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# SOCIAL PROTECTION FOR THE MIGRANT WORKER IN SOUTH AFRICA

by

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## SUMMARY

The purpose of this dissertation is to investigate the social protection, if any, afforded to migrant workers in South Africa. To accomplish this purpose, the ambit of the concept of 'social protection' is investigated and the legal status and different categories of migrant workers are probed. The strands of social protection identified and evaluated in the study are:

- social assistance;
- social insurance; and
- labour security.

Each of the categories that define the social protection afforded to migrant workers is examined. The ILO, UN and SADC have numerous standards and instruments dedicated to the extension of social protection as well as the protection of migrant workers globally. The Constitution of the Republic of South Africa, 1996, acknowledges that international law must be considered when interpreting the Bill of Rights. Furthermore, the courts must prefer a reasonable interpretation of legislation, consistent with international law. Each component of social protection, as well as migration, is regulated by different legislative instruments.

South Africa has legislative instruments dedicated to the regulation of social assistance, social insurance and labour security. In South Africa, irregular migrants receive limited social protection. The South African courts have played a positive role in the development and broadening of the social protection afforded to migrant workers, especially in the form of labour security. The limitations in the legislative instruments that regulate labour security are being extended to give effect to the courts' decisions. Most of South Africa's neighbouring countries have some form of social protection, but other SADC countries can receive lessons from South Africa with regard to the development of social protection, specifically in the form of labour security.



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# FOREWORD

I would like to give thanks to my Heavenly Father for allowing me this wonderful opportunity and blessing me with the necessary endurance, strength and knowledge in life and providing me with dreams bigger than I could ever imagine. His grace has been with me throughout this dissertation and nothing would have been possible without His love, blessings and the promise of tomorrow.

My sincere and heartfelt thanks therefore go out to the following people:

- My supervisor, Professor BPS Van Eck. Thank you for your guidance, honesty, support and expert knowledge. I thank you for always having time for me, assisting and motivating me through difficult times in writing this dissertation. It has been an honour and a privilege to have you as my supervisor.
- My parents, Flip and Izabel Snyman, for giving me the wonderful opportunity and privilege to be able to study and complete my studies with their loving support, guidance, patience, understanding and so much more.
- Vivienne Boshoff, who never allowed me to give up, listened to endless ideas and stayed up with me without ever complaining.
- Ansie Smit, who inspired me to enter the law profession and who always has time and answers for me.
- My sister, Nicolene Snyman, who always understands and provides me with more than just support.
- My friends, family and colleagues.



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**DECLARATION OF AUTHENTICITY**

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# CHAPTER 1
# INTRODUCTION


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## 1.1 BACKGROUND

The terms associated with the concept of social protection are, among other things, social security, social assistance and social insurance.[1] The need for social protection emanated from portions of the population who could not provide for themselves and could not count on their governments for assistance.[2] Numerous factors had an impact on societies and their views towards the welfare of their people.[3] In many instances, individuals could no longer care for themselves when they fell sick or became too old to work for their own wages. Their income was too small to save up for the years during which they could not look after themselves.[4]

The First and Second World Wars changed the face of the world, and by the 1960's some of the more developed countries had introduced a number of social protection measures.[5] The so-called welfare system's[6] responsibilities expanded and benefits were distributed to people for, among other things, retirement, medical care, injury and unemployment. This system's challenges are to develop suitable and incorporated strategies that include the whole population and stop the economic and social downgrading of those people living in situations such as poverty or life-threatening disease, as well as attending to the distribution of the services provided.[7]

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[1] Olivier *et al* (2003) 26. The broader term 'social protection' will be used throughout the course of this dissertation.
[2] Strydom *et al* (2006) 1.
[3] An example of this is the Industrial Revolution in the United Kingdom.
[4] Strydom *et al* (2006) 1; Olivier *et al* (2003) 26.
[5] Strydom *et al* (2006) 3.
[6] Harris (2000) 5 says that "[a] state [that] accepts responsibility for welfare and (via legislation and other constitutional means) provides mechanisms – institutions and procedures – for the delivery of the services and other forms of provision required to meet basic needs."
[7] Richter (2006) *SAJHR* 197.



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The development of social protection can be categorized by two broadly diverse approaches, namely the Bismarckian and Beveridge systems.[8] In the Bismarckian system, public schemes are developed from employee-employer contributions. The inference is that this system is insurance-based. In Europe, the Beveridge system places the emphasis on minimum-income protection, with these benefits provided as part of the state budget. Traces of these approaches can be found in early schemes, and owing to modern developments, a mixed system has been introduced in various countries.

The definition of social protection differs from one organization and/or country to another. The International Labour Organization (ILO) defines the concept as "the protection which society provides for its members, through a series of public measures against economic and social distress."[9] Overall, the aim of social protection is to reduce the risks that communities face by increasing opportunities and the competence of individuals to provide for themselves and, to some extent, for their dependants.[10]

Social protection is recognized as a human right by the ILO and the United Nations (UN). The ILO played an important role in the development of social protection and adopted a number of conventions and recommendations to this end.[11] During the International Labour Conference held in 1952, numerous parties came to an agreement that concluded that social protection has an important place on the agenda of the ILO.[12] Furthermore, the UN adopted the International Covenant on Economic, Social and Cultural Rights in 1966.[13]

In South Africa, as the time of racial discrimination was coming to an end, the concept of social security was being reformed.[14] Social protection has been

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[8] Olivier *et al* (2003) 29.
[9] Strydom *et al* (2006) 4. See Chapter 2.2.2.
[10] Mpedi and Govindjee (2009) *Obiter* 775.
[11] Strydom *et al* (2006) 3.
[12] Van Ginneken (2003) *Int Lab Rev* 277. The Social Security (Minimum Standards) Convention, 102 of 1952, was adopted by the ILO in 1952. By 2006, 40 member states had ratified this Convention. See also Strydom *et al* (2006) 4. See Chapter 2.2.3.3.
[13] Van Ginneken (2003) *Int Lab Rev* 277. See Chapter 2.2.3.4.
[14] Strydom *et al* (2006) 18. However, to date most of the conventions have not been ratified by the South African government.



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perceived in a whole new light since the introduction of section 27 of the Constitution of the Republic of South Africa, 1996.[15] This section states that everyone has the right to access to social security,[16] which is one of the categories of social protection.[17] Furthermore, it indicates that a state must take reasonable legislative measures, within its available resources, to improve everyone's social security rights.[18] However, this section was only adopted after several historic events and developments in the country. The Constitution was developed to provide a balance between the rights entrenched in the Constitution and the enforcement of these rights.

In South Africa, social protection can be divided into a number of categories, and these should be determined according to the intended aims of the initiative.[19] The main strands of social protection in South Africa are to be found in social assistance, social insurance[20] and labour security.[21] Social assistance, also known as social-welfare, can be divided into two categories. The first is means-tested social assistance, where people need to qualify for assistance. Examples of grants under this category are disability grants and child grants.[22] The second category relates to national social assistance, and is based on the assumption that the government should aim to provide a minimum standard of living for all people within the borders of the country.[23]

The Social Assistance Act[24] (SAA) is the primary legislation in South Africa for regulating the provision and implementation of social assistance. The SAA makes provisions for various forms of social grants, which are mainly funded through taxation. Booysen notes that:

> "[S]outh Africa has a well-developed system of social security and the reach of the social grant safety net has expanded rapidly over the past five years."[25]

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[15] Dekker (2000) *Law, Dem & Dev* 1.
[16] S 27(1)(c). Hereinafter the Constitution.
[17] See Chapter 2.2.
[18] S 27(2).
[19] Olivier *et al* (2003) 30.
[20] Strydom et al (2006) 6.
[21] The definition of social protection will be dealt with comprehensively in Chapter 2.2.2.
[22] Ss 4 – 13 of the Social Assistance Act 13 of 2004. See also Strydom *et al* (2006) 8.
[23] Strydom *et al* (2006) 8.
[24] 13 of 2004.
[25] Booysen (2004) *JSA HIV* 45.



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Contributions to social insurance are usually made by the employer and/or the employee, and whether this places this form of social assistance beyond the scope of the protection provided to migrant workers will be examined.[26]

Social protection typically starts in the workplace, where workers spend the majority of their working lives.[27] Social protection is often limited to the existence of a contract of employment[28] and/or possession of citizenship of the host country.[29] These limitations have been considered by the South African courts[30] and it has been held that the Constitution has the effect of extending the scope of the protection that the state must provide to non-citizens or those with no valid contract of employment.[31]

South Africa is also one of the members of SADC. The SADC countries are all connected, whether it is for economic purposes or by a deadly disease.[32] The reality is that they need to stand together to help those individuals who are less fortunate. As will be indicated through the course of this dissertation, numerous writers, international standards, legislative instruments and courts have acknowledged that migrant workers are a vulnerable group around the world.[33]

Migration is a factor that creates both a number of problems and opportunities in the SADC region, as migrant workers flow from one country to another in search of better living standards. Each SADC country has developed its own legislative

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[26] Olivier *et al* (2003) 9 – 10.

[27] *Recommendation Concerning HIV and AIDS and the World of Work,* 2010 (No. 200) International Labour Office, Geneva.

[28] See the definition of 'employee' as contained in s 1 of the Unemployment Insurance Act and s 1 of the Compensation for Occupational Injuries and Diseases Act, as well as the discussion in Van Niekerk *et al* (2012) 70 – 73.

[29] See the scope of application of the Social Assistance Act 13 of 2004 as provided for in s 2(1).

[30] In *Khosa v Minister of Social Development; Mahlaule & Others v The Minister of Social Development & Others* 2004 (6) SA 505 (CC) the court stated that the rights protected by s 27 could be extended to persons with refugee status. In the abovementioned cases, the Constitutional Court emphasised the justifiability and inter-relatedness of the rights contained in s 27. See also Becker and Olivier (2008) 56.

[31] *Discovery Health Ltd v CCMA* 2008 ILJ 1480 (LC); *Government of the Republic of South Africa & others v Grootboom and others* 2001 (1) SA 46 (CC). These cases will be discussed in Chapter 3.3.3.

[32] As stated by Olivier and Mpedi (2004) *JJS* 12 "[t]he SADC region is one of the poorest regions in the world. The SADC countries share common problems. They share the experience of being confronted by, *inter alia*, high levels of unemployment and under-employment, poverty, and the HIV/AIDS pandemic."

[33] See Chapters 2 and 3. For example, see the ILO standards available on http://www.ilo.org/global/about-the-ilo/decent-work-agenda/social-protection/lang--en/index.htm visited on 2012/06/19 and Olivier (2011) Part 1 *SADC Law J*.



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instruments regarding social protection, migration and labour, which are unique to their own systems of law and the needs of their community members.

## 1.2 RESEARCH QUESTIONS

This dissertation will aim to evaluate the current position of the migrant worker in South Africa with regard to the social protection available to them. The focus of this study is not merely to criticize the existing state of social protection among residents in their respective countries, but to evaluate the South African system and consider whether or not the regulatory framework is sufficient. The different questions that will be answered through the course of this dissertation are:

- What is the appropriate content of the definition of social protection for the purposes of this research?
- To what extent do international norms provide social protection?
- Does South Africa have a constitutional duty to follow the international norms with regard to social protection?
- What is South Africa's legal framework?
- To what extent do policymakers and courts expand the concept of social protection?
- What are the different legal statuses that migrants can hold and are these aligned with social protection?
- To what extent does SADC regulate social protection?
- Can lessons be learned from neighbouring countries?

In addressing these questions, the main focus will be on the ambit of social protection in South Africa. This focus will include the different strands of the social protection system of South Africa, the relevant legislative instruments and the willingness of the courts to evaluate this concept with regard to migrants. Attention will be given to the position of the ILO, UN and SADC on the concept of social protection and migration. A comparative analysis of some of the SADC countries and the instruments ratified by these jurisdictions will be carried out by the study.

## 1.3 SIGNIFICANCE OF THE STUDY

According to Statistics South Africa (Stats SA),[34] "migration is the most difficult to define and least understood component of population change."[35] An estimated 1 million international migrants are expected to enter the country between 2011 and

[34] Available on http://www.statssa.gov.za/publications/findpublication.asp visited on 2013/08/14.
[35] Statistical release P0351.4 *Documented immigrants in South Africa* (2012) 8.



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2015.[36] Stats SA aimed to monitor the number of permanent and temporary permits issued to migrants in South Africa, and it was found that a significant number[37] of temporary residence permits were issued in accordance with the Immigration Act[38] in 2012, 23.5% of which were work permits. Only 1 283 permanent residence permits were issued in 2012. Work permits were once again the most prevalent of the permits issued.[39]

Both skilled and unskilled workers cross the South African border in search of employment in any form to provide for themselves and their dependants. Unfortunately there are no accurate statistics available to indicate the number of irregular migrants in South Africa. Migrant workers form part of most countries' communities and have needs. Health care and basic education are just some of the services people need to establish a basic living standard for themselves. They render services and need labour protection.

Most human needs could be categorized under social protection. Migrant workers, especially in the mining sector in South Africa, are part of the South African community. The study's coverage of social protection for migrant workers in South Africa is significant, owing to the fact that a large number of the migrants in South Africa are from the African continent.[40]

International organizations place emphasis on the development of social protection and the concept of migration. Social protection in South Africa must be evaluated and the legislative instruments should acknowledge the existence of migrant workers, while still being reasonable about the duties of the country towards migrant workers.

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[36] Gauteng and the Western Cape receive the highest number of migrants within the country, both national and international. Statistical release P0302 *Mid-year population estimates* (2013) 5 and 11.

[37] A total of 141 550 temporary permits were processed. Statistical release P0351.4 *Documented immigrants in South Africa* (2012) 14.

[38] 13 of 2002.

[39] Work permits made up 34,4 % of the permanent residence permits analyzed and issued.

[40] Zimbabweans had the most processed temporary and permanent residence permits in South Africa in 2012. See Statistical release P0351.4 *Documented immigrants in South Africa* (2012) 14 and 29.



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## 1.4 RESEARCH METHODOLOGY

This study will follow a comparative and analytical approach to the social protection, if any, available to the migrant worker in South Africa. A comparison will be drawn between South Africa and other SADC countries. The study will focus on an analysis of social protection and the impact or possible negative effect the inclusion of this group may have on social protection at large. Both national and international standards and obligations will be dealt with.

A specific referencing method will be followed. The complete reference to each book, journal article and international instrument will be given in the bibliography at the end of the dissertation, after Chapter 6. There will also be a table in which the shortened reference that will be used in the footnotes can be found. When referring to legislation, the full title of the act or instrument will be stated in the text, and any abbreviations to be used will be given.

Social protection does not have a concrete definition. However, it includes concepts such as social security, social assistance, social insurance and labour security. These concepts will be investigated and context will be given to the terms. Migrant workers in South Africa will be the focus of this dissertation. The concept of 'workers' used here will include not only the general accepted definition of workers, but also employees as defined by various legislative instruments.[41] As the meaning of 'employee' used follows South African legislation, the concept of a 'worker' dealt with here will not include independent contractors. Therefore, independent contractors

[41] S 1 of the UIA defines an 'employee' as "any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor." S 1 of the COIDA defines the term as "'a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing and whether the remuneration is calculated by time or work done, or is in cash or in kind, and includes: (a) a casual employee employed for the purposes of the employer's business; (b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract; (c) a person provided by a labour broker against payment to a client for the rendering of service or the performance of work, and for which service or work such person is paid by the labour broker; (d) in the case of a deceased employee, his dependent, and in the case of an employee who is a person under disability, a curator acting on behalf of the employee." According to s 213 of the LRA 'employee' means "(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assist in carrying on or conducting the business of an employer."



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will form no part of this dissertation. The status of being a worker is not limited to employees or dependent on the existence of employment contracts. Both formal and informal workers will be examined. Migrant children are another group of individuals who usually fall within the scope of vulnerable people. Large numbers of migrant children flow into the country, whether it is with their migrant parents or by themselves, in the search for work. This category of migrants will not form part of this analysis.

The definition of 'migrants' developed by various international and national instruments will be used throughout this study. It will include migrants of all genders and races.[42] However, only migrants who work within the borders of South Africa will be examined comprehensively. The migrants' spouses and independents will be excluded. Only permanent and temporary residents, refugees, asylum-seekers and irregular migrants will be the focus of this study.

When dealing with South African migration law there are a number of significant legislative instruments that are important to evaluate.[43] It is acknowledged that the Citizenship Act 88 of 1995 can be considered a part of migration policy in South Africa, as it regulates citizenship.[44] However, despite this acknowledgement, it will not be included in the scope of this dissertation.

In addition, informal social security forms part of the definition of social protection, but will not be covered in detail in this dissertation. Throughout the dissertation, reference will be made to informal social security and the role it plays where applicable, but it will only be covered briefly.

## 1.5 PROPOSED STRUCTURE

This study will consist of six chapters. The chapter division will be as follows:

In Chapter 1, the introduction, the background to the problem is provided and the research questions are specified. The relevant terminology and necessary

[42] The definition of migrants, migration and categories of migrants will be dealt with comprehensively in Chapter 4.
[43] These will be discussed comprehensively in Chapter 4.
[44] Statistical release P0351.4 *Documented immigrants in South Africa* (2012) 8.



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restrictions on the topic are dealt with and explained. The referencing method that is used throughout the dissertation is also explained.

In Chapter 2, the focus falls on the definition of social protection for the purposes of this research. In addition to this, the international norms pertaining to social protection established by the ILO are explored. This includes a discussion of the functions of the ILO and the instruments provided by the ILO, which could have a positive impact on the problem if ratified and implemented by the relevant countries. The Constitution is the primary piece of legislation in South Africa and the supreme law of the country. All legislation must be consistent with it. The socio-economic rights entrenched in the Constitution are evaluated. The question is posed whether there is a constitutional obligation on South Africa to adhere to these norms.

In Chapter 3, South African legislative instruments concerning social protection and labour law are examined. Case law that changed or extended this right to other vulnerable groups is analysed. This includes relevant legislation and court cases. It will be determined whether the government is providing adequate social protection according to section 27 of the Constitution. The Constitution is dealt with in Chapter 2 and is only mentioned here where specific socio-economic rights are considered or extended.

In Chapter 4, the concept of migration as defined by international and national organizations is acknowledged. The different categories of migrants that form part of this study are defined in this chapter. The ILO and UN instruments and standards that did not form part of the previous chapters (specifically regarding migration) are evaluated. This chapter examines the South African legislation applicable to migration law in particular and whether or not this migration law is in line with other fields of law.

Chapter 5 is a comparative analysis of some of the other countries in the SADC region regarding their social protection for migrants. In the SADC region migrants form one of the largest groups of people that need protection, and there are numerous declarations, models and protocols dedicated to these individuals' well-being. South Africa's neighbouring countries are affected by the same problems that



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the South African government has to face on a daily basis. The pros and cons of each country's model of social protection are examined. Case studies with an impact on the development of the social protection of migrant workers in these countries are also reviewed. This chapter also focuses on the bilateral agreements concluded between the SADC countries and South Africa, as well as the effect the agreements have on the people in the countries involved.

In Chapter 6, the conclusion, concluding remarks about each chapter and the research question in general are made. Furthermore, strategies and recommendations regarding law reforms and the implementation of legislative instruments are given.



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# CHAPTER 2

# THE CONCEPT OF SOCIAL PROTECTION: INTERNATIONAL STANDARDS AND THE CONSTITUTION


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## 2.1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (the Constitution) acknowledges international standards and the implementation of these standards in the South African legal system.[1] The International Labour Organization (ILO) is an important standards-generating body and it establishes norms that deal with workers, whether they are citizens or migrants.[2] This organization also makes no distinction between regular or irregular workers.[3] The ILO is an international

[1] S 39(1)(b) as well as ss 232 and 233 of the Constitution state that international law must be considered while interpreting the Bill of Rights and that an interpretation of any legislation that is consistent with international law should be preferred.

[2] In *South African National Defence Union v Minister of Defence & another* 1999 (6) BCLR 615; (1999 (4) SA 469 (CC) the Constitutional Court said "[s]ection 39 of the Constitution provides that, when a court is interpreting Chapter 2 of the Constitution, it must consider international law. In my view, the conventions and recommendations of the International Labour Organisation ('the ILO'), one of the oldest existing international organisations, are important resources for consider the meaning and scope of 'worker' as used in section 23 of the Constitution."

[3] The terms used for migrants were 'legal and illegal migrants'. However, this has been criticized as having negative connotations. Therefore 'irregular' will be the term used to describe migrants who are in the country without the necessary authority according to the South African immigration law. This refers to the unauthorized status of migrants in the country. See Dupper (2007) *Stell LJ* 220. At223, the author states that "[w]ithin the category of non-nationals or non-citizens, a distinction can



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organization with specific objectives and goals in every sector of the workplace.[4] In the mission and objectives of the ILO it is stated that "in support of its goals, the ILO offers unmatched expertise and knowledge about the world of work, acquired over more than 90 years of responding to the needs of people everywhere for decent work, livelihoods and dignity."[5]

The ILO has played an important role in enhancing the principles of social protection in member countries.[6] There are numerous standards dedicated to the development, protection and administration of social protection. Some of these standards apply directly to migrant workers. Social protection is recognized as a wider concept than the term social security.[7] The term 'social protection', together with any other relevant terms, will be defined in the next section of this chapter.

In South Africa, the term 'social protection' is still being developed and interpreted by scholars and the South African courts. Courts play a significant role in the development of the meaning and context of social protection by putting the concept into practice and stating how it should be implemented.[8] Cases before the court serve as examples and allow us to associate this concept with human beings and their human rights.

In this chapter, firstly, the term 'social protection', as defined by different organizations, will be evaluated. This definition will be used through the course of this dissertation. Following this, the ILO, as well as its standards with regard to some

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be drawn between migrants legally authorised to be in the country (so called 'regular' migrants) and those who enter or work in countries without legal authorisation (so-called 'irregular' migrants). For many years, the term 'illegal' was attributed to migrants falling into the last category, but this characterization has been criticized as normative and conveying the idea of criminality".

[4] In terms of the ILO's "decent work agenda", it has four strategic objectives, namely to: promote and realize standards and fundamental principles and rights at work; create greater opportunities for women and men to decent employment and income; enhance the coverage and effectiveness of social protection for all; and strengthen tripartismand social dialogue. Available on http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm, visited on 2012/10/23.

[5] Available on http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm, visited on 2012/10/23.

[6] Van Ginneken (2003) *Int Lab Rev* 277. In 2001 at the International Labour Conference it was stated that the highest priority is the development of policies to extend social protection to those who have none.

[7] Kapindu (2011) *AHRLJ* 95.

[8] In the following cases: *Government of the Republic of South Africa other v Grootboom and others* 2001 (1) SA 46 (CC) and *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 756 (CC).



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elements of social protection, will be evaluated. Furthermore, the Constitution forms an essential part of the country's legislative framework and the constitutional rights associated with social protection will be examined. Finally, a conclusion will be drawn regarding the concept of social protection.

## 2.2 THE CONCEPT OF SOCIAL PROTECTION

The concept of social protection has been defined by numerous individuals, organizations and legislators. The ILO defines 'social protection' as:

> "[t]he set of public measures that a society provides for its members to protect them against economic and social distress that would be caused by the absence or a substantial reduction of income from work as a result of various contingencies (sickness, maternity, employment injury, unemployment, invalidity, old age, and death of the breadwinner); the provision of health care; and, the provision of benefits for families with children".[9]

The above definition from the ILO sounds much like the concept of social security. A wider and more modern definition has recently been developed by the Asian Development Bank (ADB). According to the ADB's definition,[10]'social protection' is a combination of guiding principles and plans developed to lessen poverty and vulnerability by promoting competent labour markets and limiting individuals' exposure to risk, ensuring that they can protect themselves against loss of income by promoting their capability to fend for themselves.[11]

In South Africa, the so-called Taylor Report uses the term 'comprehensive social protection'. According to this definition, social protection[12] makes an attempt to offer

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[9] García and Gruat (2003) 13. See also ILO *World Labour Report: Income Security and Social Protection in a Changing World* (2000) 29; ILO *Principles of Social Security* (1998) 8.

[10] Asian Development Bank "Social Protection: Reducing Risks, Increasing Opportunities" – Available on http://www.adb.org/SocialProtection/default.asp, visited on 2012/06/04.

[11] Mpedi and Govindjee (2009) *Obiter*775. Some of the ILO standards are applicable in all of the social protection branches, such as the Equality of Treatment (Social Security) Convention 118 of 1962. According to Brand and Heyns(2005) 227 this convention guarantees the payments of long-term benefits even if the worker resides aboard.

[12] See Committee of Inquiry Into a Comprehensive Social Security System *Transforming the Present – Protecting the Future* (Draft Consolidated Report) March 2002, 41. This session was chaired by Prof Viviene Taylor. The report stated that "[c]omprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through



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the essential resources to make it possible for people living in South Africa to take part and proceed in the social and economic sectors. Through this, South African residents may also add to the development of social and economic standards. The report confirms that social protection is a wide concept, as it is dedicated to incorporating approaches and programmes to guarantee bare minimum living standards and encourage participation in the labour market by all citizens. This includes initiatives taken by the state to ensure equal social protection for people in South Africa.[13]

When considering the three definitions mentioned, some similarities and prominent differences can be observed. The definitions all contain some kind of acknowledgement of the need for the protection for individuals who cannot provide for themselves – whether economically or socially. They also refer to a person's capacity to work and earn a decent living. The differences are that not all of the definitions include labour security, and there are specific programs referenced in each definition that are not the same in every country or organization.

Social protection extends beyond aspects that traditionally fall under the term 'social security'. In South Africa, social security[14] is referred to as a concept with more than one aspect.[15] It includes, among other things, social assistance, social insurance[16] and a selection of private and public measures that provide benefits in the event of an individual's earning capacity ceasing or being interrupted.[17] These events can include ill health, disability, old age or unemployment.

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an integrated policy approach including many of the developmental initiatives undertaken by the state."

[13] Kapindu (2011) *AHRLJ* 98.

[14] In the White Paper for Social Welfare, 'social security' was defined as "[t]he policies, which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, disability and old age, etc, by means of contributory and non-contributory schemes providing for their basic needs." See Chapter 7 of GN 1108 in GG 18166 of August 1997.

[15] Tshoose (2010) *PELJ* 410.

[16] Dupper (2007) *Stell LR* 224 and Fombat (2013) *AJICL* 3 the author also refers to the notions of "indirect" and "informal" social security that are particularly relevant in the African context. The first term refers to the provision by government of food, housing, education and energy that are not part of the traditional social security schemes. The latter term relates to a safetynet provided by members of a social group such as a family or community.

[17] Olivier *et al* (2004) 23 – 24.



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The Social Assistance Act[18] defines 'social assistance'[19] as a social grant that includes relief of social distress. 'Social insurance', on the other hand, usually refers to specific schemes in which workers, as well as their employers, make contributions to some form of insurance fund. These schemes are employment-based and normally include retirement schemes, workmen's compensation, health insurance, unemployment insurance and the Road Accident Fund.[20]

It is clear that the definitions of social protection discussed above are wide enough to cover the main elements of social security, namely social assistance and social insurance. The distinction between social insurance and social assistance is predominantly noteworthy in the context of access to social security for migrants.[21] However, apart from these strands, it is argued that social protection is wide enough to include the concept of labour security in its definition. Social protection typically starts in the workplace, where workers spend the majority of their working lives.[22] The majority of the social insurance systems are employment-based, which indicates that social protection in that form is dependent on labour security.

Informal social security should also be included in the definition of the concept of social protection. Dekker argues that it has only recently been identified as an element of protection under social security.[23] Migrants are mostly situated in the informal sector. Dekker defines 'informal social security' as provisions relying on "principles of reciprocity and solidarity". She states that this form of social protection does not only rely on financial transfers, but provides support unique to a particular group of individuals where this group has something in common.[24] Another more elaborate definition of informal social security indicates that it is a self-developed safety net for a specific group of individuals in a society that includes, but is not limited to, bonds such as family, friends or nationality.[25]

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[18] 13 of 2004.
[19] S 1 of the SAA.
[20] Millard (2008) *AHRLJ* 40.
[21] Dupper (2007) *Stell LJ* 225.
[22] *Recommendation Concerning HIV and AIDS and the World of Work,* 2010 (No. 200) International Labour Office, Geneva. Also referred to in Chapter 1 of this dissertation.
[23] Dekker (2005) 6.
[24] *Ibid*.
[25] Kapindu (2011) *AHRLJ* 96 referring to Olivier *et al* "Formulating an integrated social security response: Perspectives on developing links between informal and formal social security in the



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Informal social security will not form part of this study, even though it is still included in the definition of social protection. Therefore, a combination of the comprehensive definitions of the different organizations will be used. It will include: social assistance; social insurance; and labour security. In the following paragraphs the ILO and the Constitution of the Republic of South Africa will be examined with regard to social protection.

## 2.3 THE INTERNATIONAL LABOUR ORGANIZATION

### 2.3.1 Background

The ILO was established in 1919 by the Treaty of Versailles. South Africa joined the ILO on 26 May 1994.[26] The ILO is divided into three main bodies: the International Labour Conference; the Governing Body; and the International Labour Office.[27] Each of these bodies has their own structure and functions within the ILO. The ILO's director-general, Juan Somavia, introduced the Decent Work Agenda in his report to the International Labour Conference, which established as the primary goal of the ILO "to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity".[28]

The ILO community consists of governments and workers' and employers' representatives. The institution on which the ILO is founded also includes labour laws, social justice and tripartism.[29] Tripartism refers to the participation of employers, workers and governments in the ILO structures. The original impetus behind the development of the ILO was war and revolution. Through the years these two streams[30] came together and the important role social justice would play in the further development of the ILO was emphasized.[31]

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SADC region" paper presented at the EGDI and UNU-WIDER Conference on "Unlocking human potential: Linking the informal and formal sectors" 17-18 September 2004, Helsinki, Finland, stated that "[i]nformal social security arrangements are those self-organised informal safety nets which are based on membership of a particular social group or community, including, but not limited to, family, kinship, age group, neighbourhood, profession, nationality, ethnic group, and so forth".

