

Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part I)

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Abstract

This contribution, the first of two parts, reflects critically on access to South African social security benefits by Southern African Development Community (SADC) citizens. The article discusses this issue by examining relevant SADC migration dimensions, the existing migration law and policy regime in South Africa, and the fragmented nature of the South African social security system. Legally and factually, the position of non-citizens in terms of South African immigration law is superimposed on their social security status. To some extent, this is qualified by the provisions of labour agreements entered into between South Africa and some of its SADC partners. The result is that most categories of SADC citizens have only limited – and, in some cases, severely restricted – access to South African social security benefits. The historical evidence, supported by data on modern-day migration movements within SADC, suggests that systems of labour migration in southern Africa, and in particular to South Africa, are deeply entrenched. And yet, South African immigration law and policy, as a regime superimposed on the existing social security framework, is characterised by its emphasis on control and deportation, and on restricting access, controlling movement and regulating presence in the host country. Immigration law and policy does not honour a human rights approach, and fails to encourage and support migration. To a large extent, the failure to encourage and support migration and to concentrate on control is also apparent from the scope and orientation of the labour agreements between South Africa and several SADC countries. Immigration laws and policy in South Africa, as is the case in other SADC countries, generally focus on the effects of migration, rather than on the underlying causes thereof.

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Introduction

This contribution reflects critically on access to South African social security benefits by Southern African Development Community (SADC) citizens. Part I engages with the contextual framework. It discusses relevant SADC migration perspectives, including historical and data perspectives, as well as the lack of appropriate migration policy dimensions. Reflecting on migrants' access to South African social security benefits necessarily implies an understanding of the limited public framework and entrenched fragmented nature of the South African social security system. It also requires an appreciation of the (impact of the) legal distinctions between various categories of non-citizens in South Africa and the interplay between immigration law and policy classification and restrictions, on the one hand, and access to social security benefits by these very categories, on the other. Bilateral labour agreements with neighbouring countries also have an impact on the immigration and social security status of migrant workers covered by these agreements.

Part II¹ discusses several problems and challenges affecting SADC citizens' access to South African social security benefits. It investigates, in particular, the current bilateral regime as well as regional standards and perspectives. It argues that an alternative paradigm needs to be developed: a range of unilateral steps needs to be taken, and appropriate and tailor-made bilateral arrangements within a multilateral framework are required.

These contributions are also based on extensive literature surveys recently undertaken for the World Bank,² the International Labour Organisation,³ and the South African Department of Social Development. These surveys were at times accompanied by some empirical evidence obtained in the course of discussions with key stakeholders.

1 Forthcoming.

2 For a more extensive discussion, see Olivier, M. 2009. "Regional overview of social protection for non-citizens in the Southern African Development Community (SADC)". *Social Protection Discussion Paper No. 0908*. Washington, DC: World Bank, paragraphs 3.1 and 3.4. Available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0908.pdf>; last accessed 10 March 2011.

3 See, in particular, Olivier, M. 2010a. *Reflections on the feasibility of a multilateral SADC social security agreement involving South Africa and Lesotho, Mozambique, Swaziland and Zimbabwe*. Geneva: International Labour Organization.

SADC migration perspectives

Migration data, nature and trends; historical perspectives; and the role of remittances⁴

Economic migration appears to be by far the most prevalent form of migration in the world.⁵

The chief motive for the majority of migrants is without doubt the pursuit of better living standards for themselves and for their families.

Within SADC, the majority of migrants target countries with better economies.⁶ Therefore, the migration flow is towards Botswana, Namibia and South Africa because these countries have stronger economies and also experience skills shortages.⁷ South Africa, in particular, attracts by far the majority of intra-SADC migrants.⁸

From the available evidence, subject to some exceptions,⁹ it appears that most of the migration from SADC is actually to other SADC countries. Thus, intra-SADC movement is the prevailing characteristic of migration from SADC

4 See Olivier (2009) and Olivier, M. [Forthcoming]. "Political and regulatory dimensions of access, portability and exclusion: Social security for migrants, with an emphasis on migrants in southern Africa". In Sabates-Wheeler, R & R Feldman (Eds). "Migration and social protection: Vulnerability, mobility and access".

5 Stepanek, M & J Skorpik. 2005. "Social security in a long life society". Unpublished paper presented at the Fourth International Social Security Association (ISSA) International Research Conference on Social Security, Antwerp, 5–7 May 2005, p 3.

6 However, political migration has largely been the result of instability in countries such as the Democratic Republic of Congo (DRC) and, earlier, Angola and Mozambique.

7 In terms of the traditional classification, a distinction is drawn between *labour-exporting* and *labour-importing* countries (particularly South Africa). However, some traditionally labour-exporting countries also receive migrant streams, such as the DRC, Tanzania, Zambia and Zimbabwe. See Klaaren, J & B Rutinwa. 2004. "Towards the harmonisation of immigration and refugee law in SADC". In Crush, J (Ed.). *Migration Dialogue for Southern Africa (MIDSA) Report No. 1*. Cape Town/Kingston: Institute for Democracy in Africa & Queens University, p 76.

8 For example, a recent five-country study on intra-SADC migration revealed that 86% of migrants from the said countries (Botswana, Lesotho, Mozambique, Swaziland and Zimbabwe) are currently working in South Africa; see Pendleton, W, J Crush, E Campbell, T Green, H Simelane, D Tevera & F de Vletter (Eds). 2006. "Migration, remittances and development in southern Africa". *Migration Policy Series No. 44*. Kingston/Cape Town: Southern African Migration Project & Institute for Democracy in Africa, p 3.

9 At least two exceptions should be noted. The first relates to the tendency of sizeable numbers of citizens of SADC countries to migrate to the erstwhile colonial metropolises. Secondly, South Africa constitutes a unique case, as vast numbers of South Africans have emigrated to a range of countries.

countries.¹⁰ In fact, migration has been a long-standing feature of the labour market framework in southern Africa, particularly as far as work on the mines and in agriculture is concerned.¹¹ Apart from informal cross-border trade-related migration,¹² work on the mines – again, particularly in South Africa – served as a magnet for both internal¹³ and external migrants. As a result, as indicated by Crush et al. (2005), it could be argued that the industrial development of some countries in the region was made possible only by the use of labour from other countries.¹⁴ From a historical perspective, as is supported by data on modern-day migration movements within SADC, it can be said that systems of labour migration in southern Africa are deeply entrenched and have become part of the long movements of people for generations, primarily in search of better living and working conditions.¹⁵

While many cross-border migrants in southern Africa are circular migrants, migration patterns within SADC have largely been characterised by their permanent or ongoing nature. Once immigration linkages are established, they are very difficult to break, and migration flows are almost impossible to reverse.¹⁶ This is particularly true of the mining and agricultural industries in southern Africa. In fact, a recent five-country migration study in SADC indicated

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- 10 See the migration data for SADC in the Global Migrant Origin Database, Version 4, available at http://www.migrationdrc.org/research/typesofmigration/Global_Migrant_Origin_Database_Version_4.xls; last accessed 10 March 2011. FIDH/ International Federation of Human Rights. 2008. *Surplus people? Undocumented and other vulnerable migrants in South Africa*. Paris: International Federation of Human Rights, p 5.
 - 11 Cf. Fenwick, C & E Kalula. 2005. "Law and labour market regulation in East Asia and southern Africa: Comparative perspectives". *International Journal of Comparative Labour Law and Industrial Relations*, 21:193–226.
 - 12 See generally Crush, J, V Williams & S Peberdy. 2005. *Migration in southern Africa*. Geneva: Global Commission on International Migration, pp 15–16. It has been reported that cross-border traders and shoppers spent an estimated R10 billion in South Africa in 2005 (FIDH 2008:38); see also the subheading "Irregular or undocumented non-citizens" later herein.
 - 13 Internal labour-market-related migration, in particular in South Africa, was not always voluntary. The need for labourers initially resulted in the introduction of a plethora of taxes (to be paid in cash, and known as *hut* or *poll taxes*), which were applied to push reluctant peasants into wage labour in the region; see generally Kanyenze, G. 2004. "African migrant labour situation in southern Africa". Unpublished paper presented at the International Confederation of Free Trade Unions – African Regional Organisation (ICFTU–AFRO) Conference on Migrant Labour, Nairobi, 15–17 March 2004, p 2.
 - 14 Crush et al. (2005:5–6).
 - 15 (ibid.).
 - 16 Reitzes, M. 2003. "Regionalizing international migration: Lessons for SADC". *Migration Policy Brief No. 11*. Kingston/Cape Town: Southern African Migration Project, p 18.

