

**Portability of social security benefits of
circular migrant workers in selected SADC
member states**

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DEDICATION

To my father, my mother, and my brother. May you never cease to pray in good times as you do in bad times.

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ABSTRACT

The issue of portability of social security benefits is a daunting issue facing migrant workers in both Southern Africa and the world in general. In the Southern African Development Community region migration seems to be driven mainly by the need to attain economic freedom. The fact of the matter is that migrant workers from Lesotho and Swaziland who work and have worked in South Africa do play a major role in boosting these countries' economies. Another issue that cannot be ignored is the fact that circular migration as a phenomenon is unlikely to come to an end any time soon in this part of the world. This means that social security benefits of migrant workers and its portability should be an issue that is dealt with cautiously and speedily, especially in terms of looking at the millions of unclaimed social security benefits reported each year by social security funds and schemes in South Africa. While examining the extent to which selected SADC member states, namely Lesotho, Swaziland and South Africa, have undertaken to combat this issue, international and regional instruments that have a bearing on social security rights are analysed and the realisation is that in as much as these do provide for social security rights and portability of benefits thereof, a lack of ratification and implementation play a vital role in achieving efficient portability of these rights. Although South Africa, as the largest migrant-receiving country in the SADC region, does provide for the right to social security in its Constitution, the fragmented nature of its social security framework, together with other factors such lack of information, exploitation by employers, distances travelled to lay claims and a non-existent social security adjudication system means that migrant workers are normally left with lack of redress when their contracts of employment reach an end. On the other hand, Swaziland and Lesotho, as migrant-sending countries, do not even have provisions in their constitutions that specifically deal with the right to social security. This means that citizens who work abroad do not have sufficient social security coverage in either country, as well as in South Africa as a host country. Consequently, multilateral and bilateral agreements on social security are pivotal in addressing this issue of unclaimed social security benefits as they go a long way in making sure that migrant workers are provided with

adequate social security protection and coverage as a whole. Migrant sending countries also need to undertake unilateral initiatives to guarantee that their citizens are adequately protected in this specific sphere of social security. Examples are further drawn from the best practices of different regions in the world, namely the Southeast Asian Nations Region, Caribbean Community and Common Market and the Southern Common Market.

The above-mentioned regions have established multilateral social security agreements that seek social security protection for migrant workers who play an undeniable role in their economies. Bilateral social security agreements between Zambia and Malawi, together with the one between Sweden and Philippines, are taken into consideration as best practices that Lesotho, Swaziland and South Africa may draw examples from when drawing up and concluding their own bilateral social security agreements. The Philippines' unilateral initiatives are also discussed and hailed as the best practices that migrant-sending countries such as Lesotho and Swaziland may further draw examples from. The Philippines has developed strategies aimed at guaranteeing social protection for its migrant workers abroad and further makes sure that it enters into bilateral agreements with any country that receives services from its citizens. While the need to conclude multilateral and bilateral agreements on social security cannot be denied, there is also a need for migrant-sending countries to come up with unilateral initiatives to lessen the burden on migrant-receiving countries in this social security domain. Sectors such as the mining sector should also have mining-specific agreements that specifically deal with issues related to migrant mine workers. Lack of statistics of migrant workers moving in and out of South Africa has also been labelled as one of the reasons halting access and portability of social security benefits; hence there is a need to develop a data-base aimed at keeping track of all migrant workers, retired and otherwise. Migrant workers who seek redress regarding access of their unclaimed or unpaid social security benefits also have to be provided with comprehensive protection from the courts of law. This therefore means that an adjudication system should be established to deal

with social security woes so that those seeking redress have adequate legal support.

Key words: labour, social security, social protection, migration, unilateral, bilateral, multilateral agreements

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LIST OF ABBREVIATIONS

ACMS	African Centre for Migration and Society
AHRJ	African Human Rights Journal
AJFM	African Journal Finance Management
ASEAN	Southeast Asian Nations
ASSAL	Annual Survey of South African Law
CARICOM	Caribbean Community and Common Market
CARIFTA	Caribbean Free Trade Association
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CELLS	Centre for European Law and Legal Studies
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CJDS	Canadian Journal of Development Studies
CLLPJ	Comparative Labour Law and Policy Journal
CLLPJ	Comparative Labour Law and Policy Journal
COHSOD	Council for Human and Social Development
COIDA	Compensation of Occupational Injuries and Diseases
Comp.Lab.L.&Pol'y J	Comparative Labour Law and Policy Journal
COTED	Council of Trade and Economic Development
CRC	Convention on the Rights of the Child

De Jure	South African Attorneys' Journal
EC	European Commission
EEA	European Economic Area
EEC	European Economic Community
EJSS	European Journal of Social security
EU	European Union
ICESCR	International Covenant on Economic, Social and Cultural Rights
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
ILO	International Labour Organization
ILR	International Labour Review
ISSR	International Social Security Review
JAASSH	Journal of Asian and African Social Science and Humanities
JEP	Journal Für Entwicklungspolitik
JLSDUP	Journal of Law, Society and Development and Unisa Press
JSDS	Journal of Social and Development Sciences
KLI	Kluwer Law International
LAWSA	Law of South Africa
LLJ	Lesotho Law Journal

MERCOSUR	Social Security in the Southern Common Market
ODMWA	Occupational Diseases in Mines and Works Act
PELJ	Potchefstroom Electronic Law Journal
PFA	Pensions Fund Act
PSPF	Public Service Pension Fund
PULP	Pretoria University Law Press
RAFA	Road Accident Fund
SA Merc LJ	South African Mercantile Law Journal
SADC	Southern African Development Community
SADCLJ	SADC Law Journal
SAGE	International Social Work
SAMJ	South African Medical Journal
SAPL	South African Public Law
SAT	Southern African Trust
SLR	Stellenbosch Law Review
TEBA	The Employment Bureau of Africa
TSAR	Tydskrif vir die Suid Afrikaanse Reg
UIA	Unemployment Insurance Act
UK	United Kingdom

CHAPTER ONE: INTRODUCTION

1.1 Overview

In Southern Africa, the reality is that many migrants travel to South Africa each year in search for proverbial greener pastures.¹ The reason for this is mainly due to the economic power that South Africa has compared to its Southern Africa counterparts.² Migration is described as the movement of people across national borders, while the reasons for migrating are termed migration drivers and are mainly conceptualised as reasons that generally result in people migrating from their home countries to other countries.³ Migration is explained more easily by using the push-pull theory to illustrate that instability in the home country leads to migration while stability in the host attracts people to such a country. The primary reason for migration has been described as the search for better living standards for migrant workers themselves and their dependents.⁴

Migration as a phenomenon is unlikely to decrease in the coming years because of the push-pull factors, as mentioned above.⁵ What is very clear, however, is the fact that every country in the world is experiencing migration either as a home country, a host country, a transit country, or all of the above.⁶ According to recent studies as per the ILO social protection report for 2017-2019, there is an estimate of about 244 million migrants worldwide with 150.3 million said to be migrant workers.⁷ However, it is important to note that in Southern Africa the most specific type of migration is South-South migration with most people migrating to South Africa because of its economic prowess.⁸ Research has shown just how common

¹ Kapindu 2011 *African Human Rights Journal* 94. (hereafter-*AHRJ*)

² Kapindu 2011 *AHRJ* 94.

³ Kaseke "Underlying drivers of migration in SADC" 4.

⁴ Olivier 2011 *SADCLJ* 123.

⁵ Kaseke "Underlying drivers of migration in SADC" 4.

⁶ Olivier and Govindjee "Labour rights and social protection of migrant workers" 4.

⁷ International Labour Organisation 2017 <http://www.ilo.org>. See also Anon 2015 <http://www.ilo.org/gobal/topicslabour-migration>.

⁸ Crush and Dobson "Migration governance and migrant rights in the Southern African Development Community" 2. It has been indicated that in 2011, the South African census estimated that the number of people born in foreign countries actually residing in South Africa was around 2,199,871 which was approximated as forming at least 4% of the actual population.

circular migration is in Southern Africa, especially in terms of migration patterns to and from South Africa.⁹ This means that the migrant retains strong ties with his country of origin and moves between his country of origin and the host country.¹⁰

The magnitude of migration in this region is reflected by the vast number of remittances connected to migrant workers' households.¹¹ Although people migrate for various reasons, this thesis concentrates on migrant workers' in particular, a category of people defined as those who work in a country other than their own or different from their place of residence.¹²

The problem in the SADC region specifically lies with immigration laws which have a negative impact on social security rights of migrant labourers.¹³ Since domestic immigration laws are mainly concerned with the regulation of people entering a particular state, these national immigration laws are also used to regulate and control access and entitlement to social security benefits in the receiving country.¹⁴ Consequently, this means that the immigration status of a worker is sometimes linked with the entitlement to social security benefits hence irregular migrants are usually excluded from social assistance coverage.¹⁵

The main focus of the SADC immigration policies is the deportation and control of migrants and neither free movement nor integration of the region¹⁶ One reason for this is the fact that SADC migrant-receiving countries have migrants ranging from both the formal to the informal sector.

These migrants are largely made up of domestic workers, mine workers, farm workers and construction workers who go back to their home countries at the end of their employment contracts and normally send remittances to their families who

⁹ Núñez 2009 [http:// www.tips.org.za](http://www.tips.org.za).

¹⁰ Núñez 2009 [http:// www.tips.org.za](http://www.tips.org.za).

¹¹ Olivier 2011 *SADCLJ* 125. Research reveals that 85% of migrant sending countries in the SADC region get cash remittances from migrant workers.

¹² Taha, Messkoub & Siegmann 2013 <http://www.iss.nl>.

¹³ Mpedi and Smit Access to Social Security for Non-Citizens 52.

¹⁴ Mpedi and Smit (eds) Access to Social Security for Non-Citizens 52.

¹⁵ Mpedi and Smit (eds) Access to Social Security for Non-Citizens 52.

¹⁶ Mpedi and Smit (eds) Access to Social Security for Non-Citizens 52.

remain in those countries. Therefore, circular migration is prevalent in this part of Southern Africa.

1.2 Problem statement

According to the Southern Africa Trust, ZAR 5.7 million worth of retirement benefits were reported as unclaimed in 2013 in South Africa and clearly indicates that more has to be done to enhance the portability of social security benefits in this region.¹⁷ According to the report submitted by the South African Financial Services Board, it is not clear how much money is owed to former migrant workers; however, the International Institute of Social Law and Policy states that a number of problems experienced by former migrant workers and their beneficiaries have contributed to this enormous sum of unclaimed funds.¹⁸ It is therefore important to note that there is a relationship between migration and social security.

The International Labour Organisation¹⁹ describes social security as the protection provided by society to individuals and households to guarantee access to health care and income security, specifically for unemployment, sickness, invalidity, cases of old-age, work injury, maternity or loss of a breadwinner.²⁰ Social protection²¹ of these migrant workers is composed of four components which will now follow.²² The first component is the accessibility of social security in both migrant-sending and migrant-receiving countries and how this affects the vulnerable.²³ The second component is the need to balance the needs of employers and workers by recruitment processes in countries of origin together with labour market conditions

¹⁷ Olivier *et al* state as thus: "in a 2013 Southern Africa Trust (SAT) report, large numbers of beneficiaries have not claimed their benefits (many of whom are migrant workers or their dependents), leaving an amount of R 5,7 billion in unclaimed retirement benefits." See Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹⁸ Jansson *Mail and Guardian* Page Unknown.

¹⁹ International Labour Organisation (hereafter-ILO)

²⁰ International Labour Organisation Date Unknown <http://www.ilo.org>.

²¹ Taha, Messkoub & Siegmann state that "Social protection and social security are often used interchangeably, but social protection can include private measures such as employer-funded schemes and support through social networks."

²² Taha, Messkoub & Siegmann 2013 <http://www.iss.nl>.

²³ Taha, Messkoub & Siegmann 2013 <http://www.iss.nl>.

for migrants. The third component is related to access to informal networks which can be used to act as informal social safety nets to support migrants and their dependants while, lastly, the fourth component deals with the portability of social security benefits between the receiving and sending countries. This last component is particularly vital to the purposes of this thesis because the study intends to establish how access and portability of social security benefits can be advanced.

The portability of social security benefits is defined as the migrant worker's ability to maintain, preserve and transfer benefits from a social security programme in his or her host state to a home state.²⁴ The issue of portability of social security benefits can only be addressed and solved through mutual agreements between both the sending and the receiving state or the receiving country with multiple sending countries.²⁵ These agreements are referred to as bilateral and multilateral agreements. While both bilateral and multilateral social agreements can be used as a means of providing minimum standards of social security rights for migrant workers, it is important to note that the latter agreements are mostly used for economic integration and free movement of labour in the regional context.²⁶ Multilateral social security agreements are further used for progressive harmonisation of social protection and labour policies which eventually lead to equal treatment of migrant workers and citizens.²⁷

To a large extent, a migrant worker's status is a determinant of how he or she will be treated in a receiving country's social security system since social security entitlements are normally related to the length of employment periods or type of residency or size of contributions.²⁸ This research will focus specifically on documented migrant workers namely temporary residents.

²⁴ Taha, Messkoub & Siegmann 2013 <http://www.iss.nl>.

²⁵ Grenfell Date Unknown <http://www.moscow.iom.int>.

²⁶ Van Ginneken 2013 *European Journal of social security* 214. (hereafter-*EJSS*)

²⁷ Van Ginneken 2013 *EJSS* 214.

²⁸ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 6.

1.2.1 Temporary residents

This research is particularly interested in the plight of circular migrant workers who have to return to their home countries at the end of their employment contracts. While temporary residents are eligible for social insurance coverage in South Africa, they are not covered by the public sector health care in an attempt to reduce strain on South African resources.²⁹ In the event that an injury or disease occurs within the course of their employment, temporary residents can access compensation for occupational diseases and injuries; however, the only means of social security available to them would be via contributory private health care schemes.³⁰ Social assistance, on the other hand, is restricted to citizens and permanent residents while temporary residents are allowed to access social insurance coverage.³¹ The question, however, remains as to what really happens after temporary residents return to their countries of origin. This research, therefore, tackles the issue of portability of social security benefits of temporary residents or migrant workers upon their return home.

1.3 Research question

1.3.1 Main research question

How can access to and portability of social security benefits of circular migrant workers be enhanced in selected SADC member states?

1.3.1.1 Subsidiary research questions

To what extent could international labour law and social security law instruments enhance access to and the portability of social security benefits for migrant workers?

²⁹ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 19. South Africa is a receiving country that will be discussed for purposes of this research.

³⁰ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 19-20. Both social assistance and social insurance will be explained in detail in section 1.5.1 of this research.

³¹ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 20.

To what extent could social security schemes and regulations in selected SADC member states aid the portability of social security benefits of migrant workers?

To what extent could social security agreements enhance access to and the portability of social security benefits for migrant workers in selected SADC member states?

Could the adjudication of social security disputes enhance the portability of social security of migrant workers in selected SADC member states?

1.3.2. ILO standards on social security

The *Convention on Minimum Standards in Social Security* 102 of 1952 is considered a leader in social security conventions as it sets out global minimum standards of all nine branches of social security.³² The nine branches can be named as follows: medical care, sickness benefits, unemployment benefits, old-age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits and survivors' benefits.³³ The Convention's importance is confirmed by the fact that it has been used by many states as a referral point to draft their own social security legislation.³⁴ Upon ratification, this Convention requires states to provide for at least three of the nine branches and extend coverage by providing other social security branches in its social security system at a later stage.³⁵

The *Social Protection Floors Recommendation* was adopted in 2012 by the ILO, a move hailed as a milestone for social security since it reaffirms social security as a

³² Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>. South Africa, Lesotho and Swaziland have not ratified this Convention. However, this Convention is important as it is referred to as a leader of all social security conventions. Hirose, Nikac and Tamagno state that this Convention has been cited as reference in the gradual development of comprehensive social security systems at domestic level worldwide.

³³ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³⁴ Nyenti & Mpedi 2015 <http://www.sapen.org>. See also Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³⁵ Meknassi 2006 *Comparative Labour Law and Policy Journal* 209-210. (hereafter Comp.Lab.L.&Pol'y J)

human right and renews national commitments to extend coverage worldwide.³⁶ The Recommendation provides guidance to member states as to how to establish and maintain social protection floors as a fundamental aspect of their domestic social security systems.³⁷ This instrument advocates for the enjoyment of a minimum level of social security and the extension of social security strategies to ensure support for disadvantaged groups and people with special needs.³⁸

1.3.3 ILO standards on social security of migrant workers

From ILO's early years, the International Labour Conference has inserted clauses on equality of treatment between national and non-national workers into its social security Conventions. In addition to the general social security Convention which set minimum standards, the International Labour Conference has adopted several instruments that specifically lay down provisions for the protection of migrant workers' social security rights, namely the *Equality of Treatment (Accident Compensation) Convention*, 1925 (No. 19), the *Equality of Treatment (Social Security) Convention*, 1962 (No. 118) and the *Maintenance of Social Security Rights Convention*, 1982 (No. 157), together with its supplementary *Maintenance of Social Security Rights Recommendation*, 1983 (No. 167).

The *Equality of Treatment (Accident Compensation) Convention* 19 of 1925 was adopted with the intention of compensating those who encounter personal injuries due to industrial accidents.³⁹ According to this Convention, each ratifying state undertakes to grant nationals of any contracting state and their dependants the same treatment in respect of accident compensation as it grants its own nationals.⁴⁰ Furthermore, it provides that equal of treatment be guaranteed to foreign workers and their dependants without any condition of residence.⁴¹ It is, therefore, safe to state that it covers migrant workers as well. According to article

³⁶ International Social Security Association Date Unknown <http://www.issa.nl>. See also *Social Protection Floors Recommendation* 202 of 2012.

³⁷ Article 1(a).

³⁸ Article 16.

³⁹ Article 1.

⁴⁰ Article 1(1)

⁴¹ Article 2.

1 (2), if a member state has to make payments abroad, then measures adopted shall be regulated if necessary by special arrangements between member states concerned. The Convention does not oblige any member state to pay benefits abroad. However, if measures to pay benefits to nationals living abroad are adopted, then the same has to be done for foreign workers.⁴²

The *Equality of Treatment Convention* (hereafter - Convention 118)⁴³ was passed in 1962, stating clearly in its preamble that one of its missions is to tackle the issue of equality between nationals and non-nationals in the social security sphere, and sets out nine branches of social security as well.⁴⁴ It further states that member states are obliged by the Convention to cover migrants or non-nationals with any or more of the said branches already legislated by an effective operating law for nationals of the said member states.⁴⁵

However, it is important to note that ratifying states may choose which of these branches to enforce and which to exclude.⁴⁶ By ratifying the Convention, the receiving state undertakes to protect migrant labourers from a state with reciprocal ratification of the Convention.⁴⁷ According to article 5 of this Convention, benefits to be provided abroad include invalidity benefits, old-age benefits, survivors' benefits and death grants and employment injury pensions.⁴⁸ However, these benefits can only be exported abroad to nationals of fellow ratifying states.⁴⁹

The other important instrument for purposes of this research is the *Maintenance of Social Security Rights Convention* 157 of 1982 which points out that contracting states may accept the Convention's obligations in respect of any one or more of the nine branches of social security for which it has in effective operation

⁴² Kulke Date Unknown <http://www.social-protection.org>.

⁴³ *Equality of Treatment (Social Security) Convention* 118 of 1962. The jurisdictions relevant to this research which are Lesotho, Swaziland and South Africa have not ratified this Convention.

⁴⁴ Article 2. See chapter 1 section 1.3.2. See also the Preamble of Convention -118.

⁴⁵ Article 2(1).

⁴⁶ Grenfell date unknown <http://moscow.iom.int>.

⁴⁷ Grenfell date unknown <http://moscow.iom.int>.

⁴⁸ Article 5(1).

⁴⁹ Grenfell date unknown <http://moscow.iom.int>.

legislation covering its own nationals within its own territory.⁵⁰ This means that member states accept the Convention's obligations for all branches for which it has a scheme in place.⁵¹ In terms of article 2(3) thereof, the Convention applies to all general and special social security schemes, whether contributory and non-contributory including schemes consisting of employer-imposed obligations as per legislations in respect of any branch of social security.⁵² Ratification of the Convention means that member states endeavour to enter into bilateral and multilateral agreements which will deal with issues like maintenance of acquired rights and portability of social security benefits.⁵³ Analysing these international labour law and social security law instruments will determine if such do advance access to and portability of social security benefits hence directly addressing the first subsidiary research question.

1.3.4 The framework of social security rights in the SADC

The issue of lack of multilateral agreements that regulate the portability of social security in the SADC plays a very essential role in migrant labourers' lives. At the present moment, there is a lack of coordination and harmonisation of social security schemes throughout the SADC.⁵⁴ While it is important to note that the SADC has some core instruments which seem to envisage such coordination and harmonisation to a certain inadequate extent, the lack of regional enforcement and ratification is one of the reasons why portability of social security rights is still a problem. An example is the *Charter of Fundamental Social Rights in SADC*

⁵⁰ Article 2. See also Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>. It is unfortunate that Lesotho, Swaziland and South Africa have not ratified this Convention as this would have been a starting point towards the establishment of social security agreements between the three countries.

⁵¹ De L "Social protection for migrant workers: ILO's approach and ASEAN perspective".

⁵² Article 2(1).

⁵³ De L "Social protection for migrant workers: ILO's approach and ASEAN perspective". According to article 5 of the Convention, legislation regarding people to be covered by the Convention must be determined by agreement between member states concerned to avoid conflict and other unnecessary consequences that might occur. This article therefore provides guidelines for the creation of bilateral agreements on social security benefits which may therefore lead to coordination of social security schemes amongst member states.⁵³ Multilateral and bilateral agreements are further provided for expressly in article 4 which makes distinctions between provisions of the convention which need immediate application and those that need multilateral and bilateral agreements to come into operation.

⁵⁴ Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu).

(hereinafter, the Social Charter) adopted by the SADC in 2003. Most important is the fact that the Social Charter evoked the objectives of the *SADC Treaty*⁵⁵ and clearly advocates for the alleviation of poverty, development and economic growth, enhancement of quality and standard of living of people in the region. It further supports the socially disadvantaged by encouraging and advocating for the integration of states in the region.⁵⁶ Article 2(e) of this Charter states that the promotion of the establishment and harmonisation of social security schemes is one of its objectives.⁵⁷ Article 10 obliges member states to create an enabling environment so that every worker in the region has a right to adequate social protection.⁵⁸ The fact that it advocates for the establishment and harmonisation of social security schemes while urging members to create an enabling environment for every worker to receive social protection shows that there is an intention on the part of SADC to create an environment that would make the portability of social security benefits easier.⁵⁹ It is imperative to note that the Social Charter does not draw a distinction between citizens and non-citizens and therefore can also be construed as including migrant labourers. However, the realisation that there is a need for an effective instrument for the coordination, convergence and

⁵⁵ On the 17 August 1992, the heads of state of countries throughout Southern Africa signed the Declaration and Treaty of the Southern African Development Community, officially creating SADC.

⁵⁶ Mpedi and Smit *Access to Social Security for Non-Citizens* 35. See Dupper 2014 <http://www.transformeurope.eu>. See also the articles 2 to 5 of the SADC Treaty which was signed in August 17, 1992 in Windhoek, Namibia. See also article 6 of the treaty.

⁵⁷ See also Dupper 2014 <http://www.transformeurope.eu>. Dupper does however show the inadequacy of the provision by stating that because of the existing diversity of social protection schemes in the region the assumption is that the Charter envisages weak harmonisation of minimum standards in the region

⁵⁸ Dupper 2014 <http://www.transformeurope.eu>. See also Mpedi and Smit *Access to Social Security for Non-Citizens* 38.

⁵⁹ Likewise, article 10(2) further states that persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance. It is important to note that the word "persons" in the said article 10 shows no distinction between citizens and non-citizens and can therefore be construed as encompassing migrant workers as well. Even more explicit are the provisions of article 8(a) which affords protection to every employee in the region. It states that every worker in the region shall enjoy resources affording him/her a decent standard of living, including equity in post-employment security schemes at the time of retirement. Article 8(b) further stipulates that in situations that a worker has reached retirement age but does not have other means of subsistence and is not entitled to pension, such a person will be entitled to adequate social assistance to provide for his basic needs including health care. See Mpedi and Smit *Access to Social Security for Non-Citizens* 38.

harmonisation of social security systems in the region has led to the establishment of the *Code on Social Security in the SADC*.

1.3.4.1 The Code on Social Security in the SADC

The purpose of the *Code on Social Security in the SADC*⁶⁰ was summarised by Dupper⁶¹ as providing “SADC and Member States with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region”⁶² Perhaps even more important in the Code is article 4.1, which explicitly indicates that everyone in the SADC has a right to social security.⁶³ The Code further explicitly deals with migrant labourers in article 17, which also lists a few core principles and encourages its member states to protect lawfully employed migrants by ensuring that such principles are promoted.⁶⁴ It advocates for the protection of all lawfully employed migrant labourers and states that protection through core principles should be advanced by means of national laws and both bi and multilateral agreements.⁶⁵ Most importantly (in light of this study) member states are urged to ensure the exportability of benefits and payment thereof, in the host country.⁶⁶ The Code advances this argument by primarily advocating for equal treatment of migrants and citizens in the social security schemes of host countries and further states that there should be an accumulation and maintenance of acquired rights and benefits, and collection of insurance periods in

⁶⁰ The Code on Social Security in the SADC (Hereafter-Code) was approved in 2007 by the ministers and social development partners and recommended to the Integrated Committee of Ministers for adoption. See Mpedi and Smit *Access to Social Security for Non-Citizens and the portability of social benefits* 39.

⁶¹ Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu).

⁶² Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu).

⁶³ Article 4.2.

⁶⁴ Article 17.3. The Charter even extends coverage to illegal and undocumented migrants by stating that such should be afforded basic minimum social security coverage in accordance with the laws of the host country. See also Mpedi and Smit *Access to Social Security for Non-Citizens* 39.

⁶⁵ Article 17.2. However, there is a limited and insufficient range of bilateral agreements on portability and exportability of social security benefits, including pensions. See also Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁶⁶ Article 17(b). Article 17(a) in essence advocates for migrant labourers’ participation in social security schemes of host countries.

different SADC member states.⁶⁷ This shows that it seeks social security protection for migrant labourers not only while at work in the host country but also upon their return to their country of origin. However, it is important to note that this Code is of non-binding and only provides guidelines necessary for the implementation of social security in the region.⁶⁸ SADC member states' regulations on social security and the portability thereof are essentially not coordinated. This together with other issues previously mentioned has led to the adoption of the *SADC Protocol on Employment and Labour* which is described as foreseeing coordination in the region.

1.3.4.2 SADC Protocol on Employment and Labour

Another significant SADC instrument is the *SADC Protocol on Employment and Labour* which came into being in 2014 and was described as foreseeing the adoption of the means to facilitate the coordination and portability of social security benefits.⁶⁹ Article 19(f) of this protocol urges member states to implement measures to facilitate coordination and portability of social security benefits through the adoption of bilateral and multilateral agreements and furthermore advocates for equality of treatment of citizens and non-citizens and promotes aggregation of insurance periods and maintenance of acquired rights and benefits. However, the implementation of this protocol has largely been hindered by a lack of ratification.⁷⁰ Thus, there is still a lack of mechanisms and social security agreements that aid and advance the portability of social security benefits for retired migrant workers.

⁶⁷ Article 17(c)&(d). Perhaps more essential for purposes of this thesis is article 17.2 (d) which advocates blatantly for facilitation of exportability of benefits. According to this provision, member states should ensure the facilitation of exportability of benefits, including the payment of benefits in the host country.

⁶⁸ Nyenti and Mpedi 2015 *Potchefstroom Electronic Law Journal* 249-250. (hereafter *PELJ*) The other problem with article 17 is the fact that host countries seem to be given the liberty to deal with irregular migrants in any way they prefer. The fact that the provision says in accordance with the laws of the host country means that most irregular migrant labourers are not afforded even the slightest protection because they are not catered for in domestic laws of host countries. Article 17. See also Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>. Member states are further encouraged to ensure coverage of self-employed migrant labourers on the same scale as employed migrants. See

⁶⁹ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁷⁰ Southern Africa Trade Union Co-ordination Council 2016 <http://www.satucc.org>.

SADC regional instruments do not portray strong enough measures for the proper establishment and development of social security coordination with the exception of the code.⁷¹ One of their major flaws is that they do not have one compulsory rule prohibiting nationality discrimination.⁷² In fact, even the *SADC Treaty* (as adopted in 1992) does not seem to be specific enough about issues pertaining to discrimination on the basis of nationality.⁷³ Article 6(2) of the *SADC Treaty* asserts that member states shall not discriminate against any person on the grounds of gender, religion, political views, race, ethnic origin, culture or disability. There is also absolute silence regarding discrimination on the grounds of citizenship in the *SADC Treaty*.

The SADC region has to adopt precise and solid measures to deal with issues relating to social security for migrant workers. Specific country-to-country arrangements and agreements based on principles contained in the *Code on Social Security in the SADC* may be considered. National laws and practices also have to be examined in order to realize protection for migrant workers. The next part of the research will look closely at national laws and practices pertaining to social security of migrant workers.⁷⁴ These discussions ultimately lead to the second subsidiary research question which is whether SADC regional labour law and social security law instruments do advance access and portability of social security benefits of circular migrant workers.

1.4 Access and portability of social security benefits of migrant workers in South Africa, Lesotho and Swaziland

1.4.1 South Africa

Social protection is easily one of the most essential rights and yet it has been stated that 80 % of the world's working population does not have access to social

⁷¹ Olivier "Social protection for migrant workers from Malawi" 6.

⁷² Olivier "Social protection for migrant workers from Malawi" 1-6.

⁷³ Olivier "Social protection for migrant workers from Malawi" 1-6.

⁷⁴ South Africa will be the starting point of the discussion as a migrant receiving country, then Lesotho and Swaziland will follow.

security.⁷⁵ South Africa has work-related social protection concentrated mainly in the formal economy sector.⁷⁶ Other than that, the focus is mainly on citizenship and residency as the main requirements for access.⁷⁷ It is for these reasons that access to social security of migrant labourers is rather difficult. Migration policies in this region are mainly concerned with the control and expulsion of illegal migrants in the region.⁷⁸ One of the pieces of legislation that largely controls migration in South Africa is the *Immigration Act*⁷⁹ whose preamble states that it was passed to establish a system that controls migration by ensuring boarder monitoring with an aim of making South African borders solid. The preamble further states that the aim is to detect, reduce and deter illegal migrants from entering the Republic of South Africa.

Nonetheless, the *Immigration Act* has done little to deter migration influx in South Africa; hence a large number of irregular migrants pouring in.⁸⁰ One major problem with the *Immigration Act* is the fact that it makes it difficult for low-skilled, documented migrant workers to attain employment in South Africa. In terms of section 2(1)(j), one of its objectives is to regulate the influx of foreigners by ensuring that businesses in this country employ migrants who are exceptionally skilled or qualified. The provision further states that the Act aims to encourage employers to train citizens and reduce their dependency on foreigners.⁸¹

⁷⁵ Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers". See Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu).

⁷⁶ Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers". See Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu).

⁷⁷ Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers".

⁷⁸ Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers".

⁷⁹ Act 13 of 2002.

⁸⁰ Biney states that: "South African borders, particularly the border shared with Zimbabwe, have become undeniably porous for undocumented workers as people commonly cross without going through immigration posts. The failure of the South African government to use its 'immigration-regulatory powers' to regulate or manage its borders effectively could be a silent offer to irregular migrants to enter." Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers".

⁸¹ Article 2(1)(j). The fact that the provision encourages businesses to employ exceptionally skilled migrants is a good thing, however, this does not mean that low skilled migrant workers do not flood into South Africa year in and year out. These low skilled migrant workers who normally do not know their rights end up being employed illegal and normally get exploited.

The other provision that makes it essentially challenging for low-skilled migrants to find employment is section 38, which states that employers who knowingly hire unauthorised migrants will be prosecuted.⁸² This section seems to turn a blind eye to the fact that the mining, agricultural, hospitality and construction sectors of the present-day South African economy rely heavily on low-skill migrant labour for survival.⁸³ These low-skilled migrant labourers are largely irregular or undocumented migrants and are, therefore, found in sectors that are not adequately covered by legislations.⁸⁴ Migrants are often associated with jobs that citizens of host countries would not accept; hence finding themselves in harmful working and living conditions. Their fear of being detected, prosecuted and even deported means that they keep silent about their hazardous conditions.⁸⁵ Consequently, a great number of migrants are clustered in sectors of the economy either completely uncovered by social security or lack proper social security law enforcement.⁸⁶

It is significant to further note that section 27 of the *Constitution of the Republic of South Africa* states that anyone has the right to access social security.⁸⁷ According to section 27(2), the state must take reasonable legislative and other measures within its available resources to achieve progressive realisation of these social security rights. In South Africa, there is a clear distinction between social assistance and social insurance.⁸⁸ Social assistance is a form of social security providing assistance in cash or in-kind to persons who lack the means to support themselves and their dependents. Beneficiaries of this form of social security are

⁸² Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers".

⁸³ Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers".

⁸⁴ Biney in advocacy of this states that: "In South Africa, like elsewhere in the world, they are often found in sectors of the economy that are not adequately covered by protective legislations." See also Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁸⁵ Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers".

⁸⁶ Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers".

⁸⁷ Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

⁸⁸ Millard 2008 *AHRLJ* 40. See also Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers".

normally those who are not covered by any form of social security.⁸⁹ Social assistance is means-tested and is financed from government revenues with an intention of alleviating poverty through minimum income support. Social assistance covers grants available in South Africa, which comprise of old-age grants, disability grants, foster care grants, care-dependency grants and a child support grants.⁹⁰ In South Africa, this system is made available to certain groups of migrants or non-citizens, mainly refugees and permanent residents.⁹¹

On the other hand, social insurance is defined as a form of social security intended to protect income earners and their dependants against reduction or loss of income as a result being exposed to any sort of risk that weakens an individual's capacity earn an income.⁹² Social insurance is contributory in nature and these contributions are paid by employers, employees, self-employed individuals or other contributors depending on the type and nature of scheme one is part of.⁹³ It is therefore, safe to state that social insurance intends to achieve a reasonable level of income maintenance.⁹⁴ Moreover, social insurance of South Africa is made up of retirement schemes, health insurance, workmen's compensation and unemployment insurance.⁹⁵

An example of this is the *Unemployment Insurance Act (UIA)*⁹⁶ which covers employees and their dependants against temporary unemployment arising from the termination of service, illness, and the birth or adoption of a child.⁹⁷ However, the *Road Accident Fund* is also social insurance even though it is not insurance-based.⁹⁸ It is crucial to note that temporary migrant workers or short-term migrant

⁸⁹ See article 1.2 of the Code on Social Security in the SADC.

⁹⁰ Millard 2008 *AHRJ* 40.

⁹¹ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁹² Article 1.3 of the Code.

⁹³ Article 1.3 of the Code.

⁹⁴ Article 1.3 of the Code.

⁹⁵ Millard 2008 *African Human Rights Law Journal* 40. Note that the above-mentioned schemes are regulated by the following statutes *Pension Funds Act* 24 of 1956, *Medical Scheme Act* 131 of 1998, *Unemployment Insurance Act* 75 of 1966 (hereafter-UIA).

⁹⁶ Act 63 of 2001.

⁹⁷ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁹⁸ Millard 2008 *AHRJ* 40.

employees are excluded from social insurance protection.⁹⁹ This is mostly because such migrants have to go back home upon the completion of their employment contracts.¹⁰⁰ It is pivotal to point out that the UIA has no history of payments outside South African borders.¹⁰¹

Domestic workers, on the other hand, fall under one of the most under-regulated employment sectors in South Africa.¹⁰² For example, they are not covered by the *Compensation for Occupational Injuries and Diseases Act* (hereinafter COIDA) and are therefore not able to get redress for injuries they incur while working.¹⁰³ Domestic work is traditionally one of the most noteworthy areas of employment for migrant labourers from around the SADC region.¹⁰⁴ Migrant domestic workers, who are mostly black women from other SADC countries, tend to find employment in poor conditions coupled with low earnings.¹⁰⁵ Domestic workers are also inaccessible to authorities because their occupation is within a private sphere outside the public realm.¹⁰⁶

In South Africa, domestic workers receive their social security cover from the UIA upon contributing 1% of their monthly income towards the same fund.¹⁰⁷ However, the UIA is not available to foreign nationals who are required to go back home upon the termination of their employment.¹⁰⁸ Non-coverage of migrant domestic workers by both COIDA and UIA shows how undervalued this sector of employment is in this region.

Labour law related issues, on the other hand, stem from regulations that deal with injuries and illnesses that arise out of employment. In the mining sector, different

⁹⁹ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹⁰⁰ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹⁰¹ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹⁰² Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹⁰³ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹⁰⁴ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹⁰⁵ According to reports, in 2001 42% of black women from other SADC member states employed in Johannesburg worked in households. Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹⁰⁶ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹⁰⁷ It is noteworthy to heed the fact that such domestic workers ought to work for more than 24 hours in order to be eligible. Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹⁰⁸ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

laws govern occupational injuries and diseases and these are governed by different departments. This fragmentation also makes it difficult for migrants to access their rights.¹⁰⁹ Of note are the *Occupational Diseases in Mines and Works Act* (hereinafter the ODMWA)¹¹⁰ and COIDA, which provide a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment, or who contract occupational diseases.¹¹¹ However, these two Acts are regulated by different government departments. COIDA is essentially governed by the Compensation Fund of South Africa, which falls under the Department of Labour and is responsible for benefits which encompass medical benefits and temporary and permanent disability compensation payments, while ODMWA falls under the Medical Bureau for Occupational Diseases which is essentially part of the Department of Health.¹¹² It has to be noted that there are a lot of differences between these two Acts, with COIDA providing benefits which are generally superior to those of ODMWA.¹¹³

The challenge faced by migrant labourers and their dependents is the fact that social security mechanisms differ according to categories of affected workers affected.¹¹⁴ This together with lack of synergy, coordination and collaboration at the policy, institutional and operational levels in South Africa delays social security provision for migrant labourers and their dependents.¹¹⁵ Another hurdle that migrant labourers face is related to medical assessments that lead to compensation. For mining-related lung diseases, assessments are undertaken by the Medical Bureau for Occupational Diseases situated in Johannesburg. Ex-miners, especially migrant miners, find it very difficult to travel to South Africa for

¹⁰⁹ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹¹⁰ Act 78 of 1973.

¹¹¹ Act 130 of 1993.

¹¹² Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹¹³ Olivier et al "Occupational injuries and deaths, as well as non-mine-related occupational diseases and mine-related diseases not covered by ODMWA (such as noise induced hearing loss), are essentially covered by COIDA... COIDA provides for different categories of benefits, including medical benefits and temporary and permanent disability compensation payments, which may be in the form of a lump sum or pension payments depending on the severity of the disability."

¹¹⁴ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹¹⁵ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

these assessments; hence the millions of unclaimed benefits.¹¹⁶ The difficulty here is showcased by the fact that limited steps have been taken to extend these services to migrants' countries of origin.¹¹⁷ Inaccessible and virtually non-existent banking facilities are also a major hurdle for dependants and beneficiaries who reside in their home countries.¹¹⁸ Another problem also stems from the timeframes given by the *Pension Funds Act*¹¹⁹ of South Africa since it only allows a 12 month period for the location of dependants and this long, sometimes insufficient, process is inadequate and causes delays in payments of benefits.¹²⁰

The absence of synergy, coordination and collaboration is also made apparent by the fact that South African social security institutions do not communicate effectively with institutions from neighbouring migrant-sending countries; hence there is a deficiency in the portability of social security benefits.¹²¹ The next part of the research will analyse these migrant-sending countries, in particular Lesotho and Swaziland.

1.4.2 Disparities between selected migrant-sending countries in the SADC

This part of the research specifically looks at Lesotho and Swaziland and how these two migrant-sending countries have protected their own nationals working in South Africa (as the largest migrant-receiving country in Southern Africa).¹²² Lesotho is a country landlocked inside South Africa. Its geographical position makes it very dependent on South Africa because all its borders lead to the latter.¹²³ The scarcity of jobs in Lesotho means that most Basotho citizens migrate to South Africa in search of better living conditions.¹²⁴ Swaziland is also a landlocked country which shares its borders with South Africa and Mozambique. However, it is its economy that makes it dependent on South Africa which leads to

¹¹⁶ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹¹⁷ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹¹⁸ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹¹⁹ Act 24 of 1956.

¹²⁰ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹²¹ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹²² Olivier 2011 *SADCLJ* 127.

¹²³ Millard 2008 *AHRJ* 43.

¹²⁴ Millard 2008 *AHRJ* 43.

most of its citizens migrating to South Africa.¹²⁵ Lesotho and Swaziland's relevance to the research is further enhanced by the fact they both signed bilateral agreements with South Africa in 1973 and 1975, respectively.¹²⁶ These bilateral labour agreements were entered into to regulate the flow of migrant labourers from these two countries into South Africa.¹²⁷ The agreements also regulated payments of allowances to the migrant workers' families who remain at home, payment of deferred payments to migrant workers upon their return home and payment of money into a welfare fund chosen by authorities of migrant-sending countries for purposes of supporting their citizens when they return home.¹²⁸ The agreements also regulated obligations and conditions which had to be fulfilled by South Africa, Lesotho and Swaziland in order to have the three countries liaise adequately and effectively.¹²⁹ These agreements were, however, not established for the purpose of regulating portability of social security benefits and cannot be construed as regulating social security coordination between these countries.¹³⁰ This part of the study will investigate access to social security benefits by Lesotho and Swazi citizens abroad. The main intention of this study is to determine whether these two countries offer some social security protection to their citizens who work in South Africa. The question as to whether these two countries offer any social security protection to their citizens at all will also be explored.

1.4.2.1 Lesotho

The undeniable truth is that Lesotho is wholly dependent on South Africa in this area of social security.¹³¹ It is even hailed as one of the countries with the highest proportion of GDP emitted from the remittances of migrant workers.¹³² It was therefore fitting for arrangements to be made for Lesotho migrant labourers in

¹²⁵ The World Bank 2019 <https://www.worldbank.org>. Eswatini is a landlocked country bordering South Africa and Mozambique. Poverty levels are at a very high level with 39.7 % of the population estimated to have been living under the poverty line of \$1.90.

¹²⁶ Bamu 2014 <https://www.ilo.org>.

¹²⁷ Mpedi and Nyenti *Towards an Instrument for the Portability* 34.

¹²⁸ Mpedi and Nyenti *Towards an Instrument for the Portability* 34.

¹²⁹ Mpedi and Nyenti *Towards an Instrument for the Portability* 35. See also section chapter 4 section 4.6 for an in-depth discussion of the labour agreements.

¹³⁰ Mpedi and Nyenti *Towards an Instrument for the Portability* 35.

¹³¹ Millard 2008 *AHRJ* 44.

¹³² Crush and Dodson 2015 <http://www.nanseninitiative.org/wp-content>.

South Africa to receive old-age and disability pensions during the apartheid era.¹³³ Lesotho and South Africa entered into an agreement relating to the establishment of an office for a representative of Lesotho in South Africa.¹³⁴ The agreement was also established with the aim of regulating these citizens across international borders and made it possible for officials in Lesotho to liaise with South African officials regarding issues relating to compensation and pneumoconiosis.¹³⁵ In 1985, the Workers Compensation Trust Fund was also established by the Government of Lesotho in order to facilitate the transfer of payments and benefits to Lesotho citizens from South Africa with ease.¹³⁶

In 1979 the *Deferred Payment Act* was passed that obliged migrant workers to remit 30% of their salaries to Lesotho for use in the future.¹³⁷ Bitso¹³⁸ states that this was formerly administered in the pool which would eventually become insolvent as a result of bad management. In 2009 this statute was repealed by the *Deferred Payment Act* 19 of 2008 which still requires 30 % remission but this time to a bank of a migrant's choice in Lesotho.¹³⁹ Pensions, on the other hand, have numerous pension administrators notably from RSA Compensation Fund and Rand Mutual Insurance which provide pension benefits to Lesotho migrant workers who retire due to injury or disease.¹⁴⁰ Bitso¹⁴¹ also reiterates that migrants who worked in both the railway industry and metal-related industry do get monthly pension benefits after retirement.

¹³³ Millard 2008 *AHRJ* 43. Millard states that arrangements have been made for migrant labourers of Lesotho in South Africa to receive old-age and disability pensions since the apartheid era. Migrant labourers with a permanent residence status are entitled to social assistance in South Africa.

¹³⁴ Millard 2008 *AHRJ* 43.

¹³⁵ The Labour Agreement of the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho signed on the 24 August 1973 and entered into force on 24 August 1973. The terms of the agreement were discussed in section.1.4.2. above. See also Millard 2008 *AHRJ* 43.

¹³⁶ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 83. The fund was established by the Workmen's Compensation Trust Fund Regulations 42 of 1985.

¹³⁷ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 84.

¹³⁸ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 84.

¹³⁹ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 84.

¹⁴⁰ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 84.

¹⁴¹ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 85.