[26] Van Niekerk*et al* (2012) 20.

[27] *Ibid*.

[28] Available on http://www.ilo.org/public/english/support/lib/century/index6.htm, visited on 2013/03/15 and http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm, visited on 2013/03/12. Also see Van Ginneken(2003) *Int Lab Rev* 279.

[29] Rodgers *et al* (2009) x.

[30] War and revolution.

[31] Rodgers *et al* (2009) 3.



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The ILO standards lay down actions to be taken or principles to be respected by the members of the ILO.[32] The standards are negotiated in multinational forums by governments, and require the participation of workers and employers to be ratified. These international instruments include, but are not limited to, conventions, recommendations and declarations.[33] The standards should ideally be appropriate to the adopting country's level of development and the governance already implemented. This ensures that the standards can have a positive impact on the country and that the necessary steps are taken to comply with the requirements.[34]

Another issue that needs to be clarified under the ILO with regard to migrants is that of international agreements between countries, which can be bilateral as well as multilateral.[35] Mpedi indicates that the goal of these agreements is "the prevention of destitution among non-citizens during period(s) of absence from, and on return to, their home counties."[36] These agreements are built on certain principles,[37] which are embraced in numerous ILO instruments concerning social protection for migrants.[38]

Agreements between nations could be of utmost importance when dealing with social protection for all individuals. The ILO has actively recommended bilateral agreements between nations as a way of managing the flow of migration between countries.[39]The ILO's standards play an important role when dealing with any issue related to the work environment.[40] The ILO's outlook and standards regarding the different aspects of social protection will be dealt with in the following paragraphs,

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[32] *Ibid* 19.
[33] Van Niekerk*et al* (2012) 21 – 22.
[34] Rodgers *et al* (2009) 22 – 24.
[35] See also the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Adopted by General Assembly Resolution 45/158 of 18 December 1990, which states in its preamble that it "[r]ecogniz[es] also the progress made by certain States on a regional or bilateral basis towards the protection of the rights of migrant workers and members of their families, as well as the importance and usefulness of bilateral and multilateral agreements in this field".
[36] Mpedi: Introduction in Becker and Olivier (2008) 5.
[37] The principles are equality of treatment, determination of applicable legislation, maintenance of acquired rights and reciprocity.
[38] For example ILO *Standards for the XXI Social Security* (2002 ILO Geneva) 41 – 44 and ILO *Social Security for Migrant Workers* (1996 ILO Geneva) 8 – 20.
[39] Becker and Olivier (2008) 30.These agreements will be discussed in the comparative chapter to indicate whether such agreements exist between South Africa and its neighbouring countries, as well as the implications thereof.
[40] The Governing Body of the ILO initiated a campaign in 1995 to secure the universal ratification of the fundamental conventions, with the result that 80% of the possible ratifications have occurred. See Van Niekerk*et al* (2012) 22.



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starting with the broad concept of social protection as the umbrella term. However, the ILO conventions and standards with regard to migration and migrant workers specifically will be evaluated in Chapter 4 of this dissertation.

### 2.3.2 The ILO and Social Protection

According to the ILO, social protection is much broader now than it was in 1919 when the ILO was established. The Decent Work Agenda covers, *inter alia*, social security, unemployed persons seeking employment, fundamental labour rights, occupational safety and migrant workers.[41] Social protection is recognized by the ILO as a human right.[42] The ILO supports a basic social protection package, which forms a platform for countries to develop their social protection standards in line with their economies.[43]

The objectives that the ILO identified pertaining to social protection also provide clarification to the concept of social protection. The objectives include the following:

> "i.) Extending the coverage and effectiveness of social security schemes;
> ii.) Promoting labour protection, which comprises decent conditions of work, including wages, working time and occupational safety and health, essential components of decent work;
> iii.) Working through dedicated programmes and activities to protect such vulnerable groups as migrant workers and their families; and workers in the informal economy."[44]

The ILO has a universal approach, actively promoting the principle of "social protection for all".[45] The ILO attempts to achieve this by implementing programmes with specific attention to the diversity of the socio-economic actualities of each country.[46] This realization of the fundamental differences between countries has led to the development of numerous concepts. The concept of a social protection floor was proposed by the World Commission on the Social Dimension of Globalization and was developed by the ILO to extend the coverage of social protection.

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[41] Rodgers *et al* (2009) 139.
[42] Also mentioned in Chapter 1.
[43] Kapindu (2011) *AHRLJ* 95.
[44] Available on http://www.ilo.org/global/about-the-ilo/decent-work-agenda/social-protection/lang--en/index.htm visited on 2012/06/19.
[45] Rodgers *et al* (2009) 139, 168.
[46] *Ibid* 168.



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According to the recommendation, the "social protection floors are nationally defined as sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion."[47] Nyenti and Mpedi confirm that the reason for this development is that "a certain minimum level of social protection needs to be an accepted and undisputed part of the socio-economic floor of the global economy."[48] Despite the ILO's attempts to extend social protection to all by developing international instruments together with other international organizations,[49] the implementation of these obligations is still not being transformed into actual access to social protection.[50]

### 2.3.3 The ILO and Social Security

The ILO's initial approach to social protection came in the form of social security. Since the establishment of the ILO, social security has been one of the core areas of the ILO's mandate.[51] This approach was very much in line with that of the Declaration of Philadelphia.[52] The ILO dedicated a number of conventions and recommendations concerning the development of social security over the years. It is significant to acknowledge the fact that the ILO originally dealt with social insurance before broadening its scope.

In the 19th century, a need for protective legislation emerged, which was the beginning of a new concept. It was part of the state's social function to offer social protection for its community.[53] This formed the groundwork for the development of social insurance in a time of war. The systems were implemented for both workers and employers, who contributed to a fund for social and economic crises.[54] During

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[47] *Text of the Recommendation Concerning National Floors of Social Protection,* International Labour Conference, *Provisional Record* 14A One hundred and first session, Geneva, 2012 4.
[48] Nyenti and Mpedi (2012) *PELJ* 244.
[49] Such as the United Nations Organisation.
[50] One of the factors preventing this transformation is the member countries' territorial sovereignty. Becker and Olivier (2008) 4.
[51] ILO's International Labour Conference, *Social Protection Floors for Social Justice and a Fair Globalization,* 101st Session, 2012 Report IV (1) 5.
[52] The Declaration of Philadelphia was adopted by the International Labour Conference at its 26th Session, held in Philadelphia, on 10 May 1944. The Declaration of Philadelphia forms part of the ILO Constitution. See also Rodgers *et al* (2009) 166.
[53] For example, the Declaration of Philadelphia III provides for "(f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care". See Rodgers *et al* (2009) 141.
[54] During the current development of the extension of social security, Recommendation No 67 of the ILO recommends in par 2 and 3 that income security should be organized as far as possible on the



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the years that followed, social assistance no longer took an inferior place to social insurance. The ILO acknowledged that both approaches were required in an inclusive programme of social security.[55]

The Recommendation Concerning National Floors of Social Protection, 2012 (No 202) reaffirmed that the right to social security is a human right.[56] Thus, once again, the importance of international standards regarding social security was highlighted. The same text[57] recognizes that social security is an investment in people, assisting them to participate in the labour market in an ever-changing economy. This indicates the link between the different elements of social protection, namely social security and labour security.

The most significant ILO convention concerning social security is the Social Security (Minimum Standards) Convention, 1952 (No 102). It lays down the foundation for the development of social security[58] and contains the minimum requirements for a social security system in a country in which it was ratified.[59] This convention gives an indication of the different standards that should be taken into account when dealing with the sections that should be evaluated by the adopting country.[60] This convention establishes minimum international standards regarding nine branches of social security, namely: medical care, sickness benefits, unemployment benefits, old-age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits and survivors' benefits.[61]These usually form the basis of the social grants provided by a state that has ratified the convention.

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basis of compulsory social insurance for the coverage of all workers and their families, including the self-employed, which should be complemented by social assistance programmes for the coverage of those who fall outside of formal social security schemes, thus ensuring full coverage of the population. See ILO's International Labour Conference, *Social Protection Floors for Social Justice and a Fair Globalization,* 101st Session, 2012Report IV (1) 11 and Rodgers *et al* (2009) 144.

[55] Rodgers *et al* (2009) 152.

[56] International Labour Conference, *Provisional Record* 14A One hundred and first Session Geneva, 2012 2.

[57] *Text of the Recommendation Concerning National Floors of Social Protection,* International Labour Conference*, Provisional Record* 14AOne hundred and first Session Geneva, 2012 2.

[58] Strydom *et al* (2006) 326.

[59] *Ibid* 6.

[60] To name a few: Part III Sickness; PartIV Unemployment; Part V Old age; Part VI Employment injury: Incapacity of Work; Invalidity; Survivors; Part VIII Maternity; Part IX Invalidity; Part X Survivor.

[61] There are also conventions which seek equal treatment of nationals and non-nationals and those that promote the protection of acquired social security rights when workers transfer their work from one country to another.See, for example: the Equality of Treatment (Accident Compensation)



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This convention forms part of the so-called 'updated' conventions of the ILO.[62] This is an indication that the conventions are still applicable in everyday life and are up to date in the modern and changing society, despite the age of these conventions. The 'updated' conventions are the Medical Care and Sickness Benefits Convention, 1969 (No 130), Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No 128), Equality of Treatment (Social Security) Convention, 1962 (No 118), and the Maintenance of Social Security Rights Convention, 1982 (No 157). As stated by Mpedi, the last two conventions mentioned require the member state to conclude social security agreements by negotiating with other ratifying countries.[63]

Article 14 of the Maintenance of Social Security Rights Convention, 1982, reads as follows:

> "[e]ach member shall promote the development of social services to assist persons covered by this Convention, particularly migrant workers, in their dealings with the authorities, institutions and jurisdictions, particularly with respect to the award and receipt of benefits to which they are entitled and the exercise of their right of appeal, as well as in order to promote their personal and family welfare."

This article shines light on the fact that the conventions of the ILO cannot be read separately, but should be interpreted as intended, interlinked with all other conventions. Unfortunately, South Africa has not yet ratified any of these conventions.[64] It is recommended that South Africa, as member state, should consider ratifying some or all of these conventions to echo the ethics of the ILO and develop its social security system in line with international standards.[65]

### 2.3.4 The ILO and the UN regarding Labour Security

As mentioned previously, the ILO's concept of social protection is wider than mere social security. It also consists of labour protection. This includes labour markets and social services, and their goals for decent work are in line with the concept of social protection.[66] The convention concerning Termination of Employment at the Initiative

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Convention, 1925 (No 25); the Equality of Treatment (Social Security) Convention, 1962 (No 118); and the Maintenance of Social Security Rights Convention, 1982 (No 157).

[62] Mpedi and Govindjee (2009) *Obiter* 781.

[63] *Ibid*. Also see the discussion in Chapter 4.

[64] Strydom *et al*, (2006) 6.

[65] Mpedi and Govindjee (2009) *Obiter* 781.

[66] Van Ginneken (2003) *Int Lab Rev* 10.



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of the Employer, 1982 (No 158), falls specifically under employment security, as it is referred to by the ILO. This term is synonymous with labour security, but as explained in Chapter1, the scope of this dissertation is not limited to employees or cases involving an employment contract, and therefore 'labour' would be the more appropriate term. This convention indicates in Article 2 that it is applicable to all employed persons,[67]and is thus not limited to citizens of the ratifying country. It, however, excludes some categories from specific provisions; these include workers working under a contract of employment or on casual basis.[68]

Böhning avers that among the United Nations (UN) organizations, the ILO has the constitutional responsibility of protecting the "interests of workers when employed in countries other than their own".[69] However, for a number of political reasons, the ILO was sidestepped when the UN adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families in 1990 (hereinafter the International Convention).[70]

The International Convention[71] is an inclusive instrument adopted by the UN.[72]It extends social protection to all migrants, regardless of their status in their country of residence. It guarantees the right to access to social protection even to irregular migrants.[73] This convention recognizes that migrant workers must be treated in the

[67] A 2 of C158 of 1982 indicates that "[t]his Convention applies to all branches of economic activity and to all employed persons".

[68] A 2 of C158 of 1982 furthermore states that "[a] member country may exclude the following categories of employed persons from all or some of the provisions of this Convention: (a) workers engaged under a contract of employment for a specified period of time or a specified task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period".

[69] Böhning (1991) *IMR* 700.Also mentioned briefly in Chapter 4.

[70] The International Convention will be discussed further in Chapter 4 with regard to migration, categories of migrants and its influence on the development of regulative legislation regarding migration.

[71] Adopted by General Assembly Resolution 45/158 of 18 December 1990.

[72] Dupper (2007) *Stell LR* 219 225.

[73] A 1 states that "[t]he present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status. See also Dekker (2010) *SA Merc LJ* 392. Other key conventions include the Migration for Employment Convention and Regulations ILO, 1949 (No 97) and the Migrant Workers (Supplementary Provisions) Convention ILO, 1975 (No 143) and Migrants Workers Recommendations ILO, 1975 (No 151).



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same way as the nationals of the country in which they are employed.[74] It further places an obligation on the state parties, such as the employer of the migrant worker, to guarantee the rights associated with the position of employment despite the possibility of irregularity in the migrant's migration status.[75] The International Convention specifically mentions the elements of social protection as defined previously by various organizations.[76]

Some of the other conventions of importance under the concept of social protection, which are also 'updated' conventions, are the Employment Promotion and Protection Against Unemployment Convention, 1988 (No 168), the Employment Injury Benefits Convention, 1964 (No 121) and the Maternity Protection Convention, 2000 (No 183).

The Discrimination (Employment and Occupation) Convention, 1958 (No 111), is one of the 23 labour-associated conventions ratified by South Africa.[77] This convention provides a list of many causes of discrimination.[78] This convention plays an important part in dealing with social protection for migrant workers, since no one should be discriminated against on any grounds. There are numerous other conventions applicable when dealing with labour security, as well as with the other elements of social protection.[79] It is, however, not possible to deal with all of these instruments, and therefore the most important conventions have been mentioned and will be evaluated during the course of this dissertation where applicable.

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[74] A 25 indicates that "(1) [m]igrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and: (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms; (b) Other terms of employment, that is to say, minimum age of employment, restriction on work and any other matters which, according to national law and practice, are considered a term of employment."

[75] A 25(3).

[76] A 27 – 28.

[77] Tanner (2012) 107.

[78] A 1 of C 111 of 1958.

[79] To name a few: Unemployment Convention, 1919 (No 2); Employment Service Convention, 1948 (No 88); Labour Clauses (Public Contracts) Convention, 1949 (No 94); Equal Remuneration Recommendation, 1951 (No 90); Equal Remuneration Convention, 1951 (No 100); Discrimination (Employment and Occupation) Convention, 1958 (No 111); Minimum Wage Fixing Convention, 1970 (No 131); Occupational Health Services Convention, 1985 (No 161): and Promotional Framework for Occupational Safety and Health Convention, 2006 (No 187).



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## 2.4 SOCIAL PROTECTION IN TERMS OF THE CONSTITUTION

### 2.4.1 Background

The Constitution is the legislative instrument with the highest status in the country. It was a historic moment when the South African government adopted the Constitution. Chapter I of the Constitution outlines the founding principles on which the rest of the constitutional rights are based.[80] These founding principles are stated in section 1 as:

> "[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the Constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

The Bill of Rights is contained in Chapter II. The fundamental rights, also referred to as 'human rights', are situated here. The application of international law is dealt with in section 233 of the Constitution. This section provides that every court must prefer a reasonable interpretation of any legislation considered that is consistent with international law. This will be preferred above an interpretation that is inconsistent with international law. Therefore, international law must be taken into account when constitutional rights are evaluated to the extent that it is in line with the fundamental values of the Constitution.[81]

Fombat points out that a number of African countries, including South Africa, have adopted constitutions which establish the right to some form of social security as a human right.[82] The South African Constitution guarantees a number of socio-economic rights. South Africa took the bold step of including, *inter alia*, the right to social security in the Constitution,[83] which changed the way that social protection is perceived in the country. Therefore, this inclusion, as well as the other rights in the Constitution associated with social protection, will be dealt with accordingly. In

[80] Ss 1 – 6 of the Constitution.
[81] S 39 of the Constitution.
[82] Fombat (2013) *AJICL* 11 – 20.
[83] S 27 of the Constitution.



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*Government of the Republic of South Africa v Grootboom*[84] it was stated that "the people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble of the Constitution records this commitment."[85]

In South Africa, there are a variety of routes that could be used to enforce social protection. These stem from both statutes and common law, and can be enforced by institutions such as commissions,[86] tribunals,[87] boards,[88] offices[89] and courts.[90] There are no specialized social protection courts or administrative tribunals in South Africa.[91] The content and extent of the right to social protection and the ambit of socio-economic rights have been considered by the South African judiciary on a number of occasions. In a number of cases, these rights were evaluated directly, and in others they were considered in a more indirect manner.[92]

### 2.4.2 The Constitution

The South African Constitution has been called one of the most progressive constitutions in the world.[93]Albie Sachs once acknowledged that:

> "[i]t is no accident that constitutions usually come into being as a result of bad rather than good experiences. Their text or subject is almost invariably: 'never again'. In the case of South Africa the new Constitution arises out of the need to escape the profound humiliation and oppressions created by apartheid. Through the Constitution we affirm something from our dolorous history. It is worth repeating: all constitutions are based on mistrust. If we could trust our rulers, our parties, ourselves, we would not need constitutions. Power not only corrupts, it intoxicates, it confuses. Like nature it abhors vacuum, like water it follows the path of least resistance. Oppression is oppression but in some ways oppression in the name of the good is worse than oppression in defence

[84] 2001 (1) SA 46 (CC).
[85] *Grootboom*Par 1.
[86] Such as the South African Human Rights Commission.
[87] One of these tribunals is the Commission for Conciliation, Mediation and Arbitration.
[88] For example, the Appeals Committee of the Unemployment Insurance Board.
[89] The Director General of the Department of Social Development would be placed in this category.
[90] For example, the Constitutional Court and the labour courts.
[91] Becker and Olivier (2008) 3.
[92] The following cases dealt more directly with social security issues: *Government of the Republic of South Africa other v Grootboom and others* 2001 (1) SA 46 (CC); *Khosa v Minister of Social Development; Mahlaule & Others v The Minister of Social Development & Others* 2004 (6) SA 505 (CC); *Larbi-Odam & Others v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC); *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 756 (CC). The following cases dealt more indirectly with labour security issues: *Kylie v CCMA* 2010 (7) BLLR 705 (AAH); *Discovery Health Ltd v CCMA* 2008 ILJ 1480 (LC); *Hoffman v South African Airways* 2000 (2) SA 628 (W).
[93] Becker and Olivier (2008) 7.



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> of the bad, since it tarnishes the very ideas it seeks to protect and deprives people even of the image of a better society."[94]

The Constitution has two main objectives. It is used to determine whether legislation, behaviour or actions are in line with the Constitution. If this is not the case, the Constitution provides the necessary tools to declare a specific situation unconstitutional. When dealing with any right, especially in the Constitution, there are two ways to approach the interpretation of the Constitution or legislation that gives it effect.

Firstly, the text must be dealt with accordingly. To understand the text itself, it must be read in context as a whole. All of the other fundamental rights in Chapter II, as well as the rest of the Constitution, must also be considered.[95] Secondly, the historical and social context of the right needs to be considered.[96] The common law entitlement of any individual will be taken into account, due to the fact that the Constitution states that the common law should be observed.[97] The fundamental rights can, however, trump the common law if it is deemed to be what is best for the affected person in the specific circumstances.[98]

The Constitution contains a number of human rights that could be interpreted to fall within the scope of social protection. However, the term 'social protection' is not used in the Constitution, which only refers to the term 'social security'.[99] Tshoose mentions that:[100]

> "[f]rom a constitutional rights perspective, it is clear that there is a close interrelationship between the concept of social security and several other related concepts that constitute the basis of specific fundamental rights, such as the right to have access to land, to housing, to health-care services and to sufficient food and water."[101]

These rights are important when dealing with the concept of social protection, since, as indicated in the explanation of the definition; social security is one of the elements

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[94] Sachs in Corder and McLennan (1995) 51.
[95] *Grootboom* par 22 and 24 at 61H – 62A/B and 62D.
[96] *Ibid*.
[97] S 8 of the Constitution.
[98] For example, the right not to be unfairly dismissed –Van Niekerk *et al* (2012) 98.
[99] S 27 of the Constitution.
[100] Tshoose (2010) *PELJ* 411.
[101] S 25 to 27 in the Constitution.



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of social protection. All other legislation or customary uses must be in line with the Constitution.[102]Section 39(2) of the Constitution requires that when interpreting any legislation, and when developing common law or customary law, every court, tribunal or forum must promote the spirit, purpose and objects of the Bill of Rights. This should be the focus of any developing authority or interpreting court. Pakade ADJP stated in *Ngalo v The South African Social Security Agency (SASSA)*[103] that:

> "[a]n important feature of the Constitution is the express recognition of socio-economic rights in a justifiable Bill of Rights. These include the right to basic education, access to adequate shelter and housing, adequate health care services, the right to sufficient food, water and social security."[104]

Socio-economic rights in the Constitution are flanked by a number of important rights.[105] The rights that form a part of social protection are positive rights, as they can be claimed by individuals to be the delivery of protection by the government. The fulfilment of these socio-economic rights will most probably continue to require the courts to direct the way that the state must comply with its obligations.[106] Socio-economic rights can be a double-edged sword. On the one hand, they are seen in a negative light, in which they place an obligation on the state and require it to deliver certain socio-economic goods. On the other hand, they could be interpreted as a positive development in the equal inclusion of all individuals. The main problem is the enforcement of socio-economic rights, which must be done by a court.[107] This is where the separation of powers cited in the Constitution becomes relevant.[108]

Every case dealing with social protection must be interpreted individually, and constitutional rights must be the starting point. This is essential when determining whether the state has met the obligations placed on it by the Constitution. An inclusive example of such an obligation is situated in section 27(2) of the Constitution.[109] Section 27 combines social assistance, and, to some extent, social

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[102] S 2 of the Constitution provides that the "[C]onstitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."
[103] (2740/11) [2013] ZAECMHC 4 (14 February 2013).
[104] Par 1.
[105] Becker and Olivier (2008) 7.
[106] Currie and De Waal (2005) 569.
[107] *Ibid.*
[108] Ss 43 and 44 of the Constitution.
[109] *Grootboom* Par 24 62D – E.



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insurance. Section 27(3) could be interpreted to include every person inside South African borders, regardless of their immigration status.

The right to fair labour practice, which could be interpreted as the right to work, is a human right because, as stated by Udombanat, "it is a means to an end – human survival."[110] Although the subsections use the terms "worker", "employee" and so forth, the section also applies to "everyone", and makes no reference to citizenship or the existence of legally binding contracts of employment.[111] When dealing with labour and labour practices, it is not only a matter of establishing economic growth. Social justice must also be a key part of these policies.

### 2.4.3 Social Protection

The rights in the Constitution that are of importance to migrants when evaluating social protection are firstly contained in section 27 of the Constitution. The section deals with health care, food, water and social security.[112] It is noticeable that this section places an indirect obligation on the state to provide basic social protection for all, together with an internal restriction, namely that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights."[113]

This section is a summary of important aspects of social protection in South Africa, although it is most definitely not the only section of the Constitution that deals directly or indirectly with social protection. Section 23 of the Constitution is applicable when the labour security component of social protection is evaluated. This section falls under the heading "Labour Relations" and states that: "(1) [e]veryone has the right to fair labour practices."[114]

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[110] Udombanat (2006) *Corn Int LJ* 187.
[111] Van Niekerk *et al* (2012) 36.
[112] S 27 of the Constitution provides as follows:(1) Everyone has the right to have access to –(a) health care services, including reproductive health care;(b) sufficient food and water; and(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.(3) No one may be refused emergency medical treatment.
[113] S 27(2) of the Constitution.
[114] The rest of s 23 reads as follow: "(2) Every worker has the right- *(a)* to form and join a trade union; *(b)* to participate in the activities and programmes of a trade union; and *(c)* to strike. (3)Every employer has the right- *(a)* to form and join an employers' organisation; and *(b)* to participate in the



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Other fundamental human rights in the Constitution overlap and strengthen the right to social protection. Human dignity[115] is something that is associated with every individual and it can never be taken away or be excluded from any person's other rights. Equality[116] is not only one of the cornerstones of democracy,[117] but also forms the basis of any system that deals with human beings. In society, social protection is essential and no system can be successful if its application is not equally available to all.

The right to freedom and security of a person[118] is a cornerstone of democracy, together with the abovementioned two rights. Section 21 deals with freedom of movement and residence. This is one of the more important rights when dealing with migrants in particular. This section states in its first subsection that "everyone" has the right to freedom of movement. Therefore, it is not limited to only South African citizens. Lastly, but definitely not least, is the right to life.[119] Every individual, whether they are an adult or a child, a citizen of the country or a migrant, has the right to life. This is part of the idea behind a social protection system – to provide for individuals who can no longer provide for themselves. Furthermore, it aims to develop programs to adequately equip a person to be economically active and have the necessary skills to look after themselves.[120]

The fundamental rights in the Constitution are the building blocks of social protection in South Africa, although they cannot be interpreted in solitude. Specific cases will be discussed in Chapter 3 that deals with the South African legislative instruments and the extension of social protection by the courts.[121] The rights in the Constitution must

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activities and programmes of an employers' organisation. (4) Every trade union and every employers' organisation has the right- *(a)* to determine its own administration, programmes and activities; *(b)* to organise; and *(c)* to form and join a federation. (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1). (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1)".

[115] S 10 of the Constitution.
[116] S 9 of the Constitution.
[117] As stated in s 7 of the Constitution.
[118] S 12 of the Constitution.
[119] S 11 of the Constitution.
[120] As stated in the definition of social protection in par. 2.2.
[121] See Chapter 3.3.3.



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be read together with the different sections of the acts[122]that deal directly or indirectly with the right to social protection. Most of the sections in these acts have been interpreted and extended by the courts. Therefore, it is of utmost importance to understand these sections and be aware of the latest court rulings to give the best and most resent summary of the current position of migrant workers with regard to social protection.[123] This was emphasized by the Constitutional Court, where it was stated that the Constitution "must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, and other provisions of the Constitution itself", which therefore encourages a narrower or more specific approach.[124]

## 2.5 CONCLUSION

A number of definitions were considered in the beginning of this chapter. In order to protect the best interests of the poor and vulnerable (such as migrants), it is suggested that the definition of social protection should include the following subdivisions: social assistance, social insurance and labour security. This conception is derived from the definitions of different international organizations (the ILO and ADB) and the Taylor Report. An important factor is the fact that all of the definitions contain some reference to the alleviation of poverty. It is also clear that all of the definitions indicate the acknowledgement of the need for the protection for those who cannot provide for themselves.[125]

The concept of social protection is being developed in South Africa, as well as across its borders, by implementing conventions, recommendations, legislation and the views of academics. South African policymakers and the courts must take cognizance of international standards developed by the ILO and the UN. Important principles relating to the protection of social security and labour rights of migrants have been included in ILO and UN conventions. South Africa is not a signatory to

[122] These include: Basic Conditions of Employment Act 75 of 1997; Compensation for Occupational Injuries and Diseases Act 85 of 1993; Employment Equity Act 55 of 1998; Immigration Act 13 of 2002; Labour Relations Act 66 of 1995; Medical Schemes Act 131 of 1998; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; Social Assistance Act 13 of 2004; Unemployment Insurance Act 63 of 2001.
[123] See Chapter 3.
[124] *Soobramoney* par 16; *Makwanyane* par 9 – 10.
[125] See Chapter 2.2.2.



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any of these conventions and it is argued that the adoption of these conventions would go a long way in improving the provisions for migrant workers in South Africa. The Constitution places an obligation on the state and South African courts to follow international norms when interpreting legislation. Therefore, there is a constitutional obligation on South Africa to acknowledge international norms with regard to social protection and implement these norms in order to develop the South African system.

The Constitution acknowledges the right to social protection in the form of social security in section 27, as well as in section 23 when dealing with labour security as a part of social protection. The other fundamental rights in the Bill of Rights play a significant part in the realization of social protections. Human dignity and equality are as much a part of the South African social protection system as the two rights contained in sections 23 and 27 of the Constitution. The enforcement of socio-economic rights has been perceived in a whole new light since the inclusion of social security and labour rights in the Constitution.

Social protection could easily be defined as the tools needed by human beings in order for them to assist themselves in their fight against poverty and deprivation. This role is why social protection should be defined and examined to determine the extent of social protection, if any, granted to the migrant worker in South Africa.



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# CHAPTER 3

# SOCIAL PROTECTION: THE SOUTH AFRICAN REGULATORY FRAMEWORK


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## 3.1 INTRODUCTION

South Africa is a country with a well-developed regulatory framework. The country follows the doctrine of the separation of powers.[1] The three arms of government are the judiciary, the executive and the legislative authority. These arms need to function both jointly and separately for the democratic system to be implemented as intended in the drafting of the Constitution of the Republic of South Africa, 1996 (the Constitution). The South African legislative authority, together with the other arms of government, develops the necessary legislation required by the society to provide for the necessities of the people in the community.