that migration is now clearly regarded as a career rather than as a passing phase in the working lives of migrants, despite the fact that they maintain strong links with the home country.¹⁷ This also flows from the fact that more migrants from the countries concerned¹⁸ are older,¹⁹ married,²⁰ and, in most cases, heads of households.²¹ In addition, the same study indicates that many migrant-sending households have a migration 'tradition' which is passed on from one generation to the next in that parents and even grandparents worked outside the home country.²² Furthermore, it is generally accepted that SADC-related migration is characterised by several dimensions,²³ including contract labour migration,²⁴ declining levels of legal migration to and within the region, an increase in clandestine and undocumented (i.e. irregular) migration,²⁵ and an increased feminisation of cross-border migration.²⁶

The importance and role of migration in SADC countries are also demonstrated by the extent and significance of remittances to recipient households. Remittances play a vital role in supporting southern African households, as they are fundamental in enabling families to meet their everyday needs.²⁷ For most migrant-sending households, migrant remittances comprise the main source of household income. Lesotho is one of the most migration-dependent

17 (ibid.:4).

18 That is, (migration from) Botswana, Lesotho, Mozambique, Swaziland and Zimbabwe (ibid.:1).

19 Only 7% of the migrants covered in the survey were under the age of 25; in contrast, 41% were over 40 (ibid.:2). See also Crush et al. (2005:21–23).

20 As many as 62% of the migrants covered by the survey were married (ibid.:2).

21 Just over half the migrants were actually the head of the household rather than an ordinary member of it, although the pattern differed from country to country (ibid.:2–3).

22 About 50% of the migrants covered in the survey indicated that their parents had been cross-border migrants (ibid.:3).

23 Generally, see Kanyenze (2004:1–2).

24 The proportion of foreign workers in contract labour, especially on the mines, rose from 40% in the late 1980s to close to 60% today (Crush et al. 2005:7). This has been particularly beneficial to Mozambique, as the share of Mozambican workers in contract labour in South Africa rose from 10% to 25% in the same period.

25 Irregular migration appears to be widespread and on the increase in southern Africa, although the exact numbers of irregular migrants are a subject of constant debate and conflicting opinion. A recent study estimates that there are 500,000 irregular migrants in South Africa (ibid.:12–13). See also FIDH (2008:5).

26 Crush et al. (2005:14); SAMP & IOM/Southern African Migration Project & International Organization for Migration. 2005. *HIV/AIDS, population mobility and migration in southern Africa: Defining a research and policy agenda*. Kingston/Cape Town/Geneva: SAMP & IOM, p 17.

27 Dodson, B, H. Simelane, D. Tevera, T. Green, A. Chikanda & F de Vletter. 2008. *Gender, migration and remittances in southern Africa*. Cape Town: Institute for Democracy in Africa, p 8.

countries in the world. Migrants' remittances are the country's major source of foreign exchange, accounting for 25% of gross domestic product in 2006.²⁸

A recent study undertaken in five SADC countries found that 85% of migrant-sending households receive cash remittances.²⁹ These are sent on a regular basis and "easily outstrip agriculture in relative importance as a household income source".³⁰ In fact, the same study remarks that, —³¹

[a]cross the region as a whole, annual median income from wage employment and cash remittances is the same ... When cash and commodities are combined, however, the value of remittances exceeds all other forms of income.

Remittances are primarily used for consumption spending, in particular for household food security and other basic needs.³² However, they also play a significant role in the economic development of SADC countries. As remarked in a recent study, and echoing the international experience in this regard, —³³

[f]or national economies, cross-border remittances are a source of foreign exchange and taxes, contribute to the balance of payments, and provide capital for enterprises and valuable household incomes.

Therefore, SADC governments and even international organisations have started to integrate remittances as a tool for development in their poverty reduction strategies.³⁴

SADC country and regional policy frameworks pertaining to migration and the position of migrants, particularly in the host country context, need to take these phenomena of intra-SADC migration into account. Incorrect and overly restrictive policy choices may have a devastating effect on household survival and poverty in the region:³⁵

28 Crush, J, B Dodson, J Gray & C Leduka. 2010. *Migration, remittances and gender-responsive local development: The case of Lesotho*. Santo Domingo/New York/Maseru: UN International Research and Training Institute for the Advancement of Women & United Nations Development Programme, p 2.

29 Pendleton et al. (2006:4).

30 (ibid.:5).

31 (ibid.).

32 (ibid.:6–7).

33 Crush et al. (2005:18); see also Thouez, C. 2005. "The impact of remittances on development". In UNFPA/United Nations Population Fund (Eds). *International migration and the Millennium Development Goals*. New York: UNFPA.

34 Ramírez, C, M Domínguez & J Morais. 2005. "Crossing borders: Remittances, gender and development". *UN-INSTRAW Working Paper*. Santo Domingo: United Nations International Research and Training Institute for the Advancement of Women, p 52.

35 Reitzes (2003:18).

Restrictive policy interventions that fail to acknowledge migration linkages between sending and receiving countries are likely to depend on coercive measures rather than on consensus. They would disrupt and dislocate survival networks, generating increased poverty by severing the economic lifelines on which many migrants and their dependants rely for survival. No historical linkages existed between labour-receiving countries in western Europe and the sending countries from which they recruited and imported their labour. Despite this, ... once migration linkages were established they could not be broken, and governments found it impossible to reverse migration flows.

For a range of reasons, reliable data on the extent and volume of migration within and to SADC is hard to obtain.³⁶ This also applies to South Africa, the major migrant-receiving country in the region.³⁷

Contextual and policy perspectives

As noted by the International Organization for Migration (IOM), SADC member states have no clear common approach towards immigration.³⁸ In fact, security concerns, in the form of control and deportation, appear to characterise the migration laws and policies of the various SADC countries. Migration within the region is viewed as a 'problem', rather than as an opportunity. According to the IOM,³⁹ member states' immigration policies limit regional economic growth by distorting the labour market, inhibiting cross-border movements, criminalising informal economies, and marginalising migrants.

Migrants in SADC, particularly intra-SADC migrants, invariably find themselves in a precarious position, also in relation to social security.⁴⁰ They face seemingly insurmountable difficulties due to the operation of several legal restrictions, inappropriate and inchoate policies, and the treatment they generally receive, especially in the host country.

With regard to the legal and supporting policy framework, the legal principle of the territorial application of national laws generally prevalent in SADC countries means that migrants are usually excluded from social security laws that

36 Kanyenze (2004:12–15). The dimensions of migration in SADC are uncertain; see e.g. Williams, V. 2002. "An overview of migration in the SADC region". Unpublished paper presented at the SAMP/LHR/HSRC workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria, 23 April 2002, p 65.

37 For data on migrants worldwide and in Africa in general, see Holzmann, R, J Koettl & T Chernetsky. 2005. *Portability regimes of pension and health care benefits for international migrants: An analysis of issues and good practices*. Geneva: Global Commission on International Migration, pp 3, 6.