There are, however, still a few problems relating to the portability of social security benefits to Lesotho. According to Ramonate¹⁴² from the Ministry of Labour and Employment in Lesotho, such problems may be summarised as lack of financial means, communication difficulties resulting from language barriers, and inability to contact necessary social security authorities and entities responsible for social security benefits. Other issues stem from distance travelled while claiming benefits and strenuous length of time taken to process benefits.¹⁴³ All these processes together with the inability to trace social security agencies and banking difficulties for some Basotho are hurdles that affect portability.¹⁴⁴

1.4.2.2 Swaziland

The most notable issue surrounding the migration of Swazi nationals is that there is simply no agreement dealing with portability between it and other SADC member states.¹⁴⁵ It is, however, important to recognise the fact that Swaziland has ratified some of the key International Labour Organisation instruments that deal with migration and social security benefits and these include the *ILO Unemployment Convention 2* of 1919, *ILO Migration for Employment Convention 97* of 1949.¹⁴⁶ Other significant instruments include the *Maintenance of Social Security Rights Convention*¹⁴⁷ and the *Equality of Treatment Convention*.¹⁴⁸

Apart from these international conventions, Swaziland also has a few statutes that seem to advance portability of social security benefits to a limited extent. These include the *Swaziland National Provident Fund Order*¹⁴⁹ which provides that the Government of Swaziland may enter into reciprocal agreements with any other state that has a scheme similar to the *Swaziland National Provident Fund*.¹⁵⁰ The provision further points out that the agreement may include that "any period of

¹⁴² Ramonate "Portability and Access of Social Security Benefits by Former mineworkers" 17-18.

¹⁴³ Ramonate "Portability and Access of Social Security Benefits by Former mineworkers" 17-18.

¹⁴⁴ Ramonate "Portability and Access of Social Security Benefits by Former mineworkers" 17-18.

¹⁴⁵ Millard 2008 *AHRLJ* 48.

¹⁴⁶ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 115.

¹⁴⁷ 157 of 1982.

¹⁴⁸ 118 of 1962.

¹⁴⁹ 23 of 1974.

¹⁵⁰ Section 45(1).

membership of such fund or scheme in the country of such government may be treated as a period of membership of the fund.”¹⁵¹ It is also important to note that this principle also applies vice versa.¹⁵² Perhaps more important is the fact that Swaziland National Provident Fund allows contributing citizens to access their benefits even if they no longer reside in Swaziland.¹⁵³ This fund is very important because it allows exportability of such benefits from Swaziland to other countries.¹⁵⁴ The study of South Africa, Lesotho and Swaziland ultimately leads to the third research question, which is whether social security schemes and regulations in selected SADC member states aid and advance portability of social security benefits of migrant workers.

1.4.3 Best practices and comparative multilateral and bilateral agreements

The lack of portability of social security benefits for migrant workers upon the termination of their employment contracts in the SADC region requires that there be bilateral and multilateral agreements concluded specifically to deal with this issue. However, there are best practices around the world that countries in the SADC region may use as examples of how to address this issue. The most important question is, nevertheless, whether the constitutions of these SADC countries allow lessons to be learned from other countries. Section 39(1)(b)&(c) of the *Constitution of South Africa* provides that when interpreting the Bill of Rights, a court tribunal or forum must consider international law and may consider foreign law.¹⁵⁵ The Constitution also permits South Africa to enter into international agreements and provides that such agreements will bind it subject to the approval by a resolution in both the National Assembly and the National Council of Provinces.¹⁵⁶ In South Africa, an international agreement becomes binding when it

¹⁵¹ Section 45(1).

¹⁵² Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 115.

¹⁵³ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 114.

¹⁵⁴ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 114.

¹⁵⁵ *Constitution of the Republic of South Africa*, 1996. Section 27 states that everyone has a right to have access to social security. Section 27 of the Constitution makes social security a fundamental right.

¹⁵⁶ Section 231(2). Section 231(3) on the other hand provides that international agreements of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without

is enacted into law by national legislation while a self-executing provision of an agreement approved by parliament will become law unless it is inconsistent with the Constitution or an act of parliament.¹⁵⁷ The importance of international law is also seen in section 233 that states that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The *Constitution of Swaziland*, on the other hand, provides that the government may execute or cause to be executed an international agreement in the name of the Crown.¹⁵⁸ Section 238(2) points out that such an international agreement executed by or under the authority of the government shall be subject to ratification and becomes binding on the state by an act of parliament or resolution of at least two-thirds of the members at a joint sitting or the two chambers of parliament.¹⁵⁹ The *Constitution of the Kingdom of Lesotho* does not provide for both international law and international agreements.¹⁶⁰ However, the country belongs to the dualist tradition which views international law and domestic law as two separate systems.¹⁶¹ On the other hand, international law can be domesticated by an act of parliament before it can be applied.¹⁶² Consequently, it is safe to say that Lesotho, Swaziland and South Africa can enter into international agreements by concluding multilateral and bilateral social agreements. The next part of the research will look at best practices bilateral and multilateral agreements that can be followed by these countries and even the SADC region as a whole.

approval by the National Assembly and the National Council of Provinces, but must be tabled in the national Assembly and the Council within a reasonable time.

¹⁵⁷ Section 231(4).

¹⁵⁸ The Constitution of the Kingdom of Swaziland, 2005. See section 238(1).

¹⁵⁹ Section 238(3). Provides that provisions of section 238(2) do not apply where the agreement is of a technical, administrative or executive nature or does not require ratification or accession.

¹⁶⁰ The Constitution of the Kingdom of Lesotho, 1993.

¹⁶¹ Dube 2008 <https://www.nyulawglobal.org>.

¹⁶² Dube 2008 <https://www.nyulawglobal.org>.

1.4.3.1 Bilateral Labour and Social Security Agreement concluded between The Kingdom of Sweden and The Republic of the Philippines

The Kingdom of Sweden and The Republic of the Philippines have concluded a social security bilateral agreement which would assist with ensuring that nationals of both these countries maintain their social security rights and benefits regardless of their nationality status. This means that migrant workers would be able to access their social security benefits upon their return to the country of origin.

This social security agreement touches on several of issues including the choice of law applicable, maintenance of acquired rights, benefits payable under the agreement, portability of social security benefits, totalisation of creditable periods and even how calculations of benefits are made.¹⁶³ The SADC region also has a similar social security agreement that has been concluded between Zambia and Malawi, namely the *Zambia/Malawi Social Security Agreement*.

1.4.3.2 Social security agreement between Zambia and Malawi

There is an arrangement between Zambia and Malawi in terms of the payment of social security benefits to migrant labourers.¹⁶⁴ Millard¹⁶⁵ suggests that this agreement should be looked at as an example that other SADC countries may follow. This agreement was concluded as a means of poverty reduction.¹⁶⁶ In this instance, Zambia as a host country of migrant mine workers agreed to export social security benefits to migrant mine workers from Malawi.¹⁶⁷ The agreement encompasses reciprocal visits by social security officials between the two countries.¹⁶⁸ The said visitations are very important as they allow the two countries to be aware of issues that require immediate attention.¹⁶⁹ This

¹⁶³ See Chapter 5, section 5.6.2 for an elaborate analysis of the agreement.

¹⁶⁴ Zambia/Malawi Social Security Agreement (2003).

¹⁶⁵ Millard 2008 *AHRJ* 45.

¹⁶⁶ Millard 2008 *AHRJ* 45.

¹⁶⁷ Millard 2008 *AHRJ* 45.

¹⁶⁸ Mpedi and Nyenti 2013 <http://www.southernafricatrust.org/docs>.

¹⁶⁹ Mpedi and Nyenti 2013 <http://www.southernafricatrust.org/docs>.

agreement has been hailed as a very good example of what should happen in the region to combat issues such as poverty, among others.¹⁷⁰

Bilateral agreements alone are not enough to do away with the plight of migrant workers in this field of social security and its portability. Multilateral social security agreements are also important and will definitely enhance the portability of social security benefits in the region. The next part of the study will analyse selected best practices multilateral social security agreements.

1.4.3.3 Selected regional multilateral agreements

The Caribbean Community and Common Market, Social Security in the Southern Common Market and the Southeast Asian Nations Region are now discussed with reference to their social security initiatives. The aim is to discuss the agreements that countries in these regions have concluded with reference to the social security protection they have offered to their migrant workers.

Reports in 2016 suggest an estimated 6.7 million migrant workers originated from Southeast Asian countries that were residing and working in other Southeast Asian countries.¹⁷¹ Migrant workers in this region are either unskilled or possess low skill sets and the Philippines is said to be one of the major countries of origin in this region, referred to as the Association of Southeast Asian Nations region (hereinafter ASEAN region).¹⁷² Migrant workers in this region find employment in sectors prone to human rights violations because of their low skill sets.¹⁷³ Migrant workers originating from regions with low income such as the ASEAN region and the SADC region are faced with a lot of issues such as lack of knowledge regarding their rights in migrant-receiving countries. These workers do not know if

¹⁷⁰ Millard 2008 *AHRJ* 43.

¹⁷¹ Olivier & Govindjee 2016 *Institutions and Economics* 60.

¹⁷² Olivier & Govindjee 2016 *Institutions and Economics* 61. The Association of Southeast Asian Nations was established in 1967 and is made up of Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei, Lao, Burma, Cambodia, Vietnam and Myanmar. This association was said to be established for the purpose of promoting economic, political and regional cooperation and stability.

¹⁷³ Olivier & Govindjee 2016 *Institutions and Economics* 61.

they are afforded social protection in their host countries or not.¹⁷⁴ In the Caribbean Community and Common Market (hereinafter- CARICOM), the slave trade around the eighteenth and nineteenth century caused the first major immigration waves in this region.¹⁷⁵ Traditionally, the nature, direction and magnitude of migration in the Caribbean have been influenced by trends in global and regional socio-economic development.¹⁷⁶ In the 1970s, the oil boom attracted many migrants from smaller, lower-income islands to work in the oil refineries in the United States and dependencies of the Netherlands.¹⁷⁷ The booming energy sector in Trinidad and Tobacco also attracted more migrants.¹⁷⁸ However, in the 1980s, the global crisis in the energy sector saw a decline in labour demands meaning that more employment opportunities were required.¹⁷⁹ The tourism sector in the Caribbean grew in the 1990s and this led to an increased demand of migrant workers from other islands and neighbouring Latin American countries in order to labour shortages¹⁸⁰ Migration patterns in the CARICOM region dictate that people move to neighbouring countries such the United State of America.¹⁸¹ The CARICOM region experiences both incoming and outgoing migration on a large scale.¹⁸² These migration patterns continue even today and most migrant workers are disadvantaged when they have to leave a certain country for another one without making sufficient social security contributions.¹⁸³ The last two decades also saw intra-regional migration become a predominate feature of the Southern Common Market (hereinafter MERCOSUR).¹⁸⁴ Low and semi-skilled migrant workers dominate intra-regional migration in MERCOSUR.¹⁸⁵ The increase in

¹⁷⁴ Olivier & Govindjee 2016 *Institutions and Economics* 61.

¹⁷⁵ Anon 2005 <https://repositoria.cepal.org>.

¹⁷⁶ Anon 2005 <https://repositoria.cepal.org>.

¹⁷⁷ Anon 2005 <https://repositoria.cepal.org>.

¹⁷⁸ Anon 2005 <https://repositoria.cepal.org>.

¹⁷⁹ Anon 2005 <https://repositoria.cepal.org>.

¹⁸⁰ Anon 2005 <https://repositoria.cepal.org>. The smaller Caribbean islands could not supply the needed labour supply. Migrant workers from Latin America particularly Columbia and Venezuela.

¹⁸¹ Fuchs & Straubhar 2003 <http://citeerx.ist.psu>.

¹⁸² Faure 2018 <http://www.opendiplomacy.eu>.

¹⁸³ Anon 2014 <http://caricom.org>.

¹⁸⁴ Aimsiranun "Regional approaches to labour migration: Mercosur and Asean in comparative perspective" 58-65.

¹⁸⁵ Aimsiranun "Regional approaches to labour migration: Mercosur and Asean in comparative perspective" 58-65.

migrant labour mobility in these regions meant that measures also had to be adopted in order to provide them with much-needed social security coverage. A few instruments were adopted by these three regions to protect their intra-regional migrant workers.

The Southeast Asian Nations Region adopted a few regional instruments which portray the importance of social security in the region, namely *ASEAN Declaration on the Protection and Promotion of the Rights of Migrants Workers*,¹⁸⁶ *ASEAN Agreement on the Movement of Natural Persons of 2012*,¹⁸⁷ and the *ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers*.¹⁸⁸

Social Security in the Caribbean Community and Common Market was established in terms of the *Treaty of Chaguaramas*¹⁸⁹ which openly prohibits discrimination based on nationality. There is also the *Charter of Civil Society for the Caribbean Community* which has been hailed as acting as a bill of rights in the region.¹⁹⁰ The *Caribbean Community and Common Market Agreement on Social Security* was entered into in 1997 and advocated for equality of treatment between nationals and non-nationals.¹⁹¹ Thus, advocating for social protection of migrant workers in their host countries.

Effective social security in the Southern Common Market meant that this region had to establish and adopt instruments such as *Southern Common Market Multilateral Agreement on Social Security* which set out to coordinate social welfare systems in the region.¹⁹² There was also the *MERCOSUR Social and Labour Declaration* which foresaw the importance of including social security in

¹⁸⁶ ASEAN Declaration on the Protection and Promotion of the Rights of Migrants Workers was signed on the 13th January 2007 during the 12th ASEAN Summit.

¹⁸⁷ Signed in Phnom, Cambodia on the 19th November 2012.

¹⁸⁸ Signed in the Philippines, Manila on the 14th November 2017.

¹⁸⁹ It was signed on July 4, 1973 in Chaguaramas.

¹⁹⁰ Signed by heads of governments of the CARICOM on Wednesday, February 19, 1997. Anon 2015 <https://caricom.org>. See also Mpedi and Nyenti *Revised Portability* 59.

¹⁹¹ The CARICOM Agreement on Social Security was attested to in Georgetown, in Guyana on the 1st March 1996 and eventually came in effect on the 1st of April 1997. Anon 2015 <https://www.ilo.org>.

¹⁹² Pucheta 2014 *Centre for European Law and Legal Studies* 13. (hereafter-CELLS) *Southern Common Market Multilateral Agreement on Social Security* as adopted in 1997.

the process of integration.¹⁹³ The *Agreement Relating to Residence Permits for Nationals of State Parties to MERCOSUR, Bolivia and Chile* also asserted the importance of integration while at the same time looked at implementing free movement policies for nationals of the region.¹⁹⁴ Facilitation of free movement of labour seems to be a priority under this instrument. The MERCOSUR region also developed a joint database for MERCOSUR social security institutions which was intended to contribute towards protecting migrant workers' social security rights.¹⁹⁵ This joint database was established with an intention to implement a data transfer and validation system and led to a reduction in the time it took for retired workers to receive their social security benefits.¹⁹⁶ In addition to this, the joint database reduced the number of migrant workers who evaded social security contributions and further reduced situations where benefits were being paid to retirees who had died.¹⁹⁷ Before this initiative was established, transference and validation of data was done manually which took a lot of time and resources.¹⁹⁸ This manual system meant that beneficiaries' social security benefits usually took a long time to be processed; hence the joint database was mainly established to systemise the MERCOSUR multilateral social security agreement.¹⁹⁹

The aim of these agreements is to improve access and portability of social security rights for migrant workers.²⁰⁰ These agreements do away with both nationality and residency requirements under non-discrimination clauses between nationals and non-nationals, together with rules of cooperation between social security institutions of those countries concluding the agreement.²⁰¹ It is these institutions that are tasked with coordinating contribution periods accumulated by migrant workers and regulating transfer and payments of acquired rights.²⁰² These

¹⁹³ Mpedi and Nyenti *Revised Portability* 69.

¹⁹⁴ The Agreement as approved by the Council of MERCOSUR. MERCOSUR/CMC/DEC No 28/02. See Mpedi and Nyenti *Revised Portability* 70.

¹⁹⁵ Anon Date Unknown <http://lencd.org>.

¹⁹⁶ Anon Date Unknown <http://lencd.org>.

¹⁹⁷ Anon Date Unknown <http://lencd.org>.

¹⁹⁸ Anon Date Unknown <http://lencd.org>.

¹⁹⁹ Anon Date Unknown <http://lencd.org>.

²⁰⁰ Taha, Messkoub & Siegmann 2015 *ISSR* 99.

²⁰¹ Taha, Messkoub & Siegmann 2015 *ISSR* 99.

²⁰² Taha, Messkoub & Siegmann 2015 *ISSR* 99.

agreements are examples of good practices that may be followed by countries in the SADC region trying to enhance both access and portability of social security benefits for migrant workers.²⁰³

1.4.3.4 Other lessons and best practices

The other intention of the thesis is also to encourage migrant-sending countries to provide some form of social security assistance to their citizens working abroad and aid migrant-receiving countries by addressing some of the challenges their citizens face upon their return home. It is important to note that bilateral social security agreements are only one of the means of ensuring social security protection and the portability thereof.²⁰⁴ Migrant-sending countries also need to strengthen legislations that deal with social protection.²⁰⁵ Regulations that deal with recruitment agencies and orientation programmes before migrants leave for work in other countries is also of the utmost importance.²⁰⁶ Migrant-sending countries should also embark on social security bilateral initiatives to cover their migrant workers abroad.

The Republic of the Philippines is an example of a country that has employed such initiatives by providing coverage to their migrants who are not given protection in their host countries through voluntary social insurance systems.²⁰⁷ The *Philippines Migrant Workers and Overseas Filipinos Act* of 1995 is a good example of the kind of legislation a migrant-sending country that realises the importance nationals abroad can emulate. According to section 4 of the Act, which deals with the deployment of migrant workers, the Philippines will only deploy its Filipino citizens to countries that will protect such people. Section 4(a) states that such a country

²⁰³ Taha, Messkoub & Siegmann 2015 *ISSR* 99.

²⁰⁴ Wickramasekara 2015 <http://www.ilo.org>.

²⁰⁵ Wickramasekara 2015 <http://www.ilo.org>.

²⁰⁶ Wickramasekara 2015 <http://www.ilo.org>.

²⁰⁷ Wickramasekara 2015 <http://www.ilo.org>. In the Republic of the Philippines (hereafter the Philippines) these schemes are: the voluntary social insurance system regulated by the *Republic Act* No. 1161 (Social Security Law) Presidential Decree No. 735, further amending certain sections of *Republic Act* No. 1161 as amended, otherwise known as the "Social Security Law" the Medical Care Program for Overseas Filipino Workers (Government of the Republic of the Philippines. Executive Order) 195 of August 13, 1994. There is also the Phil health Overseas Workers' Program, and the supplementary pension fund and savings account (known as SSS Flexi-Fund)²⁰⁷.

must have labour laws and social security laws that protect migrant workers and their rights in general. The Act further states that a receiving country has to be a signatory to multilateral conventions, declarations or resolutions relating to the protection of migrant workers and must have concluded a bilateral agreement.²⁰⁸ The Act obliges the Philippines to only make arrangements with a government that protects the rights of overseas migrant Filipino workers. This means that such a receiving state has to have concrete measures in place that protect their rights.²⁰⁹

The discussion of these best practices and comparative multilateral and bilateral agreements directly addresses the fourth subsidiary research question which is whether social security agreements could enhance access and portability of social security benefits for migrant workers in selected SADC member states.

1.4.4 Challenges facing access and portability of social security benefits for migrant workers

Access to and portability of social security benefits is affected by various factors and principles that have a bearing on its provision to migrant workers. The fact that migrant workers return home when their contracts of employment come to an end means that a lot of principles and factors have to be kept in mind while providing for their social security benefits. This part of the research will start by discussing the relationship between immigration and social security. The intention here is to analyse how both migration and social security coverage affect each other. The relationship between labour law and social security law will be the next point of discussion. The aim here is to analyse how the employer-employee relationship affects the provision of social security benefits and how both labour laws and social security laws relate to each other. Lastly, the research will discuss principles of territoriality and taxation, and how they affect the portability of social security benefits to migrant workers. Since these principles have a bearing on portability of social security benefits for migrant workers, the intention is to

²⁰⁸ Wickramasekara 2015 <http://www.ilo.org>.

²⁰⁹ Section 4(d).

investigate how they affect access and portability of social security benefits for migrant workers in general.

1.4.4.1 The relationship between immigration and social security

Protection of migrants' social security rights advances different legal problems.²¹⁰ Vulnerable members of society such as migrants are often protected human rights standards, which are usually the normative source of protection for those living in adverse economic and social conditions. Despite this, social security protection has generally been inadequate.²¹¹ Resource implications mean that social security, though described and identified as an entitlement in human rights standards alongside other social rights, is indicated less precisely and entails more conditions than other rights.²¹² The nature of resource implications as related to social security rights is relevant since its provision depends entirely on the availability of much-needed resources. The argument here is that social security coverage is inadequate worldwide and cannot meet the intended income replacement levels it was intended to address in developed, developing and under-developed countries.²¹³ The other challenge is that many vulnerable groups of people are generally excluded from social security and social assistance because of their employment status.²¹⁴ Many challenges facing social security coverage and access are economic and political in nature, and these are discussed in general below.

1.4.4.2 Labour law and social security law

One of the major challenges facing both labour law and social security law is the manner in which this relationship evolves. Consequently, there is a need to explore the impact of the employer-employee relationship and how it affects access to social security, which eventually heralds the portability of social security

²¹⁰ Vonk Date Unknown <http://www.rug.nl/research/portal/files>.

²¹¹ Carney 2010 *African Journal of International Comparative Law* 29. (hereafter *AJICL*)

²¹² Carney 2010 *AJICL* 29. Carney states that: "Social security is identified as an entitlement under several international human rights instruments but along with other so-called 'social' or 'positive' rights such as that to health, it is stated in less precise and more conditional (or 'aspirational') form due to its resource implications than civil and political rights, which are less easily conscribed."

²¹³ Carney 2010 *AJICL* 29.

²¹⁴ Carney 2010 *AJICL* 29.

benefits.²¹⁵ The definition of an employee has been seen as one of the biggest disparities between social security legislations and labour law legislations.²¹⁶ The *Unemployment Insurance Act*²¹⁷ defines the term employee as any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor.²¹⁸ While the *Basic Conditions of Employment Act*²¹⁹ defines an employee as any person, excluding an independent contractor, who works for another person or for the state and receives remuneration and who in any manner assists in carrying on or conducting the business of an employer.²²⁰ The *Labour Relations Act*²²¹, on the other hand, defines an employee as any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive any remuneration, and any other person who in any manner assists in carrying out or conducting the business of an employer.²²²

The problem here is that there is clearly a broader definition of this term in labour legislation such as (BCEA and LRA) than in the UIA. Mpedi²²³ shares the same sentiment when he states that "employee" as defined in the LRA, BCEA and UIA includes entitlement and receipt of remuneration by a person; however, the UIA does not refer to individuals who assist in the conducting or carrying out of the business of the employer. It is, therefore, safe to conclude that the definition of employee in the UIA is too narrow.²²⁴ An atypical employee not falling within the standard idea of who an employee is may be prejudiced by an employer who wants to elude his social insurance obligations. The narrowness of the definition of employee as presented in the UIA leads to the possibility of employers changing the nature of the employment relationship between themselves and their

²¹⁵ Le Roux and Rycroft *Reinventing Labour Law* 279.

²¹⁶ Le Roux and Rycroft *Reinventing Labour Law* 279.

²¹⁷ 63 of 2001.

²¹⁸ Section 1(c).

²¹⁹ 75 of 1997.

²²⁰ Section 1.

²²¹ 66 of 1995.

²²² Section 213.

²²³ Le Roux and Rycroft *Reinventing Labour Law* 274.

²²⁴ Le Roux and Rycroft *Reinventing Labour Law* 274.

employees to evade social insurance obligations like contributing towards the UIA.²²⁵ According to sections 200A and 83A of the LRA and BCEA, respectively:

A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors are present: the manner in which the person works is subject to the control or direction of another person; the person's hours of work are subject to the control or direction of another person; in the case of a person who works for an organisation, the person is a part of that organisation; the person has worked for that other person for an average of at least 40 hours per month over the last three months; the person is economically dependent on the other person for whom that person works or renders services; the person is provided with tools of trade or work equipment by the other person; or the person only works for or renders services to one person.²²⁶

The two labour law legislations through these provisions clearly provide for a rebuttable presumption regarding who may be deemed to be an employee.²²⁷ If any of the stated factors are present, the affected person will, therefore, be presumed as an employee.²²⁸ However, Mpedi²²⁹ states that in situations where the presumption finds application, there will be a shift from the affected person to the employer to prove that the said person was or is not under his or her employment.²³⁰ This is further proof that the definition of employee is broader in labour law legislations than social security law legislations.²³¹ The presumption is definitely omitted in other social security legislations like the *Compensation for Occupational Injuries and Diseases Act*.²³² The other issue that Mpedi identifies is the absence of independent contractors in the definition of employee in the UIA, LRA and BCEA which he insists allows employers to change the relationship of the employment contract, therefore, making it easier to avoid their social insurance

²²⁵ Le Roux and Rycroft *Reinventing Labour Law* 274.

²²⁶ Le Roux and Rycroft *Reinventing Labour Law* 273.

²²⁷ Le Roux and Rycroft *Reinventing Labour Law* 273.

²²⁸ Le Roux and Rycroft *Reinventing Labour Law* 273.

²²⁹ Le Roux and Rycroft *Reinventing Labour Law* 273.

²³⁰ Mpedi states that: "In circumstances in which the presumption applies, the burden of proof shifts to the employer, who must then prove that the person who performs the work is not 'an employee'. The employer must rebut the presumption on the preponderance of probabilities. In addition, either contracting party may approach the Commission for Conciliation, Mediation and Arbitration (the CCMA) for an advisory award determining whether a person is an employee or not. In addition, the presumption applies to persons who earn amounts equal to or less than a threshold amount set by the Minister of Labour from time to time."

²³¹ See Le Roux and Rycroft *Reinventing Labour Law* 273.

²³² 130 of 1993 (hereafter-*COIDA*)

obligations.²³³ The research deals with both social security law and labour law; therefore, it is safe to explore how the two concepts work and link with each other. Portability of social security benefits of migrant workers is a notion that encompasses both labour and social security law and in this thesis both social security and labour law legislations will be discussed with the aim of enhancing access to and portability of social security benefits for migrant workers.

1.4.4.3 The principle of territoriality

The principle of territoriality as applicable in instances of social security benefits and portability means that social security benefits are provided within borders of the providing state and, therefore, cannot be granted outside national borders to a migrant's home country.²³⁴ One of its biggest challenges to migrant workers is the fact that while they do not have access to social security benefits in their countries of origin, they are also not covered in their host countries.²³⁵ Olivier²³⁶ with this and states that the principle of territoriality of national laws implies that migrant workers are excluded from social security systems operative, not only in their home countries but also in their host countries because of nationality and resident requirements prevalent in such countries.²³⁷ This issue has been attributed to the inadequacy of social security legal and policy frameworks in the region together with legal restrictions concerning portability of social security benefits to countries of origin.²³⁸ These issues can be overcome by countries choosing to enter into social security agreements which would regulate both access and portability of social security benefits of migrant workers.

The residence condition does not only refer to the worker but may also encompass his/her family.²³⁹ Paskalia²⁴⁰ refers to a migrant worker awaiting old-

²³³ See Le Roux and Rycroft *Reinventing Labour Law* 273.

²³⁴ Paskalia Free movement, social security and Gender 47.

²³⁵ Vonk Date Unknown <http://www.rug.nl/research/portal/files>. See also Olivier "Social protection for migrant workers from Malawi" 1-9.

²³⁶ Olivier "Social protection for migrant workers from Malawi" 1-9.

²³⁷ It must be noted that the host country refers to a country in which a migrant is under employment while the home country is his or her country of origin.

²³⁸ Olivier "Social protection for migrant workers from Malawi" 1-9.

²³⁹ Paskalia Free movement, social security and Gender 47.

age pension with the anticipation of spending such money upon his return home. The argument is that such a worker is usually confronted with serious issues in instances where the host country does not have legislation providing such benefits outside national borders.²⁴¹ Family members may also be affected if such a country does not allow for the portability of benefits to beneficiaries in other countries.²⁴² The other challenge that may pose a threat to migrant workers acquiring social security benefits is the issue of compliance with qualification periods.²⁴³ While some states require that a migrant worker be employed for several years to qualify for social security benefits, others require that there be contributions for a certain period for an individual to qualify for the said benefits.²⁴⁴ Some systems require that both the above conditions be present before paying out.²⁴⁵ Therefore, this means that if there are insufficient records regarding the period of time or contribution in the country of employment, the migrant worker faces the risk of going home without receiving his entitlements.²⁴⁶

For migrant labourers to access these social security benefits, they have to fulfil the residency requirement together with at least a minimum number of contributions for social insurance because social security legislations often provide for benefits conferment upon the resident requirement being fulfilled.²⁴⁷ To ensure migrant workers' access to social security benefits there has to be a coordination of social security schemes.²⁴⁸ However, despite this coordination, there are still some categories of migrant labourers that might be excluded from protection.²⁴⁹ Vonk²⁵⁰ shares her views on this point by stating that this is a result of the manner in which national governments operate and the part played by the courts. Her

²⁴⁰ Paskalia Free movement, social security and Gender 47.

²⁴¹ Paskalia Free movement, social security and Gender 47.

²⁴² Paskalia Free movement, social security and Gender 47.

²⁴³ Qualification period refers to a minimum period of time under employment for entitlement of social security benefits.

²⁴⁴ Paskalia Free movement, social security and Gender 47.

²⁴⁵ Paskalia Free movement, social security and Gender 47.

²⁴⁶ Paskalia Free movement, social security and Gender 47.

²⁴⁷ Paskalia *Free movement, social security and Gender* 47. See also Taha, Messkoub & Siegmann 2013 <http://www.researchgate.net>.

²⁴⁸ Taha, Messkoub & Siegmann 2013 <http://www.researchgate.net>.

²⁴⁹ Taha, Messkoub & Siegmann 2013 <http://www.researchgate.net>.

²⁵⁰ Vonk Date Unknown <http://www.rug.nl/research/portal/files>.

sentiments show that the principle of territoriality together with residency and citizenship affect both access to and portability of social security benefits of migrant labourers.²⁵¹

The principle of territoriality poses a few challenges to the harmonisation of social security schemes. This is because the process of harmonisation by itself has to come to terms with the fact that some regions in the world are poverty-stricken and member states possess different economic capacities from others.²⁵² The SADC region is faced with high levels of unemployment and HIV/AIDS, and such, contribute to migration patterns in that people will always migrate to other countries in search of better working conditions.²⁵³ Therefore, harmonisation of social security schemes of different countries is important as it will aid and enhance access to and portability of social security for migrant workers within the region.

Since the SADC region is generally under-developed and has limited social security coverage, there is a problem with coordinating and harmonising social security schemes in the region with specific reference to Swaziland, Lesotho and South Africa.²⁵⁴ To ensure that coordination and harmonisation of these schemes is effective, there has to be proper consideration of economic muscles of countries in the SADC region since countries are economically uneven, social realities such as poverty and high levels of unemployment and under-employment have to be taken in to consideration²⁵⁵

The political scenery in the region has also been subject to a lot of scrutiny with scholars like Mpedi²⁵⁶ suggesting that harmonisation efforts would be more successful in a politically serene region.²⁵⁷ Nevertheless, a politically stable climate

²⁵¹ Vonk Date Unknown <http://www.rug.nl/research/portal/files>. See also Taha, Messkoub & Siegmann 2013 <http://www.researchgate.net>.

²⁵² Mpedi 2009 *Journal of South African Law* 702. (hereafter- *TSAR*)

²⁵³ Mpedi 2009 *TSAR* 702.

²⁵⁴ Mpedi 2009 *TSAR* 702.

²⁵⁵ Mpedi 2009 *TSAR* 702.

²⁵⁶ Mpedi 2009 *TSAR* 702.

²⁵⁷ Mpedi does however, show that even though political stability is not a major requirement, it does play a vital role in coordination which eventually leads to proper portability of social security benefits.

is not a prerequisite for the harmonisation of social security systems in the region however, for harmonisation to be achieved easily, there has to be political stability.²⁵⁸ Portability of social security benefits cannot work properly and efficiently if effected by only one country in isolation. This is why the principle of territoriality is always referred to as a hindrance to portability of social security benefits of migrant workers.²⁵⁹ According to Penning,²⁶⁰ the principle of territoriality as applicable to social security:

Is a general phenomenon that a state restricts its responsible in the area of social security to its own territory and or its own nationals? The linking of the social security system to the territory of State is called the territory principle. The principle is no legal principle, but a term which describes that a national social security system applies only to events that happen within the national borders of the State in question. An example of the effect of this principle is the condition that a person is entitled only to the benefit if the risk materialised in the territory of that state. Another example is the condition that a person must have worked or lived for specific periods in the territory of a State in order to be entitled to benefit. A third example is the condition that benefits are paid only in the territory where the right to the benefit was acquired. In other words , a relationship is made between, on the one hand, the territory of the state and, on the other hand the group of persons, contributions, benefits and, on the other hand, the group of persons, contributions, benefits and/ or risks that are governed by the legislation of that state.²⁶¹

This principle of territoriality has also been criticised by many as restricting the free movement of workers from being realised in the SADC region because each country uses its own the criteria to choose the field of social security it chooses to apply.²⁶²

1.4.4.4 Taxation

Taxation has been hailed as one of the biggest challenges facing the portability of social security benefits since, as with the implementation of benefits, every country has its own way of applying tax meaning that certain social security benefits may be taxed while others are not taxed at all.²⁶³ The differences in

²⁵⁸ Mpedi 2009 *TSAR* 702.

²⁵⁹ Mpedi 2009 *TSAR* 702.

²⁶⁰ Penning Introduction to European Social Security Law 4-5.

²⁶¹ Penning Introduction to European Social Security Law 4-5.

²⁶² Penning Introduction to European Social Security Law 4-5.

Mpedi and Smit (eds) Access to Social Security for Non-Citizens 31.

taxing regimes of the various countries pose serious challenges which include the double taxing of benefits.²⁶⁴ In general, migrants are susceptible to such which essentially leads to them being obliged to pay taxes in different regimes.²⁶⁵ Some of the challenges that are normally raised include the fact that some migrant workers were taxed regardless of agreements concluded between their home and host countries. Migrant mineworkers in South Africa from Mozambique complained that they were still being taxed despite the bilateral agreement between these two countries, which was totally against this practice.²⁶⁶ Tax-related challenges also include employers who provide incorrect employee information and employees who refrain from registering for tax.²⁶⁷

1.4.5 Administrative challenges affecting portability

1.4.5.1 Adjudication of social security in the SADC

It has to be considered that in general, courts of law play a very big role in providing social security to migrant labourers and other citizens.²⁶⁸ The interventions by these together with legislation and policies are vital to incorporating migrants in the social security systems of host countries.²⁶⁹ One major hurdle in the SADC is the fact that the right to social security is not explicitly echoed in the majority of SADC member states constitutions.²⁷⁰ Moreover, it should be remembered that whenever the issue of access to social security benefits and the portability of such are raised, administrative challenges frequently delay or freeze the provision and portability of social security benefits and are, therefore, factors that have to be addressed.²⁷¹

²⁶⁴ Holzman and Werding 2015 *CESifo Economic Studies* 9.

²⁶⁵ Grenfell Date Unknown <http://www.moscow.iom.int>.

²⁶⁶ Southern Africa Trust and Southern Africa Miners Association " *The portability and access of social security*" 12.

²⁶⁷ Southern Africa Trust and Southern Africa Miners Association " *The portability and access of social security*" 12.

²⁶⁸ Vonk Date Unknown <http://www.rug.nl/research/portal/files>.

²⁶⁹ Vonk Date Unknown <http://www.rug.nl/research/portal/files>.

²⁷⁰ Olivier 2011 *International Journal of Social Security and Workers Compensation* 31. (hereafter IntJISSWC)

²⁷¹ Olivier 2011 *IntJISSWC* 31.

Since administrative action plays a very pivotal role in the provision of social security, Olivier²⁷² states that administrative action has to be just, meaning that it should be seen in social security institutions' conduct, decisions and actions in general. This just administrative action, he goes on to state, should also be seen in social security tribunals and not only the courts of law since the former are regarded as quasi-judicial institutions and not the courts of law.²⁷³ Although constitutions of SADC member states have brief provisions relating to the right to social security and access to justice, there is a reason for advocacy of social security principles of adjudication.²⁷⁴

The SADC region has the *Code on Social Security in the SADC* as the only instrument thus far which provides adjudication of social security at the domestic level.²⁷⁵ In article 21.1(b) it is stated that:

Member States should endeavour to establish proper administrative and regulatory frameworks in order to ensure effective and efficient delivery of social security benefits, in particular: easy access for everyone to independent adjudication institutions that have the power to finally determine social security disputes, inexpensively, expeditiously and with a minimum of legal formalities.

The other important piece of legislation in the SADC region is the *SADC Treaty* that refers to the establishment of the SADC Tribunal which would have effectively played a huge role in the adjudication of social security and portability thereof.²⁷⁶ Consequently, SADC legal instruments (in particular via the *Code on Social Security*) provide an important but limited framework for social security adjudication at a national level, while regional level interventions, though supported by a broad-based Treaty and Protocol framework and the jurisprudence of the now-suspended SADC Tribunal, have thus far proved to be largely ineffective. Article 9.1(g) of the SADC Treaty establishes the tribunal, while article 16 states that the decisions of the tribunal will be final and binding.²⁷⁷ In article 16.1 the tribunal was specifically described as established to ensure adherence

²⁷² Olivier 2011 *IntJISSWC* 31.

²⁷³ Olivier 2011 *IntJISSWC* 31.

²⁷⁴ Olivier 2011 *IntJISSWC* 31.

²⁷⁵ Olivier 2011 *IntJISSWC* 32.

²⁷⁶ Olivier 2011 *IntJISSWC* 33. See also article 16 of the Treaty.

²⁷⁷ Article 16.5.

and proper interpretation of the provisions and the Treaty itself and other subsidiary instruments and to further adjudicate disputes that may be referred to it. The term subsidiary instruments may be construed as referring to other SADC instruments which include the *Code on Social Security* despite its non-binding nature.²⁷⁸

It is important to note further that both the *SADC Treaty* and the *Tribunal Protocol* accord the powers to the tribunal.²⁷⁹ However, it has since been noted that failure on the part of the tribunal to act against Zimbabwe's land reform policies has resulted in its suspension and the terms of the judges not being renewed.²⁸⁰ This issue regarding Zimbabwe generally exposed the SADC Tribunal as an ineffective institution and social security adjudication can safely be said to have taken a step back as a result of this suspension.²⁸¹ Olivier²⁸² states rightfully that social security adjudication at the appeal level is not adequately regulated in the SADC region. Therefore, this becomes one of the challenges facing the portability of migrant labourers in this region. These discussions of adjudication of social security disputes finally tackles the fourth subsidiary research question which is whether adjudication of social security disputes can enhance the portability of social security benefits of migrant workers in selected SADC member states. The administration also entails making beneficiaries aware of their rights including the rights that they may have acquired over some time and enforcing the said rights.²⁸³

²⁷⁸ It should be noted that although the *Code on Social Security* is non-binding in nature it is a create source of the protection afforded under social security in the SADC and would have given the Tribunal more power if more states ratify and implement it in their domestic laws.

²⁷⁹ Olivier 2011 *IntJISSWC* 34.

²⁸⁰ Erusmas 2011 *SADCLJ* 29. According to Erusmas: The Zimbabwe saga and that country's failure to comply with the SADC Tribunal's rulings on its human rights violations have revealed the weakness in this arrangement. The Summit was not prepared to act against Zimbabwe; instead, it decided to appoint a consultant to investigate the jurisdiction and terms of reference of the Tribunal. In the meantime, until the results are known, the functioning of the Tribunal has been suspended and the terms of the Judges (Members) have not been renewed. See also Olivier 2011 *International Journal of Social Security and Workers Compensation* 33.

²⁸¹ Olivier 2011 *IntJISSWC* 33.

²⁸² Olivier 2011 *IntJISSWC* 33.

²⁸³ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 31.

1.4.5.2 Other administrative challenges

Generally, administrative challenges include the capacity to distribute social security benefits to beneficiaries outside national territories by social security institutions.²⁸⁴ Despite disbursement of benefits, these challenges include dissemination of information to beneficiaries and speedy portability of such benefits.²⁸⁵ These institutions also need to comply with rules and regulations that govern portability and distribution of social security benefits.²⁸⁶ Lack of administrative cooperation between social security schemes and countries also makes it rather hard to enhance the portability of social security benefits.²⁸⁷

The issue of exportability of currencies to other countries also plays a huge role in difficulties encountered while exporting social security benefits.²⁸⁸ It is argued that complex currency restrictions together with high costs of transferring money lead to non-portability of social security benefits.²⁸⁹ Another major reason behind inadequate portability of social security benefits in the region is the limited provisions found in major migrant-receiving countries' legislations like South Africa.²⁹⁰ The immigration laws of migrant-receiving countries are also a challenge as they are said to restrict movement in the SADC region.²⁹¹ Other challenges include inaccessibility of health services upon the occurrence of occupational diseases which automatically lead to migrant workers not getting the certification that compensation institutions require.²⁹² Portability is further hindered by the fact that there are some instances where the causal link between illness and

²⁸⁴ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 31.

²⁸⁵ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 31.

²⁸⁶ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 31.

²⁸⁷ Mpeli and Nyenti "Challenges experienced by former mine workers" 14.

²⁸⁸ Smit *Access to Social Security for Non-Citizens* 32.

²⁸⁹ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 32.

²⁹⁰ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 32.

²⁹¹ Mpeli and Nyenti "*Challenges experienced by former mine workers*" 14. As already stated, article 3 of the Draft Protocol provides for entry into another state without a visa shall be for a maximum period of ninety 90 days per year and that this will be subject to restrictions of national laws of state parties concerned. This minimal time attributed to migrants without visas has been criticised for obstructing free movement in the region.

²⁹² Mpeli and Nyenti "Challenges experienced by former mine workers" 15.

employment is sometimes hard to establish and computation of compensation is often hard to determine.²⁹³

Another issue that is often overlooked is difficulties raised by differences in banking systems.²⁹⁴ The absence of a cohesive banking system across Southern Africa has been addressed as one of the challenges facing the portability of social security benefits.²⁹⁵ The general premise is that there cannot be a link between the sophisticated financial system of South African and the unsophisticated financial systems of its neighbours.²⁹⁶

Access and portability of social security benefits for circular migrant workers are issues that this research intends to discuss and analyse. The research will be centred on the main research question which how the portability of social security benefits for circular migrant workers can be enhanced in selected SADC member states. The discussion of this question will be aided by the four subsidiary research questions as mentioned earlier in this chapter.

1.5 Assumptions and hypothesis

For purposes of this study, the following hypotheses are made:

- (a) The lack of bilateral agreements between South Africa and migrant-sending countries hinders portability of social security benefits of migrant workers.
- (b) The legal principle of the territorial application of national laws generally prevalent in migrant-sending countries in the SADC means that migrants labourers are not catered for by their home countries and consequently not covered by their host countries.
- (c) Lesotho and Swaziland as migrant-sending countries have no bilateral social security initiatives for their nationals working abroad.

²⁹³ Mpeli and Nyenti "Challenges experienced by former mine workers" 15.

²⁹⁴ Southern Africa Trust and Southern Africa Miners Association " *The portability and access of social security*" 54.

²⁹⁵ Southern Africa Trust and Southern Africa Miners Association " *The portability and access of social security*" 55.

²⁹⁶ Southern Africa Trust and Southern Africa Miners Association " *The portability and access of social security*" 55.

- (d) There no adequate database in South Africa, Lesotho and Swaziland keeping track of all migrant workers circulating within these countries making it difficult to trace retirees upon their return home.

For of this study, the following assumptions are made:

- (a) South Africa, Lesotho and Swaziland are constitutional democracies.
- (b) There is no specialised court adjudicating social security disputes in the SADC.

1.6 Aims and objectives

- (a) To critically analyse international and regional labour law and social security law instruments by looking at the protection offered by such and identifying the flaws that hinder the portability of social security benefits in the SADC region.
- (b) To critically discuss the social security laws of South Africa as the largest migrant-receiving country in the SADC. The aim is to establish whether these laws hinder or enhance access to and the portability of social security benefits of circular migrant workers.
- (c) To analyse disparities between selected migrant-sending countries namely Lesotho and Swaziland's social security benefits schemes and regulations. The aim is to analyse these two countries' social security schemes and regulations to discover if these have a bearing on the issue of portability of social security benefits of their nationals upon their return home.
- (d) To analyse and discuss comparative best practices from other regions facing the same problems as the SADC region. The aim is to discuss unilateral, bilateral and multilateral social security agreements from other regions to urge the SADC region and selected SADC member states namely Lesotho, Swaziland and South Africa come up with their own social security agreements by using these countries as examples.

