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**Running title: Social Protection Afforded to Irregular Migrant Workers**

## **Social Protection Afforded to Irregular Migrant Workers: Thoughts on the Southern Africa Development Community (with Emphasis on Botswana and South Africa)**

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### **Abstract**

The majority of migrant workers target those countries in southern Africa that have stronger economies. Irregular migrants are in a particularly vulnerable position, and this article discusses the protection that this category of persons may expect to experience in the southern African region. It traverses the international, continental and regional instruments providing protection to irregular migrants, and considers the constitutional and legislative frameworks in relation to social protection in Botswana and South Africa. The article concludes by recommending that the broader notion of “social protection”, rather than the narrower concept of “social security”, should be emphasized. Job creation programmes are essential. It suggests that the advantages of the free movement of people in the region should be explored and encouraged. The article also supports the notion that a regional policy that seeks to balance the flow of migrants in the Southern African Development Community should be adopted.

### **INTRODUCTION**

Within the Southern African Development Community (SADC), the majority of migrant workers target countries with stronger economies, including Botswana, Namibia and South Africa.<sup>1</sup> Of these countries, South Africa is by far the most significant “receiving country” for people who are looking for a better way of life in the region.<sup>2</sup>

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The term “migrant workers” is a wide concept. It refers to those persons who are engaged in a remunerated activity in a country of which they are not nationals.<sup>3</sup> It includes persons who enter a country with or without the necessary permission from the authorities of the receiving country. The one common feature is that the term covers non-citizen migrants. As pointed out by Mpedi and Smit, there are a number of distinct categories within the broader group of non-citizen migrants.<sup>4</sup> The groups include permanent residents, temporary residents, refugees, asylum-seekers and “irregular” or “undocumented” migrants. This last category is also referred to as “illegal migrants”. However, this term has been criticized for connoting something criminal and reprehensible about the persons it covers and the term “irregular migrants” is used for the purposes of this contribution.<sup>5</sup> Of the categories mentioned, irregular migrants undoubtedly form the most vulnerable group. Members of this group are often subjected to substandard living and working conditions, are always fearful of being deported and are in most instances excluded from the varying degrees of social protection coverage that governments provide.<sup>6</sup>

It is problematic to obtain accurate estimates of how many irregular migrants live and work in SADC: such migrants do not want to be detected, and government and private agencies are not effective in determining reasonably accurate numbers. So, for example, according to one of the South African government’s official web pages under the heading “State of South Africa’s population report 2000” it is stated that estimates range between 2 million and 4 million irregular immigrants.<sup>7</sup> However, according to Crush, Williams and Peberdy, even though South Africans believe that 25 per cent of the population is foreign, the more accurate figure of irregular migrants is probably closer to 500,000.<sup>8</sup>

Despite the uncertainty regarding the exact number of irregular migrants in southern Africa, one aspect that is clear is that the problem is not insignificant. Citizens and migrants compete for scarce resources in developing countries, while in many instances they struggle for survival.<sup>9</sup> In addition to scarce resources, the countries are faced

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<sup>1</sup> MP Olivier “Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (part I)” (2011) 1/1 *SADC Law Journal* 121 at 123.

<sup>2</sup> According to W Pendleton, J Crush, E Campbell, T Green, H Simelane, D Tevera and F de Vletter “Migration, remittances and development in southern Africa” (2006) *Migration Policy Series* No 44 (Southern African Migration Project and Institute for Democracy in Africa) at 3 “South Africa plays a central role in the cross-border migration picture with 86% of the total number of migrants [in the southern Africa region] currently working there.” This report resulted from a Migration and Remittances Survey, conducted by the Southern African Research Centre (Queen’s University) which forms part of volume of a Migration Policy Series. Five southern African countries were covered by this study, namely Botswana, Lesotho, Southern Mozambique, Swaziland and Zimbabwe.

<sup>3</sup> Art 2(1) of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (the International Convention on Migrant Workers), adopted by GA res no 45 of 158 on 18 December 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”.

<sup>4</sup> LG Mpedi and N Smit *Access to Social Services for Non-Citizens and the Portability of Social Benefits within the Southern African Development Community* (2011, Sun Press) at 3.

<sup>5</sup> O Dupper “Migrant workers and the right to social security: An international perspective” (2007) *Stellenbosch Law Review* 219 at 223 refers to PA Taran “Human rights of migrants: Challenges of the new decade” (2000) *International Migration* at 23, who mentions that the term “illegal migrants” associates migrants with “criminality, unemployment, disease and other social ills”. Art 5 of the International Convention on Migrant Workers states: “For the purposes of the present Convention, migrant workers and members of their families: (a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment ... ; (b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.”

<sup>6</sup> Many migrants are at the bottom of the employment ladder, doing jobs that are “dirty, dangerous and difficult”: Dupper, id at 220. This is especially true in respect of irregular migrants, who most often fall into a pool of flexible labour outside most forms of social protection. See *Towards a Fair Deal for Migrant Workers in the Global Economy* (2004, International Labour Office) at 7.

<sup>7</sup> See: <[http://www.gov.za/sites/www.gov.za/files/StateofSAPopulationReport2000-1\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/StateofSAPopulationReport2000-1_0.pdf)> (last accessed 18 December 2012).

<sup>8</sup> J Crush, V Williams and S Peberdy *Migration in Southern Africa* (2005, Global Commission on International Migration) at 15–16.

<sup>9</sup> AH Dekker “The social protection of non-citizen migrants in South Africa” (2010) 22 *South African Mercantile Law Journal* 388.

with phenomena such as high HIV infection<sup>10</sup> and unemployment rates.<sup>11</sup> These significant socio-economic problems are all contributory factors that increase the competition for available resources in the SADC region.

The overarching theme of this article concerns the question of to what extent irregular migrants can rely on “social protection”<sup>12</sup> in the SADC region and in Botswana and South Africa in particular. International, continental and regional norms relating to social protection and migrant workers have been adopted. In addition, the constitutions of a number of African countries contain the right to some form of social protection as a human right.<sup>13</sup> This article starts with a conceptualization of the term “social protection” as it is used in the rest of the discussion; it then traverses a number of significant international, continental and regional instruments pertaining to migration and social protection; the article provides a snapshot of the social protection measures that have been introduced in two neighbouring SADC countries, Botswana and South Africa; finally it considers suggestions by commentators and draws conclusions regarding the plight of irregular migrants in southern Africa.

## **SOCIAL PROTECTION AND SOCIAL SECURITY**

The concepts “social protection” and “social security” are fairly flexible and the terms often overlap. Social protection is a wider concept than social security and includes, but is not limited to, the traditional sub-divisions of social security. Social security is often described as consisting of two main pillars, namely “social insurance” and “social assistance”.<sup>14</sup> Social insurance relates to formalized schemes that rely on contributions to an insurance scheme, such as unemployment insurance and disability insurance. Such schemes are employment-based and the contributions to such schemes are collected from the salaries of the contributors (or their employers); only the contributors are eligible to claim benefits from the insurance fund. Social assistance, on the other hand, includes formal programmes financed by taxes and which provide a safety-net for those who are not engaged in regular employment. State-funded health care, old-age pensions and child care for means-tested parents are examples of such schemes.<sup>15</sup>

The term “social protection” is not limited to the protection of persons who have contributed to social insurance schemes or groups of people such as the elderly or indigent who receive basic social assistance benefits. The term also incorporates schemes and policies that promote employment, job creation and the improvement of

<sup>10</sup> According to A Strode, B Grant and S Bhamjee “Are there laws and policies protecting people infected and affected by HIV/AIDS in southern Africa? An update of a review of the extent to which countries within the South African Development Community have implemented the HIV/AIDS and Human Rights International Guidelines” (2010) 16/2 *Obiter* 460, seven of the SADC countries have HIV/AIDS rates of 15% or more.