38 IOM/International Organization for Migration. 2005. *Current migration themes in southern Africa: An IOM perspective*. Geneva: IOM, p 5. See also Olivier ([Forthcoming]).

39 (ibid.).

40 See Olivier (2009:100–106, paragraph 9.1).

operate in their home country, while nationality and residence requirements often exclude foreigners from the operation of social security laws in their host country. Other legal restrictions, for example, in relation to the portability of benefits, also exist. In short, in the absence of legal and policy frameworks and special measures that respond adequately to their precarious position in social security, and in the absence of suitable bilateral treaties or enforceable regional standards, in addition to an overarching multilateral framework, intra-SADC migrants are discriminated against in law and practice.⁴¹

Immigration laws and policy in SADC countries generally focus on the effects of migration, and not on its underlying causes. The policy and legal framework in this regard emphasises the tightening of controls, the monitoring of borders, and – particularly in South Africa – the establishment of detention centres and the increased deportation of irregular migrants.⁴² A recent study remarked that “[N]o country, with the possible exception of Botswana, has migrant or immigrant-friendly legislation on the books”.⁴³ An increasingly forceful line on enforcement is adopted.⁴⁴

In essence, immigration laws and practice in SADC are not geared towards honouring a human rights approach or towards encouraging and supporting migration, but towards restricting access, controlling movement and regulating presence in the host country.⁴⁵ In addition, primacy is given to immigration laws and policy – at the expense of social security laws and labour laws.⁴⁶

41 Generally, see Baruah, N & R Cholewinski. 2006. *Handbook on establishing effective labour migration policies in countries of origin and destination*. Geneva: Organisation for Security and Co-operation in Europe, International Organization for Migration & International Labour Organization, p 154.

42 Maharaj, B. 2004. “Immigration to post-apartheid South Africa”. *Global Migration Perspectives No. 1*. Geneva: Global Commission on International Migration, p 23; Siddique, M. 2004. *South African migration policy: A critical review*. Perth: University of Western Australia Business School, p 32.

43 Crush et al. (2005:10, 24).

44 (ibid.:25).

45 According to Williams (2002:65), all SADC member states have immigration laws and policies based on three fundamental principles: (a) The sovereignty of the nation state; (b) The integrity of national boundaries; and (c) The right to determine who may enter its national territory and to impose any conditions and obligations upon such persons.

46 Mitchell, S. 2006. *Migration and the remittance euphoria: Development or dependency?*. London: The New Economics Foundation, p 22. See now, however, the judgment of the South African Labour Court in *Discovery Health Limited v CCMA & Others* [2008] 29 ILJ 1480 (LC), in which the South African labour court interpreted the provisions of the Immigration Act, 2002 (No. 13 of 2002) in accordance with constitutional protection available to workers.

The mistreatment of many intra-SADC and African migrants, also in the form of xenophobic actions, especially in South Africa, has been widely reported.⁴⁷ This applies in particular to specific vulnerable groups, including asylum-seekers and refugees, women involved in informal cross-border trade, and irregular migrants.

Therefore, it appears that governments in southern Africa, as is also the case in other parts of Africa, do not as a rule comprehend that migration is a livelihood strategy and, thus, crucial for the welfare of migrants, and that it also serves the developmental needs of the host country. As Black (2004) remarked, “[T]raditional countries of immigration, such as South Africa, Côte d’Ivoire and Gabon[,] have become more intolerant of migrant workers”.⁴⁸ Most governments in the SADC region tend to view migration to their countries as a threat rather than as an opportunity, and few, if any, have proactive immigration policies.⁴⁹

It is also clear that gender and poverty are closely related to migrants’ social security position. These two aspects are not properly provided for in existing country and regional migration policy frameworks. As indicated elsewhere,⁵⁰ migration in SADC – as is the case with social security – is deeply gendered. Appropriate policy responses are required to deal with the plight of female spouses who migrate and those who stay behind in the home country. Informal cross-border trade and human trafficking are further examples of the gendered dimension of intra-SADC migration.⁵¹ Furthermore, migration plays a profound role in preventing, redressing and alleviating poverty in SADC.⁵² However, proper integration of poverty issues within the migration policy framework is lacking in SADC:⁵³

There is a profound disjuncture between immigration policies and poverty reduction strategies in most countries in the Southern African region. Migration is

47 Landau, L. 2004. *Democracy and discrimination: Black African migrants in South Africa*. Geneva: Global Commission on International Migration. See also FIDH (2008). For example, xenophobic attacks in South Africa during May 2008 left more than 60 dead. For recent criticism by the UN Human Rights Rapporteur, see “SA skills shortage magnet for migrants”; available at <http://www.fin24.com/Economy/SA-skills-shortage-magnet-for-migrants-20110131>; last accessed 31 January 2011.

48 Black (2004:14).

49 Crush et al. (2005:8–9).

50 Olivier (2009:18–21; 117–127).

51 See African Union. 2006. *The Migration Policy Framework for Africa*. Document EX.CL/276 (IX), paragraph 6.5, paragraph 2.2; African Union. 2006. *African Union African Common Position on Migration and Development*. Document EX.CL/277 (IX), paragraph 3.8. See also the section entitled “Irregular or undocumented non-citizens” below, in relation to informal cross-border trade.

52 For example, via remittances.

53 Maharaj (2004:27–28, 29).

not systematically factored into national poverty reduction strategies throughout the region. Nor has immigration policy been integrated systematically with pro-poor policies ... To the extent that migration is sidelined or ignored in policy thinking, so pro-poor policy frameworks will fall short in their attempts to alleviate poverty and minimise inequalities in the region.

Labour market realities in SADC contribute to the precarious position of those who migrate. For them, working and living conditions are often, and have often been,⁵⁴ inadequate. Cross-border migrants are mostly unskilled or semi-skilled,⁵⁵ and are typically found at the lower end of the labour market in receiving countries.⁵⁶ Irregular migrants in particular are exploited, and their workers' and human rights are infringed.⁵⁷ Migrants are also especially affected by the restructuring of, and the conditions prevailing at, the environments where they are usually employed. A case in point is mining: as a result of labour market flexibility,⁵⁸ among other things, the mining industry in South Africa shed a large number of regular jobs between 1989 and 2000, causing a decrease in such jobs from almost 422,000 to about 231,000. Little effort was made to ameliorate the effects of retrenchments.⁵⁹ The state similarly failed to assist. Also, it has been noted that the mining sector in particular has a stubbornly high rate of disabilities and deaths.⁶⁰

The South African social security system: Limited public framework and entrenched fragmentation

Social assistance system

The South African social assistance system consists of the payment of social grants and the provision of various kinds of social services.⁶¹ However, the system is category-based and means-tested, as benefits are provided only to certain defined categories of persons who are deemed to be in need. As regards non-citizens, social assistance support is only available to permanent residents⁶² and, in some cases (not including the old age grant), refugees.

54 Poor working conditions of intra-regional migrants in southern Africa are a historical reality (Crush et al. 2005:5–6).

55 Pendleton et al. (2006:3).

56 Cross-border migrants are usually found in marginalised categories such as casual work, subcontracting, and informal trading (Kanyenze 2004:15).

57 (ibid.).

58 Subcontracting activities on South African mines have also been growing: (ibid.:16).

59 Kanyenze (2004:16).

60 (ibid.:17).

61 In terms of the Social Assistance Act, 2004 (No. 13 of 2004), social grants are provided for child support (for disadvantaged children), care dependency (for severely disabled children), foster care, disability, old age, and war veterans. Social relief of distress is available as a temporary intervention.

