

Migration and the portability of social security benefits: The position of non-citizens in the Southern African Development Community

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Summary

The Southern African Development Community (SADC) region currently experiences spontaneous migration of citizens across borders in search of job opportunities and a better standard of living. Generally, freedom of movement across borders which manifests in migration, is a distinguishing feature of globalisation and should be respected as a basic human right. However, what is of growing concern in SADC is the portability of migrants' social security benefits. Do the current SADC structures allow migrants to preserve, maintain and transfer social security benefits such as pension benefits independent of their nationality or country of origin? This article explores the social security measures in individual SADC member states and the extent to which these national measures provide protection for migrants in SADC. Comparing the situation within SADC to that in the European Union, the article concludes that, although there is no simple solution to the problem, it is imperative that SADC member states recognise international standards pertaining to migrants and, more importantly, standards pertaining to the portability of benefits. Ideally, SADC member countries should gradually extend social protection to non-citizens who contribute to their economies through their labour and thereby enhance the right to freedom of movement.

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1 Introduction

One of the most pressing social security issues in present-day Southern Africa is the social protection of people who migrate from one country in the region to another. Although the level and frequency of regional migration have not been established satisfactorily due to a lack of reliable statistics, it is well known that a significant number of people migrate daily across borders within the Southern African Development Community (SADC)¹ in the hope of making a living elsewhere.²

What is really at stake in instances where migrants leave their country of birth to work elsewhere is the portability of benefits from one fund or country to another. Holzman *et al* explain that '[p]ortability in this context is understood as the migrant worker's ability to "preserve, maintain and transfer acquired social security rights" independent of nationality and country of residence'.³ Furthermore, the interests that are the subject of transfers are usually long-term benefits based on social insurance considerations.⁴

There is no commonly-accepted generic or general legal concept of 'migrant' in international law.⁵ However, the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families (CPRMWMF) 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'.⁶ While most countries welcome an influx of professionals, migrants who engage in menial, dirty, dangerous and difficult jobs are subjected to poor

¹ The Southern African Development Community was formed in 1980 as a loose alliance of nine majority-ruled states in Southern Africa known as the Southern African Development Co-ordination Conference (SADCC). Their main aim was to co-ordinate development projects in order to lessen economic dependence on the then apartheid South Africa. The member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. For more information on the activities of SADC, see in general <http://www.tralac.org/scripts/content.php?id=3032> (accessed 17 March 2008).

² MP Olivier *et al* 'Equitable trade and the social dimension in SADC: Recent experiences and proposals for enhanced protection' paper presented at IIRA/CIRA: 4th Regional Congress of the Americas and 39th Canadian Industrial relations Association Annual Meeting, Toronto, 25-29 June 2002.

³ R Holzman *et al* 'Portability regimes of pension and health care benefits for international migrants: An analysis of issues and good practices' 2005 *Social Protection Discussion Series* 4.

⁴ Holzman *et al* (n 3 above) 5.

⁵ O Dupper 'Migrant workers and the right to social security: An international perspective' (2007) 18 *Stellenbosch Law Review* 217.

⁶ Dupper (n 5 above) 220.

working and living conditions that are often far inferior to those available to the citizens of a specific country.⁷

On this point, note that the distinction between different types of migrants is important.⁸ Economic migrants may be sub-divided into unskilled labour migrants, highly skilled migrants and business migrants, migrants who reunite with their families, and refugees,⁹ who may be sub-divided into conventional refugees¹⁰ and asylum seekers.¹¹

Regardless of the reason for migration, freedom of movement across borders which manifests in migration is a distinguishing feature of globalisation. While globalisation is not a new phenomenon, the present era of globalisation has distinctive features, namely, that shrinking space, shrinking time and disappearing borders link people's lives 'more deeply, more intensely, more immediately than ever before'.¹² In SADC, the problem is compounded by the fact that there is no formal labour market. This makes a comparison with a labour market like the European Union (EU), which has a formal labour market, rather difficult, but nevertheless a worthwhile exercise.

This article investigates the social security measures that exist in individual SADC member states and the extent to which these national measures provide protection for migrants in SADC. Because the focus is on migration between countries, this article discusses instruments which provide protection at a supra-national level. Finally, the article compares the situation within SADC to that in the EU against the background of the European Convention.

This article will proceed as follows: After clarifying some definitional issues, the focus turns to an overview of the protection systems that exist in 11 of the SADC member states – omitting the lusophone and francophone countries with a civil law tradition (Angola, Democratic Republic of Congo and Mozambique). Thereafter, it discusses the existing structures in SADC and finally it investigates the EU as a possible source of information on the viability of cross-border agreements. Finally, the article makes recommendations as to how SADC member states can harmonise legislation and truly provide protection

⁷ As above.

⁸ B Schulte 'Institutional framework, legal instruments and legal techniques relating to the promotion of access to social security to non-citizens – A German perspective' unpublished paper read at a joint international workshop by the Max Planck Institute for Foreign and Comparative Social Law, Munich, Germany, and the Centre for International and Comparative Labour and Social Security Law at the University of Johannesburg held on 18 and 19 January 2006 in Johannesburg.

⁹ Schulte (n 8 above) 10.

¹⁰ Geneva Convention; see Schulte (n 8 above) 10.

¹¹ As above.

¹² V Taylor 'Social protection challenges in Southern Africa' (2001) 2 *Co-operation South Journal* 49.

to migrants. All along, the reader should bear in mind that migration has to be managed on two levels, namely, politically, by harmonising the laws that deal with immigration, and on a social protection level, by aligning the protection measures that exist at a national level in different SADC countries. Furthermore, to afford social protection to such a diverse group is extremely problematic, as immigration requirements vary. For example, asylum seekers and highly skilled workers with temporary residence in a foreign country are subjected to different immigration requirements than are unskilled labour migrants. The discussion of country-specific systems that follows outlines protection systems within SADC countries and examines whether these systems succeed in affording protection to both nationals and non-nationals. This article does not aim to provide the ultimate solution to the multi-faceted problem of cross-border migration, but it does suggest a number of possibilities.