South Africa is the African continent's[2] largest economy. According to a recent study of five different SADC countries[3] it was found that 86% of the migrants are situated in South Africa for the purposes of work.[4] Job-seeking is one of the reasons why the

[1] Mbazira (2011) *SAPL* 62.
[2] The African continent consists of 54 countries. To name a few: Algeria, Angola, Botswana, Cameroon, Congo, Egypt, Gabon, Kenya, Mauritius, Mozambique, Nigeria, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Available on http://www.worldatlas.com/cntycont.htm visited on 2013/04/09.
[3] Botswana, Lesotho, Mozambique, Swaziland and Zimbabwe.
[4] Olivier (2011) Part 1 *SADC Law J* 123.



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country receives the most migrants.[5] These migrants include a large number of irregular[6] migrants,[7] as well as migrants who legally reside in the country.

The South African regulatory framework consists of legislation (national, provincial and municipal), common law and customary law. Legislation is developed and passed down by the National Legislative Authority,[8]which has the power to pass legislation with regard to any matter and to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government.[9]

In one of the most significant South African court cases dealing with social protection, the court stated that, when appropriate, specialized organizations such as the ILO can supply relevant guidelines for the interpretation of national law, and in particular the Bill of Rights.[10] It is noticeable that the South African courts do have the will to use the ILO conventions and recommendations, for example, but they do not have the means to execute these, since most of these instruments have not been ratified by South Africa.

Legislation relevant to the main elements of social protection, as explained in Chapter 2, will be discussed in this chapter. The three elements are, namely, social assistance, social insurance and labour security. Despite the fact that there are a number of acts that relate to social protection, these legislative instruments have certain limitations. The South African courts have played an important role in the development of social protection, and the most significant cases dealing with social protection will be discussed in this chapter. The acts that will be discussed form part of the regulatory framework within which the South African government functions. It will be the focus of this next chapter to interpret the legislation in accordance with the Constitution and evaluate the courts' decisions.

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[5] Kapindu (2011) AHRLJ 94.
[6] In Chapter 2 of this dissertation it was explained that this term would be used to best describe migrant workers who are in the country without the necessary authority according to the South African immigration laws. See Chapter 2.2.1 ft 3.
[7] Between 500 000 and 1miljion according to Kapindu (2011) AHRLJ 94.
[8] S 44 of the Constitution.
[9] S 44 of the Constitution regulates the powers allocated to the national legislative authority.
[10] *Grootboom*par 26 64D – E.



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## 3.2 LEGISLATIVE FRAMEWORK

### 3.2.1 Introduction

South Africa's regulatory framework is constantly under development. Most of the legislation applicable to social protection is fragmented and does not include informal social security.[11] The legislation related to the formal sector of social protection will be discussed under this part of the dissertation.

Before the different sections of social protection and the legislation applicable to each are discussed, it is appropriate to acknowledge that one act is relevant when dealing with all of these categories. This is the South African Immigration Act.[12] It distinguishes between different categories of non-citizens according to their immigration status and/or intention of entering into the receiving country. The Immigration Act[13] forbids the employment of irregular immigrants. There is no protocol that guarantees the protection of these workers when they need to approach the courts or the CCMA for remedies where there are problems arising from their employment status.[14] The legal status of migrant workers is discussed more comprehensively in Chapter 4.

### 3.2.2 Social Assistance

This form of social protection is captured in section 27(1)(c) of the Constitution, and there it is referred to as one of the strands of social security.[15] The importance of the

[11] See Dekker (2005) 53. Fombat (2013) *AJICL* 3 refers to the notions of "indirect" and "informal" social security, which are particularly relevant in the African context. The first term refers to the provision by government of food, housing, education and energy that are not part of the traditional social security schemes. The latter term relates to a safetynet provided by members of a social group such as a family or community. The informal sector is where migrants are mostly situated. Dekker (2005) 6 defines this term as provisions relying on "principles of reciprocity and solidarity". She states that this form of social protection does not rely only on financial transfers, but is support unique to the particular group of individuals, where this group has something in common. "Informal social security arrangements are those self-organised informal safety nets which are based on membership of a particular social group or community, including, but not limited to, family, kinship, age group, neighbourhood, profession, nationality, ethnic group, and so forth." See Kapindu (2011) *AHRLJ* 96 referring to Olivier *et al* "Formulating an integrated social security response: Perspectives on developing links between informal and formal social security in the SADC region" paper presented at the EGDI and UNU-WIDER Conference on "Unlocking human potential: Linking the informal and formal sectors" 17 – 18 September 2004, Helsinki, Finland.

[12] 13 of 2002. This act will be discussed in more detail in Chapter 4 dealing specifically with migrants.

[13] S 38 of Act 13 of 2002.

[14] Mpedi and Smit (2011) 156.

[15] Defined in Chapter 2.



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right to access to social security[16] was described by Jansen van Vuuren and Lamarche, who stated that:

> "[a]s a human right, social security can contribute to social protection by providing useful benchmarks to assess how the economic, political and ideological initiatives arising from the need for social protection contribute to respect for human rights, including the right to social security."[17]

The Social Assistance Act[18] (SAA) is the primary piece of legislation that regulates the provision and implementation of social assistance.[19] Social assistance is financed by tax and the entitlement to benefits is means-tested.[20] When section 27 of the Constitution is interpreted together with the words in the preamble of the SAA,[21] it could be said that social assistance should be formulated comprehensively to include all individuals in need of assistance.[22] This, according to Sinclair, is not the current position associated with the SAA.[23] The objectives of the SAA are to:

> "(a) provide for the administration of social assistance and payment of social grants;
> (b) make provision for social assistance and to determine the qualification requirements in respect thereof;
> (c) ensure that minimum norms and standards are prescribed for the delivery of social assistance; and
> (d) provide for the establishment of an inspectorate for social assistance."[24]

In section 1 of the SAA, social assistance is narrowly defined. It is stated that social assistance is limited to a "social grant in terms of the Social Assistance Act".[25] "Social assistance" is defined in section 1 as "a social grant including social relief of

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[16] S 27 of the Constitution.
[17] Jansen van Vuuren and Lamarche "The Right to Social Security and Assistance" in Brand and Heyns (2005) 121. See also Richter (2006) *SAJHR* 209.
[18] 13 of 2004.
[19] Other legislative instruments under social assistance are the Special Pensions Act 69 of 1996 and the Military Pensions Act 84 of 1976. For further explanations on these acts see Olivier (2011) Part 1 *SADC Law J* 133.
[20] Dupper (2007) *Stell LJ* 224. Means-tested could be defined as subject to a means test, which involves assessment by an outsider of an individual or a family's income and assets. See Malherbe (2003) 383. S 5 of the SAA indicates that "(2) [t]he Minister may prescribe additional requirements or conditions in respect of – (b) means testing."
[21] The preamble states that "since the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance, and obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."
[22] The Constitution in s 27 uses the word "everyone".
[23] Sinclair (2012) *Stell LR* 200.
[24] S 3 of the SAA.
[25] S 1 of the SAA. See also Sinclair (2012) *Stell LR* 200.



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distress."[26] The SAA does not define social grants in general terms such as "a cash transfer paid by the state to persons who demonstrate that they do not have enough income to support themselves and their dependants".[27]Instead, the SAA makes provisions for various forms of social grants and lists the following categories:

- child support grant;
- care dependency grant (for disabled children);
- foster child grant;
- disability grant;
- older person's grant;
- war veteran's grant; and
- grant-in-aid as a temporary intervention.[28]

These categories serve as a vague definition of what is understood under the concept of social assistance in South Africa. These grants are paid monthly to the individuals who need protection, when other legislation does not supply necessary remedies.[29]

Initially, the SAA old-age grants were awarded to women 60 years and older and men 65 years and older.[30] This was not in line with one of the Constitution's fundamental principles, namely equality.[31] However, this section was brought in line with the fundamental values of our country and substituted by section 1 of Act 6 of 2008.[32] The disability grant is payable to individuals who are physically or mentally disabled, unfit to obtain any form of employment, and who can therefore not provide for themselves.[33] The SAA mentions a specific age, but is silent about the person's nationality in this section. As stated in the introductory chapter, this dissertation will not focus on children, and therefore the grants associated with children will not be discussed. The principles established by the SAA, as well as its regulations, extend

[26] S 1 of the SAA.
[27] Sinclair (2012) *Stell LR* 200.
[28] S 4 of the SAA.
[29] De Beer and Vettori (2007) *PER* 2.
[30] Dekker (2005) 64.
[31] Ss 7 and 9 of the Constitution.
[32] S 10 of the SAA provides that: "[a] person is, subject to section 5, eligible for an older person's grant if – (a) in the case of a woman, she has attained the age of 60 years; and (b) in the case of a man, he has – (i) after 1 April 2008, attained the age of 63 years; (ii) after 1 April 2009, attained the age of 61 years; or (iii) after 1 April 2010, attained the age of 60 years; [Para. (b) substituted by s. 1 of Act 6 of 2008.]".
[33] S 9 of the SAA states that: "[a] person is, subject to section 5, eligible for a disability grant, if he or she – (a) has attained the prescribed age; and (b) is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance".



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disability grants to individuals who are incapable of entering the labour market due to their disability.[34]

The SAA grants the Director General of the Department of Social Development the authority to discontinue the imbursement of grants to individuals who are absent from the Republic of South Africa[35] or who misspend the grants.[36] The Director General may also demand that any overpayment of any social assistance grant must be repaid.[37] The South African Social Security Agency (SASSA) was established by the South African Social Security Agency Act[38] to ensure the efficient and effective management, administration and payment of social assistance.[39] The SAA assigns to the Agency a duty to make available, out of monies apportioned by parliament, the different grants as stated above.[40]

The SAA originally restricted protection through social grants to citizens and to those persons who are not citizens but who are covered by an agreement between South Africa and the country where the person is a citizen.[41] According to the current Regulation 1 of the SAA, refugees are included in the group of individuals eligible for social assistance.[42] Therefore, the protection under the SAA in the form of payment of social assistance extends to South African citizens, permanent residents and refugees.[43]

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[34] Richter (2006) *SAJHR* 199.
[35] S 7 of the SAA.
[36] S 8 of the SAA.
[37] S 9 of the SAA.
[38] 9 of 2004.
[39] S 5 of Act 9 of 2004. As discussed later in this chapter this was extended.
[40] S 4 of the SAA.
[41] Ss 2(1) and 5(1)(c) of the SAA. See also s 231(2) of the Constitution regarding international standards with regard to agreements between countries. These agreements are also referred to as bilateral or multilateral agreements. Also see Chapter 4 regarding the international organizations' outlook on agreements and Chapter 5 referring to agreements between South Africa and its neighbouring countries.
[42] Government Gazette 35205 (30 March 2012) states that "2. [r]egulation 1 of the Regulations is hereby amended by the substitution of the definition of refugees, after the definition of" permanent resident", of the following definition: "refugee" means a person referred to in section 1 of the Refugee Act, 1998". Available on http://www.info.gov.za/view/DownloadFileAction?id=162809 visited on 2013/08/15.
[43] Furthermore, the amendment to regulation 2 indicates that: "3. [r]egulation 2 of the Regulations is hereby amended by the substitution for paragraph (e) by the following paragraph: (e) is a South African citizen, permanent resident or a refugee." These amendments came into force on 1 April 2012.



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Coverage is not linked to being an employee. However, only migrants with permanent residence status can access social assistance in South Africa according to our legislation.[44] The SAA does not extend to irregular non-citizens.[45] Legislation, in the form of the SAA, has made an audacious effort to uplift the country's citizens.[46] Unfortunately, the rights afforded to individuals by legislation are not enough, since the provision thereof often fails. One of the reasons for this is the lack of sufficient public financial resources.[47] Therefore, it can be stated that access to social assistance for migrants is more problematic than access to social insurance.[48]

It is also clear that the definition of social grants in accordance with the SAA is not in line with the promise of social assistance entrenched in the Constitution. The grants mentioned are divided into specific categories. Therefore, social grants not only exclude the majority of migrant workers, but also a part of the citizen community.[49] However, it is not recommended that unlimited categories should be implemented in social assistance in South Africa.

### 3.2.3 Social Insurance

The social insurance system in South Africa consists of retirement schemes, workmen's compensation funds, the Road Accident Fund (RAF), health insurance and unemployment insurance. The RAF is the only scheme which is not employment-based.[50] These categories are regulated by a number of pieces of legislation. The Unemployment Insurance Act (UIA)[51], the Unemployment Insurance Contribution Act (UICA)[52] and the Compensation for Occupational Injuries and Diseases Act (COIDA)[53] are some of the relevant acts.

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[44] Millard (2008) *AHRLJ* 42.
[45] Olivier (2011) Part 1 *SADC Law J* 146.
[46] De Beer and Vettori (2007) *PER* 2.
[47] See *Soobramoney v Minister of Health, Kwazulu-Natal*1998 (1) SA 765 (CC); *Government of the Republic of South Africa v Grootboom*2000 (11) BCLR 1169 (CC); *Minister of Health v TAC* 2002 (5) SA 721 (CC). See the discussion in Chapter 3.3.3.
[48] Dupper (2007) *Stell LJ* 225 and 250.
[49] Sinclair (2012) *Stell LR* 201 states that "the definition and eligibility sections in the Social Assistance Act have the effect of excluding absolutely".
[50] Millard (2008) *AHRLJ* 40.
[51] Act 63 of 2001.
[52] Act 4 of 2002.
[53] Act 85 of 1993.



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The purpose of the UIA is to:

> "[e]stablish an unemployment insurance fund to which employers and employees contribute and from which employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits and in so doing to alleviate the harmful economic and social effects of unemployment."[54]

The objectives of COIDA are to provide for compensation for disablement caused by occupational injuries or diseases. Such injuries or illnesses or death resulting from such injuries or diseases must have been sustained by employees in the course of their employment,.[55] The UIA and COIDA only apply to persons who fall under their respective definitions of 'employee'.[56]

The UICA is responsible for the collection of contributions and administers the Unemployment Insurance Fund.[57] The UICA applies to employees and employers, unless these individuals are specifically excluded.[58] It is a contentious issue whether irregular migrant workers should be deemed to be employees. In South Africa, public insurance schemes mostly extend to formal workers,[59] while migrant workers usually fall within the informal sector. This scheme is therefore mostly to the advantage of individuals in the formal sector who make contributions to the fund, and thus would automatically exclude most migrant workers, owing to the fact that they work in the informal sector. [60]

The UIA also does not apply to a person who enters the Republic of South Africa for the purpose of carrying out a contract of, for example, service within the Republic, if upon the termination the employee is required under certain circumstances to leave the Republic and their employers.[61] These exclusions in the specific acts are

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[54] S 2 of the UIA.
[55] See the long title of COIDA.
[56] As defined in Chapter 1.1.4. See also the definition of 'employee' as contained in s 1 of the Unemployment Insurance Act and s 1 of the Compensation for Occupational Injuries and Diseases Act and the discussion in Van Niekerk*et al* (2012) 70 – 73.
[57] Dekker (2005) 57.
[58] S 3 of the UIA.
[59] Van Niekerk*et al* (2012) 459.
[60] *Ibid* 468.
[61] S 3(1)(d) of the UIA – "(d) persons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership within the Republic if upon the termination thereof the employer is required by law or by the contract of service, apprenticeship or learnership, as the case may be, or by any other agreement or undertaking, to repatriate that person, or that person is so required to leave the Republic, and their employers."



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problematic. It causes a situation in which the individuals who are excluded from the formal social protection of the abovementioned acts have no protection if they should lose their employment. Owing to the lack of formal protection, excluded people will either be without any support, or they would have to rely on informal social security.[62]

Although this has not been considered by the courts, should a person's temporary residence in terms of the Immigration Act be dependent on the existence of a contract of employment or a bilateral agreement, such a person will in all probability not be entitled to unemployment benefits in terms of the UIA once the person returns to the sending country. However, the UIA is silent on the position pertaining to persons who do not return to their country of origin. According to Olivier, the Unemployment Insurance Fund also has no experience to date of paying benefits outside South Africa's borders.[63]

COIDA does not exclude non-citizens from claiming from the compensation fund. COIDA offers a system of no-fault reparation for employees with injuries arising from their employment. It is up to non-resident employees to elect to claim in terms of COIDA or the laws of their own country.[64] However, COIDA has numerous exclusions from its protection sphere.[65] This causes some of the communities' members to remain without any social protection.[66]

Health care is specifically mentioned by the Constitution.[67] There is private provisioning in South Africa, but this is usually linked to formal occupation. Private medical schemes are regulated by the Medical Schemes Act.[68] Free health care is

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[62] Dekker (2005) 59.
[63] Olivier (2011) Part 1 *SADC Law J* 131.
[64] Van Niekerk*et al* (2012) 483.
[65] S 1 of COIDA."'employee' means… but does not include – (i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act No. 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force; (ii) a member of the Permanent Force of the South African Defence Force while on "service in defence of the Republic" as defined in s 1 of the Defence Act, 1957; (iii) a member of the South African Police Force while employed in terms of s 7 of the Police Act, 1958 (Act No. 7 of 1958), on "service in defence of the Republic" as defined in s 1 of the Defence Act, 1957; (iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work; (v) a domestic employee employed as such in a private household."
[66] For example, informal sector workers and domestic workers.
[67] S 27 of the Constitution.
[68] 131 of 1998.



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available to some groups of the society.[69] However, it is submitted that it would be more appropriate to categorize this as social assistance.

In South Africa, the implementation of a National Health Insurance (NHI) system is currently under discussion. The aim of the NHI system is to provide universal access to medical services.[70] A Green Paper, a Policy on National Health Insurance published in August 2011, suggests that South Africa should implement a single-tier system financed through a single source. Health insurance will also be under the control of a "national fund". Commentators have mentioned that the Green Paper provides for a strong basis for improving the health system, and thus includes everyone.[71] However, members of society under this system will make no contributions, and thus it may be better to classify the system as social assistance rather than social insurance.

Another part of social insurance is retirement schemes. South Africa does not have a national retirement scheme, but individuals can join private schemes. The private provisions are governed by the Pension Funds Act.[72] Under the abovementioned social assistance, there is provision for an old-age grant for both men and women. This plays an important role in the country's social protection system. However, the retirement system in South Africa has the effect that only the very rich or the formally employed can contribute to a fund to provide for themselves during old age.[73]

According to Olivier, farm workers are another example of migrant workers in South Africa. These individuals are rarely members of a retirement scheme and are mostly left without any formal post-employment income if they should retire.[74] This vulnerable group needs social protection when they can no longer provide for themselves because of old age.

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[69] These groups are: the elderly, pregnant mothers and children under seven years of age.
[70] Rijnen (2010) Medihelp Medical Scheme. Available on http://www.medihelp.co.za/Libraries/2012_Upload_Annual_report_of_2011/A06867_Medihelp_English_Annual_Report.sflb.ashxvisited on 2012/06/25.
[71] Van den Heever "Evaluation of the Green Paper on National Health Insurance" Available on http://www.hsf.org.za/projects/health-reform/national-health-insurance-project-developments/nhi-useful-resources/responses-to-national-health-insurance-green-paper visited on 2012/06/25.
[72] 24 of 1956.
[73] Dekker (2005) 59.
[74] Olivier (2011) Part 1 *SADC Law J* 134.



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The Road Accident Fund Act[75] regulates the Road Accident Fund (RAF). The RAF's objectives[76] are to compensate any victim who has sustained bodily injuries where a driver caused damage by the negligent driving of a motor vehicle.[77] This might seem like a strange part of social insurance to discuss where migrant workers are involved, but owing to the fact that most people in South Africa need to use some form of transportation,[78] it may be of importance to these individuals as well. One other reason is that nationality plays no role in the eligibility of the victim to receive compensation.[79] The person who lodges a claim should only do so according to the requirements of Act 56 of 1996.[80]

However, critics point out that social insurance for non-citizens in its current format is problematic, as different government departments administer medical assessments and the processing and payment of compensation. According to Olivier, "[s]treamlined and uniform payment mechanisms for cross-border workmen's compensation payments are largely absent".[81]

In summary, Olivier makes the valid statement that:

> "[i]n 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."[82]

### 3.3.4 Labour Security

The Labour Relations Act (LRA),[83] Employment Equity Act (EEA)[84] and the Basic Conditions of Employment (BCEA)[85] are the three main pieces of legislation that give effect to the constitutional right to fair labour practices and labour security. The main

[75] 56 of 1996. Hereinafter Act 56 of 1996.
[76] 56 of 1996.
[77] S 17 of Act 56 of 1996.
[78] Private or public transport.
[79] Millard (2008) *AHRLJ* 41.
[80] Claims should be lodged within the required time period. Millard (2008) *AHRLJ* 41.
[81] Olivier (2011) Part 1 *SADC Law J* 133.
[82] *Ibid* 145.
[83] 66 of 1995.
[84] 55 of 1998.
[85] 75 of 1997.



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purposes of the LRA[86] are, namely, to regulate and advance collective bargaining,[87] establish labour dispute resolution institutions[88] and protect workers against unfair dismissal.[89]

The EEA plays a significant role in the achievement of equality in the workplace by eliminating unfair discrimination, and it regulates the implementation of affirmative action measures.[90] According to section 3 of the EEA, the act must be interpreted in fulfilment of the Constitution's purpose. This must be done by taking into account any code of good practice by the EEA and other relevant employment law. The international obligations of the Republic of South Africa must be considered, specifically those stated in the Discrimination (Employment and Occupation) Convention, 1958 (No 111).[91]

The purpose of the BCEA is to establish and enforce basic conditions of employment.[92] The BCEA makes provisions for South Africa as a member state to comply with the obligations of the ILO. The BCEA strives to give effect to the right to fair labour practices as defined in the Constitution.[93] All three legislative instruments enhance social justice and provide some form of labour security.

The Constitution places more emphasis on the maintenance of a fair employment relationship than labour security in general.[94] This suggests that the focus of the Constitution falls on the prevention of unfair employer-employee actions; it prevents unfair discrimination and would not tolerate the unfair termination of employment. In

[86] S 1 of the LRA provides as follows "[t]he purpose of this Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of this Act, which are – (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution; (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organization; (c) to provide a framework within which employees and their trade unions, employers and employers' organizations can – (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and (ii) formulate industrial policy; and (d) to promote – (i) orderly collective bargaining;(ii) collective bargaining at sectoral level; (iii) employee participation in decision-making in the workplace; and (iv) the effective resolution of labour disputes".
[87] Chapter II of the LRA.
[88] Chapter VII of the LRA.
[89] Chapter VIII of the LRA.
[90] S 2 of the EEA.
[91] S 3 of the EEA.
[92] S 2 of the BCEA.
[93] S 23 of the Constitution.
[94] *Ibid*.



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terms of the LRA (and in broadly the same terms as the BCEA and the EEA) an 'employee' means:[95]

> "(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employment' have meanings corresponding to that of employee."

Although it does not fit under labour security in the stricter sense of the word, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[96] applies to any individual not covered by the EEA. PEPUDA places a positive obligation on the state, organizations and all persons to promote equality.[97] It focuses on the development of a democratic society guided by the principles of equality, justice, human dignity, freedom, fairness, equity and social progress.[98] Section 1 of PEPUDA lists prohibited grounds upon which no person may be discriminated against.[99] These grounds are one of the reasons why this act will be applicable when dealing with migrant workers in South Africa.

When interpreting PEPUDA, the Constitution and the principles contained therein must be the main focus and effect must be given to these fundamental principles.[100] If there is any conflict between the interpretation of PEPUDA and any other act, excluding the Constitution, PEPUDA will prevail over any other law.[101] PEPUDA makes no specific mention of migrants, non-citizens or any derivative of these terms. Therefore, it will be applicable only to protect such individuals against unfair discrimination on the grounds of their lack of citizenship and right to human dignity.

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[95] S 213 of the LRA, s 1 of the BCEA and s 1 of the EEA.
[96] 4 of 2000.
[97] S 25 of PEPUDA.
[98] Tanner (2012) 207.
[99] According to s 1 of PEPUDA, 'prohibited grounds' are "(a) [r]ace, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or (b) any other ground where discrimination based on that other ground – (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)".
[100] S 3 of PEPUDA.
[101] Tanner (2012) 207.



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The Employment Services Bill (ESB)[102] was published in 2010 by the National Assembly.[103] It is the cornerstone of a plan to facilitate larger state intervention in the labour market. The purpose of the new Employment Services Act will be to promote employment of South African citizens by improving access to the labour market; people seeking job opportunities, by improving employment prospects of persons with disabilities and employees who could possibly be retrenched; to facilitate the employment of foreign nationals in a manner that is consistent with the objects of the ESB[104] and the South African Immigration Act; and by promoting employment escalation and place of work efficiency.[105]

The ESB refers to a migrant worker as a "foreign national".[106] Article 2 of the ESB indicates that one of the purposes of the act would be to:

> "(h) facilitate the employment of foreign nationals in the South African economy, where their contribution is needed in a manner - (i) that gives effect to the right to fair labour practices contemplated in section 23 of the Constitution; (ii) that does not impact adversely on existing labour standards or the rights and expectations of South African workers; and (iii) that promotes the training of South African citizens and permanent residents."

The ESB aims to facilitate worker schemes to enable vulnerable work seekers to enter employment and remain employed.[107] Even though migrant workers would fall within the vulnerable work seekers group, the ESB goes on to restrict the employment of migrant workers without the necessary documentation.[108] The ESB seeks to protect the employment opportunities and conditions in South Africa for the South African citizens and permanent residents. However, the ESB provides protection to the migrant worker who is employed as an employee despite the lack of

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[102] The amended bill 38 of 2012 was recently introduced by the National Assembly (proposed section 75). Explanatory summary of ESB published in Government Gazette No 35844 of 2 November 2012

[103] It was published in General Notice 1112 of 2010, GG 33873 of 17 December 2010.

[104] S 5(1)(i) of the ESB.

[105] The Preamble of the Employment Services Bill. See also the New Labour Bills Changes in the Offing. Available at http://0-www.mylexisnexis.co.za.innopac.up.ac.za/nxt/gateway.dll/bc/k visited on 2013/11/30.

[106] In s 1 of the Employment Services Bill ''foreign national'' means an individual who is not a South African citizen or does not have a permanent residence permit issued in terms of the Immigration Act.

[107] S 6 of the ESB.

[108] The ESB determines the requirements for the employment of foreign nationals by stating in s 8(1) that "[a]n employer may not employ a foreign national within the territory of the Republic of South Africa prior to such foreign national producing an applicable and valid work permit, issued in terms of the Immigration Act."



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authorisation by stating that the employee is entitled to enforce any claim that he or she may have in terms of any legislative instrument or contract of employment against the employer.[109]

The introduction of the ESB is aimed at developing the Department of Labours' public employment services. This enhancement would be established by the regulation of private employment agencies, as well as the provision of legal status for the Sheltered Employment Factories administered by the Department and Productivity South Africa.[110] The main means to achieve these aims would be the comprehensive administration of public employment services by the Department of Labour. The ESB would establish the much needed regulation of employment services as to provide protection to all work seeking individuals regardless of their migration status. However, it could be stated that this would place unnecessary strain on the workload of the Department of Labour. The over-regulation could threaten businesses and scare employers out of employing individuals due to the risks associated with employment of new employees.[111]

Other acts that may be of importance when social protection for migrant workers in the form of labour security is evaluated are: the Occupational Health and Safety Act (OHSA)[112] and the Mine Health and Safety Act[113] (MHSA). The OHSA is applicable when the duties of employees and employers need to be established. These include the establishment of health and safety committees.[114] The MHSA states that the owner of a mine should ensure that the specific mine is in outstanding condition and properly equipped in such a way that it is safe for the employees to perform their duties there.[115] The latter act is of importance when dealing with migrant workers, owing to the fact that most of the migrants in South Africa are situated in the mining sector,[116] and that is also the sector in which the most deaths occur.[117]

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[109] S 8(4) of the ESB.
[110] Modlin (2011) *Professional Accountant* 30.
[111] *Ibid.*
[112] 85 of 1993.
[113] 29 of 1996.
[114] Van Niekerk*et al* (2012) 463.
[115] S 2(1) of the MHSA.
[116] Olivier (2011) Part 1 *SADC Law J* 134.
[117] *Ibid* 130.



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## 3.3 THE COURTS: EXTENDING THE RIGHT TO SOCIAL PROTECTION

### 3.3.1 Introduction

The South African courts[118] interpret legislation in line with their judicial authority. When dealing with any legislation, the courts must give effect to the fundamental principles listed in the Constitution. Furthermore, the courts must take international law into account, and may consider foreign law.[119] Any legislation, customary or common law, must be in line with the principles contained in the Constitution,[120] and the courts should prefer a reasonable interpretation consistent with international law.[121]Section 38 of the Constitution states that the courts must provide "appropriate relief, including a declaration of rights", while section 167 states that the courts may provide any order that is "fair and equitable". The court must determine the boundaries of what is "appropriate, fair and equitable relief".

The Constitutional Court's decision in *Fose v Minister of Safety and Security*[122] continues to give substance to what can be defined as appropriate, fair and equitable relief. In *Fose*, the court held that appropriate relief will in its fundamental nature be relief required to protect and implement the Constitution. The court stated that each particular case's circumstances would have an effect on the type of relief. This could be in the form of a declaration of rights, a mandamus, an interdict or any other relief required by the circumstances to protect the rights in the Constitution. It was also noted that, if it is necessary, the court may even develop new remedies to insure the enforcement of the impaired rights.[123] As mentioned by Mbazira, the South African courts have stayed within their judicial powers and limited rulings where they would interfere with the other arms of the government.

