1970s. The Ugandan legislation reserved designated trading spaces in the majority of the country's major towns for citizens only, thereby excluding many Ugandan Asian retailers who possessed British nationality as a legacy of colonialism. The justification for this was that 'the spirit of the Africanisation policy was that priority should be given to citizens of African origin.'²⁴ However, this intervention was not enough, and in 1972, 60 000 British 'Asians' in Uganda were given 90 days to leave the country. Idi Amin put it bluntly: 'I want to see that the whole Kampala Street is not full of Indians. It must be proper black and administration in those shops is run by the Ugandans ... They must go to their country.'²⁵

Despite many African precedents being notably worrisome, the South African government pushed ahead with its plans. On 16 June 2016, the Department of Home Affairs published a Green Paper on International Migration, followed by a White Paper in July 2017. Both papers called for an overhaul of the country's refugee system. In particular they argued that asylum seekers should not be entitled to work while awaiting the finalisation of their claims. Rather they should be housed in asylum seeker 'processing centres' tucked away near the country's northern borders. These centres would, so the documents claimed, cater for the basic needs of asylum seekers. 'Low risk' asylum seekers would be permitted to leave facilities on condition that they could support themselves or access welfare assistance without having to work. By introducing a policy of incarceration and detention, the state believed that it would reduce 'the incentive for abuse by economic migrants'.²⁶

The establishment of processing centres could arguably enable the state to circumvent the *Watchenuka* case judgment, which held that policies that rendered asylum seekers destitute were unconstitutional. The White Paper proposed that asylum seekers would have their basic needs met by the state in these centres, in conjunction with international bodies such as the UNHCR and the International Red Cross.

It might have sounded like a feasible plan at the time. Some policy-makers perhaps envisioned well-run centres offering food, education and medical care to relatively content and compliant detainees. Others may not have really cared one way or another, so long as asylum seekers were not operating businesses and selling bread and vegetables to suspicious citizens in key political constituencies. But the plan struck a hurdle early on, when the UNHCR rejected it outright. As far back as 2015, the UNHCR had been clear that it would not fund asylum seeker shelters in the country; its focus was on helping refugees, not those seeking asylum.²⁷

In December 2017 the government passed the Refugees Amendment Act of 2017, omitting any explicit reference to camps or shelters. But the state was still determined somehow to remove asylum seekers from key

workforces. The Act sets out elaborate tests and conditions for endorsing asylum seekers' visas with the right to work, which ultimately prevents them from engaging in self-employment.²⁸ Its regulations also empower the state to prohibit asylum seekers from working in certain economic sectors. Shelters or processing centres were, however, still on the agenda. The Act requires asylum seekers to report to a refugee status determination officer at any refugee reception office 'or at any other place' designated by the director-general.

By the close of 2017, after years of unsuccessful attempts to dislodge foreign traders, the state had finally taken a legislative step to remove asylum seekers from the country's small business markets. The law would only permit recognised refugees to engage in self-employment. These changes, however, would only be implemented once regulations had been passed. As a result, rather than immediate spectacle and aggressive upheaval, the opposite occurred. In the aftermath of the Act's passing there fell a quiet hum. Bureaucratic processes and day-to-day life continued as usual, the status quo maintained for the time being.

But political events in South Africa did not follow the same pattern. On a sunny afternoon in central Johannesburg on 1 August 2019, metro law enforcement officers and South African police officials were taken by alarm. An operation aimed at clamping down on the sale of illegal and counterfeit goods in the city's fashion district had gone haywire and culminated in angry shopkeepers chasing down officers with stones and glass bottles. Footage showed a police armoured vehicle gearing quickly into reverse, spewing black fumes into the air and then driving hurriedly away. It soon turned out that many in the crowd were foreign nationals, causing a public outcry. It is unclear what triggered the protest. One trader complained that routine police harassment had eventually led to eruption of violence: 'They treat us as if we are aliens, it's an everyday thing.'²⁹ Along the same lines, David Bruce and Tanya Zack interpret the actions by traders as a response to frequent heavy-handed police raids, extortion and corruption.³⁰

Politicians were quick to capitalise on the events. Gauteng Premier David Makhura took to Twitter that evening, blaming ‘foreign nationals’ for the attack on police, which he described as a ‘despicable crime against our state.’³¹ Gauteng Community Safety MEC Faith Mazibuko asserted that ‘We can’t co-govern with criminals, especially foreign nationals who want to turn our country into a lawless Banana Republic.’ She added: ‘We will assert our authority and show ungovernable foreign nationals that there are laws in South Africa and they must be respected.’³²

A week after the riots, a mob gathered in the vicinity of the Noord Street taxi tank in the Johannesburg CBD. Its members were not foreign traders, but South Africans wielding knives, hammers, scissors and other makeshift weapons.³³ As they made their way through the city, they smashed shop and car windows and looted stores.³⁴ Police conducting raids in the area reacted and dispersed the crowd with rubber bullets. But violence did not dissipate altogether. Three weeks later more xenophobic attacks broke out, this time in Pretoria, allegedly fuelled by the death of a taxi driver at the hands of a foreign national. This was followed by further riots in Johannesburg the following week.³⁵