2 Protection systems within SADC countries

2.1 South Africa

Section 27(1)(c) of the South African Constitution¹³ provides that everyone has the right to have access to social security. The South African Constitution appears to endorse the difference between 'social insurance' and 'social assistance'.¹⁴ The South African social insurance system consists of retirement schemes, health insurance, workmen's compensation, unemployment insurance and the Road Accident Fund. Apart from the Road Accident Fund, these systems are all employment-based. As far as the responsible institutions are concerned, Olivier and Kalula observe that a bewildering number of institutions administrate social insurance in South Africa.¹⁵

As far as social assistance is concerned, a number of grants are available in South Africa. These include an old-age grant, a disability grant, a foster care grant, a care-dependency grant and a child support grant.¹⁶

The portability of benefits within the South African social security system has received no attention in jurisprudence. This aspect of social security gains importance where long-term benefits, such as pensions, are concerned. Currently, section 14 of the Pension Funds Act¹⁷ contains rather limited provisions on the transferability of pension benefits.

¹³ Constitution of the Republic of South Africa 1996.

¹⁴ MP Olivier *et al* (eds) *Social security: A legal analysis* (2003) 23.

¹⁵ MP Olivier & ER Kalula 'Scope of coverage' in Olivier *et al* (n 14 above) 144.

¹⁶ Social assistance is payable in accordance with the Social Assistance Act 13 of 2004.

¹⁷ Act 24 of 1956.

However, apart from this arrangement, the transfer of benefits between funds is an aspect that is largely neglected.¹⁸

Another weak aspect of social security in South Africa is the position of non-nationals. Apart from some exceptions for foreigners with permanent residence status, non-nationals generally are excluded from social security in South Africa.¹⁹ This is particularly evident in social insurance in South Africa. As far as employment-based schemes are concerned, entitlement to benefits mainly depends on employee-status. It follows that only those who have permanent residence, or whose stay in the country is otherwise legal, may qualify to be 'employees' in terms of the Unemployment Insurance Act²⁰ or the Compensation for Occupational Injuries Act.²¹ In addition, pensions and provident funds are set up only for those in formal employment. Those who are self-employed or employed in the informal sector must make their own arrangements.

The Road Accident Fund is the only public social security scheme in South Africa that is not employment-based. The objective of the Fund, as stated in the Road Accident Fund Act,²² is to compensate any victim who sustained bodily injuries where someone caused damage by the negligent driving of a motor vehicle. Nationality plays no role in eligibility for compensation. A victim needs to lodge his claim timeously and dispose with the burden of proof.²³ This feature of the South African

¹⁸ Sec 14(1) reads: 'No transaction involving the amalgamation of any business carried on by a registered fund with any business carried on by any other person (irrespective of whether that other person is or is not a registered fund), or the transfer of any business from a registered fund to any other person, or the transfer of any business from any other person to a registered fund shall be of any force or effect unless (a) the scheme for the proposed transaction, including a copy of every actuarial or other statement taken into account for the purposes of the scheme, has been submitted to the registrar; (b) the registrar has been furnished with such additional particulars or such a special report by a valuator, as he may deem necessary for the purposes of this subsection; (c) the registrar is satisfied that the scheme referred to in paragraph (a) is reasonable and equitable and accords full recognition (i) to the rights and reasonable benefit expectations of the members transferring in terms of the rules of a fund where such rights and reasonable benefit expectations relate to service prior to the date of transfer; (ii) to any additional benefits in respect of service prior to the date of transfer, the payment of which has become established practice; and (iii) to the payment of minimum benefits referred to in section 14A, and that the proposed transactions would not render any fund which is a party thereto and which will continue to exist if the proposed transaction is completed, unable to meet the requirements of this Act or to remain in a sound financial condition or, in the case of a fund which is not in a sound financial condition, to attain such a condition within a period of time deemed by the registrar to be satisfactory.'

¹⁹ Olivier & Kalula (n 15 above) 136.

²⁰ Act 63 of 2001.

²¹ Act 130 of 1993.

²² Act 56 of 1996.

²³ In order to succeed with a claim, the plaintiff needs to prove that the wrongdoer drove a motor vehicle negligently. See in general HB Klopper *Law of third party compensation* (2000) 2. The writer indicates that the claimant needs to prove all the elements of a delict, namely, conduct, unlawfulness, fault, causation and damage.

social security system is unique. In all other SADC countries, migrants must procure private insurance against possible claims arising from negligent driving.²⁴

As far as social assistance is concerned, the landmark case of *Khoza and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others*²⁵ signalled a departure from the introspective and nationalistic approach towards social assistance that previously characterised the South African system. In this case, the Constitutional Court ruled that benefits in terms of the Social Assistance Act²⁶ should be extended to non-citizens with permanent residence status.²⁷ In addition, the Court held that refugees, who have obtained refugee status in terms of the Refugee Act,²⁸ qualify for all the socio-economic rights guaranteed in section 27 of the South African Constitution.²⁹

South Africa has long been the economic stronghold of the region. One would think that a country whose mine companies actively recruit labour from other countries in SADC would have provided for cross-border portability of benefits. Although these foreign labourers obtained work permits and qualify as 'employees' in terms of various South African statutes, the true challenge has proven to be the actual payment of pensions, unemployment benefits and compensation for occupational injuries and diseases to those who inevitably return to their home countries. The absence of agreements between South Africa (as the host country) and other states (as sending countries) results in great injustices. As far as Lesotho is concerned, the Taylor Report states that arrangements have been made for migrant workers from Lesotho to receive South African old-age and disability pensions 'since during their active years they contributed to South Africa's revenue base through income and value-added sales tax'.³⁰ Those migrants who have been granted permanent residence are entitled to social assistance in South Africa. On workman's compensation, Taylor comments as follows:³¹

Lesotho has also made use of South African workers' compensation for occupational injuries and diseases, including migrant Basotho workers who were injured in South African mines and have returned home.