The courts have wide remedial powers to assist individuals, but can only apply these if the matter is brought before a court and if there are available resources. Unfortunately, migrants rarely have the resources and ability to bring matters before courts when dealing with social protection. The cases that have reached the South

[118] A court can be the Constitutional Court acting in accordance with s 167(6)(a) of the Constitution, a Court, a Magistrate's Court or another court with a similar status to these courts.
[119] S 39(1) of the Constitution.
[120] S 39(2) and (3) of the Constitution.
[121] S 233 of the Constitution.
[122] 1997 7 BCLR 851 (CC).
[123] *Fose* par 19. See also Mbazira (2011) *SAPL* 64.



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African courts will now be evaluated in accordance with the concept of social protection as defined in Chapter 2. Social assistance and social insurance will be discussed under the heading of socio-economic rights, since, in the cases under discussion, the court focused on section 27 of the Constitution[124] as a whole. The portability of benefits within the South African social protection system has not enjoyed any attention in jurisprudence.[125]

### 3.3.2 Socio-economic Rights

Socio-economic rights require the courts to be open-minded when interpreting these rights in individual cases.[126] The following four Constitutional Court cases concerning socio-economic rights will be discussed in this chapter: *Soobramoney v Minister of Health, KwaZulu-Natal*,[127]*Government of the Republic of South Africa v Grootboom*,[128]*Minister of Health v Treatment Action Campaign* (*TAC*)[129] and *Khosa v Minister of Social Development*.[130] According to Wesson, *Grootboom* is the most significant,[131]and *TAC* and *Khosa* draw heavily upon the judgment in *Grootboom*.[132] It could be said that the court set the foundation for future assessment of socio-economic rights in *Grootboom*.

In *Soobramoney v Minister of Health, Kwazulu-Natal*,[133] the tension between the realization of human rights and available resources was considered. In *Soobramoney*, the appellant was a diabetic who suffered from an irreversible heart disease. He asked to be admitted to a state hospital and he was informed that he did not qualify for admission. There was a severe shortage of dialysis machines. The hospital only admitted those patients who could be cured. The appellant claimed that he had a right to receive emergency medical treatment from the hospital in terms of section 27(3) of the Constitution.[134]

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[124] Referred to in the court cases as s 26 of the Interim Constitution. This section is identical to s 27 of the Constitution.
[125] Becker and Olivier (2008) 145.
[126] Mbazira (2011) *SAPL* 62.
[127] 1998 (1) SA 765 (CC).
[128] 2001 (1) SA 46 (CC).
[129] 2002 (5) SA 721 (CC).
[130] CCT 12/03 and2004 (6) SA 505 (CC).
[131] Wesson (2004) *SAJHR* 284.
[132] *Ibid* 285.
[133] 1998 (1) SA 756 (CC). Hereinafter *Soobramoney.*
[134] The facts of this case will be discussed in full later in Chapter 3 of this dissertation.



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Relying on section 27(2) of the Constitution, the Constitutional Court held that the state has a constitutional obligation "within its available resources" to provide health care in emergency conditions.[135] The court acknowledged that the rights imbedded in section 27 of the Bill of Rights do not focus on nationality, as the right extends to "everyone". The court's approach was against a generous awarding of socio-economic rights, by not forcing the obligation to uphold the right without recognizing the availability of resources.

In *Soobramoney*[136] it was held that the state needs to focus on the broader community as a whole rather than the individual. The court indicated that, with regard to chronically ill individuals, the patient needs to meet certain conditions. It simply seems unreasonable to expect someone who urgently needs medical attention to be waitlisted until everyone in the country is provided with food, water and so on.[137]

The Constitutional Court reached the conclusion that "a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters".[138] It is said that in terms of remedies, the Constitutional Court chose a weak remedy, instead of a more personal remedy.[139] The Constitutional Court acknowledged that the Constitution should not be read in isolation, but in context, including its political and historical development.[140] Furthermore, the court held that the state has a constitutional obligation "within its available resources" to provide health care in emergency conditions.[141] However, the court concluded that the Department of Health did not have sufficient funds to cover the cost of services being provided to the public and that there was no breach of the constitutional guarantees contained in the Constitution.[142]

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[135] *Soobramoney* par 11.
[136] 1998 (1) SA 765 (CC).
[137] Wesson (2004) *SAJHR* 303.
[138] *Soobramoney* par 29.
[139] Mbazira (2011) *SAPL* 66.
[140] *Soobramoney* par 16 and also see *Makwanyane* par 9 – 10.
[141] As stated in s 27(2) of the Constitution.
[142] *Soobramoney* par 11.



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*Soobramoney* was the first case concerning socio-economic rights brought before the Constitutional Court. The approach in *Soobramoney* has since then largely been abandoned.

In the case of *Government of the Republic of South Africa & Others v Grootboom& Others*,[143] the respondents were left homeless as a result of their eviction from their informal homes, situated on private land earmarked for low-cost housing. They applied for an order requiring government to provide them with adequate basic housing until they obtained permanent accommodation.[144]The case was appealed in the Constitutional Court, and the decision of the High Court was set aside. Despite not dealing directly with section 27 of the Constitution, the claimants in *Grootboom* were granted relief, and the court stated that the Constitution does make provision for civil, political, social and economic rights. It was further mentioned that the fundamental values of our community are underpinned by the right to freedom, human dignity and equality, and those without safe havens and food are denied these values.

This case was groundbreaking with regard to the extension of socio-economic rights, and included a promise to all people living in harsh conditions beneath the minimum standards breadline.[145] The court adopted a more generous approach and extended socio-economic rights to all individuals, allowing them to enjoy the human rights in the Bill of Rights.[146] The Constitutional Court further indicated that the key to the fulfilment of these socio-economic rights is the standard of reasonableness.

The court, through evaluation of the facts against the background of the Constitution, indicated that the state violated the Constitution[147] by not having an appropriate program in place.[148] The court focused on the 'reasonable programme' test. In *Grootboom*, the court took the measures taken by the state into account and

[143] 2000 (11) BCLR 1169 (CC).
[144] S 26 of the Constitution, which provides that everyone has the right of access to adequate housing. S 26(2) imposes an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources.
[145] Mbazira (2011) *SAPL* 60.
[146] *Grootboom* par 23.
[147] S 26 of the Interim Constitution.
[148] *Grootboom* par 99.



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declared that the content of these measures are primarily a matter for the legislature and the executive. The court's duty is not to determine whether or not measures could have been adopted, but whether the adopted measures are reasonable.[149] The courts have since favoured the *Grootboom*[150] approach, as it was used as the basis of numerous cases that followed.[151]

In *Khosa v Minister of Social Development; Mahlaule & Others v The Minister of Social Development & Others*,[152] Mozambican citizens who had acquired permanent residence status in South Africa[153] applied for social assistance under the SAA. They would have qualified for grants but for the fact that they were not South African citizens.[154] They relied on section 27 of the Constitution, which provides "everyone" with the right to access to social security, and in section 9 it guarantees everyone the right to equality. In *Khosa*, the judiciary once again emphasized the importance of the different arms of government when dealing with the awarding of socio-economic rights.[155] The reference to the doctrine of separation of powers in *Khosa*[156] is implicit. In this case, the doctrine is seen in the argument made by Justice Mokgoro that the non-citizens' minority rights should be protected against the oppression of the majority.[157]

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[149] *Grootboom* par 41. In a more recent case, the Constitutional Court once again emphasized the need for the different forms of government to stay within their constitutional jurisdiction. *Motswagae and Others v Rustenburg Local Municipality and Another* [2013] ZACC 1 (CCT42/12) started as an application for an interdict in the North West High Court, Mahikeng. The application was brought because the Rustenburg Local Municipality authorised construction work on property occupied by the first applicant. This involved excavation of land by the use of a bulldozer right next to the outer wall of the first applicant's home, exposing the foundations of the building. The question before the court was whether the municipality acted lawfully in authorising this work on the property without obtaining a court order for the eviction of the applicants. The court dealt with s 26 of the Constitution which contains the right of housing to everyone. The court granted these applicants leave to appeal and stated in par 17 that "[i]t is trite that the municipality must act reasonably at every stage in the process of providing housing to people within its jurisdiction. Unconstitutional conduct cannot, by definition, qualify as reasonable conduct."

[150] 2001 (1) SA 46 (CC).

[151] *TAC* and *Khosa* case.

[152] 2004 (6) SA 505 (CC). Hereinafter *Khoza.*

[153] In terms of exemptions granted to them under the now repealed Aliens Control Act 96 of 1991.

[154] *Khoza* par 2 and 3.

[155] Becker and Olivier (2008) 171.

[156] 2004 (6) SA 505 (CC).

[157] *Khosa* par 71 the court made reference to the case of *Larbi-Odam*. In this case it was held that "[w]ith regard to the vulnerability of permanent residents, the court in *Larbi-Odam* found that first, foreign citizens are a minority in all countries, and have little political muscle. Secondly, the court felt that citizenship is a personal attribute which is difficult to change." Also see Becker and Olivier (2008) 171.



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The court held that the rights to social security are vested in "everyone", and that permanent residents are bearers of this right. The court read the words "or permanent resident" after the word "citizen" in each of the challenged sections of the SAA. However, the court was not prepared to extend the constitutional right to social security to irregular migrants. It could be argued that the court has not done enough in the *Khosa* case and that it missed a golden opportunity to extend the social security protection (in respect of social assistance in particular) to irregular migrants.

The statement[158] mentioned in *Grootboom* was affirmed in *Khosa*, and the court held that the socio-economic rights in the South African Constitution are closely related to the founding values of "human dignity, equality and freedom."[159] Consequently, in *Khoza,* the court held that the provisions that limited the provision of social grants to citizens contravened the norms of the Constitution and extended the right to social protection to all persons with permanent residence. The court held that the necessity to provide access to social assistance to people permanently residing in South Africa, as well as the impact on their right to life and dignity should this be denied, outweigh the financial impact on the state.[160]

The government argued that all non-citizens ought to be excluded, because the constitutional imperative was linked to "available resources". The court rejected this argument and did not extend the right to social security to all non-citizens. The court held that it would be reasonable to exclude irregular or undocumented residents who have a tenuous link to the country.[161] The court also held that owing to the fact that

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[158] *Grootboom* par 23.

[159] *Khoza* par 40.

[160] *Khosa* par 82. The court stated that "[i]n my view the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration consideration on which the state relies".

[161] *Khoza* par 46 – 47. At par 59 the court held that "[i]t may be reasonable to exclude from the legislative scheme workers who are citizens of other countries, visitors and illegal residents, who have only a tenuous link with this country. The position of permanent residents is, however, quite different to that of temporary or illegal residents. They reside legally in the country and may have done so for a considerable length of time. Like citizens, they have made South Africa their home. While citizens may leave the country indefinitely without forfeiting their citizenship, permanent residents are compelled to return to the country (except in certain circumstances) at least once every three years. While they do not have the rights tied to citizenship, such as political rights and the right to a South African passport, they are, for all other purposes mentioned above, in much the same position as citizens. Once admitted as permanent residents they can enter and leave the country. Their homes, and no doubt in most cases their families too, are in South Africa. Some will have children born in South Africa. They have the right to work in South Africa, and even owe a duty



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the additional costs would at most amount to 2% of the overall government expenditure on social grants, the state's argument that it would be overburdened was unacceptable.[162]

Even though non-citizenship was subjected to constitutional challenge in *Khosa* under access to social assistance in terms of the SAA,[163] the court still only restricted the provision of grants to permanent residents. These grants were not extended to temporary residents and irregular migrants.[164] The directives of the Constitutional Court were incorporated into the regulations implementing the Act.[165] The judgment in *Khosa* is in line with the rights integrated into the Constitution, as well as the international approach.[166] Despite this it was pointed out by Dekker that criticism has been levelled against the *Khoza* decision, and this highlights the difficulty the courts are facing in balancing the realization of human rights and maintaining adequate resources to fund the social protection system as a whole.[167]

According to Brand and Heyns, even though in both *Grootboom* and *Khosa* the court followed different tests[168] to determine the realization of social-economic rights for the claimants, some important indicators were identified.[169] These are, *inter alia*, the position of the claimants in society, their degree of deprivation and the extent to which there was a breach of their rights. A further factor is how it affected their right to human dignity.

It is acknowledged that in *Khosa* the court acted nobly in extending social assistance to non-citizens.[170] However, this intended noble act places an additional burden on the welfare-spending obligations of the state.[171] The exact financial impact of this judgment is still unclear, considering the fact that the exact number of non-citizens

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of allegiance to the state. For these reasons, I exclude temporary residents and it would have been appropriate for the High Court to have done so".

[162] *Khoza* par 60.

[163] S 5(1)(c) of SAA (as amended).

[164] See also Mpedi and Smit (2011) 10.

[165] Regulation No. 31356 Goverment Gazette. 22 August 2008 SAA. Mpedi and Smit (2011) 154.

[166] Strydom *et al* (2006) 302. See discussion about international norms in Chapter 2.2.3.

[167] Dekker (2010) *SA Merc LJ*398.

[168] *Khosa* followed a stricter proportionally test, while in *Grootboom* a stringent means-end effectiveness test was applied.

[169] Brand and Heyns (2005) 45.

[170] Becker and Olivier (2008) 165.

[171] *Khosa* par 58 – 62.



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cannot be determined. Justice Ngcobo, writing on behalf of the minority, begins by assuming that the availability of benefits to non-citizens might increase the migration to South Africa.[172] He goes on to state that:

> "[t]he fact that the increase is not huge is not relevant. The fact of the matter is that there will be an increase; how huge that increase will be, will be determined by an increase in the number of permanent residents. What makes it difficult to predict the number of persons who might qualify, is that there is no clear information about the number of people who might qualify under a more generous immigration regime. And if there is merit in the possibility that the State could become a magnet for new immigrants seeking permanent resident status, estimating the likely size of the pool of grant applicants and an accurate estimate of the financial burden would be even more arduous a task."[173]

In *Minister of Health and Others v Treatment Action Campaign and Others*[174]the government had instituted a policy whereby an antiretroviral drug, Nevirapine, was made available only in certain research sites within the public health sector This was done to test the efficacy of the program in preventing mother-to-child transmission of HIV. The respondents had approached the High Court for an order obliging the government to make this drug widely available within the public health sector, as the program was denying those who did not have access to the research sites access to the drug.[175]

The court again gave an indication of relying on weaker remedies.[176] The court issued a declaration, which was later changed into a mandatory order, requiring the state to remove the restrictions on the reasonable programs relevant to the matter at hand.[177] Despite the court's declaration and indications that it is willing to extend a helping hand to the suffering members of society, not enough is being done. A supervisory order was dismissed by the court,[178] as it suggested that the government has always respected the court's orders and that they had no reason to believe otherwise.[179]

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[172] *Khosa* par 121 and 124.
[173] *Khosa* par 129.
[174] 2002 (5) SA 717.
[175] *TAC* par 1 – 12.
[176] Mbazira (2011) *SAPL* 67.
[177] *TAC* par 135(3).
[178] Mbazira (2011) *SAPL* 68.
[179] *TAC* par 129.



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A case that was considered by the courts a few years after *Grootboom* could also be of importance. It does not deal with the concept of social protection or migrant workers directly, but it gives an indication of social protection in the country and the power the court has if it is willing to extend its judicial functions. In *Occupiers of 15 Olivia Road v City of Johannesburg*,[180]300 residents of neglected buildings in Johannesburg approached the court on the grounds that they would be evicted by the City of Johannesburg. The City's argument was that it had initiated a program to revamp the City by rehabilitating neglected buildings. The High Court provided relief for the applicants by stating that the City did not provide these individuals with alternative accommodation. It indicated that the program did not satisfy the requirement to provide for those in crisis and those in desperate need of housing. The court granted an interdict against the eviction.[181]

The Supreme Court of Appeal (SCA) agreed with the City that the buildings were unsafe and authorized the eviction. The SCA ordered the City to provide temporary shelter for those in desperate need. The occupiers appealed to the Constitutional Court.[182] The Constitutional Court ordered the parties "to engage with each other meaningfully[i]n an effort to resolve the differences and difficulties aired in this application."[183] This is where the idea of meaningful engagement found its origin.[184] The court also focused on the question of whether the City satisfied the requirements set out by section 26[185] and *Grootboom.*

The court, in *Olivia*, created a new remedy by using a stronger structural remedy. According to the court, the state has a constitutional responsibility to facilitate the participation of communities and their organizations in local government.[186] The judgment expanded the remedial powers of the court and set a new precedent for individuals to challenge government actions.[187] This approach is founded on the question of whether the community was reasonably engaged in the discussion by the

[180] 2008 5 BCLR 475.
[181] See *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W); 2006 6 BCLR 728 (W).
[182] See *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA); 2007 6 BCLR 643 (SCA).
[183] *Olivia* par 5.
[184] Mbazira (2011) *SAPL* 73.
[185] Interim Constitution.
[186] *Olivia* par 16.
[187] Mbazira (2011) *SAPL* 74.



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state or another authority.[188] It is suggested that this could be a good approach when dealing with social protection for migrant workers. These individuals form part of the community, and as a whole the community could make useful contributions to solving the problems associated with the social protection of migrant workers.

The inclusion of vulnerable groups and the extension of socio-economic rights, for example, open the door to a discussion of the powers of the court. The question of whether fundamental socio-economic rights are enforceable against the state arises.[189] In the approach adopted by the Constitutional Court, it is indicated that the courts with constitutional jurisdiction may grant declaratory as well as mandatory orders.[190] The courts can order the state to act positively and enforce the social protection rights. The socio-economical rights in the Constitution are justifiable, despite the financial and budgetary implications they carry.[191]

### 3.3.3 Labour Security

Labour security is not recognized as a distinct concept by South Africa. It is integrated into the social protection and labour law of the country. Therefore, the interpretation of the courts is significant in this issue. Through the decisions of the courts, social protection in the form of labour security is being developed. Some of these court cases will be discussed with the aim of evaluating the limitations and the extensions developed by the court. One of the main reasons why the extensions developed by the courts are needed with regard to migrant workers is the presumption that migrant workers provide cheaper labour than South African citizens.[192]

In *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) &Another*[193] the Constitutional Court considered whether the regulations dealing with the employment of educators, which limited the appointment of educators to South African citizens, were in compliance with the Constitution. The

[188] *Ibid*.
[189] Becker and Olivier (2008) 178.
[190] Declaratory orders are orders that determine what the rights of the parties are, while mandatory orders can order a party to act in a particular way. See Becker and Olivier (2008) 179.
[191] This position has been affirmed in *TAC* case par 25, and as a whole.
[192] Van Niekerk*et al* (2012) 483.
[193] 1997 (12) BCLR 1655 (CC).



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court recognized that foreign teachers are a vulnerable group on the grounds that: citizenship is a personal attribute which is difficult to change, these individuals are a minority and they have little political muscle. The court held that discrimination on the basis of citizenship in the context of permanent residents amounted to unfair discrimination.[194] Although the court did not reach a final conclusion pertaining to temporary residents, it did conclude that their position is precarious. However, considering that the regulation did allow for temporary residents to be disadvantaged more than permanent residents, the court found this could cause injustice and the regulation was invalidated in its entirety.

In *Discovery Health Ltd v CCMA*,[195] the question arose whether a contract of employment concluded in contravention of the Immigration Act[196]was rendered null and void, with the consequence that the employee could no longer claim protection in terms of the LRA. The worker, an Argentinean national, was dismissed when his employer found out that he was not legally permitted to work for that company in terms of the Immigration Act. The employee referred an unfair dismissal dispute to the CCMA. The employer argued that only an employee, as defined in terms of the LRA, may claim the protections afforded by the Act.[197] It was further contended that the statutory definition states that an employee must be a party to a valid contract of employment.[198]

The court concluded that even though a contravention of the Immigration Act constitutes a criminal offence, it does not invalidate the underlying contract of employment and the worker still remains an employee in terms of the LRA. To this the court added that even if the contract was not valid, the definition of 'employee' does not presuppose a valid contract of employment. Even though his claim was for unfair dismissal, the consequence of the court's approach was that the definition of an employee was extended to include the protection of an irregular migrant.[199]

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[194] At par 31 the court held that "[t]hus, it is simply illegitimate to attempt to reduce unemployment among South African citizens by increasing unemployment among permanent residents."
[195] 2008 *ILJ* 1480 (LC).
[196] 13 of 2002.
[197] This definition was mentioned in the previous discussion of the different legislation.
[198] *Discovery Health(ILJ)* par 3.
[199] Dekker (2010) *SA Merc LJ* 399.



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Although this case did not deal with social security legislation in the stricter sense of the word, it is submitted that the *Discovery Health (ILJ)* principle can apply to such legislation as well. The court did not consider the question of whether employees who return to their country of origin are still entitled to protection in terms of labour and social security legislation. In *Discovery Health (ILJ)*, the court stated that there is tension between the right of states to protect their labour markets and the fundamental rights of those who seek work in other countries.[200]

In the context of social protection, Van Niekerk stated that globalization has an intense effect on global migration and has caused the number of people who migrate to different countries to increase considerably. He indicates that some of the reasons for this movement are escaping poverty, unemployment and, *inter alia*, economic and social demands in migrants' countries of origin.[201] However, in the sense of general social protection, it is submitted that the right to social protection should rather be extended than limited, which would exclude certain individuals from protection.[202] The court's decision made an indication that the court should consider the international movement towards extending labour legislation to defenceless employees.[203]

The definition of employee was also provided a broad interpretation in *"Kylie" v CCMA.*[204] In this instance, the claimant was a sex worker who was employed in a massage parlour to perform sexual services for a reward. The worker was informed that her employment had been terminated without prior hearing.[205] The Labour Appeal Court held that the worker was entitled to protection under labour law, although she was not entitled to all of the remedies afforded to other workers under the LRA. Davis held that the definition of employee in section 213 of the LRA was wide enough to include a person whose contract of employment was unenforceable in terms of the common law.[206]

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[200] Kapindu (2011) *AHRLJ* 100.
[201] *Discovery Health (ILJ)* par 45.
[202] Dekker (2010) *SA Merc LJ* 401.
[203] Van Niekerk*et al* (2012) 80.
[204] [2010] 7 BLLR 705 (LAC) par 16 and 20.
[205] *"Kylie"* par 1 – 2.
[206] *"Kylie"* par 3.



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Social protection was not dealt with specifically in either the *Discovery Health (ILJ)*or "*Kylie"* cases. However, because the court in *"Kylie"* stated that illegal workers should be awarded the rights enshrined in the Constitution, it could be said that they are not excluded from social rights. In *Discovery Health (ILJ)*, the court extended social protection to irregular migrant workers. Even though there are significant differences between labour security and social insurance legislation (such as the fact that the latter places significant financial burdens on the state) both of these cases can be interpreted to extend rather than limit the scope of the application of the relevant legislative instruments.[207]

## 3.4 CONCLUSION

The South African social protection framework has severe limitations. Social assistance does not extend to temporary residents (*Khoza*) or irregular migrants, and social insurance generally does not apply to individuals who return to their country of residence. However, there are some positive, but limited, developments in relation to compensation for occupational injuries and diseases. The exclusions of the legislation regarding social insurance have a direct impact on the informal social security system.[208] The informal social security system is the only safetynet left for those individuals who are disqualified from formal social protection by the related acts.

Despite the fact that government officials have consistently argued that social protection should only be granted to citizens, the Constitutional Court has extended the entitlement to social protection to permanent residents (*Khoza)* and has struck down regulations discriminating against temporary residents (*Labri-Odam)*. Nevertheless, at this stage, there are no indications that the Constitutional Court would be willing to extend social protection in the form of social assistance and social insurance to irregular migrants.

As mentioned, the comprehensive definition of social protection (regardless of which organization's definition is being referred to) is wide enough to include labour security. It is important that this fact be recognized in South Africa, since social

[207] Olivier (2011) Part 1 *SADC Law J* 144 – 145.
[208] Dekker (2005) 62.



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protection generally starts in the workplace, where workers spend the majority of their working lives.[209] This, together with the necessary changes to relevant labour legislation in South Africa, is a positive development and is exactly what is needed to improve the position of migrants in terms of social protection in the country in which they reside.

The courts have indicated a willingness to extend labour security provisions to irregular migrants (*Discovery Health (ILJ)* and *"Kylie"*) in the sphere of labour security. It is submitted that the broadening of protection in labour security could, in future, play a significant role in extending the coverage of other branches of social protection (social assistance and social insurance) to irregular residents as well. This extension could serve as the foundation for providing social protection to those migrants who work in the host country, and therefore make a contribution to the particular country's labour economy.

Labour legislation does not exclude migrants, and where there was uncertainty the courts have extended the scope of application of these acts to migrants and those who have not entered valid contracts of employment. This has occurred against the background of the Constitution and its human-rights culture. South Africa could focus on its well-developed labour legislation to extend social protection in the form of labour security to irregular migrants, and move a step closer to the Constitution's idea of protection that extends to "everyone". It would also be to the advantage of the South African government to promulgate the different bills introduced to amend the labour legislation in South Africa. Furthermore, if the social insurance system could be extended, even slightly, it will have a positive impact on limiting the reliance on informal social protection[210] in this country.

Even though it is clear that the courts would not be willing to extend the right to social protection to irregular migrants, the numerous factors set out in the different court decisions, as well as available financial resources, are important considerations when dealing with the awarding of social protection to at-risk groups

[209] *Recommendation Concerning HIV and AIDS and the World of Work,* 2010 (No. 200) International Labour Office,Geneva.
[210] In the form of informal social security.



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such as irregular migrants. Even though all categories of migrant workers cannot rely on social protection in South Africa, the one fact that remains clear is that they have the right to the protection of their general right to human dignity.



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# CHAPTER 4
# THE LEGAL STATUS OF MIGRANT WORKERS


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## 4.1 INTRODUCTION

Migration is a concept known in most countries and regions.[1] In the SADC region and elsewhere in the world, migrants seek better living standards in countries with stronger economies. The Constitution of the Republic of South Africa, 1996 (the Constitution), recognizes the right to freedom of movement.[2] This entails that everyone has the right to leave the country, regardless of whether they are citizens or migrants within the borders of South Africa. Freedom of movement is one of the rights most associated with the flow of migrants between countries. This right is also acknowledged by international standards.

The preamble to the Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143)[3] states that while developing the convention everyone was considered to have the right to leave any country, including his or her own, and to enter such

[1] Kalitanyi and Visser (2010) *SAJEMS* 377.
[2] S 21 of the Constitution provides that "(1) [e]veryone has the right to freedom of movement; (2) Everyone has the right to leave the Republic; (3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic; (4) Every citizen has the right to a passport".
[3] Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers. Entry into force 9 Dec 1978.Hereinafter Convention 143 of 1975.



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country, as set forth in the Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Rights[4].

When dealing with the concept of social protection, specifically with regard to migrant workers, the concept of migration and the terms associated with it need to be evaluated. As indicated by the definition of social protection,[5] it is a wide concept and protects individuals in different ways in terms of their needs and status. Generally, migrant workers are not protected in the same way as citizens of a country.[6] Each country has their own legislative instruments, implemented within their justice system, to regulate migration and migrant workers. Olivier notes that in most countries migration law is deemed superior to social protection or labour laws.[7] This has implications for the social protection, if any, afforded to migrant workers.

In this chapter, the idea of migration will be evaluated to establish a generally acceptable conception for the purposes of this dissertation. There are different categories of migrants in each country, which could differ due to influencing circumstances.[8] Only the categories associated with migrant workers will be considered during the assessment of the concept of migration. The international standards that have influenced the development of the regulation of migration in South Africa will also be dealt with briefly. The legislative instruments concerning migration in South Africa will be examined to indicate how migration in and out of South Africa is regulated. The impact of migration legislation on the social protection of migrant workers will also be considered.

## 4.2 THE CONCEPT OF MIGRATION

Migration is no longer a concept that needs to be accepted or rejected, but is rather an existing concept that needs to be dealt with on a daily basis. It is one of the fundamental and inevitable components of the economic and communal life of

[4] No 14668. Adopted by the General Assembly of the UN on 19 December 1966.
[5] See Chapter 2.
[6] This is seen in the conditions and the establishment of bilateral and multilateral agreements. See the comparative chapter (Chapter 5). See also legislative instruments such as: ss 2(1) and 5(1)(c) of the Social Assistance Act 13 of 2004 and s 231(2) of the of the Constitution and the Unemployment Insurance Act 63 of 2001.
[7] Olivier (2012) Part 2 *SADC Law J* 131.
[8] These circumstances could, for example, be in times of war or due to a cataclysm (an act of God).



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individual countries and broader regions.[9] Migration is relevant to humans and animals. Generally, animals migrate in order to survive. This is also appropriate for humans.

The factors affecting the flow of migration used to be the availability of food, shelter, better weather conditions or safety. During our current times, these are still motivating factors, although new reasons, such as overpopulation and job relocation, also play a role. A number of authors maintain that there is no universally accepted definition for migration.[10] However, the one aspect that is clear is that the definition of migration should not be limited to the movement of individuals between countries, but should also include movement within the borders of a specific country. Kalitanyi and Visser define migration as "the movement of people across country (and state) lines, for the purpose of establishing a new place or seeking peace and stability".[11] This definition is deemed to be appropriate for purposes of this chapter and the rest of this dissertation.