Although the ‘Johannesburg riots,’ as the violence later came to be called, seemed quite typical of the usual collective ritual involved in xenophobic attacks in South Africa, this time the backlash against the havoc was unusually acute. This was not because the country’s citizens had expressed greater alarm at the looting and hatred; the source of the fallout came from further afield. On 3 September, thousands of kilometres north-west of South Africa, a man with thick-rimmed glasses and wearing a traditional *fulani aboki* hat decided to take action on the matter. The man was President Muhammadu Buhari of Nigeria, leader of the continent’s largest economy. Buhari’s special adviser released a statement that day noting the president’s ‘deep concern’ about reported attacks on Nigerians in the country and ‘Nigeria’s displeasure over the treatment of her citizens.’³⁶ The statement announced that Buhari had summoned South Africa’s high commissioner to Nigeria to brief

him, and had dispatched a special envoy to meet with President Cyril Ramaphosa. That afternoon, Ramaphosa, who up until then had been silent about the violent destruction, quickly condemned the attacks against foreign nationals in the country in a recorded statement as 'something totally unacceptable, something that we cannot allow to happen in South Africa'.³⁷ His envoy Jeff Radebe boarded a flight to Nigeria two weeks later to apologise for the country's misdeeds, much like a remorseful lover.

Buhari's intervention was popularly supported at home. Nigerian musicians boycotted a music festival in Johannesburg, and major South African companies, Shoprite and MTN, were forced to shut their doors in the West African country. So did the South African consulate and high commission in Lagos and Abuja. It turned out that South Africa's perceived anti-Africanism was a useful means of generating patriotism and nationalism in Nigeria. The country boycotted the World Economic Forum in Africa, which was held in Cape Town, alongside Rwanda, DR Congo and Malawi. A local Nigerian airline, Air Peace, also stepped into the fray, offering to evacuate Nigerians from South Africa at no cost. The first flight arrived in Lagos on the night of 11 September 2019 with much fanfare. International media shared images and recordings of passengers cheering on arrival, hugging and embracing the airline company's emotional CEO.

The xenophobic attacks in South Africa were a political win for governments across the continent, but a critical embarrassment for the host state. The humiliation entailed having to send emissaries across the continent to communicate condolences, being booed at public events and having to attend tense and awkward press conferences abroad. This generated renewed urgency among South African officials to finalise the country's new asylum seeker framework.

At a joint sitting of parliament on 18 September 2019, Ramaphosa prepared some groundwork for introducing the new altered refugee system in the country. He once more highlighted that in doing so the country was simply mimicking its African neighbours. 'We should

consider, as many other countries have,' he said, 'the regulation of how foreign nationals can own and participate in certain types of businesses within the small and medium enterprise sector.'³⁸ A few days later, Small Business Development Minister Khumbudzo Ntshavheni elaborated further in a radio interview: 'In countries like Nigeria, Zimbabwe, Ethiopia, Tanzania, Ghana, Bangladesh, Pakistan they have regulations that specify the sectors where foreign nationals are not allowed to participate,' she stated.³⁹ The list of examples had grown. Instances of discriminatory laws could be found throughout the global South. In these countries, she explained, foreign nationals were excluded from various sectors 'including in the micro businesses, in the retail sector, in the pharmaceutical sector'. The government was keen to follow suit as small business sectors 'contribute to the alleviation of poverty, survival of our people, and the ability of our people to create jobs for themselves'.

The minister did not present any evidence to illustrate the harmful impact of foreign businesses on the South African economy, many of which paid rent to South African landlords, purchased goods from South African suppliers, and encouraged economic circulation and access to markets in low-income areas. The accuracy of the minister's list of examples is also doubtful. Nigeria does bar investment into certain economic sectors, but these prohibitions – contained in the Nigerian Investment Promotion Commission Act – apply to 'both foreign and Nigerian investors'.⁴⁰ In other words, the Act does not reserve any economic sectors exclusively to citizens. Prohibited sectors in the Act's 'negative list' include the production of arms and ammunition, the production of and dealing in narcotic drugs, and the production of military ware – sectors that are commonly illegal to private actors in other countries. Moreover, Nigeria does not prohibit foreigners in any way from engaging in its small and medium retail markets. Other countries appear less than enthusiastic about their legislated exclusions. For example, in August 2019 Zimbabwe announced its intention to repeal its Indigenisation and Economic Empowerment Act of 2008, and the longevity of Ghana's legislation is also in question.⁴¹

In calling for curtailments on foreign businesses, the state continued cautiously and carefully to emphasise African precedent. Although the pariah in South Africa lacked the political leverage enjoyed by the elite and the common people, the government was aware that Africa's most populous country and largest economy could summon its own masses and political and economic strength. By reasoning that such policies were prolific across the continent, the state was intentionally normalising an ideology of exclusion, which would otherwise have widely come across as abnormal and abhorrent.