²⁴ On the requirements for liability, see D van der Nest 'Motor vehicle accidents' in Olivier *et al* (n 14 above) 501.

²⁵ 2004 6 BCLR 569 (CC).

²⁶ Act 59 of 1992. This Act was replaced by the Social Assistance Act 13 of 2004 (see n 16 above).

²⁷ *In casu*, the majority ruled that permanent residents are entitled to, *inter alia*, the old-age grant, the child support grant and the care dependency grant.

²⁸ Act 130 of 1998.

²⁹ n 13 above.

³⁰ Taylor (n 12 above) 56.

³¹ As above.

It is submitted that the case of Lesotho is special for at least two reasons. First, its geographical position as a kingdom with no harbour and limited natural resources makes it dependent on South Africa. Second, the scarcity of employment opportunities leaves many of its residents with no choice other than to migrate to South Africa. Consequently, the extension of benefits to Lesotho migrants is definitely equitable. In the light of Lesotho's example, the question arises whether there have been similar successful agreements with other countries in SADC on the portability of benefits. On this point, Olivier and Mhone comment as follows:³²

A perusal of international agreements applicable to South Africa reveals that South Africa is not yet, barring a limited number of exceptions, linked to the network of bilateral conventions on the co-ordination of social security. In this regard, South Africa mirrors largely the position obtaining in most countries in the SADC region. Co-ordination of social security is presently almost totally absent in the region. The few examples that do exist do not function satisfactorily, while attempts to enter into more comprehensive arrangements still have to bear fruit.

This position does not only affect non-citizens who migrate to South Africa, but also South Africans who take up employment in other countries.³³ While it is true that a number of citizens from other countries have benefited from pensions and benefits in terms of employment-based schemes in South Africa, the lack of formal agreements makes it very difficult for beneficiaries and their dependants to actively enforce their rights once outside the borders of South Africa.

To sum up, the South African social security system is largely fragmented, does not encourage or compel the transfer of benefits between schemes nationally and, unfortunately, displays very little cross-border co-ordination.

2.2 Botswana

Taylor explains that social security in Botswana is relatively underdeveloped.³⁴ The majority of Botswana's people rely heavily on kinship-based support.³⁵ Current schemes include programmes for destitute persons, an orphan care programme, supplementary feeding for vulnerable

³² MP Olivier & GCZ Mhone 'Social protection in SADC: Developing an integrated and inclusive framework - The case of South Africa' in MP Olivier & ER Kalula (eds) *Social protection in SADC: Developing an integrated and inclusive framework* (2004) 136.

³³ As above.

³⁴ Taylor (n 12 above) 55.

³⁵ As above.

groups, a universal old-age pension, a World War II veterans' allowance, a labour-based drought-relief programme, cover for people living with HIV/AIDS and other informal social assistance programmes.

The system in Botswana is not rights-based. According to Ntseane and Solo:³⁶

At present, most of the social security programmes that are in place do not have a legal basis. The constitution of Botswana contains a bill of fundamental rights, containing political and civil rights also known as first generation rights. Since it was crafted as far back as 1966, it did not have socio-economic rights or second-generation rights, as do recent constitutions.

Apart from the absence of a rights-based framework, one should note that Botswana has not ratified any international social security conventions and does not have any plans to do so in the foreseeable future.³⁷ Consequently, because of the underdeveloped, needs-based system that is in place in Botswana, one can safely conclude that this specific system is focused on residents of Botswana, that it lacks the sophistication of portability of benefits nationally and that there are no multi-national agreements with any other SADC countries pertaining to benefits for migrant workers.

2.3 Lesotho

As was stated above,³⁸ Lesotho is very reliant on its South African neighbour in the area of social security. Arrangements exist between Lesotho and South Africa, albeit more in the form of South Africa as a host country of migrants and Lesotho as a sending country. Taylor states that Lesotho is currently in the process of designing its own social security scheme. The purpose of this new scheme is to cover old age, invalidity, death and maternity.³⁹ Informal agreements between South Africa and Lesotho seem to be of the more successful ones in the SADC region.⁴⁰

³⁶ D Ntseane & K Solo 'Social protection in SADC: Developing an integrated and inclusive framework — The case of Botswana' in Olivier & Kalula (n 32 above) 89.

³⁷ Ntseane & Solo (n 36 above) 92.

³⁸ See sec 2.1 above.

³⁹ Taylor (n 12 above) 56.

⁴⁰ Lesotho is an enclosed area that relies heavily upon South Africa for its economic well-being. Agreements are in place as a matter of necessity and not of policy, as many citizens of Lesotho move across the border into South Africa in order to work. The absence of agreements would have disastrous consequences for a small country like Lesotho. If workers who have spent a lifetime working in South Africa were denied a pension upon retirement, it would lead to disastrous consequences for those workers and everyone else who are reliant upon them.