<sup>11</sup> According to an official report by the South African government sponsored Statistics South Africa, an unemployment rate of 24,3% was surveyed in South Africa during the fourth quarter of 2014. See Statistics South Africa *Quarterly Labour Force Survey, Quarter 4*, <[www.statssa.gov.za/publications/P0211/P02114thQuarter2014.pdf](http://www.statssa.gov.za/publications/P0211/P02114thQuarter2014.pdf)> (last accessed 6 June 2015). The survey defined (at xxiv) the term “unemployed persons” as those (aged 15–64 years) who: were not employed in the reference week; actively looked for work or tried to start a business in the four weeks preceding the survey interview; and were available for work, ie would have been able to start work or a business in the reference week, or had not actively looked for work in the past four weeks but had a job or business to start at a definite date in the future and were available.

<sup>12</sup> See the discussion below about the terms “social protection”, “social security” and “labour security”.

<sup>13</sup> CM Fombad “An overview of the constitutional framework of the right to social security with special reference to South Africa” (2013) 21/1 *African Journal of International and Comparative Law* 1 at 12.

<sup>14</sup> AH Dekker, L Janse van Rensburg, R Liffman, M Thompson and A van der Walt “Social security: A conceptual overview” (2000) *Law, Democracy & Development* 1 at 3; Dupper “Migrant workers”, above at note 5 at 224; Fombad, id at 2.

<sup>15</sup> However, it has been argued that the term social security should be given a broader interpretation than limiting it to the traditional pillars mentioned above. W Van Ginneken “Extending social security: Policies for developing countries” (2003) 142/3 *International Labour Review* 277 at 279 argues that “a broad perception of social security is required to respond to the realities faced by informal-economy workers”. A discussion of informal social security in the SADC region falls beyond the scope of this article.

economies.<sup>16</sup> As stated by the Asian Development Bank, social protection is a combination of guiding principles and plans developed to lessen poverty and vulnerability by promoting competent labour markets, limiting individuals' exposure to risk and ensuring that they can protect themselves against loss of income by promoting their capability to fend for themselves.<sup>17</sup>

The director general of the International Labour Organization (ILO), Juan Somavia, introduced the concept and goals of the ILO's "decent work" agenda in 1999. This strategy adopts a broad approach, which reaffirms the ILO's primary goals "to promote opportunities for woman and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity".<sup>18</sup> As this article will argue more comprehensively, it is submitted that the goals of social protection should be closely linked to the concept of decent work as espoused by the ILO.

In 2004 the World Commission on the Social Dimension of Globalization proposed a "social protection floor"; the ILO has developed this concept further as a means to extend the coverage of social protection.<sup>19</sup> In 2009 the UN System Chief Executives Board adopted a Global Initiative for a Universal Social Protection Floor.<sup>20</sup> This initiative does not establish a new international human rights instrument. However, it does establish social protection floor policies parallel to existing international instruments and obligations at international, regional and national levels.<sup>21</sup> This initiative also places the emphasis on social protection, rather than the more limited scope of social security,<sup>22</sup> and this is also where the emphasis falls in this contribution.

## INTERNATIONAL, CONTINENTAL AND REGIONAL INSTRUMENTS

### The UN and the ILO

The ILO has adopted conventions which provide for minimum standards of social security in general. Of particular significance is the ILO Social Security (Minimum Standards) Convention No 102 of 1952, which establishes minimum world-wide standards for nine branches of social security: medical care, sickness benefit, unemployment

<sup>16</sup> The South African Department of Social Development uses the term "comprehensive social protection". See the Department of Social Development Strategic Plan Update 2009–12, available at: <[http://www.dsd.gov.za/index2.php?option=com\\_docman&task=doc\\_view&gid=74&Itemid=3](http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=74&Itemid=3)> (last accessed 20 December 2012). This concept includes social assistance, social insurance, social services and development initiatives which promote labour security. AH Dekker "Where have all the young men gone? The impact of HIV/AIDS on informal social security systems and care for the elderly" (2004) 19/1 *SA Public Law* 152 at 158 mentions: "Comprehensive 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".

<sup>17</sup> Asian Development Bank "Social protection: Reducing risks, increasing opportunities", available at: <<http://www.adb.org/de/node/152502>> (last accessed 4 June 2012). See also LG Mpedi and A Govindjee "Social protection for workers posted to and from South Africa: A critical assessment" (2009) 30/3 *Obiter* 774 at 775, who favour the use of the term "social protection" rather than the more limited concept of "social security".

<sup>18</sup> "Report of the director-general: Decent work" (1999, 87th session of the International Labour Conference) at 3. M Van Staden "Towards a South African understanding of social justice: The International Labour Organization perspective" (2012) 1 *TSAR* 91 at 104 argues that South Africa should apply the norms established by the ILO to develop the concept of "social justice" in South Africa.

<sup>19</sup> World Commission on the Social Dimension of Globalization "A fair globalization: Creating opportunities for all" (2004, ILO).

<sup>20</sup> ILO and World Health Organization "The social protection floor" (a joint crisis initiative by the UN Chief Executives Board for Co-ordination on the Social Protection Floor) (2009, ILO / World Health Organization).

<sup>21</sup> M Nyenti and LG Mpedi "Impact of SADC protection instruments on the setting up of minimum social protection floor in southern African countries" (2012) 15/1 *Potchefstroom Electronic Law Journal* 244 at 247.

<sup>22</sup> *Ibid.*

benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit.<sup>23</sup>

The UN and the ILO have recognized the need to protect migrants and their families in particular and have also adopted conventions dealing directly with protective measures for migrants.<sup>24</sup> In 1990 the UN adopted the International Convention on Migrant Workers.<sup>25</sup> This is probably the most significant overarching convention providing protection to migrants and their families and is the subject of further discussion below.

However, long before the adoption of this instrument, the ILO had been concerned with the protection of migrant workers. Dupper points out that, since the ILO's foundation in 1919,<sup>26</sup> the preamble to the ILO Constitution highlighted among other things the need for the "protection of the interests of workers when employed in countries other than their own".<sup>27</sup> The ILO has adopted two significant conventions aimed specifically at addressing the plight of migrant workers: the Migration for Employment Convention (Revised) No 97 of 1949 (1949 Convention) and the Migrant Workers (Supplementary Provisions) Convention No 143 of 1975 (1975 Convention). Neither of these conventions makes direct reference to the protection of irregular migrants in particular. The 1949 Convention provides for the equal treatment of both migrant workers and other workers within member states, including in the areas of employment rights, social security rights and accommodation rights. However, article 6 specifically provides that this protection applies in respect of nationals and "immigrants lawfully within its territory". By implication, this provision excludes irregular migrants.