1.7 Research Methodology

The study is primarily aligned with the literature perusal and analysis of appropriate academic literature and journals, legislation, case law and internet sources relating to labour law and social security law, with specific reference to the portability of social security benefits. This research took the form of a desktop study of how the international community and organisations have dealt with migration and the portability of social security benefits of documented migrant workers. This study comprised of critical reviews of labour laws, international and regional labour and social security law instruments.

Best practices unilateral, bilateral and multilateral social security agreements are discussed as examples that may be used in the SADC to advance the portability of social security benefits for migrant workers. This best practices approach is ideal because the Constitution of South Africa as the largest migrant-receiving country in the SADC permits international law and foreign law to be considered while interpreting the Bill of Rights. Lesotho and Swaziland are jurisdictions of selection because of their geographical location and economic dependence on South Africa.²⁹⁷

1.8 Chapters' outline

Chapter 1: Introduction and the history of migration in the SADC region

Chapter one gives a brief overview of migration patterns in the SADC region. It seeks to identify discussions and analyse these migration patterns to and from South Africa as the largest migrant-receiving country in the SADC region and how this affects the portability of documented migrant workers from Lesotho and Swaziland as the selected migrant-sending countries in the region. Definitions are also given to illustrate what is meant by social security rights and the portability thereof. This chapter further illustrates whether international and regional instruments do in fact provide for social security of migrant workers and further

²⁹⁷ See part 1.4.2 of this chapter for Lesotho and Swaziland's relevance to the thesis.

discusses the challenges that hinder the provision and portability of these benefits as related specifically to migrant workers.

Chapter 2 A discussion of both International and Regional standards on migration, labour rights, social security rights and portability social security rights

The objective of this chapter is to critically analyse both international (ILO) and regional (SADC) instruments and the protection they offer with the view to eventually point out the flaws hindering access to and portability of social security rights and benefits in the SADC region. This chapter will analyse and discuss ILO standards on social security and social security for migrant workers together with other UN instruments that also provide for social security rights. The chapter will then move on to discuss regional and sub-regional standards on social security rights to discover whether such do provide for access to and the portability of social security rights and if so to what extent. Lastly, this chapter will analyse challenges that face developing countries in terms of the provision of such rights and discuss how they are adjudicated.

Chapter 3 Access to social security rights of migrant labourers in South Africa

This chapter will use South Africa as a country of reference since it is the largest migrant-receiving country in the SADC region and provides a critical discussion of the social security laws of South Africa. This chapter aims to examine the extent to which the South African social security system allows access to social security benefits as related to circular migrant workers. Firstly, the chapter will present the history of migration movements and social security in South Africa and then moves on to discuss the access to social security in the current South African constitutional dispensation. Furthermore, it will then examine the state of social security legislations and the impact of the Constitutional Court in developing social security after which the issues surrounding dispute resolution and the adjudication of social security in South Africa will be analysed.

Chapter 4: Disparities between social security schemes of selected migrant-sending countries.

The objective of this chapter is to analyse the disparities between selected migrant-sending countries' social security benefits schemes and regulations. The chapter will analyse recent changes in these countries' schemes in order to establish whether these have any impact on the portability of social security benefits. Lastly, the challenges that migrant workers from these countries face upon their return home are examined and critically analysed.

Chapter 5: Best practices and Comparative Bilateral Agreements

This chapter will aim to analyse unilateral, bilateral and multilateral social security agreements from selected regions and countries around the world. These regions were selected mainly because they tend to face similar problems as the SADC region. The bilateral social security agreement between The Kingdom of Sweden and The Republic of the Philippines is examined to establish how it deals with the process of portability of social security benefits. This particular agreement is selected because it is a good example of how a modern-day social security agreement should be drafted. Another reason for its selection is because it is between The Republic of the Philippines, a predominantly migrant-sending country, and Sweden, a developed and largely a migrant-receiving country. A social security agreement between Zambia and Malawi is also analysed since it is a good example of an agreement between a migrant-sending country and a migrant receiving country in the SADC region. The second reason this agreement was selected is that it deals with the portability of social security benefits of Malawian migrant mine workers who deploy their services in Zambia and it has been hailed as a good example of what a SADC member state should consider while drafting their own social security agreements. An analysis of the best practices from a selected migrant-sending country, namely The Republic of the Philippines will take main priority since unilateral initiatives assist its migrants abroad who are without social security coverage in the host countries and, thus is relevant to this study.

Chapter 6: Conclusion and recommendations

The last chapter of this study forms the conclusion. All the findings from the previous chapters are analysed to measure what was examined and established regarding selected migrant-sending countries, selected migrant-receiving country and best practices unilateral initiatives, bilateral and multilateral social security agreements in this sphere of the access to and portability of social security benefits of migrant workers. The last section of this chapter will offer recommendations on how access to and the portability of social security benefits for migrant workers might be advanced.

CHAPTER TWO: A DISCUSSION OF BOTH INTERNATIONAL AND REGIONAL STANDARDS ON MIGRATION, LABOUR RIGHTS, SOCIAL SECURITY RIGHTS AND THE PORTABILITY SOCIAL SECURITY RIGHTS.

2.1 Introduction

As was previously stated, social security was established as a means of poverty alleviation.²⁹⁸ The ILO has defined it as the protection provided to individuals and households to guarantee access to health care and to guarantee income security especially income for unemployment, invalidity, cases of old-age, maternity, work injury, loss of a breadwinner and sickness.²⁹⁹ During the middle ages, institutions, charities and public authorities, all took initiatives to alleviate poverty.³⁰⁰ This was done by looking at poverty as a social question and not merely as a moral question. Consequently, various European countries would implement measures such as providing food and lodging for the poor and later adopting and bureaucratic regulations intended to help those who were in dire need of help.³⁰¹

The rise in industrialisation then termed the industrial revolution meant that society was more inclined to help each other through setting voluntary contributions jointly.³⁰² Social protection was further enhanced through the contract of employment which essentially led to wages being paid to workers.³⁰³ This wage labour is still considered as one of the methods that established a system of social protection which can safely be defined as a means of security for most people in the world today.³⁰⁴ Servais³⁰⁵ points out that in the 1880s Germany

²⁹⁸ Taha, Messkoub & Siegmann 2013 <http://www.researchgate.net>. See also International Labour Organisation Date Unknown <http://www.ilo.org>.

²⁹⁹ International Labour Organisation Date Unknown <http://www.ilo.org>.

³⁰⁰ Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf.

³⁰¹ Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf. In 1601, England adopted 'Poor Laws' with an intention of aiding those who were experiencing poverty in the rural areas of England.

³⁰² Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf.

³⁰³ Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf.

³⁰⁴ Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf.

³⁰⁵ Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf. See also Msalangi Date Unknown *The African Journal of Finance and Management* 61. (hereafter -*AJFM*)

was a pioneer of the system of statutory social insurance which established the notion of rights to benefits. This system was eventually copied by other European countries at the end of the nineteenth century while similar schemes were introduced in Latin America.³⁰⁶

The Great Depression of 1929-1933 and the recovery thereafter meant that another social security programme would eventually be set up.³⁰⁷ This new social security programme would be introduced in the 1930s mainly in Europe and America.³⁰⁸ Significant developments were witnessed post-1945 after the Second World War at the national, regional and international levels when social security was recognised as a human right.³⁰⁹ The Beveridge's report of 1942 is referred to as a landmark report since it, played a very significant role in the development of social security systems that would eventually be promoted by the ILO.³¹⁰ It has also been credited for the establishment of Britain's social security system and National Health Service.³¹¹ As a result of this report, new developments in the form ILO Conventions were introduced by the ILO.³¹²

On the other hand, in Africa, such means of eradicating poverty were not necessarily introduced after colonialism. Instead, the social and economic needs of people were met through a system based on communal responsibility of all those who were economically active in a family tribe or clan and a village as a whole.³¹³ This traditional system of eradicating poverty in Africa, when properly even

³⁰⁶ Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf. Servais explains this scenario as such: "Other European countries, like France or Belgium, slowly followed an equivalent model at the end of the nineteenth or at the start of the twentieth century. Similar schemes were introduced in Latin America (Argentina, Brazil, Chile and Uruguay). Insurance models were widened; new risks such as unemployment benefits were included; and the groups of persons covered were enlarged. Although the insurance model prevailed, tax-financed programmes were also introduced at an early stage."

³⁰⁷ Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf.

³⁰⁸ Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf.

³⁰⁹ Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf.

³¹⁰ Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf.

³¹¹ BBC 2014 <http://www.bbc.co.uk>. The author of the report was Sir William Beveridge who provided a summary of principles that would eventually be used to eradicate poverty in the Britain. The report made a proposal of a social security system that would eventually be used in Britain.

³¹² Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf.

³¹³ Msalangi Date Unknown *AJFM* 62.

identified people who were in detrimental conditions and needed assistance.³¹⁴ Communal responsibility meant that those who were economically active assisted the sick, the young, the handicapped and those members of society whose productive capacities were limited and impaired.³¹⁵ Social rights for minimum subsistence were secured for all members of the community but were in some instances withheld from those who were deemed lazy and did not use resources available to them for their livelihood.³¹⁶ The risk of hunger was addressed and provided for as a collective.³¹⁷

When the missionaries arrived in Africa, they came up with activities that played a role in the eradication of poverty by establishing schools and educating people who would eventually be employed by the same missionaries for wages.³¹⁸ Missionaries introduced hospitals and established orphanages and other forms of care which included taking care of the elderly, the sick and other disabled members of society.³¹⁹

After the Second World War, social security schemes were introduced in Africa and included employers' liability schemes and service pensions like the workmen's compensation.³²⁰ These were mainly established to protect employees from contingencies that would stop them from sustaining a living, and lead to poverty.³²¹ Msalangi³²² states that these schemes were non-contributory and mainly covered employees in terms of injuries, sickness and death. History shows that in English speaking colonies in Africa there was a relatively uniform social security system framework.³²³—With time, after most African countries gained their independence, they started to address some of the weaknesses that were not fully

³¹⁴ Msalangi Date Unknown *AJFM* 62.

³¹⁵ Msalangi Date Unknown *AJFM* 62.

³¹⁶ Msalangi Date Unknown *AJFM* 63.

³¹⁷ Msalangi Date Unknown *AJFM* 63. These traditional systems of social security only collapsed in instances such as epidemics, war and drought leading to crop failures.

³¹⁸ Msalangi Date Unknown *AJFM* 63.

³¹⁹ Msalangi Date Unknown *AJFM* 62.

³²⁰ Msalangi Date Unknown *AJFM* 62.

³²¹ Msalangi Date Unknown *AJFM* 63.

³²² Msalangi Date Unknown *AJFM* 63.

³²³ Bailey Date Unknown <http://www.ilo.org>.

covered by the social security schemes of the colonial government.³²⁴ Nevertheless, the new changes that were implemented were slight modifications of the schemes that had already existed and this was done to cover a larger population that was now in dire need of coverage.³²⁵ Most of the problems that African countries encountered are still being experienced today and this time to a larger extent, therefore, there are patterns in which people now migrate from their countries of birth to other countries in order to search for better living conditions.

With this background in mind, this chapter seeks to look at strides that are being made in the sphere of social security to tackle poverty. The research will analyse and discuss international and regional standards on migration, labour rights, social security rights and portability of social security benefits.

The chapter will commence with the discussion of international standards on these issues as related to migrant workers, followed by a discussion of both regional and sub-regional standards on social security rights. Finally, the last section of this chapter will address the challenges that face access and portability of social security rights and benefits.

2.2 International standards on social security and the portability of social security rights

Globally, social security protection and portability of social security rights of migrant workers are both affected by a diverse number of principles which may either aid or hinder them. In Southern Africa, one of these principles is referred to as the principle of territoriality and advocates for the application of social security legislation of any country to be confined within the territory of such a country and nothing more.³²⁶ It has been hailed as mirroring or reflecting the sovereignty of every state in the world.³²⁷ Nonetheless, it is crucial to note that this principle means that migrant workers may not get social security coverage from social

³²⁴ Bailey Date Unknown <http://www.ilo.org>.

³²⁵ Msalangi Date Unknown *AJFM* 64.

³²⁶ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³²⁷ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

security schemes in their home countries and may further only have limited social security coverage in the countries of employment.³²⁸

Asymmetrical reciprocity is another principle intended to warrant that a migrant worker will not be disadvantaged in his country of employment because his country of origin does not have a well-developed or an up-to-standard social security system.³²⁹ In terms of this particular principle, if a member state has accepted a certain branch of social security, or that branch was already part of its domestic legislation upon ratification of the convention but in contrast, the said state chooses not to apply it or provide it to migrants from other states, then it cannot expect the other states to provide such cover or protection to migrants from it.³³⁰

This chapter intends to discuss the implications of the above-mentioned principles at an international, regional and sub-regional level by looking at how they affect the broader principle of the portability of social security benefits of migrant workers. It is important to note that evidence has shown that many countries do not pay social security benefits abroad despite the fact that they export social security benefits to their own nationals working in foreign countries.³³¹ Portability of social security benefits is affected by several things, which include administrative problems, monetary restrictions and statutory limitations.³³²

2.2.1 ILO standards on social security rights

2.2.1.1 Convention on Minimum Standards in Social Security

It is imperative to draw examples from the *Convention on Minimum Standards in Social Security 102 of 1952* since it has been hailed as a forerunner to other social

³²⁸ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³²⁹ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³³⁰ See article 3 of the *Equality of Treatment Convention 118 of 1962* and also Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>. According to article 3 of the *Equality of Treatment Convention 118 of 1962* a member state has state its intentions clearly while ratifying the convention regarding the branch of social security it wishes to accept as an obligation.

³³¹ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³³² Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

security standards and conventions worldwide.³³³ Kulke³³⁴ refers to this instrument as a flagship of ILO social security conventions while the Convention is of substantial value because it sets global minimum standards of all nine branches of social security.³³⁵

The importance of this Convention is portrayed by the fact that it has been used by many states as a point of reference in their quest to build more ideal social security systems.³³⁶ Nyenti and Mpedi insist that its influence can also be identified at regional levels and further argue that its far reaching influence can be seen in instruments like the *European Social Charter*.³³⁷ Another important aspect to consider is the fact that it makes ratification easier by permitting states to offer protection of at least three branches of social security upon ratification.³³⁸ Nevertheless, protection does not end with the provision of only these three branches of social security; the ratifying state will have to accept the obligations of other branches of social security named in this Convention.³³⁹ Consequently, Nyenti and Mpedi³⁴⁰ insist that the aim is to assist these states to progressively attain all the obligations set out in the Convention by allowing obligations under other branches. Meknassi³⁴¹ describes the convention as follows:

Far from establishing a single minimum level of cover that would apply to everyone, Convention 102 defines nine separate benefits and provides quantitative and qualitative indicators that allow States to be regarded as meeting the minimum social security standards if the conditions required to provide protection against three of the nine risks are satisfied. Each country is

³³³ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>. Selected countries of this study have not ratified this Convention.

³³⁴ Kulke Date unknown <http://www.social-protection.org>.

³³⁵ Kulke Date unknown <http://www.social-protection.org>. See Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>. See also Chapter 1, section 1.3.2 for a list of all the nine branches of social security.

³³⁶ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³³⁷ Nyenti & Mpedi 2015 <http://www.sapen.org>. See also Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>. Kulke Date Unknown [Http://www.social-protection.org](http://www.social-protection.org). Kulke insists that "Convention No. 102 was used as the blueprint for regional instruments such as *the European Code of Social Security No 048*. Its principles are reflected in other regional instruments such as the *European Social Charter No 035*, the Treaty of Amsterdam of the European Union and those developed in Africa and Latin America."

³³⁸ Nyenti & Mpedi 2015 <http://www.sapen.org>.

³³⁹ Nyenti & Mpedi 2015 <http://www.sapen.org>.

³⁴⁰ Nyenti & Mpedi 2015 <http://www.sapen.org>.

³⁴¹ Meknassi 2006 *Comp.Lab.L. &Pol'y J* 209-210.

thus free to include this cover in its social security system or in other related or parallel institutional schemes such as public health or social assistance schemes.

The fact that the Convention allows states to offer at least three of the nine branches of social security upon ratification means that the ILO saw a need to make ratification of the instrument a bit more flexible. This need for flexibility was introduced because of the socio-economic and other uncertainties that were facing industrialised countries of that time.³⁴² In fact, this Convention was generally put in place in an era where full employment in the formal sector was a very achievable goal since it envisions general taxation and insurance contributions as a source of financing social security benefits.³⁴³ This means that it has a very strong focus on insurance.³⁴⁴

Another important provision of this Convention is article 68(2) that presents the notion of equal treatment between nationals and migrants in terms of any contributory social security schemes as depending on any reciprocity conditions provided for by social security agreements.³⁴⁵ Unfortunately, this provision excludes migrant workers from any social assistance the host country might provide. Dupper³⁴⁶ rightfully points out that the said provisions allow the exclusion of migrant workers from non-contributory social security benefits.

³⁴² Olivier 2013 *The International Journal of Comparative Labour Law and Industrial Relations* 31-32. (hereafter *IJCLLIR*) This flexibility

³⁴³ Olivier 2013 *IJCLLIR* 32.

³⁴⁴ Olivier 2013 *IJCLLIR* 31-32.

³⁴⁵ Article 68(2).

³⁴⁶ Dupper 2007 *SLR* 228.

2.2.2 ILO standards on social security rights of migrant workers

2.2.2.1 Equality of Treatment (Accident Compensation) Convention

The ILO has adopted a few instruments that relate to the social security rights of migrant workers and their family members. In 1925, the International Labour Conference adopted the *Equality of Treatment (Accident Compensation) Convention*³⁴⁷ that guaranteed nationals of ratifying member states, who suffer personal injury due to work accidents similar treatment regarding workmen's compensation as granted by the ratifying receiving-state to its own nationals.

This Convention clearly advocated that migrant workers be treated the same as citizens. The equal treatment is further seen in article 1(2) which states as thus:

This equality of treatment shall be guaranteed to foreign workers and their dependents without any condition as to residence. With regard to the payments which a Member or its nationals would have to make outside that Member's territory in the application of this principle, the measures to be adopted shall be regulated, if necessary, by special arrangements between the Members concerned.

This provision states that equality between migrants and citizens will be guaranteed without any condition, especially residence. Since the article further provides for portability of benefits and states that measures to be adopted shall be regulated by arrangements between members, it can be construed as saying that there should be bi- or multilateral agreements between states to enable the portability of such benefits.³⁴⁸

³⁴⁷ *Equality of Treatment (Accident Compensation) Convention* 19 Of 1925. See article 1(1) thereof which states as thus: "Each Member of the International Labour Organisation which ratifies this Convention undertakes to grant to the nationals of any other Member which shall have ratified the Convention, who suffer personal injury due to industrial accidents happening in its territory, or to their dependants, the same treatment in respect of workmen's compensation as it grants to its own nationals."

³⁴⁸ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>. All countries of choice for this study have ratified this Convention.

2.2.2.2 The Equality of Treatment Convention

The *Equality of Treatment Convention* (hereinafter Convention 118)³⁴⁹ was passed in 1962 and clearly states in its preamble that one of its missions is to tackle the issue of equal treatment of nationals and non-nationals within the social security sphere.³⁵⁰ Interestingly, it also sets out nine branches of social security.³⁵¹ Upon ratification, the said state simply undertakes to offer protection to migrant workers from a state which has also ratified the convention. However, an exception to the said condition applies to refugees and stateless persons without any condition of reciprocity.³⁵² As an international instrument, it advocates for equality of treatment relating to social security coverage. This equal treatment relating to social security coverage has to be established worldwide for all branches of social security which member states have accepted as obligations. Article 3 makes this very clear by stating that each member, while ratifying this Convention, should specify which branch of social security it accepts as an obligation. The Convention also makes provision for member states to accept any other obligations of the Convention in respect of social security branches that were not accepted while ratifying.³⁵³ The principle of asymmetrical reciprocity plays a very important role in Convention

³⁴⁹ *Equality of Treatment (Social Security) Convention* 118 of 1962. Lesotho, Swaziland and South Africa have not ratified this Convention.

³⁵⁰ The Preamble of the said Convention states as thus: "The General Conference of the International Labour Organization,:
"Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Forty-sixth Session on 6 June 1962, and
Having decided upon the adoption of certain proposals with regard to equality of treatment of nationals and non-nationals in social security, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, adopts this twenty-eighth day of June of the year one thousand nine hundred and sixty-two the following Convention, which may be cited as the Equality of Treatment (Social Security) Convention, 1962."

³⁵¹ Article 2(1). See Chapter 1, section 1.3.2 for a discussion of the said branches of social security.

³⁵² Article 10.

³⁵³ Article 2(4) states that this should be done by notification to the Director General of the International Labour Organisation. This article states as thus: "Each Member which has ratified this Convention may subsequently notify the Director-General of the International Labour Office that it accepts the obligations of the Convention in respect of one or more branches of social security not already specified in its ratification."

118, however, there is an exception to article 3. Hirose, Nikac & Tamagno³⁵⁴ explain this exception as follows:

...the principle of global reciprocity is combined with an option which allows States to make exceptions to the provisions of Article 3 for a specified branch in the case of nationals of any State which has legislation relating to that branch but does not grant equality of treatment in respect thereof to the nationals of the first State.³⁵⁵

This means that a country that refuses equal treatment of workers from another country, cannot expect the other country to provide equal treatment to its own workers.³⁵⁶ These sentiments show just how important this principle of reciprocity is and are pivotal to ensuring that states party to Convention 118 do actually follow through on their part of their bargain. Although article 4

states that "equality of treatment as regards the grant of benefits shall be accorded without any condition of residence", it is important to note that there are some benefits under the non-contributory schemes that may be subjected to the condition of residence and duration which may not exceed the limits set out in the Convention.³⁵⁷ On the other hand, article 4(2) states that grant benefits other than medical care, sickness benefit, employment injury benefit and family benefit may be subjected to the condition that a beneficiary has resided in the state in accordance with the legislation in which the benefit is due, while in case of a survivor the condition is that the deceased resided in the territory for a period not exceeding:

- (a) six months immediately preceding the filing of claim, for grant of maternity benefit and unemployment benefit;
- (b) five consecutive years immediately preceding the filing of claim, for grant of invalidity benefit, or immediately preceding death, for grant of survivors' benefit;
- (c) ten years after the age of 18, which may include five consecutive years immediately preceding the filing of claim, for grant of old-age benefit.

³⁵⁴ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³⁵⁵ Article 3.

³⁵⁶ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³⁵⁷ Article 4(1) makes this very clear when it states as thus: "Equality of treatment as regards the grant of benefits shall be accorded without any condition of residence: Provided that equality of treatment in respect of the benefits of a specified branch of social security may be made conditional on residence in the case of nationals of any Member the legislation of which makes the grant of benefits under that branch conditional on residence on its territory."

This indicates that the principle of equal treatment does not mean that benefits may be granted in all situations without conditions but rather that the said benefits should not be denied to non-nationals solely on the ground of residence.³⁵⁸

Another important article for purposes of this thesis is article 5 which deals directly with the portability of social security benefits. This part of the Convention lays down the notion of providing benefits abroad, with concerning invalidity benefits, old-age benefits, survivors' benefits and death grants and employment injury pensions.³⁵⁹ However, the provision states that payments must be made to migrants of other states which have accepted the obligation of the Convention in respect of a certain social security branch in question.³⁶⁰ However, it must be noted that nationals or citizens of the state in question are also provided for. When explaining the issue of the portability of social security benefits as per Convention 118, Grenfell³⁶¹ states that:

The Convention allows for the exportability of benefits to nationals of ratifying states, whether or not they live in a ratifying state, in the areas of invalidity, old-age, survivors (sic), death grants and injuries at work. However, it stipulates that if a ratifying state allows its own nationals to export benefits in additional branches, it must allow non-nationals to do the same. On the question of exportability, asymmetrical reciprocity is not expected though; if state X does not apply the C Convention to coverage regarding injuries at work, state Y does not have to allow for the exportability of injury benefits to nationals of state X.

Article 6 further states that family allowance grants have to be guaranteed to both nationals and non-nationals of any other state which has accepted the obligations of the Convention for that branch, with respect to children residing in a territory of such a member state. This in, essence, means that the said children must reside or live in a state that ratified the Convention. It is only in this instance that benefits earned by their parents while in another state be given to them.³⁶²

³⁵⁸ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³⁵⁹ Article 5(1).

³⁶⁰ Article 5(1).

³⁶¹ Grenfell Date Unknown <http://www.moscow.iom.int>.

³⁶² Grenfell Date Unknown <http://www.moscow.iom.int>.

However, the parents must have earned those benefits in a state that has also ratified the Convention.³⁶³

2.2.2.3 Maintenance of Social Security Rights Convention

The *Maintenance of Social Security Rights Convention 157 of 1982 and Maintenance of Social Security Rights Recommendation 167 of 1983* established a frame work and a set of internationally agreed-upon principles and rules for the protection of migrant workers' social security rights through the coordination of social security schemes.³⁶⁴ According to article 2(3), this Convention applies to all general and special social security schemes, whether contributory and non-contributory including schemes consisting of employer imposed obligations as per legislations in respect of any branch of social security. These branches are namely, medical care, sickness benefit, invalidity benefit, maternity benefit, old-age benefit, employment injury benefit, benefit in respect of occupational injuries and diseases, unemployment benefit and family benefit.³⁶⁵ However, it is important to note that the application of the Convention is not extended to special schemes for civil servants, war victims or to social and medical assistance schemes.³⁶⁶ The importance of ratification for purposes of application is espoused in this convention by article 3 which states that people protected by the Convention should have been subjected to legislations of a state or states that have ratified the Convention together with their family members or other beneficiaries or survivors.³⁶⁷

Article 5 states that the law or legislation regarding people covered by the Convention must be determined by mutual agreement between member-states concerned. The intention of this mutual agreement, among others, is to avoid conflicts of laws and other undesirable consequences that might occur particularly for those concerned either through lack of protection, or as a result of the undue

³⁶³ Grenfell Date Unknown <http://www.moscow.iom.int>.

³⁶⁴ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>. All countries relevant to this study have no ratified this Convention.

³⁶⁵ Article 2(1).

³⁶⁶ Article 2(4).

³⁶⁷ Article3.

plurality of contributions or other liabilities or of benefits. This provision sets out guidelines for the realisation of multilateral and bilateral agreements on social security that may lead to the coordination of social security schemes among member states.³⁶⁸

The fact that the Convention requires that there be agreements reached between other states that ratified it and that the said agreements address certain issues may be construed as generally being a road map to the establishment of bilateral agreements. Such agreements between states are said to address the following issues:

- a) Employees who are normally employed in the territory of a Member shall be subject to the legislation of that Member, even if they are resident in the territory of another Member or if the undertaking which employs them has its registered office, or their employer has his place of residence, in the territory of another Member;
- (b) Self-employed persons who normally engage in their occupation in the territory of a Member shall be subject to the legislation of that Member, even if they are resident in the territory of another Member;
- (c) Employees and self-employed persons sailing on board a ship flying the flag of a Member shall be subject to the legislation of that Member even if they are resident in the territory of another Member or if the undertaking which employs them has its registered office, or their employer has his place of residence, in the territory of another Member;
- (d) Persons who are not part of the economically active population shall be subject to the legislation of the Member in whose territory they are resident, in so far as they are not protected in virtue of subparagraphs (a) to (c) of this paragraph.

³⁶⁸ Grenfell Date Unknown <http://www.moscow.iom.int>.

The fact that the above provisions set guidelines that lead to the formation of bilateral agreements was espoused by Grenfell³⁶⁹ who stated that:

Convention 157 sets out guidelines for the formation of bilateral and multilateral agreements aimed at establishing coordination schemes on social security. Though the obligation to establish coordination is thus indirect, the Convention requires that agreements be reached with other ratifying states and that the resulting coordination schemes address certain key issues (while allowing for flexibility in the details of how those issues are addressed). The schemes must also include a number of minimum areas of coverage, including invalidity; old-age; survivors; death grants; injury pensions; unemployment; and family benefits. There are also obligatory categories of beneficiaries: employees who are nationals of ratifying states; their family and survivors; and refugees and stateless persons.

Moreover, article 4 of this Convention, on the other hand, makes an express provision for multilateral and bilateral agreements and further shows a distinction between provisions of the Convention which need immediate application upon enforcement of the Convention by the state in question and those that need to wait for multilateral and bilateral social security agreements in order to come into being.³⁷⁰

2.2.2.3.1 Maintenance of Social Security Rights Recommendation 167 of 1983

The *Maintenance of Social Security Rights Recommendation* was passed to supplement Convention 157.³⁷¹ This Recommendation comprises of provisions that would assist in the implementation of Convention 157. Article 2 of the Recommendation states that member states bound by social security bilateral and multilateral agreements should undertake to extend to nationals of other member states the benefit of the agreement in relation to the applicable law, the maintenance of rights in the course of acquisition and maintenance of acquired right and provision of benefits abroad. The fact that the provision of benefits abroad was provided for in this Recommendation shows just how important Convention 157 and the ILO perceives the portability of social security benefits to be.

³⁶⁹ Grenfell Date Unknown <http://www.moscow.iom.int>.

³⁷⁰ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³⁷¹ Kulke Date unknown <http://www.social-protection.org>.

The Recommendation further states that in cases where member states concluded social security agreements, in which one member state had no legislation specifically dealing with unemployment benefit and family benefit, such member states should try and make arrangements that would compensate or aid nationals who may otherwise lose their acquired rights as a result of changing residency between the two countries.³⁷² This provision further states that beneficiaries entitled to family benefits should be compensated upon change of residency as well.³⁷³ Moreover, as previously stated, the Recommendation has annexure 1 which makes a model provision for concluding social security bilateral and multilateral agreements.³⁷⁴ The Recommendation covers all nine branches of social security as previously defined and even makes provision for the portability of social security benefits abroad.³⁷⁵ The Recommendation further stipulates standards relating to the maintenance of rights, rules on how applicable legislations work and finally rules on how different institutions may find middle ground and assist each other.

2.2.2.4 Domestic Workers Convention

The ILO passed the *Domestic Workers Convention* in 2011, which was a step in the right direction to protect migrant domestic workers and domestic workers as a whole.³⁷⁶ The aim behind the passing of this Convention was to improve domestic workers' access to social security, wages, hours of work, working conditions and freedom of association.³⁷⁷ This Convention as a legally binding instrument cemented the way for the domestic workers sector to be properly regulated and further paved the way for protection of people employed in unregulated and

³⁷² Article 4.

³⁷³ Article 4.

³⁷⁴ See Chapter 2.1.4 below for a list of all the nine branches. See also Kulke Date unknown <http://www.social-protection.org>.

³⁷⁵ Convention 102 of 1952 see also Kulke Date unknown <http://www.social-protection.org>. See also Article 19 of the recommendation. These nine branches are medical benefits, sickness benefits, unemployment benefits, old age benefits, employment benefits, family benefits, maternity benefits, invalidity benefits and survivors' benefits.

³⁷⁶ Convention 189 concerning decent work for domestic workers which was adopted in 2011 and entered into force in to force in 2013

³⁷⁷ Seepamore 2016 <http://www.uj.ac.za>. Ratified by South Africa. While Lesotho and Swaziland have not ratified it as yet.

informal work relationships in the world.³⁷⁸ As stated in the previous chapter, domestic workers still face a great deal of exploitation in the workplace with their salaries not being properly regulated coupled with the fear of being expelled for challenging employers.³⁷⁹ The Convention recognises that domestic work continues to be one of the most undervalued employment sectors in the world mainly carried out by female migrants from very disadvantaged communities.³⁸⁰ The preamble recognises that this employment sector constitutes a very significant per cent of the global labour force, yet it is still marginalised.³⁸¹ According to article 1 of the Convention, the term domestic work means the performance of work in a household. While a domestic worker is defined as a person involved in the performance of domestic work in an employment relationship.³⁸² On the other hand, a person who only performs domestic work occasionally or sporadically and not on an occupational level is not a domestic worker.³⁸³

Article 14 makes it very clear that necessary measures have to be taken to ensure that domestic workers enjoy social security conditions that are favourable to them as other workers in formal employment.³⁸⁴ This provision illustrates that those measures have to be incorporated into national laws and regulations.³⁸⁵ Moreover, they have to be implemented in consultation with most representative trade unions, employers associations, domestic workers representative organisations, employers of domestic workers and their representatives.³⁸⁶ However, ratification and implementation are still major problems hindering the effectiveness of this instrument in the SADC region, especially in the social security field.

Although international labour and social security standards do in theory provide for equality of treatment between national and non-national workers regarding social security coverage. Nonetheless, these standards by themselves are not enough to

³⁷⁸ Seepamore 2016 <http://www.uj.ac.za>.

³⁷⁹ Seepamore 2016 <http://www.uj.ac.za>.

³⁸⁰ The Preamble.

³⁸¹ The Preamble

³⁸² Article 1(b).

³⁸³ Article 1(c).

³⁸⁴ Article 14(a).

³⁸⁵ Article 14(a).

³⁸⁶ Article 14(b).

guarantee migrants workers their acquired social security benefits. These are because they make maintenance of migrant workers' acquired social security rights dependent on the existence of social security agreements between both migrant-sending and receiving-countries.³⁸⁷ However, in practice, few migrant-sending countries, which are usually developing countries, have concluded such agreements or are bound by social security conventions. Consequently, the absence of social security agreements means that only a small minority of migrant workers can realise their entitlement to social security benefits upon returning to their country of origin.³⁸⁸

Therefore, it is fitting to recognise such international norms and standards have had a significant influence on the regulation of labour markets and, to a more limited extent, the social security framework in developing countries. Regional instruments and domestic statutory frameworks in the developing world covering these areas were often developed with the international standards framework in mind and invariably show similarities to international and other regional instruments.³⁸⁹ A typical example of this is the *Convention on Minimum Standards in Social Security 102 of 1952* which has been referred to as a flagship of ILO social security conventions.³⁹⁰ This Convention as stated earlier has been used by many states and regions as a point of reference in their quest to build ideal social security systems.³⁹¹

The next part of the research discusses the United Nations instruments which have a bearing on the provision of social security benefits.

³⁸⁷ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³⁸⁸ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>.

³⁸⁹ Olivier 2013 *IJCLIR* 29.

³⁹⁰ Kulke Date unknown <http://www.social-protection.org>.

³⁹¹ See section 2.2.1.1 for an in-depth discussion of Convention on Minimum Standards in Social Security 102 of 1952.

2.3 Other international instruments impacting social security

2.3.1 The United Nations International Covenant on Economic, Social and Cultural Rights

Social security is recognised by a number of different international instruments that are not necessarily social security orientated. Therefore, these instruments can, therefore, be identified as impacting social security in one way or the other. The *United Nations International Covenant on Economic, Social and Cultural Rights* (hereafter *ICESCR*) states explicitly that states party to the convention should recognise everyone's right to social security and should further also include social insurance.³⁹² While dealing with the issue of social security envisaged in this covenant, it would not be wise to deal with this instrument to the exclusion of the *United Nations General Comment* as adopted in 2008 (hereinafter *General Comment*).³⁹³ The *General Comment* is very important for purposes of comprehending the content and coverage of the right to social security as envisaged by the international community and more specifically the UN. The *General Comment* starts off by acknowledging the right to social security and social insurance as echoed in article 9 of the *ICESCR* and states that this right is

³⁹² Article 9 thereof. The convention was adopted on the 16 December 1966 and came into force from 3 January 1976. It is important to note further that the convention further makes provision for working mothers before or during birth and states that such should be afforded leave with adequate social security benefits. This is in accordance with Article 10(2). According to article 10(1) the convention makes further provision for protection and assistance to be accorded to families' in particular caring and providing education for dependent children. The *ICESCR* is very important as it further espoused the principles proclaimed by the United Nations and the Universal Declaration of Human Rights. This view point is largely rooted in the sentiments echoed by the preamble of the said covenant which reads as thus: "The state parties to the present Covenant, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognising that these rights derive from the inherent dignity of the human person, Recognising that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights, Considering the obligation of states under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms, Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant, Agree upon the following articles."

³⁹³ United Nations General Comment no 19 of 2008.

essential in guaranteeing everyone's human dignity although many are faced with circumstances that deprive them of the capacity to fully realise such.³⁹⁴ This instrument states that non-nationals should not be excluded from social security systems in any way, shape or form through direct or indirect discrimination more specifically they should not be excluded by the imposition of eligibility conditions or lack of adequate access to information.³⁹⁵

This provision directly addresses the sub-question as to what extent international instruments could enhance the access to and the portability of social security benefits for migrant workers. The fact that this instrument prohibits direct or indirect discrimination against non-nationals indicates that migrant workers should also have access to social security rights and benefits. The *General Comment* further stipulates that where non-nationals and migrant workers have contributed to social security schemes of host countries, they should not face any restrictions while trying to retrieve their contributions or benefits upon their return to their countries of origin or when they change workplaces or occupations.³⁹⁶ This provision shows that the *General Comment* intends to advance the portability of social security benefits for migrant workers who return home upon expiration of their employment contracts.

Emergency medical care has also been essential since it has been pointed out as an entitlement to all persons regardless of their immigration status.³⁹⁷ Non-contributory schemes for income support, affordable health care and family support are also identified as basics that should be made accessible to migrants or non-nationals with proportionate and reasonable restrictions if any.³⁹⁸

³⁹⁴ Article 1 of the *General Comment*.

³⁹⁵ General Comment 19 of 2008. It is important to note that the comment further prohibits discrimination against indigenous people and minority groups and states that that such should not be excluded from social security systems. These groups include refugees, asylum-seekers, returnees and other migrants.

³⁹⁶ General Comment 19 of 2008. See article 36 of the General Comment.

³⁹⁷ According to article 37, non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. This provision further points out that any restrictions, including a qualification period, must be proportionate and reasonable and further states that all persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.

³⁹⁸ Article 37.

Furthermore, the *General Comment* states that refugees, asylum-seekers and other disadvantaged and marginalised groups or individuals should enjoy equal treatment while accessing non-contributory social security schemes, including the reasonable access to health care and family support, consistent with international standards.³⁹⁹

Another important aspect of the *ICESCR* is seen in article 2(3) which explicitly states that developing countries may determine the extent to which they would guarantee economic rights recognised in the *ICESCR* to non-nationals and this would be done by considering human rights and national economies of these developing countries.⁴⁰⁰ This provision is a general exception and can, therefore, be narrowly construed as applying only to developing countries' economic rights.⁴⁰¹ It is important to note that the *ICESCR* does not allow discrimination between nationals and non-nationals when it comes to the provision of social and cultural rights.⁴⁰² While the *General Comment* also makes provision for all the nine branches of social security.⁴⁰³ It further prohibits the discrimination of nationality and points out that where non-nationals, including migrant workers have made contributions to social security schemes, they should be able to benefit and retrieve such contributions if they leave their countries of employment.⁴⁰⁴ This provision stipulates that there should be portability of social security benefits of migrant workers upon his or her return home. What is also important is the fact that migrant workers' social security entitlements are not supposed to be affected by a change in their work place.⁴⁰⁵

³⁹⁹ General Comment 19 of 2008.

⁴⁰⁰ Olivier 2009 <http://www.siteresources.world.bank.org>>Resources. Article 2(3) states that developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the...covenant to non-nationals.

⁴⁰¹ Olivier 2009 <http://www.siteresources.world.bank.org>>Resources.

⁴⁰² Olivier 2009 <http://www.siteresources.world.bank.org>>Resources.

⁴⁰³ See Chapter 2.1.4 below for a list of all the nine branches.

⁴⁰⁴ Article 36.

⁴⁰⁵ Article 36.

2.3.2 International Convention on the Elimination of All Forms of Racial Discrimination

The *International Convention on the Elimination of All Forms of Racial Discrimination* (hereinafter-CERD) does make provision for the right to social security. According to CERD:

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of...social security rights.⁴⁰⁶

This provision prohibits racial discrimination on the grounds of nationality in the enjoyment of social security rights. This can, therefore, be interpreted as allowing migrant workers access to social security rights. This instrument realises the need for migrant workers to get access to social security by prohibiting nationality discrimination and this may be seen as addressing only part of the sub-question of this chapter, which is the extent to which these international instruments advance migrant workers access to social security rights.

2.3.3 The Convention on the Rights of the Child

The *Convention on the Rights of the Child* (hereinafter-CRC)⁴⁰⁷ points out that parties to the Convention shall respect all the rights set forth in it without discrimination of any kind irrespective of the child's or his or her parents, or legal guardian nationality. One of the rights set forth in this convention is the right to social security as provided for in article 26 of this convention.⁴⁰⁸ The same provision further states that member states shall recognise social insurance and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.⁴⁰⁹ Therefore, the CRC allows access to social security for migrants and migrants include migrant workers and is a good example

⁴⁰⁶ Article 5(e)(iv).

⁴⁰⁷ This instrument was adopted on the 20 November 1989 and finally came into force entry on the 2 September 1990

⁴⁰⁸ Article 26.

⁴⁰⁹ Article 26.

of another United Nations instrument that recognises the need for social security in its provisions.

2.3.4 International Covenant on Civil and Political Rights

The *International Covenant on Civil and Political Rights*⁴¹⁰ also plays a rather significant role because it recognises human rights in general. In its preamble, this Covenant echoes that states party to it recognise their obligation of promoting universal respect for the observance of human rights and freedoms. Since social security is a human right, this covenant can, therefore, be construed as supporting the provision of social security.⁴¹¹ According to article 2, every state party to the Covenant undertakes to ensure that everyone within its territory and subject to its jurisdiction is granted the rights recognised by it which include human rights without any distinction as to race, colour, sex, language, political, religion, national or social origin, property, birth or other status. Although the Covenant does not explicitly provide for the right to social security, it is safe to insist that this UN instrument also guarantees social security protection to migrant workers to some extent since social security is a human right. Prohibition of discrimination on any grounds, including nationality discrimination means that the instrument recognises the need for migrants to access social security rights.

2.3.5 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*⁴¹² exemplifies principles and standards

⁴¹⁰ This Convention was adopted in 1966 and finally entered into force in 1976.

⁴¹¹ National Economic Social Rights Initiative 2015 <http://www.nesri.org>. According to National Economic Social Rights Initiative (hereinafter NESRI), the right to social security ensures that everyone, regardless of the work, is guaranteed the means necessary to attain basic needs and services. NESRI further states that a number of human rights principles are essential while providing social security and these include, comprehensiveness which means that social security encompass all risks involved loss of means of survival beyond one's control. There is also the principle of flexibility which generally deals with pensions and states that retirement age should be flexible. Non-discrimination also plays a pivotal role as it provide for social security without any form of discrimination.

⁴¹² This was adopted by General Assembly Resolution 45/158 of 18 December 1990.

espoused by other international human rights instruments and states the following:

Taking into account the principles embodied in the basic instruments of the United Nations concerning human rights, in particular the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.⁴¹³

Furthermore, the preamble goes on to state that principles and standards espoused within the International Labour Organisation shall be considered. This part of the preamble lists these conventions as thus:

Taking into account also the principles and standards set forth in the relevant instruments elaborated within the framework of the International Labour Organisation, especially the Convention concerning Migration for Employment (No. 97), the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No.143), the Recommendation concerning Migration for Employment (No. 86), the Recommendation concerning Migrant Workers (No.151), the Convention concerning Forced or Compulsory Labour (No. 29) and the Convention concerning Abolition of Forced Labour (No. 105), Reaffirming the importance of the principles contained in the Convention against Discrimination in Education of the United Nations Educational, Scientific and Cultural Organization.

Since this Convention was established to afford migrant workers protection it is therefore important to note that while going through provisions of this instrument, the protection of migrant workers and their families in countries of employment seems to be a concern.⁴¹⁴ This Convention is also very relevant to migrant workers because it provides for equality of treatment between nationals of the host country and migrant workers and their families regarding the provision of social security. According to article 27(1):

With respect to social security, migrant workers and members of 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 and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time

⁴¹³ The Preamble of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. This convention describes a migrant worker in article 2(1) as a 1 referring to 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.

⁴¹⁴ Nyenti & Mpedi 2015 <http://www.sapen.org>.

establish the necessary arrangements to determine the modalities of application of this norm.⁴¹⁵

Equality of treatment between nationals and migrant workers is further espoused in article 43(1) which states that migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to:

- (a) Access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned;
- (b) Access to vocational guidance and placement services;
- (c) Access to vocational training and retraining facilities and institutions;
- (d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents;
- (e) Access to social and health services, provided that the requirements for participation in the respective schemes are met;
- (f) Access to co-operatives and self-managed enterprises, which shall not imply a change of their migration status and shall be subject to the rules and regulations of the bodies concerned;
- (g) Access to and participation in cultural life.