2.4 Malawi

According to Kanyongolo, the Malawian Constitution does not specifically provide for the right to social security.⁴¹ Even so, there are some provisions that deal with aspects related to social security, such as the right to development,⁴² equality of opportunity⁴³ and the right to education.⁴⁴

In Malawi, social security measures include sickness benefits, maternity benefits, severance pay, pensions, disability benefits, a minimum wage and a number of social assistance arrangements.⁴⁵ Sickness and maternity benefits are very restricted.⁴⁶ The Workers' Compensation Scheme provides benefits to victims of employment injuries, and in this respect there exists an agreement between Zambia and Malawi on the payment of these benefits to migrant workers.⁴⁷ The Labour Law Reform Task Team states:⁴⁸

Two SADC member states, viz Zambia and Malawi, have entered into what appears to be a successful and operative broad-based bilateral social security agreement, providing for the cross-border payment of a range of social security benefits. It is suggested that this may serve as an example for developing similar approaches to be adopted in retirement benefits portability arrangements Tanzania could enter into at a SADC and EAC level.

This document was drafted in the friendly atmosphere that marks relations between the two countries. Problems that were highlighted in the public pension fund included, *inter alia*, delays in receiving cheques resulting in cheques turning stale, cheques bearing a signature not recognised by the banks in Malawi, widows and minors not being paid survivors' benefits, the stopping of payment due to unexplained reasons, the reduction of pensions due to exchange rate fluctuations and the failure of pensioners to cash cheques because they do not have bank accounts. Other problems that were identified included those experienced by other pension funds and the workers' compensation fund. These include, *inter alia*, the inability of the funds to trace dependants and pay compensation to them.

⁴¹ NR Kanyongolo 'Social protection in SADC: Developing an integrated and inclusive framework — The case of Malawi' in Olivier & Kalula (n 32 above) 97.

⁴² Sec 30(1) Constitution of Malawi.

⁴³ Sec 30(2) Constitution of Malawi.

⁴⁴ Sec 5 Constitution of Malawi.

⁴⁵ Kanyongolo (n 41 above) 109.

⁴⁶ Taylor (n 12 above) 56.

⁴⁷ As above.

⁴⁸ Report of the Tanzanian Labour Law Reform Task Team (May 2005) 123. See also the discussion on the proposed Tanzanian legislation in sec 2.10 below.

These limited measures are aimed mainly at poverty alleviation. On this point, Taylor states:

Malawi has been chronically food-insecure for the past three to five years; most households are unable to produce enough food to meet their subsistence requirements due to the effects of drought, floods and other factors in some areas. A Safety Net Intervention has been initiated to provide relief to vulnerable households and assist people to move out of poverty; it focuses on food security and combines government and donor involvement.

Once more, the pattern is one of addressing basic needs nationally. Because of the underdeveloped system and the fact that very few Malawians insure themselves privately,⁴⁹ there is indeed very little need for portability of benefits between funds nationally. Apart for the arrangement with Zambia, cross-border agreements do not exist.

From the agreement between Malawi and Zambia it is evident that both countries realise their interdependence. Zambia, as a receiving country, uses Malawian labourers on its mines. Upon their return to Malawi, these workers experience problems in accessing their pensions and other social security benefits and have to turn to the Malawian government for assistance. The Malawi/Zambia agreement is commendable and should be regarded as an example for similar agreements between other countries.

2.5 Mauritius

In Mauritius, social security measures include free education, health services, subsidised food as well as old age, disability and death benefits, offered through a universal social insurance system.⁵⁰ While the pension system covers all residents, earnings-related pensions are paid to employees.⁵¹ In terms of social assistance systems, poor families with three or more children also receive a family allowance.⁵²

In a country with a national social security system, the portability of benefits is clearly superfluous. However, the cross-border transfer of benefits is something that should receive attention.

2.6 Namibia

Olivier and Kalula elevate Namibia to be one of the countries with the most innovative social security approaches, structures and models. They explain this recent transition as follows:⁵³

⁴⁹ Kanyongolo (n 41 above) 110.

⁵⁰ Taylor (n 12 above) 57.

⁵¹ As above.

⁵² As above.

⁵³ MP Olivier & E Kalula 'Regional social security' in Olivier *et al* (n 14 above) 666-667.

Firstly, Namibia embarked upon a comprehensive codification of the social insurance part of its system, inclusive of retirement and — in principle — health provision. Secondly, a centralised institution (the Social Security Commission) was set up to implement the reforms and to administer the new system, which tasks included publicising the system and introducing a user-friendly, distinct social security number and social security card for identification and claim purposes. Thirdly, and partly in order to inform and sensitise the population regarding the need for and practical benefits of a (public) social insurance system, Namibia has been implementing some of the short-term schemes first.

This new scheme provides for payment to employees of maternity and sick leave, benefits for occupational injuries, death, invalidity, funeral and survivors' benefits.⁵⁴ As part of the new innovative system, ordinary employees as well as domestic and casual workers contribute to social security.⁵⁵ While employment injury benefits are financed entirely by employers, retirement benefits are payable to workers over 60 who have worked and contributed to social security for at least 15 years. A future project is the development of a medical aid scheme.⁵⁶

Despite all these innovations, Olivier and Kalula warn that much still needs to be done, especially in the areas of informal social security and the extension of social security to non-citizens.⁵⁷ One can predict that multilateral agreements with other SADC member states will strengthen the position of non-citizens in Namibia and provide a wider support network to migrants in the region.

2.7 Seychelles

In the Seychelles, old-age, disability and death benefits are paid to employees, the self-employed and the unemployed.⁵⁸ The Seychelles pension scheme covers all full-time workers with 25 or more working hours per week.⁵⁹ The system also includes a survivor pension as well as sickness and maternity benefits to employed and self-employed persons.⁶⁰ For the latter there is no minimum qualifying period.⁶¹

⁵⁴ Taylor (n 12 above) 57.

⁵⁵ As above.

⁵⁶ As above.

⁵⁷ Olivier & Kalula (n 53 above) 667.

⁵⁸ Taylor (n 12 above) 57.

⁵⁹ As above.

⁶⁰ As above.

⁶¹ As above.

Once again, this particular system is very insular and does not contain any cross-border agreements.