Article 10 of the 1975 Convention mirrors article 6 of the older convention in this regard. 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 families *are lawfully within its territory*".<sup>28</sup>

The 1975 Convention further encourages member states to conclude bilateral (and multilateral) agreements with other countries that could ensure portability<sup>29</sup> of social security benefits and reciprocity of treatment.<sup>30</sup> Thus,

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<sup>23</sup> There are also conventions which seek equal treatment between nationals and non-nationals and others 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) Convention No 25 of 1925; the Equality of Treatment (Social Security) Convention No 118 of 1962; and the Maintenance of Social Security Rights Convention No 157 of 1982.

<sup>24</sup> Apart from this, 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 being the fundamental conventions of the ILO: the Freedom of Association and the Right to Organise Convention No 87 of 1948; the Right to Organise and Collective Bargaining Convention No 90 of 1949; the Forced Labour Convention No 29 of 1930; the Abolition of Forced Labour Convention No 105 of 1957; the Minimum Age Convention No 138 of 1973; the Worst Forms of Child Labour Convention No 184 of 1999; the Equal Remuneration Convention No 100 of 1951; and the Discrimination (Employment and Occupation) Convention No 100 of 1951. See A Van Niekerk, MA Christianson, M McGregor, N Smit and S van Eck *Law@work* (2012, LexisNexis) at 22.

<sup>25</sup> The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, above at note 3.

<sup>26</sup> Dupper "Migrant workers", above at note 5 at 219. He also points out: "At the First Session of the International Labour Conference in 1919, a recommendation [the Reciprocity of Treatment Recommendation, 1919 (No 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."

<sup>27</sup> The ILO Constitution is available at: <<http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf>> (last accessed 20 December 2012).

<sup>28</sup> Emphasis added.

<sup>29</sup> "Portability" refers to a migrant worker's right to maintain social security benefits which were gained in the country where they were employed and to transfer them to their country of origin after their return: Dupper "Migrant worker" above at note 5 at 219.

<sup>30</sup> "Reciprocity", in the context of migration, would mean that both the country of employment and the migrant's country of origin would have to be signatories to a convention before social security rights can be transferred: Dupper "Migrant workers", above at note 5 at 231, note 80. As pointed out by Dupper, it is significant to note that the principle of non-reciprocity is enshrined in both of the ILO conventions dealing with migration. This entails that the migrant's social security rights should be respected by the country of employment irrespective of whether the country of origin has ratified the convention.

for example, a person who has worked in a foreign country and has contributed to the receiving country's social security programmes should be able to return to their country of origin and continue to receive benefits from the receiving country's programmes.<sup>31</sup> The 1975 Convention is susceptible to criticism in so far as irregular migrants are not protected. Irregular migrants are generally in a more precarious position than regular migrants and this category is arguably in greater need of protection than regular migrants.<sup>32</sup>

Böhning avers that, among the UN organizations, the ILO has the constitutional responsibility for protecting the "interests of workers when employed in countries other than their own".<sup>33</sup> However, for a number of political reasons, the ILO was sidestepped when the UN adopted the International Convention on Migrant Workers in 1990. It took almost 13 years for a sufficient number of countries to ratify this convention before it could enter into force.<sup>34</sup> The fact that this took so long 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.<sup>35</sup>

It is submitted that human rights gains pertaining to the protection of irregular migrant workers were made with the adoption of the International Convention on Migrant Workers.<sup>36</sup> This convention does not only cover the families of migrant workers; most of the convention applies to all migrant workers irrespective of their status. The preamble to the convention states that it should be borne in mind that "the human problems involved in migration are even more serious in the case of irregular migration and ... [that] therefore ... appropriate action should be encouraged in order to prevent and eliminate clandestine ... trafficking in migrant workers, while at the same time ... [protecting] their fundamental human rights".

The International Convention on Migrant Workers is divided into four parts. The first provides for the scope of application and definitions. The second provides that state parties shall adhere to international human rights instruments and directs that states should not discriminate against migrants on grounds such as sex, race, religion or nationality.<sup>37</sup> Part III forms the centrepiece of the instrument and establishes a set of human rights that apply to all migrant workers (both regular and irregular), while the final part establishes an additional set of "other [human] rights" that apply only to regular migrant workers and their families. Part III is of particular relevance, as it relates to the social and labour security of migrant workers. In relation to social security, article 27(1) states that "[m]igrant workers and their families shall enjoy in the State of employment the same treatment granted to nationals in so far as *they fulfil the requirements provided for by the applicable legislation* of that State".<sup>38</sup> Article 27(2) adds that:

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<sup>31</sup> For example, the Southern Africa Trust "Crossing the threshold of regionalism" (2008) *Policy Brief* 10 makes reference to Morocco as an example of a country that has concluded bilateral agreements with a number of European countries to ensure the transfer of pension and health benefits. The effect of these agreements has been that the return rate to Europe of Moroccan migrant workers who retained their social insurance benefits has increased by 50%.

<sup>32</sup> S Sivakumaran "The rights of migrant workers one year on: Transformation or consolidation?" (2004) 36 *Georgetown Journal of International Law* 113 at 120; Dupper "Migrant workers", above at note 5 at 220.

<sup>33</sup> R Böhning "The ILO and the new UN convention on migrant workers: The past and the future" (1991) 25/4 *International Migration Review* 698 at 700.

<sup>34</sup> O Dupper "Migrant workers and the right to social security: An international perspective" in U Becker and MP Olivier (eds) *Access to Social Security for Non-Citizens and Informal Sector Workers: An International, South African and German Perspective* (2008, Sun Press) 13 at 35–36 confirms that 20 ratifications were needed for the convention to come into force. YES, THIS IS A CHAPTER IN A BOOK.

<sup>35</sup> Taran "Human rights of migrants", above at note 5 at 18; Dekker "The social protection", above at note 9 at 392 points out that there is a "fear that irregular migration may increase" if human rights protection is extended to irregular migrants.

<sup>36</sup> Böhning "The ILO and the new UN convention", above at note 33 at 740. The text of the convention is available at: <<http://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf>> (last accessed 7 May 2015).

<sup>37</sup> International Convention on Migrant Workers, art 7.

<sup>38</sup> Emphasis added.

“[w]here the applicable legislation does not allow migrant workers ... a benefit, the States concerned shall *examine the possibility* of reimbursing interested persons the amount of contributions made by them”.<sup>39</sup>

A number of salient aspects stand out when the social security article is interpreted. First, states are not compelled to provide migrants (regular or irregular) with the same social security benefits as their citizens. States remain at liberty to set their own requirements in their social security legislation which need to be met before a person becomes entitled to benefits. This could include being a national or that only regular migrants may apply.<sup>40</sup> Secondly, the article sets a relative weak directive in respect of contributions made by migrant workers. There is no compulsion contained in the provision, as it directs that states “shall examine the possibility [of] reimbursing” contributors the amount of contributions they made to social security schemes.<sup>41</sup>

The International Convention on Migrant Workers provides much stronger protection in respect of labour security than in the case of social security. Article 25 protects individual employment rights and directs that all migrant workers “shall enjoy treatment not less favourable than that which applies to nationals of the State” in respect of, among other things, remuneration and other working conditions (such as overtime, paid holidays and the termination of employment).<sup>42</sup> The article goes further and directs that “it shall not be lawful to derogate in private contracts of employment” from the equality of treatment to which nationals are entitled.<sup>43</sup> Finally, article 25 protects irregular migrants directly in so far as “employers shall not be relieved of any legal or contractual obligations ... in any manner by reason of such irregularity [in their stay or employment]”.<sup>44</sup>

The provisions relating to labour protection are the strongest and most meaningful in protecting the rights of irregular migrant workers. The word “shall” is used, and no discretion is provided in relation to the setting of additional requirements in legislation as is the case with the social security clause. Furthermore, irregular migrants are specified, in so far as employers may not be relieved of any of their individual labour law obligations which may be relevant to nationals in a particular jurisdiction.