Parties to the convention are further obliged to promote conditions that will ensure effective equality of treatment to enable migrant workers to enjoy these

⁴¹⁵ Article 28 of this convention makes it an obligation that migrant and members of their families have access to medical care. This article does this by stating as thus: "Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment." A guarantee of social assistance is also a good step towards equality of treatment, hence provision of medical care is a good thing. It also important to note that according to article 45 (1) family members of migrant workers are also to be treated equally with nationals of the host country or the country of employment. This provision states as thus: 1. Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to: (a) Access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned; (b) Access to vocational guidance and training institutions and services, provided that requirements for participation are met; (c) Access to social and health services, provided that requirements for participation in the respective schemes are met; (d) Access to and participation in cultural life. See also Nyenti & Mpelu 2015 <http://www.sapen.org>.

rights mentioned above.⁴¹⁶ Another important issue is provided for in article 61(3) which states that project-tied migrant workers should remain protected by social security systems of their countries of origin or habitual residence during their involvement in the project. It is imperative to note that such protection bestowed upon states party to the Convention is subject to bilateral or multilateral agreements between the state parties concerned. State parties to this Convention are further urged to take appropriate measures to avoid any denials of rights or duplication of rights.⁴¹⁷ Moreover, even though there is no mention of portability of social security benefits in this convention, the fact that it encourages the establishment of bilateral and multilateral agreements will definitely advance this issue to the desired level.

2.4 The African Union (Regional social security standards)

In 1963, the Organisation of African Unity changed its name to the African Union (hereinafter AU) upon agreement by 32 states that had already achieved independence mainly due to the need to go about creating and amending structures reflective of the dynamics of the changing world.⁴¹⁸ Integration of the region was one of the core objectives of the AU, since there was a need to aid each other and prepare for the global economic challenges awaiting them moreover, it further addresses challenges such as social, political and economic that the continent was faced with.⁴¹⁹

2.4.1 The Constitutive Act of the African Union

The *Constitutive Act* of the African Union which was adopted by the 36th ordinary session of the Assembly of Heads of States (hereinafter *Constitutive Act*) indicates in article 2 thereof that the AU is established in accordance with the provisions

⁴¹⁶ Article 43(2). See also Nyenti & Mpeli 2015 <http://www.sapen.org>.

⁴¹⁷ Article 61(3) states as thus: Subject to bilateral or multilateral agreements in force for them, the States Parties concerned shall endeavour to enable project-tied workers to remain adequately protected by the social security systems of their States of origin or habitual residence during their engagement in the project. States Parties concerned shall take appropriate measures with the aim of avoiding any denial of rights or duplication of payments in this respect.

⁴¹⁸ Nyenti & Mpedi 2015 <http://www.sapen.org>.

⁴¹⁹ Nyenti & Mpedi 2015 <http://www.sapen.org>.

contained within it.⁴²⁰ It is therefore important to note that the *Constitutive Act* does contain objectives that have a bearing on the development of social protection and might impact such within the continent.⁴²¹ According to article 3(a) thereof, one of the objectives is to achieve greater unity and solidarity between the African countries and the peoples of Africa while, on the other hand, article 3(c) advocates for the acceleration of political and socio-economic integration in the region. The fact that the *Constitutive Act* echoes solidarity and integration within the region is a clear indication that it advocates for a better continent for those who live in it. According to Nyenti and Mpedi, these objectives deemed as “social protection-related” were intended to achieve social integration within the region, therefore, making the continent a better place for its nationals.⁴²²

The AU also recognises and prioritises human rights as one of the core issues to be tackled in the region.⁴²³ Article 3(h) of the *Constitutive Act* states that one of the objectives is the promotion and protection of human and people’s rights in accordance with the *African Charter on Human and Peoples’ Rights* and other relevant human rights instruments. Article 3(i) which states that the objective is to “coordinate and harmonise the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union,” is necessary in the sphere of social security and migrant workers because of the dire need for the conclusion of multilateral and bilateral agreements in African.⁴²⁴

⁴²⁰ Adopted by the 36th ordinary session of the Assembly of Heads of State and Government in Lome, Togo, on 11 July 2000, and came into force in 2001.

⁴²¹ Nyenti & Mpedi 2015 <http://www.sapen.org>.

⁴²² Nyenti & Mpedi 2015 <http://www.sapen.org>.

⁴²³ Nyenti & Mpedi 2015 <http://www.sapen.org>.

⁴²⁴ Coordination of social security schemes is very essential in the AU and *SADC* region because of a large number of migrant workers constantly on the move in search for better working conditions. The objective insists that there should be harmonisation and coordination, this is very essential as it would aid portability of social security benefits immensely. *The Code of Social Security in the SADC Region* is a perfect example how important harmonisation and coordination are. Article 3 of this Code describes the purpose of the code as “to provide SADC and Member States with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region.” Article 3(3). Other objectives of the AU include to: “defend the sovereignty, territorial integrity and independence of its Member States, accelerate the political and socio-economic integration of the continent; promote and defend African common positions on issues of interest to the continent and its peoples; encourage international cooperation, taking due account of the *Charter of the United Nations*

2.4.2 *The African Charter on Human and Peoples' Rights*

In 1981, the AU adopted the *African Charter on Human and Peoples' Rights* (hereinafter African Charter)⁴²⁵ and it recognized that there was a need to protect and guarantee human rights. According to the preamble of the African Charter, recognition of fundamental human rights stems from human beings' attributes that justify their international protection. This provision further states that such respect attributed to people's rights should be a guarantee of human rights.⁴²⁶ This Charter states that every individual shall have duties towards his family, society, the state and other legally recognised communities and the international community.⁴²⁷ On the other hand, article 28 states that everyone is duty-bound to respect and consider his fellow human beings without discriminating against such and further maintain relations intended to promote, safeguard and reinforce mutual respect and tolerance.

While in terms of article 29(1), the said individual also has the duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family, to respect his parents at all times, and to maintain them in case of need. The above provision portrays the kind of commitment the African Charter has to guarantee collective rights in the community instead of making provision for individuals.⁴²⁸ It lays out the duties in terms of individuals together

and the *Universal Declaration of Human Rights*; promote peace, security, and stability on the continent; promote democratic principles and institutions, popular participation and good governance, establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations; promote sustainable development at the economic, social and cultural levels as well as the integration of African economies; promote co-operation in all fields of human activity to raise the living standards of African peoples; advance the development of the continent by promoting research in all fields, in particular in science and technology and to work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent."

⁴²⁵ *African Charter on Human and Peoples' Rights* adopted in June 27, 1981 and came into force in October 21, 1986.

⁴²⁶ The Preamble of the African Charter. "Recognising on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand, that the reality and respect of peoples' rights should necessarily guarantee human rights."

⁴²⁷ Article 27(1).

⁴²⁸ Nyenti & Mpedi 2015 <http://www.sapen.org>.

with their families and the community at large. Nyenti and Mpedi⁴²⁹ state that these obligations insist that the African Charter foresees a multi-actor responsibility intended to realise social protection rights. It is important to state that the African Charter does not directly guarantee social security rights.

It is important to note that both article 16(2) which obliges states party to the Charter to take measures intended to protect the health of their people and make sure that they receive medical attention upon getting sick. Together with article 18(1) which states that a family shall be a natural unit and the basis of society under the protection of the state which shall take care of its physical and moral health, are perfect examples of articles that provide for social protection in the African Charter.

Although there is no specific mention of migrants and social security in this instrument, provisions of social protection are a good start in the drive to provide social security especially since it was stated that all the rights provided for in the African Charter are interrelated. According to the case of *SERAC vs Nigeria*,⁴³⁰ it was held that:

The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.⁴³¹

⁴²⁹ Nyenti & Mpedi 2015 <http://www.sapen.org>.

⁴³⁰ 2001 *AHRLR* 60 (*ACHPR* 2001) Communication 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Decided at the 30th ordinary session, Oct 2001, 15th Annual Activity Report.

⁴³¹ Par 68. In March 1996, the complaint was lodged by two non-governmental organisations, namely the Social and Economic Rights Action Centre (SERAC), based in Nigeria and the Centre for Economic and Social Rights (CESR) in New York. The communication dealt with several alleged serious human rights violations of the Ogoni people. The complaint alleged that the military government of Nigeria had been directly involved in irresponsible oil development practices in the Ogoni region. The Nigerian National Petroleum Company (NNPC), the State oil company, formed a joint venture with Shell Petroleum Development Corporation (SPDC) whose activities in the Ogoni region allegedly caused environmental degradation and health problems among the Ogoni people, resulting from the pollution effected on the environment. The complainant particularly complained about the widespread

This judgement did not specifically make mention of social security, but it did show that the state has a duty to provide such. That provision states as thus:

At a secondary level, the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the State to promote the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures. The last layer of obligation requires the State to fulfil the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).⁴³²

The research deals with circular migrant workers from selected SADC member states, and includes Lesotho, Swaziland, and South Africa. The access to and portability of social security rights are issues central to this research, therefore, the fact that the African Charter makes member states duty-bound to provide social security can be construed as insisting that migrant workers do have a right to get access to social protection (as argued above). Consequently, it addresses the sub-question unique to this part of the research, namely, to what extent regional instruments advance access to and portability of social security benefits for circular migrant workers.

contamination and pollution of soil, water and air, homes that were destroyed; the burning of crops and killing of farm animals; and the climate of terror the Ogoni communities had been suffering from, violation of their rights to health, a healthy environment, housing and food.

In terms of the African Charter, these allegations included violations of Articles 2 (non-discriminatory enjoyment of rights), 4 (right to life), 14 (right to property), 16 (right to health), 18 (family rights), 21 (right of peoples to freely dispose of their wealth and natural resources) and 24 (right of peoples to a satisfactory environment).

Further allegations included the fact that the Nigerian government was seen to be condoning and facilitating these violations by providing these oil companies with military assistance and other legal personnel under direct control by the government. It is further alleged that the government did not even bother to monitoring or supervising these operations by the oil companies while the armed forces further violated human rights by attacking and burning a number of Ogoni villages.

⁴³² Par 46-47.

2.4.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Another important AU instrument is the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (hereinafter Women's Rights Protocol).⁴³³ As the name suggests, this Protocol aims to protect women against all forms of discrimination and makes it a duty of all states that all forms of discrimination are prohibited in constitutions and other pieces of legislation in such countries.⁴³⁴ Nyenti and Mpedi⁴³⁵ indicate that equality was seen as a necessary tool while implementing this protocol. States party to this protocol agree that to do away with discrimination, they have to:

...enact and effectively implement appropriate laws or regulatory measures that prohibit and punish harmful practices which endanger the health and general well-being of women; and ensure that the opinions of women are taken into account in all endeavours at a village, city, suburban or national level. Each state party must also pass laws or take corrective action to ensure that women and men enjoy the same rights in areas or situations in which women are still treated unjustly.⁴³⁶

Article 13(f) of the Women's Rights Protocol is essential as it makes provision for the social security rights of women. According to this provision, a state party to the Women's Rights Protocol shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities by establishing a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it.⁴³⁷ Although this provision talks about the informal

⁴³³ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 3; reprinted in 1 *African Human Rights Law Journal* 40, entered into force November 25th, 2005.

⁴³⁴ Nyenti & Mpedi 2015 <http://www.sapen.org>.

⁴³⁵ Nyenti & Mpedi 2015 <http://www.sapen.org>.

⁴³⁶ Nyenti & Mpedi 2015 <http://www.sapen.org>. See article 2(b)&(c) of the Women's Rights Protocol.

⁴³⁷ Article 13 entices state parties to pass legislations that will guarantee women equal opportunities as men in work and other economic related opportunities necessary for the survival of humans. Other provisions under article 13 include: " promote equality of access to employment; promote the right to equal remuneration for jobs of equal value for women and men; ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace; guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting

sector, the Protocol does recognise the need to provide social security for women across the African continent. It is also important to point out that this instrument also prohibits discrimination against women at all levels and all fields, meaning that discrimination on the grounds of nationality is prohibited.⁴³⁸ In fact, the preamble of the Women's Rights Protocol stipulates that states party to it consider article 2 of the *African Charter on Human and Peoples' Rights* prohibiting discrimination on the grounds of national and social origin. This means that rights afforded in this instrument are, therefore, made accessible to migrant workers as well.

2.4.4 Social Policy Framework for Africa

The *Social Policy Framework for Africa* (hereinafter SFP)⁴³⁹ was passed to address sufficiently the high burden of disease prevalent on the continent, lack of basic infrastructure, social services, inadequate health care and services, poor access to education and training, high illiteracy rates, gender inequality, youth marginalisation and political instability in most African countries.⁴⁴⁰

It is important to note that the SPF is not intended to be legally binding or impose any obligations originating from treaties or conventions not ratified by member

their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force; create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector; introduce a minimum age for work and prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially the girl-child; take the necessary measures to recognise the economic value of the work of women in the home; guarantee adequate and paid pre and post-natal maternity leave in both the private and public sectors; ensure the equal application of taxation laws to women and men; recognise and enforce the right of salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children; recognise that both parents bear the primary responsibility for the upbringing and development of children and that this is a social function for which the State and the private sector have secondary responsibility; take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography."

⁴³⁸ Article 2 of the Women's Rights Protocol.

⁴³⁹ First Session of the AU conference of ministers in charge of social development Windhoek, Namibia 27 - 31 October 2008, adopted in 2009.

⁴⁴⁰ Executive summary of the Social Policy Framework for Africa. Nyenti and Mpedi state that the SPF was created with an intention complementing of other national and regional programmes including policy initiatives such as New Partnership for Africa's Development (hereinafter-NEPAD) and the Poverty Reduction Strategy Papers (hereinafter-PRSP) were these two were generally inadequate and lacking.

states.⁴⁴¹ However, what it does is to allow member states to use parts of the framework they perceive necessary and appropriate to the challenges their specific countries face.⁴⁴² The SPF, therefore, contains guiding principles to aid in attaining the objectives of the framework. These principles are as follows:

Social policies must encapsulate the principles of human rights, development imperatives and be embedded in the African culture of solidarity; It must be intimately linked to economic and political policies aiming at advancing society's well-being. Policy for social development as a broader goal should be coordinated with, but not subordinate to, economic growth and political development; Social policy formulation must include bottom-up approaches to allow the participation of beneficiaries and recipients in decision-making; Social policy should have a long-term development perspective; The different stakeholders should work together in well-coordinated partnerships that enable them to complement and not compete with one another.⁴⁴³

According to the framework, governments play a leading role in implementing principles and policies in the framework.⁴⁴⁴ Moreover, in terms of the SPF, AU members will work with other partners namely community-based organisations, civil societies, communities (especially marginalised communities), the private sector, regional economic communities, and other development partners while trying to achieve all these objectives.⁴⁴⁵

When it comes to the issue of migrants, it is safe to say that the SPF has identified this issue as key and has acknowledged the fact that it is essential and beneficial to the economy and social life of the continent.⁴⁴⁶ The AU in this aspect further acknowledges that if migration flows and migration as a whole were to be managed properly, this would yield many benefits to both the host and the home country.⁴⁴⁷

⁴⁴¹ Article 19.

⁴⁴² Article 19.

⁴⁴³ Article 16.

⁴⁴⁴ Article 17. Governments of state parties to the SFP.

⁴⁴⁵ Article 17.

⁴⁴⁶ Social Policy Framework for Africa. Article 23, 2.2.2.

⁴⁴⁷ Social Policy Framework for Africa. Article 23, 2.2.6.

The SPF also acknowledges the importance of remittances and the economic contribution migrants have made to member states.⁴⁴⁸ It states that the most important issue is to appreciate what migration has done to the continent by effectively enhancing the positives of it.⁴⁴⁹ It is therefore important to note that the effective enhancement and management of the portability of social security benefits is essential to the governance of migration and migrant workers' well-being. It is against this background that the SPF recommends the promotion of regional integration and collaboration of social security schemes in African states in order to warrant the portability of social security rights and benefits for migrant workers.⁴⁵⁰ The SPF further recommends that member states develop labour market data and information on the migration flow.⁴⁵¹ Including the integration of migration and development into Poverty Reduction Strategies (hereinafter PRSPs) to promote migration as an instrument for regional and social integration.⁴⁵² The SPF intends to enhance access and portability of social security benefits for migrant workers and this can clearly be seen from the above recommendations.

2.4.5 Ouagadougou Declaration and Plan of Action (2004)

This piece of legislation was adopted by the AU's third extraordinary session in Ouagadougou, Burkina Faso on the 8th to 9th September 2004. The *Ouagadougou Declaration and Plan of Action* was adopted to deal with poverty alleviation and unemployment.⁴⁵³ While passing it, the heads of states were also concerned with

⁴⁴⁸ The SPF suggests that there is about US\$40 Billion that migrant workers send to their home countries per annum.

⁴⁴⁹ Social Policy Framework for Africa. Article 23, 2.2.6. The SPF states as thus: "Well-managed migration has the potential to yield significant benefits to countries of origin and destination. For example, best estimates suggest that Africans working abroad send home about US\$40 billion a year. Labour migration has also played an important role in filling labour needs in agriculture, construction and other sectors, thus contributing to the economic development of many destination countries in Africa. Mismanaged or unmanaged migration, on the other hand, can have serious negative consequences for the wellbeing of States and migrants, including potential destabilizing effects on national and regional security, and jeopardizing inter-State relations. Mismanaged migration can also lead to tensions between host communities and migrants and give rise to social pathologies such as trafficking, xenophobia and victimization."

⁴⁵⁰ Article 23, 2.2.6. Recommended Action (j).

⁴⁵¹ Article 23, 2.2.6. Recommended Action (k).

⁴⁵² Article 23, 2.2.6. Recommended Action (i).

⁴⁵³ Nyenti & Mpedi 2015 <http://www.sapen.org>.

lack of social protection affecting particularly women, youth and persons with disabilities in the African continent.⁴⁵⁴ The Declaration further stated that it was passed to deal with the issue of poor occupational health and safety conditions of the majority of workers, particularly those in the informal sector.⁴⁵⁵

The *Ouagadougou Declaration and Plan of Action* addresses and echoes the sentiments of the Decent Work Agenda of the ILO.⁴⁵⁶ The Declaration will promote ILO standards and create opportunities for women and men to access decent income.⁴⁵⁷ It recognises the need to empower people by opening opportunities and creating social protection and social security for employees, particularly poor and vulnerable ones.⁴⁵⁸ It is also concerned with the fragmentation of social and economic policies and recognises the need to deal with such; it also realises the need to recognise employment creation as a major concern.⁴⁵⁹ Migrant workers are also afforded social protection in this declaration that states that it will ensure equal opportunities for vulnerable and marginalised groups by creating a conducive environment and ensuring protection and assistance for migrant workers and other vulnerable groups.⁴⁶⁰ This instrument recognises the need to afford migrant workers social security protection and allows them to have access to social security rights. However, it does not explicitly prohibit discrimination based on nationality and this may be seen as a limitation on its part.

2.4.6 AU Migration Policy Framework for Africa

The *AU Migration Policy Framework* (hereinafter the Policy Framework) was adopted by the Executive Council's ninth session on the 25th to the 29th of 2006 at Banjul in the Gambia. The Policy Framework was passed to provide needed

⁴⁵⁴ Provision 5.

⁴⁵⁵ Provision 8.

⁴⁵⁶ Nyenti & Mpedi 2015 <http://www.sapen.org>. Decent work is defined as: "productive work in which rights are protected, which generates an adequate income with adequate social protection. It also means sufficient work in the sense that all should have access to income earning opportunities. It marks the high road to economic and social development, a road in which employment, income and social protection can be achieved without compromising workers' rights and sound standards." See Anon Date unknown <http://www.molmen.gov.tt>.

⁴⁵⁷ Provision 4.

⁴⁵⁸ Nyenti & Mpedi 2015 <http://www.sapen.org>.

⁴⁵⁹ Provision 11.

⁴⁶⁰ Provision 31, 8(f).

guidelines that would assist states and other concerned institutions in the formulation of their own regional and national migration policies.⁴⁶¹ Although the document is non-binding in nature, it provides a wide array of recommendations on different issues concerning migrants and recommends that states choose principles they deem fit for their various circumstances.⁴⁶² This Policy Framework calls for the incorporation of convention No. 97⁴⁶³ and No. 143⁴⁶⁴ and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* into national legislations of African states.⁴⁶⁵ Convention No. 97 insists that each member state should undertake to treat migrants residing lawfully within it in the same manner as it does its own nationals with respect to social security.⁴⁶⁶ While the preamble of Convention 143 points out that, standards that cover social security which are needed in the promotion of equality of opportunity and treatment of migrant workers should be considered.⁴⁶⁷ The Convention was passed to ensure the treatment of migrant workers is at least equal to that of nationals.⁴⁶⁸

⁴⁶¹ African Union 2006 <http://www.sa.au.int>.

⁴⁶² African Union 2006 <http://www.sa.au.int>.

⁴⁶³ Convention concerning Migration for Employment which was adopted in 1949 and entered into force in 1952.

⁴⁶⁴ Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers which entered into force on the 9th December 1978 and was adopted by the on the 24th June 1975.

⁴⁶⁵ Adopted in 1990 and entered into force in 2003.

⁴⁶⁶ Article 9. This equality of treatment regarding social security entails: "unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme." However, limitations to this provision include appropriate arrangements for the maintenance of acquired rights and rights in the course of acquisition. The other limitations are prescribed special arrangements concerning benefits paid out of public funds and payments concerning people or migrants who do not fulfil contributions conditions necessary to be awarded normal pension.

⁴⁶⁷ The Preamble.

⁴⁶⁸ The Preamble. Article 9 of this Convention offers a migrant labourer whose rights have been violated, a chance to take his or her matter to court and enjoy full social security rights arising from his past employment in cases where his or her stay in the country of employment is no longer regularised. It is however crucial to point out that the Convention allows the migrant labourer to access his or her social security benefits and remuneration from his or her past employment even if it had entered the state of employment irregularly. See Article 9(1). According to article 10 of convention 143, each member state party to the convention undertakes to put in place national policies created to promote and guarantee equal treatment and opportunities pertaining to issues like social security for legal migrant workers and their families.

The Policy Framework was set up to encourage the provision of social protection and social security benefits specifically unemployment insurance, old-age pension and compensation for employment injuries for migrants while working abroad and upon their return home.⁴⁶⁹ It is safe to state that the policy framework advocates for the portability of social security benefits. Incorporation of measures that promote equal access to proper working conditions and access to social security for migrant workers in the same footing as nationals of host nations is another trait of the policy framework.⁴⁷⁰ The next part of the research will deal with sub-regional labour and social security standards which have a bearing on both access and portability of social security rights and benefits of migrant workers.

2.5 The framework of social security rights in the SADC

The Southern African Development Community (hereinafter SADC) was established with a vision inclined to a common future within the community. Among other things, the said vision guarantees economic security, social justice, a refuge for people and improved quality of life.⁴⁷¹ SADC abolishes obstacles associated with free movement of labour, capital and people within the SADC region while coordinating political and socio-economic policies.⁴⁷² It is however imperative to note that migration in SADC is of a very peculiar nature. The migration movement within this region is referred to as the intra-SADC movement and this has been identified as the prevailing nature or characteristic within the SADC region.⁴⁷³ According to reports, South Africa is a very large migrant receiver with an estimated 94% of African migrants entering from the other SADC countries while 75% makes up only the documented migrants.⁴⁷⁴

⁴⁶⁹ African Union 2006 <http://www.sa.au.int>. Provision 1.1 on National labour migration policies, structures and legislation.

⁴⁷⁰ African Union Date unknown <http://www.unhcr.org>.

⁴⁷¹ Olivier 2011 *SADC Law Journal* 122. (hereafter *SADCLJ*)

⁴⁷² Olivier 2011 *SADCLJ* 122.

⁴⁷³ Olivier 2014 *Kluwer Law International* 82. (hereafter-*KLI*) It has been stated that "Southern African cross-border mobility tends to occur within the region or with neighbouring regions, while only a small percentage moves overseas, confirming the South-South nature of SADC migration."

⁴⁷⁴ Olivier 2 *KLI* 82. Information received from Olivier states that there was an estimation of about 500 000 irregular migrants residing in South Africa in 2005.

Industrial development in some countries in the region has attracted a vast number of migrants. It is, however, important to point out the crucial part played by such migrants in the development of both migrant-sending and receiving countries in the SADC region.⁴⁷⁵ Migration plays a very important role in the lives of migrant workers because it leads to their ability to provide for their families and contribute financially to their countries.⁴⁷⁶ Remittances play a major role in the development and survival of migrant dependant countries and families of migrants in general. Lesotho is a typical example. Olivier reports as follows:

The importance and role of migration in SADC countries is also demonstrated by the extent and significance of remittances to the survival of recipient households, as they are fundamental in enabling families to meet their everyday needs. For most migrant-sending households, migrant remittances comprise the main source of household income: a recent study undertaken in five SADC countries found that 85% of migrant-sending households receive cash remittances. Lesotho is one of the most migration-dependent countries in the world. A recent study indicates that formal remittance transfers constitute 28.6% of Lesotho's GDP.⁴⁷⁷

The above quote supports the importance of migration in Southern Africa, hence it is important for countries in the region to try and regulate this in a more comprehensive manner.

2.5.1 The SADC Treaty

The Treaty of the Southern African Development Community (hereafter SADC Treaty) was adopted in 1992 to attain development and economic growth, poverty alleviation, enhancement of the standard and quality of life of the people in the region and support for the socially disadvantaged through regional integration.⁴⁷⁸ The fact that this SADC Treaty's objective is to improve the lives of nationals of the region shows that social security is considered a priority in the region.

However, notable is the fact that it refers to most aspects associated with the purpose of SADC while migration is not regulated in a comprehensive or

⁴⁷⁵ Olivier 2014 *KLI* 84.

⁴⁷⁶ It has further been stated that migrants within Southern African region see migration as a career rather than just a passing phase in their daily lives. See Olivier 2014 *KLI* 84.

⁴⁷⁷ Olivier 2014 *KLI* 86.

⁴⁷⁸ Article 5(a). The first objective of the SADC Treaty.

satisfactory manner.⁴⁷⁹ The Treaty has a non-discrimination clause found in article 6(2) but this is silent on discrimination based on the grounds of citizenship. Article 6(2) reads as thus:

SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill-health, disability or such other ground as may be determined by the Summit.

This means that the SADC Treaty does not provide strong enough methods that would lead to the establishment of social security organisational means and measures.⁴⁸⁰

The SADC Treaty further calls for the establishment of policies that would among other things lead to "the progressive elimination of obstacles to free movement of capital and labour, goods and services and of the people of the region generally, among member states"⁴⁸¹ It has however been evident in the past that freedom of movement of labour has not been catered for as was initially thought. This has therefore been criticised by those who argue that catering for free movement of goods while at the same time restricting the movement of labour "makes little economic sense."⁴⁸² This in itself shows that the SADC regulatory regime is without doubt weakly developed as most instruments in the region are. However, it is important to point out some of the good that has been established by this Treaty.

The absence of multilateral agreements that regulate the provision of social security benefits for migrant workers abroad leads to the inadequacy and insufficiency of social security instruments in the SADC region. As already mentioned in the previous chapter, the absence of social security agreements means that there is no synergy, harmonisation and coordination of social security

⁴⁷⁹ Olivier 2011 *SADCLJ* 124.

⁴⁸⁰ Olivier 2014 *KLI* 86.

⁴⁸¹ SADC 2013 *Labour Migration Policy Draft* 3. According to the Labour Migration policy draft, "the SADC Labour Migration Policy is drafted within the spirit of the overall *SADC Treaty* whose main objectives include inter alia, 'to achieve development, peace and security, and economic growth, to alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa, and support the socially disadvantaged through regional integration, built on democratic principles and equitable and sustainable development'".

⁴⁸² Olivier 2014 *KLI* 86.

schemes in the region.⁴⁸³ This inadequacy and insufficiency of social security instruments is exacerbated by lack of ratification and enforcement in the region consequently this is seen as one of the reasons the portability of social security benefits for migrant workers has been insufficient. This reason is supported by a few core instruments that appear to envision coordination and harmonisation of social security schemes to an inadequate extent in the SADC region.

2.5.2 Charter of Fundamental Social Rights in SADC

The *Charter of Fundamental Social Rights in SADC* (hereinafter Social Charter) adopted by the SADC in 2003 evokes the objectives of the *SADC Treaty*⁴⁸⁴ and clearly advocates for the alleviation of poverty, development and economic growth and enhancement of quality and standard of living of people in the region. It further promotes the protection of the socially disadvantaged by encouraging and advocating for the integration of states in the region.⁴⁸⁵ The Social Charter guarantees the protection and enforcement of international instruments' protected rights in the SADC region.⁴⁸⁶

According to article 2(e) of the Social Charter, one of its objectives is to promote the establishment and harmonisation of social security schemes. However, the existing diversity in the social security schemes arena of the SADC region leads to an assumption that the Social Charter envisions weak harmonisation and frail establishment of minimum standards.⁴⁸⁷ This weakness and frailness leads to the inability of SADC member states to attain effective portability of social security benefits of migrant workers. The lack of harmonisation means that there is simply

⁴⁸³ Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu).

⁴⁸⁴ On the 17 August 1992, the heads of state of countries throughout Southern Africa signed the Declaration and Treaty of the Southern African Development Community, officially creating SADC.

⁴⁸⁵ Mpedi and Smit *Access to Social Security for Non-Citizens* 35. See Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu). See also the articles 2 to 5 of the SADC Treaty which was signed in August 17, 1992 in Windhoek, Namibia. See also article 6 of the treaty which states as thus "Member states undertake to adopt adequate measures to promote the achievement of the objectives of SADC and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty."

⁴⁸⁶ Nyenti and Mpedi 2012 *PELJ* 252.

⁴⁸⁷ Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu).

no coordination between social security schemes in the region. This results in migrant workers being prejudiced when it is time to access their duly earned benefits.

The obligations imposed by article 10 on member states to create an enabling environment for every worker in the region to access adequate social protection also plays a vital role in the social security sphere of the region.⁴⁸⁸ This provision states that every worker has a right to adequate social protection and social security benefits. The said provision is also meant for individuals who are unable to find employment and it states that such individuals be provided with necessary social assistance and resources for their subsistence.

In terms of article 10(2) persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance. Nyenti and Mpedi⁴⁸⁹ state that this requirement, namely that people who have been unable to enter or re-enter the labour market be provided with resources and social assistance, may be understood as including social security, health, water and other necessary basic needs adequate for human survival. They further reiterate that this interpretation may be read as requiring every member state in the SADC region to provide basic essentials to each citizen unable to provide himself with such.⁴⁹⁰ It is important to note that the word "persons" in the said article 10 shows no distinction between "citizens and non-citizens", therefore, it can be construed as encompassing migrant workers as well as nationals.⁴⁹¹

The provisions of article 8(a) which affords protection to every employee in the region are even more explicit in that every worker in the region shall enjoy resources affording him or her decent standard of living, including equity in post-employment security schemes at the time of retirement. Article 8(b) further stipulates that in instances where a worker has reached retirement age but does

⁴⁸⁸ Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu). See also Mpedi and Smit *Access to Social Security for Non-Citizens* 38.

⁴⁸⁹ Nyenti and Mpedi 2012 *PELJ* 254.

⁴⁹⁰ Nyenti and Mpedi 2012 *PELJ* 254.

⁴⁹¹ Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu).

not have other means of subsistence and is not entitled to a pension, such a person will be entitled to adequate social assistance to provide for his basic needs, including health care.⁴⁹² Furthermore, it is imperative to note that this provision also does not distinguish between citizens and non-citizens. Moreover, the Social Charter, unlike other ILO conventions, has no independent mechanism that supervises and calls member states to justify any breaches to its provisions.⁴⁹³

2.5.3 *The Code on Social Security in the SADC*

The purpose of the *Code on Social Security in the SADC*⁴⁹⁴ was summarised by Dupper⁴⁹⁵ as providing "SADC and member states with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region".⁴⁹⁶ Perhaps even more important is article 4.1 which explicitly indicates that everyone in the SADC has a right to social security.⁴⁹⁷ The Code further deals with migrant workers explicitly in article 17 and even extends coverage to illegal

⁴⁹² See Mpedi and Smit *Access to Social Security for Non-Citizens* 38. Further provisions are made for people with disabilities under article 9 which states that member states should create an enabling environment for people with disabilities so that such persons shall be additional measures aimed at improving their social and professional integration irrespective of the origin or the nature of their disabilities.

⁴⁹³ Smit "SADC Charter on Fundamental Social rights" 8.

⁴⁹⁴ The Code on Social Security in the SADC (Hereafter-code) was approved in 2007 by the ministers and social development partners and recommended to the Integrated Committee of Ministers for adoption. See Mpedi and Smit *Access to Social Security for Non-Citizens and the portability of social benefits* 39.

⁴⁹⁵ Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu). Article 3 which stipulates the purposes of the code states as thus: Article 3.1 to provide Member States with strategic direction and guidelines in the development and improvement of social security schemes, in order to enhance the welfare of the people of the SADC region. 3.2 To provide SADC and Member States with a set of general principles and minimum standards of social protection, as well as a framework for monitoring at national and regional levels. 3.3 To provide SADC and Member States with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region.

⁴⁹⁶ Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu).

⁴⁹⁷ Article 4.2 thereof goes on to state explicitly that every member state should establish and maintain a system of social security in accordance with the provisions of this Code and Article 10 of the *Charter of Fundamental Social Rights* in SADC. While 4.3 states further that "Every Member State should maintain its social security system at a satisfactory level at least equal to that required for ratification of International Labour Organisation (ILO) *Convention Concerning Minimum Standards of Social Security* No. 102 of 1952. 4.4 Finally states as thus: "Every Member State should progressively raise its system of social security to a higher level, which should include achieving the meaningful coverage of everyone under the system, bearing in mind the realities and level of development in the particular Member State. The essence of this whole was to extend the right to social security to everyone which can also easily be construed as encompassing migrant workers as there was clearly no distinction between citizens and non-citizens.

and undocumented migrants by stating that they should be afforded basic minimum social security coverage in accordance with the laws of the host country.⁴⁹⁸ It is important to note that the Code is of a non-binding nature and only provides guidelines needed for the implementation of social security in the region.⁴⁹⁹

Despite its non-binding nature, another problem is the fact that host countries seem to be given the liberty to deal with irregular migrants in any way they prefer.⁵⁰⁰ The fact that the provision says in accordance with the laws of the host country means that most irregular migrant workers are not afforded even the slightest protection because they are not catered for in the domestic laws of host countries.

This article lists a few core principles and encourages member states to protect lawfully employed migrants by ensuring that such principles are promoted.⁵⁰¹

These core principles are as follows:

- (a) Migrant workers should be able to participate in the social security schemes of the host country;
- (b) Migrant workers should enjoy equal treatment alongside citizens within the social security system of the host country;
- (c) There should be an aggregation of insurance periods and the maintenance of acquired rights and benefits between similar schemes in different member states;
- (d) Member States should ensure the facilitation of exportability of benefits, including the payment of benefits in the host country;
- (e) Member States should identify the applicable law for purposes of the implementation of the above principles;
- (f) Member States should ensure coverage of self-employed migrant workers on the same basis as employed migrants.

This article advocates for the protection of all lawfully employed migrant workers and states that protection through core principles should be advanced by means of national laws and both bi or multilateral agreements between member states.⁵⁰²

⁴⁹⁸ Article 17.3.

⁴⁹⁹ Nyenti and Mpedi 2015 *PELJ* 249-250.

⁵⁰⁰ Article 17(3).

⁵⁰¹ See also Mpedi and Smit Access to Social Security for Non-Citizens 39.

⁵⁰² Article 17.2. This provision lists these principles as follows: a) Migrant workers should be able to participate in the social security schemes of the host country. (b) Migrant workers should enjoy equal treatment alongside citizens within the social security system of the host country.

Most importantly for purposes of this thesis, member states are urged to ensure the exportability of benefits in the host country.⁵⁰³

Article 17 advocates for migrant workers' participation in social security schemes of host countries.⁵⁰⁴ It advances this argument by primarily advocating for equal treatment of migrants and citizens in the social security schemes of host countries and further states that there should be an accumulation and maintenance of acquired rights and benefits and collection of insurance periods in different SADC member states.⁵⁰⁵ It is imperative to note that member states are further encouraged to ensure coverage of self-employed migrant workers on the same scale as employed migrants. Olivier et al⁵⁰⁶ summarises the social security Code as thus:

SADC, for example, has agreed on a Social (Security) Code which touches upon migrants' rights, encourages members to protect their immigrants, gives them equal access to the social security system, and offers at least basic protection to undocumented migrants. Further, member states are encouraged to introduce, by way of national legislation and bi- or multilateral arrangements, cross-border coordination principles, such as maintenance of acquired rights, aggregation of insurance periods, and exportability of benefits. However, the Social Code is not a legally binding agreement and, given the status quo of the welfare systems in SADC, it seems to be more of a wishful thinking.

However, there is a limited range of bilateral agreements on portability and exportability of social security benefits, including pensions.⁵⁰⁷ The above argument advanced by Olivier⁵⁰⁸ illustrates that existing unilateral arrangements together with fragmented institutional establishments in South Africa and its neighbouring countries is entirely insufficient. The advanced premise shows that SADC member states' regulations on social security and portability thereof are essentially not coordinated. What is a reality in SADC is the fact that access to social assistance

(c) There should be an aggregation of insurance periods and the maintenance of acquired rights and benefits between similar schemes in different Member States. (d) Member States should ensure the facilitation of exportability of benefits, including the payment of benefits in the host country.

⁵⁰³ Article 17(b).

⁵⁰⁴ Article 17(a).

⁵⁰⁵ Article 17(c)&(d).

⁵⁰⁶ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁵⁰⁷ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁵⁰⁸ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

or the social pension payable in some countries is not normally available to migrants.⁵⁰⁹ The reality is that in SADC, the principles envisioned by the Code cannot be realized for a number of reasons which include sentiments espoused by Dekker⁵¹⁰ which were as follows:

Regional instruments could be problematic, especially for South Africa, in the SADC context where the social security playing field is uneven. Not all social security systems are equally well developed or the countries economically and politically stable. Before improved regional social security protection can be realised, all parties concerned need to agree on some core values and minimum standards of social protection.

The truth of the matter is that regional instruments are adopted to attain regional integration.⁵¹¹ However, regional integration regarding social security commitments can only be properly achieved in an environment where regional social security systems have equal or similar provisions regarding the level of social security benefits and access thereof. South Africa has a more developed social security system than some of its SADC counterparts, which in this case are Lesotho and Swaziland. The principles espoused in the Code will be hard to realize unless the countries involved come up with some agreements regarding the provisions or social security standards they prioritise. This argument directly addresses the sub-question of the extent to which SADC regional labour law and social security law instruments advance the access to and the portability of social security benefits for circular migrant workers. As already stated the Code is non-binding in nature and can only lay out guidelines that may be followed by countries who realize the need to establish agreements relating to access and portability of social security rights and benefits of migrant workers.

⁵⁰⁹ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁵¹⁰ Dekker 2010 *Mercantile Law Journal* 394. (hereafter *Merc LJ*)

⁵¹¹ See Chapter 1, 1.2.

2.5.4 Draft Policy Framework on Portability of Accrued Social Security Benefits within the Region

At the present moment SADC has what is referred to as the *Draft Policy Framework on Portability of Accrued Social Security Benefits within the Region*.⁵¹² Most importantly, the Framework specifically defines portability as the transfer of accrued social security benefits of an individual beneficiary.⁵¹³ The Framework's importance is further seen in the way it defines all essential social security principles in the enhancement of social security benefits. According to the Framework, harmonisation, which one of the key words important for this thesis is defined as the process of creating common standards across the SADC notwithstanding the fact that each country has a duty to pass laws and regulations that govern social security in their territories or jurisdictions.⁵¹⁴

The objective of the Framework is to facilitate the development of policies and programmes established to progressively enhance adequate and efficient regional coordination of social security systems of all SADC member states.⁵¹⁵ The Framework promotes decent work to all in the region and states clearly in article 3(c) that countries in the SADC do recognise that labour is not a commodity. This clearly shows that the Framework recognises that workers have dignity and the need to be afforded social protection. This provision goes further by stating that decent work and social security contribute immensely to the eradication of poverty and economic development in the region.⁵¹⁶

The Framework outlines guidelines and principles to aid member states in the interpretation and implementation thereof by stating that all matters and issues will be decided upon agreements by such member states.⁵¹⁷ The consensus needed for the implementation and interpretation by member states may be

⁵¹² SADC/ELSM&SP/1/2016/3. (Hereinafter The Framework).

⁵¹³ Section 1(2).

⁵¹⁴ Section 1(2).

⁵¹⁵ Section 2.

⁵¹⁶ Section 3(c).

⁵¹⁷ Section 3(2) (a).

advanced by social security bilateral and multilateral agreements which would aid enormously in reduction of poverty and portability of social security benefits.⁵¹⁸

Section 4 lists objectives of the Framework and starts off by providing for portability of social security benefits. The Framework was established to, among other things to provide mechanisms that would enable workers, to retain their social security rights which they acquired under laws of the member state while moving in and out the region.⁵¹⁹ Another objective is to ensure that all workers within the region enjoy equal rights under the social security laws of SADC member states.⁵²⁰ The Framework further calls for progressive coordination and integration of social security laws by providing a platform that would advance them.⁵²¹ The Framework aims to contribute to the eradication of poverty in the region by improving the standard and livelihood conditions in the region.⁵²² Hence it makes provision for social security which is a means of eradicating poverty.

The fact that the Framework intends to contribute towards the process of preventing discrimination towards non-citizens regarding social security systems and further intends to facilitate harmonisation is undeniably a positive action towards migrant workers accessing their social security rights and benefits.⁵²³ Migrant workers are therefore enabled to access social security benefits even upon their return home. The scope of application of the Framework has also been outlined in section 5 which states that it applies to all social security schemes which include but are not limited to:⁵²⁴

a) retirement benefits;

⁵¹⁸ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>. Deacon, Olivier and Beremauro states that social security agreements' advantage of generating common standards and regulations and therefore avoid discrimination amongst migrants from different countries.

⁵¹⁹ S 4(1) (a).

⁵²⁰ S 4(1) (b).

⁵²¹ S 4(1) (c).

⁵²² S 4(1) (d).

⁵²³ The Preamble of the Framework illustrates that member states are convinced that the Framework will contribute to the process of preventing discrimination of non-citizens in social security systems and facilitate harmonisation thereof.

⁵²⁴ See Par 2.1.4 for a list of all nine branches of social security.

- b) occupational injury and disease benefits;
- c) unemployment insurance;
- d) health insurance; and
- e) survivors' benefits where relevant.

The scope of coverage is adequate for purposes of social security protection in the region. The fact that the provision states that coverage is not only limited to the schemes that are listed, indicates that the scope is very broad. Migrant workers are additionally protected under section 6 which, among others, points out that member states are urged to grant them equal treatment under their own laws as they provide their own citizens.⁵²⁵ This means that migrant workers are to be afforded social security rights in receiving states as well. Protection is also afforded to survivors of a migrant worker who has been subjected to legislations of different states irrespective of whether such survivors are citizens of the host country and reside in a different member state.⁵²⁶ In cases of survivor benefits, the Framework points out that equality of treatment will be guaranteed to survivors of persons who have been subjected to legislations of one or more member states regardless of their nationality or residence.⁵²⁷ The provision guarantees migrant workers' survivors social security benefits regardless of their nationality or residential status. Discrimination on the basis of nationality is therefore, essentially prohibited in this Framework. The Framework states clearly that there shall be no reductions, amendments, suspensions, withdrawals or confiscations on social security benefits on the basis that the beneficiaries reside outside their host country.⁵²⁸ The Framework clearly makes provision for the access to and the portability of social security benefits and rights for migrant workers and their dependents or survivors. However, this Framework is still in draft status therefore it has no impact at this present moment. Nonetheless, it

⁵²⁵ S 6(1).

⁵²⁶ S 6(2).

⁵²⁷ S 6(2).

⁵²⁸ S 6(3) which states as thus: "Benefits payable under the legislation of one or more Member States will not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the primary beneficiary or his/her survivors reside in a Member State other than in which the competent institution responsible for providing benefits is situated."

does address the extent to which SADC regional labour law and social security instruments advance the access to and the portability of social security benefits for circular migrant workers.

2.5.5 SADC Protocol on Employment and Labour

Another important SADC instrument is the *SADC Protocol on Employment and Labour* that was adopted in 2014. When this Protocol was adopted it foresaw the adoption of means to facilitate the coordination and portability of social security benefits.⁵²⁹ This Protocol was adopted to ensure the realisation of minimum labour standards and social protection.⁵³⁰ This shows that the Protocol intends to protect the labour force by affording them labour law protection and even further afford them social protection. The Protocol was further adopted to achieve the promotion of social security, policies, measures and practices that facilitate labour mobility.⁵³¹ Since labour mobility also entails migration of workers this premise can narrowly be construed as meaning that it was adopted to promote social security and practices that ease the migration of workers. This shows that this instrument identifies the importance of labour mobility and migration as a whole. In accordance with Article 2(c) of the Protocol, state parties agree to be guided by the principle that labour is not a commodity together with the fact that decent work and social security can contribute to economic development and poverty eradication. It clearly realises the importance of protecting workers and the latter's contribution towards SADC's economic development. Article 19(f) of this protocol further discusses the portability of social security benefits as thus:

Adopt measures to facilitate the coordination and portability of social security benefits, especially through the adoption of appropriate bilateral and multilateral agreements providing for equality of treatment of non-citizens, aggregate of insurance periods, maintenance of acquired rights of acquired rights and benefits, exportability of benefits and institutional cooperation.

⁵²⁹ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁵³⁰ Article 3(c).

⁵³¹ Article 3(e).