2.8 Swaziland

According to Taylor, social security in Swaziland is still in the early stages of development.⁶² Employers in the private, agricultural and industrial sector make compulsory contributions to a pension fund, and employees contribute half the total amount.⁶³ Public servants with more than 10 years of service are eligible for pensions.⁶⁴ Apart from these, there are private pensions, private life insurance schemes, means-tested targeted relief to needy people and welfare services for those with disabilities and other special needs.⁶⁵

In 1983, Swaziland introduced workmen's compensation, based on employer liability for occupational injuries and diseases, permanent disability, temporary incapacity and death.

Currently, Swaziland lacks arrangements on the transfer of benefits from one fund to the other nationally, and no formal agreements with other countries exist. Innovative legislation and multinational agreements between Swaziland can bridge this gap in order to extend protection to both Swazi nationals and non-nationals.

2.9 Tanzania

In Tanzania, a number of funds provide social security benefits to its members. The National Social Security Fund covers workers in the private sector as well as non-pensionable and non-permanent employees in the civil service and parastatal organisations.⁶⁶ The self-employed are covered by the Parastatal Pension Fund.⁶⁷ The latter fund was initially intended for pensionable and permanent employees in parastatal organisations, but cover has been extended to all those who want to join.⁶⁸ The Local Authority Pension Fund covers employees of local authorities and the Public Service Pension Fund and the National Health Insurance Fund cover government workers and all public servants respectively.⁶⁹

The Labour Law Reform Task Team was instructed to review social security legislation in Tanzania. Although all the above-mentioned schemes have been retained, the Task Team had some reservations about

⁶² Taylor (n 12 above) 57.

⁶³ As above.

⁶⁴ As above.

⁶⁵ As above.

⁶⁶ Report of the Tanzanian Labour Law Reform Task Team (n 48 above) 10.

⁶⁷ As above.

⁶⁸ As above.

⁶⁹ As above.

this.⁷⁰ Apart from recommendations on contributions and the payment of benefits, the Task Team also made extensive recommendations on the movement of members from one public fund to another, notably:

- retention of benefits built up under the first fund;⁷¹
- refusing an employee's withdrawal of benefits upon completion of service with a former employer and assumption of services with a new employer;⁷²
- recognition of periods of contribution with an old fund as periods of contribution with the new fund;⁷³
- allowing the said employee to be a member within the framework of the new fund on the basis of contributions applicable to the new fund and deciding whether one fund should be solely liable for payment of all relevant benefits or whether payment of contributions should be shared between the old and the new fund.⁷⁴

These recommendations are commendable and have been included in Tanzania's Social Security Bill.⁷⁵

As far as agreements with other jurisdictions are concerned, the Bill explicitly provides for bilateral or multilateral agreements between the government of Tanzania and other governments or international organisations. These agreements may prescribe the conditions and procedures for the transfer of membership of funds when an employee transfers to employment outside the borders of Tanzania.⁷⁶ The clause specifies that in entering into bilateral or multilateral agreements, the government shall consider the need or otherwise to implement within the framework of the agreement any one or all of the internationally applicable cross-country social security principles, including equality, choice of law for benefit claims, aggregation of insurance premiums, maintenance of acquired rights, payment of benefits even though the beneficiary does not reside in his home country, and the modification, adaptation or amendment of the provisions of this bill or any other law to give effect to the agreement.

This particular innovative approach in Tanzania should be used as a model for similar agreements in other countries in SADC. Not only does it provide for possible bi-and multilateral agreements, but it also highlights a number of core values, such as equality and the main-

⁷⁰ Report of the Tanzanian Labour Law Reform Task Team (n 48 above) 115. Eg, it was argued that the system needed a complete overall and that very little should remain of the existing social security system.

⁷¹ Report of the Tanzanian Labour Law Reform Task Team (n 48 above) 119.

⁷² As above.

⁷³ As above.

⁷⁴ As above.

⁷⁵ Social Security Bill 2005. See cl 323.

⁷⁶ Cl 324(2) Social Security Bill 2005.

tenance of acquired rights. Furthermore, it is unique to a developing country and is not overly idealistic.

2.10 Zambia

Unlike Tanzania, whose economy is mainly dominated by agriculture, the main economic activity in Zambia is mining.⁷⁷ As far as social protection is concerned, Chisupa explains that section 7 of the Zambian Constitution⁷⁸ determines that the state will endeavour to provide social protection to its citizens subject to the availability of resources.⁷⁹ This principle is executed through various instruments enacted by the government. Social protection legislation in Zambia comprises the National Pension Scheme Act,⁸⁰ the Public Service Pension Act,⁸¹ the Workers Compensation Act⁸² and the Local Authorities Superannuation Act.⁸³

The National Pension Scheme Act came into operation in February 2000.⁸⁴ Membership of this scheme is compulsory for employees, civil servants and those employed by the local authorities.⁸⁵ This particular scheme pays retirement benefits, invalidity pensions, survivors' pensions as well as a funeral grant.

The Public Service Pension Fund pays benefits to those employed in the public service and those who became disabled whilst on duty.⁸⁶

Older than these two funds, the Local Authorities Superannuation Fund was established in 1954. This particular scheme covers employees of all local authorities, the Zambia Electricity Supply Corporation and the National Housing Authority.⁸⁷ This scheme provides protection against retirement and invalidity and pays benefits to survivors.⁸⁸

For occupational injuries and diseases, the Workers' Compensation Fund provides benefits to all employees except those in the police and armed forces.⁸⁹

⁷⁷ Taylor (n 12 above) 59.

⁷⁸ Constitution of Zambia, 1996.

⁷⁹ N Chisupa 'Social protection in SADC: Developing an integrated and inclusive framework — The case of Zambia' in Olivier & Kalula (n 32 above) 198.

⁸⁰ Chisupa (n 79 above) 198 (no clearer reference available).