62 As per the judgment of the Constitutional Court in *Khosa & Others v The Minister*

Social insurance and unemployment

Various social insurance laws in South Africa deal with social security contingencies. The Unemployment Insurance Act (UIA)⁶³ covers workers and their dependants against temporary unemployment arising from termination of service, illness, and the birth or adoption of a child. However, migrant workers do not qualify for unemployment insurance benefits: they are excluded from coverage, since they have to return to their home country, when their contract of service, apprenticeship or learnership in South Africa ends.⁶⁴ This affects especially those migrant workers who work on a contract basis in South Africa, which applies to by far the majority of foreign mine- and farm workers there. Furthermore, the Unemployment Insurance Fund has no experience to date of paying benefits outside South Africa's borders, and only accepts South African-issued documentation for purposes of paying benefits to foreigners in South Africa.⁶⁵

Workmen's compensation: Legislation, assessments, and payments

A major problem facing workers from neighbouring countries who suffer occupational injuries or diseases in South Africa are the many South African laws and the largely uncoordinated institutional frameworks, as well as differences in the range of benefits. Different *statutes* deal with employment-related injuries and diseases within and outside the mining sector, and are administered by different government departments:⁶⁶ the Occupational Diseases in Mines and Works Act (ODMWA)⁶⁷ and the Compensation for Occupational Injuries and Diseases Act (COIDA).⁶⁸ COIDA and the ODMWA provide a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment or who contract occupational diseases. Occupational lung diseases in the mining sector are covered by the ODMWA. This law is administered by the Department of Health, South Africa, via its

of Social Development & Others; Mahlaule & Others v The Minister of Social Development & Others 2004 (6) BCLR 569 (CC).

63 No. 63 of 2001. These benefits are payable by the Unemployment Insurance Fund. Employers and employees contribute equally to the Fund. The maximum period of benefits (in respect of a worker who has been contributing for a period of four years) is eight months.

64 Section 3(1)(d), UIA.

65 Pers. comm., Mr Sagren Govender, Executive Manager of Operations, Unemployment Insurance Fund, 24 May 2010.

66 In addition, two mutual associations are permitted to operate under licence, as authorised by the Minister of Labour. They are the Rand Mutual Assurance Company Limited (RMA) in the mining industry, and the Federated Employers' Mutual Association (FEMA) in building and construction.

67 No. 78 of 1973.

68 No. 130 of 1993.

Johannesburg-based Medical Bureau for Occupational Diseases Directorate, where benefit medical examinations take place and former and currently employed mineworkers are certified. Lump sum (compensation) payments as well as medical benefits are provided in terms of the ODMWA, and are paid by the Compensation Commissioner operating under the auspices of the Department of Health. Occupational injuries (and deaths) as well as non-mine-related occupational diseases and mine-related diseases not covered by the ODMWA, such as noise-induced hearing loss, are essentially covered by COIDA.⁶⁹ This law is administered by the Compensation Fund of South Africa, which falls under the auspices of the Department of Labour. COIDA provides for different categories of benefits, which cover medical benefits as well as temporary and permanent disability compensation payments. The compensation payments could be in the form of lump sum or pension payments, depending on the severity of the disability. There are several major differences between ODMWA benefits and compensation payable under COIDA.⁷⁰

Still in the context of workmen's compensation, different and largely uncoordinated institutional avenues exist for, respectively, undertaking medical assessments and for processing and paying compensation. Medical assessments for mining-related lung diseases are undertaken by the Medical Bureau for Occupational Diseases Directorate. However, former mineworkers may not be able, either financially or medically or both, to travel to South Africa for this purpose. Medical assessments for occupational injuries in the mining context, and for occupational diseases in the mining context not covered by the ODMWA, fall under the auspices of the Rand Mutual Assurance Company Limited (RMA). For most other categories of former migrant workers, medical assessments are undertaken by the Compensation Fund of South Africa. Limited but insufficient steps have been taken to extend medical examination services to affected former workers from neighbouring countries.⁷¹ These

69 Also covered in terms of COIDA are occupational diseases suffered by employees working in the mining industry who are not covered by the ODMWA. These include mine health personnel.

70 For example, ODMWA benefits are generally inferior to those under COIDA. However, unlike COIDA, the ODMWA provides free benefit examinations. The ODMWA only provides for lump sum payments with no provision for pension payments or for additional compensation in the event of negligence on the part of the employer. However, additional compensation is payable if the permanent disability of the employee worsens from the first to the second degree. In terms of a recent Constitutional Court judgment (*Mankayi v AngloGold Ashanti Ltd* CCT 40/10, decided on 3 March 2011), a person covered under the ODMWA is not excluded from claiming for recovery damages against his/her employer for occupational diseases resulting in disablement or death. In contrast (?contrast?), section 35(1) of COIDA excludes a person covered under COIDA from claiming from his/her employer.

71 As far as former mineworkers are concerned, the RMA has established a medical clinic in Xai-Xai, Mozambique. Also, representatives from South Africa's Department

services are mostly restricted to existing beneficiaries and usually do not extend to former workers who have not yet been examined.

Streamlined and uniform payment mechanisms for cross-border workmen's compensation payments are largely absent. For many beneficiaries and dependants in neighbouring countries, banking facilities are non-existent or inaccessible. Also, transaction costs substantially reduce the value of a benefit paid out to beneficiaries.⁷² Compensation in respect of mining-related lung diseases covered by the ODMWA is paid by the Department of Health in South Africa through its Compensation Commissioner. The Commissioner pays these benefits directly into the claimant's bank account. If no bank account exists, the making of payments becomes problematic.⁷³ Compensation in respect of mining-related injuries and deaths, and for mining-related diseases not covered by ODMWA, is administered by RMA, which in some cases uses the services of the Employment Bureau of Africa (TEBA). Compensation in respect of occupational injuries and deaths as well as occupational diseases outside the mining context is paid by the Compensation Fund of South Africa, which depends on different payment modalities.⁷⁴

National/public retirement scheme

There is currently⁷⁵ no national or public retirement scheme in South Africa, as there is in Mozambique, implying that retirement insurance is covered by private mechanisms. Retirement insurance schemes – in the form of pension and provident funds – are regulated by the Pension Funds Act,⁷⁶ while the Financial Services Board (FSB)⁷⁷ is the regulatory and supervisory mechanism. However, some occupation-based retirement schemes are regulated by other statutes and cover particular categories of workers. These include the Military Pensions Act,⁷⁸ the Special Pensions Act,⁷⁹ and the General Pensions Act.⁸⁰

of Health visited Lesotho to investigate the possibility of having medical assessments done in Lesotho.

72 Olivier (2010a:178, paragraphs 465–466).

73 Apparently, as far as Lesotho is concerned, except for those with banking accounts, such payments are made via the Office of the Master of the High Court in Lesotho.

74 Including payment into either bank accounts or, in the case of Lesotho, into the Workmen's Compensation Trust Fund. The monthly pensions of Mozambican clients are paid into the bank account of the Mozambican Department of Labour.

75 However, significant steps have already been taken by the South African Government towards establishing a comprehensive national social security scheme covering retirement benefits as well.

76 No. 24 of 1956. It is believed that around 75% of workers in the formal sector in South Africa are members of occupation-based or private retirement schemes.