Article 19 also makes provision for the facilitation of remittances by migrants and this is important because circular migration is prevalent in this part of the world.⁵³²

While the Protocol is, in essence, non-binding, there seems to be an intention to create a regime within the SADC community that affords minimum levels of protection to migrant workers regardless of their status.⁵³³ This instrument does, therefore, provide for the access to and the portability of social security benefits for migrant workers.

The SADC Treaty establishes the SADC region but does not seem to be specific enough about issues pertaining to discrimination on the basis of nationality.⁵³⁴ According to article 6(2) of the SADC Treaty, SADC and its member states shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability. However, nothing is said about discrimination on the grounds of citizenship in the SADC Treaty. Regardless of this, the above sub-regional instruments do make provision for access to and the portability of social security rights and benefits. Moreover, they also make provision for harmonisation, integration and coordination of social security schemes in the SADC region. However, there is a severe lack of coordination of social security schemes between SADC member states.⁵³⁵ The next section discusses the shortcomings of international social security instruments in the developing world. This section analyses how these international instruments affect the broader picture of provision for social security rights in general.

2.6 Shortcomings of international standards in the developing world

It is not unknown that many developing countries find it very hard to ratify the International Labour Organisation's labour and social security standards.⁵³⁶ The major problem arises when social security instruments have to be considered for ratification. It has been suggested that many developing countries find it hard to

⁵³² Article 19(g).

⁵³³ Olivier "Social protection for migrant workers from Malawi" 1-5.

⁵³⁴ Olivier "Social protection for migrant workers from Malawi" 1-6.

⁵³⁵ Social security schemes of selected SADC member states will be discussed in chapters 3 and 4 which follow this chapter.

⁵³⁶ Olivier 2013 *IJCLIR* 31.

comply with such conventions and standards, therefore making the observance of such difficult.⁵³⁷ With specific reference to Africa, both the history of colonial governance and the legacy of discrimination have been blamed by many as the sole reason for this inability to comply with international standards.⁵³⁸ In South Africa, for example, the legacy of the marginalisation of the past regime is also to blame as the majority of the population was excluded from actively participating in the growth of the country, this resulted in scant economic growth.⁵³⁹ Olivier explains it as follows:

First, the majority of the population, consisting of Africans, has been simultaneously marginalized and excluded from participation in productive activities. Second, income-generating opportunities have been segregated to one degree or another, with the result that the incidence of under-employment, open unemployment and poverty is unequal and highly skewed against the marginalized majority. Third, the HIV/AIDS epidemic is having grave consequences in all social and economic spheres in all the countries. Finally, the quest for both regional and global integration gives rise to mixed consequences, exacerbating the condition of the poor, the underemployed and the unemployed in urban and rural areas.⁵⁴⁰

This part of the chapter, therefore, discusses the strengths and shortcomings of international labour law and related social security instruments and standards. Emphasis is however placed on the strengths and shortcomings of the International Labour Organisation and its instruments in relation to the development of modern labour law and related social security law and with specific reference to the development of labour and social security law in the developing world.

2.6.1 Social security state and challenges

There had been a long-standing assumption that economic development would lead to an increase in social security coverage in the developing world however,

⁵³⁷ Olivier 2013 *IJCLLIR* 31.

⁵³⁸ Olivier 2013 *IJCLLIR* 23. Olivier states as thus: "There are of course historical and colonial roots of the phenomena referred to in the introduction, with specific reference to Africa. As indicated... the combination of an exclusionary enclave of formal sector-led economic growth and the imperatives of racial discrimination have produced a number of socio-economic outcomes in the region."

⁵³⁹ Olivier 2013 *IJCLLIR* 23.

⁵⁴⁰ Olivier 2013 *IJCLLIR* 23.

reports soon found this premise to be flawed.⁵⁴¹ Majority of people in these parts of the world still lack social security protection because of the growing number of informal employment.⁵⁴²

The quality of employment that one attains plays a pivotal role in the kind of social security protection that one is afforded.⁵⁴³ People in the formal economy are often more likely to obtain contributory benefits while those who cannot afford such benefits can only receive non-contributory benefits upon consideration by the government and social groups.⁵⁴⁴ Governments of developing countries face the challenge of defining which groups of the population outside the realm of social insurance including migrants and migrant workers should be covered by non-contributory social security schemes.⁵⁴⁵ There is also the challenge of implementing and enforcing these social security policies to establish minimum levels of social security coverage for those in need.⁵⁴⁶

Many least developed and developing countries' non-contributory schemes are not adequate to protect those outside the formal employment sector.⁵⁴⁷ This is therefore, one of the main reasons why social insurance remains a huge part of social security for employees in the better part of the world.⁵⁴⁸ The ILO, together with governments, is also faced with the issue of providing adequate social security benefits to employees.⁵⁴⁹

According to this issue of adequacy, social security benefits are considered to have passed the test of adequacy if they are neither too high nor too low.⁵⁵⁰ They are regarded as being too low if people cannot survive on them and too high if they

⁵⁴¹ ILO 2011 <http://www.ilo.org>.

⁵⁴² ILO 2011 <http://www.ilo.org>.

⁵⁴³ ILO 2011 <http://www.ilo.org>.

⁵⁴⁴ ILO 2011 <http://www.ilo.org>.

⁵⁴⁵ ILO 2011 <http://www.ilo.org>.

⁵⁴⁶ ILO 2011 <http://www.ilo.org>.

⁵⁴⁷ ILO 2011 <http://www.ilo.org>.

⁵⁴⁸ ILO 2011 <http://www.ilo.org>.

⁵⁴⁹ ILO 2011 <http://www.ilo.org>.

⁵⁵⁰ ILO 2011 <http://www.ilo.org>.

result in behaviour that is unfavourable to the survival of the scheme or detrimental to the public good.⁵⁵¹

The ILO conventions also set out a number of branches to be implemented upon ratification and these may be considered as adequacy bench marks.⁵⁵² Moreover, ILO instruments like ILO Convention No. 102, for example, set out minimum adequacy standards for social security benefits in each of the branches.⁵⁵³ However, developing countries find it hard to implement these adequacy standards because of the reasons featured below.

2.6.2 The International Monetary Fund

Although the International Labour Organisation plays a very important role in regulating the labour market in developing countries, these countries seek and acquire assistance from international financial institutions like the World Bank, International Monetary fund (hereafter IMF) and regional development banks because of financial crises and their inability to sustain themselves.⁵⁵⁴ The major problem of these financial institutions is the fact that they dictate terms and conditions to developing countries that seem to be more inclined towards economic effectiveness and say little to nothing about labour markets and the provision of social security.⁵⁵⁵ Weiss explains this as follows:

They tend to stress the negative economic effects of minimum wage systems, income support systems, measures restricting free entry and exit from labour markets, collective and centralized collective bargaining as well as of working

⁵⁵¹ ILO 2011 <http://www.ilo.org>.

⁵⁵² See ILO conventions 102 and 118.

⁵⁵³ These branches are as follows: 1. medical care 2. sickness benefit 3. unemployment benefit 4. old-age benefit 5. employment injury benefits 6. family benefit 7. maternity benefit 8. invalidity benefit and; 9. survivors' benefits

⁵⁵⁴ The African Development Bank, Asian Development Bank, the Latin American Development Bank, the Inter-American Development Bank.

⁵⁵⁵ Weiss 2013 *IJCLIR* 7. According to Prasad and Gerecke, "defining total social security spending in line with the International Monetary Fund's (IMF, 2001) definition of social protection, we include sickness and invalidity benefits, maternity allowances, children's or family allowances, unemployment benefits, retirement and survivors' pensions, and death benefits; these can take the form of subsidies, grants, and other social benefits. The data we draw on does not include general education spending, provision of medical goods and services or untargeted labour market programmes." This shows that the IMF pays little regard to the Labour market. Prasad and Gerecke 2010 <http://www.sagepub.co.uk/journalsPermissions.nav>

time restrictions.⁵⁵⁶ However, not only is this view one-dimensional because it focuses exclusively on economic efficiency, but it has also proved to be mistaken, as demonstrated by extensive empirical research.⁵⁵⁷

In fact, Weiss states that these financial institutions together with others who advocate for “labour market deregulation” only point out undesirable effects of regulating the labour market; therefore such countries find it difficult to implement ILO standards.⁵⁵⁸ It is no hidden secret that developing countries seek financial assistance from time to time from financial institutions. However such is normally made available subject to the application of what are termed Structural Adjustment Programmes (hereafter SAPs).

These programmes encompass certain policies and include measures that aim to make labour markets and labour laws more flexible while reducing public spending.⁵⁵⁹ In a nutshell, the main reason for this is the minimisation of public spending. Specific reference is made to other developing countries like Uganda and Tanzania as thus:

In Uganda, the transfer of regulation/control of the National Social Security Fund (NSSF) to the Bank of Uganda from an independent Board answerable to the labour ministry was already in 2002 made a structural performance criterion and benchmark under the 2002/2003 programme. Similarly, in Tanzania, the ongoing reform of the public pension scheme environment has been conducted within the framework of agreements and understandings between the Government of Tanzania and the IMF. The focus of this process related to the financial and economic role of the schemes, including the need to strengthen regulation and supervision and, in particular, granting a regulatory role to the Bank of Tanzania.⁵⁶⁰

Another challenge developing countries in Africa face is consistent government meddling with the social security administration boards, making it very difficult for such boards to achieve their goals.⁵⁶¹ Another big issue is that such governments

⁵⁵⁶ Weiss 2013 *IJCLLIR* 7.

⁵⁵⁷ Weiss 2013 *IJCLLIR* 7-8.

⁵⁵⁸ Weiss 2013 *IJCLLIR* 7. Weiss states that financial institutions are still very powerful and dictate terms to developing countries.

⁵⁵⁹ Olivier 2013 *IJCLLIR* 23.

⁵⁶⁰ Olivier 2013 *IJCLLIR* 24.

⁵⁶¹ Olivier 2013 *IJCLLIR* 26. Olivier states as thus: “There are also considerable challenges facing governments and social security systems in the developing world, particularly in Africa. One of these challenges relates to the inherited institutional design and the resulting governance and management problems. In many African countries, there are clear indications of excessive

usually transfer funds from social security schemes to other schemes, leading to even bigger problems.⁵⁶² This means that those in need are further left to suffer while retirees are left with no means to support themselves. Poverty in these countries further escalates, hence, people's lives never or barely ever improve.

2.6.3 The universality of international labour standards

International labour law standards and other human rights standards have been referred to as the normative source of principles that tend to protect vulnerable groups like migrants from being discriminated against.⁵⁶³ Carney⁵⁶⁴ states that the presence of such standard in social security governance has been deemed weak and therefore, questionable. One of the arguments advanced for why social security rights are feeble related to the manner in which such rights are provided for in other international human rights instruments.⁵⁶⁵ Despite the fact that social security rights are provided for as entitlements in other human rights instruments, the rights are mentioned conditionally when dealing with such rights which need more resources for their provision to be advanced.⁵⁶⁶ Carney⁵⁶⁷ advances this argument as thus:

Social security is identified as an entitlement under several international human rights instruments but along with other so-called 'social' or 'positive' rights such as that to health, it is stated in less precise and more conditional (or 'aspirational') form due to its resource implications than civil and political rights, which are less easily conscribed. For economic and political reasons, social security entitlements are by no means universal in coverage or 'adequate in their levels of income replacement, even in developed countries.

The fact that social security rights are dependent on the availability of resources means that their provision is more conditional than other rights and, therefore,

state intervention or interference. Governments often control the composition and appointment of governing boards, as well as social security administrations, the management of funds and investment decisions."

⁵⁶² Since these are already insurance orientated coverage is already very meagre and does not cover all those who are in need, transferring such lead to even bigger problems.

⁵⁶³ Carney 2010 *AJIC* 29.

⁵⁶⁴ Carney 2010 *AJIC* 29.

⁵⁶⁵ Carney 2010 *AJIC* 29.

⁵⁶⁶ Carney 2010 *AJIC* 29.

⁵⁶⁷ Carney 2010 *AJIC* 29.

cannot be referred to as entitlements as other rights would be. Universal application of social security standards and other ILO standards is weak because different overlapping forces that play a role between labour law, social security and migration.⁵⁶⁸ One of the major reasons is the priorities that countries attach to certain rights.⁵⁶⁹ Another reason why many international instruments and ILO standards have been referred to as tenuous is largely because most member states feel that advancing too many rights to migrant workers will encourage too much migration.⁵⁷⁰

According to Sengenberger,⁵⁷¹ the ILO prefers universal adoption of its instruments for all employees and economic sectors all over the world. This premise has been challenged by many in the legal fraternity as being unachievable for employees in the developing world with due regard being placed on different cultures of such countries.⁵⁷² In disagreeing with this concept of universality, the often-quoted article 19 of the ILO Constitution is frequently brought forth:

In framing any Convention or Recommendation of general application, the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest modifications, if any, which it considers may be required to meet the case of such countries.⁵⁷³

Sengenberger states that those who advance this argument do so by making reference to the *Hours of Work Convention* of 1919⁵⁷⁴ which as he puts it made “special provisions for slower implementation” of the said Convention.⁵⁷⁵ These critics of the principle of universality state that provisions were made for Japan

⁵⁶⁸ Carney 2010 *AJIC* 42.

⁵⁶⁹ History dictates that certain countries put different weight to different rights depending on the history of labour mobility and economic prowess. See Carney 2010 *AJIC* 42.

⁵⁷⁰ Dupper 2007 *SRL* 239.

⁵⁷¹ “Globalization and Social Progress The Role and Impact of International Labour Standards” 36.

⁵⁷² Sengenberger states as follows “The ILO claims universal validity of its normative instruments for all workers and economic sectors worldwide. This postulate has been challenged on the grounds that ILS are unrealisable for parts of the labour force and for less developed countries (as a whole or segments of them), and for countries with particular cultures and traditions.”

⁵⁷³ Sengenberger “Globalization and Social Progress The Role and Impact of International Labour Standards” 49.

⁵⁷⁴ Hours of Work (Industry) Convention No. 1 of 1919.

⁵⁷⁵ Sengenberger “Globalization and Social Progress The Role and Impact of International Labour Standards” 49.

and British India⁵⁷⁶ as it was then called for a different system of the application. It was further stated that the Convention will not apply to China, Persia, or Siam. The reason for this was that "the limitation of hours of work was to be reconsidered at an unspecified later date."⁵⁷⁷ This has been seen as an illustration of how the ILO Conventions refrain from providing unrealistic measures as a whole.⁵⁷⁸

Those who are against universality argue that the ILO should consider the different capabilities of countries before trying to and implement international labour standards.⁵⁷⁹ Sengenberger further states that the ILO should not ignore "local diversity of economic and social conditions." He states that there must be restrictions to divergences from international labour standards, otherwise standards stop being standards.⁵⁸⁰ Another major contention is that the ILO has never given heed to those who think it should neglect the concept of universality, at least to a certain extent, by not permitting any regional standards that could have been more effective than universal application.⁵⁸¹

Research, however, shows that the ILO has not been unreasonable in its international labour standards application; in fact it has exempted certain countries from immediate implementation of conventions or international labour

⁵⁷⁶ According to Article 10 of the Hours of Work Convention: In British India the principle of a sixty-hour week shall be adopted for all workers in the industries at present covered by the factory acts administered by the Government of India, in mines, and in such branches of railway work as shall be specified for this purpose by the competent authority. Any modification of this limitation made by the competent authority shall be subject to the provisions of Articles 6 and 7 of this Convention. In other respects, the provisions of this Convention shall not apply to India, but further provisions limiting the hours of work in India shall be considered at a future meeting of the General Conference." While Article 11 states as thus: "The provisions of this Convention shall not apply to China, Persia, and Siam, but provisions limiting the hours of work in these countries shall be considered at a future meeting of the General Conference."

⁵⁷⁷ Sengenberger "Globalization and Social Progress The Role and Impact of International Labour Standards" 49.

⁵⁷⁸ Sengenberger "Globalization and Social Progress The Role and Impact of International Labour Standards" 49.

⁵⁷⁹ Sengenberger "Globalization and Social Progress The Role and Impact of International Labour Standards" 49.

⁵⁸⁰ Sengenberger "Globalization and Social Progress The Role and Impact of International Labour Standards" 50.

⁵⁸¹ Sengenberger "Globalization and Social Progress The Role and Impact of International Labour Standards" 50

standards.⁵⁸² The exemption of China, Persia or Siam from immediate implementation of the Hours of Work Convention shows that the ILO tolerates ratification of at least some parts of the conventions.⁵⁸³ Sengenberger sees this as a means by which the ILO allows flexibility regarding the implementation of any such conventions. He states that member states are given such permission to account for their differences, especially "socio-economic and cultural" differences.⁵⁸⁴

While advocating for reform, Langille another critic of the principle of universality, states that a shift from the universal to the local, contextual, embedded approach is necessary.⁵⁸⁵ Weiss, on the other hand, states that universality has been part of the ILO for time immemorial. He states that this principle has been constitutionally embedded as part of the ILO policy and cannot, therefore, be dealt with that easily and advances global economy and universality of human rights as some of the major reasons why.⁵⁸⁶ He even goes further and suggests that Langille is attacking a "strawman". His major contention is that the ILO has built regional offices and strives to meet regional specific needs by all means, including tactics of technical cooperation.⁵⁸⁷ However, he finally questions his 'regional offices establishment argument' by pointing out that it is pointless when it comes to standard-setting because the principle of universality will still prevail.⁵⁸⁸ Langille, on the other hand, points out that critics of the principle of universality further attack the ILO's institutional reform approaches. He advances by saying the following:

In the limit, the obsession with comprehensive institutional reform leads to a policy agenda that is hopelessly ambitious and virtually impossible to fulfil. Telling poor countries in Africa or Latin America that they have to set their sights

⁵⁸² Sengenberger "Globalization and Social Progress The Role and Impact of International Labour Standards" 50

⁵⁸³ See article 10 and 11 of the Hours of Work (Industry) Convention No. 1 of 1919.

⁵⁸⁴ Sengenberger uses Convention No. 111 of 1958 which "requires ratifying countries to declare and pursue a national policy designed to promote equality of opportunity in respect of employment and occupation, with a view to eliminating any discrimination" as an illustration of the flexibility of the ILO Conventions.

⁵⁸⁵ Langille 2010 *Comp.Lab.L. & Pol'y* J 542. See also Weiss 2013 *IJCLLIR* 12.

⁵⁸⁶ Weiss 2013 *IJCLLIR* 12.

⁵⁸⁷ Weiss 2013 *IJCLLIR* 12.

⁵⁸⁸ Weiss 2013 *IJCLLIR* 13.

on the best-practice institutions of the United States or Sweden is like telling them that the only way to develop is to become developed-hardly useful policy advice!⁵⁸⁹

He further states that the above critical sentiments are very wise as they are “informed by years of observation and thinking and draws some very interesting conclusions from this principle of universality. He clearly seems to be of the opinion that they raise valid points and further sees the above sentiments as leading to “comprehensive programmes of reform”.⁵⁹⁰ According to Langille, this principle of universality and institutional reform has left a sense that “the only way to be developed is to become developed” in developing countries.⁵⁹¹ There is indeed universality in the application of ILO instruments, especially ones dealing with social security standards like the *ILO Convention 102*, which sets out minimum adequacy standards for social security benefits in each of the branches.⁵⁹² This Convention makes ratification easier by permitting states parties to provide at least three of these branches of social security upon ratification. This means that the ILO has at least tried to become more lenient in its requirements pertaining to the implementation of social security standards. However, this has not improved the ratification and implementation of this social security instrument

⁵⁸⁹ Langille 2010 *Comp.Lab.L. & Pol'y J* 530.

⁵⁹⁰ Langille discusses one of the critics who advocated for reform and states that he had listed the points of reform as follows:

A. In how we express what we stand for: A shift from a detailed set of rules/a recipe to principles.

B. In our understanding of the scope and level of reform: A shift from the universal to the local/contextual/embedded.

C. In our view of the source of change: A shift from top-down to bottom-up, from externally imposed to internally generated, from supply to demand.

D. Regarding the pace of change: A shift from "all at once" to "a few things at a time."

E. In the framing of the task at hand: A shift from grand solutions to removing concrete identifiable roadblocks. However, Trebilcock criticises this view by Langille and states as follows:

“This characterization misunderstands where ILO standards come from and how they are developed. It also exaggerates the extent of detail in many Conventions and ignores the availability of flexibility devices. Most disturbingly, Langille's argument may ultimately question the very idea of the universality of human rights and the imperative of their effective enforcement for enabling the human freedom he extols to spread its wings and fly.”

Trebilcock 2010 *Comp.Lab.L. & Pol'y J* 554.

⁵⁹¹ Langille 2010 *Comp.Lab.L. & Pol'y J* 530.

⁵⁹² These branches are as follows: 1. medical care 2. sickness benefit 3. unemployment benefit 4. old-age benefit 5. employment injury benefit 6. family benefit 7. maternity benefit 8. invalidity benefit and; 9. survivors' benefits

and others of a similar nature. One reason for this lack of ratification and implementation may be the resource implication nature of this right. Consequently, the ratification and even implementation is still a major problem in developing countries and this can easily be attributed to universality nature of these instruments.

The principle of universality is not exactly flawed in general, the major problem is that principles of the developed world cannot and will not be as effective if they are applied in the developing world. This is so because there are a lot of issues connected to the issue of universality, especially in the social security arena. Weiss points out that “conventions tend to be inspired by patterns of industrialized states that turn out to be fairly irrelevant for developing countries.”⁵⁹³ These Conventions pay attention to the formal sector and say little to nothing about the informal sector. The other issue that arises is mainly related to the enforcement of social security and labour standards as a whole. As Olivier puts it, much attention is paid on compliance and obedience with the standards that are set by the ILO, and little is paid to developing countries’ individual capability to comply with such standards.⁵⁹⁴ He further states that even less attention is placed on such countries’ capacity to “progressively realise” such measures.⁵⁹⁵

2.6.4 Ratification as a challenge

Although it has been evident that an act of ratification by itself does not necessarily mean that a state will comply with any such ratified instrument, Sengenberger also adds that people should be cautious and refrain from assuming that mere ratification of ILO Conventions is a reflection of “observance of standards at

⁵⁹³ Weiss 2013 *IJCLIR* 13.

⁵⁹⁴ Olivier 2013 *IJCLIR* 36.

⁵⁹⁵ Olivier 2013 *IJCLIR* 36. Olivier draws a distinction from the United Nations human rights instruments as a whole which tend to allow progressive realisation of Conventions. He states as thus: “This is unlike the position with supervision under some UN human rights instruments – where the approach appears to be to bear in mind the particular level of socio-economic development and the state of labour law, the labour market and social security of a particular country, as well as its fiscal ability. In fact, this approach is supported by the general orientation towards compliance appearing from the International Covenant on Economic, Social and Cultural Rights: in terms of Article 2(1) it is expected of ratifying countries to guarantee a minimum core of the rights enshrined in the Covenant and to progressively achieve their full realization.”

national level.”⁵⁹⁶ Development of states has been cited as one of the major culprits hindering the adherence to ratified international instruments.⁵⁹⁷–However, the importance of an act of ratification cannot be ignored or denied as this shows the inclination of the ratifying countries to implement ILO standards or other “international law minimum standards and provides the opportunity for external monitoring.”⁵⁹⁸ Moreover, certain countries have been seen to ratify ILO conventions at very different levels, while some countries wait until they have stabilised their national labour conditions, as Sengenberger puts it “making ratification more or less a symbolic act”. Others simply ratify right away without any further compliance.⁵⁹⁹ Nonetheless, the ratification of social security conventions by developing countries has surprisingly been very slow. In fact, when compared to the ratification of other labour law conventions, the rate has been described as “alarmingly low”.⁶⁰⁰

Furthermore, Langille has criticised the ILO conventions on social security and other conventions as being too detailed and suggested that the ILO should consider turning these in-to principles.⁶⁰¹ He blames these “detailed rules” for the low ratification rate in developing countries and Weiss believes that the ILO should heed these suggestions.⁶⁰² Moreover, Weiss cites the low ratification rate of *Convention on Minimum Standards on Social Security* 102 of 1952 as an example.⁶⁰³ Clearly, there are reasons for this low ratification rate and he suggests that developing states may fear that they might not be able to comply with such social security standards because the core labour law conventions’ ratification is

⁵⁹⁶ Sengenberger “Globalization and Social Progress The Role and Impact of International Labour Standards” 50.

⁵⁹⁷ Olivier 2013 *IJLLIR* 27.

⁵⁹⁸ Olivier 2013 *IJLLIR* 30.

⁵⁹⁹ Sengenberger “Globalization and Social Progress The Role and Impact of International Labour Standards” 50.

⁶⁰⁰ Olivier 2013 *IJLLIR* 30.

⁶⁰¹ Weiss 2013 *IJLLIR* 13.

⁶⁰² Weiss 2013 *IJLLIR* 13. Weiss states as follows: “Whether conventions are too detailed and whether it would be better in many cases to substitute detailed rules by mere principles deserves attention. The lack of sufficient ratification may well be implied by rules that are too detailed.”

⁶⁰³ Weiss 2013 *IJLLIR* 13.

very high compared to the former conventions on social security.⁶⁰⁴ The other reason might be the notion that international labour standards “distort labour market”; however, such standards are essential for the protection of employees against the harm they would face from businesses competing for economic gain.⁶⁰⁵ Some critics contend that such standards hinder economic growth. Sengenberger points out the following:

In contrast, the neo-classical formulation of economic theory leaves no doubt that unrestricted competition, unfettered market forces, and a purely market-determined income distribution necessarily create the best economic results, including employment and work. ILS would distort the market mechanism, and prevent it from delivering optimal outcomes.⁶⁰⁶

It has also been suggested that international labour standards are too costly. Those who raise this issue suggest that they are detrimental to the economy since they “raise the cost of production and squeeze firms out of the market.”⁶⁰⁷ This has also become one of the greatest hindrances to the process of ratification and is also one of the major reasons for the lack of social security bilateral and multilateral agreements within the SADC region. A lack of ratification of social security standards has also played a major role in the lack of portability of social security benefits for migrant workers in the SADC region. It is, therefore, important for the ILO to re-strategise in order to afford developing countries a realistic opportunity to implement such conventions.

Although the reality is that ratification and implementation of international, regional and sub-regional social security standards are very slow in the SADC region there are some positives aspects to this, especially the Draft Policy Framework on Portability of Accrued Social Security Benefits within the region which is a step in the right direction and will definitely advance the process of the

⁶⁰⁴ Weiss 2013 *The IJLLIR* 13.

⁶⁰⁵ Sengenberger “Globalization and Social Progress The Role and Impact of International Labour Standards” 44.

⁶⁰⁶ Sengenberger “Globalization and Social Progress The Role and Impact of International Labour Standards” 44.

⁶⁰⁷ Sengenberger “Globalization and Social Progress The Role and Impact of International Labour Standards” 47.

portability of social security benefits upon ratification and implementation by SADC member states.

2.6.5 Social security and the informal economy

The world of employment is a constantly evolving sphere of everyday life and is what the author would like to refer to as an ongoing process, more so because of the daily economic changes in people's lives. According to Lund, workplaces require constant scrutiny and regulation because they are a source of vulnerability, ill-health and frailty for poor and unqualified employees.⁶⁰⁸ Although the informal economy is growing rapidly the world over, the ILO, as important a role it has played in regulating the employment sphere, has neglected to regulate this informal environment by providing for social security for such employees.⁶⁰⁹ Weiss, on the other hand, states that the ILO has been aware of the difficulties facing the informal economy and has tried to address such issues. However, he points out that the approach adopted by the ILO seems to be trying to transform the informal sector into a formal one.⁶¹⁰ He expresses this as thus:

As already indicated above, for some time now the ILO has been aware of the informal sector as an area to be addressed. However, the idea behind the ILO's approach still seems to be to transform the informal sector into a formal one: a futile attempt given the size of the informal sector and the strong traditional perceptions of labour markets in developing countries. Neither the existing conventions nor the decent work agenda meet the needs of the informal sector.⁶¹¹

Within the informal sector, the problems pointed out include the high risks associated with it and a lack of social protection coverage.⁶¹² Langille is also very vocal about the issues surrounding this employment sphere. As seen with Weiss, Langille also criticises "the ILO's approach for being a 'we know what is good for you system'."⁶¹³ Both Langille and Weiss argue that the ILO dictates terms to countries giving an impression that they, the ILO, knows exactly what is good for

⁶⁰⁸ Lund 2012 *International Social Security Review* 9. (hereafter- Int Soc Secur Rev)

⁶⁰⁹ Lund 2012 Int Soc Secur Rev 9.

⁶¹⁰ Lund 2012 Int Soc Secur Rev 9.

⁶¹¹ Weiss 2013 *IJCLLIR* 13.

⁶¹² Lund 2012 *Int Soc Secur Rev* 9.

⁶¹³ Weiss 2013 *The IJCLLIR* 13.

them without looking at the core of these countries economic sectors' issues. The criticism here is that this approach intents to the informal economy into a formal one.⁶¹⁴

Contrary to this statement, another scholar Trebilcock⁶¹⁵ is firmly against Langille's sentiments and reflects on how the ILO has assisted member states by directly attacking Langille's arguments. According to Trebilcock, the procedure of establishing labour standards provides governments and social partners many opportunities to influence their contents. He stated this as thus:

International labour standards emerge from a concern that global action is needed to tackle a problem. Rather than being "visited upon States by a dedicated agency" (to use Langille's phrase), ILO standards emerge in a process that involves these States at all stages. In the tripartite context of the ILO, the term "member states" encompasses the representatives of employers and workers, who alongside those of government take the decisions about which items will be considered for possible standard-setting.⁶¹⁶

However, the fact is that a high percentage of the world is moving towards working in the informal sector and their exclusion from social protection spheres is evident and cannot be denied. Lund explains this and the wide range of the informal sector in the following manner:

These may be vendors working on streets and in public parks, industrial outworkers and professional consultants operating from their own private homes, or waste workers taking their pickings from the streets or from publicly- or privately-owned waste dumps. Whether self-employed or waged workers, they are generally excluded from social protection programmes designed for "vulnerable groups", as they are working-age adults. They are also not covered by social security programmes for work-related disease or injury. Their places of work are not regulated by conventional occupational health and safety regulations.⁶¹⁷

Research has indicated that this change, has been taking place in the last few years as more and more countries have realised the contribution of the informal sector to their economy.⁶¹⁸ Lund states that there has been a realisation of a role developing countries can play in the social security sphere. He goes on to add that

⁶¹⁴ Weiss 2013 *The IJCLLIR* 13.

⁶¹⁵ Trebilcock 2010 *Comp.Lab.L. & Pol'y J* 554.

⁶¹⁶ Trebilcock 2010 *Comp.Lab.L. & Pol'y J* 554.

⁶¹⁷ Lund 2012 *Int Soc Secur Rev* 10.

⁶¹⁸ Lund 2012 *Int Soc Secur Rev* 10.

investing in social security has been seen as a way developing countries can further enhance their development.⁶¹⁹ Despite the catalytic role that may be played by social security, informal workers are still not afforded social security benefits as employees.⁶²⁰ The informal sector employees also need to be afforded a wide range of benefits ranging from retirement funding or pension benefits to other health and safety measures because of their sometimes risky employment.⁶²¹

Another issue that has been raised is the “insurance-orientated” nature of the coverage. Olivier states that these developments and characteristics of the schemes mean that the focus is placed on employees in the formal employment sphere.⁶²² Social insurance laws are still confined to the long-established employer-employee relationship and their cover tends to be constricted, leaving the most vulnerable without adequate social security coverage.⁶²³ This is because generally social insurance coverage requires both employers and employees to contribute towards coverage of employees.

Another concern the ILO should consider is an indisputable fact that the world of employment is consistently changing, with this in mind, it would be pertinent that social security coverage is extended beyond, the boundaries of the normal employer-employee relationship. Olivier explains this as follows:

Another challenge concerns the restricted scope of social security schemes in developing countries. Bearing in mind recent developments, many social security schemes in developing countries are insurance-oriented and focus on those people who are employed in the formal sector. This is mainly informed by the legal regime. Unlike labour laws, which in a growing range of developing countries have extended their reach at least to some extent beyond the confines of the traditional employment relationship, social insurance laws are usually still predicated on the existence of an employer-employee relationship. Social

⁶¹⁹ Lund 2012 *Int Soc Secur Rev* 10.

⁶²⁰ The only social security benefits that such employees get are the ones that are entitled to the public in general and not their status as employees. See Lund at 10.

⁶²¹ According to Lund informal employees also need coverage which “pertains to provisions such as access to health insurance, to savings for retirement, and to on-the-job training. It also pertains to health and safety measures at the workplace, and to protection against hazards deriving from the nature of the workplace and production processes.” Lund 2012 *Int Soc Secur Rev* 10.

⁶²² Olivier 2013 *IJCLLIR* 27.

⁶²³ Olivier 2013 *IJCLLIR* 27.

insurance cover therefore tends to be narrow, leaving the most vulnerable, in particular those in rural areas, without any form of social protection.⁶²⁴

Developing countries are faced with a number of challenges especially when it comes to implementing and enforcing labour and social security standards. These challenges also encompass identifying classes of people outside the sphere of social insurance such as migrant workers to be covered by non-contributory social security schemes.-Developing countries' inability to sustain themselves means that they normally acquire assistance from financial institutions which normally dictate terms and conditions that neglect the provision of social security. The other challenge stems from the fact that international labour standards' application seem to be universal in nature making it difficult for developing countries to implement them. Since it is proven that most developing countries find it hard to apply and implement these labour and social security standards, it goes without saying that country-specific arrangements will go a long way in the implementation of these standards. The next part of the research discusses challenges impacting on international and regional standards on social security adjudication. The discussion will focus on measures of redress in instances where social security disputes arise.

2.7 Challenges impacting on international and regional standards on social security adjudication

In instances where disputes arise, courts of law play a vital role in providing overall social security protection to migrant workers and citizens overall.⁶²⁵ It is their policies and legislations that play an important role in the incorporation of social security systems of host countries.⁶²⁶ While dealing with the portability of social security benefits, it is important to look at how migrant workers can get redress when they are not being granted their hard-earned social security benefits. Adjudication of social security benefits is, therefore, very important in trying to advance efficient portability of social security benefits. Furthermore, it is

⁶²⁴ Olivier 2013 *IJCLLIR* 27.

⁶²⁵ Olivier 2013 *IJCLLIR* 27.

⁶²⁶ Olivier 2013 *IJCLLIR* 27.

it is important to note that international law plays an important role in the development of social security adjudication systems, regionally, sub-regionally and domestically.⁶²⁷ Nyenti⁶²⁸ explains this importance by stating that it must be considered in the development of the adjudication systems because it acts as a benchmark for the evaluation of domestic adjudication frameworks.

However, the ILO conventions and the standards thereof are very limited and do not contain all the principles that are now considered as inherent and essential to the social security adjudication of disputes.⁶²⁹ The right to lodge a complaint and appeal in social security matters is fundamentally to make sure that there is compliance and effective implementation of those insured.⁶³⁰ The *ILO Conventions* 102 and 168 both provide for the right to lodge an appeal. Article 70(1) of *ILO Convention* 102 states that every claimant has a right to appeal matters that relate to such a claimant being denied his benefits or in instances where such a claimant has a query relating to quantity or quality of the said benefits. The Convention also permits a member state to appoint an appropriate authority to conduct investigations relating to the refusal of medical care or quality of care received by the claimant and states that such investigations may replace the right to appeal.⁶³¹ While investigations carried on by the appropriate authority might be seen as necessary for the speedy provision of the benefit, the provision seems to place the prerogative with the states to whether or not the claimant could appeal matters of this nature. Therefore, the power is stripped from the courts. Article 70(1) specifically states that upon a claim being settled by a special tribunal being appointed to deal with social security matters, no appeal shall be required. However, this provision seems to disregard the power of appealing matters that are settled by lower courts or tribunals as it were.

⁶²⁷ Nyenti "Reforming the South African Social Security Adjudication System: The Role and Impact of International and Regional Standards" 288.

⁶²⁸ Nyenti "Reforming the South African Social Security Adjudication System: The Role and Impact of International and Regional Standards" 288.

⁶²⁹ Olivier 2013 *IJCLIR* 39.

⁶³⁰ ILO Social Security and the Rule of Law 165.

⁶³¹ Article 70(2).

On the other hand, *Convention 168*⁶³² provides for the right to appeal by stating that in scenarios where the claimant has been denied a benefit or such a benefit has been withdrawn or reduced, any dispute regarding the amount may be presented to the body administering the benefit scheme and, thereafter, to an appeal by an independent body.⁶³³ Most importantly, however, the provision points out the need for the procedure to be simple and rapid.⁶³⁴ The Convention further insists that the appeal procedure allows the claimant to get professional representation from qualified persons in accordance with national laws.⁶³⁵ Access to justice has been provided for in a number of international and regional instruments.⁶³⁶ This right to justice may be seen in conventions such as *the ILO Employment Promotion and Protection against Unemployment Convention*,⁶³⁷ *the ILO Social Security (Minimum Standards) Convention*,⁶³⁸ *African Charter of Human and Peoples' Rights*,⁶³⁹ *International Covenant on Civil and Political Rights* and *the Code on Social Security in the SADC*.⁶⁴⁰

According to the *ILO Employment Promotion and Protection against Unemployment Convention*, when a dispute concerning a withdrawal, refusal or reduction of a benefit arises, such people who have a claim have a right to present their claim to the body administering the benefit scheme.⁶⁴¹ The claimant also has a right to appeal to an independent body.⁶⁴² The *International Covenant on Civil and Political Rights*, on the other hand, obliges member states party to the Covenant to ensure that anyone whose rights or freedoms are violated be granted an effective remedy notwithstanding the fact that the violation has been committed by persons who act in an official capacity.⁶⁴³ Article 2(3)(a) and (b) makes it mandatory for countries party to the covenant to ensure that any person

⁶³² Employment Promotion and Protection against Unemployment Convention, 1988

⁶³³ Article 27(1).

⁶³⁴ Article 27(1).

⁶³⁵ Article 27(2).

⁶³⁶ Nyenti *Developing an Appropriate Adjudicative* 96.

⁶³⁷ Entered into force on the 17th October 1991 and adopted in 1988.

⁶³⁸ 102 of 1952.

⁶³⁹ Adopted in 1981 and came into force in 1986.

⁶⁴⁰ This Convention was adopted in 1966 and finally entered into force in 1976.

⁶⁴¹ Article 27.

⁶⁴² Article 27(1).

⁶⁴³ Article 2(3).

claiming such a remedy has a right determined by a competent judicial, administrative or legislative competent authority provided for by the laws of the state. The said state also has to make sure that the mentioned competent authority enforces such remedies when such are being granted. The covenant's provisions of the right to justice do not end here.

The Covenant makes it very clear that everyone has a right to equal protection before courts of law and other tribunals.⁶⁴⁴ It continues by stating that, in determining a person's rights, he or she shall be entitled to a fair and just public hearing by a competent independent and impartial tribunal established by law.⁶⁴⁵ According to this provision, a right to a fair and just public hearing shall be granted to those whose rights have been violated. Portability of social security benefits is a right for those who contributed to such social security schemes. Hence those who are denied their duly deserved social security benefits upon their return home ought to be provided with the right redress by being afforded a fair and just public hearing.

The Committee on Civil and Political Rights⁶⁴⁶ has also indicated that public authorities should refrain from prejudging the outcome of a trial.⁶⁴⁷ In accordance with the Committee, access to justice in the Covenant is aimed at making sure that there is the proper administration of justice, together with upholding a series of rights such as equality before the courts of law and tribunals, the right to a fair and just public hearing by a competent, impartial and independent tribunal legally established and equality before the law.⁶⁴⁸

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*⁶⁴⁹ makes it very clear that migrant workers and their family members have equal rights as citizens of the said state

⁶⁴⁴ Article 14(1).

⁶⁴⁵ Article 14(1)

⁶⁴⁶ Hereinafter-the Committee.

⁶⁴⁷ *Michael Freemantle v Jamaica*, Communication No. 625/1995. See also United Nations Report of the Human Rights Committee, General Assembly Official Records Fifty-fifth Session Supplement No. 40 (A/55/40).

⁶⁴⁸ Nyenti *Developing an Appropriate Adjudicative* 96.

⁶⁴⁹ This was adopted by General Assembly Resolution 45/158 of 18 December 1990.

before courts or tribunals while determining any rights and obligations in a law suit.⁶⁵⁰ The *Convention on the Elimination of Discrimination against Women* (or CEDAW) also makes it very clear that women may not be subjected to any discrimination while appearing before the law.⁶⁵¹

The Preamble of the *African Charter of Human and Peoples' Rights*,⁶⁵² states undoubtedly that the *African Charter* does recognise the right to justice by specifically pointing out that every person has a right to be heard and can appeal any rights violations to a competent court or tribunal.⁶⁵³—The African Charter, in essence, makes provision for and encourages member states to enact guidelines and principles specifically dealing with the right to a fair trial and legal assistance in general.⁶⁵⁴ Instruments like the *Kigali Declaration of 2003*⁶⁵⁵ and the *Grand Bay Declaration and Plan of Action*⁶⁵⁶ present very bold explanations of what the right to fair and just public hearing by a legally competent, independent and impartial judicial body while determining an individual's rights actually entails.⁶⁵⁷ Interpretations also entail state obligations, especially their nature and scope.⁶⁵⁸

The SADC region, as previously indicated, has in place the *Code of Social Security in the SADC* and this has made specific provision for social security adjudication through article 21.2(b) which explicitly states that members of the SADC should

⁶⁵⁰ Article 18(1).

⁶⁵¹ Nyenti *Developing an Appropriate Adjudicative* 96.

⁶⁵² *African Charter on Human and Peoples' Rights* adopted in June 27, 1981 and came into force in October 21, 1986.

⁶⁵³ Article 1(b).

⁶⁵⁴ Nyenti *Developing an Appropriate Adjudicative* 96.

⁶⁵⁵ Declaration of the 1st African Union (AU) Ministerial Conference on Human Rights in Africa meeting on 8 May 2003 in Kigali, Rwanda. See also Nyenti *Developing an Appropriate Adjudicative* 98. The declaration is said to have been passed to endorse the *Grand Bay Declaration* and calls on states parties to support African human rights initiatives. See Nmehielle Date Unknown <http://www.wcl.american>.

⁶⁵⁶ Declaration and Plan of Action of the First OAU Ministerial Conference on Human Rights, meeting from 12 to 16 April 1999 in Grand Bay, Mauritius. See also Nyenti *Developing an Appropriate Adjudicative* 98.

⁶⁵⁷ Nyenti *Developing an Appropriate Adjudicative* 98. See also *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003. Section A (1) state that: "In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body."

⁶⁵⁸ Section A (1).

make an effort to establish proper administrative and regulatory frameworks for purposes of ensuring delivery of social security benefits through access to independent adjudication institutions empowered to resolve social security disputes. The provision further states that member states should make sure that everyone has access to these institutions and that such should be available to such claimants inexpensively, expeditiously and with minimum legal requirements.⁶⁵⁹ Moreover, it is important to make reference to the *SADC Treaty* that referred to the establishment of social security tribunal which has since been suspended.⁶⁶⁰ As already indicated, adjudication of social security is essential and will definitely enhance the portability of social security benefits upon disputes arising when such have to be distributed to the rightful beneficiaries.

Despite the suspension of the SADC tribunal, the one major problem facing adjudication of social security benefit is a lack of independence in SADC member states.⁶⁶¹ Adjudication forums of social security in various SADC member states are made up of people appointed by political delegates of various departments that deal with or that are responsible for social security departments that select members of the adjudication forums.⁶⁶² Olivier⁶⁶³ also points out that such appointers also fund and even take over disciplinary procedures relating to forum members. What is needed in the SADC region is a "supra-natural authority" that would deal with enforcement, standard-setting and effective establishment of appropriate social security principles.⁶⁶⁴ Further challenges faced by individual SADC member states and their constitutions while trying to adjudicate social security are dealt with in the coming chapters.

⁶⁵⁹ Article 21.1(b).

⁶⁶⁰ Erusmas 2011 *SADCLJ* 29.

⁶⁶¹ Olivier 2011 *International Journal of Social Security and Workers Compensation* 46. (hereafter *IJSSWC*)

⁶⁶² Olivier 2011 *IJSSWC* 46.

⁶⁶³ Olivier 2011 *IJSSWC* 46.

⁶⁶⁴ Olivier "International and Regional Social Security Standards" 69.

2.8 Conclusions

The primary aim of this chapter is to discuss international and regional standards on migration, labour rights, social security rights and portability of social security benefits. The intention here was to analyse the extent to which both international and regional labour law and social security law instruments advance access and the portability of social security benefits for circular migrant workers. The chapter commenced with a discussion of ILO standards on social security which highlighted provision for social security rights and even set out clear global minimum standards for the provision of these rights. These standards further make provision for equal treatment between nationals and non-nationals, especially with regard to contributory social security schemes. Even so, they still have a very strong insurance focus as they envision general taxation and insurance as a source of social security rights and benefits. Consequently this means that while migrants are permitted to access to social security rights and schemes in their host countries in accordance with these standards migrant workers, specifically, are denied non-contributory social security benefits in their host countries. In addition, there is simply no provision for the portability of social security benefits for migrant workers upon their return home in terms of these standards.