⁸¹ Act 35 of 1996.

⁸² Chisupa (n 79 above) 201 (no clearer reference available).

⁸³ Chisupa (n 79 above) 200-201 (no clearer reference available).

⁸⁴ As above.

⁸⁵ Chisupa (n 79 above) 198-199.

⁸⁶ Chisupa (n 79 above) 200.

⁸⁷ As above.

⁸⁸ As above.

⁸⁹ Chisupa (n 79 above) 201.

Finally, a number of non-statutory schemes and private pension schemes exist that provide benefits to those who are not covered by the public schemes.⁹⁰

On the social assistance side, there are the Public Welfare Assistance Scheme and the programme against malnutrition.⁹¹

It is not clear whether there are arrangements concerning transfers between pension funds. There is, however, a very successful broad-based bilateral agreement with Malawi that provides for the payment of a range of social security benefits.⁹² No other agreements exist with other countries in the SADC region.

2.11 Zimbabwe

According to Taylor, Zimbabwe does not have a comprehensive social security system, but rather a number of fragmented schemes under separate laws for workmen's compensation, pension and provident funds, state service disability benefits, welfare assistance and war victims' compensation.⁹³ The pension scheme covers workers in formal employment only.⁹⁴ Employers and employees both contribute towards this pension scheme.⁹⁵

The Accident Prevention and Workers' Compensation Act provides protection against injuries or deaths occurring in the workplace. Only those in the formal sector benefit from this particular scheme. As with most other schemes, only employers contribute. Benefits include medical care, a disability pension and assistance towards medical care.⁹⁶

As far as social assistance is concerned, Zimbabwe has a means-tested system aimed at the poorest members of society.⁹⁷ Finally, there is access to health services and drought relief.⁹⁸

On the system as a whole, Kaseke states that social protection schemes in Zimbabwe do not promote integration and inclusion. Furthermore, coverage is low because the existing scheme does not cover people in the informal sector at all. Also, the government assists approximately only one in every thousand needy applicants.⁹⁹

From the above it is evident that Zimbabwe's social protection system fails nationally. Consequently, there are no agreements with other SADC countries about the portability of benefits whatsoever. It is

⁹⁰ As above.

⁹¹ As above.

⁹² Report of the Tanzanian Labour Reform Task Team (n 48 above).

⁹³ Taylor (n 12 above) 59-60.

⁹⁴ E Kaseke 'Social protection in SADC: Developing an integrated and inclusive framework — The case of Zimbabwe' in Olivier & Kalula (n 32 above) 220.

⁹⁵ As above.

⁹⁶ As above.

⁹⁷ As above.

⁹⁸ As above.

⁹⁹ Kaseke (n 94 above) 224.

submitted that, because there are so many migrant workers who flock to South Africa, it should be a priority of both governments to enter into agreements about the transfer of long-term benefits.

2.12 Conclusion

From the discussion above, it is clear that social protection in SADC member states is not at all integrated. Each member state has a national system that is fragmented and, in most cases, severely strained. Better protection for non-citizens can only take place in a well-organised structure where there is mutual consensus on core values. The next paragraph looks at the existing structures in SADC and the way in which these structures aim at uniformity and co-operation.

3 The role of existing structures and agreements

The existing SADC structures include, *inter alia*, the Summit of Heads of State and Government, the Council of Ministers, commissions and a tribunal.¹⁰⁰ In most member states there are already a SADC national committee as well as a range of national programmes.¹⁰¹

When considering developments in the region and possible restructuring, one must bear in mind that there is no formal labour market in the SADC region and that labour market regulation is urgently needed.¹⁰² Labour market regulation is needed in order to prevent 'beggar thy neighbour' policies.¹⁰³

Unfortunately, other international human rights instruments on the continent are of limited value in the area of migration. Article 12(1) of the African Charter on Human and Peoples' Rights (African Charter)¹⁰⁴ contains provisions pertaining to the right to freedom of movement and residence of individuals. Article 12(1) of the African Charter guarantees an individual's right to leave any country, including his own, and to return to his country. Furthermore, article 16 provides for the right to health, article 17 for the right to education and article 22 for the right to economic, social and cultural development. The African Charter recognises socio-economic rights in a unique way by referring

¹⁰⁰ See in general Olivier & Kalula (n 53 above) 658.

¹⁰¹ Olivier & Kalula (n 53 above) 660.

¹⁰² Olivier & Kalula (n 53 above) 668.

¹⁰³ As above. Olivier & Kalula summarise SADC's objectives as follows: '... the promotion of economic and social development and the establishment of common ideals and institutions ... The treaty commits member states to the fundamental principles of sovereign equality of members, solidarity, peace and security, human rights, democracy and rule of law, equity, balance and mutual benefit.'

¹⁰⁴ OAU Doc OAU/CAB/LEG/67/3/Rev 5.

to economic development within the context of group solidarity.¹⁰⁵ Unfortunately, when compared to other international and regional instruments, the African Charter makes little mention of social security and it places little emphasis on social security.¹⁰⁶ However, one need not despair: Jansen van Rensburg and Lamarche explain that the African continent has a unique way of addressing social security rights. The focus is on the duties of families and communities towards the destitute members of society. The African Charter reflects this value in the duty that is placed upon an individual to maintain his or her parents in the event of need.¹⁰⁷

The only other international human rights instrument that originated on the African continent that deals with social security is the African Charter on the Rights and Welfare of the Child (African Children's Charter). This instrument addresses a child's rights to survival, protection and development, education, health and health services and the right not to be exploited economically.¹⁰⁸

When looking at international treaties such as the African Charter, one should bear in mind that such an instrument should first be ratified and adopted. It is only when a country brings its national legislation up to par with an international instrument that the instrument has any value in providing legal protection. The countries discussed in paragraph 3 above should do more than simply ratify existing treaties if they are to extend social protection to migrants. With this in mind, the discussion turns to the EU as a model for cross-border protection in order to see whether it provides possible solutions for problems related to the protection of non-citizens in SADC.