There are different forms of migration, such as economic or labour migration. Labour migration could be divided into unskilled and skilled labour migration, as well as business migration. Other forms of migration include migration associated with family reunion and refugees. Refugees can be divided into conventional refugees[12] and asylum-seekers.[13] Labour migration focuses specifically on migrant workers. These individuals move between countries in search for employment. This form of migration is aided by improved transportation and communication systems around the world. According to Dupper, labour migration is affected by so-called "push" and "pull" factors. Migrant workers leave their country in search of better living conditions and a brighter future. Poor living and working conditions are push factors, while the

[9] Kalitanyi and Visser (2010) *SAJEMS* 377.
[10] See Kalitanyi and Visser (2010) *SAJEMS* 377 referring to Goetz, Migration and local labour markets (1999) *The web book of regional science,* Penn State University 18 and Helton People movement: The need for world migration organization (2003) available on http://www.cfr.org/publication/5950/people_movement.html visited on 2013/06/10.
[11] Kalitanyi and Visser (2010) *SAJEMS* 377.
[12] According to the Geneva Convention.
[13] Becker and Olivier (2008) 123.



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availability of decent work is a pull factor.[14] In modern times, migration is regarded as a type of career, rather than a passing phase to improve living standards.[15]

## 4.3 CATEGORIES OF MIGRANT WORKERS

There is no commonly accepted concept of a migrant worker. Different international standards aim to provide a definition when dealing with international migration. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 defines a migrant worker as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national".[16]

The categories of migrants recognized in South Africa are: permanent and temporary residents, refugees and asylum-seekers, and irregular or undocumented non-citizens.[17] A permanent resident is a non-citizen who has been granted permission to reside in the country indefinitely.[18] According to a number of South African Constitutional Court judgments, permanent residents are given the same treatment afforded to nationals.[19] A temporary resident is a non-citizen who has been granted permission to enter and/or reside in South Africa for a specific period of time.[20] An example of temporary residents would be workers who have entered into labour agreements, which are normally enforceable for between 12 and 18 months. Temporary residents are issued a permit to reside in the country for a certain period of time on the condition that the non-citizen is not a "prohibited or undesirable person".[21]

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[14] Dupper (2007) *Stell LJ* 219.
[15] Olivier (2011) Part 1 *SADC Law J* 125.
[16] A 2 of International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990.
[17] As stated in the previous chapters the term 'irregular migrants' will be used to describe undocumented or illegal immigrants or any derivative of these terms. See also the Immigration Act 13 of 2002 and the Refugees Act 130 of 1998 for the categories of migrants recognized in South Africa.
[18] Olivier (2011) Part 1 *SADC Law J* 136.
[19] *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).
[20] Olivier (2011) Part 1 *SADC Law J* 136.
[21] S 29 and 30 of the Immigration Act 13 of 2002.



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Refugees are individuals who have been granted asylum within the South African borders in accordance with the Refugees Act.[22]Asylum-seekers, on the other hand, are persons who are seeking recognition as a refugee or whose refugee status in South Africa has not been confirmed. When dealing with refugees, the Refugees Act should be read together with international standards.[23] The social protection available to asylum-seekers is limited. It is difficult for these individuals to gain access to social protection until their status as a refugee has been determined.[24] They are excluded from the social security system in South Africa, and especially social assistance, but are allowed to work and study.[25]

An irregular or undocumented non-citizen is a person within the South African borders without the necessary permission to stay in the country or who is in the country in contravention of immigration laws.[26] This includes persons who have entered the country without the appropriate documentation, such as a visa or permit, or even an individual who resides in the country beyond the date on the visa or permit issued to them. Irregular migrants are regarded as illegal non-citizens and will be deported when arrested. Irregular migrants form part of specific vulnerable groups maltreated in migrant-receiving countries.[27] The irregularity of this group of migrants is not a permanent migration status. It may be remedied, either when the migrant-receiving country changes the status of the migrant or when the migrant worker returns to an area where his or her stay is permitted.[28] In South Africa most of the irregular migrants migrate from Swaziland, Angola, Mozambique and Zimbabwe.[29]

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[22] 130 of 1998. S 1(iv), (v) and (xv). Furthermore, a 1A(2) of the Convention Relating to the Status of Refugees, 1951 (modified by the 1967 Protocol) defines a refugee as a person who, "[o]wing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". See also Dupper (2007) *Stell LJ* 221.

[23] S 1A of the Refugees Act indicates that it should be interpreted and applied 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.

[24] Olivier (2011) Part 1 *SADC Law J* 139.

[25] *Minister of Home Affairs & Others v Watchenuka & Another* [2004] 1 All SA 21 (SCA). See also Olivier (2011) Part 1 *SADC Law J* 139.

[26] Olivier (2011) Part 1 *SADC Law J* 139.

[27] Smit (2007) *TSAR* 712.

[28] Noted by Dupper (2007) *Stell LJ* 223.

[29] Van der Elst (2011) *TGW* 144 and 145.



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Migrant workers tend to perform migrant or flexible jobs.[30] These migrants often suffer poor working conditions that are much worse than the working conditions of their country's own citizens. One of the continuities South Africa has with its past is that most of the migrant workers entering South Africa are unskilled or semi-skilled workers.[31] The unauthorized status of irregular migrant workers tends to make them more vulnerable and subject to deportation or arrest at any time. They have limited or no access to social benefits and labour rights. Even if in some instances they do have certain rights afforded to them, these migrants will generally not rely on these rights, owing to the fear of being prosecuted by the authorities.[32] There is an apparent link between migration policies in different countries and access to social protection, as irregular migrant workers and asylum seekers are commonly excluded from social security.[33]

## 4.4 THE REGULATION OF MIGRANTS

### 4.4.1 International Instruments

According to Millard:

> "[m]igration has to be managed on two levels, namely, politically, by harmonizing the laws that deal with immigration, and on a social protection level, by aligning the protection measures that exist at a national level."[34]

The matter of citizenship is generally regulated by the receiving-country's national laws specifically relating to migration. The territorial sovereignty of each country plays a significant role, and it is acknowledged that each state has the power to regulate the physical domain of the country with regard to international law.[35] Therefore, countries are allowed to set limitations on the use of their country by non-citizens. This principle is reflected by the International Convention on the Protection

[30] Dupper describes migrant jobs or so called flexible jobs as "jobs that are dirty, dangerous and difficult (so-called '3-D' jobs), which once they become 'migrant jobs', tend to remain migrant jobs." Dupper (2007) *Stell LJ* 220. See also International Labour Office *Towards a Fair Deal for Migrant Workers in the Global Economy* (2004) 10.
[31] Crush *et al* in Cholewinki*et al* (2009) 255.
[32] Dupper (2007) *Stell LJ* 220.
[33] Vonk (2002) *EJSS* 317.
[34] Millard (2008) *AHRLJ* 40.
[35] Dupper (2007) *Stell LJ* 222.



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of the Rights of All Migrant Workers and Members of their Families, 1990 (the International Convention).[36] It states that:

> "[n]othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families".[37]

The United Nations' (UN) regulatory framework with regard to migration falls evenly within the ILO's sphere of aptitude. The UN adopted the International Convention in 1990, while the ILO was circumvented. This convention is described as the "epitome of international human rights" and is regarded as one of the essential human rights instruments for vulnerable groups all around the world.[38] The International Convention has a total of 35 ratifications.[39] The fact that it took so long to obtain a sufficient number of signatory states to ratify the International Convention is indicative of the fact that there is a broad reluctance to adopt conventions that protect the human rights of migrants in general and irregular migrants in particular.[40]

The International Convention has four stated purposes, namely:

- to unify the body of law applicable to migrant workers;
- to complement other instruments;
- to improve the distinctive status of migrant workers and their families; and
- to reduce clandestine trafficking.[41]

It suggests that whenever state parties consider regularizing the status of any irregular migrant in accordance with appropriate national legislation and bilateral or multilateral agreements, the following circumstances must be considered: the proper recording of the circumstances under which they enter a country, the extent of their stay in the country of employment and other relevant factors, especially those relating to family conditions.[42]

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[36] 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.
[37] A 79.
[38] Dupper (2007) *Stell LJ* 226.
[39] Dupper "Migrant workers and the right to social security: An international perspective" in Becker and Olivier(2008) 35 – 36 confirms that 20 ratifications were needed for the Convention to come into force.
[40] Taran "Human rights of migrants: Challenges of the new decade" (2000) *International Migration* 18 as referred to by Dupper (2007) *Stell LJ* 227 and 240; Dekker (2010) *SA Merc LJ* at 392 points out that there is a "fear that irregular migration may increase" if human rights protection is extended to irregular migrants.
[41] Preamble of the Convention.
[42] A 69(2).



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In *Discovery Health* (BLLR),[43] which was discussed in Chapter 3, the court stated that despite the fact that it has not been ratified by many countries,[44] the International Convention "remains a significant statement of international norms in relation to the rights of migrant workers". The International Convention includes the following categories of migrant workers, namely: frontier workers, seasonal workers, seafarers, workers on offshore installations, itinerant workers, project-tied workers and self-employed workers.[45]

The preamble of the Constitution of the ILO[46] accentuated the "protection of the interests of workers when employed in countries other than their own".[47]The ILO has conventions dedicated to migrant workers' social security in particular and social protections in general.[48]Two of the most important conventions dealing with aspects of social security are, namely, the Equality of Treatment (Social Security) Convention, 1962 (No 118), which states that migrants should be given the same coverage and entitlement to benefits as citizens of the country they are residing in, and secondly, the Maintenance of Social Security Rights Convention 1982 (No 157), which states that migrants should be allowed to receive the benefits they are entitled to, even when they travel outside of the borders of the country that is obliged to make the benefits available. Both of these conventions focus on the social assistance and social insurance strands of social protection.

As mentioned in previous chapters, the ILO has adopted conventions, recommendations and standards regulating the international world of labour.[49] The ILO's Migration for Employment Convention, 1949 (Revised) (No 97),[50] together with the Migration for Employment Recommendation (Revised), 1949 (No 86), contain

[43] *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC) par 46.
[44] South Africa has not ratified the International Conventions. However, the court may consider its terms. See *Discovery Health Limited v CCMA &others* [2008] 7 BLLR 633 (LC) par 46.
[45] Part V of the Convention (aa 57 – 63).
[46] As revised. Constitution of the International Labour Organization (April 1919).
[47] Preamble of the Constitution of the ILO available at http://www.ilo.org/public/english/bureau/leg/download/ constitution.pdf visited on 2012/12/20. Dupper (2007) *Stell LR* 225 also mentions that "[a]t the First Session of the International Labour Conference in 1919, a recommendation [The Reciprocity of Treatment Recommendation, 1919 (N0 2)] was adopted which already reflected the two main aims of the ILO in this area, namely equality of treatment between nationals and migrant workers, and coordination of migration policies between States."
[48] As discussed in Chapter 2.2.3.
[49] As discussed in Chapter 2.2.3.
[50] Convention 97 of 1949.



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standards regarding the organization of migration and equality of treatment. Convention 97 of 1949 is more elaborate than the earlier conventions concerning migration, and reveals a flexible reaction to the needs of migrant workers.[51]

The ILO recognizes that irregular migrants, and to some extent regular migrant workers, are subject to abuse by employers. Convention 143 of 1975[52] acknowledges that migrant workers are entitled to compensation for work they have already done. This could include any contribution they made to, for example, a pension fund, medical aid or unemployment insurance. This convention further states in article 3 that every member must adopt the necessary methods to restrain the secret movement and illegal employment of migrants. These measures are implemented to abolish the abuse of migrant workers. This article is clearly structured to exclude illegal movement, as well as illegal employment and working conditions, thus limiting the scope of this convention.

Convention 143 of 1975 applies the concept of equality through various articles. Dupper states that this convention is an improvement over Convention 97 of 1949.[53] Convention 143 of 1975 acknowledges irregular migrant workers and indicates that in some instances the migrant worker will not be regarded as irregular despite the lack of necessary documentation. Article 8 states that, on the condition that the migrant has legally resided in a country for the purpose of employment, the migrant worker shall not be regarded as illegal or irregular merely because of the fact that he or she has lost his or her employment. Furthermore, it will not imply the withdrawal of the authorization of residence or a work permit, if it has been granted.

These two conventions draw no distinction between permanent migrant workers and temporary migrant workers. The conventions do, however, exclude a number of different categories of migrant workers.[54] Despite the improvement of the different

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[51] See also the discussion with regard to the ILO standards dedicated to labour security in Chapter 2.2.3.4.

[52] Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers. Entry into force: 09 Dec 1978.Hereinafter Convention 143 of 1975.

[53] Dupper (2007) *Stell LJ* 230.

[54] Convention 97 of 1949 referrers to frontier workers in par 112. A 2 of the UN International Convention defines the term 'frontier worker' as "[a] migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a



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conventions with regard to the regulation of the protection afforded to migrant workers, a number of problems still remain. These relate to a situation where the citizens of the country are treated badly, and where migrant workers will consequently be affected negatively if they must be treated in the same manner as the migrant-receiving country's citizens. Furthermore, migrants mostly perform jobs not done by the nationals themselves,[55] and therefore drawing a comparison is almost impossible.

Neither of these conventions makes a distinction between regular and irregular migrants in particular. Article 6 of the Convention 97 of 1949 makes provision for the equal treatment of migrant workers and other workers within member states in, among other things, the areas of employment rights, social security rights and accommodation rights.[56] However, it specifically provides that the protection applies to nationals and "immigrants lawfully within its territory".[57] Lastly, none of the ILO instruments explicitly protects migrant workers in an irregular situation. This vulnerable group of individuals has never been included in the protection provided by these conventions.[58]

The ILO encourages the adoption of bilateral agreements to manage the flow of migration between countries.[59] These agreements are formed to regulate the

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week." A 11.2(b) in both Conventions exclude members of the liberal professions and artistes, who are given permission to enter for an (undefined) short duration; A 11.2(d) of Convention 143 of 1975 refers to persons coming specifically for the purposes of training and education; and lastly A 11.2(e) of Convention 143 of 1975 excludes employees of organizations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments for a limited and defined period of time and who are required to leave that country on the completion of their duties or assignments.

[55] Referred to as'migrantjobs'. See Dupper (2007) *Stell LJ* 220.

[56] See Olivier (2012) Part 2 *SADC Law J* 146 – 147. Article 6(1)(b) of ILO Convention 97 of 1949 on the Migration for Employment (Revised Convention) provides that ratifying countries undertake to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of, among other things, but subject to certain limitations, social security.

[57] A 10 of Convention No 143 of 1975 mirrors article 6 in relation to the position of nationals and regular migrants. It provides that states that have ratified the Convention undertake to guarantee "[e]qual opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their familiesare lawfully within its territory".

[58] Dupper (2007) *Stell LJ* 230. However, the UN International Convention extends to irregular migrant workers as well.

[59] Migration for Employment Recommendation (Revised), 1949 (No 86), Migration for Employment Convention (Revised), 1949 (No 97) and Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143).



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obligations of the signatory country in order to lessen the disadvantages that migrants face.[60] There are five important principles to consider when establishing international agreements. These are: (a) equality of treatment; (b) determination of applicable legislation; (c) maintenance of acquired rights; (d) maintenance of rights in course of acquisition; and (e) payment of benefits abroad.[61] International agreements use five methods to improve the disadvantaged position of migrants.

These were stated by Roberts[62] as follows:

> "[e]quality of treatment, or the prohibition of discrimination on grounds of nationality in respect of rights and obligations under the legislation of each of the contracting parties; provisions to ensure that migrant workers are not insured in either country's scheme and thus without any social security protection and to prevent them being insured in both; aggregation of periods of insurance spent in each of the countries when calculating entitlement to benefits; proratarization - that each of the countries pays a proportion of the pension determined by the period of insurance spent in each; and export of benefits."[63]

These agreements do have their advantages and provide some protection to migrants in the field of social protection. However, this protection is still not sufficient, and still has a number of shortcomings. One of the factors influencing the sufficient implementation of agreements is the member countries' territorial sovereignty. This is defined as the country's right to determine who should and who should not have access to social protection, whether it is in the form of social security or any of the other elements of social protection.

These agreements do not succeed in putting the principles established at the multilateral level and determined by international conventions into practice. One of the reasons for this is that migrants flow from many more countries than they did a

[60] ILO *Introduction to Social Security* (1989) ILO Geneva 152.
[61] See ILO *Standards for the XXIst Social Security* (2002) ILO Geneva 41 – 44. Also see the Equality of Treatment (Accident Compensation) Convention, 1925 (No 19); the Migration for Employment Convention, 1966 (No 66); and the Maintenance of Social Security Rights Convention, 1982 (No 157).
[62] These reports were tabled by Roberts during the International Research Conference on Social Security held at Helsinki on 25 – 27 September 2000 under the theme "Social Security in the Global Village". Available at https://dspace.lboro.ac.uk/dspace-jspui/bitstream/2134/2677/2/2roberts.pdf visited on 2013/06/11.
[63] Roberts in Sigg&Behrendt (2002) 214. See also Becker and Olivier (2008) 32.



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few years ago.[64] Furthermore, the protection provided by the bilateral agreements between the affected countries is inconsistent.[65] The benefits included in the agreements do not make provisions for all occurrences. Lastly, these agreements have certain limitations, as they usually do not extend to migrants of a third country. Those migrants whose country is not a party to an agreement are thus dependent upon the benefits offered by the host country. These benefits would differ from country to country.[66]

### 4.4.2 National Instruments

#### 4.4.2.1 Introduction

When regulating migration in any country, the national laws applicable should ideally always be in line with the international standards, as the migrants should be protected as international citizens of the world. According to Crush *et al*, "South Africa has a long history of abusing migrants' rights".[67] The enduring abuse of migrants' rights even after the apartheid era has been apparent in three central areas. The first is at the community level, where there is growing prejudice against non-citizens in South Africa.[68] Secondly, the workplace is another area where migrants' rights are abused, since migrant workers are a vulnerable group and would not risk deportation to report bad working conditions.

Lastly, on the streets of some of the biggest cities in South Africa, the police initiated attacks on irregular migrants, which resulted in waves of xenophobia in migrant communities.[69] In 2001,former president Thabo Mbeki stated that South Africa's intimate relationship with the rest of the African continent "is illustrated by the significant number of fellow Africans who have sought to settle in South Africa" and that "it is fundamentally wrong and unacceptable that we should treat people who come to us as friends as though they are our enemies."[70]

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[64] Becker and Olivier (2008) 32.
[65] *Ibid.*
[66] Some bilateral and multilateral agreements between South Africa and its neighbouring countries within the SADC region will be discussed in the following chapter.
[67] Crush *et al* in Cholewinski*et al* (2009) 247.
[68] An example of the growing intolerance by citizens is the incidence of verbal or physical attacks on non-citizens. See also Crush *et al* in Cholewinski *et al* (2009) 257.
[69] Crush *et al* in Cholewinski*et al* (2009) 257.
[70] President Thabo Mbeki in *ANC Today*, May 2001. Available on



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The Constitution affords human rights protection to everyone in the country.[71] South Africa also guarantees the right of freedom of movement.[72] This right is not limited to citizens only.[73] Many outsiders where stunned by the fact that South Africa, with one of the most progressive constitutions[74] in the world, could at the same time treat migrants with disregard for their basic human rights.[75] South Africa has developed legislative instruments to give effect to the international instruments ratified by the country in order to regulate the flow of migration and the rights afforded to migrants.

The South African government revised its migration legislation and introduced mechanisms through which labour markets could be accessed.[76] This contributed to the rising number of migrants flowing into the country from the rest of Africa.[77] Some of the most important acts and instruments concerning migration will be discussed in the order that they were promulgated. The impact that these instruments have had on the regulation of the ongoing flow of migration into South Africa will form part of this discussion.

#### 4.4.2.2 The Aliens Control Act and Refugees Act

Before 2002, migration in South Africa was governed by the Aliens Control Act[78] (ACA). The ACA refers to migrants as 'aliens'. The ACA defines an 'alien' as a person who is not a South African citizen.[79] The ACA regulated entry into the country in one of two ways. Firstly, it was regulated by way of bilateral agreements.[80] These agreements between the country and its neighbouring states indicated the specific terms under which migrants could enter and work in the country, specifically in the mining industry.[81] Secondly, regulation of migration was done through the provisions of the ACA itself. The ACA prescribed and developed mechanisms to control

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http://www.queensu.ca/samp/sampresources/samppublications/policyseries/Acrobat22.pdf visited on 2013/08/02. See also Crush *et al* in Cholewinski *et al* (2009) 263.

[71] Chapter 2 of the Constitution.

[72] S 21.

[73] The relevant section refers to "everyone".

[74] Including the Bill of Rights contained in Chapter 2 of the Constitution.

[75] As indicated previously. See also Crush *et al* in Cholewinski *et al* (2009) 258.

[76] The Immigration Act 13 of 2002 was developed.

[77] Crush *et al* in Cholewinski *et al* (2009) 250.

[78] 96 of 1991.

[79] S 1 of the ACA as the definition was substituted by s 5 of the Abolition of Restrictions on Free Political Activity Act 206 of 1993.

[80] Crush *et al* in Cholewinski *et al* (2009) 261.

[81] These agreements will be discussed in Chapter 5, where there will be a comparison drawn between South Africa and some of its neighbouring countries.



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migration.[82] The ACA continued to regulate the practices that were developed during the era of the former National Party government, and most of the provisions of the ACA were found to be unconstitutional and inconsistent with the Constitution.[83] The effect of this inconsistency was the development of new legislation.[84]

The Refugees Act[85] acknowledged and integrated international standards into its regulation of refugees situated in South Africa.[86] According to the provisions of the Refugees Act, migrants have rights and obligations while they are inside the borders of the country. This group of individuals is entitled to full legal protection, including the human rights entrenched in the Bill of Rights. Among other things, refugees are allowed to receive formal written recognition of their status as a refugee in South Africa.[87] Furthermore, refugees have the right to receive basic health services and education similar to what residents receive.[88]

The Refugees Act currently makes a distinction between refugees and asylum-seekers.[89] The Refugees Act permits refugees to seek work in South Africa,[90] but do not have a similar provision with regard to asylum-seekers. There is only one fundamental obligation imposed on the refugee in the country, which is that the refugee must abide by the laws of the Republic of South Africa.[91] The legislation dedicated to the regulation of refugees is, in most instances, comprehensive in its

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[82] The preamble to the ACA acknowledged that the act was developed "to provide for the control of the admission of persons to, their residence in, and their departure from, the Republic; and for matters connected therewith."

[83] Crush *et al* in Cholewinski *et al* (2009) 261.

[84] The Immigration Act 13 of 2002, which was not substantively different from the objectives of the ACA. As discussed under subsection 4.4.2.4 above. See also Crush *et al* in Cholewinski *et al* (2009) 261.

[85] 130 of 1998.

[86] The preamble states that "[w]here as the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the I969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law."

[87] Indicated by s 27 of the Refugees Act, as well as the right to receive an identity document in accordance with s 30.

[88] S 27(g) states that refugees are "[e]ntitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time."

[89] Refugees are defined in s 1 as individuals who have been granted asylum in accordance with the provisions of the Refugees Act, whereas asylum-seekers are persons who are seeking recognition as refugees in terms of the Refugees Act.

[90] S 27(f) determines that refugees are entitled to seek employment as one of the rights allocated to refugees.

[91] S 34 of the Refugees Act.



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objective to protect the rights of refugees. Asylum-seekers, on the other hand, do not receive the same treatment as refugees or other residents, as they are still awaiting the confirmation of their status.

#### 4.4.2.3 The White Paper on International Migration

The White Paper on International Migration (the White Paper)[92] was developed aiming to deal with migration in a global context, as well as facilitating South Africa's integration into SADC. The White Paper divides migrants into three different categories, namely those with the willingness to stay in the country permanently, individuals who do not want to stay in the country on a permanent basis and refugees.[93]

The White Paper acknowledges that there are no constitutional grounds for the exclusion of the application of the Bill of Rights in the Constitution based on the status of an individual, including irregular migrant status.[94] However, the White Paper accepts the following as one key guiding principle: "the migration system should enable Government to retain control on who may enter the country and the conditions and length of his or her stay."[95] This could be seen in the same light as the international organization's acknowledgement of different states' sovereignty,[96]which indicates that each country, including South Africa, has the right to exercise its sovereignty and decide who may enter the country and the period for which they may remain.

Furthermore, the White Paper investigated the community's needs and recognized, *inter alia*, the following priorities:

- "ensuring that illegal aliens do not take available job opportunities away from community members and do not compete with them for scarce public services;

[92] Available on http://www.info.gov.za/whitepapers/1999/migrate.htm visited on 2013/07/23.

[93] In a 14 of the White Paper different migrants are defined which would fall within the three categories above. These are for example "[m]igration means to travel so as to temporarily change one's place of residence; and immigration means to enter another country in order to make one's permanent life and home there."See also Sebola (2011) *JPA* 1057 and Majodina (2001) 141.

[94] In a 2.2 the limitation clause incorporated in the Constitution is recognized, and it is further stated that, despite the limitations acknowledged by this clause, "[t]he limitation clause may not be invoked to prevent a class of people, however identified, from enjoying the total use and benefits of a given constitutional right."

[95] A 4.1 of the *White Paper* 10 – 11.

[96] The International Convention in a 42(3) indicates that migrants may enjoy political rights if the migrant-receiving government grants them these rights through the state's sovereignty.



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- ensuring that illegal aliens do not become public charges or become involved in criminal activities;
- ensuring that education is provided at community level to avoid any form of xenophobia by making communities understand the tragedy of illegal immigration while cooperating with law enforcement authorities;
- ensuring the resettlement of refugees and ensuring that they are not confused with illegal immigrants."[97]

The priorities of the White Paper focus on the protection of the community against irregular migrants, as it is indicated that they should not be able to take available jobs. It would appear that the priorities are centred against irregular migrants entering the country, since there are measures taken to ensure that the community is aware of the flow of migration from the point of view that it is a "tragedy". Despite this point of view, the White Paper gives an indication of the country's willingness to be part of the refugee matter worldwide and to administer its public administration internationally.[98] The White Paper never came into force in South Africa. The White Paper establishes fairness with regard to migrants entering the country. The implementation of the White Paper could have been of significant value in bringing the South African immigration law in line with the international norms regarding migration.

#### 4.4.2.4 The Immigration Act

The South African Immigration Act[99] was developed due to the lack of constitutionally aligned legislative instruments regarding migration.[100] The Immigration Act differs from the ACA in two ways: firstly, by identifying the serious problem of xenophobia, and secondly, by referring to the need for skilled workers to migrate to South Africa.[101] However, the Immigration Act focuses on the control of migration in the enforcement of migration law.[102] Section 2 of the Immigration Act establishes a list of main objectives. These objectives intend to, *inter alia*, facilitate the legal movement of people into and out of South Africa; prevent irregular

[97] A 5 of the *White Paper* 14.
[98] Sebola (2011) *JPA* 1057.
[99] 13 of 2002. Hereinafter the Immigration Act.
[100] As seen under the provisions of the precursor, the Aliens Control Act 96 of 1991, discussed in the next part of this chapter.
[101] The preamble of the Immigration Act states that "(m) xenophobia is prevented and countered both within Government and civil society."
[102] Crush *et al* in Cholewinski*et al* (2009) 262.



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migration into South Africa; and decrease the administration associated with permits.[103]

Furthermore, the Immigration Act has certain objectives with the specific intentions of regulating labour migration and improving economic growth. It aims to reduce the unlawful migration of unskilled workers in particular, and at the same time encourage people with skills needed in the country to migrate to South Africa.[104] This could be seen as an indication that there is a willingness to develop labour security and to integrate the laws associated with labour security with those legislative instruments regarding migration. The Immigration Act makes it a condition for different government and private institutions and sectors to become involved with the execution and enforcement of migration law.[105]

The Immigration Act establishes different ways in which persons can migrate legally to South Africa.[106] Unlike the international instruments, South Africa draws a distinction between temporary and permanent residents. Section 9(4)(b) of the Immigration Act determines that non-South African citizens may enter and remain in the country only if they have a permanent residence permit or one of 14 different kinds of temporary residence permits.[107] Persons with permanent residence permits[108] may stay in the country indefinitely and temporary residents only temporarily.

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[103] S 2 of the Immigration Act. See also Crush *et al* in Cholewinski*et al* (2009) 262.

[104] S 2(j) states that the Act aims to regulated "[t]he influx of foreigners and residents in the Republic to – (i) promote economic growth, inter alia. by –(aa) ensuring that businesses in the Republic may employ foreigners who needed; (bb) facilitating foreign investments, tourism and industries in the Republic which are reliant on international exchanges of people and personnel; (cc) enabling exceptionally skilled or qualified people to sojourn in the Republic; (dd) increasing skilled human resources in the Republic; (ee)facilitating the movement of students and academic staff within the Southern African Development Community for study, teaching and research; and (ff) promoting tourism; (ii) where applicable. Encouraging the training of citizens and residents by employers to reduce employers' dependence on foreigners' labour and promote the transfer of skills from foreigners to citizens and residents".

[105] S 44 establishes the duties and obligations afforded to the different organs of the state. S 45 regulates the duties and obligations of other institutions.

[106] Ss 10 – 24 regulate permits afforded to temporary residents, while ss 25 – 31 are used to regulate permanent residence.

[107] Ss 10 – 24 of Act 13 of 2002. The different temporary residence permits are: visitor's permit; diplomatic permit; study permit; treaty permit; business permit; crew permit; medical treatment permit; relative's permit; work permit; retired person permit; corporate permit; exchange permit; asylum; and cross-border and transit passes.