77 Established under the Financial Services Board Act, 1990 (No. 97 of 1990).

78 No. 84 of 1976.

79 No. 69 of 1996.

80 No. 29 of 1979.

Furthermore, although steps to remedy the situation are contemplated, there is no generally applicable legislation in South Africa yet that –

- compels all employers to make retirement provision for their employees
- requires compulsory preservation,⁸¹ or
- enforces compulsory transfer.⁸²

In the mining industry, where large numbers of migrant workers are employed, the most common mechanism chosen are provident funds, which pay out a lump sum at retirement. These have invariably been set up through collective agreement, particularly for mineworkers at junior levels and manual labourers. Senior-level mine officials generally belong to pension funds that pay out regular, usually monthly, benefits. When a member passes away before retirement, survivor benefits can be paid out to the member's nominees and/or dependants. However, South Africa's Pension Funds Act allows for a 12-month period within which to trace and verify dependants, which may cause considerable delay in paying benefits to surviving spouses and children.⁸³ In addition, the trustees of the pension or provident fund can require so-called trusts to be set up, usually for minor children. These trust funds are operated by independent institutions, referred to as *beneficiary funds*.

The retirement schemes described above also fall under the FSB's supervisory and regulatory authority. However, until recently, trust funds created for the benefit of minor children, including minor children of deceased migrant workers, did not fall under the FSB's authority. The beneficiary funds responsible for the operation and safeguarding of the trust funds had to report only to the Master of the High Court. Subsequent to the loss of a large sum of money invested with an asset management company by a beneficiary fund,⁸⁴ such funds were required to register in terms of the Pension Funds Act and are now, therefore, FSB-regulated and -supervised institutions.⁸⁵

Farm workers in South Africa, many of whom are migrants, rarely belong to retirement schemes. Thus, they are largely left without a regular post-employment income when they retire.

81 That is, retention of retirement contributions or benefits built up in a retirement scheme for the benefit of a worker when that worker exits the (formal) labour market before retirement.

82 That is, compelling the transfer of retirement contributions or benefits built up in a retirement scheme for the benefit of a worker when that worker changes his/her employer.

83 Section 37C.

84 The so-called Fidentia episode, in which approximately R500 million (US\$70 million) was lost.

85 See section 2A of the Pension Funds Act, inserted by the provisions of the Financial Services Laws General Amendment Act, 2008 (No. 22 of 2008).

In all of the above cases, the required documentation needs to be submitted before a lump sum payment and/or regular payment of benefits can be activated. This could be particularly cumbersome for surviving spouses and their children, as they may live in remote rural areas, may not know which documents to submit, how to procure and fill it out, and may not be able to obtain the required supporting marriage and birth certificates, for example. In addition, continued payments may be subject to the submission of appropriately completed and attested life certificates – which may be beyond the capability of many illiterate beneficiaries.

National/public health insurance scheme

In the absence of a national or public health insurance scheme in South Africa, health care is provided for a small part of the population by private schemes which are regulated by the Medical Schemes Act.⁸⁶ Private health care provision is mainly occupation- and insurance-based. Public health care is available to the majority of the population, but has several shortcomings, including limited funding and capacity.

Motor vehicle accident insurance

Motor vehicle accident insurance, which is generally regarded as part of social insurance in South and southern Africa, is provided by the Road Accident Fund.⁸⁷ The Fund, which is primarily fed by a compulsory fuel levy, pays compensation to a third party for any loss or damage suffered as a result of any bodily injury or death caused by the negligent driving of motor vehicles.

In sum

Not all categories of workers from SADC countries have access to the full range of benefits generally available under the South African social security system. For example, domestic workers are excluded from the operation of COIDA, which keenly affects the position of Mozambican workers who are or were involved in this sector.⁸⁸ Furthermore, as indicated above, fixed-term contract migrant workers do not qualify for unemployment insurance benefits.

In conclusion, a bewildering array of fragmented institutional and operational mechanisms characterises the different service delivery elements in South Africa. Furthermore, these mechanisms can vary, depending on the category of workers affected (e.g. former mineworkers and other former migrant workers) and the nature of the issue concerned (e.g. occupational diseases and injuries). One is left with the clear impression that there is a lack of

86 No. 131 of 1998.

87 Established in terms of the Road Accident Fund Act, 1996 (No. 56 of 1996).

88 Section 1(xix)(d)(v), COIDA.

synergy, coordination and collaboration at policy, institutional and operational levels within South Africa, as far as social security provisioning and service delivery is concerned – particularly in relation to migrant workers and their dependants. This applies across the board, but especially in the realm of workmen's compensation.

Different categories of migrants and their access to South African social security benefits

Categories of non-citizens in South Africa: Immigration law and policy classification and restrictions

Permanent and temporary residents

The Immigration Act,⁸⁹ which regulates non-citizens' entry into and residence in South Africa, distinguishes between various categories of non-citizens according to their immigration status and/or purpose of entry. In terms of section 9(4)(b) of the Act, a non-citizen may enter and remain in the country only if s/he has a permanent residence permit or one of 14 different kinds of temporary residence permit.⁹⁰

A *permanent resident* is a non-citizen who has been granted permission to reside in the country indefinitely. Legally speaking, permanent residents are given the same treatment accorded to nationals, in terms of a number of South African Constitutional Court judgments.⁹¹ For example, a permanent resident in South Africa has all the rights contained in the Bill of Rights,⁹² except those rights explicitly reserved for citizens. As such, permanent residents are the elite of non-South Africans, and are able to apply for citizenship after five years.⁹³ Some citizens of other SADC countries have indeed acquired permanent residence status in South Africa in this manner.

A *temporary resident* is a non-citizen who has been granted permission to enter and/or reside in South Africa for a definite period of time. From a legal perspective, migrant workers invariably work on a temporary basis in South Africa, irrespective of the fact that many of them – especially migrant mineworkers – have been working in South Africa for many years. Those who work in South Africa within the framework of the labour agreements entered

89 No. 13 of 2002.

90 See sections 11–23.

91 *Larbi-Odam v Member of the Executive Council for Education (North-West Province) & The Minister of Education* 1998 (1) SA 745 1655 (CC); *Khosa & Others v The Minister of Social Development & Others*; *Mahlaule & Others v The Minister of Social Development & Others* 2004 (6) SA 505 (CC).

92 Chapter 2, Constitution of the Republic of South Africa of 1996.

93 See section 5 of the South African Citizenship Act, 1995 (No. 88 of 1995).

into with neighbouring countries are required to have their contracts renewed every 12 to 18 months.

The crucial provision in the Immigration Act⁹⁴ is that a temporary residence permit is issued on condition that the non-citizen is not, or does not become, a “prohibited or undesirable person”.⁹⁵ One of the means by which this result is attained in relation to temporary residents is by including various financial requirements for the issue of permits and, therefore, the granting of lawful entry into South Africa. In terms of section 30, an *undesirable person* includes anyone who is likely to become a public charge. This may imply that a non-citizen is deemed to be undesirable and denied entry if s/he lacks financial resources and needs social assistance or welfare.

Mention should also be made of section 21 of the Immigration Act. This section provides for the issuing of a corporate permit, which allows a corporate client (such as a mining company) to employ a number of foreigners on a corporate or collective basis, without the need to comply with the cumbersome conditions and procedures required in terms of the Act and applicable to, for example, (individualised) work permits.⁹⁶ Section 21 affords special and preferential status to corporate employers in relation to migrant workers from the signatory countries, including SADC countries, and designated sectors such as the mining sector. Further implications are that the corporate employer, e.g. a mining house, has to provide financial guarantees – unless exempted, either partially or wholly – to defray deportation and other costs should the permit be withdrawn. Financial guarantees are also required to defray such costs if a person employed in terms of the permit fails to leave South Africa when s/he is no longer subject to the corporate permit, e.g. when the period for which the worker had been engaged has expired.⁹⁷ However, the corporate permit does not guarantee the right to residence in South Africa, and it has important implications for the social security position of migrant workers from SADC employed in terms of such a permit, when read with the provisions of the labour agreements with South Africa. These migrant workers are not entitled to unemployment insurance benefits, as explained below.