However, in contrast to this, the ILO standards on social security rights of migrant workers do make provision for social security rights and access thereof for migrant workers. This is done by providing for equal treatment between national and non-nationals in the provision of social security rights. These standards also make provision for the portability of social security benefits for migrant workers, while some go further to even illustrate the need to set up guidelines for the establishment of bilateral and multilateral agreements on social security agreements which would aid this process of portability. Moreover, the principle of asymmetrical reciprocity seems to play a vital role in these standards. This principle in essence advocates for reciprocal application of international social security law instruments between contracting or ratifying member states.

This chapter further observed that certain UN instruments do provide for access to social security rights for migrant workers. Although some of these instruments such as the CRC do not expressly provide for the right to social security but instead make mention of the equality of treatment between nationals and non-nationals in the provision of human rights, the rest do make provision for social security rights. Moreover, as already discussed, these UN instruments mention the need to establish multilateral and bilateral social security agreements and actually go so far as to provide for portability of social security benefits for migrant workers.

In contrast, some AU instruments do not expressly make provision for access to social security benefits for migrant workers while others do. For example, the *African Charter* only provides for social protection and does not generally mention migrant workers' social security rights. The other AU instruments also provide for social security rights for migrants by only providing for equality between nationals and non-nationals in the provision of such rights, as already indicated. Those that do recognise migrants like the SPF, only mention the importance of migration and do not necessarily provide for portability of social security benefits. On the other hand, the *Ouagadougou Declaration and Plan of Action* makes provision for access to social security rights for migrant workers, it does not address the interrelated issue of portability. The access to and the portability of social security rights and benefits are only provided for in the *AU Migration Policy Framework for Africa* although it only does this by calling for the incorporation of international instruments.

SADC social security instruments on the other do provide for the access to and portability of social security rights and benefits for migrant workers. Nonetheless, these instruments also make provision for harmonisation, integration and coordination of social security schemes in the region. Furthermore, there is severe lack of coordination of social security schemes between SADC member states with the result that these instruments do provide for access to and portability of social security rights and benefits to a limited extent.

It was noted that developing countries face certain challenges in terms of the provision of social security rights. These include the fact that such countries normally seek assistance from global financial institutions which normally set out conditions on how such finances should be used, making it hard for such countries to provide for social protection. Another issue that was further examined was the issue of universality of international labour standards. While some scholars argue that this principle makes it difficult for developing countries to implement such standards, some scholars argue that these standards make flexible exceptions for the benefit of developing countries. Further challenges include the lack of ratification of such standards, making it difficult for access and portability of social security rights and benefits. The fact that some of these standards are insurance-focused was also identified as a challenge for these countries. The argument here is that such standards seem to ignore the fact that the informal economy is constantly evolving and, therefore, needs regulations especially from a social security point of view. Challenges impacting international and regional standards on social security adjudication systems were also discussed and it was observed that more has to be done when workers seek redress regarding their social security rights and benefits.

The next chapter discusses access to social security rights of migrant workers in South Africa, as the biggest migrant receiving country in the-SADC region.

CHAPTER THREE: ACCESS TO SOCIAL SECURITY RIGHTS OF MIGRANT LABOURERS IN SOUTH AFRICA

3.1 Introduction

In 2008, when South Africa was suddenly hit by a series of xenophobic attacks, the SADC region was shocked and thought it would eventually pass. However, this has not been the case. In fact, these attacks have become a norm of late and show just how vulnerable migrant workers are in South Africa.⁶⁶⁵ South Africa is the largest migrant-receiving country in Southern Africa, however, unemployment has escalated while social security benefits are limited. It is these scarce resources that have been the source of many quarrels between nationals and non-nationals in South Africa.⁶⁶⁶ Poverty in the developing worlds, especially in the SADC together with an increase in labour demands, has made sure that immigration tensions remain on a constant high.⁶⁶⁷ As a result of all this, South Africa has put in place immigration policies and legislations intended to control the flow of migrants in and out of its territory.⁶⁶⁸ Regardless of these immigration policies does heed the fact that in the promotion of the economy there is a need to accept foreigners into its labour market. These foreigners who pay their dues and also contribute to the social security sphere while living and working in South Africa deserve their earnings, which include social security benefits when their tenure in South Africa ends. The purpose of this chapter, therefore, is to discuss both the immigration and social security laws of South Africa as the largest migrant-receiving country in Southern Africa. It critically discusses the social security laws of South Africa. It starts with a discussion of the history of migration and its movement thereof in South Africa after which it then moves on to discuss the general overview of the immigration policies in the country. A historical background of social security in South Africa is also added before a general discussion of social security in South Africa takes centre stage. The role of the

⁶⁶⁵ Dekker 2010 *SAMercLJ* 388.

⁶⁶⁶ Dekker 2010 *SAMercLJ* 388.

⁶⁶⁷ Olivier "Labour rights and social protection of migrant workers" 6.

⁶⁶⁸ Olivier "Labour rights and social protection of migrant workers" 6.

Constitution in the provision of social security rights and benefits is then explored and includes a thorough discussion of the decisions of the courts, especially those of the Constitutional Court that led to the development of social security and socio-economic rights as a whole to provide a clear picture of why the portability of social security rights is especially important in this region. Lastly, other dispute resolution mechanisms of social security rights are examined to illustrate how they impact the portability of social security benefits of migrant workers.

3.2 Migration movements in South Africa

The number of migrants flocking to South Africa has undeniably increased over the decades, especially after the first democratic elections in 1994.⁶⁶⁹ Migrant workers were predominantly from neighbouring countries which comprised of Lesotho, Swaziland, Botswana, Mozambique and Zimbabwe.⁶⁷⁰ However, as years went by, migrants from Nigeria, Kenya and the Democratic Republic of Congo also started moving to South Africa.⁶⁷¹ It is, therefore, important to note that labour movements in the entire Southern Africa region date back to pre-colonial times when people moved along the region in search of various places to work.

These migrant workers found employment in various sectors, according to Kitimbo,⁶⁷² Mozambicans worked as seasonal workers in the Western Cape while the Cape colony was a destination for most Basotho, Tsonga and Peli males who travelled to this part of the region in search for seasonal farm work and public work in order to be able to buy arms.⁶⁷³ In addition to this, the discovery of gold and diamond in South Africa in the nineteenth century together with the industrialisation that eventually ensued was a magnet to further migrant workers from neighbouring Southern African countries.⁶⁷⁴ Other main attractions in the region were the farms in the Orange Free State that lured Basotho migrants from

⁶⁶⁹ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>

⁶⁷⁰ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>

⁶⁷¹ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>

⁶⁷² Kitimbo 2014 Discussion Paper

⁶⁷³ Kitimbo 2014 Discussion Paper.

⁶⁷⁴ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>

the then Basutoland.⁶⁷⁵ The need to buy agricultural implements, guns and the necessity of paying dowry or what is termed “bride money” were the major reasons for seeking employment while the presence of the Portuguese in Mozambique led to most Tsonga men migrating in search for wages in the middle of the 19th century.⁶⁷⁶ The opening of the Kimberly mines in 1970 was also a catalyst that led to more migrant workers leaving their neighbouring countries in search of more work.⁶⁷⁷ The Kimberly mines are credited for leading the way for contract migrant mine workers from among other countries like Botswana, Lesotho and Mozambique.⁶⁷⁸

The introduction of the Rand Native Labour Association led to a more formalised manner of recruiting migrants workers.⁶⁷⁹ It was established to coordinate the recruitment of labourers in Southern Africa and. was eventually renamed the Witwatersrand Native Labour Association in 1901 and the recruiting continued.⁶⁸⁰ The Native Recruiting Corporation was established in 1912 and later merged with the WNLA to form The Employment Bureau of Africa (hereinafter TEBA) still plays a vital role in issues relating to recruitment and the portability of social security benefits of migrant labourers in the Southern African region.⁶⁸¹

Since migration has always been a form of addressing labour shortages in South Africa, in the past one of the major characteristics of the migrant labour system was always to deny migrant workers permanent residency and the right to work permanently.⁶⁸² In the mining industry, migrant workers were compelled to return home and in scenarios where they wanted to go back to work, they would then

⁶⁷⁵ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>

⁶⁷⁶ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>

⁶⁷⁷ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>

⁶⁷⁸ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>

⁶⁷⁹ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>

⁶⁸⁰ Schutte Date unknown <https://www.uj.ac.za>. Schutte explains that the Anglo-Boer war which had resulted in the mining activities’ suspension would eventually lead to the incorporation of the Witwatersrand Native Labour Association (hereinafter- WNLA or WENELA). WENELA’s mainly concerned with recruiting migrant workers from Mozambique and other countries including Liberia, Egypt, Uganda and Mauritius. See also Wilson “Labour in South African Gold Mines” 4. Where Wilson reiterates that the Anglo-Boer war led to decline in productivity and as result there was a shortage of black people hence WENELA was established.

⁶⁸¹ Chelkowska, Harington, McGlashan 2014 <https://www.saimm.co.za/Journal/v104n02p065.pdf>.

⁶⁸² Anon Date unknown Wentzel and Tlabeli Dateunknown <http://www.hsrcpress.ac.za>.

renegotiate their new contracts from there.⁶⁸³ This initiative was effective in the sense that it made it easier for both the home and the host countries to track these workers whereabouts, making it easier for benefits to be allocated upon migrant workers retirement.

To further track and control the movement of migrant workers, the *Natives (Urban Areas) Act*⁶⁸⁴ was enacted and it authorised any urban local authority to require every male native remaining in what was then referred to as the proclaimed area after his employment contract had been terminated to get a document certifying his stay for a certain period of time.⁶⁸⁵ Furthermore, these males were also required to get documentation certifying their stay if they had also failed to secure another job resulting in the expiry of their licence. In later years, the *National (Urban) Consolidated Act*⁶⁸⁶ was enacted, and it allowed Africans to apply for permanent residence in urban areas upon proving that had resided in such an area continuously since birth.⁶⁸⁷ This continuous residence meant that the employee had to have resided in South Africa for fifteen years since birth or had worked for the same employer for ten years.⁶⁸⁸ According to Wentzel and Tlabeli,⁶⁸⁹ section 10 reinforced provisions that made it easy to expel Africans who were no longer needed and eventually introduced the principle of influx control.⁶⁹⁰ Migrant workers' mobility was largely controlled by pass laws and these regulations were enforced as a means of influx control against black people in general.⁶⁹¹ This history of influx control has played a pivotal role in the circular migration that is still prevalent in Southern Africa even now.⁶⁹² This history clearly indicates that South Africa has always seen a need for migrant workers, who

⁶⁸³ Anon Date Unknown Wentzel and Tlabeli Date unknown <http://www.hsrapress.ac.za>.

⁶⁸⁴ Act 21 of 1923.

⁶⁸⁵ Section 20(c).

⁶⁸⁶ Act 25 of 1945.

⁶⁸⁷ Section 10.

⁶⁸⁸ Section 10.

⁶⁸⁹ Wentzel and Tlabeli Date unknown <http://www.hsrapress.ac.za>.

⁶⁹⁰ Wentzel and Tlabeli Date unknown <http://www.hsrapress.ac.za>. In later years when it became clear that the policies introduced for influx control were largely ineffective, Bantustans were introduced however, the aim here was still regulate influx of such Africans in urban areas while the intention was still to encourage Africans to stay in rural areas.

⁶⁹¹ Wentzel and Tlabeli Date unknown <http://www.hsrapress.ac.za>.

⁶⁹² Wentzel and Tlabeli Date unknown <http://www.hsrapress.ac.za>.

would then return home. In other words, there was always a need to introduce a system that would ease the portability of social security benefits of these migrant workers.

Influx control would eventually be abolished in 1986, while the migrant labour system continued to exist.⁶⁹³ In South Africa, the history of segregation was seen in immigration legislation that essentially segregated people on the basis of national origin, class, gender and race.⁶⁹⁴ In South Africa, the first-ever immigration policy that covered the whole nation was referred to as the *Immigrants Regulations Act* of 1913 and is credited for the establishment of the Department of Home Affairs, which was initially, termed the immigration department. It is this department that highlighted the urgency of the government to control the flow of migrants in and out of South Africa.⁶⁹⁵

Furthermore, the *Immigrants Regulations Act* established the Immigration Board whose purpose was to sit in on appeals of those people who were generally prohibited from the Union of South Africa.⁶⁹⁶ The *Immigration Regulations Act* amalgamated all the relevant laws before the Union of South Africa was formed, and excluded the migration of certain categories of people considered unsuitable on account of their life style, habits, standards and economic standing .⁶⁹⁷

However, the act still recognised the need for Africans to migrate to South Africa because of the labour they provided.⁶⁹⁸ This was, therefore, done by creating exemption clauses that allowed and gave the Minister the power to permit certain categories of people who were otherwise considered prohibited immigrants to

⁶⁹³ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>.

⁶⁹⁴ Peberdy DateUnknown <Http://www.queensu.ca/samp/transform/Peberdy.htm>.

⁶⁹⁵ Clause 1. See also Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>.

⁶⁹⁶ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>.

⁶⁹⁷ South African History Online 2011 <Http://www.sahistory.org.za>. Once a migrant has been declared a prohibited migrant as stated in the Act, such a person is given three days to lodge an appeal and is also supposed to pay money for detention and for a return home. However, the immigrant was also granted the right to appeal his or her expulsion to the courts of law. However, as Peberdy stated, it is important to note that such a person was also required to prove that they were not prohibited immigrants as per legislation. He insists that this burden of proof was essentially to the effect that such a person was guilty until proven innocent.

⁶⁹⁸ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>.

enter South Africa.⁶⁹⁹ However, these clauses allowed migrant labourers to be organised in such a manner that exempted the South African mining industry from certain provisions of the Act.⁷⁰⁰ The *Immigration Regulations Act* was in essence, a reflection of all the segregation of this era in history.⁷⁰¹

However, it is essential to note that this piece of legislation was passed in South Africa to exclude Indians who had migrated to South Africa in 1860.⁷⁰² The *Immigration Amendment Act* was passed in 1937 to amend the 1913 Act and allowed South African industries to recruit from countries further up north.⁷⁰³ Since the South African government wanted to prevent black people from settling in the cities, legislators permitted industries to recruit migrant labourers and favoured this only when they used temporary migrant labourers because this type of migration was easy to control.⁷⁰⁴ The financial muscle behind the gold mines meant that the government also permitted this industry to recruit migrant labourers further up north.⁷⁰⁵

In 1937, the *Aliens Act* was adopted and is credited for allowing migrants with desirable traits to enter South African borders.⁷⁰⁶ This can loosely be construed as meaning that the South African government always saw a need to leave the door open for migrant workers with skills that the country deemed as important. The *Aliens Act* is also credited for the impact it has had on all other immigration policies that followed its implementation.⁷⁰⁷ According to the *Green Paper on International Migration in South Africa*, the *Aliens Act* also led to the use of the word "alien" used to describe anyone who was not a South African or British

⁶⁹⁹ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>.

⁷⁰⁰ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>.

⁷⁰¹ Wentzel and Tlabeli Date unknown <http://www.hsrcpress.ac.za>.

⁷⁰² Department of Home Affairs 2016 [Http://www.dha.gov.za](http://www.dha.gov.za). It is also important to note that immigration Act of 1913 also maintained restrictions of movement to black South Africans as well. Black South African community were not granted the full citizenship rights but were referred to as non-citizens.

⁷⁰³ Wilson "Labour in South African Gold Mines" 71.

⁷⁰⁴ Wilson "Labour in South African Gold Mines" 71.

⁷⁰⁵ Peberdy DateUnknown [Http://www.queensu.ca/samp/transform/Peberdy.htm](http://www.queensu.ca/samp/transform/Peberdy.htm).

⁷⁰⁶ Department of Home Affairs 2016 <http://www.Green Paper on the International Migration.com> or <http://www.home-affairs.gov.za>.

⁷⁰⁷ Department of Home Affairs 2016 <http://www.home-affairs.gov.za>.

citizen.⁷⁰⁸ The *Population Registration Act* passed in 1950 has been considered one of the legislations that paved the way for the apartheid legislation that was eventually passed.⁷⁰⁹ This is essentially because of the racial classifications introduced by the Act.⁷¹⁰ The Act's importance was further seen in the manner which it provided a means for control and identification of migrants inside South Africa.⁷¹¹ The use of identity documents was also used as a means to distinguish between legal and illegal migrants.⁷¹²

Under the apartheid regime, strict border controls were tightened even further as restrictions especially for Africans who were considered undesirable.⁷¹³ The Department of Home Affairs and the police controlled ports of entry into South Africa; however, cheap labour from neighbouring countries was never rejected even though those migrant workers were never given the chance to apply for citizenship.⁷¹⁴ According to the *Green Paper on International Migration in South Africa*, between 1913 and 1986, the only way black migrant workers could enter South Africa without being recruited was by entering illegally or as contract workers.⁷¹⁵ This is evidence enough that people have been migrating to South Africa for well over a century now.⁷¹⁶ Furthermore, it is important to recall that before 1961, citizens of Lesotho, Botswana, Swaziland and Namibia were able to enter South Africa without excessive limitations and were considered as nationals

⁷⁰⁸ Department of Home Affairs 2016 <http://www.home-affairs.gov.za>. The passing of the Aliens Act was meant to curb the influx of Jewish migrant into South Africa because of their constant attacks or anti-Semitic situation in Nazi Germany. The screening of every potential migrant intending to come to South Africa, especially from outside Britain and Ireland were selected by the Immigrants Selection Board, and this board had the discretion to permit or deny the immigrant from getting in South Africa. The Board further had the discretion to define "assimilability" which was a term which was described as one of the qualification while assessing whether a migrant is eligible to enter in South Africa or not. This term was therefore used to exclude Jewish migrants from entering South Africa. See also Anon Date Unknown <http://www.liquisearch.com>.

⁷⁰⁹ Peberdy DateUnknown <Http://www.queensu.ca/samp/transform/Peberdy.htm>.

⁷¹⁰ Act 30 of 1950. Racial categories were White, black, Indian and Coloured.

⁷¹¹ Peberdy DateUnknown <Http://www.queensu.ca/samp/transform/Peberdy.htm>.

⁷¹² Peberdy DateUnknown <Http://www.queensu.ca/samp/transform/Peberdy.htm>.

⁷¹³ Department of Home Affairs 2016 <http://www.home-affairs.gov.za>.

⁷¹⁴ Department of Home Affairs 2016 <http://www.home-affairs.gov.za>.

⁷¹⁵ Department of Home Affairs 2016 <http://www.home-affairs.gov.za>.

⁷¹⁶ Peberdy 2013 *Journal Für Entwicklungspolitik* 69. (hereafter *JEP*) Peberdy also points out that there is a significant number of people migrating from other parts of the African continent especially as refugees after the apartheid regime was done away with.

of South Africa to a limited extent.⁷¹⁷ That is, nationals of these countries were obviously treated in a similar manner as black South Africans.⁷¹⁸

In 1978, *the Aliens Amendment Act* was passed and borders were sealed further.⁷¹⁹ The *Immigration Laws Amendment Act* of 1984, on the other hand, further tightened the movement and control of migrants.⁷²⁰ The entry and conditions thereto of non-nationals in South Africa were further provided for in the *Aliens Control Act* of 1991⁷²¹ which was passed to consolidate all five existing pieces of legislations in to one piece of law.⁷²² However, 1995 was the year that pioneered migration reforms of post-apartheid South Africa through the amendment of the *Aliens Control Act*.⁷²³ This *Amendment Act* helped to amend section 55 of the Act which allowing migrants to be detained indefinitely without any judicial review by the Department of Home Affairs.⁷²⁴ This was done by allowing reviews for detentions which lasted more than thirty days.⁷²⁵ However, despite these changes, the Act was still deemed insufficient and lacked constitutional reforms.⁷²⁶ This, therefore, led to the publishing of the *Green Paper on International Migration* in May, 1997, which was intended to pave the way for a more planned system of migration that would eventually lead to the growth of the economy.⁷²⁷

The Green Paper stated that the tightening of border controls should be a priority to make sure that the proposed migration policy is administered properly.⁷²⁸ One of the major concerns that the Green Paper aimed to address was the influx of

⁷¹⁷ Peberdy 2013 *JEP* 69.

⁷¹⁸ Peberdy 2013 *JEP* 69.

⁷¹⁹ Peberdy Date Unknown [Http://www.queensu.ca/samp/transform/Peberdy.htm](http://www.queensu.ca/samp/transform/Peberdy.htm). Act 53 of 1978.

⁷²⁰ Peberdy Date Unknown [Http://www.queensu.ca/samp/transform/Peberdy.htm](http://www.queensu.ca/samp/transform/Peberdy.htm). Act 53 of 1978.

⁷²¹ 96 of 1991.

⁷²² Crush and McDonalds 2001 <http://www.jstor.org>.

⁷²³ Department of Home Affairs 2016 <http://www.home-affairs.gov.za>.

⁷²⁴ Department of Home Affairs 2016 <http://www.home-affairs.gov.za>.

⁷²⁵ Department of Home Affairs 2016 <http://www.home-affairs.gov.za>.

⁷²⁶ Department of Home Affairs 2016 <http://www.home-affairs.gov.za>.

⁷²⁷ (hereinafter the Green Paper) General Notice 849 of 1997. The Green Paper was presented to the then Minister of Home Affairs, the Honourable M. Buthelezi on the 13th May 1997.

⁷²⁸ Green Paper, Pg 30, par 3.4.3.

irregular migrants into South African borders.⁷²⁹ The contention here was that the migration policy at the time offered little to no assistance to migrants who only came to South Africa seeking temporary work.⁷³⁰ This migration policy did not provide employers with an option to hire temporary migrating job seekers legally.

The *White Paper on International Migration for South Africa*,⁷³¹ the *Draft Immigration Bill* together with the Green Paper led the way to the new *Immigration Act*,⁷³² which was enacted to come up with a new manner of dealing with immigration in South Africa.⁷³³ In this *Immigration Act*, those who would be allowed to come into South Africa would have to possess certain skills.⁷³⁴ According to the *White Paper on International Migration*, the Department of Home Affairs is required to publish a list of critical skills intermittently following consultation with other departments, namely, the Departments of Labour, Trade and Industry and Higher Education and Training.⁷³⁵

The contention here was that the country was in dire need of certain skills and, therefore, an influx of migrants could aid in addressing these skills shortages.⁷³⁶ The preamble of the *Immigration Act*, states that the issuance of all permits, both temporary and permanent residence permits be done as quickly as possible in order to ensure that the South African government has access to foreign skills.⁷³⁷ The Act further stipulates that its enforcement be based on human rights- while

⁷²⁹ Green Paper, par 3.3.1. p 15. The Green paper points out very clearly that international migration cannot be stopped. However, it does go on to show that better management of international migration would be highly beneficial to those involved.

⁷³⁰ Par 3.3.1.

⁷³¹ Department of Home Affairs 2017 <https://dha.gov.za>. (hereafter White Paper).

⁷³² *Immigration Act* 13 of 2002.

⁷³³ Crush and McDonalds 2001 <http://www.jstor.org>.

⁷³⁴ Crush and McDonalds state that the new immigration act promised a long awaited approach to immigration, with skills being the main criteria for selection of migrants.

⁷³⁵ Department of Home Affairs 2017 <https://dha.gov.za>. A list of critical skills as published by the 3rd of June 2014 include: Business, Economics and Management Studies, Agriculture, Agricultural Operations, and Related Sciences, Architecture and the Built Environment, Information Communication and Technology, Engineering, Health Professions and Related Clinical Sciences, Life and Earth Sciences, Professionals and Associate Professionals, Trades, Business Process Outsourcing, Academics and Researchers and Post-Graduate. This is the list of critical skills as published by the Department of Home Affairs in 2018 and these enable highly skilled migrants to work in their occupation in South Africa. New World Immigration 2019 <https://www.workpermitsouthafrica.co.za>.

⁷³⁶ Crush and McDonalds 2001 <http://www.jstor.org>.

⁷³⁷ Vallentgoed Legal Protection of Rights of Migrant Workers 17.

xenophobia should be prevented completely.⁷³⁸ However, complete control of the movement of people in and out of the Republic of South Africa was also clearly echoed in the preamble.⁷³⁹

The *Immigration Act* recognises the importance of fundamental rights and states in section 2(1)(a) thereof that one of the aims of the *Immigration Act* is to promote a culture of human rights in both civil societies and the government in respect of immigration control.⁷⁴⁰ However, one of the objectives of the *Immigration Act* that could be viewed as anti-migration is the provision that states that the Act would be used to detect and deport illegal migrants.⁷⁴¹ The *Immigration Act* has been described as making provision for two types of permanent residence permits.⁷⁴² In section 20 of the Act, a retired person who has an intention of retiring in South Africa may be issued a retired person's permit for a period of more than three months.⁷⁴³ However, the Act does state that such a migrant who so wishes to retire in the Republic of South Africa must have his own social security coverage to cater for the rest of his stay while in South Africa.⁷⁴⁴ This provision does seem to advocate for the portability of social security benefits from migrant-sending countries as well. It advances some of the objectives of the thesis, which are discussed in the following chapters and wishes to advance the establishment of unilateral agreements by migrant-sending countries.⁷⁴⁵ However,

⁷³⁸ Vallentgoed *Legal Protection of Rights of Migrant Workers* 17. Before the 1994 South African general election, the South African immigration policies were generally regarded as unconstitutional because they did not comply with International human rights namely charters and other conventions that dealt with the movement of people across borders.

⁷³⁹ The Preamble of the Immigration Act 13 of 2002. See also Vallentgoed *Legal Protection of Rights of Migrant Workers* 17.

⁷⁴⁰ Vallentgoed *Legal Protection of Rights of Migrant Workers* 17.

⁷⁴¹ Section 2(c).

⁷⁴² Vallentgoed *Legal Protection of Rights of Migrant Workers* 17.

⁷⁴³ Section 20(1).

⁷⁴⁴ Section 20(1) (b).

⁷⁴⁵ Section 20(1) (b) further states that if such a person cannot show proof that he has the right to a pension or an irrevocable annuity or retirement account which will give such a migrant a prescribed minimum payment for the rest of his or her life from the country of his or her origin he must show proof that he has a minimum prescribed Net worth.

more important is the fact that such a migrant may be allowed to work in South Africa under the conditions stated by the Department of Home Affairs.⁷⁴⁶

Migrants and foreigners as a whole are also provided permanent residence in section 25. This Act makes provision for migrant workers to obtain permanent residency status in the Republic of South Africa.⁷⁴⁷ According to this provision, a migrant who has been granted permanent residence will have the same rights, duties, obligations and privileges as those of citizens of South Africa as long as those have been mentioned in the Constitution of South Africa.⁷⁴⁸ The Act further provides for the granting of permanent residency where an employee has possessed a work permit for a period of five years, provided that such a person had been a permanent resident under the age of 21, been a spouse of a South African citizen or if he/she is a child of a South African citizen.⁷⁴⁹

Permanent residency may also be granted in terms of sections 26 and 27 of the *Immigration Act*. Section 26 talks about what is termed direct residency and makes provision for permanent residency on other grounds. It points out that such will be issued to migrants or foreigners who had held work permits or corporate permits for five years and have received permanent employment.⁷⁵⁰ Further conditions for granting such a permit entail a submission of certification of a job description. This certificate will show if such a job really does exist and is bound to be filled by the said migrant and it has to be from a prospective employer's chartered accountant. Moreover, such an employer has to be permanent.⁷⁵¹ The Department of Labour also has to certify that the said migrant will not get benefits inferior to those of nationals of the state.⁷⁵² Further qualifications mentioned in section 27 include the fact that the said permit may only be granted to a foreigner

⁷⁴⁶ Section 20(2).

⁷⁴⁷ Section 25.

⁷⁴⁸ Section 25(1).

⁷⁴⁹ Annexure A form 46. See also Vallentgoed *Legal Protection of Rights of Migrant Workers* 18. Section 26(b), (c) & (d).

⁷⁵⁰ Section 26(a).

⁷⁵¹ Section 26(a) (i).

⁷⁵² Section 26(a) (ii). The benefits and salary of migrants or foreigners are said not to be inferior to those prevailing in the appropriate market segment considering collective bargaining agreements and other standards regulating the said market.

or migrant if it is within the annual limit set by the Department of Labour for each employment sector after consultation with other's departments such as the Department of Trade and Industry and the Department of Education.⁷⁵³

However, section 28 of the Act does provide conditions for withdrawal of permanent residency permit and this includes the realisation that within four years of receiving a permit such a migrant committed an offence listed in the Act and was convicted.⁷⁵⁴ The Act further makes provision for foreigners who do not qualify for either permanent or temporary residence permits in section 29 thereof. This shows just how strict the *Immigration Act* is when it comes to permitting people to enter South Africa.⁷⁵⁵ According to section 29(1)(a), those who are prohibited include those who are infected with an infectious disease, those with outstanding warrants or convictions relating to genocide, terrorism, murder, torture, drug trafficking, money laundering or kidnapping.⁷⁵⁶ Other grounds of prohibitions range from previous deportation, racism or social violence and participation in organisations or associations using crime to achieve their objectives.⁷⁵⁷

It is important to note that the *Immigration Act* lists of persons that are prohibited from being employed and these are:

- (a) An illegal foreigner
- (b) A foreigner whose status does not authorize him or her to be employed by such person
- (c) A foreigner on terms, terms and conditions or in a capacity different from those contemplated in such foreigner's status.

⁷⁵³ Section 27(a) (iii).

⁷⁵⁴ Section 28(a). These offences include Treason against the *Republic* Murder, Rape, other than statutory rape, Indecent Assault, Robbery, Kidnapping, Assault when a dangerous wound is inflicted, and Arson, Any conspiracy, incitement or attempt to commit an offence referred to in this Schedule. See schedule 1 of the *Immigration Act*.

⁷⁵⁵ Vallentgoed Legal Protection of Rights of Migrant Workers 19.

⁷⁵⁶ Section 29(1) (b).

⁷⁵⁷ Section 29(1) (b), (c), (d) & (e).

This list shows clearly that employees are barred from employing informal migrants. If employees follow this diligently then issues such as an influx of illegal migrant workers would be curbed. The subsequent amendment of the *Immigration Act* has led to a few changes and supports the notion that, there is a need to employ migrant workers for economic growth. The *Immigration Amendment Act* 19 of 2004 was passed and it stated clearly in its preamble that it sets out to put in place an entirely new system of immigration control which ensures the growth of the economy through the employment of foreign labour and by enabling the entry of exceptionally skilled or qualified people, skilled human resources and academic exchanges with the Southern African Development Community.⁷⁵⁸ However, one will notice that the amendment act says little to nothing about the unskilled migrant workers who enter the South African labour market and work as domestic workers, construction workers and farm workers.

The same preamble further points out that the amendment act will ensure that xenophobia is prevented in all its forms and promises to comply with the international obligations of the Republic of South Africa.⁷⁵⁹ The preamble in essence intends to make sure that border control and monitoring is done effectively, while protecting human rights and making nationals aware of rights pertaining to migrants and other foreigners like refugees.⁷⁶⁰ It further states that both temporary and permanent work permits will be issued as quickly as possible through simplified procedures benefitting both the administration and the service seekers.⁷⁶¹ The other significant change brought about by the *Immigration Amendment Act* is the introduction of changes regarding the composition and functions of the Immigration Advisory Board which will assist the Minister with new policies and regulations of immigration.⁷⁶²

The *Immigration Amendment Act* also provides migrants workers with several types of permits allowing them to stay in South Africa. These permits range from

⁷⁵⁸ Preamble (d).

⁷⁵⁹ Preamble (m), (o).

⁷⁶⁰ Preamble.

⁷⁶¹ Preamble.

⁷⁶² Vallentgoed Legal Protection of Rights of Migrant Workers 21.

corporate permits provided to an applicant in order to allow such an applicant to employ migrants.⁷⁶³ To “a quota work permit, an intra-company transfer permit and exceptional skills or qualifications permits.”⁷⁶⁴ While section 27 also provides for residency on other grounds for migrant workers with permanent employment offers.⁷⁶⁵

A closer look at South Africa’s immigration policies has led to the conclusion that such a restriction of the flow of migrant labourers into South Africa leads to a shortage of skilled workers in South Africa.⁷⁶⁶ However, it is unrealistic to refrain from pointing out that the phase from 1991 to 2005 brought about a lot of changes to the South African immigration policies sphere.⁷⁶⁷ Migration policies went through numerous changes, most importantly, from the *Aliens Control Act* to the *Immigration Amendment Act* 13 of 2011.⁷⁶⁸ During this time, especially the period in which the *Aliens Control Act* was implemented, the emphasis was not placed on attracting skilled migrants or foreigners as referred to by the Act, but instead was placed on employing citizens.⁷⁶⁹

The recently published Green Paper on Migration intends to come up with a migration policy or approach that would be in line with the new *African Development Agenda* 2063, which is designed to harmonise migration in the continent.⁷⁷⁰ However, there still has to be a White Paper that will present a broad standing of the government in a particular issue.⁷⁷¹

3.2 Historical background of social security in South Africa

The South African social security system is two dimensional in the sense that Africans are largely beneficiaries of social assistance, while white people benefit

⁷⁶³ Section 21(1). The Department of Labour, Trade and Industry have a duty to determine how many foreigners and migrants should allowed by the corporate applicant. See section 21(2).

⁷⁶⁴ Vallentgoed Legal Protection of Rights of Migrant Workers 20.

⁷⁶⁵ Section 27(a).

⁷⁶⁶ Bisschoff, Botha & Botha 2012 [Http://www.fm-kp.si/en/zalzb](http://www.fm-kp.si/en/zalzb).

⁷⁶⁷ Bisschoff, Botha & Botha 2012 [Http://www.fm-kp.si/en/zalzb](http://www.fm-kp.si/en/zalzb).

⁷⁶⁸ Bisschoff, Botha & Botha 2012 [Http://www.fm-kp.si/en/zalzb](http://www.fm-kp.si/en/zalzb).

⁷⁶⁹ Bisschoff, Botha & Botha 2012 [Http://www.fm-kp.si/en/zalzb](http://www.fm-kp.si/en/zalzb).

⁷⁷⁰ Cronjé, 2016 [Http://www.tralac.org](http://www.tralac.org).

⁷⁷¹ Cronjé, 2016 [Http://www.tralac.org](http://www.tralac.org).

from social insurance.⁷⁷² The reason for the exclusion of Africans in social insurance is because most of them remain in the informal sector largely because of their lack of education or skills.⁷⁷³ This exclusion, therefore, means that such Africans become key beneficiaries of the ever-expanding social assistance that is a prime measure of poverty reduction and social development.⁷⁷⁴ However, Harttgen, Klasen & Woodlard⁷⁷⁵ do state that despite all these social assistance measures, there are still a few remaining doubts as to whether social assistance is functioning well and positively South Africa.

With the exception of a few improvements since 1994, poverty levels are still very high in South Africa.⁷⁷⁶ In 1928, non-contributory pensions were instituted for white and coloured members of the South African society who were excluded or not covered by occupational retirement.⁷⁷⁷ These pensions were means-tested and could only be afforded to individuals of a certain age.⁷⁷⁸ However, it is estimated that in 1943 about 4 % of social assistance spending was on Africans and this comprised only of targeted relief and pensions for the blind.⁷⁷⁹ By 1958, 19 % of old-age pensions was spent on Africans, while an estimated 60 % of social old-age pensioners was made up of Afrikaners.⁷⁸⁰

A decade after, 1970 saw more Africans being incorporated into the social assistance system of South Africa.⁷⁸¹ This rapid increase in the provision of social assistance to Africans was mainly due to what the previous government of South Africa referred to as a means of strengthening homelands that were set aside for

⁷⁷² Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 357-380. Reference to page numbers should be more specific.

⁷⁷³ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 357.

⁷⁷⁴ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 357.

⁷⁷⁵ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 357.

⁷⁷⁶ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 357.

⁷⁷⁷ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358. This measure was adopted by the government of South Africa mainly to address to raising poor white population. However, it is estimated that at around 1943, percentages on spending on occupational insurance amounted to 56% going to the Coloured population and 40% to the white population.

⁷⁷⁸ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

⁷⁷⁹ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

⁷⁸⁰ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

⁷⁸¹ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

Africans during the apartheid-era.⁷⁸² During this period in history, more money was spent on social assistance, mainly because the government intended to incorporate all racial groups into the system.⁷⁸³ This, therefore, led to more money flowing into homelands of Africans in the form of social assistance.⁷⁸⁴ From this period up to 1992 when the *Social Assistance Act*⁷⁸⁵ finally came into being, discriminatory provisions precluding most black South Africans from the social security sphere were finally done away with.⁷⁸⁶ Pensions and grants that were initially bestowed on upon white South Africans were extended to cover the black population as well.⁷⁸⁷

When it comes to the history of social security in South African constitutions prior to the current constitutional dispensation, it is important to note that there is no mention of the right to social security. The *Union of South Africa Act*, 1910, the *Republic of South Africa Constitution*, 1962, and the *Republic of South Africa Constitution Act* 110 of 1983 do not mention the right to social security. The *Interim Constitution of the Republic of South Africa Act* 200 of 1993 (hereafter Interim Constitution) also does not refer to this right. However, according to section 26(1), it is provided that every person shall have the right to engage in economic activities and to pursue a livelihood anyway in the national territory. This provision goes on to point out that measures will be designed to promote the protection and improvement of the quality of life and equal opportunities for all, provided that such measures are justifiable in an open and democratic society based on freedom and equality.⁷⁸⁸ The fact that the Interim Constitution was interested in the improvement of the quality of life of people and the provision of equal opportunities for all is a clear indication that poverty eradication was also on its agenda.

⁷⁸² Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

⁷⁸³ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

⁷⁸⁴ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

⁷⁸⁵ Act 59 of 1992.

⁷⁸⁶ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

⁷⁸⁷ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

⁷⁸⁸ Section 26(2).

According to the White Paper for Social Welfare, social security has been defined as various public and private measures that make provision for cash or other in-kind benefits or both, never developing, or being exercised only at unacceptable social cost for such a person who is unable to avoid poverty and secondly, in order to maintain children.⁷⁸⁹ The fact that avoidance of poverty is mentioned in this definition of social security shows that the improvement of people's lives is a part of social security.

3.3 Social Security rights in the current South African Constitutional dispensation

As already indicated, social protection is a very important human right; however, it is still perplexing and difficult to grasp the reason why so many people in the world do not have access to social security. Apparently, about 80 % of the world's working class have no access to social security.⁷⁹⁰ There is no doubt that migrant workers are one of the most inadequately social security covered people in the world.⁷⁹¹ The immigration status of an individual plays a very big role in deciding whether such an individual will have the right to access to social security benefits or even the extent to which a migrant worker will be afforded benefits.⁷⁹² The influence of immigration laws and the impact on social security regulations in South Africa and SADC as a whole has been captured as follows:

The social security position of different categories of non-citizens (permanent residents, temporary residents including migrant workers, asylum-seekers, refugees and undocumented migrants) in SADC differs. Their position is influenced by ... an essentially formal labour market conception of social insurance and limited, discretion-based and embryonic social assistance frameworks This is fortified by the orientation and nature of in particular intra-SADC migration, in terms of which intra-SADC migrants usually end up at the lower end of the labour market. Social security laws often draw distinctions based on nationality and/or residence. In addition, immigration laws execute a major influence as they invariably make access to and sojourn in a country for

⁷⁸⁹ Triegaardt Date Unknown <http://www.dbsa.org>.

⁷⁹⁰ Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers". See Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu).

⁷⁹¹ Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers". See Dupper 2014 <http:// www.transformeurope.eu>.

⁷⁹² Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers". See Dupper 2014 <http:// www.transformeurope.eu>.

several categories of migrant workers and their families' dependent on the non-citizen not being or becoming a burden on the State.⁷⁹³

The South African social security framework largely prohibits migrant workers from accessing social security benefits; however those with permanent residency status do have access to these benefits.⁷⁹⁴

As already indicated, according to Section 27 of the Constitution of the Republic of South Africa everyone has the right to access social security.⁷⁹⁵ However, in the previous chapters of the research, it was established that in South Africa there is both social assistance and social insurance and these two terms are very different.⁷⁹⁶ Consequently, for purposes of dealing with the access to and portability of social security benefits of migrant workers, this part of the chapter will deal with social insurance.

Social insurance focuses on making sure that workers are protected against loss of income.⁷⁹⁷ This is made up of, among other aspects, the Unemployment Insurance Fund (hereafter UIF), the Compensation Funds and the Road Accident Fund (hereafter RAF) as the relating this research are the responsibility of the

⁷⁹³ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁷⁹⁴ *Khosa v Minister of Social Development* 2004 6 SA 505 (CC). The court stated that permanent residents were unfairly discriminated against. See also Mpedi *Developing an Appropriate Adjudicative* 26.

⁷⁹⁵ Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).

⁷⁹⁶ See Chapter 1, Par 1.4.1. Millard 2008 *AHRJ* 40. See also Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers". As already indicated in chapter 1, Par 1.4.1, it is therefore safe to conclude that social security in South Africa is made up of social assistance and social insurance. See Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers". Social assistance covers grants available in South Africa which "include an old-age grant, a disability grant, a foster care grant, a care-dependency grant and a child support grant." It is "rendered in cash or in kind to persons who lack the means to support themselves and their dependants and are not recipients of other government funds." While social assistance essentially offers additional income support to those in need. See Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>. In South Africa this system is made available to certain groups of migrants or non-citizens, mainly refugees and permanent residents. See Chapter 1, Par 1.4.1. There are five key social assistance grants in South Africa, and these comprise of State Old Age Pensions, the Disability Grant, Foster Care Grant, Child Support Grant and the Care and Dependency Grant. See Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358. Implementation of these grants is left in the hands of the South African Social Security Agency (hereinafter-SASSA) which uses the income-based means test to see who is eligible for these grants. Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358. (hereafter *CJDS*)

⁷⁹⁷ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

government.⁷⁹⁸ Social insurance is employment-based and has voluntary funds that are regulated by the government.⁷⁹⁹ These voluntary schemes comprise of medical schemes, workmen's compensation and retirement schemes, and are purely insurance-based.⁸⁰⁰

The *Unemployment Insurance Act* (hereinafter UIA)⁸⁰¹ regulates the UIF and was passed to protect workers that have contributed to the fund against unemployment and other risks such as maternity, adoption of a child, illness and death.⁸⁰² However, the UIF only covers workers who belong to a certain labour force and covers temporary unemployment for up to six months.⁸⁰³ UIF does not cover temporary migrant workers or other short-term migrant employees.⁸⁰⁴ Moreover, the UIF was criticised for benefitting only 5% of the 4.2 million unemployed workers meaning that there was a dire need to broaden the coverage of social insurance.⁸⁰⁵ With regard to the issue of whether there should be arrangements made to afford migrant workers some form of coverage through this fund, the answer is affirmative, however, such arrangements should be made in the form of bilateral and other multilateral agreements between migrant-sending countries and South Africa.⁸⁰⁶ The *Social Assistance Act*⁸⁰⁷ states clear conditions upon which beneficiaries outside the South Africa jurisdiction may be granted their social grant benefits.⁸⁰⁸ However, this Act has to be read together with the 2008 Regulations in terms of the SAA, regulation 31(2) thereof, which

⁷⁹⁸ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

⁷⁹⁹ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

⁸⁰⁰ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

⁸⁰¹ Act 63 of 2001.

⁸⁰² Brockerhoff 2013 <http://www/spii.org.za>. See also Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>. Where the *Unemployment Insurance Act* was said to cover employees and their dependents against temporary unemployment caused by "termination of service, illness and the birth or adoption of a child."

⁸⁰³ Brockerhoff 2013 <http://www/spii.org.za>.

⁸⁰⁴ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁸⁰⁵ Brockerhoff 2013 <http://www/spii.org.za>.

⁸⁰⁶ Govindjee and Olivier 2015 *PELJ* 2750.

⁸⁰⁷ Act 13 of 2004. Hereinafter-SAA.

⁸⁰⁸ Section 16.

comprises of arrangements according to which payments across borders may be made.⁸⁰⁹ Olivier and Govindjee⁸¹⁰ describe this scenario as thus:

...provisions of section 16 of the Social Assistance Act 13 of 2004, read together with Regulations 31 of the 2008 Regulations in terms of the SAA, which contains arrangements for the payment of social assistance grant benefits to the beneficiaries who are outside South Africa. Regulations 31(2) provides that South African Social Security Agency may require any person who is absent from the country and who continues to receive as social grant to report at such frequency as the Agency determines to a South African mission or purposes of identity verification or to present any qualifications as the Agency may determine for purposes of verifying any information in connection with a beneficiary.