[108] S 25 of Act 13 of 2002 provides that "(1) [n]o person shall employ – (a) an illegal foreigner; (b) a foreigner whose status does not authorise him or her to be employed by such person; (c) a



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Permanent residence is allocated to migrants under certain conditions.[109] The holder of a permanent residence permit has the same rights, obligations, duties and privileges that the citizens of South Africa have, excluding, *inter alia*, those rights and duties specifically allocated to citizens only.[110] A permanent residence permit could be issued to a holder of a work permit for five years who has received an offer of permanent employment.[111] The department may also issue permanent residence permits to a person with a sound and good character and with an offer of permanent residence.[112]

There are a number of permits allocated to temporary residents.[113] These permits are considered to be in force after the allocation of the permit and will only be issued if the holder is not a prohibited or undesirable person.[114] Cross-border permits are issued that 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",[115] these permits do not allow the holders to trade. In South Africa, only citizens are allowed to choose their own trade, occupation or profession.[116]

Section 32 of the Immigration Act instructs that an irregular non-citizen is required to leave, unless allowed by the Department to remain in the Republic awaiting an application for a status. It is specifically stated that "any illegal foreigner shall be deported". South African migration law efficiently utilizes a means of survival test to

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foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status. (2) An employer shall make a good faith effort to ascertain that no illegal foreigner is employed by him or her or to ascertain the status or citizenship of those whom he or she employs."

[109] S 25(3) states that a permanent residence permit may be issued under the condition that the holder does not become a prohibited person and is subject to s 28 of the Immigration Act.

[110] S 25(1) of the Immigration Act.

[111] S 26 of the Immigration Act.

[112] S 27 indicates the other grounds on which residence could be afforded to migrants.

[113] As regulated by ss 10 – 24 the permits associated with temporary residence are: Visitor's permit; Diplomatic permit; Study permit; Treaty permit; Business permit; Crew permit; Medical treatment permit; Relative's permit; Work permits; Retired person permit; Corporate permit; Exchange permit; Asylum; and Cross-border and transit passes.

[114] S 10(4) of the Immigration Act.

[115] S 24 of the Immigration Act.

[116] S 22 of the Constitution states under the heading of "[f]reedom of trade, occupation and profession", that "every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law".



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assure that only those who can support themselves are allowed to come into and stay in South Africa.[117]

As pointed out by Olivier,[118] one of the crucial provisions of the Immigration Act is that a temporary residence permit is issued on condition that the non-citizen does not become a "prohibited or undesirable person". One of the conditions is that a person should not become a "public charge". This could become a severe restriction to non-citizens who lose their temporary residency and may even imply that those who apply for social assistance could lose their right to remain in the country in terms of the Immigration Act. There are merits in Olivier's argument that the migration policies (and legislative instruments) and social protection measures should be bought in line with each other.

## 4.5 CONCLUSION

Migration is a rising trend that forms part of everyday life. Migration is the constant flow of persons between countries, as well as people moving within their own country. There are a number of reasons responsible for migration. Some of these are for food, shelter and better work conditions. The factors that almost always play a significant role are the migrant's search for better living standards and providing for his or her family.

The different forms of migration are important considerations when dealing with the protection or benefits that migrants are entitled to. Labour migration is a significant concept when the social protection afforded to migrant workers is examined. This form of migration deals with skilled as well as unskilled workers, and therefore also includes migrant workers employed in the informal sector. Migrant workers are seen as a vulnerable group of individuals, and thus need protection from exploitation by the employer and eviction by the authorities. Migrants are treated differently depending on their migration status. Migrants are not eligible for the same social protection that is available to the citizens of the host country. Furthermore, regular and irregular migrants are not entitled to the same benefits either. There are a

[117] S 30(1)(a) read together with s 10(4). See also Olivier (2012) Part 2 *SADC LJ* 130 and Olivier (2011) Part 1 *SADC Law J* 138.
[118] See Olivier (2011) Part 1 *SADC Law J*137 and ss 29 – 30 of Act 13 of 2002.



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number of limitations to the social protection that irregular migrant workers will receive.

When regulating migration, not only legislative instruments are of significance. The ILO encourages the adoption of bilateral and multilateral agreements between countries affected by migration. These agreements are established according to different international standards, and aim to equalize the availability of social protection to all individuals. Despite the vital role that bilateral agreements between migrant-receiving and migrant-sending countries play in defining and developing the rights of migrant workers to social protection, these agreements still have their shortcomings.

International standards recognize the territorial sovereignty of each country over its physical domain. Regardless of the authority of every state to manage the flow of migration in and out of the country, international legislative instruments must be considered. These instruments aim to protect migrant workers who leave their own countries in search of employment to improve their living standards. The ILO and UN play significant roles in the development of the concept of migration and the removal of the obstacles that these individuals face on a day-to-day basis.

The UN adopted the International Convention in 1990. It took a number of years for the convention to come into force. The convention places a significant responsibility on countries affected by the flow of migration. It is the most comprehensive instrument where the position of migrant workers is concerned, but inevitably overlaps with the ILO instruments.[119] Despite the good intentions of international organizations to protect all workers, regardless of their migration status, there are still some groups that are not included under the umbrella of social protection.

It is clear through the course of migration in and out of South Africa that the legislative measures do not provide proficient protection for migrant workers. When the employment contract, if any, of a migrant worker comes to an end, the worker is

[119] Dupper (2007) *Stell LJ* 227.



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required to leave the country as soon as possible.[120] The Immigration Act aims to strike a balance between the desires of the South African economy for exceedingly skilled workers and the apprehension that the working conditions of migrant workers may weaken existing labour markets and practices.[121] It attempts to accomplish this by limiting the flow of unskilled migrant workers into South Africa.

Most of the SADC migrants who are semi-skilled and enter the country for employment reasons cannot qualify for a work permit under the different categories in the Immigration Act. The South African government, through legislation and developing policies, is able to give preference to migration laws over labour and social protection laws.[122]

[120] This period has been recorded as being between 24 and 48 hours. See also Olivier (2012) Part 2 *SADC Law J* 131.
[121] Olivier (2011) Part 1 *SADC Law J* 137 – 138.
[122] Olivier (2012) Part 2 *SADC Law J* 131.



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# CHAPTER 5
# REGIONAL STANDARDS AND A COMPARATIVE PERSPECTIVE


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## 5.1 INTRODUCTION

South Africa is the largest host country of migrant workers in the Southern African Development Community (SADC).[1] One of the most important reasons for labour migration from other SADC countries to South Africa is the availability of work in the South African gold mines.[2] There are both migrant-sending and migrant-receiving countries in SADC.[3] Within SADC, the majority of migrants target countries with stronger economies.[4] These include South Africa Namibia and Botswana.[5] Most foreign migrants entering South Africa are from SADC countries, such as Mozambique and Lesotho.[6]

[1] Olivier (2011) Part 1 *SADC Law J* 127.
[2] Crush *et al* in Cholewinski*et al* (2009) 253.
[3] Mpedi and Smit (2011) 1.
[4] Dekker (2010) *SA Merc LJ* 390.
[5] *Ibid*.
[6] Mokgoro (2010) *Stell LJ* 221.



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The International Organization for Migration's Standing Committee on Programmes and Finances defines migration as involving "a diverse group of people, including regular and irregular migrants, victims of trafficking, asylum seekers, refugees, displaced persons, returnees, migrant workers and internal migrants".[7]

The majority of migrants to SADC countries come from other SADC countries.[8]It is widely accepted that SADC is a deprived and poor region.[9] Poverty, unemployment, low levels of education, HIV/Aids and irregular migration pose significant socio-economic challenges to the governments of these developing countries. These significant socio-economic problems are all contributing factors to the increase in the competition for available resources in the SADC region. Each country in the SADC region faces its own problems regarding economic growth, social poverty and the uniqueness of the citizens of that specific country. The different SADC countries have developed their own legislative instruments to deal with migration, social protection and labour, which are unique to their own systems of law and their community's needs.

International, continental and regional norms relating to social protection and migrant workers have been adopted. In addition to this, a number of the constitutions of African countries contain the right to some form of social protection as a human right.[10] During the assessment of the regional standards, a comparison will be drawn between South Africa and some of its neighbouring countries in the quest to establish whether South Africa can learn something from the developments that occurred in the countries or the mistakes made by the different countries. In this chapter, reference will be made to specific agreements[11] concluded between South Africa and some of the SADC countries regarding migration and the awarding of

[7] Migration and Health in SADC: a review of the literature 12 available on http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CC4QFjAA&url=http%3A%2F%2Ffreedommedia.co.za%2Fiom%2F%3Fwpdmact%3Dprocess%26did%3DNTUuaG90bGluaw%3D%3D&ei=b9AyUuLXMsKohAevtoHIDQ&usg=AFQjCNG4iEEkGgNDv9qkPGy74Tl7UPb19g visited on 2013/08/13. Hereinafter Migration and Health in SADC.

[8] Olivier (2011) Part 1 *SADC Law J* 123 mentions that "[s]ubject to some exceptions, 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 countries."

[9] Olivier and Mpedi (2004) *JJS* 15.

[10] Fombat (2013) *AJICL* 21/1 1 at 12.

[11] Bilateral, multilateral and labour agreements.



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social protection benefits to the individuals flowing from one country to another for work purposes.

The overarching theme of this chapter concerns the question of the extent to which migrant workers can rely on social protection[12] in the SADC region, and in some specific SADC countries.

## 5.2 THE STRUCTURE OF SADC

The Southern African Development Co-ordination Conference (SADCC) was established in 1980 when nine majority-ruled states formed a loose alliance.[13] On 17 August 1992, in Windhoek, Namibia, the SADC Treaty was signed, transforming SADCC into SADC.[14] The motto contained in the SADC coat of arms reads "Towards a Common Future". Article 3 of the SADC Treaty states that member states shall establish a priority list of relevant conventions (including the ILO's eight core conventions)[15] and take appropriate action to ratify and implement these instruments. This is an indication of SADC's commitment to providing social protection to its inhabitants.

Article 5 of the SADC Founding Treaty establishes that SADC's objectives are the achievement of development and economic growth, alleviation of poverty, enhancement of the quality of life of the people of Southern Africa, and support for the socially disadvantaged through regional integration.[16] The treaty entrusts member states to adopt fundamental values, such as equality of members, solidarity, peace and safety, human rights, democracy and the rule of law, equity, balance and

[12] See the discussion about the terms 'social protection' and 'social security' in Chapter 2.
[13] Tanner (2012) 383.
[14] On 14 August 2001, Heads of State and government signed an agreement amending the SADC Treaty.
[15] The ILO has adopted numerous conventions that provide for social security and labour protection in general that also indirectly relate to migrants. The ILO has identified eight conventions as the fundamental conventions of the ILO. These are, namely, the Forced Labour Convention, 1930 (No 29);the Freedom of Association and the Right to Organise Convention, 1948 (No 87); the Right to Organise and Collective Bargaining Convention, 1949 (No 90); the Equal Remuneration Convention, 1951 (No 100); and the Discrimination (Employment and Occupation) Convention, 1951 (No 100); the Abolition of Forced Labour Convention, 1957 (No 105); the Minimum Age Convention, 1973 (No 138); the Worst Forms of Child Labour Convention, 1999 (No 184).See Van Niekerk*et al* (2012) 22.
[16] Nyenti and Mpedi (2012) *PELJ* 253.



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mutual benefit.[17]As mentioned by Nyenti and Mpedi, the objectives of the SADC Treaty "envisage a regional collaborative approach, as they can be achieved only through the development of regional social security mechanisms."[18]

There are 15 countries in SADC.[19] SADC has been declared a free-trading zone, which will also increase migration to the different SADC countries.[20] SADC is not a supranational institution. Due to the fact that SADC is based on the principle of sovereign equality of all member states, it could be classified as an organization of an entirely inter-governmental character.[21]

### 5.3 THE SADC PERSPECTIVE ON SOCIAL PROTECTION AND MIGRATION

SADC has made some attempts to promote the extension of social protection and migration among member countries. The countries in the SADC region are increasingly becoming aware of the necessity to coordinate the social protection systems in the region. This awareness has been augmented by the increasing flow of migration and the need for integration in the region.[22] The International Organization for Migration mentions that, according to studies, the SADC states have no common approach towards migration. The report further confirms that the SADC countries' legislative instruments simply focus on the effect of migration. In SADC, most countries view migration as a problem and not as an opportunity.[23]

SADC identifies a number of categories of migrants. These are: migrant/mobile workers,[24] regular migrants/documented migrants,[25] irregular migrants/undocumented migrants,[26] asylum-seekers,[27] refugees,[28] internally

[17] Olivier and Mpedi (2004) *JJS* 14 and Millard (2008) *AHRLJ* 52.
[18] Nyenti and Mpedi (2012) *PELJ* 252.
[19] The SADC member states are: Angola, Botswana, the Democratic Republic of the Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Republic of Seychelles, Swaziland, South Africa, United Republic of Tanzania, Zambia and Zimbabwe.
[20] Dekker (2010) *SA Merc LJ* 390.
[21] Tanner (2012) 388.
[22] Olivier and Mpedi (2004) *JJS* 17.
[23] Olivier (2011) Part 1 *SADC Law J* 127 – 128.
[24] According to international migration law, a migrant worker is a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national. See Migration and Health in SADC 12 and 13.
[25] Refers to people who migrate through recognized, legal channels.
[26] Someone who, owing to illegal entry or the expiry of his or her visa, lacks the legal status in a transit or host country.
[27] Persons seeking to be admitted into a country as refugees and awaiting decision on their



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displaced migrants,[29] economic migrants,[30] trafficked persons,[31] seasonal migrant workers,[32] cross-border traders,[33] labour migrants[34] and internal migrants.[35] These different categories of migrants are regulated and identified by a number of instruments developed by SADC. These will not be discussed, as only the migrants recognized by the South African legislation form part of this research.[36]

SADC's vision is one of common future, with in the SADC community. This vision will guarantee economic security social justice, refuge for people, improvement of quality of live.[37] Furthermore, SADC aims to abolish the obstacles associated with the free movement of labour, capital and people within the SADC region, while harmonising political and socio-economical policies.[38] SADC has made enormous progress in the further development of social protection, while encouraging the member states to undertake the provisions of the different instruments.

SADC shares the vision of the international organizations of establishing bilateral and multilateral agreements between the SADC countries.[39] In 1997, a number of comprehensive objectives were visualized[40] in a Draft Protocol on the Facilitation of

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application for refugee status under relevant international and national instruments.

[28] A person who, "owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" in a 1A(2) of the Convention relating to the Status of Refugees, 1951 as modified by the Protocol relating to the Status of Refugees, 1967.

[29] Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.

[30] A person leaving his/her habitual place of residence to settle outside his/her country of origin in order to improve his/her quality of life. It also applies to persons sett ling outside their country of origin for the duration of an agricultural season.

[31] A person who has been moved by deception, coercion, the threat or use of force and/or other forms of exploitation.

[32] A migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year as stated in a 2(2)(b) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990.

[33] Cross-border migrants who move across an international border for the purpose of trade.

[34] A person who moves from their home country to another, or within their own country of residence, for the purpose of employment.

[35] A person who moves from one area to another within the same country. This movement may be temporary or permanent.

[36] See Chapter 4.4.3.

[37] Mpedi and Smit (2011) 36.

[38] *Ibid*.

[39] Chapter 4.4.4.1.

[40] Available at http://www.unisa.ac.za/contents/faculties/law/docs/DRAFT.pdf visited on 2013/06/26.



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Movement of Persons in the SADC.[41] These objectives were divided into immediate objectives[42] and ultimate objectives.[43] These objectives are mainly focused on the protection of the individual while inside the borders of the country and to eliminate obstacles that may cross their paths. These objectives towards the facilitation of movement by the development of agreements were examined in a Migration Policy Brief in 2006.[44] The SADC Treaty played an important role in the establishment of the Draft Protocol.[45]

The Draft Protocol of 2006 has established a significant point of departure for the facilitation of movement between the SADC countries. However, there are a number of serious practical problems associated with the implementation of the Draft Protocol. The Migration Policy Brief[46] confirms that the Draft Protocol gives no indication as to how it should be implemented in the member states' legislative structures. Furthermore, there are substantial resource and capacity implications associated with the implementation of the provisions of the Draft Protocol. The member state will have to develop logistical mechanisms and appropriate technology. If this protocol could be ratified by member countries and implemented into the countries' structures it would pave the way to thorough agreements.[47]

Despite the efforts of international organizations and SADC to develop legislative instruments and other measures to extend protection to migrant workers, there is still much that needs to be done. Social protection afforded to migrant workers, regardless of their status, is regulated in a restricted way by the different

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[41] The Draft Protocol.

[42] In a 2, the immediate objective are stated as follows: "[t]he immediate objective of this Protocol in relation to every citizen of a Member State is to facilitate – a) entry, for a lawful purpose and without a visa, into the territory of another Member State for a period of three months at a time; b) residence in the territory of another Member State; and c) establishment of oneself and working in the territory of another Member State."

[43] A 3 of the Draft Protocol defines Ultimate Objective as "[t]he ultimate objective of this Protocol is to develop policies aimed at the progressive elimination of obstacles to the movement of persons of the Region generally into and within the territories of Member States."

[44] William and Carr (2006) Southern African Migration Project, The Draft Protocol on the Facilitation of Movement of Persons in SADC: Implications for State Parties, Migration Policy Brief No. 18 6. Available at http://dspace.cigilibrary.org/jspui/bitstream/123456789/30699/1/Migration%20Policy%20Brief%20No.%2018.pdf?1 visited on 2013/06/26.

[45] The Treaty will be discussed in Chapter 5.

[46] William and Carr (2006) Southern African Migration Project, The Draft Protocol on the Facilitation of Movement of Persons in SADC: Implications for State Parties, Migration Policy Brief No. 18 8 – 10.

[47] Millard (2008) *AHRLJ* 57.



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international structures. All of the available instruments and agreements still have limitations and exclude some groups of migrant workers. The good intentions of SADC, for example, with the development of the Draft Protocol are not enough to facilitate free movement and extend protection to all. Most SADC countries simply do not have strong enough economies or sufficient resources to accommodate individuals entering these countries.

The SADC Treaty refers to most aspects associated with the purposes of SADC. However, migration is not regulated in a comprehensive way. The non-discrimination section of the SADC Treaty does not cover discrimination on the grounds of citizenship.[48] Furthermore, the SADC Treaty does not regulate freedom of movement conclusively.[49] SADC has adopted the Charter of Fundamental Social Rights in SADC (the SADC Charter),[50] which includes a number of objectives for promoting social protection in the SADC region. Adapting the objectives of the SADC Treaty, the SADC Charter, among other things, places the emphasis on the harmonization of the social protection of those who have work and those who are striving to enter the job market. Article 10 provides that:

> "[e]very worker … shall have a right to adequate social protection … and enjoy adequate social security benefits. Persons who have been unable to enter or re-enter the labour market … shall be able to receive sufficient resources and social assistance."

It can be argued that article 10(1) (as quoted above) could have suggested that no discrimination is allowed with regard to social protection for workers, including migrant workers, irrespective of their migration status.[51] Other goals include the alignment of policies regarding freedom of association and collective bargaining,[52] equal treatment for men and women,[53] protection of children and young people,[54] protection of elderly persons[55] and protection of people with disabilities.[56]

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[48] A 6(2).
[49] A 5(2)(d) requires SADC to "[d]evelop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States".
[50] In August 2003 it was signed by the SADC members' Heads of State.
[51] Kapindu (2011) *AHRLJ* 104.
[52] A 4 of the SADC Charter.
[53] A 6 of the SADC Charter.
[54] A 7 of the SADC Charter.
[55] A 8 of the SADC Charter.
[56] A 9 of the SADC Charter.



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The SADC Charter emphasizes the need for social protection for workers and vulnerable people, and it can be ratified by SADC countries. It contains provisions relating to the social protection of both workers and those who are not employed.[57] The SADC Charter makes provision for the right to sufficient social protection and equal treatment for all genders.[58]It is worth noting that the SADC Charter does not extend these protective measures to irregular migrants.

On the positive side, the SADC Social Security Code (the Code) encourages member states to facilitate the exportability of benefits, which includes the payment of benefits in the host country.[59]Although this Code is non-binding, it determines that countries should apply the minimum standards to their social protection systems as stated in the ILO Social Security (Minimum Standards) Convention.[60] In article 4(1) the Code provides that "everyone" has the right to social security. The Code also requires of SADC member states that they develop and maintain social security systems in line with the provisions of the Code and the SADC Charter.[61] The Code defines 'social protection' as:

> "[p]ublic and private … measures designed to protect individuals against life-cycle crises that curtail their capacity to meet their needs. The object is to enhance human welfare."[62]

The Code specifically promotes the social protection of migrants, foreign workers and refugees. It encourages member states to protect regular migrants in so far as they should be entitled to participate in the social security schemes of host countries and they ought to enjoy equal treatment regarding social protection compared to

[57] Kapindu (2011) *AHRLJ* 104.
[58] A 10 and a 6 direct member states to create an enabling environment consistent with the ILO conventions on discrimination and equality and other relevant instruments so that: gender equity, equal treatment and opportunities for men and women are ensured; equal opportunities for both men and women shall apply, in particular with regard to access to employment, remuneration, working conditions, social protection, education, vocational training and career development; and reasonable measures are developed to enable men and women to reconcile their occupational and family obligations. See also Mpedi (2009) *TSAR* 700.
[59] A 17(2)(c) and (d) of the SADC Social Security Code.
[60] Social Security (Minimum Standards) Convention, 1952 (no 102).
[61] A 10 of the Community Social Charter provides that "[m]ember states shall create an enabling environment so that every worker in the Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance".
[62] A 1 of the Code.



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nationals of the host country.[63] However, the instrument is narrowly construed in so far as it provides that social protection should be extended to "all lawfully employed immigrants" by means of bi- or multilateral arrangements between member states and national legislation.[64] In article 6(2) of the Code non-discrimination are dealt with. The list is, however, a closed list and does not include prohibition of discrimination with regard to a person's nationality or citizenship.[65]

Added to this, article 17(3) of the Code requires that irregular migrants should be provided with "basic minimum protection" and should enjoy protection under the laws of the receiving country.[66] Where the SADC Charter contains general overarching goals, the Code focuses on the implementation of social security in the SADC region.[67]It encourages states to work towards the free movement of persons and it suggests that migration controls should be progressively reduced.[68]

There is no inclusive or effective social protection scheme in Africa. According to Udombanat, there is a perception that such a scheme would be limiting and would affect the economies of adopting countries negatively. The development in SADC can also be attributed to the ratification of international standards by the SADC countries. For example the UN International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) has been ratified by almost 12 member states.[69] Consequently, many states have developed legislative instruments that are not compatible with the standards of the ILO.[70]

## 5.4 COUNTRIES IN THE SADC REGION

### 5.4.1 Introduction

In a study that covers the constitutional right to social security in 30 African countries, Fombat concludes that, since the 1990s, constitutional reforms have resulted in a significant improvement in the recognition of human rights in Africa.[71]

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[63] A17(2)(a) and (b) of the Code.
[64] A17(2) of the Code.
[65] Olivier (2012) Part 2 *SADC Law J* 144.
[66] Nyenti and Mpedi(2012) *PELJ* 257.
[67] The SADC Social Security Code refers to the position of migrant workers in particular.
[68] A 17(1) of the Code.
[69] Mpedi and Smit (2011) 46.
[70] Udombanat (2006) *Corn Int LJ* 218.
[71] Fombat (2013) *AJICL* 1.



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The author mentions that many of the modernized constitutions "now contain provisions aimed at promoting democratic governance, constitutionalism, respect for the rule of law and human rights." The study mentions that 14 out of the 30 African constitutions contain "social security as a distinct right".

However, in only in two of those countries, namely South Africa and Kenya,[72] this right, and other related constitutional social security protection, have been specified in depth. Added to this, in numerous African countries socio-economic rights and those rights associated with social protection are contained in sections that categorize them as "state policy" or "fundamental objectives and directive principles", which are specified as unenforceable by the judiciary.[73]

### 5.4.2 Namibia

In one of South Africa's neighbouring countries, Namibia, the Constitution of the Republic of Namibia, 1990 (the Namibian Constitution) grants a number of constitutional rights to "all persons".[74] Neither the term 'social protection' nor 'social security' is mentioned in this constitution. Therefore, the components of social protection, as defined for purposes of this study, will have to be considered individually. The entitlement to social protection[75] (and even health care) is dependent on citizenship. The exception, though, is that state hospitals do provide subsidized health care for non-citizens.[76]

Namibia, like South Africa, is one of the SADC countries that rely on reform initiatives to make its social protection systems more comprehensive and inclusive in its fight to address poverty and job creation.[77] It is also one of the richer countries in

[72] Kenya will, however, not be one of the countries under discussion.
[73] Fombat (2013) *AJICL* 12 – 16 mentions that this is especially the case in among others, Lesotho, Nigeria, Sierra Leone and Tanzania.
[74] To name a few: A 8 Respect for Human Dignity "(1) [t]he dignity of all persons shall be inviolable"; A 10 Equality and Freedom from Discrimination "(1) [a]ll persons shall be equal before the law"; and A 16 Property "(1) [a]ll persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens."
[75] Protection such as public housing, disability grants and old age pension schemes is restricted to citizens.
[76] Mpedi and Smit (2011)9.
[77] Olivier and Mpedi (2004) Vol 28(3) 17.



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the region and migration tends to flow towards this country.[78] SADC operates on two different non-contributory schemes, namely means-tested and universal programmes. Namibia follows the universal programme.[79]

National legislation aims to include constitutional provisions and administer these to the advantage of all persons. The Namibian universal pension scheme, which is established by the National Pensions Act,[80] is one example of the legal social security entitlement created by national legislation.[81] The Namibian government implemented a fund to provide for payments to employees in cases such as maternity leave and death.[82] In this system, employees, domestic and casual workers make a contribution.

The Namibian Maternity, Sickness, and Death Fund makes provision for maternity and sickness benefits.[83]Namibia has also taken the initiative to develop a medical aid scheme. These funds are regulated by the Social Security Act.[84]

The Social Security Act states that the act "shall apply in relation to every employer, including the State, and every employee."[85] This gives an indication that it will be applicable to workers as well. The Social Security Act defines 'employers' as well as 'employees' as "a Namibian citizen or lawfully admitted to Namibia for permanent residence therein", when business or employment is conducted outside of the Namibian border.[86] There is an exclusion of most categories of migrant workers in

[78] South Africa, Botswana and Namibia.Dekker (2010) *SA Merc LJ* 390.
[79] Nyenti and Mpedi (2012) *PELJ* 269.
[80] 10 of 1992.
[81] ILO *Social Protection Floors for Social Justice and a Fair Globalization* (2012)International Labour Conference 101st Session Report IV 28.
[82] Olivier *et al* (2003) 23.
[83] Nyenti and Mpedi (2012) *PELJ* 271.
[84] 34 of 1994. The purpose of this act is "[t]o provide for the establishment, constitution and powers duties and functions of the Social Security Commission; to provide for the payment of maternity leave benefits, sick leave benefits and death benefits to employees and to establish for that purpose the Maternity Leave, Sick Leave and Death Benefit Fund; to provide for the payment of medical benefits to employees and to establish for that purpose the National Medical Benefit Fund; to provide for the payment of pension benefits to retired employees and to establish for that purpose the National Pension Fund; to provide for the funding of training schemes for disadvantaged, unemployed persons and to establish for that purpose the Development Fund; and to provide for incidental matters".
[85] S 2.
[86] S 1.



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Namibia when the term 'employee' or 'employer' is used in the different sections of the Social Security Act.

In *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia and others*,[87]the appellant challenged the constitutionality of a provision of the Labour Act[88] that prohibited the existence of labour brokers. The applicant's position is that section 128[89] of the Labour Act is inconsistent with the applicant's right to the fundamental freedom "to carry on a trade or business" guaranteed to it by article 21(1)(j)[90] of the Namibian Constitution. The court remarked that the right, which was the subject matter of this application, vests in all persons whether they are citizens or non-citizens of Namibia. However, the court held that nothing precludes the Namibian parliament from enacting legislation that restricts the enjoyment of the right to non-citizens who meet prescribed statutory requirements, such as holding a work permit and permanent resident permit, which allow them to lawfully reside in Namibia and practice any profession, or carry on any occupation, trade or business.[91]

The court went on to state that "labour is not commodity"[92] and emphasized the importance of labour legislation in bringing about social justice in the workplace; to redress bargaining imbalances between employers and employees; and to protect employees, especially those who are most vulnerable[93]to exploitation.[94] This statement provides a clear indication that the social protection afforded to workers can be extended to categories of migrant workers by adopting the existing labour

[87] (2011) 32 ILJ 205 (Nms).
[88] 11 of 2007.
[89] S 128 provides that "(1) [n]o person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party. (2) Subsection (1) does not apply in the case of a person who offers services consisting of matching offers of and applications for employment without that person becoming a party to the employment relationships that may arise there from. (3) Any person who contravenes or fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding N$80,000 or to imprisonment for a period not exceeding five years or to both such fine and imprisonment. (4) In so far as this section interferes with the fundamental freedoms in Article 21(1)(j) of the Namibian Constitution, it is enacted upon the authority of Sub-article 2 of that Article in that it is required in the interest of decency and morality".
[90] A 21 Fundamental Freedoms provides that "(1) [a]ll persons shall have the right to: (j) practise any profession, or carry on any occupation, trade or business".
[91] Par 9.
[92] Par 70 defines this concept in the following way "[t]he undeniable basic premise thereof is that labour is not a tradable innate object but an activity of human beings."
[93] Including migrant workers.
[94] Par 100.



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laws under the sub-section of labour security. Clearly, the Namibian courts, much like the South African courts,[95] have the willingness to extend the coverage of social protection through the development of labour security.