4 Cross-border protection of non-citizens in the European Union: Lessons to be learnt?

By way of comparison, one can draw from the European Community Regulation 1408/71 that applies to families who move around within the EU. A number of basic principles apply in the EU, namely:¹⁰⁹

- choice of law, regarding the identification of the applicable legal system;
- equal treatment;

¹⁰⁵ L Jansen van Rensburg & MP Olivier 'International and supra-national law' in Olivier *et al* (n 14 above) 633. See also BO Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American system' (1984) 6 *Human Rights Quarterly* 141-147.

¹⁰⁶ As above.

¹⁰⁷ L Jansen van Rensburg & L Lamarche 'The right to social security and assistance' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 232.

¹⁰⁸ As above.

¹⁰⁹ Olivier & Kalula (n 53 above) 670-671.

- aggregation of insurance periods; and
- maintenance of acquired benefits and the payment of benefits to community residents, irrespective of their place of residence.

These principles are universal and should ideally be implemented in any sound legal system that deals with migrants, regardless of the labour market it serves. In order to achieve these principles, four possible regimes may be followed in order to solve the problem of portability of benefits across borders, namely:

- access to social security benefits and advanced portability regulated by bilateral agreements between the migrant-sending and receiving country;¹¹⁰
- access to social security benefits in the absence of bilateral agreements;¹¹¹
- no access to portable social security benefits;¹¹² and
- undocumented but legal migrants who participate in the informal sector of the host country.¹¹³

Where access to social security benefits and advanced portability are regulated by bilateral agreements between the migrant-sending and receiving country, it should be easy for a migrant to have his benefits transferred from one country to another.¹¹⁴ However, not all bilateral social security agreements cover all benefits, with the result that a migrant worker may still experience inconvenience with transfers.¹¹⁵

In the case of the second possibility, namely, where there is an absence of bilateral agreements, the national social law of the host country alone determines if and how benefits may be accessed after the return to the home country.¹¹⁶

The third possibility, namely, where migrants have no access to social security benefits, is probably the most inequitable situation.¹¹⁷ Typically, migrants are not allowed to contribute to long-term protection schemes such as old-age pensions.¹¹⁸ Where one can expect the fairly well-to-do to invest in private retirement schemes, the average migrant in SADC is not in a position to make such private arrangements.¹¹⁹

¹¹⁰ Holzman *et al* (n 3 above) 7.

¹¹¹ As above.

¹¹² As above.

¹¹³ As above.

¹¹⁴ As above.

¹¹⁵ As above.

¹¹⁶ As Holzman *et al* (n 3 above) 7 correctly argue: 'This is obviously a broad category with a varying quality of portability, as the national social law varies greatly across countries. Most legal immigrants who do not benefit from bilateral agreements fall within this category.'

¹¹⁷ As above.

¹¹⁸ As above.

¹¹⁹ As above.

In the final instance, every bit as problematic as the third possibility, is the case in which undocumented but legal immigrants participate in the informal sector of the receiving country. These migrants usually are not entitled to any social protection and they inevitably end up with no portable rights at all.¹²⁰

From the discussion of the country-specific arrangements above,¹²¹ it is evident that social security benefits in most SADC member states are very limited at the national level. For those who do migrate between member states, there are usually no bilateral agreements, or no access to social security benefits and in most cases, migrants are taken up in the informal sector where they have no or little protection, and definitely no prospect of portability of benefits.

This is a multi-dimensional problem that cannot be solved through the efforts of one or two member states alone. Instead, urgent and creative solutions are needed. The next section looks at a number of possibilities that may be explored in the near future.

5 Recommendations

5.1 General

The importance of a tailor-made solution for the SADC region cannot be over-emphasised. By merely copying the existing structures in the EU or other economic areas, the specific challenges that face SADC member states can easily be overlooked. The EU is much older and is made up of countries such as Germany, Belgium and Holland, who have a history of social security that goes back a very long way. Although international standards should definitely be considered, one should not be naïve about the potential and capacity of social protection structures within SADC. With this in mind, the next paragraph advances a number of possible solutions.

5.2 Portability at a national level

As was seen above, each SADC country has a specific system within which protection is afforded. The most pressing issue on a national level is the portability of pension fund benefits. In this regard, it is suggested that countries adopt a similar approach than what was suggested for Tanzania, namely that benefits built up under the first fund be retained, that employees not be allowed to withdraw pension benefits when their employment contracts terminate for whatever reason, that various periods of contribution are recognised and that funds reach agreements on transfers and payments of benefits to

¹²⁰ As above.

¹²¹ See para 3 above.

employees.¹²² Transferability of other benefits, such as medical care and disability benefits, will definitely in due course follow the same pattern, especially if the pension funds model as suggested here is successful. The proposed legislation as envisaged by the Tanzanian Labour Law Reform Task Team¹²³ may just as profitably be implemented by other member states in SADC.

The most important issue nationally is for the legislator to force employees to transfer their benefits, either into a new fund or into a long-term fixed deposit for later use. Currently, members of funds withdraw their benefits prematurely without being penalised. By eliminating this problem and by educating employees about the consequences of early withdrawal, employees are protected from the devastating effects of using their benefits on commodities that have no long-term value. Unfortunately, most funds are regulated by legislation and a change in legislation is the only way in which the non-transferability of benefits can be achieved.

5.3 Cross-border portability of benefits

Before one can even start to make recommendations regarding portability of benefits, it is necessary to look at core values and importantly, issues concerning human rights.