If there is an ongoing failure to pay grant benefits abroad with no apparent reasonable justification, this may and will be regarded as discrimination on the basis of nationality and is expressly dealt with in Article 2(2) of the *ICESCR* which states that member states of the covenant undertake to guarantee the exercise of rights in the covenant without discrimination of any kind, including of nationality.⁸¹¹

The General Comment⁸¹² to the *ICESCR* also makes it very clear that the Covenant has no jurisdictional limitation expressly mentioned and prohibits discrimination based on nationality.⁸¹³ It further states that where migrant workers contributed to a social security scheme, they must be able to receive their benefits when they leave the country, regardless of change of workplace.⁸¹⁴ The ratification of the *ICESCR* by South Africa will hopefully elevate how portability of social security benefits is effected.⁸¹⁵

However, there is another form of social insurance which is a non-employment based social insurance scheme, namely the Road Accident Fund that was established by the *Road Accident Fund Act*.⁸¹⁶ Unlike other types of social insurance, the RAF exists because of the compulsory fuel levy and is paid out to

⁸⁰⁹ Govindjee and Olivier 2015 *PELJ* 2751.

⁸¹⁰ Govindjee and Olivier 2015 *PELJ* 2751.

⁸¹¹ Govindjee and Olivier 2015 *PELJ* 2751.

⁸¹² General Comment 19 of 2008.

⁸¹³ Par 36. See chapter 2, Par 2.3.1 on the discussion of the *ICESCR*.

⁸¹⁴ Par 36.

⁸¹⁵ The instrument was ratified on the 12 January 2015.

⁸¹⁶ Act 56 of 1996. (Hereinafter RAF).

third parties for any loss or damage suffered as a result of death or bodily injuries.⁸¹⁷ On the 1st of August 2008, the *Road Accident Fund Amendment Act*⁸¹⁸ came into force and limited the RAF's liability to compensate to claims of general damages/non-pecuniary loss only to cases where serious injuries have been sustained.⁸¹⁹

The RAF was enacted to regulate the fund whose objective is to compensate for loss or damage wrongfully caused by the driving of motor vehicles.⁸²⁰ The fund pays compensation to victims of negligent driving of motor vehicles who sustained serious injuries.⁸²¹ It is important to note that nationality or citizenship plays no role in deciding whether one is eligible to receive compensation from the fund.⁸²² For instance, both permanent⁸²³ and temporary residents⁸²⁴ employed in the formal sectors of the economy are eligible for the Road Accident Fund.⁸²⁵

The victim of the injury is required to lodge a claim within a certain time and prove that the driver or wrongdoer drove negligently.⁸²⁶ However, the seriousness of the injury is determined by the Medical Practitioner who undertakes

⁸¹⁷ Apon, Du Plessis & Nyenti 2007 [Http//www.siteresources.worldbank.org](http://www.siteresources.worldbank.org). See also section 5 of the Road Accident Fund Act.

⁸¹⁸ Act 19 of 2005.

⁸¹⁹ Apon, Du Plessis & Nyenti 2007 [Http//www.siteresources.worldbank.org](http://www.siteresources.worldbank.org). Before the Amendment came into being victims were at liberty to claim all general damages in full from the fund. However, it was discovered that the money recovered from motor vehicle levies did not match the money that was paid out to victims by the fund. This deficit increased over the years and a commission (known as the Satchwell Commission) of enquiry was appointed. When the commission was done it made a report and amongst its recommendations was an indication that "the Fund's liability for general damages be limited to those victims who suffered 'serious injury'. General damages, so the Commission found, tended to be paid out to persons who suffered light or moderate injuries and who claimed no damages for medical costs or loss of earnings. In addition, these general damages claim for relatively minor injuries put a substantial administrative burden on the Fund. By limiting awards of general damages to those who suffered serious injuries, so the Commission concluded, the total liability of the Fund could be reduced by almost 40 per cent." *Road Accident Fund v Duma and Three Related Cases (Health Professions Council of South Africa as amicus curiae)* 2013 1 All SA 543 (SCA) Par 3. These recommendations were eventually promulgated into domestic law when the amendment of 2005 became law and the regulations 2008 were passed.

⁸²⁰ Objective of the fund. See 56 of 1996.

⁸²¹ Millard 2008 *AHRLJ* 40.

⁸²² Millard 2008 *AHRLJ* 41.

⁸²³ Fourie & Smit 2011 *IJCLL* 60.

⁸²⁴ Fourie & Smit 2011 *IJCLL* 57.

⁸²⁵ Fourie & Smit 2011 *IJCLL* 60.

⁸²⁶ Millard 2008 *AHRLJ* 41.

assessments prescribed by the *American Medical Association's Guides to the Evaluation of Permanent Impairment*, 6th edition.⁸²⁷ The practitioner has to prepare a RAF 4 report in which he identifies if the injuries fall under what are considered non-serious injuries' list. For injuries to fall within this list, they must have resulted in less than 30 % impairment or 30 % or more impairment of the whole body or person.⁸²⁸

The practitioner has to consider whether the injury has led to a long-term impairment or loss of bodily function, loss of a foetus, permanent serious disfigurement, and severe long-term mental or even severe disturbance of the behaviour or disorder.⁸²⁹ In such an instance, the practitioner's has to take in to consideration whether one or more of these are present.⁸³⁰ However, issues arise in instances where the fund does not respond to the assessment and the victim does not get a response in time. Migrant workers are usually prejudiced because they normally have to travel to and from South Africa on their limited resources. This is because they normally get seriously injured which results in them losing their jobs or even dying upon being injured. Upon death, it is the beneficiaries who suffer.

However, in the case *Road Accident Fund v Duma and Three Related Cases (Health Professions Council of South Africa as amicus curiae)* 2013 1 All SA 543 (SCA) the first issue was what would happen in circumstances where the fund does not respond within a reasonable time. While the second issue was what the remedy would be upon the rejection of the RAF 4 form without any reasons. The court held that the claimant may make a judicial review of the decision and take the matter to court if the fund refuses to have received the application or RAF 4 form. In addressing this issue of reasonable time, it was held that:

To recapitulate; if the Fund rejects the RAF 4 form with or without proper reasons it means that the requirement that the Fund must be satisfied that the injury is serious has not been met. In that event the plaintiff cannot continue

⁸²⁷ Kobrin 2014 De Rebus.

⁸²⁸ Kobrin 2014 *De Rebus*.

⁸²⁹ Kobrin 2014 *De Rebus*.

⁸³⁰ Kobrin 2014 *De Rebus*.

with its claim for general damages in court. The court simply has no jurisdiction to entertain the claim. The plaintiff's remedy is to take the rejection on appeal in terms of regulation 3(4). It follows that the rejection cannot be ignored merely because it was not raised within a reasonable time. The solution is to be found in s6(2)(g) read with s6(3)(a) of PAJA. These sections provide that if an administrative authority unreasonably delays to take a decision in circumstances where there is no period prescribed for that decision, an application can be brought 'for judicial review of the failure to take the decision'. Though PAJA sees this as a 'ground of review' it is really no different from the time honoured common law remedy of *mandamus*.⁸³¹

In instances where the fund rejects the RAF 4 form without any specific reasons, the matter will remain valid until proven otherwise by a court of law.⁸³² However, these processes are not at all advantageous to migrant workers.

Generally, migrant workers find it extremely hard to find employment, and when they do get jobs they end up doing farm work, car guarding, or become security guards or domestic workers.⁸³³ Unfortunately as already established earlier in this research, domestic workers fall under one of the most under-regulated employment sectors in South Africa.⁸³⁴ This, therefore, means that migrant domestic workers fall prey to the same vulnerabilities as plague national domestic workers. For instance, while other migrant workers are covered by COIDA, migrant domestic workers and other domestic workers in general, are not afforded the same cover and are, therefore, not able to receive redress for injuries they incur while working.⁸³⁵

Despite the fact the definition of "employee" in COIDA is broad enough to encompass domestic workers, there is still no space for these employees to claim under this Act. Moreover, according to section 1(d), an employee is a person who entered work under a contract of service, apprenticeship or learnership with an employer, regardless of whether the contract is express, oral, or in writing, and whether the remuneration is calculated by the length of time, work done and paid in cash or in-kind. However, migrant domestic workers and national domestic

⁸³¹ Par 20.

⁸³² Kobrin 2014 *De Rebus*.

⁸³³ Chapter 1, Par 1.4.1. Apon, Du Plessis & Nyenti 2007 [Http://www.siteresources.worldbank.org](http://www.siteresources.worldbank.org).

⁸³⁴ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁸³⁵ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

workers employed according to the following terms; in a private household are excluded from this definition of an employee.⁸³⁶

COIDA allows benefits to be paid to employees or their dependants from the Compensation Fund upon death, for diseases or death arising out of, or in the course of employment.⁸³⁷ Another major disadvantage relating to migrant domestic workers is found in section 35 of COIDA that states that once a claim has been made against the Compensation Fund, no action shall be brought against an employer for the recovery of damages regarding any occupational injuries and diseases resulting in the disablement or death to such an employee.⁸³⁸ Consequently this means that migrant domestic workers are unable to take their employers to court because of low wages and on top of that, migrant domestic workers are even more disadvantaged by the fact that they are usually deported to their countries of origin upon losing their jobs.⁸³⁹ The general vulnerability of migrant domestic workers and domestic workers means that they are unable to afford litigation and are, therefore, unable to challenge any irregularities on the part of their employers.⁸⁴⁰ According to the Weigi and Informality project the reasons for setting aside domestic workers from COIDA's coverage are as follows:⁸⁴¹

It has been argued by the Compensation Fund that the rationale for the exclusion of domestic workers and informally employed is that it is logistically impossible to administer. For domestic workers it is difficult to administer and monitor as there is potential for a single employee to have multiple employers. In case of an injury, the domestic worker has to take the civil route of claiming compensation from the employer.

The rationale for exclusion of domestic workers and migrant domestic workers from COIDA was supported by the South African Reform Commission, which in its discussion paper, stated that despite even though domestic workers are regarded as employees by the *Labour Relations Act* and the *Basic Conditions of Employment*

⁸³⁶ Section 1(xix) (d) (v).

⁸³⁷ Weigi law and Informality Project 2014 [Http://www.wiego.org](http://www.wiego.org).

⁸³⁸ See also Weigi law and Informality Project 2014 [Http://www.wiego.org](http://www.wiego.org).

⁸³⁹ Weigi law and Informality Project 2014 [Http://www.wiego.org](http://www.wiego.org).

⁸⁴⁰ Weigi law and Informality Project 2014 [Http://www.wiego.org](http://www.wiego.org).

⁸⁴¹ Weigi law and Informality Project 2014 [Http://www.wiego.org](http://www.wiego.org).

Act, there are public policies that warrant their exclusion from COIDA that are not necessarily discriminatory or unfair.⁸⁴² The discussion paper⁸⁴³ stated this issue as thus:

Section 1 (definition of 'employee') excludes at (v) "a domestic employee employed as such in a private household". It is submitted that although domestic workers are regarded as employees in the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 75 of 1997 there are public policy reasons for the exclusion from the Compensation for Occupational Injuries and Diseases Act 130 of 1993. This exclusion is therefore not necessarily discriminatory or unfair but a review of the exclusion may be warranted.

This discussion paper seems to justify the deliberate exclusion of both migrant and national domestic workers from the scope of coverage by COIDA. Nevertheless, it is important to note that, according to Weigi law and Informality Project, the above sentiments were questioned by the Social law Project that addressed the exclusion of migrant workers from COIDA.⁸⁴⁴ The social law project pointed out that there were no valid policy reasons to warrant exclusion of domestic workers in private households and went on to state that these could be viewed as infringements on their rights to fair labour practices.⁸⁴⁵ Moreover, most domestic workers, including migrant domestic workers, are black females and their exclusion from COIDA may be viewed as discrimination based on of gender, race and even nationality.⁸⁴⁶ This exclusion is also seen as denying both migrant and domestic workers their right to fair labour practices.⁸⁴⁷ It is important to point out that advocating for the inclusion of migrant domestic workers in COIDA cannot be successful without first arguing for the inclusion of domestic workers in general.⁸⁴⁸

⁸⁴² The South African Law Reform Commission 2010 [Http://www.justice.gov.za](http://www.justice.gov.za).

⁸⁴³ Discussion Paper, 2.151. The South African Law Reform Commission 2010 [Http://www.justice.gov.za](http://www.justice.gov.za). See also Weigi law and Informality Project 2014 [Http://www.wiego.org](http://www.wiego.org).

⁸⁴⁴ Weigi law and Informality Project 2014 [Http://www.wiego.org](http://www.wiego.org).

⁸⁴⁵ Weigi law and Informality Project 2014 [Http://www.wiego.org](http://www.wiego.org).

⁸⁴⁶ Weigi law and Informality Project 2014 [Http://www.wiego.org](http://www.wiego.org).

⁸⁴⁷ Domestic workers are normally prejudiced when they have to go to court against their former employers because of their vulnerability and lack of resources.

⁸⁴⁸ In South Africa, the Ministry of labour promulgated what is referred to as the *Sectoral Determination 7: Domestic Workers Sector* (hereinafter SD7) in terms of section 51(1) of the *Basic Conditions of Employment Act*. See Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>. "the Minister may make a sectoral determination establishing basic conditions of employment for employees in a sector and area." This provision led to the inclusion of domestic workers in the UIA. This inclusion meant that domestic workers would

This is because, as already indicated, COIDA currently does not provide cover for domestic workers in general. Therefore it would be biased and absurd to argue for the protection of migrant domestic workers in their host country without also advocating for the protection of its nationals.

Significant strides were made towards including migrant workers in COIDA's coverage in the case of *Sylvia Mahlangu and Another v The Minister of Labour and Others*.⁸⁴⁹ In this case, a domestic worker had died at her employer's home, allegedly while washing the top windows outside a bedroom located next to a pool. It is further alleged that the domestic worker, who was partially blind, slipped and fell from the step ladder and fell into the pool. Since she could not swim, she drowned and her body was only found hours later by her employer. The applicants, one of whom was the daughter of the domestic worker, sought a declaration seeking to determine the constitutionality of domestic workers' exclusion from COIDA.

In this matter, the High Court declared that section 1(xix)(v) of COIDA, which excluded domestic workers from the scope of its coverage, is unconstitutional since it excludes domestic workers employed in private households in its definition of employee and further held that the said provision be severed from section 1 of COIDA. Moreover, the High Court held that the declaration of severance be applied retrospectively to provide relief for the applicant and other domestic workers who had been injured or died while at work before the declaration was granted. However, it is important to note that since was argued by the respondents that the Department of Labour was in the process of amending

receive their cover from the UIA upon contributing 1% of their monthly income towards the unemployment insurance fund/ compensation fund. It is noteworthy to heed the fact that such domestic workers ought to work for more than 24 hours in order to be eligible. Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>. UIA covers domestic workers who work for more than 24 hours per month for their employer while those who work less than 24 hours are excluded from coverage. See Weigi law and Informality Project 2014 <Http://www.wiego.org>. However, it is rather unfortunate that the UIA is not able to compensate foreign nationals or migrant workers who are required to go back home upon termination of their employment. See Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁸⁴⁹ Case no: 79180/15.

COIDA to eventually cover domestic workers, the court held that the Department be given time to conclude the proposed amendments.

Employment injury compensation's legislative framework has been set out in two statutes, namely the *Occupational Diseases in Mines and Works Act* (hereinafter ODMWA)⁸⁵⁰ and COIDA that makes provision for a no-fault scheme of occupational injuries and diseases.⁸⁵¹ COIDA's coverage is extended to employees as defined in the Act and these include:⁸⁵²

- (a) a casual employee employed for the purpose of the employer's business;
- (b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;
- (c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;
- (d) in the case of a deceased employee, his dependents, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee;

However, there are certain classes of workers who are expressly excluded from the coverage of COIDA and these are people employed by the state, to military service or are undergoing training as per the *Defence Act* 44 of 1957, and those who are not permanently employed by the Permanent Force of the South African Defence Force.⁸⁵³ Further exclusions entail members of the permanent force of the South African Force and the South African Police Service while in defence of the

⁸⁵⁰ Act 78 of 1973.

⁸⁵¹ Mpedi & Nyenti *Employment Injury Protection* 62.

⁸⁵² Section 1(xix) (a)-(d). See also Mpedi & Nyenti *Employment Injury Protection* 62.

⁸⁵³ Section (xix) (i).

Republic of South Africa as per the *Defence Act* and the *Police Act 7 of 1958*.⁸⁵⁴ A persons who gets a contract and goes on to hire and engages people to do that job on his behave are also excluded from COIDA.⁸⁵⁵

The administration of COIDA is undertaken by the Director General of the Department of Labour who is assisted by the Compensation Commissioner together with other employees of the Department of Labour.⁸⁵⁶ Mpedi and Nyenti⁸⁵⁷ point out that practically these powers are thrust upon the Compensation Commissioner. The Compensation Fund plays a big role in this scenario because both the employees and the Compensation Commissioner are paid from it.⁸⁵⁸ Employees need to realise that they will not be compensated if the injury ensued because of serious wilful misconduct on their part.⁸⁵⁹ Compensation will, however, be disbursed if the said accident resulted in serious disablement or death leaving behind dependents.⁸⁶⁰ According to section 22(4), such an accident shall be deemed to have arisen out of and in the course of employment, despite the fact that the employee acted against the law of his/her employment, contrary to his employer's instructions or without any instructions at all. This provision states that compensation will be granted to such an employee if the Director General feels that the employee's actions were in the interest of the business of the employer.

3.3.1 How COIDA works

In order to understand the issue of the portability of social security benefits, factors like accidents of employees while at work have to be completely understood. Legislations like COIDA also have to be discussed to clarify when and how they compensate. According to the *Compensation for Occupational Injuries and Diseases Act* an accident has been defined as "an accident arising out of and

⁸⁵⁴ Section (xix) (ii), (iii).

⁸⁵⁵ Section (xix) (v).

⁸⁵⁶ Section 2(1) (a), (b).

⁸⁵⁷ Mpedi & Nyenti *Employment Injury Protection* 63.

⁸⁵⁸ Section 2(2).

⁸⁵⁹ Section 22(3) (a).

⁸⁶⁰ Section 22(3) (a) (i) (ii). See also Mpedi & Nyenti *Employment Injury Protection* 64.

in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee."⁸⁶¹

3.3.1.1 Requirements

For an accident to be deemed to have occurred for purposes of COIDA, two separate separate requirements that have to be determined and these are:

- (i) the accident must have arisen out of the employee's employment; and
- (ii) the accident must have arisen in the course of an employee's employment

It is, however, important to note that the case of *Etsebeth v Minister of Defence*⁸⁶² tried to distinguish between the concepts of "arising out of" and "arising in the course" of employment. In this case, the plaintiff was on board a flight that did not involve his everyday duties such as cleaning, refilling, greasing, oiling aeroplanes and helicopters on the ground. He explains that on the fateful day he was in the helicopter as a 'flip' mechanic; that is, he was just on a jolly ride and was not on duty. He further stated that he was informed that he would also observe the poachers and was given a safety briefing before the helicopter took off. In dealing with this matter, the court stated that although it was true that the plaintiff was employed as a mechanic, it was common cause that during the accident he was just on a jolly ride. It further stated that what is important and had to be determined was whether the plaintiff was performing his duties at the time of the accident. It stated as follows:

COIDA does not state that it should be in the course of employees 'duties' but employment. The word employment has, in my view, broader meaning than the word duties.⁸⁶³

The court further stated that the plaintiff's presence on the flight was connected to his employment since he was under the supervision and control of the employer. The court said that:

⁸⁶¹ Section 1(i). See also Jakob Perspectives on determining permanent disablement in South African occupational injury law 24.

⁸⁶² CASE NO: 23698/2002.

⁸⁶³ Par 13.

The trip was taken during working hours and the trip was also arranged or organised by the plaintiff's seniors for work-related matters. The crew in the flight was not on a frolic and I do not think that they would just allow the plaintiff to have a jolly ride during working hours whilst they had to perform some duties.

⁸⁶⁴

The same sentiments were echoed in the case of *MEC for Education, Western Province v Strauss*⁸⁶⁵, in which the court stressed the importance of supervision and control by the employer.⁸⁶⁶ For migrant workers and all other workers for

⁸⁶⁴ Par 10.

⁸⁶⁵ 2007 SCA 155 (RSA).

⁸⁶⁶ The plaintiff instituted proceedings against the defendant, the governing body of the school and two medical doctors claiming damages arising from an incident that occurred on 12 February 2001 while she was engaged in training learners at the school to throw the discus. She was struck on the forehead just above the left eye by a discus thrown by a learner participating in the training session and sustained serious injuries as a result. Her claim against the governing body and the two medical doctors was subsequently withdrawn and she proceeded against the defendant only. The plaintiff's claim against the defendant is founded on the latter's own alleged negligence and also, by virtue of s 60 of the Act, on the negligence of the principal of the school or its governing body. As to the defendant's own negligence, it was alleged, for example, that the defendant failed to provide safety nets around the discuss circle and also that he failed to ensure that nets were provided by the principal, the governing body or the school. It was alleged that the 'school principal, governing body and/or Head of Department' failed to ensure that educators and sports trainers or coaches were able to carry out their functions in an environment where the risk of injury was eliminated or that they failed to take reasonable steps such as the provision of safety nets to prevent injury to the plaintiff. Another case that will add on to the issue of control is *Xakaxa v Santam Insurance Co Ltd 1967 4 SA 521 (E)* where the employer placed at the disposal of his employee a bicycle free of charge in order to assist him to get to work on time. While on his way to work, the employee was involved in a collision and was injured. The court held that the employer had not divested himself of the control of the bicycle and that the accident had occurred in the scope of the employee's employment. See also the case of *Human v Workmen's Compensation Commissioner 1956 (2) SA 461(T)*. In this case the widow of a workman applied for compensation under the then Workmen Compensation Act arising out of the death of the workman. The deceased had been employed as a painter by his employer, the employer had supplied a lorry to convey the workmen from and to the place of work. At week-ends those workmen who wished to do so could remain at work while, but those who wanted to spend their weekends elsewhere were permitted to do so and for them the employer provided a lorry free of charge. The workmen were not obliged to travel on the lorry and could use other means of transport if they so wished. However, one fateful day, after conveying, the lorry got involved in an accident and the deceased passed away as a result. In dealing with this matter, the court held as thus: ".the conditions of employment of the deceased as above set out imposed upon him a contractual duty to travel on the lorry which placed him under the orders of the employer or his foreman. This finding was based on the fact that although the deceased was at liberty to find his own transport, he had accepted the offer on the day of the accident to use the employer's lorry, by reporting for duty at 6 a.m. and in fact was entitled to overtime for the hour from that time to 7 a.m." The basis of the court's decision was that by accepting the lorry as a means of transport meant that the expedition to work was during and in the course. The court in this case stated that issue was a matter of law meaning therefore that the employee and the employer were bound from the moment there was an acceptance. Clearly the term accident has wider connotations than first meets the eye. In the case of *Gunter v Compensation Commissioner 2009 30 ILJ 2341 (O)* the

compensation under COIDA, there must be a clear understanding of what the requirements are before they can access the benefits.

To better understand these two concepts, it is important to understand that the courts of law have stated that when dealing with the concept of an accident "arising out of" an employee's employment, it has been indicated that there should be a causal connection between the accident and the employee's employment. Simply put, the migrant worker will only be compensated if he or she can prove that there was a connection between the accident and his or her employment. In the case of *Urquhart v Compensation Commissioner*,⁸⁶⁷ the appellant, a press photographer for a daily newspaper, had suffered a breakdown

appellant, a farm manager/foreman, exercised a wide discretion in the execution of his duties as farm manager and could act as he saw fit as long as his actions were in the best interests of the business. He was injured in a motor vehicle accident while on his way to collect spare parts which were urgently needed for his employer's combine harvester. The motor vehicle in which the appellant was travelling was not being driven by the employer or one of its employees at the time of the accident. The appellant's claim in terms of the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 was initially rejected on the basis of s 22(5) of the Act. The appellant lodged an objection in terms of s 91(1). The tribunal found that s 22(5) did not apply as the appellant had not been travelling to or from his workplace when the accident occurred. It found that s 22(1) read with the definition of 'accident' in s 1 applied and that, as the employer had no control over the appellant when the accident took place, he had not been acting within the course and scope of his employment at the time. The tribunal therefore rejected the appellant's claim. He appealed to the High Court in terms of s 91(5) of COIDA. The court held that the tribunal had correctly found that s 22(5) did not apply. It stated that the tribunal's finding was to the effect that the section only extended the commissioner's liability to persons going to or from their place of work in the circumstances defined in the section and not to employees who are actually performing work at the time of the accident. In holding for the appellant, the court held as thus: "The undisputed evidence of the appellant's witnesses was that the appellant had a wide discretion in the running and management of the farm and was not required to get instructions from the employer for day-to-day decisions. The appellant was on duty and on his way to obtain the spare part for the combine harvester when the accident happened, and it mattered not that the trip had been undertaken outside normal business hours because the appellant was not bound by specific working hours. His responsibility was to ensure the urgent repair of the harvester and he was fulfilling that responsibility when the accident occurred. Moreover, he was entitled to use his discretion as to the form of transportation he would use in order to obtain the part in question. It was clear therefore that, in the circumstances, the appellant was doing his work (and was therefore under his employer's control) while travelling to obtain the part for the combine harvester." See 2342 J-K. The above sentiments show clearly that the court considered the employee's accident to have happened in the course of his employment. However, one of the issues that have caused controversies arises out of section 22(5) which states the following: "For the purposes of this Act the conveyance of an employee free of charge to or from his place of employment for the purposes of his employment by means of a vehicle driven by the employer himself or one of his employees and specially provided by his employer for the purpose of such conveyance, shall be deemed to take place in the course of such employee's employment."

⁸⁶⁷ 2006 27 ILJ 96 (E).

as a result of witnessing and photographing a number of stress-inducing events over many years. He was diagnosed with post-traumatic stress disorder, which precluded him from continuing to work. The appellant then lodged a claim for compensation in terms of the COIDA and his claim was rejected. The Compensation Commissioner stated that he was not satisfied that the appellant's condition was the result of an accident arising out of or in the course of his employment. The appellant's objection was solidly dismissed on the grounds that his condition was not caused by an accident as contemplated by the COIDA, and that it was not an occupational disease within the meaning of the Act. The appellant then took the matter on appeal to the High Court which held that:

The law has long recognized that for purposes of compensation or damages a psychiatric disorder or psychological trauma is as much a personal injury as a cracked skull, and there is nothing in the definitions of 'accident' and 'occupational injury' in the Act to indicate that this legislation has a contrary intention. Indeed, the definitions in the Act are not so much definitions as a broad classification to make provision for different kinds of compensation for different kinds of disorder. This is quite apparent from the wording of the definitions in s 1 which say nothing about the nature of the accident or the occupational injury envisaged other than to confine them to an event within the sphere of employment. The section says that 'accident' means 'an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee' and 'occupational injury' means 'a personal injury sustained as a result of an accident'. Section 22 says that if an employee meets with an accident resulting in his disablement he shall, subject to the provisions of this Act, be entitled to the benefits provided for and prescribed in the Act. The benefit provided for and prescribed in the Act is the right to compensation for personal injuries in terms of chapter IV.⁸⁶⁸

The court believed that the court below had interpreted COIDA too restrictively with resultant prejudice to the workman and that, if it had understood the concept of an accident to include the cumulative effect of a series of specific incidents giving rise to post-traumatic stress disorder, it would have interpreted the Act properly and in a manner more favourable to the appellant. It would have concluded that the appellant's post-traumatic stress disorder was the result of an accident which arose out of and in the scope of the appellant's employment, within the meaning of the Act. With this being said, it is important to note that migrant workers can only access benefits under COIDA if one of these

⁸⁶⁸ Par 14.

requirements are met. The next part of the thesis deals with illegible migrant workers and all other benefits that such workers can access under COIDA.

3.3.2 Benefits that can be claimed under COIDA

In order to understand the social security rights that migrant workers can access in South Africa, it is important to comprehend how such rights are apportioned under COIDA. When accidents occur, they do so in different forms sometimes leading to injuries resulting in disablements and deaths. These disablements are sometimes temporary or permanent. This next part of the thesis discusses benefits that can be claimed under COIDA, in order to identify what can be claimed and eventually be exported in instances where the migrant worker decides to return to his or her home country upon termination of his/her employment contract.

3.3.2.1 Temporary disablement

Section 47 of COIDA makes provision for temporary disablement benefits which can either be total or partial.⁸⁶⁹ Section 47(1) (a) points out that temporary total disablement shall be calculated in terms of schedule 4 that states that there shall be periodical payments made to the disabled employee and this will comprise of 75% of what the employee earned during the occurrence of the accident. According to section 48(1), the right to compensation for temporary, total or partial disablement shall come to an end upon the termination of such disablement or if the said disabled employee comes back and resumes the work which he was employed for at the time of the disablement, or takes on any other

⁸⁶⁹ Schedule 4 (1). According to section 1(xliii) temporary partial disablement means " the temporary partial inability of such employee as a result of an accident or occupational disease for which compensation is payable to perform the whole of the work at which he or she was employed at the time of such accident or at the commencement of such occupational disease or to resume work at a rate of earnings not less than that which he or she was receiving at the time of such accident or at the commencement of such occupational disease." While section 1(xliv) temporary total disablement means "the temporary total inability of such employee as a result of an accident or occupational disease for which compensation is payable to perform the work at which he was employed at the time of such accident or at the commencement of such occupational disease or work similar thereto."

occupation of greater or similar earnings.⁸⁷⁰ If the disablement of the employee persists or deteriorates, or the said disabled employee undergoes further medical help leading to further absence from work, the Director General or the liable employer shall direct that the employee be compensated further for temporary total or partial disablement.⁸⁷¹

3.3.2.2 Permanent disablement

This is a benefit issued to those employees who suffer permanent disablement or permanent injury or serious disfigurement.⁸⁷² Compensation for permanent disablement is calculated by looking at the earning of an employee at the time of the disablement, namely, the time of the accident, occupational disease and the rigorousness of the disablement.⁸⁷³ According to schedule 4(2), permanent disablement of 30% leads to a lump-sum of money payable and this will be 15 times the monthly earnings of the employee at the time of the accident.⁸⁷⁴ If the permanent disablement is less than the 30% stipulated, the amount payable will be a lump-sum of the same proportion as the degree of permanent disablement to 30%.⁸⁷⁵ However, if the disablement is permanent and up to 100%, a monthly pension amounting to 75% of an employee's earnings at the time of the accident will be payable.⁸⁷⁶ In instances, where the permanent disablement is more than 30% but less than 100%, the amount payable will be will a lump-sum of the same proportion as the degree of permanent disablement to 100%.⁸⁷⁷

3.3.2.3 Dependants' benefits

This is the type of benefit to be paid to the dependents of an employee who died as a result of an occupational accident or diseases.⁸⁷⁸ In this instance , the amount of money to be paid to the dependents will be in the form of a lump-sum,

⁸⁷⁰ See also Mpedi & Nyenti *Employment Injury Protection* 65.

⁸⁷¹ Section 48(2) (a) & (b).

⁸⁷² Section 49(1) (a).

⁸⁷³ Mpedi & Nyenti *Employment Injury Protection* 65.

⁸⁷⁴ Schedule 4 (2).

⁸⁷⁵ Schedule 4 (3).

⁸⁷⁶ Schedule 4 (4).

⁸⁷⁷ Schedule 4 (5).

⁸⁷⁸ Section 54(1) (a).

contribution to funeral costs or monthly pension.⁸⁷⁹ Schedule 4 of COIDA explains the following.⁸⁸⁰

1. The maximum amounts of pensions payable to the dependants
2. The maximum periods expected to be paid to the dependants
3. Amount of money and maximum period payable to the child
4. Money to be paid towards funeral costs.

3.3.2.4 Medical aid

If an employee has an accident and there is need for him/her to go to the hospital or a medical practitioner, or a medical practitioner to his or her place of residence, COIDA makes provision to make the said conveyance a possibility. According to section 72(1), the employer has to make sure that the said conveyance takes place. This benefit is, therefore, provided to employees who encounter occupational accidents and injuries and as a result need their medical expenses to be paid.⁸⁸¹

In essence, COIDA provides no-fault compensation for employees who incur injuries in accidents arising out of and in the course of their employment.⁸⁸² Compensation is also afforded those employees who contract occupational diseases.⁸⁸³ However, in the mining sector injuries and diseases related to employment are provided for in ODMWA.⁸⁸⁴ These benefits ODMWA are generally inferior to those of COIDA, despite the fact that they offer free benefit examinations.⁸⁸⁵ It should be noted that such benefits are non-existent under COIDA.⁸⁸⁶ ODMWA applies to all persons who have undertaken and performed risk work at a mine or works in the Republic of South Africa and provides compensation for, "pneumoconiosis together with TB, pneumoconiosis, permanent

⁸⁷⁹ Mpedi & Nyenti Employment Injury Protection 65.

⁸⁸⁰ See also Van Assen 2012 [Http://www.wcawca.co.za](http://www.wcawca.co.za).

⁸⁸¹ Mpedi & Nyenti Employment Injury Protection 65.

⁸⁸² Nyenti Apon&Du Plessis 2007 [Http://sireresources.world.org](http://sireresources.world.org).

⁸⁸³ Nyenti Apon&Du Plessis 2007 [Http://sireresources.world.org](http://sireresources.world.org).

⁸⁸⁴ Nyenti Apon&Du Plessis 2007 [Http://sireresources.world.org](http://sireresources.world.org).

⁸⁸⁵ Nyenti Apon&Du Plessis 2007 [Http://sireresources.world.org](http://sireresources.world.org).

⁸⁸⁶ Nyenti Apon&Du Plessis 2007 [Http://sireresources.world.org](http://sireresources.world.org).

obstruction of airways, progressive systemic sclerosis and any other permanent disease of the cardio-respiratory organs attributable to risk work.”⁸⁸⁷ Furthermore, it makes provision for a levy to be paid into a central fund by employers, and it is from this fund that mine workers are liable to claim from.⁸⁸⁸ There is an assessment in each controlled mine by means of what is referred to as ‘periodic gravimetric dust sampling’ and it is through this assessment that the levy is raised from each employer..⁸⁸⁹ However, when it comes to ODMWA, the requirement is that the deceased lungs be removed and sent for examination before the compensation can be approved in instances where the dependants have lodged a claim for compensation.⁸⁹⁰ ODMWA only provides lump-sum payments and payments in the form of pensions are made.⁸⁹¹ However, there is no provision whatsoever for additional compensation in instances where an employer was found to have been negligent.⁸⁹²

Nonetheless, in the case of *Mankayi v AngloGold Ashanti Limited*⁸⁹³ where the applicant was an employee of the respondent as an underground miner for the duration of sixteen years, the applicant made a claim to the effect that during his tenure of employment, the respondent had negligently exposed him to harmful dusts and gases which led to him contracting tuberculosis and chronic obstructive airways diseases which further led to his inability to work as a mineworker, and in other occupations. After the conclusion that he indeed suffered from a compensatable illness, the applicant was issued money amounting to ZAR 16 320.00 in terms of ODMWA. The applicant, on the other hand, claimed damages to the amount of ZAR 2.6 Million, comprising of past and future loss of earnings of ZAR 738 147. 14, future medical expenses of ZAR 1 374 600 and general damages of ZAR 500 000. The applicant further claimed that the respondent owed a legal duty arising from both statutory and common law to provide him with a safe and

⁸⁸⁷ White *et al* 2001 *SAMJ* 600.

⁸⁸⁸ White *et al* 2001 *SAMJ* 600.

⁸⁸⁹ White *et al* 2001 *SAMJ* 600.

⁸⁹⁰ Olivier 2013 *LAWSA*13(3). Par 108 (d).

⁸⁹¹ Olivier 2013 *LAWSA*13(3). Par 139(4).

⁸⁹² Olivier 2013 *LAWSA*13(3). Par 139(4).

⁸⁹³ 2011 5 *BCLR* 453 (CC); 2011 3 *SA* 237 (CC); 2011 6 *BLLR* 527 (CC).

healthy working environment. He contended that the respondent failed to apply safe, effective and appropriate control measures.

The issue that had to be decided was whether section 35(1) of the COIDA extinguishes the common law right of mineworkers to recover damages for occupational injury and disease from negligent employers or mine owners, regardless of the fact that they are not entitled to claim under COIDA. Both the High Court and the Supreme Court of Appeal held that the applicant was prohibited from instituting delictual claims against the respondent. The matter was finally taken to the Constitutional Court where it was held as follows:

What section 35(1) does, in one extended sentence, is two interrelated things. Firstly, it expunges the common law claims of employees against the employer and, secondly, it limits an employer's liability to pay compensation save for under the Act. It expressly mentions that 'no liability for compensation on the part of such employer shall arise save under the provisions of this Act...' It limits the employer's liability to pay compensation to liability under COIDA alone. That in my view, is an indication that both parts of the provision apply only to those employees covered by "the provisions of this Act"; namely, COIDA.⁸⁹⁴

The court pointed out that while comparing the benefits from both COIDA and ODMWA, there is a clear indication that benefits falling within the scope of COIDA are more generous and comprehensive than those falling under the scope of ODMWA.⁸⁹⁵ The result of the afore-mentioned premise is that a mine worker or any person whose illness is compensatable under ODMWA will get far fewer and more inferior benefits compared to those under COIDA because he loses the latter's benefits as a result of the prohibition by section 35(1).⁸⁹⁶ It was, therefore, fitting for the Constitutional Court to rule that the mine worker retain his common law right to claim from the mine owners. However, it is also essential to note that there are some critics of the judgement who indicated that it would open the flood gates of cases against the employers.⁸⁹⁷ However, Tshoose,⁸⁹⁸ points out that such critics are wrong since this case paved the way for mine workers to seek

⁸⁹⁴ Par 92.

⁸⁹⁵ Tshoose 2011 (14) *PER/PELJ* 255.

⁸⁹⁶ Olivier 2013 *LAWSA*13 (3). Para 131.

⁸⁹⁷ Tshoose 2011 (14) *PER/PELJ* 256.

⁸⁹⁸ Tshoose 2011 (14) *PER/PELJ* 256.

redress from the failed compensation system of South Africa.⁸⁹⁹ The question, therefore, arises as to whether migrant mine workers are aware that they can take this route, especially in instances where employers are at fault and their negligence has led to the detriment of such workers.

3.3.3 How ODMWA Compensates

In instances where a permanently disabled employee's disability takes a turn for the worse and the disability moves from first to the second or third degree, there will be payment of medical expenses only to a limited degree.⁹⁰⁰ For instances, in cases where an employee is temporarily disabled, ODMWA makes provision for 75 % of the wages to be paid during the period of disablement when the employee is still absent from work because of tuberculosis.⁹⁰¹ However, payment for absenteeism will only be given for a maximum of six months.⁹⁰² If permanent disablement occurs, ODMWA still only provides for a lump-sum of money based on the permanent disability percentage and the amount of money the employee or remuneration the employee receives.⁹⁰³ Upon the death of an employee, the widow or widower and dependents will be liable to a lump-sum if such death is a result of a disease that is compensable under ODMWA, such disease being discovered upon the performance of autopsy if such a disease was not previously compensated.⁹⁰⁴

The employee compensation system of employee occupational diseases, injuries death is very fragmented. For instance, COIDA and ODMWA are governed and regulated by two different government departments. On the one hand, COIDA is governed by the Compensation Fund of South Africa, that fund falls under the

⁸⁹⁹ Tshoose 2011 (14) *PER/PELJ* 256.

⁹⁰⁰ Olivier 2013 LAWSA13 (3). Para 139(4).

⁹⁰¹ Olivier 2013 LAWSA13 (3). Para 140.

⁹⁰² Olivier 2013 LAWSA13 (3). Para 140.

⁹⁰³ Olivier 2013 LAWSA13 (3). Para 141.

⁹⁰⁴ Olivier 2013 LAWSA13 (3). Para 143.

Department of Labour. ODMWA, on the other hand, falls under the Medical Bureau for Occupational Diseases which forms part of the Department of Health.⁹⁰⁵

One of the many tests confronting migrant labourers and their dependents is the fact that social security mechanisms differ according to categories and types of workers affected by occupational hazards.⁹⁰⁶ This together with “lack of synergy, coordination and collaboration at the policy, institutional and operational levels” in South Africa delays social security provision for migrant labourers and their dependents.⁹⁰⁷ Another stumbling block that migrant labourers face is centred around medical assessments that lead to compensation. As already pointed out in previous chapters, for mining related lung diseases, assessments are undertaken by Medical Bureau for Occupational Diseases and this is situated in Johannesburg, therefore, ex-miners, especially migrants, find it very difficult to travel to South Africa for these assessments. Hence millions of unclaimed benefits.⁹⁰⁸ The problem here is show-cased by the fact that limited steps have been taken to extend these services to migrants’ countries of origin.⁹⁰⁹ Inaccessible and virtually non-existent banking facilities are also a major hurdle for dependants and beneficiaries in other migrant-sending countries in the SADC region.⁹¹⁰

The absence of synergy, coordination and collaboration is also made apparent by the fact that South African social security institutions do not cooperate effectively with institutions from neighbouring migrant-sending countries; hence there is a deficiency in the portability of social security benefits.⁹¹¹ Another problem stems from the time frames provided by the *Pension Funds Act*⁹¹² of South Africa that only allows a 12 months period to locate dependants and this long, sometimes insufficient process is inadequate, and causes delays in the payments of

⁹⁰⁵ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁹⁰⁶ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁹⁰⁷ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁹⁰⁸ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁹⁰⁹ See Chapter 1.4, Par 1.4.1. See also Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁹¹⁰ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁹¹¹ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁹¹² Act 24 of 1956.

benefits.⁹¹³ This next part of this research analyses the fragmented nature of the South African social security legislations and the impact of the Constitutional Court on the development of social security in South Africa.

3.4 The current state of social security legislations and the impact of the Constitutional Court on the development of social security in South Africa

While the South African legislature enacted several laws it intends to enforce for purposes of advancing social security the laws are, however, still subject to the limitations referred to in section 36 of the Constitution. Olivier⁹¹⁴ has attended to this issue as follows:

Any infringement on the duty to respect, protect, promote, and fulfil the right to access to social security by current and future legislation will have to be measured against the provisions of section 36(I) of the Constitution. Current social assistance legislation includes the Social Assistance Act 59 of 1992, Special Pensions Act 69 of 1996, Demobilisation Act 99 of 1996 and the Promotion of National Unity and Reconciliation Act 34 of 1995. Legislation regarding social insurance includes the Unemployment Act 30 of 1966 and Compensation of Occupational Injuries and Diseases Act 130 of 1993. Section 36(1) determines that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

The list does not end here; there is also the *Medical Scheme Act*⁹¹⁵ which is responsible for consolidating the laws relating to registered medical schemes and protects the interests of members of medical schemes. This consolidation is carried out by providing measures for the coordination of medical schemes, among other things.⁹¹⁶ There is also the RAFA which led to the establishment of the Road Accident Fund together with the UIA which makes provisions for unemployment insurance in South Africa. The list further includes the *Military*

⁹¹³ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

⁹¹⁴ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

⁹¹⁵ 131 of 1998.

⁹¹⁶ Mpedi LG Pertinent Social Security Issues in South Africa 12-13. As quoted from the Preamble of the Medical Scheme Act.

Pensions Act which provides for the payment of pensions, gratuities and medical treatment to people disabled or whose disabilities were aggravated by military service.⁹¹⁷ By enacting so many pieces of legislation, the legislature was trying to cover all aspects of social security in South Africa. These social security laws aim to fulfil the constitutional obligation which is the provision of access “to social assistance to those individuals who are unable to support themselves and their dependents.” The statutes even set out enforcement mechanisms for social assistance.⁹¹⁸

However, this wide range of acts has been heavily criticised with the first being to the effect that South Africa’s adoption of many social security laws, especially in the form of amendments, adds to the ignorance of beneficiaries since lack of information means that they do not know their rights.⁹¹⁹ Another issue problem is that the difficulty of knowing which version of the law is operative sometimes becomes problematic to the courts while trying to enforce a right because they are often misled. These sentiments were shared in the case of *Cele v South African Social Security Agency*⁹²⁰ as follows:

In the field of social assistance in South Africa the primary and secondary legislations is as labyrinthine as it apparently is in the United Kingdom and the entitlement of any applicant to relief flowing from a failure on the part of the Minister of Social Development or SASSA may well be complex. All this can only serve to emphasize the necessity for those lawyers who practise in this area of the law to be thoroughly familiar with the applicable legislation, both primary and secondary and to ensure that it is properly placed before the Court in a coherent form when the need for litigation arises.

These legislations have also been criticised as being in conflict with each other. And on top of this, another criticism relates to access of information. This conflict of legislations may affect workers, especially migrant workers, who are susceptible to a lack of information regarding the laws of their countries of employment. This conflict of legislations together with lack of information further hinder their

⁹¹⁷ 84 of 1976. See also Mpedi LG Pertinent Social Security Issues in South Africa 12-13.

⁹¹⁸ Mpedi LG Pertinent Social Security Issues in South Africa 14.

⁹¹⁹ Mpedi LG Pertinent Social Security Issues in South Africa 14.

⁹²⁰ 2008 (7) BCLR 734. Quoted from Mpedi LG Pertinent Social Security Issues in South Africa 14.

chances of accessing their well-deserved social security benefits because they are usually deported back home upon the termination of their employment contracts.