It has been remarked that the Immigration Act attempts to strike a balance between the needs of the South African economy – particularly in respect of the need for highly skilled workers, the will to limit the inflows of largely

94 See section 10.

95 As defined in sections 29 and 30.

96 Regulated in section 19.

97 Section 21 of the Immigration Act, as amended. According to the Supreme Court Appeal judgment in *Director-General: Department of Home Affairs & Another v Mavericks Revue CC* [2008] 1 All SA 435 (SCA); 2008 (2) SA 418 (SCA), a repatriation guarantee cannot be required from the worker concerned in the case of a corporate permit.

unskilled migrant workers or economic refugees,⁹⁸ and the concern that migrants' working conditions may undermine established labour standards and practices.⁹⁹ And yet, given the specific legal requirements that have to be met,¹⁰⁰ with some exceptions¹⁰¹ the majority of SADC migrants to South Africa, who are employed in semi-skilled positions, cannot qualify for a general work permit under the available categories.¹⁰² Therefore, the Immigration Act, in its current form, does not appear to be a suitable instrument to appropriately regulate the flow of migrant workers from other SADC countries to South Africa.

Finally, it should be noted that, apart from many documented migrants apparently remaining on temporary permits for long periods¹⁰³ as the possibility to apply for permanent residence after five years is not generally publicised and promoted, there are two further policy hurdles which effectively discourage and restrict migration to South Africa. The first is that migration policies in South Africa do not favour family reunification.¹⁰⁴ The second hurdle is that the Department of Home Affairs made a policy decision not to allow a foreigner to hold more than one permit at a time, and not to allow refugees to change their status or asylum seekers to change their permits if they married or had children with South African citizens.¹⁰⁵

Refugees and asylum-seekers

The international (including regional) standards and obligations relating to refugees and asylum-seekers, also in the area of social security, are crucially important for South Africa. This flows from the fact that, firstly, South Africa has ratified and is, therefore, bound by several of the relevant international and regional instruments; and that, secondly, every court, tribunal and forum has to consider international law in a matter involving the entitlement of refugees and asylum-seekers to the constitutional right to access to social security and to appropriate social assistance.¹⁰⁶

98 Both for security reasons and because of the high level of unemployment prevailing in South Africa (FIDH 2008:18).

99 (ibid.).

100 Especially the requirement that it has to be shown that nobody in South Africa has equivalent skills, qualifications or experience (FIDH 2008:5).

101 For example, mineworkers covered under bilateral agreements.

102 FIDH (2008:18).

103 (ibid.:21).

104 (ibid.); see also section 18, Immigration Act.

105 (ibid.).

106 See section 27(1)(c) of the Constitution, read with section 39(1)(b) and section 231, as well as section 233.

The importance of these international and regional standards is also evident from legislation on refugees, which deals with the position of refugees and asylum-seekers in South Africa. Section 1A of the Refugees Act¹⁰⁷ stipulates that it needs to be interpreted and applied in a manner consistent with –

- (a) the 1951 UN Convention Relating to the Status of Refugees;
- (b) the 1967 UN Protocol Relating to the Status of Refugees;
- (c) the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa;
- (d) the 1948 UN Universal Declaration of Human Rights; and
- (e) any domestic law or other relevant convention or international agreement to which South Africa is or becomes a party.

The Refugees Act defines an *asylum-seeker* as a person who is seeking recognition as a refugee in South Africa or whose refugee status has not yet been confirmed, as opposed to a *refugee*, who has been granted asylum in terms of the Act.¹⁰⁸ The distinction between *refugee* and *asylum-seeker* has important consequences for social protection status. Unlike refugees, asylum-seekers find it difficult to gain access to social protection until the final determination of their status. They receive only a minimum form of protection until such time as they become fully recognised refugees, and this makes their situation even more precarious. In South Africa, they are not explicitly legally included in provisions for social security, especially for social assistance. However, they are allowed to work and study.¹⁰⁹

Irregular or undocumented non-citizens

An *irregular or undocumented non-citizen* is one who is in South Africa without permission to reside in the country or who is otherwise present in the country in contravention of the country's immigration law. This includes a foreigner who has entered the country without proper authorisation or by fraudulent means, or who remains in the country beyond the date imposed by his/her visa or permit, or who engages in activities beyond the scope of what is duly authorised by that permit.¹¹⁰ In South Africa, an irregular non-citizen is regarded as an illegal foreigner, and is subject to arrest and deportation.

It is possible to discern different categories of irregular migrants, ranging from those who – as a result of porous borders, economic instability and weak

107 As inserted by the provisions of the Refugees Amendment Act, 2008 (No. 33 of 2008).

108 Section 1(iv), (v) and (xv), respectively.

109 *Minister of Home Affairs & Others v Watchenuka & Another* [2004] 1 All SA 21 (SCA).

110 Waller, L. 2006. "Irregular migration to South Africa during the first ten years of democracy". *SAMP Migration Policy Brief No. 19*. Kingston/Cape Town: Southern African Migration Project.

institutions – are involved in a variety of clandestine and unlawful cross-border criminal activities such as human trafficking, to those who trade and visit informally across borders and those who are unable to procure the necessary documentation or who have overstayed the period of their authorised sojourn in South Africa.¹¹¹

Immigration policies should, therefore, be sensitive to the nature of and reasons for the irregular status of a particular migrant. Notably, Article 69(2) of the United Nations (UN) Migrant Workers Convention¹¹² suggests that –

Whenever States Parties concerned consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, *appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations*, in particular those relating to their family situation. [Emphasis added]

*The Immigration Act and cross-border traders*¹¹³

Substantial numbers of migrant workers entering South Africa from neighbouring countries are cross-border traders. According to a recent study by the Southern African Migration Project conducted at major border posts with all South African neighbours except Namibia and Botswana, “of the 6 million border crossings in a year, 30–50% are by small-scale traders”.¹¹⁴

National and regional economic policy initiatives, and especially the SADC Free Trade Protocol, indicate that South Africa and other countries in the region view regional trade as part of the solution to the region’s economic problems and as a means of promoting regional integration and development and alleviating poverty. Yet, as Peberdy (2002:35) points out, current trade policies have paid little attention to the activities of small entrepreneurs – primarily women – who are involved in informal cross-border trade and who are also part of the movement of goods and capital through the region.¹¹⁵

111 See Olivier (2009:15–16).

112 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Resolution 45/158, Annex, 45 UN GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990). The Convention entered into force on 1 July 2003.

113 See Olivier (2010b:20–22, paragraphs 32–35).

114 “Immigration: What it’s doing to South Africa”, *Financial Mail*, 16 February 2007, p 36.

115 See Peberdy, S. 2002. “Hurdles to trade? South Africa’s immigration policy and informal sector cross-border traders in the SADC”. Unpublished paper presented to a workshop of the Southern African Poverty Network (HSRC), Lawyers for Human Rights, and the Southern African Migration Project “Regional Integration, Migration and Poverty”, Pretoria, April 2002.

However, the barriers regarding eligibility to enter South Africa seem insurmountable to many cross-border traders, and have encouraged irregular entry into South Africa.¹¹⁶ While the Immigration Act introduced cross-border permits which allow multiple entries for “a foreigner who is a citizen or a resident of a prescribed foreign country with which the Republic shares a border”,¹¹⁷ these permits do not authorise the holders to trade.¹¹⁸ Besides, while the 2002 Immigration Act established that these permits could be granted even to people who did not hold a passport but were registered with the Department of Home Affairs, this possibility has been removed by the 2004 amendment of the Act.¹¹⁹

Technically, cross-border permits do not allow cross-border traders to participate in street trade in South Africa, which leaves them vulnerable to arrest by police and Home Affairs officials, and engenders corruption.¹²⁰

Access to social security in South Africa

Permanent and temporary residents

In terms of the Constitution, foreigners with permanent residence status are entitled to the same socio-economic rights as citizens. Access to social assistance was, therefore, extended to permanent residents in the landmark case of *Khosa & Others v The Minister of Social Development & Others; Mahlaule & Others v The Minister of Social Development & Others*.¹²¹ Permanent residents in South Africa are entitled to the whole spectrum of social insurance benefits.