The promised regulations were eventually passed in late December 2019, and the Refugees Amendment Act came into effect on 1 January 2020. Camps were still off the table, but not necessarily in the long term. When explaining the new refugee regime, Minister of Home Affairs Aaron Motsoaledi depicted refugee camps in other countries as sites of plenty and places that those seeking refuge should envy. 'You are taken care of by the United Nations High Commissioner for Refugees, NGOs, they give you money, they treat you when you are sick, they even give you education,' he enthused.⁴² In contrast, in South Africa, he said, 'we don't have anything like that. They stay in communities.' His comparison left the impression that asylum seekers and refugees would be happier and more fulfilled in camps than in seeking out a living among hostile neighbours. Camps were places where they would be better off.

Asylum seekers themselves did not describe camps in such admiring terms. One day I asked a Somali community activist what he had heard of camps elsewhere on the continent. He knew of some individuals who had stayed in camps in Malawi. A camp was like being in a prison: 'They're not allowed to freely move, they're not allowed to trade, they're not allowed to do anything.' Inmates simply survived, living off substandard food, which they 'only eat because they are hungry'. Services were poor and often unavailable: 'They just wait for the UNHCR to come and give them what they need, but they don't get what they need,' a former Malawi camp inmate recalled. 'Actually, if I think about camping in Malawi, whatever

will happen to me in South Africa I will tolerate it because I don't want to be in a camp.' Camps were places where people went to rot. 'You become a useless person,' one asylum seeker described. 'There's no future,' concluded another. South Africa already had experience in running camps in the aftermath of the 2008 xenophobic attacks. An asylum seeker who had lived in Soetwater camp near Cape Town recalled the experience: 'You never lived in a place like this. There's no hygiene, nothing. Children get sick.' Reports of Lindela Repatriation Centre in North West Province are similarly littered with infringements and abuses.⁴³

The plan was first and foremost to exclude asylum seekers from certain economic sectors. Because no camps had been established in South Africa yet – albeit not for any lack of trying – Motsoaledi explained in a radio interview on 6 January 2020 that 'these people must be allowed to work'.⁴⁴ The right to work precluded the state from taking extreme measures to curtail asylum seekers' economic activities, but allowed for conditions. The Standing Committee on Refugee Affairs, he informed the radio host, would set conditions regarding 'what kind of work are you allowed to do, in what areas of studies should you be allowed, where should they be restricted'.⁴⁵ Strangely, the statement did not in any way elicit alarm or concern from the radio host, whose response was matter-of-factly to seek clarification: 'And that would be physical areas as well, which then speaks to limitations. Right?'

The sudden advent of the Covid-19 pandemic in 2020 did not inhibit the state from continuing its attempts to curtail foreign shops. In March 2020, when the country entered its first national Covid-19 lockdown, the minister of small business development assured the public that spaza shops would remain open to provide essential supplies to local customers. However, this allowance was subject to one condition: 'We must indicate,' the minister emphasised, 'that those spaza shops that will be open are strictly those that are owned by South Africans, managed and run by South Africans'.⁴⁶ By implication all other spazas – irrespective of whether they were operated by refugees, asylum seekers or permanent residents – would be required to shut down.

This condition, however, never materialised in state policy, probably because the minister's opportunistic reliance on a catastrophic national health disaster to shut down foreign businesses was too repugnant for its time. Instead, the department, in agreement with Nedbank, more meekly limited its spaza support scheme to those stores 'which are 100% owned by South Africans'.⁴⁷

When discussing its legislative manoeuvrings, the state has conveniently ignored the *Somali Association of South Africa* case, which had found that barring asylum seekers and refugees from the spaza market could render them destitute and undermine their right to dignity. As a result of the judgment, the one sector from which asylum seekers could likely not be excluded was the one the state most desperately wanted altered.

In enacting new legislation, the state was cautiously venturing into the realm of formally regulating the pariah, purportedly the African way. What started in 2006 in the aftermath of the dogs being sent out in Masiphumelele had materialised into national legislation. Protectionism, prejudice and fear had overrun the values of plurality, dignity and freedom that underpinned South Africa's early democratic political dispensation. The regulation of difference, previously confined to small township meeting halls across the Western Cape and beyond, had turned mainstream. Presidents and ministers spoke confidently of it without retort, and the state passed legislation with minimal fanfare. The roots of legislated fear and pariahdom run far and deep, and emerge after many years of gradual customisation. South African leaders, allegedly inspired by Ghana and other real and imaginary policies across the continent, were finally intent to follow the many notorious and largely tragic postcolonial examples of nation building. But they had to tread lightly. African states were watching from the sidelines, waiting to exploit xenophobia in South Africa to drum up nationalism at home – the pitfall of when competing nationalisms collide.