Article 28 of the convention protects the rights of migrant workers pertaining to emergency medical care. It provides that all migrant workers and their families “shall have the right to any medical care that is urgently required”. It further directs that such care “shall not be refused them by reason of any irregularity with regard to stay and employment”. The right to emergency medical care has been called the “bottom line” pertaining to social protection.<sup>45</sup>

To summarize, the ILO conventions do not protect irregular migrants, and the most influential stride towards the protection of the human rights of irregular migrants has been made with the adoption by the UN of the International Convention on Migrant Workers. It is submitted that two policy considerations might have played a significant role when the convention was formulated. First, once irregular migrants have entered a country, they

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<sup>39</sup> Emphasis added.

<sup>40</sup> Dupper “Migrant workers”, above at note 5 at 392 mentions that state parties “can adopt provisions that would, for example, differentiate between regular and irregular migrants, thereby negating the **protection that this article** is meant to confer on all migrants, irrespective of their status”

<sup>41</sup> Ibid.

<sup>42</sup> International Convention on Migrant Workers, art 25.1.

<sup>43</sup> Id, art 25.2.

<sup>44</sup> Id, art 25.3.

<sup>45</sup> Dupper “Migrant workers”, above at note 5 at 234. Dupper does, however, point out that there is uncertainty pertaining to the definition of “emergency care”.

should not be subjected to a situation where unscrupulous employers can exploit them by providing them with less favourable working conditions than those provided to regular migrants and nationals. If this were to be permitted, it could provide fertile ground for practices such as human trafficking. Secondly, it places financial burdens on states to provide social security services; apart from medical care, states are not compelled to provide social security services to irregular migrants. They are, however, at liberty to do so. Therefore, it has been accepted at an international level that states are entitled to include requirements pertaining to nationality in social security legislation.

### **The African Union (AU)**

The AU recognizes the importance of implementing a coherent and integrated strategy regarding the social protection of migrants at continental and regional (such as SADC) levels. As far back as 2001 the AU expressed the need for member countries to develop and implement co-ordinated migration policies. The AU Executive Council recommended that member countries should work towards the free movement of people and stressed the need to strengthen “inter-regional co-operation in matters concerning migration on the basis of the established processes of migration dialogue at regional and sub-regional levels”.<sup>46</sup>

More recently, in 2006, the AU adopted its migration policy framework for Africa,<sup>47</sup> which expresses the need for a comprehensive migration policy in Africa. It calls on member countries to adopt principles from the ILO’s 1949 and 1975 Conventions and the UN International Convention on Migrant Workers. The AU migration policy framework contains a number of guidelines relating to how policies can be developed to promote the free movement of people and to strengthen regional co-operation in matters concerning migration. It also recommends that member countries should seek collective solutions through dialogue and regional agreements, establish transparent labour migration policies, strengthen measures to prevent trafficking, and resolve conflicts relating to migration by balancing national security and migrants’ rights.<sup>48</sup> Apart from pointing out that strategies should be implemented to protect irregular migrants from trafficking, the policy framework does not provide specific protection to this vulnerable group within the broader group of migrants.

Olivier confirms that, despite the existence of AU instruments relating to the regulation and protection of migrants in general, “the adoption, implementation and monitoring of international and regional standards ... appear to be problematic”.<sup>49</sup> The author further clearly makes the point that social security regimes still operate under circumstances where free movement is not encouraged and where there is a glaring absence of the implementation of overarching and integrated migration policies.<sup>50</sup>

### **Southern African Development Community**

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<sup>46</sup> AU res on the establishment of a strategic framework for a policy of migration in Africa, paras 4–5: CM/Dec 34 (LXXIV) 2001.

<sup>47</sup> AU “African common position on migration and development” (AU Executive Council, 9th ordinary session, Banjul, 25–29 June 2006): doc EX.CL/277 (IX) (2006b).

<sup>48</sup> Id, para 7.1.

<sup>49</sup> MP Olivier “Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (part II)” (2012) 2/2 *SADC Law Journal* 129 at 138.

<sup>50</sup> Ibid.



On 17 August 1992, in Windhoek, Namibia, the SADC Treaty that transformed the Southern African Development Coordinating Conference into SADC was signed.<sup>51</sup> The motto, contained in the SADC coat of arms, reads “[t]owards 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)<sup>52</sup> and take appropriate action to ratify and implement these instruments. Article 5 spells out one of SADC’s main objectives to be “to promote sustainable and equitable economic growth and socio-economic development through deeper cooperation and integration”. 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”.<sup>53</sup>

In August 2003, the SADC heads of state signed the Charter of Fundamental Social Rights in SADC (the SADC Charter). Adapting the objectives of the SADC Treaty, the SADC Charter among other things emphasizes the harmonization of social protection for those who have work and those who are striving to enter the job market. Article 10 provides that: “every 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.” Other goals include the alignment of policies regarding freedom of association and collective bargaining,<sup>54</sup> equal treatment for men and woman,<sup>55</sup> protection of children and young people,<sup>56</sup> protection of elderly persons<sup>57</sup> and protection of people with disabilities.<sup>58</sup> It is notable that the SADC Charter does not extend these protective measures to irregular migrants.

Whereas the SADC Charter contains general overarching goals, the Code on Social Security (the SADC Social Security Code) focuses on the implementation of social security in the SADC region.<sup>59</sup> It is a non-binding document and encourages states to work towards the free movement of persons; it also suggests that immigration controls should be progressively reduced.<sup>60</sup> The code specifically promotes social protection for 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 to enjoy equal treatment regarding social security alongside nationals of the host country.<sup>61</sup> 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 multi-lateral arrangements between member states and national legislation.<sup>62</sup>

On the positive side, the SADC Social Security Code encourages member states to facilitate the exportability of benefits, which includes the payment of benefits by the host country.<sup>63</sup> In respect of irregular

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<sup>51</sup> On 14 August 2001, heads of state and government signed an agreement amending the SADC Treaty.

<sup>52</sup> See note 24 above.

<sup>53</sup> Nyenti and Mpedi “Impact of SADC protection instruments”, above at note 21 at 252.

<sup>54</sup> SADC Charter, art 4.

<sup>55</sup> Id, art 6.

<sup>56</sup> Id, art 7.

<sup>57</sup> Id, art 8.

<sup>58</sup> Id, art 8.