According to the Taylor Report,¹²⁴ a number of important measures have already been undertaken in order to synchronise systems in SADC. For instance, a Protocol on Freedom of Movement of Persons in SADC was concluded in May 1998.¹²⁵ The Protocol 'suggests a phased approach, whereby the objectives of freedom of movement of persons, namely visa-free entry, residence and establishment for SADC citizens in the territories of member states, are incrementally and progressively attained'.¹²⁶

As far as values are concerned, the Social Charter of Fundamental Rights has been agreed upon and is open for ratification by member states. According to the Taylor Report:¹²⁷

The Charter contains provisions relating to the social protection of both workers and those who are not employed – and regulates the position of

¹²² See MP Olivier 'Acceptance of social security in Africa' paper delivered at the ISSA Regional Conference for Africa held at Lusaka, Zambia, from 9-12 August 2005 15.

¹²³ See sec 2.10 above.

¹²⁴ Committee of Inquiry into a Comprehensive System of Social Security for South Africa: Transforming the Present - Protecting the Future draft consolidated report Pretoria (2002) – Committee of Inquiry into a Comprehensive System of Social Security for South Africa (Taylor Report) <http://www.welfare.gov.za/documents/2002/May/pdf> (accessed 30 August 2007) 561.

¹²⁵ As above.

¹²⁶ As above.

¹²⁷ As above.

workers (in terms of social protection) more comprehensively than those who do not work.

Furthermore, the African Charter contains provisions on the protection of peoples' rights, group solidarity, the protection of the family, the right of the aged and the disabled to special protection.¹²⁸

It therefore seems as though most of the SADC member states have reached consensus on the values that should underpin social protection structures.

As far as the co-ordination of social security structures is concerned, the Taylor Report favours bilateral and multilateral agreements that make provision for choice of law, equal treatment, aggregation of insurance benefits and maintenance of acquired benefits as well as the payment of benefits to community members.¹²⁹ Olivier is in favour of the same arrangements.¹³⁰

The establishment of bilateral and multilateral agreements is not a new idea. As far back as 1997, a Draft Protocol on the Facilitation of Movement of Persons in the SADC envisaged a number of detailed objectives.¹³¹ These objectives are *inter alia* the following:¹³²

- facilitation of movement of citizens of member states by gradually removing obstacles which impede such movement;
- expanding the network of bilateral agreements as a step towards a multilateral regional agreement;
- co-operation in preventing illegal movement of citizens;
- co-operation in improving control over external borders of the SADC community; and
- promotion of common policies with regard to immigration matters where necessary and feasible.

The ratification of Protocols such as these will no doubt pave the way for detailed agreements, such as those provided for in the Tanzanian Social Security Bill of 2005.¹³³

Apart from the above suggestions, it is submitted that there are two crucial steps that need to be taken before the portability of benefits can be tackled. First, all member countries should obtain statistics pertaining to migration. These statistics should show why workers migrate, the frequency of their movements (for instance annually), the type of work they engage in and the funds they belong to, both in their home country and in the receiving country. This should sketch a clear picture of the patterns that exist between countries and shed light on the need

¹²⁸ Taylor Report (n 124 above) 562-563.

¹²⁹ Taylor Report (n 124 above) 564.

¹³⁰ Olivier (n 122 above) 15.

¹³¹ Olivier *et al* (n 2 above) 58.

¹³² See art 2 of the Draft Protocol.

¹³³ Proposed sec 324(2) of the Social Security Bill 2005.

for cross-border agreements. For instance, if it is clear that there are no migrants travelling between South Africa and the Seychelles, it is unnecessary for those two countries to enter into bilateral agreements. However, if it is evident that a multitude of labourers migrate from Zimbabwe to South Africa, it is obvious that agreements are needed as a matter of urgency.

A second solution is for existing funds, especially retirement funds, to compile a database of non-nationals who contribute to funds. These funds are enabled to collect payments from employers and employees alike because of national legislation. At the very least, these funds can initialise procedures for cross-border transfers to other funds or into bank accounts on fixed-term deposits. Because long-term benefits are administered by funds and they are in a position to draw considerable benefits from keeping large amounts of money in their account, one can expect them to employ a bit of capital and to set up and maintain structures aimed at the portability and preservations of benefits.

Finally, if member states in SADC do proper research into migration and long-term benefit funds install and maintain proper databases, it will be possible for member countries to deal with the problem of the portability of benefits and to enter into meaningful bilateral and multilateral agreements.

6 Conclusion

SADC, as an economic region, currently experiences the spontaneous migration of citizens in search of job opportunities and a better standard of living. More often than not, these migrants enjoy limited protection and find that they have nothing to show after a lifetime of hard work.

Migration cannot and should not be stopped, as freedom of movement is an internationally-recognised right. Instead, individual countries should respect the fundamental rights of their citizens as well as the right to a decent standard of living of migrants. By recognising international standards pertaining to migrants and, more importantly, standards pertaining to the portability of benefits, SADC member countries should gradually extend social protection to non-citizens who contribute to their economies through their labour and thereby enhance their right to freedom of movement.

There can be no doubt that this is a multi-faceted problem for which there is no one-dimensional answer. It is suggested that member states of SADC gather accurate data on migration in the area and that funds play a key role in setting up databases and structures to track the payment of benefits between funds, both nationally and multi-nationally. Finally, once it is clear exactly what the extent of migration is, countries should adopt legislation on a national level on the portability of benefits, provide for bilateral and multilateral agreements and then

eventually enter into binding agreements with other member states. Legally binding agreements will ensure that non-citizens have an enforceable right against pension funds or any other institutions that provide social security benefits.

In the final instance, it is submitted that the principles that underpin EU Protocols are sound and comply with international human rights standards. Once the basic structures are in place in SADC, these principles are well worth incorporating in supra-national legislation that deals with the social protection of migrants.