Multilateral agreements with other SADC countries have the potential to strengthen the position of non-citizens in terms of social protection in Namibia.[96] An example of such an agreement is the one between Angola and Namibia, which allows citizens in border communities to travel freely with only a border pass within a range of 60 km of the border of each country. To some degree, this could also reflect the impact of the extensive migration flows between, for example South Africa and Namibia.[97]

### 5.4.3 Botswana

Compared to South Africa, Botswana has the older constitution. The Botswana Constitution, 1966, hardly makes any mention of the protection of social security or labour security rights, let alone the rights of migrant workers.[98] However, the Constitution of Botswana states that "no person" shall be deprived of his or her numerous constitutional rights. From a positive viewpoint, it could be interpreted that these rights are ensured for all individuals in Botswana, regardless of their migration status. Unfortunately, the Constitution of Botswana makes no specific reference to migrants, non-citizens or any type of individual not originally from Botswana. According to Ntseane and Solo:

> "[t]he Constitution of Botswana contains a bill of fundamental rights, containing political and social rights also known as first generation rights. Since it was crafted as far back as 1966, it does not have socio-economic rights or second generation rights, as do recent constitutions."[99]

However, despite this lack of constitutional protection, a number of *ad hoc* and fragmented social protection schemes have been put into place in Botswana. According to a 2007 World Bank Country Report on Botswana that covered access to social services for non-citizens in the SADC region, the social protection services

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[95] *Discovery Health Ltd v CCMA* 2008 ILJ 1480 (LC) and *Kylie v CCMA* 2010 (7) BLLR 705 AAH.
[96] Millard (2008) *AHRLJ* 47.
[97] Olivier (2012) Part 2 *SADC Law J* 144.
[98] Fombat (2013) *AJICL* 13.
[99] Ntseane and Solo in Olivier and Kalula (2004) Fiedrih Ebert Stiftung89. The authors mention that "Botswana has not ratified any international social security conventions nor are there at present any plans to do so." Ntseane and Solo in Olivier and Kalula (2004) Fiedrih Ebert Stiftung 92.



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that have been implemented in Botswana include a programme for destitute persons, an orphan care programme and a universal old-age pension.[100] However, the protection of social security in Botswana is not rights-based, and this means that those who are in need of assistance have no legal basis upon which to insist on the provision of social security benefits.[101]

The so-called Programme for Destitute Persons provides non-citizens with temporary assistance. However, social assistance in general is limited to citizens only.[102] Botswana is one of seven SADC countries with a very high HIV-infection rate.[103] This has encouraged the government to implement health care services for everyone. People within the borders of Botswana are also entitled to health care services through medical aid schemes.[104] Similarly to Namibia, Botswana also operates under the universal scheme.[105] It has a universal old-age pension fund, which covers its citizens of 65 years and older.[106]

The 2007 World Bank Country Report on Botswana concludes that the Botswana government has "adopted an exclusive approach with respect to social services for non-citizens and portability of these services in SADC".[107] The report sums the situation up by stating that:

> "[g]iven the inadequacy of financial revenues, there is an understanding that neighbouring governments should provide for their own citizens. There are other realities and challenges with the implementation of existing schemes such as shortage of personnel, access and adequacy of services, and financial sustainability of schemes."[108]

In 2004, Ntseane and Solo argued that Botswana should ideally conduct a comprehensive review of all social security programs and that they should be

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[100] Ntseane and Kholisani (2007) Report to the World Bank 7. Other services referred to in the report are: the School-Based Food Programme; World War II Veteran's Allowance; Labour Based Relief Programme; Programme for Remote Area Dwellers; Education; and Health Care Provision.
[101] Ntseane and Solo in Olivier and Kalula (2004) Fiedrih Ebert Stiftung89. Statistics South Africa *Quarterly Labour Force Survey: Quarter 3* (2011) vi. At 92 it is mentioned that "most social security programs in Botswana are offered as a matter of social policy only. There is no right to social security and social assistance."
[102] Mpedi and Smit (2011)8.
[103] Strode *et al* (2010) *Obiter* 460.
[104] Mpedi and Smit (2011)9.
[105] Nyenti and Mpedi (2012) *PELJ* 269.
[106] *Ibid.*
[107] Fombat (2013) *AJICL* 21.
[108] *Ibid.*



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brought under one umbrella ministry. They also suggested that social security programs should be provided with a legal base.[109] Unfortunately, there is no available literature or evidence to indicate that there is any progress being made towards the protection of either social protection rights or any other broader social rights among irregular migrants in Botswana.

South Africa has entered into labour agreements with a number of neighbouring states, including Botswana. These agreements disclose that they were entered into in order to regulate the flow of migrant labour from Botswana to South Africa. The agreements provide that employment may only transpire in accordance with the requirements of the agreement. These include a citizen of the migrant-sending country entering South Africa for purposes of employment having in his or her possession a written employment contract attested in the home country, and the period of employment not exceeding 24 months.

With some exceptions, recruitment is limited to agencies that have been authorized to do so. Entering into or remaining in South Africa in contravention of the agreements is subject to repatriation. One of the agreements between the Government of the Republic of South Africa and the Government of the Republic of Botswana is related to: the establishment of an office for a Botswana government labour representative in South Africa, Botswana citizens in South Africa and the movement of such persons across the international border.[110] Despite the positive nature of the conclusion of labour agreements with South Africa's neighbours, these do have some exclusions, which once again place limitations on the implementation of the agreements in the field of social protection. Social security, unlike labour security, is simply a by-product of these agreements.[111]

Olivier[112] further points out that the agreements exclude nationals of the migrant-sending countries receiving benefits in accordance with the South African unemployment insurance, as well as stating that "migrant workers who have to return to their home country as a result of the agreements are not regarded as contributors

[109] Ntseane and Solo in Olivier and Kalula (2004) Fiedrih Ebert Stiftung 94.
[110] South African Treaty Series 3 of 1973. The agreement entered into force on 24 December 1973.
[111] Olivier Part 2 (2012) *SADC Law J* 134.
[112] *Ibid* 135.



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to, and could therefore not benefit from, the Unemployment Insurance Fund."[113] Botswana's social protection system seems very limited and could be furthered by implementing it in their legislative system.

### 5.4.4 Mozambique

Mozambique gained independence in 1975. The Constitution of the Republic of Mozambique, 2004 (the Constitution of Mozambique)[114] was developed as legislative instrument which contains the rights and obligations afforded to the people of Mozambique. Article 1 of the Constitution of Mozambique refers to the concept of social justice by stating that "[t]he Republic of Mozambique is an independent, sovereign, democratic State of social justice". The Mozambican state is governed by the rule of law[115] and as interpreted through the Constitution of Mozambique not so very different from South Africa.[116]

Nationality in Mozambique may either be by birth or by acquiring such status.[117] In 2012 Mozambique issued 1 656 temporary residence permits, only 164 of which was working permits. In the same year only two permanent residence permits were issued.[118] The Constitution of Mozambique refers to "citizens" as indicated in the fundamental objectives of the Republic itself.[119] The Mozambican government shall grant asylum to non-citizens during their struggle and to protect human rights.[120] There are a number of socio-economic rights entrenched in the Constitution of Mozambique. The right to work and education as socio-economic rights in 1990 were furthermore extended by including medical and health care. Notably the provisions in the Constitution of Mozambique with regards to socio-economic rights have certain

[113] S 3(1)(d) of the Unemployment Insurance Act 63 of 2001.
[114] As translated and available at www.mozlegal.com visited on 2013/11/30.
[115] A 3 of the Constitution of Mozambique.
[116] See Chapter 2 of this dissertation.
[117] A 5 of the Constitution of Mozambique.
[118] Statistical Release (2012) Documented Immigrants in South Africa, Embargoed until 26 March 2013 53.
[119] In a 11 of the Constitution of Mozambique the Fundamental Objectives are listed and refer to citizens as follows: "c) the building of a society of social justice and the achievement of material and spiritual well being and quality of life for its citizens; d) the promotion of balanced economic, social and regional development in the country and e) the defence and promotion of human rights and of the equality of citizens before the law".
[120] A 20 of the Constitution of Mozambique.



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limitations.[121] Both education and health care refer only to the protection, promotion and benefits of citizens.[122]

The legislative standards in Mozambique mostly use the term "social security" to describe a form of social protection. The Social Protection Law[123] organized the Mozambican social protection system into three different levels.[124] According to article 257 of the Labour Law of Mozambique[125] the social security system intends to guarantee the social permanence of workers, in cases of incapacity to work, old age or death of the bread-winner. The different levels established by the Social Protection Law each has diverse aims. The first level is mostly state funded and aims to prevent need and encourage social incorporation for vulnerable groups.[126]

Mozambique approved the National Strategy for Basic Social Security in April 2010, as well as the Regulation for the Basic Social Security in December 2009. This was a step in the right direction for the development of a national social protection floor.[127] The Regulation for the Basic Social Security identifies four different areas of social action, namely: direct; health; education; and productive. The second level as stated in the Social Protection Law includes, *inter alia,* old-age pensions and cash death grants. Mozambique, unlike South Africa, has established a national or public retirement scheme,[128] which would fall within the scope of social insurance. The third level was designed to include private insurance in addition to public institutes.[129]

Furthermore, Mozambique has expanded its own Food Security Subsidy.[130] This Programme was originally expanded on a national level almost 20 years ago and focuses on developments at the operational level. It also formed the basis of the

[121] Mandlate (2010) *ESR Review* 23.
[122] Aa 113 and 116 of the Constitution of Mozambique.
[123] 4 of 2007.
[124] The different levels are: basic social security, obligatory social security and complementary social security.
[125] 23 of 2007. The Labour Law was approved by the Parliament on 11 May 2007. Translated and available at www.arbitrationmz.com visited on 2013/11/30.
[126] Mausse and Cunha (2011) 320.
[127] *Ibid* 315.
[128] Olivier Part 1 (2011) *SADC Law J* 133.
[129] Mausse and Cunha (2011) 321.
[130] The Food Security Subsidy Programme was developed as the Programa Subsídio de Alimentos. See also the International Labour Organization, Report of the Advisory Group chaired by Michelle Bachelet Convened by the ILO with the collaboration of the WHO, *Social Protection Floor for a Fair and Inclusive Globalization*, 2011 65.



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progress of the basic social security benefits which are implemented in the country at this stage. Despite the achievements made by the different programmes and regulations prevalent coverage remain a challenge.[131]

In accordance with the Constitution of Mozambique labour is the driving force of development on an economical and social level.[132] The right to work in Mozambique according to the Constitution of Mozambique is limited to "every citizen". Furthermore, workers are granted the right to safety at work, protection and health.[133] This is a clear indication that Mozambique comprehends social protection in the form of labour security, even though by interpretation of the other fundamental rights it is not extended to noncitizens.

Article 256(1) of the Labour Law, 2007 states that:

> "[a]ll workers shall be entitled to social security, according to the financial conditions and resources of the development of the national economy."

The Labour Law contains the strand labour security with regards to migrant workers. In the context of free movement of persons, migrant workers are protected within the borders of the country. Article 30 of the Labour Law specifies that migrant workers have similar rights, obligations and opportunities as other workers within the country. The protection under social security in accordance with the Labour Law is not limited to the existence of an employment relationship or an employment contract.[134] There is no indication that the Labour Law is limited to citizens. However, it does refer to legal employment relationships, thus excluding irregular migrant workers.[135]

The courts in Mozambique have not adjudicated any situations involving socio-economic rights, as these courts do not have a right-based approach.[136] This is one of the problems associated with the enforcement of socio-economic rights in

[131] Mausse and Cunha (2011) 317.
[132] In a 112 of the Constitution of Mozambique it is indicated that labour "[s]hall merit respect and protection".
[133] Aa 84 and 85 of the Constitution of Mozambique.
[134] It is stated in A 63(4) that "[t]he penalty of dismissal shall not result in the loss of rights arising from the employee's registration with the social security system if, on the date when the employment relationship ceases, the employee meets the requirements for receiving benefits under any arm of the system".
[135] Within the scope of the application in a 2 it refers to both citizens and foreigners.
[136] Mandlate (2010) *ESR Review* 23.



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Mozambique not only regarding migrant workers, but the citizens of the country as well. Another example of the challenges in this country is the lack of financial resources to cater for individuals. Despite these challenges Mozambique has established justifiable socio-economic rights that could be of great benefit for all individuals. Mandlate notes that

> "[w]here the provisions of constitutions are not clear, they can be interpreted in accordance with relevant ratified international law".[137]

Mozambique accepts international standards and these standards have the same force in the legal order of the country as infra-constitutional legislative acts of the Republic.[138] There are a number of ILO conventions dedicated to atypically employed individuals. Mozambique has ratified, *inter alia*, the Equal Remuneration Convention, 1951 (No 100) and Discrimination (Employment and Occupation) Convention, 1958 (No 111). The ILO concluded that in countries such as Mozambique, key social protection floor programs would cost between 1 and 2 per cent of gross domestic product (GDP).[139] Unlike South Africa, Mozambique has not signed the ICESCR[140], which could, if ratified, make a difference in the further development of the country's social protection system.

Bilateral agreements form part of the regulation of social protection between the different SADC countries. Article 14.5 of the Social Protection Law makes reference to provisions regarding bilateral social security agreements and the portability of social security benefits between neighbouring countries. However, unilateral arrangements regarding portability of benefits are almost completely absent, as article 15.2 of the Social Protection Law states that

> "[s]ubject to contrary provisions contained in "international conventions", benefits acquired under compulsory social security are not portable."[141]

So-called labour agreements where established between Mozambique and South Africa with regards to Mozambican mineworkers in South Africa.[142] The purpose of

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[137] *Ibid* 24.
[138] A 18 of the Constitution of Mozambique.
[139] International Labour Organization, Report of the Advisory Group chaired by Michelle Bachelet Convened by the ILO with the collaboration of the WHO, *Social Protection Floor for a Fair and Inclusive Globalization*, 2011 xxvii.
[140] The International Covenant on Economic, Social and Cultural Rights, 1966.
[141] As quoted by Olivier Part 2 (2012) *SADC Law J* 151.



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the bilateral agreements was to regulate the flow of migrant labour between the countries. These agreements contained a number of provisions that portrayed social protection in some form as a by-product.[143] The agreement with Mozambique in 1964 provides for the following:

- "[t]he payment of workers' compensation benefits partly in South Africa and partly in Mozambique (Article XXII);
- The transfer of assets in the estate of a deceased worker, as well as other 'unclaimed moneys' due to Mozambique workers, to Mozambique (Article XXIII); and
- Application of South Africa's Occupational Diseases in Mines and Works Act 78 of 1973 to Mozambique migrant workers who have returned to Mozambique, as far as mining-related lung diseases are concerned (Article XXV)."[144]

Except for the above mentioned agreement, the obligations in the agreements are mostly aimed at employers and not the South African government. Furthermore, South Africa drafted an agreement with Mozambique which allows for payments in respect of employment injuries and diseases to be made in the Republic of Mozambique. However, it is alleged that these payments don't reach the beneficiaries.[145] Mozambique and South Africa signed a visa waiver agreement. Citizens of each country are allowed to stay for up to 30 days in the other country, without a visa. According to media reports, numerous Mozambicans have overstayed the prescribed period and have therefore been deported as undocumented noncitizens.[146]

Despite the protection these agreements are intended to give, there are a few reasons why these agreements must be seen as limited in its effect. For example in South Africa the protection as provided for by workers' compensation in accordance with COIDA is not available to domestic workers and therefore affects Mozambican

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[142] The SA Treaty Series 11/1964 established an agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal regulating the employment of Portuguese workers from the Province of Mozambique on certain mines South Africa. The agreement entered into force on 1 January 1965. The earliest agreements between Mozambique and South Africa date back to 1875 till 1928 where the provision of temporary labour from Mozambique to South Africa was regulated. See also Olivier Part 2 (2012) *SADC Law J* 134.

[143] For example payment for welfare funds to be set up for support if the worker would be send home due to disablement.

[144] See also Olivier Part 2 (2012) *SADC Law J* 135.

[145] Olivier Part 2 (2012) *SADC Law J* 136.

[146] *Ibid* 137.



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workers in South Africa.[147] Furthermore these agreements effectively exclude Mozambican citizens from benefiting from unemployment insurance in South Africa and they cannot claim from the Unemployment Insurance Fund.[148] It would be of great value if the principle of equality of treatment as core of these bilateral agreements would be implemented with regards to both countries in the arrangement. Access to the social protection benefits in South Africa for the Mozambican migrants, as well as in Mozambique for the South African migrants should fall within the scheme of a public framework. This will form part of the further development of the intended integration as stated in the SADC Treaty.[149]

The instruments adopted in Mozambique provide a comprehensive set of standards with regards to social protection. However, by ratifying more international standards the country could improve their social protection system and extend their well-developed socio-economic rights to more workers, regardless of their migration status. By ratifying the same international standards as the countries with which bilateral agreements has been concluded, it would set the standard for equal treatment of all workers, regardless of where the work would be done.

### 5.4.5 Lesotho

Olivier acknowledges that "Lesotho is one of the most migrant dependent countries in the world".[150] The country's main source of foreign exchange is migrant remittance. Remittance is mainly used to uphold the minimum living standard of the migrant worker's family and to provide for food, security and other needs.[151] In Lesotho, social protection legislation is silent (or vague) about the right to access to social protection. The country's social protection legislation does not draw a distinction between citizens and non-citizens. However, these provisions have never

[147] Olivier Part 1 (2011) *SADC Law J* 135.
[148] *Ibid* 147.
[149] Olivier Part 2 (2012) *SADC Law J* 155.
[150] Olivier Part 1 (2011) *SADC Law J* 125 – 126.
[151] *Ibid* 126.



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been challenged by non-citizens.[152]The legislation merely uses the term "employee" or "worker".[153]

Lesotho is moderately reliant on South Africa in the field of social protection. Lesotho, unlike South Africa, does not have a serious problem of South African citizens residing in Lesotho as irregular migrants. According to Mpedi and Smit, the majority of foreigners need to support themselves in Lesotho without any support from the state.[154] The country is currently in the process of developing its own social protection system. It will mainly focus on coverage for old age, invalidity, death and maternity.[155]

The Constitution of Lesotho, 1993, does make provision for economic and social rights. These rights include the right to education.[156] The Free Primary Education programme was implemented in January 2000. Free primary education is accessible to anybody as long as they legally reside in Lesotho. Another form of social protection is health care. In Lesotho, access to health care is not given freely to the citizens of the country. Lesotho has no public housing as a form of social protection; no provision is made to provide shelter for citizens.[157] This is something that Lesotho can definitely learn from South Africa, as South Africa provides shelter to citizens who cannot afford to build houses themselves.[158] However, Lesotho is drafting a policy to attend to this problem. The National Shelter Policy states that its goal is to provide guidelines for the government to promote, protect and ensure full and progressive realization of the right to adequate shelter for all.[159] The policy's goal is based on accessibility, equity and affordability.[160]

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[152] Mpedi and Smit (2011) 9.In South Africa non-citizens challenged the legislation dealing with the right to social security in *Khosa v Minister of Social Development; Mahlaule&Others v The Minister of Social Development & Others* 2004 (6) SA 505 (CC) and *Government of the Republic of South Africa other v Grootboom and Others* 2001 (1) SA 46 (CC).
[153] Mpedi and Smit (2011) 23.
[154] *Ibid* 81.
[155] Becker and Olivier (2008) 148.
[156] S 44 of the Constitution of Lesotho.
[157] Regardless of whether a person is a citizen or a temporary resident.According to the Marketing Manager of the Lesotho Housing Cooperation and Development in an interview conducted on 10 September 2008.
[158] Mpedi and Smit (2011) 78.
[159] Draft National Shelter Policy of 2009.
[160] This is according to Ms Nthona, the Housing Officer of the Ministry of Local Government and Chieftainship Affairs, during an interview on 11 September 2008. See also Mpedi and Smit (2011) 79.



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There are informal agreements between South Africa and Lesotho, in respect of which South Africa is considered a receiving country for migrants.[161] Agreements between the Government of South Africa and the Government of Lesotho relating to the appointment of a labour representative office in South Africa, Lesotho citizens in South Africa and the movement of such persons across the border have been established to make a contribution to the regulation of the flow of migrant workers.[162] Despite the existence of the abovementioned programs, forms of social protection and agreements between Lesotho and South Africa, social protection benefits in Lesotho are still limited to citizens. Education, health care and housing are not the only categories under the concept of social protection. Lesotho may extend their social protection, when implemented, to other individuals within the available resources of the country.

### 5.4.6 Swaziland

Swaziland is still in the early stages of the development of social protection.[163] Swaziland has some categories of social protection that could be classified under the strands of social assistance and social insurance. Swaziland's Public Health Act[164] offers health care for each person within the Kingdom through a public healthcare system. The different groups of migrants only have partial access to the right to treatment in affordable public health centres.[165] The Civil Servants Referral Scheme[166] and the Phalala Fund[167] are two healthcare programmes established by the state to facilitate medical treatment of Swazi citizens abroad.

Swaziland introduced workmen's compensation in 1983. This is based on employer liability for occupational injuries and diseases, permanent disabilities and special needs.[168] The workmen's compensation, together with a provident fund and a public service pension fund, falls under the social assistance strand of social protection.

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[161] Millard (2008) *AHRLJ* 44.
[162] South African Treaty Series 1 of 1973. The agreement entered into force on 24 August 1973.
[163] Becker and Olivier (2008) 151.
[164] 5 of 1969.
[165] Mpedi and Smit (2011)10 – 11.
[166] Assist in evacuating public service employees abroad when dealing with serious medical conditions. See Mpedi and Smit (2011) 109.
[167] Pay the medical fees of the citizens of Swaziland with no income who need medical attention abroad. This fund can also be accessed by non-public service employees.
[168] Becker and Olivier (2008) 151.



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The Swaziland National Provident Fund was established in 1974, and covers all employed persons.[169] All employers need to be a member of the fund and pay a contribution for every staff member. The Public Service Pensions Fund was established to manage and administer pensions of government employees. This fund gives no indication that it is available to non-citizens in Swaziland.

Access to social security in Swaziland is based on a person's citizenship, and in some instances, their residential status as well.[170] With regard to health care, only Swazi citizens can access the Phalala Fund, even though migrants do have the right to be treated in public health facilities. Old-age grants are restricted to citizens of the country only. Social insurance is not extended to non-citizens. Section 129 of the Employment Act[171] indicates that sickness benefits can be accessed by citizens, permanent residents, temporary residents and irregular migrants who fall sick while formally employed.

The legislative instruments, programs and social security outline in Swaziland are similar to South Africa. Both countries have limitations in their provisions regarding migrant workers. Social grants in South Africa, like Swaziland,[172] were available to citizens only. This exclusion was dealt with in the South African courts and some of the social protection benefits were extended to regular migrants. In South Africa, this is only done within the available resources that the government can afford. Swaziland, much like South Africa, shows a willingness to include migrant workers in the accessibility of social protection under labour security. Unfortunately, it is once again limited due to the fact that the benefits are restricted to those in formal employment.

While dealing with some of the other SADC countries it was indicated that South Africa has entered into labour agreements with most of its neighbours. A labour agreement is, for example, an agreement between South Africa and the Government of the Kingdom of Swaziland relating to the establishment of an office for a

[169] Excluding self-employed persons, casual employees, persons employed in households and non-citizens.
[170] Mpedi and Smit (2011) 112.
[171] 5 of 1980.
[172] Mpedi and Smit (2011) 112 and 113.



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Swaziland government labour representative in South Africa and the movement of certain South African citizens across the common border.[173]

Even though these agreements make a contribution to the development of the regulation and, to some extent, protection of migrant workers moving between the different SADC countries, there are still limitations to their effectiveness. One example is that repatriation regulation is dealt with together with labour migration. This is indicated in an agreement between Swaziland and South Africa, where the function of government labour offices and representatives established under the agreement is to:[174]

> "[a]ssist the Government of the Republic of South Africa with the repatriation of sick, injured or destitute Swaziland citizens who are or were employed in the Republic of South Africa and of other such citizens whose presence in the Republic of South Africa is or has become unlawful."

### 5.4.7 Mauritius

Mauritius is one of the few African countries with a close to complete social protection floor of non-contributory benefits.[175] It is a welfare state, which indicates that it has a comprehensive social protection system for the whole population. This country does not have a national poverty line or minimum wage. The social security procedures in Mauritius include health services and old-age, disability and death benefits, which are available through a universal social insurance system.[176] Employees receive earning-related pensions, although the general pension system covers all residents.[177] Mauritius makes provision for an old-age, disability and survivor pensions fund, under their universal programme.[178]

Education[179] and health care[180] are free in Mauritius. Education facilities are free to all children of citizens. These facilities are only free to the children of non-citizens in

[173] South African Treaty Series 3 of 1986. The agreement entered into force on 22 August 1975.
[174] Olivier Part 2 (2012) *SADC Law J* 135.
[175] ILO, *Social Protection Floors for Social Justice and a Fair Globalization*, (2012),International Labour Conference, 101st Session Report IV 40.
[176] Becker and Olivier (2008) 150.
[177] *Ibid.*
[178] Nyenti and Mpedi (2012) *PELJ* 269.
[179] From primary to university level.
[180] Including tertiary care.



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schools directly operated by the Ministry of Education.[181] Social assistance schemes are regulated by the Social Aid Act, 1983, and the Unemployment Hardship Relief Act, 1983. These acts make provision for the payment of social aid or unemployment hardship relief and the schemes, similarly to South Africa's, are means-tested.

Where it is established that the head of a household is unable to earn a living[182] and cannot provide for their family, social aid will be paid to such a person.[183] Social aid is found not to be payable to non-citizens in Mauritius, when the Deportation Act, 1968, is interpreted.[184] Unemployment hardship relief benefits are awarded on the same basis as social aid, and are therefore also not available to migrants. Mauritius, much like South Africa, provides support for individuals who cannot afford to own a house. The government implemented the National Housing Development Company to assist low-income households.[185] Housing provided by government-owned companies is restricted to citizens only.

There is no social insurance scheme for health care in Mauritius, and free health services are offered to every person in the country, including non-residents and migrants. In Mauritius, basic universal pensions, as part of social insurance, constitute the largest part of their social protection system. These are regulated by the National Pensions Act, 1974, and the benefits are paid on a universal basis. Universal benefits are paid to citizens as well as to non-citizens residing in the country.[186] Mauritius truly has a wide and developed social protection system. It has implemented a number of systems and provides effective benefits for citizens. It is, however, clear that most of the social protection is restricted to citizens only. There is no indication that the country has any intention to include migrant workers in any of its social protection systems.

[181] Mpedi and Smit (2011) 104.
[182] For example, due to illness, loss of employment or imprisonment.
[183] Mpedi and Smit (2011) 93.
[184] S 4 and Regulation 3(1) of the Social Aid Regulation, 1984.
[185] Mpedi and Smith (2011) 98.
[186] Reg 3(1) of the National Pensions (Non-Contributory Benefits) Regulations, 1977 states that "[n]o claim shall be entertained unless the claimant is residing in Mauritius".



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## 5.5 CONCLUSION

The SADC region, and South Africa in particular, is experiencing significant challenges pertaining to irregular migration, unemployment, the spread of HIV-infected individuals and xenophobia. There can be no doubt that governments in Southern Africa who need to take steps to improve the plight of migrants, who are a vulnerable group of people. There is a definite increase within the SADC region in undocumented and irregular migrants, owing to the fact that most migrants have no intention of staying in the country in which they work and will remain irregular or undocumented.[187]

SADC has taken tentative steps to implement standards to protect migrants, and these instruments recommend that the ILO Social Security (Minimum Standards) Convention should be adhered to. SADC has also developed the Code. Although the Code is non-binding, it determines that illegal migrants should be provided with "basic minimum protection". Even though these are positive sentiments, there is limited evidence that practical steps have actually been taken in the SADC region to give effect to these sentiments.

Most migrant-receiving countries are starting to view migration as a threat and obstacle rather than an opportunity, and most have no legislation to protect all migrant groups.[188] Migrants have played an important role in the past in developing the economies of receiving countries, and can do so in the future. Added to this, people have the constitutional right to freedom of movement.[189]

Namibia is one of the SADC countries with a higher flow of migration, since this country has a well-developed economy. The Namibian Constitution does not mention social protection in any detail, even though it does have legislation to administer social security.[190] The social protection in Namibia is limited to citizens and permanent residents. The Namibian Constitution is applicable to both employees and employers, thus limiting the scope of the Namibian Constitution, owing to the fact that employers and employees are defined as citizens and/or permanent

[187] Dekker (2010) *SA Merc LJ* 391.
[188] Olivier Part 1 (2011) *SADC Law J* 128.
[189] S 21 of the Constitution of the Republic of South Africa, 1996.
[190] The Social Security Act 34 of 1994.



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residents. The Namibian court has dealt with cases concerning some form of social protection, as well as the possibility of the government restricting rights to citizens only. The court went on to indicate that "labour is not commodity" and explained the need to protect migrant workers.

Most of the migrants flowing into South Africa come from countries such as Mozambique. Mozambique has entrenched socio-economic rights into the Constitution of Mozambique. These rights are still limited to citizens only. The Mozambican legislative system with regards to social protection has not been developed to include migrant workers, whether they are regular or irregular. Despite these limitations Mozambique has adopted a number of instruments to comprehensively regulate social protection.

The agreements between South Africa and Mozambique seem to form the basis of the development for comprehensive bilateral agreements. As stated in the previous discussion, social protection is usually a by-product to these agreements intentions. The inclusion of extensive social protection provisions in bilateral agreements is unavoidable. Dedicated social protection arrangements between countries would be a universal best practice.[191]

Botswana, as one of the SADC countries with a stronger economy, also hosts a large number of migrants seeking better work opportunities and basic living standards. Despite the fact that the Constitution of Botswana makes no reference to social protection, let alone labour security or the situation regarding migration, it has implemented numerous programmes to contribute to the development of social protection. These programs only provide for temporary assistance. The social security system in Botswana is not rights-based and therefore not enforceable by law. Botswana can improve its social protection system by utilizing a rights-based system as followed by South Africa.