<sup>59</sup> The SADC Social Security Code, signed on 1 January 2008, refers to the position of migrant workers in particular.

<sup>60</sup> Id, art 17(1).

<sup>61</sup> Id, art 17(2)(a) and (b).

<sup>62</sup> Id, art 17(2).

<sup>63</sup> Id, art 17(2)(c) and (d).

migrants the code provides that such persons “should be provided with basic minimum protection ... and should enjoy coverage according to the laws of the host country”.<sup>64</sup>

Compared to the UN International Convention on Migrant Workers the SADC Social Security Code (and for that matter all of the SADC instruments) does not provide any meaningful social protection to irregular migrants or their families. This is especially relevant in respect of the protection relating to labour security for irregular migrants. It must be remembered that the International Convention on Migrant Workers specifically protects irregular migrant workers against exploitation, in that irregular migrants may not be subjected to employment practices that do not comply with individual labour law protection.

The SADC Treaty makes provision for member states to conclude protocols that will give effect to the aims and objectives of the treaty. Alongside protocols covering aspects like trade and economic co-operation is the SADC Protocol on Health.<sup>65</sup> The aims of this protocol include the formulation and implementation of regional health policies to attain an acceptable standard of health for the people in SADC. The protocol contains broad and vague statements, and Nyenti and Mpedi make the point that it cannot be foreseen that this instrument will have much of an impact on the regulation of health and social protection in the region.<sup>66</sup> Furthermore, SADC developed a Draft Protocol on the Freedom of Movement of Persons in 1995 based on the vision of a region where people, goods and capital could move freely across borders.<sup>67</sup> The weaknesses of the draft protocol are that it fails to take into consideration that the region consists of national economies of diverse capacities. It therefore does not take account of the socio-economic realities of the different countries in the region.<sup>68</sup> The protocol does not make specific reference to irregular migrant workers or to social protection in general, but encourages member states to conclude bilateral agreements to facilitate the movement of persons.<sup>69</sup>

## **SOCIAL PROTECTION IN BOTSWANA AND SOUTH AFRICA**

### **Background**

How have migrant-receiving countries in southern Africa responded to the instruments relating to the social protection of, among others, irregular migrant workers adopted by the UN, ILO, AU and SADC? More pertinently, to what extent have Botswana and South Africa included in their constitutions and legislative frameworks protection for migrant workers, and has any impact been made on human rights protection for irregular migrant workers?

In a study covering the constitutional right to social security of 30 African countries, Fombad concludes that, since the 1990s, constitutional reforms have resulted in a significant improvement in the recognition of human rights in Africa.<sup>70</sup> He 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”.<sup>71</sup> The study

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<sup>64</sup> Id, art 17(3).

<sup>65</sup> Available at: <[http://www.sadc.int/files/7413/5292/8365/Protocol\\_on\\_Health1999.pdf](http://www.sadc.int/files/7413/5292/8365/Protocol_on_Health1999.pdf)> (last accessed 7 May 2015).

<sup>66</sup> Nyenti and Mpedi “Impact of SADC protection instruments”, above at note 21 at 256–57.

<sup>67</sup> Available at: <[http://www.unisa.ac.za/contents/faculties/law/docs/facilitation\\_of\\_movement\\_of\\_persons\\_sadc\\_1996.pdf](http://www.unisa.ac.za/contents/faculties/law/docs/facilitation_of_movement_of_persons_sadc_1996.pdf)> (last accessed 22 October 2013).

<sup>68</sup> Mpedi and Smit *Access to Social Services*, above at note 4 at 41.

<sup>69</sup> SADC Protocol on the Facilitation of Movement of Persons, arts 13–14.

<sup>70</sup> Fombad “An overview of the constitutional framework”, above at note 13 at 1.

<sup>71</sup> Id 1 at 1.

mentions that 14 of the 30 African constitutions have specified “social security as a distinct right”.<sup>72</sup> However, the constitutions of only two of those countries, South Africa<sup>73</sup> and Kenya, specify this right and other related constitutional social security protection in depth. Added to this, the constitutions of numerous African countries contain socio-economic rights and rights associated with social protection in sections that categorize them as “state policy” or “fundamental objectives and directive principles”, which are specified not to be enforceable by the judiciary.<sup>74</sup>

The majority of migrants to SADC countries come from other SADC countries.<sup>75</sup> It is widely accepted that the SADC region is a deprived and poor region in the world.<sup>76</sup> Poverty, unemployment, low levels of education, HIV/Aids and irregular migration pose significant socio-economic challenges to the governments of these developing countries. To illustrate the point, in South Africa, which serves as a magnet for migrant workers in the region, nearly half of the country’s roughly 50 million population earn below an extremely low poverty median of R524 (EUR37.48) per month.<sup>77</sup> During the financial crisis of 2008–10, South Africa lost 1 million jobs, and the official unemployment rate of just over 25 per cent does not include the discouraged who have given up seeking employment, which increases the rate to 37.4 per cent.<sup>78</sup> The two receiving countries discussed below are neighbours. They are both members of SADC, are signatories to the SADC Charter and each has a constitution. However, what needs to be determined is whether or not these countries provide any social protection to irregular migrant workers.

## Botswana

Compared to South Africa, Botswana has the older constitution. The Botswana Constitution of 1966 hardly makes any mention of the protection of social security or labour security rights, let alone the rights of migrant workers.<sup>79</sup> 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.”<sup>80</sup>

However, despite this lack of constitutional protection, a number of ad hoc and fragmented social security schemes have been put in place in Botswana. According to a 2007 World Bank country report on Botswana, covering access to social services for non-citizens in SADC, the social security services that have been implemented in Botswana include a programme for destitute persons, an orphan care programme and a universal old age

<sup>72</sup> Id 1 at 12.

<sup>73</sup> See the discussion that follows below.

<sup>74</sup> Fombad “An overview of the constitutional framework”, above at note 13 at 12–16, mentions that this is especially the case in, among other countries, Lesotho, Nigeria, Sierra Leone and Tanzania.

<sup>75</sup> Olivier “Enhancing access”, above at note 1 at 123, mentions that “subject 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.”

<sup>76</sup> MP Olivier and LG Mpedi “Co-ordination and integration of social security in the SADC region: Developing the social dimension of economic co-operation and integration” (2004) 28/3 *Journal for Juridical Science* 10 at 15.

<sup>77</sup> “Diagnostic report” (2011) at 9 by the National Planning Commission, based on “The presidency” (2010) 26 *Development Indicators 2010* at 3, as referred to by J Sinclair “Poverty: Giving meaning to the right to social assistance” 23/2 *Stellenbosch Law Review* 191 at 213–15 and 217–19.

<sup>78</sup> Statistics South Africa “Quarterly labour force survey: Quarter 3 (2011)” at vi.

<sup>79</sup> Fombad “An overview of the constitutional framework”, above at note 13 at 13.