Temporary residents cannot access social assistance, however, as this is restricted to citizens and permanent residents.¹²² The Social Assistance Act¹²³ states that it applies to a non-citizen of South Africa only in the event

116 See Olivier (2009:100).

117 Section 24.

118 FIDH (2008:19).

119 (ibid.). This impacts negatively on many neighbouring countries' citizens, particularly Zimbabweans, who do not have passports and who are unable to obtain them expeditiously from their various home administrations.

120 Peberdy (2002:43).

121 2004 (6) SA 505 (CC). The Constitutional Court found that the Constitution expressly provided that the Bill of Rights enshrined the rights of “all people in our country” and, in the absence of any indication that Section 27(1) was restricted to citizens – as in some other provisions in the Bill of Rights – the word *everyone* could not be construed as referring only to citizens (paragraph 47).

122 This was confirmed in *Khosa*, which held that excluding temporary residents from social assistance was justified on the basis of the “tenuous link” that temporary residents had with the country.

123 No. 13 of 2004.

of a bilateral agreement providing for this, i.e. an agreement between South Africa and the country of which that person is a citizen.¹²⁴ The Minister of Social Development can, with the concurrence of the Minister of Finance, also prescribe that a group or category of persons should be covered.¹²⁵ However, no bilateral agreements have yet been signed, and the Minister of Social Development has not extended social assistance to any category of temporary non-citizens. Temporary residents can, however, access the public health care system in cases of emergency.¹²⁶

Nonetheless, temporary residents qualify for some social insurance benefits. Temporary residents who are migrant workers on work permits are eligible for compensation for –

- employment injuries and diseases
- occupation-based health and retirement benefits (in the case of retirement benefits where the rules of a fund allow), and
- motor vehicle accident insurance.

With regard to health care, temporary residents are not covered in the public sector – although, as indicated above, they can access the public health care system in cases of emergency. Otherwise, health care is available to them only through contributory private schemes as regulated by the Medical Schemes Act.¹²⁷

As regards unemployment insurance coverage in the case of termination of services, illness, maternity or adoption, temporary residents in South Africa who are migrant workers are excluded if they have to return to their country of origin. For example, the UIA excludes persons who enter South Africa for the purpose of carrying out a contract of service, apprenticeship or learnership if there is a legal or a contractual requirement or any other agreement or undertaking that such person is obliged to leave South Africa, or be repatriated upon termination of the contract.¹²⁸

Refugees and asylum-seekers

In principle, refugees in South Africa enjoy full legal protection, which includes the constitutionally entrenched socio-economic rights set out in Chapter 2 of the Constitution, and specifically the right to access to social security,

124 Section 2(1).

125 Section 1, paragraph (b) of the definition of *South African citizen*.

126 In terms of Section 27(3) of the South African Constitution, no one may be refused emergency medical treatment.

127 No. 131 of 1998.

128 Section 3(1)(d) UIA.

including, if they are unable to support themselves and their dependants, appropriate social assistance.¹²⁹

Notably, the 2008 Amendment Act¹³⁰ specifically deleted the provision which gave refugees an entitlement to the same basic health services and basic primary education to which citizens are entitled. This could conflict with South Africa's obligations under the 1951 UN Convention Relating to the Status of Refugees, which requires contracting states to accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as that accorded to their own nationals.¹³¹

In the case of *Union of Refugee Women & Others v Private Security Industry Regulatory Authority & Others*,¹³² the Constitutional Court considered the position of refugees in South Africa. It held that refugees who had been granted asylum were a special category of foreign nationals who had the right to remain in South Africa indefinitely. The court likened their position to that of permanent residents with regard to access to rights and privileges, although not in all aspects.¹³³ The court also held that refugees were allowed to take up employment, although not in every profession or industry.¹³⁴

From a legal perspective, therefore, refugees and asylum-seekers have access to occupational social security schemes, including health insurance and retirement insurance, as well as compensation for occupational injuries and diseases and for motor vehicle accidents. However, the temporary nature of their stay in South Africa may mean they fall outside the scope of workers usually covered by retirement fund arrangements. It is unclear whether refugees and asylum-seekers are entitled to contribute to and benefit from unemployment insurance. One reading of the UIA leaves one with the

129 Section 27(b), Refugees Act, read with section 27(1)(c) of the Constitution. The Social Assistance Act provides access to disability grants to refugees; see Regulation 3(a) of the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance, GG 31356, 22 August 2008.

130 Refugees Amendment Act.

131 See Article 24 of the Convention.

132 2007) 28 ILJ 537 (CC).

133 (ibid.:paragraph 99).

134 The court stressed that, although section 27(f) of the Refugees Act grants refugees the right to seek employment, this right may be limited in the case of non-citizens, in accordance with the provisions of Section 22 of the Constitution. The regulatory scheme aimed at generally excluding refugees (subject to exception) was found to be narrowly tailored to the purpose of screening entrants to the private security industry and did not constitute a blanket ban on the registration of refugees as private security service providers.

impression that they are not allowed to contribute to the Unemployment Insurance Fund.¹³⁵

As far as social assistance is concerned, the Regulations to the Social Assistance Act now include refugees as beneficiaries for the disability grant, the foster care grant, and social relief of distress.¹³⁶ However, they are not entitled to any of the other social assistance benefits, such as the old age grant. Asylum-seekers are provided with social assistance only in cases of emergency, such as emergency health care.

Whereas the Refugees Act entitles refugees to seek work, it does not contain a similar provision with regard to asylum-seekers. Nevertheless, the Supreme Court of Appeal upheld the right of asylum-seekers awaiting the processing of their applications to work or study: provisions in the Regulations in terms of the Refugees Act aimed at preventing them from exercising this right¹³⁷ were held to be beyond the powers of the Constitution.¹³⁸

Access to the full spectrum of social insurance benefits is needed in view of government policy in South Africa, which promotes self-sufficiency for refugees and their local integration. This, in turn, forces refugees to seek work and to rely on social insurance. The same applies to asylum-seekers who are allowed to remain in South Africa. Therefore, employment becomes a crucial element of the basic dignity and welfare of these two vulnerable categories of non-citizens.

Irregular or undocumented non-citizens

Undocumented migrants in South Africa enjoy some protection under the law. The case of *Discovery Health Ltd v CCMA & Others*¹³⁹ extended labour law protection to some categories of irregular or undocumented non-citizens, specifically those whose work permits have expired. Since the labour law status of a worker determines his/her right to employment-related social security benefits, the ruling could therefore imply access to social insurance protection for this category of non-citizens, i.e. that they should be able to access compensation for occupational injuries and diseases. They should

135 See section 3(1)(d), UIA.

136 Regulation 3(a) of the Regulations Relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance (GG 31356, 22 August 2008) provides that a person is eligible for a disability grant if s/he is a South Africa citizen, permanent resident or refugee.

137 See Regulation 7 of the Refugee Regulations (Forms and Procedure), 2000.

138 *Minister of Home Affairs & Others v Watchenuka & Another* [2004] 1 All SA 21 (SCA).

139 (2008) 29 ILJ 1480 (LC).

also be eligible for unemployment insurance, although their temporary status may preclude them from such cover.