In Lesotho, the social protection legislation does not make a distinction between citizens and non-citizens. The country is currently developing its own social

[191] Olivier Part 2 (2012) *SADC Law J* 158.



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protection system. Lesotho ensures socio-economic rights, such as education, to anyone residing in the country legally. The right to health care is, however, not given to everyone freely. Lesotho also does not have a public housing program for citizens who cannot afford to build their own houses. Although Lesotho and South Africa have informal agreements, there are still no guaranteed social protection benefits for migrant workers who work between these two countries.

Swaziland is also still in the early stages of developing its social protection system. This country does have some legislation in place to deal with social protection in the form of the different strands defined in the previous chapters. Permanent residents, refugees, irregular migrants and temporary residents do have access to social insurance in the form of the Swaziland National Provident Fund and private health care.[192] Once again, reference is made to the agreements between South Africa and another one of its neighbouring countries. These agreements are there to allocate some degree of protection to migrant workers flowing from the one country to the other.

In Mauritius, basic social protection benefits, such as education and health care, are free. This is a significant occurrence, since most other SADC countries simply do not have the available resources to ensure the basic living standards of their citizens. South Africa is the largest host of migrants in the SADC region, and a country with one of the strongest economies. Despite this, South Africa will not be able to provide free benefits to all of its citizens. Mauritius excludes most categories of migrant workers from social protection benefits and limits those that are available, such as health care.

Migrants are as much a part of the SADC region as the very ground that forms the individual countries. It will never be possible to protect all migrants flowing from one country to another, but it is possible to remain humane and acknowledge that they are here to stay.

[192] Mpedi and Smit (2011) 113.



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# CHAPTER 6
# CONCLUSION


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## 6.1 INTRODUCTION

In this study, the social protection, if any, afforded to migrant workers in South Africa was evaluated. Some concepts needed to be defined, interpreted and understood to gain insight into the problem. Social protection is a part of the field of law, which is continuously being developed. This area of law started to accommodate sections of the community who could no longer provide for themselves because of numerous factors.[1] By the 1960s, social protection measures were introduced by more developed countries through welfare systems. These systems incorporated strategies that included the whole population and that would improve the living conditions of those caught in economic and social despair.[2] The development of social protection was categorized by two very different approaches.[3] The one formed the basis of insurance-based social protection, and the other emphasized minimum income-protection by the state.

[1] Strydom *et al* (2006) 1. Examples are people who fell sick or could no longer work due to old age, as well as victims of the different World Wars.
[2] Richter (2006) *SAJHR* 197.
[3] The Bismarckian and Beveridge systems.See Strydom *et al* (2006) 4.



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The concept of social protection is wider than the terms mostly associated with this concept, such as social security, social assistance and social insurance. Social protection has been defined by numerous international organizations, national instruments, as well as academic writers. Different international standards and instruments have been adopted to give effect to the social protection afforded to migrant workers.[4] For the purposes of this dissertation, the strands of social protection acknowledged and evaluated are social assistance, social insurance and labour security.[5]

South Africa has one of the strongest economies, as well as the largest host of migrants, in the Southern African Development Community (SADC).[6] The South African community is diverse and different needs were recognized. Policymakers developed legislative instruments in order to provide for, protect and include all the rights associated with the needs of residents of South Africa. Originally, the concept of social protection in South Africa was defined by two main components, namely social assistance[7] and social insurance.[8] The perception regarding social protection has changed through the inclusion of section 27 in the Constitution of the Republic of South Africa, 1996.[9]

Social protection, in some instances, is limited to citizenship and/or an excising contract of employment. The South African courts have shown a willingness to extend social protection to migrants and consider the limitations associated with social protection. Migration is a concept affecting almost the whole of the African continent.[10] Most of the migrants in South Africa flow from neighbouring SADC countries. These countries have predominantly limited forms of social protection implemented into their regulatory frameworks. A comparison was drawn between South Africa and some of its neighbouring countries, and the existing agreements between these countries were examined.[11]

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[4] See Chapter 2 and 4.
[5] See Chapter 2.2.2.
[6] Olivier (2011) Part 1 *SADC Law J* 127. See also Dekker (2010) *SA Merc LJ* 390.
[7] The Social Assistance Act 13 of 2004 regulates social assistance in South Africa. See also Strydom *et al* (2006) 8.
[8] Strydom *et al* (2006) 6. This was evaluated in Chapter 3 of this dissertation.
[9] Hereinafter the Constitution.
[10] See Chapter 4.4.2.
[11] See Chapter 5.



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## 6.2 CONCLUDING REMARKS

### 6.2.1 International Organizations

Social protection is acknowledged and implemented as a human right by both the International Labour Organization (ILO) and the United Nations (UN).[12] The Constitution states that international law must be considered when interpreting the rights in the Constitution, as well as any other legislative instruments.[13] Therefore, international organizations play a significant role in the development of social protection and migration and must be considered.

The primary goal of the ILO is to endorse opportunities for all individuals to acquire civilized work or employment, "in conditions of freedom, equity, security and human dignity."[14] The ILO, in its definition of social protection, once again focuses on the promotion of measures to ensure decent living (and working) standards for all members of society who cannot provide for themselves.[15] Numerous conventions, recommendations and standards have been developed by the ILO to regulate social protection, labour and migration.[16]

One of the aspects acknowledged by the preamble of the ILO Constitution is the protection of the wellbeing of workers employed in countries other than their own.[17] The interests of workers fall within the social protection sphere. The Decent Work Agenda elevated certain objectives to extend the concept of social protection. These objectives include the promotion of labour protection, the extension of the

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[12] See Chapter 1.1.1, as well as Chapter 2.

[13] Ss 39(1)(b), 232 and 233 of the Constitution.

[14] Decent Work Agenda available on http://www.ilo.org/public/english/support/lib/century/index6.htm, visited on 2013/03/15 and http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm, visited on 2013/03/12. Also see Van Ginneken(2003) *Int Lab Rev* 279.

[15] See ILO *World Labour Report: Income Security and Social Protection in a Changing World* (2000) 29; ILO *Principles of Social Security* (1998) 8.

[16] See the discussion in Chapter 2.2.3 and Chapter 4.4.4.1.

[17] Preamble of the Constitution of the ILO available at http://www.ilo.org/public/english/bureau/leg/download/ constitution.pdf visited on 2012/12/20. Dupper (2007) *Stell LR* 225 also mentions that "[a]t the First Session of the International Labour Conference in 1919, a recommendation [The Reciprocity of Treatment Recommendation, 1919 (N0 2)] was adopted which already reflected the two main aims of the ILO in this area, namely equality of treatment between nationals and migrant workers, and coordination of migration policies between States."



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effectiveness of social security schemes and the protection of vulnerable groups, including migrants.[18] The ILO follows a universal approach to social protection.[19]

The first form of social protection acknowledged by the ILO was social security, when the Social Security (Minimum Standards) Convention, 1952 (No 102) was adopted. This convention laid down the basis for the development of social security and established the requirements for a social security system in a country that has ratified the convention.[20] The ILO refers to labour security as employment security, and the Termination of Employment at the Initiative of the Employer, 1982 (No 158) falls under this section. This convention is not limited to citizens of the ratifying country, although it excludes certain categories of workers in some provisions.[21]

When the ILO developed the Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143), it was recognized that everyone has the right to leave their home country. The ILO has a number of conventions dedicated to regulating international labour markets.[22] Some of these conventions acknowledge irregular migrants and extend protection to these migrants.[23] None of these conventions draw a distinction between temporary and permanent residents or irregular and regular migrant workers. Despite this, none of these conventions provide protection to irregular migrants explicitly.[24] The ILO encourages the adoption of bilateral agreements between countries to regulate migration. These agreements aim to

[18] Some of the objectives are "i.) [e]xtending the coverage and effectiveness of social security schemes; ii.) Promoting labour protection, which comprises decent conditions of work, including wages, working time and occupational safety and health, essential components of decent work; iii.) Working through dedicated programmes and activities to protect such vulnerable groups as migrant workers and their families; and workers in the informal economy." Available on http://www.ilo.org/global/about-the-ilo/decent-work-agenda/social-protection/lang--en/index.htm visited on 2012/06/19.

[19] "Social protection for all."See Rodgers *et al* (2009) 139.

[20] Strydom *et al* (2006) 6 and 326.

[21] A 2 of C158 of 1982 states that "[a] Member country may exclude the following categories of employed persons from all or some of the provisions of this Convention: (a) workers engaged under a contract of employment for a specified period of time or a specified task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period".

[22] Migration for Employment Convention, 1949 (Revised) (No 97) and the Migrant Workers (Supplementary Provisions) Convention ILO, 1975 (No 143).

[23] Convention 143 of 1975.

[24] See Chapter 4.4.4.1.



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regulate the obligations of the different countries with regard to the difficulties that migrants face.[25]

The ILO's conventions and recommendations are well developed and comprehensive instruments; however, they have no effect if they are not implemented and ratified by a country.[26] Even though the ILO usually has the responsibility of protecting the welfare of workers, it was sidestepped when the UN adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families in 1990 (the International Convention). The International Convention confirms the principle of the territorial sovereignty of each country in regulating the flow of migrants across the borders of that country.[27]

The International Convention defines migrant workers as people who are engaged in remunerated activities in a state where that person is not a national[28] and divides migrants into different categories.[29] According to Dupper, the International Convention is described as the "epitome of international human rights" and extends to vulnerable groups globally.[30]

### 6.2.2 SADC and Neighbouring Countries

SADC consists of a number of countries and has been declared as a free-trade zone. The SADC Treaty encourages a collaborative approach in the region by developing regional social security systems.[31] Social protection in the SADC region is not regulated comprehensively. The SADC Treaty does not cover non-discrimination on the grounds of citizenship.[32] The SADC Charter aims to harmonize the social protection of those seeking work and those who are already employed.[33]

The SADC Social Security Code (the Code) requires that irregular migrants are protected by the laws of the migrant-receiving country by providing them with

[25] See the discussion in Chapter 4.4.4.1.
[26] Mpedi and Govindjee (2009) *Obiter* 781.
[27] A 79 of the International Convention.
[28] A 2.
[29] Aa 57 – 63.
[30] Dupper (2007) *Stell LJ* 226.
[31] Nyenti and Mpedi (2012) *PELJ* 253.
[32] A 6(2). Also see the discussion in Chapter 5 par 5.3.
[33] A 10 of the SADC Charter.



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minimum basic protection.[34] In SADC, migrants seek the countries with the strongest economies.

SADC also encourages bilateral and multilateral agreements between the SADC countries. SADC developed the Draft Protocol on the Facilitation of Movement of Persons in SADC. The Draft Protocol has a number of objectives, and if ratified and implemented by the SADC countries, it could pave the way to comprehensive agreements. South Africa has concluded a few agreements with some of its neighbouring countries. Namibia's social protection is limited to citizens only. The Namibian court indicated a willingness to extend social protection in the form of labour security, as there is a need to protect migrants. Botswana is one of the neighbouring countries with which South Africa has labour agreements.[35] These agreements are developed to provide social protection on the same level as that given to nationals in the same position. Social protection in Botswana is, however, not enforceable by the law, as it is not rights-based.

The Constitution of Mozambique has entrenched socio-economic rights into their legal system. These rights are limited to the citizens of Mozambique. The Mozambican legislative instruments do not make specific mention to social protection for migrant workers. However, Mozambique has developed comprehensive regulations and standards to achieve a well-developed social protection system. Mozambique is the SADC country with the most comprehensive bilateral agreements with South Africa. These agreements, together with the SADC standards and the already developed social protection instruments in the country, could lay down the foundation for a comprehensive social protection system to the advantage of all people within the SADC region entering Mozambique.

Lesotho is still developing its own social protection system and does not distinguish between citizens and migrants. It is one of the few countries where health care is not offered to the community free of charge. The social protection system in Swaziland is in its early stages, even though it is regulated by legislation. Most of the categories of migrants in Swaziland have access to social insurance. The labour agreements

[34] A 17(3) of the Code.
[35] South African Treaty Series 3 of 1973.



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between South Africa and Swaziland do not provide sufficient protection for any workers, regardless of their citizenship.

In Mauritius, on the other hand, basic social protection is free. However, migrant workers are excluded from most of the social protection offered. South Africa, as the country with the most migrants, may gain knowledge from the development of social protection systems in the different neighbouring countries (especially Mauritius), as well as learn from its mistakes to better the social protection system in the Republic.

## 6.3 SOUTH AFRICA: LIVING INSIDE THE PROBLEM

### 6.3.1 Introduction

In South Africa, social protection and migration are governed by a regulatory framework. Human rights are entrenched in the Bill of Rights in the Constitution.[36] Some of these rights are afforded to everyone,[37] while others are limited to citizens only.[38] Furthermore, the Constitution acknowledges the sovereignty of the Constitution as the supreme law of the Republic and the principle that every country may govern themselves. South Africa took the bold step of including social protection as a human right in the Constitution. The Constitution contains the socio-economic rights, as well as labour security rights, associated with social protection. These rights are therefore protected for everyone within reason and the available resources. The Constitution also has a provision dedicated to the rights associated with migration.[39] This right is not only extended to citizens.

These rights are established further by the different legislative instruments applicable to each strand of the definition of social protection and migration. These instruments were evaluated during the assessment of the research question, together with the extension of social protection by the courts. The South African courts have shown willingness when dealing with social protection to use international organizations' standards as guidelines, even when having the means to execute them.[40] The South

[36] Chapter 2 of the Constitution.
[37] For example the right to life in s 11.
[38] In s 22 the right to freedom of trade, occupation and profession is only guaranteed to citizens.
[39] S 21 states that everyone has the right to freedom of movement.
[40] *Grootboom* par 26 64D-E and *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC) par 46.



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African legislative framework is well developed; however, it is not always comprehensive in its coverage.

### 6.3.2 Socio-economic Rights

Under the socio-economic rights section, social assistance and social insurance were discussed collectively. The main piece of legislation regulating social assistance is the Social Assistance Act (SAA).[41] The SAA defines social assistance as social grants.[42] The SAA deals with the right to social security as entrenched in the Constitution[43] by making provision for social grants. These grants are divided into a number of categories[44] and consequently exclude some members of the community.[45] Coverage in accordance with the SAA is not linked to being an employee. According to South African legislation, only migrants with permanent residence status or refugees may access social assistance. The same rights do not extend to irregular migrant workers, nor is there any reference made to temporary residents in the SAA.

Social insurance in South Africa is regulated by numerous acts.[46] Most of these instruments are employment-based.[47] The UIA establishes an unemployment insurance fund. Both employers and employees contribute to these funds, and the UIA only applies to employees. However, the UIA does not apply to persons who enter the country for work purposes who are required to leave the Republic upon the termination of their employment.[48] COIDA makes provision for compensation for injuries sustained in the workplace that result in occupational injuries, diseases or death.[49] Migrant workers are not excluded from the compensation fund established

[41] 13 of 2004.
[42] S 1 of the SAA.
[43] S 27 of the Constitution.
[44] S 4 of the SAA.
[45] See the discussion in Chapter 3 par 3.2.2.
[46] The Unemployment Insurance Act 63 of 2001 (UIA), the Unemployment Insurance Contribution Act 4 of 2002 (UICA) and the Compensation for Occupational Injuries and Diseases Act 85 of 1993 (COIDA) are some of the relevant acts that were discussed.
[47] Excluding the Road Accident Fund Act 56 of 1996.
[48] S 3(1)(d) of the UIA indicates that "[p]ersons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership within the Republic if upon the termination thereof the employer is required by law or by the contract of service, apprenticeship or learnership, as the case may be, or by any other agreement or undertaking, to repatriate that person, or that person is so required to leave the Republic, and their employers." See also Chapter 3 par 3.2.3 of this dissertation.
[49] Long title of COIDA.



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by COIDA. Individuals have to qualify for compensation, and the act has numerous exclusions, thus limiting the social protection of some community members.[50] South Africa does not have a public (national) retirement scheme, and this is therefore mostly arranged by private providers. This consequently results in a need for personal contributions to private retirement schemes and most of the community cannot afford this.[51]

The Constitutional Court has had the opportunity to give content to the socio-economic rights in the Bill of Rights and to either limit or extend social protection rights in general. Some decisions have adopted a narrower approach and others have made a more generous interpretation of the law. In *Soobramoney*, the court was inhibited by the realities of the availability of resources and it was not willing to extend emergency medical treatment to the patient. The court stated that the state only has an obligation "within its available resources".[52] The court held that the government needs to focus on the broader community, rather than an individual.[53] The Constitutional Court chose a weak remedy instead of a more personal remedy in *Soobramoney* and was against a generous awarding of socio-economic rights.[54]

In *Grootboom* and *Khosa*, the court adopted a more generous view. It is submitted that the court followed the correct approach by extending protection to vulnerable and poor people. *Grootboom* is said to be the most significant court case in this area and set the basis for future assessment of socio-economic rights.[55] The court focused on whether or not the adopted measures were reasonable.[56] The

[50] S 1 of COIDA. "'employee' means… but does not include – (i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act No. 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force; (ii) a member of the Permanent Force of the South African Defence Force while on 'service in defence of the Republic' as defined in s 1 of the Defence Act, 1957; (iii) a member of the South African Police Force while employed in terms of s 7 of the Police Act, 1958 (Act No. 7 of 1958), in 'service in defence of the Republic' as defined in s 1 of the Defence Act, 1957; (iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work; (v) a domestic employee employed as such in a private household."
[51] See Chapter 3 par 3.2.3.
[52] As stated in s 27(2) of the Constitution.
[53] Mbazira (2011) *SAPL* 66.
[54] See the discussion in Chapter 3 par 3.3.2.
[55] Wesson (2004) *SAJHR* 284.
[56] *Grootboom* par 41.



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Constitutional Court, after evaluating the facts, stated that the state breached its constitutional obligation by not having suitable programs.[57]

In *Khosa*, the court acknowledged that the minority rights of migrants must be protected against the rights of the majority.[58] The court extended social assistance in the form of social grants to individuals with permanent residence status by including the words "permanent residents" in the provisions of the SAA.[59] In *Larbi-Odam*, the court struck down regulations discriminating against permanent residents. None of the court cases indicated that the courts would be willing to extend socio-economic rights to irregular migrants. The courts showed readiness to extend socio-economic rights to migrants within available the resources and protection, while acknowledging that it could place an additional burden on the state.[60]

### 6.3.3 Labour Security

Labour security is regulated by different legislative instruments. Three main acts were evaluated during the course of this dissertation.[61] The LRA, *inter alia*, protects workers against unfair dismissal.[62] The EEA aims to achieve equity in the workplace by eliminating unfair discrimination.[63] The Discrimination (Employment and Occupation) Convention, 1958 (No 111) should be considered in accordance with the international obligations of the republic as stated in the Constitution.[64] The BCEA establishes and enforces the basic conditions of employment.[65] These acts provide some form of labour security and enhance social justice.

The courts have specified that there is a readiness to broaden labour security provisions to include irregular migrants (*Discovery Health (ILJ)* and *"Kylie"*) in the sphere of labour security. The court in *Discovery Health (ILJ)* provided a broader definition of 'employee'. The court held that the irregular status of a migrant worker

[57] See also Chapter 3 par 3.2.2.
[58] *Khosa* par 71.
[59] Also see Chapter 3 par 3.2.2.
[60] *Khosa* par 58 – 62.
[61] The Labour Relations Act 66 of 1995; the Employment Equity Act 55 of 1998; and the Basic Conditions of Employment Act 75 of 1997.
[62] Chapter VII of the LRA.
[63] S 2 of the EEA.
[64] S 3 of the EEA.
[65] S 2 of the BCEA.



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does not render an existing contract of employment void.[66] Furthermore, the court concluded that inconsistencies with the Immigration Act 13 of 2002[67] do not invalidate the contract and the worker remains an employee in accordance with the LRA.

There is a tension between the protection of labour markets and the fundamental rights of those seeking work in countries other than their own.[68] In *"Kylie"*, the court held that the definition according to the LRA is wide enough to include an individual whose contract of employment is unenforceable according to the common law.[69] It could be interpreted that in both of these cases the scope of the application of the labour security legislation was extended, rather than limited.

### 6.3.4 Migration

According to a study of five SADC countries, 86% of migrants in the region are found in South Africa.[70] Migration is generally defined as the movement of people. In South Africa, there are mainly four different categories of migrants, namely: permanent residents, temporary residents, refugees and asylum-seekers, and irregular migrants. Originally, the Aliens Control Act (ACA)[71] governed migration in South Africa. It aimed to regulate entry into the country according to the measures of the previous government. The ACA was found to be inconsistent with the Constitution. The Refugees Act[72] governs refugees and asylum-seekers in the country. Refugees are allowed to seek work in the Republic.[73] Asylum-seekers, however, do not have the same rights.

The White Paper on International Migration aims to protect all migrants, including irregular migrants. Furthermore, it was developed to integrate South Africa into SADC by dealing with migration in an international context. It also intends to manage the willingness of the country to manage the global refugee matter.[74]Migration in

[66] *Discovery Health (ILJ)* par 3.
[67] Hereinafter the Immigration Act.
[68] Kapindu (2011) *AHRLJ* 100.
[69] *"Kylie"* par 3.
[70] Olivier (2011) Part 1 *SADC Law J* 144 – 145.
[71] 96 of 1991.
[72] 130 of 1998.
[73] S 27(f) of the Refugees Act.
[74] See Chapter 4 par 4.4.2.3.



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South Africa took a new turn with the development of the Immigration Act. The quest to align the migration law with constitutional obligations contributed to the adoption of the Immigration Act. The objectives of the Immigration Act are focused on the facilitation of legal movement, as well as the prevention of irregular migration into South Africa. Through the evaluation of the migration law, it is clearly indicated that the government of South Africa gives preference to migration laws above labour and social protection laws.[75]

## 6.4 RECOMMENDATIONS AND STRATEGIES

### 6.4.1 Social grants

Social grants are the means by which social assistance is afforded to individuals.[76] Initially, the sections regulating social grants in the SAA were not in line with the provisions of the Constitution.[77] This was corrected by the South African courts.[78] However, the courts are facing difficulties in balancing the awarding of rights to individuals and maintaining sufficient resources to finance the social protection system.[79]

Another observation with regard to social assistance, specifically focussing on social grants, is the fact that the grants are categorized. This results in the exclusion of some members of the community who do not qualify for grants under the SAA.[80] It is argued that this forms an absolute exclusion, and poor adults particularly will have no protection in accordance with social assistance. Sinclair makes an argument that:

> "[f]or the restructuring of the legislative scheme for social assistance to provide access to social grants for the excluded group and an interpretation of the content of the right to social assistance that is meaningful and in line with the founding moral values and transformational demands of the Constitution."[81]

Despite the provisions in the Constitution that determine that any law or conduct inconsistent with the Constitution is invalid,[82] the argument of Sinclair is not

[75] Olivier (2012) Part 2 *SADC Law J* 131.
[76] S 1 of the SAA.
[77] See Chapter 3 par 3.2.2. See also Sinclair (2012) *Stell LR* 200 – 201.
[78] See Chapter 3 par 3.2.2. As well as *Khosa* par 71.
[79] Dekker (2010) *SA Merc LJ* 398.
[80] Sinclair (2012) *Stell LR* 200 –201.
[81] *Ibid* 201.
[82] S 2 of the Constitution.



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supported. It is acknowledged that the social protection law, particularly the SAA, was incoherent with the Constitution. However, the South African courts, specifically in *Khosa*, extended social protection to some categories of migrants, thus widening the scope of the SAA. This inclusion is a step in the right direction regarding the development of social protection in line with the Constitution. The courts, after evaluating the facts, financial impact and other relevant factors, made an economically safe decision.

The idea of extending social assistance to more groups than the categories already included in the SAA, whether poor adults or other migrant workers, is noble, but the implications could be vast. An additional financial burden on the state is not necessarily something to consider.[83] However, extending social assistance to temporary migrants who have been issued a work permit[84] in accordance with the Immigration Act could be reasonable. The migrant work permit holders do make a contribution to the country's development, whether financially or with physical labour. These permits are issued on the condition that the individual does not become a "public charge",[85] and it is argued that this condition should also be the basis of the extension of social assistance to this category of migrant workers.

In *Khosa*[86] Mokgoro captures the reason behind these extensions expressly:

> "[a] society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational." This should be the focus of our society if we intend to remain a democratic country bounded by diversity and unique in that most migrants seek out our country as a place of safe haven."

Consequently, extending social grants to other categories of migrant workers, excluding permanent residents and temporary migrants with work permits, is not a recommendation made by this dissertation.

[83] See also Nyenti and Mpedi (2012) *PELJ* 272 discussion on mandatory social insurance and the burden of these schemes on the state.
[84] S 19 of the Immigration Act.
[85] S 29 – 30 of the Immigration Act. See also Olivier (2011) Part 1 *SADC Law J* 137.
[86] 2004 (6) BCLR 569 (CC) par 52.



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### 6.4.2 Law Reform

The South African regulatory framework, in particular the social protection system, is said to be fragmented.[87] The legislation in South Africa is evaluated individually, and some items will have preference over others. This is clearly indicated where the government is able to give preference to migration law above social protection and labour laws.[88] Migration law aims to be restrictive, while social protection and labour laws are generally protective.[89] The South African courts have been willing to extend the scope of some of the instruments through interpretation.[90] Without expecting the legislation to be rewritten, the court simply included certain provisions, which would be implemented through developing regulations.

In *Discovery Health*, the court further acknowledged the Immigration Act and held that conduct inconsistent with the Immigration Act does not make a contract of employment null and void.[91] When dealing with migration laws together with social protection and/or labour law, an interpretation consistent with the different laws should be favoured. The courts indicated a willingness to extend social protection in the sphere of labour security more generously than any of the other strands.[92] Labour legislation applicable when dealing with labour security does not exclude migrants explicitly. Where there were uncertainties regarding the inclusion of migrant workers, the courts extended the scope of the application of the relevant acts.[93]

South Africa could move closer to the international and constitutional expectations of fair treatment for everyone by taking account of developments in the arena of labour security. Labour security is almost completely regulated by existing legislation and can be developed to include even irregular migrant workers in as far as it would be possible.

Most of the South African court cases mentioned throughout this dissertation made reference to or specifically mentioned international standards and instruments.

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[87] Olivier (2011) Part 1 *SADC Law J* 130. See also Olivier (2012) Part 2 *SADC Law J* 152.
[88] See Chapter 4 par 4.1 and 4.5. See also Olivier (2012) Part 2 *SADC Law J* 131.
[89] Olivier and Govindjee (2013) Paper at the *LLRN* 7.
[90] *Discovery Health*; *"Kylie"* and *Khosa*. See also Chapter 3 of this dissertation.
[91] *Discovery Health* par 3.
[92] See the discussion in Chapter 3 par 3.3.3.
[93] As stated in Chapter 3 the LRA.



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International and regional organizations make provisions for bilateral and multilateral agreements, which were discussed earlier.[94] These agreements, as stated, do have positive impacts and provide protection for migrant workers in the countries who are parties to the agreements. This, however, is not a strategy recommended at this stage, as these agreements could be of no value if both countries concluding the agreements do not have similar social protection systems and offer similar protection through their social protection systems, as shown in by the agreements between South Africa and Mozambique.

The time may have come for international instruments to regulate the extension of social protection towards migrant workers, including irregular migrants in as far as the migrant-receiving country can accommodate these individuals. The Social Security (Minimum Standards) Convention, 1952 (No 102), developed by the ILO determines the minimum standards a country's social security system should adhere to. The International Convention adopted by the UN is another significant instrument dedicated the protection of specifically migrant workers. These are only two of the international instruments applicable to the development of social protection for all.

It is recommended that South Africa could evaluate these conventions and ratify and implement them in the existing social protection system. The South African social security system already complies with most of the provisions in the ILO Social Security (Minimum Standards) Convention, 1952 (No 102).[95] South Africa is a member of the ILO, and this entails that the social protection system in South Africa is up to standard and echoes the principles that the ILO stands for. This is a recommendation or strategy to improve and extend social protection in South Africa, supported by the research in this dissertation and shared by Mpedi and Govindjee.[96]

The International Convention is a comprehensive instrument with regard to the flow of migration. It is submitted that the adoption of the International Convention could lead to an improved South African social protection system. As previously stated,[97] it

[94] See Chapter 4 and 5.
[95] Strydom *et al* (2006) 6.
[96] Mpedi and Govindjee (2009) *Obiter* 781 states that "it is therefore recommended that South Africa ratify and implement the up-to-date social security conventions as a matter of urgency."
[97] See Chapter 4.4.4.1.



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took a number of years before the International Convention was adopted by some countries, due to the obligations imposed by the International Convention. The International Convention protects migrants in general and irregular migrants in particular.[98] South Africa has already made significant progress towards extending social protection to some of the categories of migrant workers, and permanent residents and refugees are included under the protection of social assistance. Temporary residents are protected as far as this is in line with the legislation in South Africa. The courts included irregular migrants in the field of labour security.

South Africa has already made a positive development and goes even further than is expected of a country that is part of the international sphere. The International Convention acknowledges a country's sovereignty, and therefore it could only be a positive step in the future to ratify the International Convention. Through the ratification of the International Convention, South Africa could provide social protection for permanent residents, temporary residents, refugees and asylum-seekers in as far as it is financially possible and according to its sovereignty in regulating migration into South Africa.

The social protection afforded to migrant workers is not explicitly absent and in some instances provides sufficient protection in some categories. However, implementing the above recommendations may further develop the social protection system in South Africa in favour of some categories of migrant workers.

[98] See the discussion in Chapter 4.4.4.1.



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