<sup>80</sup> D Ntseane and K Solo “Social protection in SADC: Developing an integrated and inclusive framework – the case of Botswana” in MP Olivier and ER Kalula (eds) *Social Protection in SADC: Developing an Integrated and Inclusive Framework* (2004, Friedrich Ebert Stiftung) 89 at 92; the authors mention that “Botswana has not ratified any international social security conventions nor are there at present any plans to do so.”

pension.<sup>81</sup> 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.<sup>82</sup>

The National Policy on Destitute Persons was implemented in 1980; its aims are to ensure that the Botswana government provides minimum assistance to needy people and improve their welfare conditions and alleviate poverty. The 2005 Revised National Policy on Destitute Persons defines a destitute person as an individual who: due to disability or a chronic health condition, has insufficient income or assets; is incapable of engaging in sustainable economic activity due to old age disability, or is terminally ill; or is a child under 18 who is in need and may not be assisted under the orphan care programme.

The National Policy on Destitute Persons was designed to protect citizens. An individual who wants to apply must prove citizenship and, in the absence of such proof, assistance is provided only on a temporary basis. Irregular migrants are reported to the Botswana Department of Immigration and, according to the World Bank Report, “[n]on-citizens who have illegal status are eventually repatriated to their country of origin”.<sup>83</sup> This exclusionary trend in respect of the provision of social services is also present in both the orphan care<sup>84</sup> and the universal old age pension programmes,<sup>85</sup> which are dependent on citizenship.

The 2007 World Bank report 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”.<sup>86</sup> The report sums up the situation 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.”<sup>87</sup>

In 2004 Ntseane and Solo argued that Botswana should ideally conduct a comprehensive review of all social security programmes and that they should be brought under one umbrella ministry. They also suggested that social security programmes should be provided with a legal base.<sup>88</sup> The Botswana Employment Act, 1982 defines an employee as “any person who has ... entered into a contract of employment for the hire of his labour”.<sup>89</sup> The scope of the Employment Act is therefore not expressly limited to citizens only. However, there is no indication that migrant workers will be protected under the provisions of the Employment Act. Unemployment benefits in Botswana are not afforded to irregular migrants as they are only granted to citizens.<sup>90</sup> Unfortunately, there is no

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<sup>81</sup> D Ntseane and K Kholisani “Access to social services for non-citizens, and the portability of social benefits within the Southern African Development Community (SADC): Botswana country report” (2007, report to the World Bank) at 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.

<sup>82</sup> Ntseane and Solo “Social protection in SADC”, above at note 80 at 89; at 92 the authors mentions 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.”

<sup>83</sup> Ntseane and Kholisani “Access to social services for non-citizens”, above at note 82 at 8–9.

<sup>84</sup> Id at 11, the authors state: “Like the destitute allowance, the scheme is accessible to citizens only. In an effort to check citizenship, social workers who conduct assessment demand that beneficiaries produce the death certificates of their parents or their national registration card.”

<sup>85</sup> Id at 13, the authors mention: “Identification to confirm eligibility is through the National Registration Card and therefore the scheme is very exclusive.”

<sup>86</sup> Id at 21.

<sup>87</sup> Ibid.

<sup>88</sup> Ntseane and Solo “Social protection in SADC”, above at note 80 at 94.

<sup>89</sup> Employment Act, 1982, sec 1.

<sup>90</sup> Mpedi and Smit *Access to Social Services*, above at note 4 at 27.

available literature or evidence which indicates that any progress is being made towards the protection of either social security rights or any other broader social rights for irregular migrants in Botswana.

## South Africa

Commentators are in agreement that South Africa has a progressive and modern constitution<sup>91</sup> which protects most if not all categories of human rights that are ordinarily included in international human rights instruments.<sup>92</sup> It contains a Bill of Rights which protects civil, political and socio-economic rights.<sup>93</sup> No distinction is drawn between these categories of rights; all have equal force and function in an integrated fashion. In *Grootboom* the Constitutional Court confirmed that these rights are enforceable through the judiciary and emphasized that the right of access to land, the rights of children and the right to adequate shelter are inter-related to realize ultimately the constitutional right to human dignity.<sup>94</sup> The 1996 Constitution further directs that the courts “must consider international law”, and “may consider foreign law” when interpreting the Bill of Rights.<sup>95</sup>

The 1996 Constitution enshrines “everyone[’s]” right to have access to “healthcare services”, “sufficient food and water” and “social security”.<sup>96</sup> The word “everyone” is used and no limiting criteria are attached to a person, such as citizenship, migration status or legality of work. However, these social security rights are qualified in so far as the section provides that the “state must take reasonable legislative and other measures, within its available resources” to achieve the realization of these rights.<sup>97</sup> On the face of it, and by virtue of the wide meaning of “everyone”, surely it means that irregular migrants would also be entitled to social security protection under the 1996 Constitution to the extent that the state has sufficient resources to realize these rights. Commentators such as Brand, Liebenberg and Sinclair have strongly criticized decisions of the Constitutional Court where it was not

<sup>91</sup> Constitution of the Republic of South Africa, 1996 (the 1996 Constitution).

<sup>92</sup> NJ Udombana “Social rights are human rights: Actualizing the rights to work and social security in Africa” (2006) 39 *Cornell International Law Journal* 181 at 187; JC Mubangizi “Prospects and challenges in the protection and enforcement of socio-economic rights: Lessons from the southern African experience” (paper delivered at the seventh world congress of the International Association of Constitutional Law, Athens, 11 June 2007) at 2.

<sup>93</sup> Olivier and Mpedi “Co-ordination and integration”, above at note 76 at 25. The 1996 Constitution makes no direct reference to the traditional division between first, second and third generation human rights.

<sup>94</sup> In *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), the respondents were rendered homeless as a result of their eviction from their informal homes situated on private land. They applied to the court for an order requiring the government to provide them with adequate basic shelter until they obtained permanent accommodation. They were granted certain relief. The court held that human rights are inter-related and are all equally important. This has significant practical importance in a society founded on these values. At para 1 the court stated: “The people of South Africa are committed to the attainment of social justice and the quality of life for everyone. The Preamble of the Constitution records this commitment.”

<sup>95</sup> 1996 Constitution, sec 39(1)(b). Sec 233 adds that, when legislation is being interpreted, the courts must prefer any reasonable interpretation that is consistent with international law over alternative interpretations.

<sup>96</sup> *Id.*, sec 27(1)(a)–(c). Also closely related to the notions of social security and social protection, the 1996 Constitution further protects everyone’s right to human dignity (sec 10), equality (sec 9), housing (sec 26) and education (sec 29).

<sup>97</sup> *Id.*, sec 27(2). In *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), free medical treatment was denied to the applicant in an instance where a hospital could, due to financial constraints, only provide dialysis treatment to a limited number of patients. At para 11, the Constitutional Court held that the obligations imposed on the state “in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes ... Given this lack of resources ..., an unqualified obligation to meet these needs would not presently be capable of being fulfilled.” See also *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC), where a project introduced by the City of Johannesburg to address the problem of non-payment for water services was subjected to constitutional scrutiny. The project involved the installation of pre-paid meters to charge consumers for using in excess of six kilolitres of water per household monthly. The court declined to interfere with the project, based on the argument that it was not appropriate for the court to quantify the content of what constituted “sufficient” water. This was a matter for the legislature and government to determine.

willing to extend socio-economic rights to “everyone” on grounds such as insufficient resources and based on the excuse of the separation of powers.<sup>98</sup>

Also included in the 1996 Constitution under the heading “Labour relations” is a somewhat unusual provision which states that “[e]veryone has the right to fair labour relations”.<sup>99</sup> It is submitted that links can be drawn between this right and the ILO’s decent work agenda. It should be remembered that this initiative promotes opportunities for everyone to obtain decent and productive work, in conditions of freedom, equity, security and human dignity. Before turning to the potential that lies in the 1996 Constitution in extending social protection to irregular migrants, this article now provides a brief overview of some of the social security and labour security protective measures provided for in the South African legal framework.