In terms of available best practice and existing international standards, irregular or undocumented migrants who have made social insurance contributions should be entitled to benefit from those payments or at least be repaid the sums contributed if, for example, they are expelled from the country.¹⁴⁰ Generally speaking, there is a movement away from an approach that focuses exclusively on the security aspects of irregular migration, i.e. on measures to combat irregular migration, towards a more nuanced approach that also emphasises the human rights of irregular migrants. Consensus is beginning to emerge that irregular migrants are entitled to certain minimum rights in the migrant-receiving country.¹⁴¹ The Committee of Inquiry into a Comprehensive System of Social Security for South Africa, the so-called Taylor committee, remarked in its report that —¹⁴²

there [is] ... constitutional pressure to ensure all people (including illegal immigrants) have access to *certain basic services (such as emergency healthcare)*. [Emphasis added]

A restrictive definitional context could materially impact on the social security protection of non-citizens, and may have particular genderised dimensions.

For example, as explained above,¹⁴³ the limited framework of temporary permits regulated by the Immigration Act makes it virtually impossible for

140 See Cholewinski, R. 2005. *Study on obstacles to effective access of irregular migrants to minimum social rights*. Strasbourg: Council of Europe, paragraph 40; Council of Europe. 2006. *Human rights of irregular migrants*. Strasbourg: Council of Europe, paragraph 70; Article 9(1) of the International Labour Organization Migrant Workers (Supplementary Provisions) Convention 1975 (Convention No. 143 of 1975); Article 27(2) of the UN Migrant Workers Convention; Olivier (2010b:paragraph IX).

141 In the words of a British House of Lords Select Committee on the European Union, “Governments need to manage migration in a way that controls illegal immigration effectively. But in doing so they must not forget that they are dealing with people, most of whom are motivated simply by a better life for themselves and their families, and in devising measures to control immigration they must ensure that they scrupulously observe their human rights obligations”; Session 2001-02, 37th Report, A Common Policy on Illegal Migration, HL Paper 187 (5 November 2002), p 17.

142 Republic of South Africa. 2002. *Committee of Inquiry into a Comprehensive System of Social Security for South Africa. Transforming the Present – Protecting the Future (Draft Consolidated Report)*. Pretoria: Republic of South Africa, p 115; also known as the *Taylor Committee*.

143 See earlier, under the section entitled “Irregular or undocumented non-citizens”. Outside the mining and commercial farming sectors, it is difficult for female migrants to obtain work permits, since employers have to apply for and justify them in terms of no South Africans being able to fill the position (UN-INSTRAW & UNDP/United Nations International Research and Training Institute for the Advancement of

informal cross-border traders to obtain permits authorising them to trade. Their status in terms of the legislation is, therefore, by and large that of an irregular migrant.

As far as social assistance is concerned, it can be argued that irregular non-citizens in South Africa are constitutionally entitled to core social assistance, which might entail emergency social relief. However, the provisions of the Social Assistance Act do not extend support to irregular non-citizens. With reference also to prevailing international standards, it is evident that irregular migrants are entitled to emergency health care as defined in the Constitutional Court's judgment in *Soobramoney*.¹⁴⁴

However, a distinction has to be drawn between *irregular adult migrants* and *children in an irregular situation*, whether such children are accompanied or unaccompanied. In accordance with international and regional standards,¹⁴⁵ case law in South Africa indicates that unaccompanied foreign children in South Africa should be treated as children in need of care in terms of the formal child protection (including welfare) system, and should not be processed through the immigration system.¹⁴⁶

Bilateral labour agreements

As is discussed in more detail in Part II, South Africa has entered into so-called labour agreements with a number of SADC countries. Whether these bilateral agreements are consistently applied and enforced is unclear, however. There is some indication that they are obsolete.

Nevertheless, an analysis of the agreements reveals that they were concluded to tightly regulate the flow of migrant labour to South Africa from other SADC countries.¹⁴⁷ Social security and related arrangements, and specifically portability issues, are dealt with solely as a by-product of the agreements. In this regard, the agreements typically arrange for the payment of taxes to the government of the sending country, particularly for the following deductions:

Women & United Nations Development Programme. 2010. *Migration, remittances and gender-responsive development: The case of Lesotho*. New York: United Nations, p 19).

144 *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

145 See, among other things, the UN Convention on the Rights of the Child, 1989.

146 *Centre for Child Law & Another v Minister of Home Affairs & Others* 2005 (6) SA 50 (T).

147 The agreements typically provide that employment is only permitted to occur in accordance with the provisions of the agreement; that a citizen of the sending country entering South Africa for purposes of employment is obliged to have a written employment contract attested in the home country; and that the period of employment is not permitted to exceed 24 months.

- Deferred pay to be paid to the foreign national in the sending country upon return to that country
- Allowances payable to family members, and
- Monies to be paid into a welfare fund which may be set up by the government of the sending country for the purpose of supporting such citizens during periods of their disablement upon return to such country.

However, with the possible exception of the 1964 labour agreement regulating the employment of Mozambican mineworkers on certain South African mines, the obligations outlined above are clearly primarily imposed on the relevant employers and not the South African Government: the agreements invariably refer to the South African authorities having to 'endeavour to ensure' compliance by employers.

There are several other reasons why these agreements – to the extent that they may still be operational – need to be seen as limited in scope and effect, and as inadequate from the perspective of constituting true reciprocal agreement and enhancing the portability of South African social security benefits:

- The agreements are not reciprocal in nature, as they regulate the position of nationals of one of the respective countries only
- Repatriation is dealt with together with labour migration in the relevant regulation
- As a rule – but subject to some limited exceptions, e.g. the provisions on workers' compensation, in the case of Mozambique) – the agreements do not cover public social security transfers, but only employer- and occupation-based payments, and
- In view of the above, and given their overly controlling and restrictive orientation and purpose, although they provide some measure of portability of social security benefits, these agreements do not provide for other arrangements typical of coordination regimes,¹⁴⁸ such as maintenance of acquired rights, aggregation of insurance periods, and equality of treatment with nationals of the receiving country in social security matters.

In fact, these agreements effectively exclude nationals of the sending country from benefiting from unemployment insurance in South Africa: migrant workers who have to return to their home country as a result of the agreements are not regarded as contributors to, and can therefore not benefit from, the Unemployment Insurance Fund. While this may be seen as an arrangement which benefits the employers of such migrant workers,¹⁴⁹ this may leave migrants in a precarious position when they return to their home country.

148 Discussed in Part II [Forthcoming].

149 As they would otherwise have been liable to pay contributions to the Fund as well.

Conclusions

The social security position of migrants from SADC countries is influenced by their immigration status. Legally and factually, the position of non-citizens in terms of South African immigration law is superimposed on their social security status. The immigration status of migrant workers from SADC countries to South Africa is essentially determined by the provisions of the latter's Immigration Act, and qualified by the provisions of any bilateral agreements between South Africa and such countries. While many SADC migrants are employed on short-term work permits or via the corporate permit system, especially in the mining industry, some are already permanent residents and others are even citizens of South Africa. However, many SADC migrants are undocumented, which severely limits their access to social security benefits in South Africa.

The historical evidence, supported by data on modern-day migration movements within SADC, suggests that systems of labour migration in southern Africa, especially to South Africa, are deeply entrenched. Indeed, the industrial development of some countries in the region, including South Africa, depended heavily on the use of labour from other SADC countries. And yet, South African immigration law and policy, as a regime superimposed on the existing social security framework, is characterised by its emphasis on control and deportation, and on restricting access, controlling movement and regulating presence in the host country. The regime fails to honour a human rights approach and to encourage and support migration. To a large extent, this is also apparent from the scope and orientation of the labour agreements relating to the provision of migrant labour to South Africa that South Africa has concluded with several of its fellow members in SADC. Immigration laws and policy in South Africa, as is the case in other SADC countries, generally focus on the effects of migration, rather than on its underlying causes.