Viewed from a developing country’s perspective and within a regional context, South Africa has a reasonably well developed social security framework. As pointed out by Mpedi and Govindjee, “imperfect as it is”, the South African social security system caters for all of the ILO’s so-called classical contingencies, namely illness, maternity, employment injury, unemployment, invalidity, old age, death, medical care and family.<sup>100</sup> So, for example, under the category social insurance: the Compensation for Occupational Injuries and Diseases Act<sup>101</sup> and the Occupational Diseases in Mines Act<sup>102</sup> provide for compensation caused by occupational injuries and diseases; the Unemployment Insurance Act<sup>103</sup> regulates temporary unemployment insurance; the Medical Schemes Act<sup>104</sup> regulates the registration of primarily private medical schemes; the Pension Funds Act<sup>105</sup> provides for the registration and dissolution of pension funds; and the road accident fund<sup>106</sup> provides for payments to accident victims. In South Africa public insurance schemes extend to workers in the formal sector.<sup>107</sup> In most instances irregular migrant workers work in the informal and flexible job market, which automatically excludes most irregular migrant workers due to the fact that they do not contribute to any of the public social insurance schemes.<sup>108</sup>

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<sup>98</sup> D Brand “Judicial deference and democracy in socio-economic rights cases in South Africa” (2011) 22/4 *Stellenbosch Law Review* at 614-615 ; S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010, Juta & Co) at 195; J Sinclair “Poverty”, above at note 77 at 217–19.

<sup>99</sup> 1996 Constitution, sec 23(1).

<sup>100</sup> Mpedi and Govindjee “Social protection for workers”, above at note 17 at 775. Olivier “Enhancing access”, above at note 1 at 130 mentions: “However, the system is category-based and means-tested, as benefits are provided only to certain defined categories of persons who are deemed to be in need.”

<sup>101</sup> Act 85 of 1993. The act provides for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases.

<sup>102</sup> Act 76 of 1973. This act covers occupational lung diseases.

<sup>103</sup> Act 63 of 2001. Sec 2 establishes “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”.

<sup>104</sup> Act 131 of 1998. Private health care is generally arranged privately through occupation-based medical insurance. Public health care is available to the general public, but is under-funded and inadequate. South Africa is in the process of implementing a National Health Insurance scheme. The government published a discussion document entitled “Policy on national health insurance” in August 2011. See A Van den Heever “Evaluation of the green paper on national health insurance” (20 December 2011), available at: <<http://hsf.org.za/sites/workspace/gp-review-alexvdh-dec2011-vf-1.pdf>> (last accessed 7 May 2015).

<sup>105</sup> Act 24 of 1956. There is no national retirement scheme in South Africa. It is believed that 75% of workers in formal employment are members of private retirement schemes. See Olivier “Enhancing access”, above at note 1 at 133.

<sup>106</sup> Established under the Road Accident Fund Act 56 of 1996.

<sup>107</sup> Van Niekerk et al *Law@work*, above at note 24 at 459.

<sup>108</sup> Olivier “Enhancing access”, above at note 1 at 131, mentions that “migrant workers do not qualify for unemployment insurance benefits: they are excluded from coverage, since they have to return to their home country, when their contract of service ... in South Africa ends”.

The Social Assistance Act<sup>109</sup> (SAA) is the primary legislation in South Africa regulating the provision and implementation of social assistance. The SAA makes provision for various forms of social grants, which are mainly funded through taxation. Social assistance is defined as “a social grant including social relief of distress”.<sup>110</sup> The basic grants are only for a number of limited categories and the SAA initially unequivocally applied only to South African citizens.<sup>111</sup>

The South African Constitutional Court has played a progressive role in extending the scope of coverage of social assistance legislation to some categories of migrant workers, but has it done enough? In the *Khosa* and *Mahlaule* cases, Mozambican migrants who had obtained permanent residence in South Africa lodged a constitutional challenge against the SAA limiting the right to social assistance to South African citizens.<sup>112</sup> The court held that the right to social security vests 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, but the court was not prepared to extend the constitutional right to social security to irregular migrants.

The authors argue that the court has not done enough in the *Khosa* and *Mahlaule* cases and that it missed a golden opportunity to extend social security protection (in respect of social assistance in particular) to irregular migrants. Even though the scarcity of recourses is a seriously limiting factor, and the extension of social assistance would have budgetary and distributive consequences for government, this ought not to be the end of the enquiry. The information that is critical to the determination of the adequacy of resources lies within the realm of government, and the onus must surely be on it to divulge the cost implications of such an extension and to provide proof that it lacks sufficient resources to comply with the constitutional imperative to provide everyone with some form of social assistance.<sup>113</sup>

The counter-argument to this, however, may be the fact that even the most progressive of international instruments regulating the position of migrant workers, namely the International Convention on Migrant Workers, does not suggest any compulsion on states to extend social security protection to irregular migrants. As mentioned above, states are at liberty to include requirements pertaining to nationality in social security legislation. However, the authors argue that this does not bar states from extending social security rights to irregular migrants, and this is especially true in instances where a country’s constitution directs that the state should work progressively towards the extension of social security rights.

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<sup>109</sup> Act 13 of 2004.

<sup>110</sup> *Id.*, sec 1.

<sup>111</sup> *Id.*, secs 1 and 4 make provision for the following narrow and specific categories of social grants: child support (for disadvantaged children); care dependency (for severely disadvantaged children); foster child care; disability; old age; war veterans; and social relief for distress as a temporary measure. Olivier has severely criticized the limited nature of these grants: Olivier “Enhancing access”, above at note 1 at 130. Sinclair “Poverty”, above at note 77 at 201, argues that this narrow formulation is unconstitutional.

<sup>112</sup> See *Khosa v Minister of Social Development; Mahlaule v The Minister of Social Development* 2004 (6) BCLR 569 (CC) At para 40 of the decision, the court held that “the socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and freedom”. Further, at para 82, the court held that “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”. In *Larbi-Odam and Others v MEC for Education* 1998 (1) SA 745 (CC) the Constitutional Court struck down regulations that limited state school teacher appointments to citizens only. The court held that these limitations discriminated against migrants with permanent residency. However, the court did not extend this principle to irregular migrants.

<sup>113</sup> The authors acknowledge reliance on Liebenberg *Socio-Economic Rights*, above at note 98 at 195–97, and Sinclair “Poverty”, above at note 77 at 218, in formulating this argument.

To what extent does the legislative regime in South Africa provide labour security to irregular migrants? It must be borne in mind that the International Convention on Migrant Workers provides labour protection to irregular migrants in so far as they may not be exposed to exploitation in the workplace, and that the 1996 Constitution protects everyone's right to fair labour practices. In a significant positive development, the South African labour courts ruled in *Discovery Health*<sup>114</sup> and "*Kylie*"<sup>115</sup> that persons who fall in the category of irregular migrants and those engaged in illegal work fall within the definition of "employee" and are consequently entitled to the constitutional promise of fair labour practices. Despite the fact that a person's right to temporary residence may have expired, or the fact that a person may be engaged in illicit work such as prostitution, such persons are still entitled to protection against unfair dismissal and sub-standard employment conditions. Even though this opens the door to the possibility of extending social security protection to irregular migrants, this has not happened thus far.

## SUGGESTIONS AND CONCLUSIONS

The promotion of concepts like social protection, decent work and the right to fair labour practices should be encouraged, and emphasis should not only be placed on protecting the social security rights of migrant workers (and irregular migrants in particular). This, it is argued, will be the best point of departure in the quest to provide some protection to irregular migrants against exploitation in countries where they work. Unfortunately, international instruments, such as the UN International Convention on Migrant Workers, do not adequately protect irregular migrant workers' social security rights, but they do at least provide some guidance pertaining to the protection of irregular migrants' labour rights. Even though neither South Africa nor Botswana has signed it,<sup>116</sup> the instrument could still be used as a policy guide, and the Constitutional Court of South Africa in particular could be influenced by the convention when it interprets social and labour security legislation under the auspices of its 1996 Constitution.

Against the background of the startling figures noted above regarding poverty and unemployment in South Africa (which serves as an example of one southern African country), there can be no doubt that there is a huge challenge for the migrant-receiving countries in SADC to create jobs. The authors argue that placing the focus on the provision and extension of social security alone will not have the desired effect of improving the lives of citizens and migrant workers alike. A more holistic approach (in terms of which the focus falls on social protection rather than mere social security) must be followed by governments in the region to improve the chances for citizens and migrants to gain entry into the job market. Such plans of action have been introduced and redesigned with seemingly little effect in the most significant receiving country in the region.<sup>117</sup> However, hope should not be lost by states in

<sup>114</sup> In *Discovery Health Ltd v CCMA* (2008) ILJ 1480 (LC) the Labour Court concluded that, even though a contravention of the Immigration Act 13 of 2002 is deemed a criminal offence, it does not invalidate the underlying contract of employment. Sec 23 of the 1996 Constitution provides that "everyone has the right to fair labour practices" and the irregular migrant worker remains an "employee" in terms of labour legislation.

<sup>115</sup> In "*Kylie*" v *CCMA* (2010) BLLR 705 (LAC) the Labour Appeal Court held that the definition of "employee" contained in labour legislation was wide enough to include a sex worker whose contract of employment was unenforceable under common law.

<sup>116</sup> According to the official UN Treaty Collection web page, there are only 38 signatories to the convention: <[https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-13&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-13&chapter=4&lang=en)>, (last accessed on 7 June 2015).

<sup>117</sup> South Africa has responded to poverty alleviation with a number of policies over the past two decades. First it was the Reconstruction and Development Plan, then the Growth, Employment and Distribution Plan followed by the Accelerated and Shared Growth initiative for South Africa. These strategies, together with the Millennium Development Goal, aimed to halve unemployment by 2014. The now new National Development Plan aims to eradicate poverty by creating 11 million new jobs by 2030. These goals seem idealistic and extremely difficult to attain.



the region and hard work towards the effective implementation of such social protection strategies should receive the continuous and urgent attention of governments in the region. In the interim, while the alleviation of poverty has not yet occurred, a gradual and continued expansion of the provision of social insurance and social assistance schemes in respect of vulnerable groups such as irregular migrants should not be neglected. As succinctly argued by Sinclair, South Africa should guard against neglecting the goals of the welfare state by migrating to the ideals of a developmental state in totality, which generally places greater emphasis on economic growth and job creation rather than catering for the social security needs of vulnerable groups in society.<sup>118</sup>

Migration has developed into a long-standing feature of the southern African region, particularly in relation to work in the agriculture and mining sectors.<sup>119</sup> A five-country study conducted in 2005 indicates that migration is regarded as a career rather than a localized event in southern Africa.<sup>120</sup> From an historical perspective, research suggests that cross-border trade and migration have made industrial development possible in the region.<sup>121</sup> However, despite the fact that the Charter and the SADC Social Security Code encourage states to work towards the free movement of persons, evidence suggests that the countries in the SADC region are much more intent on protecting their own borders and deporting irregular migrants, than on extending human rights protection to irregular migrants.<sup>122</sup> Olivier points out that “[s]ecurity concerns, in the form of control and deportation, appear to characterise the migration laws and policies of the various SADC countries”. He adds that “[m]igration in the region is viewed as a ‘problem’, rather than an opportunity”.<sup>123</sup> What is needed is a mind shift and realization by southern African states that cross-border trade, the transfer of skilled and unskilled labour and the establishment of an economically vibrant and entrepreneurial culture in the region will also benefit the economic growth of neighbouring states.

Practical examples of how cross-border movement can be realized include developing and implementing a regional policy framework (and appropriate country policy frameworks) that will balance the demands of national security and the orderly flow of migrants in the SADC region.<sup>124</sup> Such an initiative should ideally be developed in line with the AU Migration Policy Framework for Africa and the SADC Social Security Code, which recognize the strategic and economic advantages of the free movement of people in the region. Added to this, targeted bi- and multi-lateral social security agreements should be negotiated and entered into, and the relevant countries’ legal systems should be amended to ensure the enforceability of such agreements.<sup>125</sup> In the final instance, social risks,

<sup>118</sup> Sinclair “Poverty”, above at note 77 at 196–99.

<sup>119</sup> C Fenwick and E Kalula “Law and labour market regulation in east Asia and southern Africa” (2005) 21 *International Journal of Comparative Labour Law and Industrial Relations* 193 at 194.

<sup>120</sup> Crush et al *Migration in Southern Africa*, above at note 8 at 3–5.

<sup>121</sup> *Ibid.*

<sup>122</sup> The 2007 World Bank country report on Botswana confirms that it was realised in Botswana that neighbouring governments should provide for their own citizens and that irregular migrants who apply for social security grants would only be assisted on a temporary basis, before being reported to the Botswana Department of Immigration and being repatriated to their country of origin. See Ntseane and Kholisani “Access to social services”, above at note 81 at 8–9 and 21.

<sup>123</sup> Olivier “Enhancing access”, above at note 1 at 127

<sup>124</sup> Olivier “Enhancing access (part II)”, above at note 49 at 161, sets out extensive research in this regard and makes useful suggestions about how this can be realized.

<sup>125</sup> Mpedi and Govindjee “Social protection for workers”, above at note 17 at 781; Olivier, *id* at 162. D Millard “Migration and the portability of social security benefits: The position of non-citizens in the Southern African Development Community” (2008) 8 *African Human Rights Law Journal* 37 at 55–56 suggests that policies should also be developed in the SADC region to allow for the portability of pension fund and other social insurance contributions and benefits.

such as HIV/Aids, unemployment and poverty, should be addressed, and governments should integrate migrants into the labour market rather than merely focus on the payment of benefits when social risks occur.<sup>126</sup>

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<sup>126</sup> Nyenti and Mpedi “Impact of SADC protection instruments”, above at note 21 at 273.