True is the fact that the Constitution recognises the importance of making information available to the public.⁹²¹ However, Mpedi contends that the fact that “there is no (direct) legal obligation in the social security legislation on any specific organ of state to inform the public about their rights and obligations concerning social security” poses a lot of problems to the public who are in dire need of such assistance.⁹²² Mpedi further contends that indeed, social security institutions have embarked on awareness campaigns at their own discretion, it is important that such are mandated to offer such information to the public.⁹²³

If beneficiaries of certain social security schemes or policies feel aggrieved by any means whatsoever, the law provides them with assistance on how to go about the process of complaining. The major problem with the courts of law is the fact that they take a long time to deal with and adjudicate issues before them. The approaches the courts of law take have also been found to be inconsistent; hence they in general cause even more confusion to the legal fraternity and other citizens. These inconsistencies are examined in more detail below.

The law provides procedures and mechanisms of challenging “an expulsion” for example from any social security policy.⁹²⁴ It has been suggested, however, that people find it hard to manoeuvre around the complicated and wide social security legislations.⁹²⁵ It is imperative, therefore, that the process of lodging grievances be made easier for those who administer them or those who stand to benefit from such. Mpedi⁹²⁶ supports the above by stating that:

To this end, it is important that the social security system is simplified and made more accessible to people and administrators alike. In addition, the mechanisms for resolving disputes and complaints about social security should be made more accessible by simplifying the procedures and providing legal aid to the indigent.

⁹²¹ Section 32 thereof.

⁹²² Mpedi LG Pertinent Social Security Issues in South Africa 15.

⁹²³ Mpedi LG Pertinent Social Security Issues in South Africa 15.

⁹²⁴ Mpedi LG Pertinent Social Security Issues in South Africa 15.

⁹²⁵ Mpedi LG Pertinent Social Security Issues in South Africa 15.

⁹²⁶ Mpedi LG Pertinent Social Security Issues in South Africa 15.

Mpedi insists that social security legislation is 'haphazard' and needs to be merged into one piece of legislation for the sake of accessibility and consistency, among other things.⁹²⁷ These inconsistencies cause even more confusion and, therefore, lead to a denial of justice, since justice delayed is justice denied.

3.4.1 The important role played by the Constitution in the development of social security rights

Olivier's⁹²⁸ point of departure is that upon certification of the constitution, the Constitutional Court recognised that socio-economic rights are enforceable; however, it was further acknowledged that these give rise to "budgetary considerations". The entrenchment of the Bill of Rights in the Constitution is very vital in determining the justiciability of socio-economic rights as provided for since their enforcement would lead to ensuring social security rights. Section 7 gives clarity to the importance of the Bill of Rights in the Constitution by defining such as the corner stone of democracy in South Africa.⁹²⁹

It is submitted that Olivier correctly points out that the wording of section 7(2) implies that South Africa is mandated by the Constitution to respect, protect, promote, and fulfil the rights laid out in the Bill of Rights. However, limitations set out in section 36 of the Constitution therefore guide the courts of law in their role of adjudication of a broad spectrum of socio-economic rights that encompass

⁹²⁷ Mpedi LG Pertinent Social Security Issues in South Africa 16.

⁹²⁸ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

⁹²⁹ Section 7 (1). Olivier however opines that heed must be taken when dealing with this section of the constitution because reference must be made to section 36 which deals with limitations of the Bill of Rights. According to section 36 of the constitution of the Republic of South Africa, the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. The section further provides that no law may limit any right entrenched in the Bill of Rights except as provided in subsection (1) or in any other provision of the Constitution. See Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>. ...section 7 must be read in conjunction with section 36 to determine to what the right to access to social security can be limited. Section 7(1) states that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. Section 7(2) places a duty on the state to respect, protect, promote, and fulfil the rights in the Bill of Rights.

social security rights. These rights as entrenched, therefore, include the right to access to social security.⁹³⁰ Moreover, the duty to respect as mandated by the Constitution has been described as requiring negative state action. That is, the state is required by the Constitution not to unreasonably interfere with people's fundamental rights.⁹³¹ Olivier states that this is known as negative enforcement by the courts.⁹³²

Positive enforcement by the courts, on the other hand, emanates from a constitutionally entrenched duty to protect, promote and fulfil the rights in the Bill of Rights placed upon the state by the Constitution.⁹³³ It is from this duty that socio-economic rights and social security emanate. The state is accordingly obliged to refrain from interfering with "political, civil, economic and cultural rights of its citizens."⁹³⁴ Section 9(1) of the Constitution makes provision for everyone to have equal protection before the law together with the right to equal protection and benefit of the law. This provision may be construed as including migrant workers as well. However, heed must still be taken to the limitations as set out in section 36 of the Constitution as already indicated although it must still be pointed out that the same Constitution does not prohibit unfair discrimination based on nationality.⁹³⁵ It is, therefore, important to note that in terms of certain limitations, the state is also barred from interfering with political, civil, economic and cultural rights of certain classes of documented migrants.⁹³⁶ However, an argument has been posed to the effect that these positive rights do not require the state to pop out money and distribute it to individual citizens to fulfil its positive duty towards them.

⁹³⁰ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

⁹³¹ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>. Olivier explains this aspect as thus: On a primary level the duty to respect requires negative state action and the courts will only expect the state not to unjustly interfere with a person's fundamental rights. This is known as negative enforcement by the courts.

⁹³² Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

⁹³³ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

⁹³⁴ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

⁹³⁵ See s 9(3).

⁹³⁶ Permanent residents are afforded similar rights to citizens in South Africa.

There is another school of thought that argues that those who stand to benefit from a certain right, in this instance a social security right or socio-economic right, or any other benefit from a state may require assistance for purposes of attaining such a right as claimed.⁹³⁷ In this juncture, the wording and interpretation of the provision are vital in determining the scope of the obligation thrust upon the state towards its citizens or individuals as the case maybe.⁹³⁸ As was noted in the case of *The Government of the Republic of South Africa and Others v Grootboom and Others* (hereafter *Grootboom-case*),⁹³⁹ the “right to access to” was seen as distinct from the “right to”.⁹⁴⁰ The court, in this case, had the following to say:

The right delineated in section 26(1) is a right of “access to adequate housing” as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognizes that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

The recipient of a certain benefit, however, has the right to require assistance or service from the state. What is important during this stage is the fact that all this will depend on the limitations provided for by the Constitution and other limitations that the state cannot turn a blind eye to. Olivier defines these limitations as both external and internal.⁹⁴¹ Reference has been made for some time now to section 7 (3) which states that the rights in the Bill of Rights are subject to the limitations contained in section 36 or elsewhere in the Bill as giving

⁹³⁷ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>. Such assistance maybe sort from other social security enforcement institutions but for purposes of this piece the courts of law.

⁹³⁸ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

⁹³⁹ 2001 1 SA 46 (CC).

⁹⁴⁰ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

⁹⁴¹ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

rise to external limitations.⁹⁴² These limitations will, therefore, be examined with specific reference to socio-economic rights in the realisation of social security rights. There are a number of pieces of legislation that provide for social security rights to citizens and non-citizens, but even those must take heed not to have provisions that are inconsistent with the Constitution or limitations as provided for in the Constitution. Olivier makes specific reference to the case of *S v Zuma*⁹⁴³ where the Constitutional Court emphasised the two-fold analysis to external limitations as follows:

In the first phase the applicant must show that there was an infringement on the duty to respect, protect, promote, and fulfil the rights in the Bill of Rights. In the second phase the respondent must show that the infringement was justifiable and that the right was legitimately restricted in accordance with the general limitation clause contained in section 36 of the Bill of Rights.⁹⁴⁴

An applicant who approaches the courts of law with an intention of enforcing a certain social security right will definitely have to show that there was an infringement while the state will definitely have to justify such.⁹⁴⁵

In referring to internal limitations, specific reference is made to section 27(2) which states that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.⁹⁴⁶ Arguments have been submitted to the effect that the provision recognizes the need for time and resources to say the least in the realisation of social security rights. The central issue here is that such rights cannot be completely realised right away. This is where the courts have had a problem for some time. As a mechanism of enforcement, people have resorted to courts when their socio-economic rights were not being upheld but the courts have consistently used different approaches in dealing with these scenarios. Therefore, the next

⁹⁴² Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

⁹⁴³ 1995 4 BCLR 40 I (CC) 4 I 4.

⁹⁴⁴ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

⁹⁴⁵ According to Olivier, any infringement on the duty to respect, protect, promote, and fulfil the right to access to social security by current and future legislation will have to be measured against the provisions of section 36(I) of *the Constitution*.

⁹⁴⁶ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

section of the research deals with the courts of law and the role they play as mechanisms of enforcement of social security and other related rights.

3.4.2 Courts as mechanisms of enforcement of social security and other related rights

The Constitutional Court has played a vital role in the realisation of social security rights. According to section 167(4) (e) of the Constitution, only the Constitutional Court may decide that Parliament or the President has failed to comply with a constitutional duty.⁹⁴⁷ The Constitutional Court is, therefore, duty-bound to uphold and enforce the provisions of the Constitution which include the enforcement of social-economic rights. However, it should be noted that the courts of law have approached the issue of enforcement of socio-economic rights and social security rights differently. Nonetheless, important is the fact that rights are interrelated and the courts have continuously espoused this notion as was seen in the *Grootboom*-case:

All the rights in our Bill of Rights are interrelated and mutually supporting. There can be no doubt that human dignity, equality and freedom, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realization of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential... Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and in particular, in determining whether the state has met its obligations in terms of them.

The issue of review has played a major role whereby in some instances the reasonableness review has been resorted to in determining whether the courts have fulfilled their duty accordingly while in other instances the minimum core

⁹⁴⁷ See also Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>. According to Olivier "Section 167(3) of the Constitution states that the Constitutional Court is the highest court in all constitutional matters and may decide only constitutional matters, and issues connected with decisions on constitutional matters and makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

obligation approach has been resorted to. Liebenberg⁹⁴⁸ commences her article on socio-economic rights with the following statement:

In its landmark decisions in *Soobramoney*, *Grootboom*, *Treatment Action Campaign*, and *Khosa*, the Constitutional Court adopted a model of reasonableness review for assessing whether the state has complied with the positive duties imposed by the socio-economic rights in sections 26 and 27. In doing so, it has rejected the argument urged by the amici curiae in *Grootboom* and *TAC* that FC sections 26 and 27 impose a minimum core obligation on the state to ensure that everyone has access to essential basic levels of the relevant rights. The furthest the Court was prepared to go was to hold that, where the evidence in a particular case revealed that it was appropriate, regard could be had to the content of a minimum core obligation in evaluating the reasonableness of the state's measures.

Liebenberg, however, opines that a complainant could rely directly on the fact that a state has neglected to fulfil its minimum core obligation provided for by sections 26 and 27 of the Constitution for immediate relief if such is needed.⁹⁴⁹ Moreover, she states that the said litigant could even depend on the minimum core obligation to insist that measures adopted by the state were unreasonable. However, she poses that such cannot be used to refer benefits to an individual and further states that the minimum core obligation has been objected in the *Grootboom*-case as follows:

The Court's objections to direct reliance on a concept of minimum core obligations were basically threefold: the difficulty of defining the content of minimum core obligations; a concern that any definition would not reflect the diversity of needs of differently placed groups; and an incompatibility with the institutional roles and competencies of the courts.⁹⁵⁰

Minimum core obligation may be referred to as the responsibility or obligation conferred upon a state to make sure that individuals are afforded or provided with "minimum essential levels" of socio-economic rights.⁹⁵¹ This principle advocates for a basic minimum level of subsistence for the enjoyment of a dignified human existence.⁹⁵² In the context of South Africa and for purposes of this research and

⁹⁴⁸ Liebenberg "Socio Economic Rights" 305.

⁹⁴⁹ Liebenberg "Socio Economic Rights" 306.

⁹⁵⁰ Liebenberg "Socio Economic Rights" 306.

⁹⁵¹ Du Plessis & Fuo 2015 *LDD* 1.

⁹⁵² Du Plessis & Fuo 2015 *LDD* 1. This principle of minimum core of socio-economic rights was pioneered by the Committee on Economic, Social and Cultural Rights (hereafter Committee on ESCR) with an intention of trying to establish a minimum extent of the realisation of such

its application of the minimum core obligation towards migrants' social security coverage, this approach means that every migrant worker or migrant in need would have a right to access social security, including appropriate social assistance if such migrants are unable to support themselves and their dependents.⁹⁵³

It is, therefore, essential to explain the reasonableness review concept since the courts seem to be in favour of it. Olivier states that a court adopting the reasonableness review test will not look into whether other complementary measures would have been adopted. In fact, he insists that the said court will not even look at whether public funds would have been spent better.⁹⁵⁴ What is important here is whether the state was reasonable in its approach regarding the provision or non-provision of a certain socio-economic right.

In achieving the reasonableness concept, the court has stated in the *Grootboom*-case that legislative measures and policies have to be implemented in a reasonable manner as can be seen in its following statement:⁹⁵⁵

The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented

rights by state parties to the ICESCR as ratified by South Africa in 2015. The Committee on ESCR explains the minimum core obligation's interpretation as thus: "On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining State parties' reports, the committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent on every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would largely be deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(2) obliges each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligation to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations." See Du Plessis & Fuo 2015 *LDD* 5.

⁹⁵³ See s 27 (1)(c) of Constitution of the Republic of South Africa.

⁹⁵⁴ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

⁹⁵⁵ Par 42.

by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

It further stated that reasonableness must also be understood in the context of the Bill of Rights as a whole.⁹⁵⁶ When applying this reasonableness review test, the courts have held that the state should not ignore the needs of those who are urgently in need. This was evident in the *Grootbroom*-case⁹⁵⁷ where the court held that:

To be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavour to realize. Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realization of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realization of the right. Furthermore, the Constitution requires that everyone be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

Liebenberg states that the "assessment of the reasonableness of government programmes is influenced by two further factors derived from sections 26(2) and 27(2)." She refers to these two factors as progressive realisation and availability of resources. Section 27(2) which is essential for this research may be construed as denoting that South Africa must take reasonable legislative and other measures, within its available resources, to accomplish the progressive realisation of social security rights for migrant workers. Availability of resources and progressive realisation of these rights are key, and are therefore discussed in this next part of the research.

3.4.2.1 Progressive realisation

According to Olivier,⁹⁵⁸ the wording of the phrase progressive realisation is similar to the phrase used in section 2(1) of the *International Covenant on Economic,*

⁹⁵⁶ Par 44.

⁹⁵⁷ Par 44.

⁹⁵⁸ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

Social and Cultural Rights.⁹⁵⁹ When dealing with this concept, the court authors seem to agree that the Constitution or drafters thereof were aware that the rights could not be realised right away, and that steps had to be taken to finally provide for certain rights. The *Grootboom*-case⁹⁶⁰ is a perfect example of where the courts explained this notion by pointing out that:

The term 'progressive realisation' shows that it was contemplated that the right could not be realized immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realization means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.

In this instance, the court is merely arguing that a positive obligation cannot be fulfilled within a short space of time but that a series of steps are required to be undertaken by the state instead for these obligations to be fulfilled. This, therefore, means that steps will continually be taken by the state to eventually realise the provision of social security rights to migrant workers. This realisation would also mean that such migrant workers would be availed their duly earned social security benefits upon termination of their employment contracts and their return home.

3.4.2.2 Availability of resources

Availability of resources was seen to be vital in the realisation of socio-economic rights by the court in *Grootboom*-case.⁹⁶¹ In this case the court held as thus:

The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate

⁹⁵⁹ International Covenant on Economic, Social and Cultural Rights (1966). Article 2(1) of the Covenant states as thus: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

⁹⁶⁰ Par 45.

⁹⁶¹ Par 46.

at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.

This concept was also dealt with in *Soobramoney v Minister of Health (KwaZulu-Natal)*⁹⁶² where the meaning of the phrase "available resources" was interpreted as follows:

What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.

Simply put, such rights can only be provided or realised if the resources to do so are available. The court further stated that there is a balance between goal and means. It was of the view that measures must be calculated to attain the goal expeditiously and effectively but that the availability of resources is an important factor in determining what is reasonable.⁹⁶³ The availability of resources is vital and Olivier describes it as only one of the factors to be taken into consideration when determining whether the right has been infringed upon.⁹⁶⁴ The courts have sometimes been criticised heavily for not appreciating the doctrine of separation of powers with critics arguing that in their attempt to intervene in social security issues, courts often interfere with the doctrine of separation of powers and, therefore, lack the required appreciation of budgetary constraints. Pieterse⁹⁶⁵ states as thus:

As alluded to previously, the most decisive obstacle faced by courts, in articulating standards to which resource allocation and distribution policies and processes must adhere and in scrutinising challenged laws, policies and decisions against these substantive standards, is the operation of the doctrine of separation of powers in relation to budgetary and financial decision-making. Under most conceptions of the doctrine, such decision-making is portrayed as the exclusive territory of the political branches of state. Courts are thought to lack the majoritarian backing, appreciation for the polycentric consequences of budgetary decisions and the financial expertise that is required to participate in

⁹⁶² 1997 12 BCLR 1696 (CC) par II, As quoted in *The Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC).

⁹⁶³ Par 46. See also Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>. pg.92.

⁹⁶⁴ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>

⁹⁶⁵ Pieterse 2014 *Pretoria University Law Press* 108. (hereafter *PULP*)

such decisions. They are accordingly cautioned to exercise significant restraint when budgetary or financial decisions come before them and to defer to the wisdom of those primarily responsible for these decisions.

The major contention here is that courts may in their endeavour to interpret constitutional rights, which in this instance are socio-economic rights limit or restrict the way in which the state would have allocated the resources.⁹⁶⁶ This issue of the provision and interpretation of socio-economic rights is important, however, but what is further important is the fact that such are determined by the availability of resources as indicated by the courts.

The courts also dealt with the issue of limited resources in the case of *Minister of Health v Treatment Action Campaign*.⁹⁶⁷ This case commenced as an application to the High Court in 2001 by the applicants who consisted of numerous associations and members of civil societies who were mainly concerned with the treatment of new infections and illnesses like HIV/AIDS. The respondents, on the other hand, were the Minister of Health and members of the executive councils responsible for health in Western Cape. The main applicant was the Treatment Action Campaign (hereafter-TAC) while the respondents were collectively referred to as the government.⁹⁶⁸ While devising responses to HIV/AIDS, the government came up with nevirapine as a drug of choice to be used for tackling mother-to-child transmission of the pandemic, however, there were restrictions to the availability of the drug to the public sector. The initial issues that arose were that the restrictions to the public sector were unreasonable when measured against the Constitution which orders the state and state organs to give effect to the rights guaranteed in the Bill of Rights.⁹⁶⁹ The second issue was whether the Constitution obliged the government "to plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country."⁹⁷⁰ The High Court ruled in favour of the applicants and

⁹⁶⁶ Pieterse 2014 *PULP* 108.

⁹⁶⁷ 2002 5 SA 721 (CC).

⁹⁶⁸ Par 3.

⁹⁶⁹ See section 7(2) and 8(1) of the *Constitution of South Africa*.

⁹⁷⁰ Par 5.

ordered that nevirapine be made available to the public sector.⁹⁷¹ The respondents took the matter to the Court of Appeal and from there to the Constitutional Court where several issues were raised. The first issue was the contention by counsel for the government who contended that the court gives heed to the notion of separation of powers while dealing with decisions taken by the executive while formulating policies.⁹⁷² They argued that the only order that the court could award would be the declaratory order because doing so would be respecting the separation of powers. While rejecting this contention, the Constitutional Court held that it is true that the courts of law should abide by the notion of separation of powers; however, this does not mean that they should refrain from passing orders that would impact such policies.⁹⁷³ The court further held that:

The Constitution requires the state to "respect, protect, promote, and fulfil the rights in the Bill of Rights". Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.⁹⁷⁴

Regarding the issue of the declaratory order, the court blatantly rejected that the court only had the power to issue a declaratory order but instead stated that

⁹⁷¹ Par 8. The rest of the order by the High Court read as thus: "1. It is declared that the first to ninth respondents are obliged to make Nevirapine available to pregnant women with HIV who give birth in the public health sector, and to their babies, in public health facilities to which the respondents' present programme for the prevention of mother-to-child transmission of HIV has not yet been extended, where in the judgment of the attending medical officer, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall at least include that the woman concerned has been appropriately tested and counselled. It is declared that the respondents are under a duty forthwith to plan an effective comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counselling and testing, and where appropriate, Nevirapine or other appropriate medicine, and formula milk for feeding, which programme must provide for its progressive implementation to the whole of the Republic, and to implement it in a reasonable manner. 4. The respondents are ordered forthwith to plan an effective comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counselling and testing, and where appropriate, Nevirapine or other appropriate medicine, and formula milk for feeding, which programme must provide for its progressive implementation to the whole of the Republic, and to implement it in a reasonable manner."

⁹⁷² Par 22.

⁹⁷³ Par 98.

⁹⁷⁴ Par 99.

where there is an infringement of any right, which includes a socio-economic right, it is has a duty to make sure that effective relief is granted by looking at the nature of the right and the infringement in order to determine the necessary relief.⁹⁷⁵ Most important is the fact that the court stated that it can even go as far as to issue an order of *mandamus*.⁹⁷⁶ Moreover, since in this instance the issue of availability of resources was never in dispute, the court set a precedent to the effect that where such availability is not in dispute, the court has the power to make mandatory orders to the effect that government provide socio-economic and social security rights to those in need. This means that where a migrant worker's social security right is infringed, such a migrant worker has a right to approach a court of law seeking an order to effect the access to such a right.

The issue of availability of resources is one that has caused heated debates for some time now. For example, some argue that if courts of law permit the government to keep using budgetary constraints as an excuse for not providing social security rights and other socio-economic rights it is as good as rendering the government limitless rights that would eventually lead to those defying their political obligations. Pieterse advocates as thus:

...the extent to which socio-economic rights may be enforced at any given time is circumscribed by the resources at the state's disposal, as well as by the manner in which functionaries and health care professionals dispose of such resources, the justiciability of socio-economic rights means that some form of scrutiny of financial, budgetary and rationing decisions, however limited, is both unavoidable and necessary. Absolute deference to the financial and budgetary decisions of the political branches. would have the effect of awarding them limitless discretion over the manner in which resources are appropriated in order to satisfy constitutional obligations. This would drain socio-economic rights of their remedial potential, since it would mean that the state could justify every instance of non-compliance with socio-economic rights by asserting resource-scarcity or, more cynically, could shirk its constitutional responsibilities by allocating minimal funds to the realisation of socio-economic rights.

This reasoning seems to be pretty straight forward; it shows that the limitless discretion that such would vest upon the state would be very harmful to issues

⁹⁷⁵ Par 106.

⁹⁷⁶ An order of mandamus is an order requiring an authority to comply with a statutory duty imposed. See Barrie 1998 *TSAR* 595.

concerning checks and balances for instance. Pieterse⁹⁷⁷ further indicates that this would interfere with the court's ability to do its job and, consequently, obscure the basis and criteria for rationing decisions and flagging the accountability of rationing actors. It is, therefore, important for courts to scrutinise carefully the usually raised defence or excuse of lack of available resources for purposes of just distribution of social security rights.⁹⁷⁸ Based on the court's rejection of the minimum core obligation several authors adequately define what socio-economic rights are about.⁹⁷⁹ However, their question is whether this rejection of the minimum core obligation considers the needs of those who are desperately in need of socio-economic rights or not.⁹⁸⁰

Liebenberg⁹⁸¹ states that failure by the state to make provision for people's urgent socio-economic rights is detrimental to their health, lives and future socio-economic well-being, and a signifies failure to value their inherent human dignity. The minimum core obligation model is central to the opposition of the reasonable review model. Liebenberg describes this model as the "major theoretical rival to the reasonableness model of review."⁹⁸² Among those who advocate the minimum core obligation is David Bilchitz,⁹⁸³ who states that this obligation protects people's

⁹⁷⁷ Pieterse 2014 *PULP* 108.

⁹⁷⁸ Pieterse acknowledges that courts play a very difficult role in adjudicating for socio economic rights and other rights as well as constitutionally entrenched fundamental rights. He further acknowledges that courts do not have the necessary knowledge and skills to deal with financial and budgetary constraints. However, the insertion is that courts do have a role to play and therefore should do. This was stated s thus: "It must be remembered that courts' lack of qualification to themselves engage in budgeting or financial policy-making does not render them ill-equipped to scrutinise budgetary or financial policies for adherence to constitutional directives.⁶⁵ Their challenge is to devise appropriate standards of review that grant a sufficient margin of discretion to decision-makers, while demanding appropriate justification for infringements of constitutional rights. Moreover, in instances where such justification is not forthcoming, it must be remembered that the budgetary and policy repercussions of judicial interventions cannot in and of themselves prohibit courts from complying with their constitutional obligation to award appropriate relief for infringements of the Bill of Rights."

⁹⁷⁹ Liebenberg "Socio Economic Rights" 312.

⁹⁸⁰ Liebenberg "Socio Economic Rights" 312.

⁹⁸¹ Liebenberg "Socio Economic Rights" 312.

⁹⁸² Liebenberg "Socio Economic Rights" 312.

⁹⁸³ Bilchitz Poverty and fundamental rights 187. As referred to in Liebenberg "Socio Economic Rights" 312.

vital interests for survival.⁹⁸⁴ From the above argument, it is clear that the minimum core obligation that the courts have neglected guarantees that individuals are protected from conditions that “threaten their survival.”⁹⁸⁵ Minimum core obligations should be prioritised mainly because of their urgency and Liebenberg⁹⁸⁶ refers to Bilchitz as saying the following regarding this:

However, the meeting of minimum core obligations should enjoy prioritised consideration in social policy-making and in the judicial enforcement of these rights due to the urgency of the interests they protect. In other words, without the meeting of minimum essential needs to survival, the obligation to progressively achieve the full realisation of the rights to a satisfactory standard of adequacy becomes meaningless. The implications for adjudication are that a court must require particularly weighty reasons by way of justification from the state for a failure to fulfil core obligations.

This obligation has, however, faced a lot of criticism mainly from those who contend that if the courts are allowed to proceed with this concept they will be assuming the government’s policy-making role.⁹⁸⁷ Liebenberg⁹⁸⁸ contends as thus:

The concept of minimum core obligations ostensibly compels the courts to transgress the boundaries of their institutional legitimacy and competence, thus undermining the separation of powers doctrine.

Therefore, the central argument against the minimum core obligation is that it undermines the doctrine of separation of powers. Liebenberg⁹⁸⁹ states as follows:

Of greater concern to a vision of transformative constitutionalism that promotes institutional and social dialogue in the process of realising socio-economic rights is the argument that the endorsement of minimum core obligations by the judiciary will undermine deliberative democracy. The concept of minimum core obligations ostensibly compels the courts to transgress the boundaries of their institutional legitimacy and competence, thus undermining the separation of powers doctrine.

To better understand the human rights developments that took place in the new South Africa, attention must be paid to the history of colonialism and apartheid in

⁹⁸⁴ Bilchitz *Poverty and fundamental rights* 187. As referred to in Liebenberg “*Socio Economic Rights*” 312.

⁹⁸⁵ Liebenberg “*Socio Economic Rights*” 312.

⁹⁸⁶ Liebenberg “*Socio Economic Rights*” 312-313.

⁹⁸⁷ Liebenberg “*Socio Economic Rights*” 313.

⁹⁸⁸ Liebenberg “*Socio Economic Rights*” 313.

⁹⁸⁹ Liebenberg “*Socio Economic Rights*” 313. As already seen in the case of *Minister of Health v Treatment Action Campaign* where counsel for the government contended that court give heed to the notion of separation while giving out its decision.

it. Liebenberg⁹⁹⁰ states that this era in South African history led to a violation of many human rights recognised by the *Universal Declaration of Human Rights*.⁹⁹¹ The apartheid regime contained policies consisting of imposed political, economic and social segregation of people along racial borders.⁹⁹² While certain privileges were conferred upon Coloureds and Indian racial groups, Liebenberg⁹⁹³ states that the African majority was the most disadvantaged all round.⁹⁹⁴ The separation was imposed through a range of laws the foundation of which was the *Population Registration Act* of 1950 that classified every person according to their ethnic or racial group. It would, therefore, appear as Olivier⁹⁹⁵ puts it, that an essential reform of the social security system is a means of remedying past injustices that transpired in South Africa. The Interim Constitution⁹⁹⁶ on this aspect of the past states that:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.⁹⁹⁷

The South African government prior before first-ever democratic elections was forced to the negotiating table in the early 1990s by the pressure applied to it, mainly by trade unions, liberation movements and other typical South Africans who aspired to see change take place.⁹⁹⁸ The first-ever democratic elections were held on 27 April 1994 in terms of the said Interim Constitution.⁹⁹⁹ For the first time in South Africa, therefore, the system of parliamentary sovereignty was replaced

⁹⁹⁰ Liebenberg S 2000 [http://www. Communitylawcentre.org.za](http://www.Communitylawcentre.org.za).

⁹⁹¹ Universal Declaration of Human Rights (1948).

⁹⁹² Universal Declaration of Human Rights (1948).

⁹⁹³ Universal Declaration of Human Rights (1948).

⁹⁹⁴ Hereafter the term "Black" will be used to refer to Coloureds, Indians and Africans.

⁹⁹⁵ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

⁹⁹⁶ The Interim Constitution of the Republic of South Africa 200 of 1993

⁹⁹⁷ Liebenberg S 2000 <http://www. Communitylawcentre.org.za>.

⁹⁹⁸ Liebenberg S 2000 <http://www. Communitylawcentre.org.za>.

⁹⁹⁹ According to Liebenberg, The preamble of the Final Constitution affirms that it was adopted so as to establish, amongst other goals, a society based on social justice and an improvement in the quality of life of all. When interpreting socio-economic rights, the courts are obliged to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Liebenberg S 2000 <http://www. Communitylawcentre.org.za>.

by a constitutional system of democracy.¹⁰⁰⁰ The Constitution would be the supreme law of the land stating clearly that all laws found to be inconsistent would be declared null and void.¹⁰⁰¹

The intention to reform South Africa from its past was also seen in the final Constitution of the Republic of South Africa.¹⁰⁰² Olivier¹⁰⁰³ says:

It would appear that this reformative approach is in particular borne out by the provisions of the Constitution of the Republic of South Africa 108 of 1996. For the first time in the history of South Africa the Constitution compels the state to ensure the "progressive realisation" of social security. Section 27 shows a clear and unambiguous undertaking by the state to develop a comprehensive social security system.

This progressive realisation of social security rights for everyone may also be construed from the fact that migrant workers receive social security coverage from instruments like COIDA, ODMWA and RAFA. This means that the Constitution does realise the importance of migrants to a certain extent.

The new Constitution was able to see that the past needs to be corrected and therefore mandated those in power to take steps towards progressively realising the much-needed reform among black communities. This is where the courts play an essential role since they have a duty placed upon them. According to Olivier:¹⁰⁰⁴

Section 167(3) of the Constitution states that the Constitutional Court is the highest court in all constitutional matters and may decide only constitutional matters, and issues connected with decisions on constitutional matters and makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter. Section 167(7)

¹⁰⁰⁰ Liebenberg S 2000 [http://www. Communitylawcentre.org.za](http://www.Communitylawcentre.org.za).

¹⁰⁰¹ Liebenberg S 2000 [http://www. Communitylawcentre.org.za](http://www.Communitylawcentre.org.za).

¹⁰⁰² Constitution of the Republic of South Africa 108 of 1996.

¹⁰⁰³ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>.

¹⁰⁰⁴ Olivier M 2008 <http://www.saflii.org/journals/LDD/2008/8>. The courts of law have been given the power to adjudicate on matters regarding constitutional relief and therefore can enforce parliament or the executive to provide for social security rights as a whole. The case of *Fose v Minister of safety and Security* 1997 3 SA 786 (CC) appropriate relief is described as thus: Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.

describes a constitutional matter as any issue involving the interpretation, protection or enforcement of the Constitution.

This, therefore, shows without any doubt that courts do play a role in determining issues associated with social security rights.

What is important is the fact that the jurisprudence above does to a certain extent seem to reflect on international law; however, there are undeniably some shortages one cannot turn a blind eye to. In cases such as the judgment in *Khosa v Minister of Social Development* that endorsed the notion that migrant workers be excluded from social security systems of South Africa is, therefore, pivotal to examine the position of migrant workers in social security systems of South Africa since this may aid the portability of migrant workers' benefits immensely. Development of an effective social security system is vital for the sustenance of social security systems of every state in the world, especially for South Africa as a major migrant-receiving country in the SADC. With the provision of social security and the portability thereof still being a major hurdle in the SADC, other ways of adjudication have to be closely inspected for solutions to this problem. It is an undeniable truth that adjudication and other methods of enforcement play an important role in social security systems across the board.¹⁰⁰⁵ Access to dispute resolution mechanisms and institutions of enforcement within the South African framework is, therefore, vital and this is discussed below.

3.5 Issues surrounding dispute resolution and adjudication of Social Security in South Africa

The *Constitution of the Republic of South Africa* makes it very clear that everyone has a right to a fair public hearing before the courts of law or independent and impartial tribunals or forums whenever a dispute that can be resolved by law occurs.¹⁰⁰⁶ For the adjudication of social security to be effectively realised other rights also have to be realised.¹⁰⁰⁷ As pointed out in the *Grootboom*-case, socio-economic rights are interconnected and support each other, hence, they need to

¹⁰⁰⁵ Nyenti *Pertinent social security issues in South Africa* 35.

¹⁰⁰⁶ Section 34 of the Constitution of South Africa.

¹⁰⁰⁷ Nyenti *Developing an Appropriate Adjudicative* 20.

be read together in the setting of the Constitution as a whole when trying to establish whether the court has met its obligations.¹⁰⁰⁸

Equality before the law is one of the rights that would also have a direct bearing on the establishment of an adjudication system or framework that would enhance access to the courts of law.¹⁰⁰⁹ According to section 9 of the Constitution, everyone is equal before the law and has a right to equal protection before the law including full and equal enjoyment of all rights. Access to the courts and equality in this instance have to be read together in order to fully realise an effective social security adjudication framework.¹⁰¹⁰ Mpedi points out that the right to equality can be used as a basis of affording a certain category of people rights that were previously only afforded to a certain group of people.¹⁰¹¹ An example is drawn from the *Khosa*-case where the court finally extended social assistance's access to permanent residents.¹⁰¹²

This equality may also be the basis by which migrant workers may seek redress upon receiving any unfair discriminatory action, especially one that is detrimental to them accessing their social security benefits. Section 9(2) of the Constitution makes it very clear that equality includes equal enjoyment of all rights and freedoms. It can, therefore, be inferred that equality entails equal enjoyment of social security rights as well. Unfair discrimination by the state, whether direct or indirect, is also barred in section 9(3) and Mpedi¹⁰¹³ points out that the fact that the provision states that such shall not be on the grounds "including" race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual

¹⁰⁰⁸ See Par 24 where Jacob J said that: "The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them."

¹⁰⁰⁹ Nyenti Developing an Appropriate Adjudicative 20.

¹⁰¹⁰ Sections 9 and 34. See also Mpedi *Developing an Appropriate Adjudicative* 20.

¹⁰¹¹ Nyenti Developing an Appropriate *Adjudicative* 25.

¹⁰¹² *Khosa v Minister of Social Development* 2004 6 SA 505 (CC). The court stated that permanent residents were unfairly discriminated against. See also Mpedi *Developing an Appropriate Adjudicative* 26.

¹⁰¹³ Nyenti Developing an Appropriate Adjudicative 26.

orientation, age, disability, religion, conscience, belief, culture, language and birth does not mean that the list is a closed one.. Therefore, the socio-economic status of an individual has also been included as a ground of unfair discrimination.¹⁰¹⁴ Reference is also drawn from section 9(4) which helped enact *Promotion of Equality and Prevention of Unfair Discrimination Act*¹⁰¹⁵ that was hailed for introducing socio-economic status of an individual as one of the grounds on which discrimination is prohibited.¹⁰¹⁶

Equality can be both formal and substantive.¹⁰¹⁷ The former means that all persons should have equal rights regardless of their personal circumstances, meaning that when it comes to access to the courts of law, all and sundry should and must have equal access to adjudications mechanisms or dispute resolution mechanisms essential for the protection of their rights and interests.¹⁰¹⁸ Mpedi points out that such equality, therefore, turns a blind eye to disparities between societies living in the country.¹⁰¹⁹ These disparities entail both social and economic circumstances between people or even racial groups.¹⁰²⁰ If such formal equality is applied to access to the courts of law, then access to social security adjudication institutions may be denied to those in need because of their economic and social circumstances.¹⁰²¹

¹⁰¹⁴ Nyenti *Developing an Appropriate Adjudicative* 26

¹⁰¹⁵ Act 4 of 2000. (Hereinafter- PEPUDA.)

¹⁰¹⁶ Nyenti *Developing an Appropriate Adjudicative* 26. See also PEPUDA which states that it was enacted to give effect to section 9 read together with item 23 (1) of schedule 6 to the *Constitution of the Republic of South Africa* so as to prevent and prohibit unfair discrimination and eliminate it . Item 23(1) of schedule 6 reads as thus: "National legislation envisaged in sections 9(4), 32(2) and 33(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect."

¹⁰¹⁷ Nyenti *Developing an Appropriate Adjudicative* 26.

¹⁰¹⁸ Nyenti *Developing an Appropriate Adjudicative* 26.

¹⁰¹⁹ Nyenti *Developing an Appropriate Adjudicative* 26.

¹⁰²⁰ Nyenti *Developing an Appropriate Adjudicative* 26.

¹⁰²¹ Currie I and De Waal J *The Bill of Rights Handbook* Cape Town, Juta (2005) 233. See also Mpedi *Developing an Appropriate Adjudicative* 26. Mpedi elaborates as thus: "Formal equality requires sameness of treatment, implying that the adjudication system should be open to everybody, irrespective of their circumstance. It therefore ignores economic and social disparities between individuals or groups of persons. Where a concept of formal equality is applied in relation to access to a social security adjudication framework, access may be denied to some potential litigants due to their social and economic situation."

For the adjudication of social security rights to be effective, substantive equality is needed, which considers disparities between people in order to reach the desired outcome.¹⁰²² Substantive equality as a notion provides that historical imbalances caused by colonialism and apartheid be addressed by providing previously disadvantaged groups or individuals with much more favourable treatment compared to those who were previously advantaged.¹⁰²³ Mpedi¹⁰²⁴ explains the above sentiments as thus:

Substantive equality dictates that the equality provisions could be used to address historical imbalances by granting more favourable treatment to the historically and socially disadvantaged. Therefore, one purpose of equality, as a constitutional value and a fundamental right, is to remedy historical disadvantage and material inequalities. A substantial approach to equality permits and requires positive measures, tailored for the needs of particular individuals and groups, to address inequality and remedy disadvantage, thus creating the conditions for full and equal participation in society.¹⁰²⁵

¹⁰²² Currie I and De Waal J *The Bill of Rights Handbook* 233.

¹⁰²³ Nyenti *Developing an Appropriate Adjudicative* 27.

¹⁰²⁴ Nyenti *Developing an Appropriate Adjudicative* 27.

¹⁰²⁵ See also the case of *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) where discrimination on the basis of sex was used to remedy past injustices by favouring members who fell in a category of once disfavoured groups.

In this case some categories of prisoners with not so serious offences were pardoned by the then president of the Republic of South Africa, Nelson Mandela. These categories comprised of mothers with children under the age of twelve years old. There was however a male prisoner with a son under the same age who was not pardoned hence he challenged such a move on the grounds that he was unfairly discriminated against on the basis of sex. The Constitutional Court held that the sex discrimination in the Presidential pardon was not unfair. "The different treatment of mothers and fathers was justifiable because it reflected the unequal roles which men and women actually play in child-rearing." See Hubbard 1997 [Http:www.lac.org.za](http://www.lac.org.za).

In this case the court held that: "... we need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context." Par 41. See also Mpedi *Developing an Appropriate Adjudicative* 28. Justice O'Regan further stated as thus: "In this case, mothers have been afforded an advantage on the basis of a proposition that is generally speaking true. There is no doubt that the goal of equality entrenched in our Constitution would be better served if the responsibilities for child-rearing were more fairly shared between fathers and mothers. The simple fact of the matter is that at present they are not. Nor are they likely to be more evenly shared in the near future. For the moment, then, and for some time to come, mothers are going to carry greater burdens than fathers in the rearing of children. We cannot ignore this crucial fact in considering the impact of the discrimination in this case." See Hubbard 1997 [Http:www.lac.org.za](http://www.lac.org.za).

Migrant workers and migrants in generally fall within some of the most marginalised groups of people in South Africa.¹⁰²⁶ Providing for social security coverage for migrant workers through substantive equality and access to the courts of law would aid this group of people immensely as they have historically been part of South Africa's economic development. In instances where migrant workers are denied their duly earned social security benefits, substantive equality should be prioritised.

The truth of the matter is the fact the Constitution is trying to promote equality in an unequal world and such a premise or goal will be very hard to attain, especially in a country such as South Africa. O'Regan J¹⁰²⁷ shares the same sentiments and goes on to point out that:

Although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality.

The above sentiments, therefore, echo the notion that for equality to be achieved in the strictest sense, some sacrifices that entail treating people differently because of their social and economic realities have to be made. Litigants of social security disputes are usually desperate individuals with disadvantaged backgrounds.¹⁰²⁸ The other problem is that beneficiaries of social security and other litigants are disadvantaged by the fact that litigation can only commence upon rejection of the applications for payment of the benefit.¹⁰²⁹ Litigants are further disadvantaged by the fact that some social security statutes require that internal administrative remedies be exhausted before seeking help from the courts

¹⁰²⁶ See Par 3.2.

¹⁰²⁷ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC). See also Hubbard 1997 [Http://www.lac.org.za](http://www.lac.org.za).

¹⁰²⁸ See the *Grootboom*-case adequate housing was in dispute because of the vulnerability of those without adequate housing. See also the case of *Cele v the South African Social Security Agency* 2009 5 SA 105 where the impoverished eagerly went to court over social assistance grants.

¹⁰²⁹ Nyenti Developing an Appropriate Adjudicative 29.

of law, when they eventually reach the courts of law; litigants are normally without any money to pay for lawyers and other necessary court fees.¹⁰³⁰

It is, therefore, important to point out that there is a need to take a closer look at the notion of equality, even redefining the concept of access to the courts for purposes of promoting equality for the poor and vulnerable.¹⁰³¹ The social security adjudication system or framework means that such a system or institutions within the system have to operate in a manner that will consider the special needs of social security beneficiaries or litigants. Nyenti points out that those litigants need a framework that is:

... expeditious, efficient, affordable and easily accessible dispute resolution system. Such a system is necessary because when people are poor, individual incidents of unjust administrative action or unfair denial of access to services, can tip them into greater poverty and widen inequalities.

These sentiments clearly indicate, without any doubt, that social security adjudication system has to consider the vulnerability of those who seek redress from the system. In securing adjudication of social security and the right to access the courts of law, there has to be a consideration of the right to human dignity and this has to be given effect.¹⁰³² According to section 10 of the Constitution of South Africa, "everyone has inherent dignity and the right to have their dignity respected and protected." It is, therefore, pivotal to point out that the portability of social security benefits and adjudication of social security disputes is essential for this right to dignity to be afforded to people whether they be migrants or nationals. The word "everyone" includes migrant workers who also need their right to dignity and this has to be respected and protected. It is, therefore, important to realise that if such migrant workers are denied their social security benefits upon their return home then such is an infringement of their right to dignity and their well-being. The right to human dignity will be impacted positively by the right to social security and access to social security adjudication institutions

¹⁰³⁰ Nyenti Developing an Appropriate Adjudicative 29.

¹⁰³¹ Vawda YA "Access to Justice: From Legal representation to the promotion of equality and social justice – Addressing the legal isolation of the poor" 2005.

¹⁰³² Nyenti Developing an Appropriate Adjudicative 20.

upon instances where disputes arise.¹⁰³³ Chaskalson's explanation of the notion of human dignity at the Third Bram Fischer Memorial Lecture has been credited as summing up perfectly what this right entails.¹⁰³⁴ According to Chaskalson, human dignity entails:

...an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights and plays a role in the balancing process necessary to bring different rights and values into harmony. It too, however, must find its place in the constitutional order. Nowhere is this more apparent than in the application of the social and economic rights entrenched in the Constitution. These rights are rooted in respect for human dignity, for how can there be dignity in a life lived without access to housing, health care, food, water or in the case of persons unable to support themselves, without appropriate assistance. In the light of our history the recognition and realisation of the evolving demands of human dignity in our society - a society under transformation is of particular importance for the type of society we have in the future.¹⁰³⁵

The essence and importance of the right to human dignity will be influenced by access to the court of law by all including migrant workers.¹⁰³⁶

3.5.1 Adjudication and dispute resolution provisions under relevant South African legislations

The South African social security system makes provision for legal remedies and adjudication measures through various pieces of legislation.¹⁰³⁷ Not all social security laws make provision for adjudication and/or dispute resolution mechanisms when a person is dissatisfied.¹⁰³⁸ In the absence of any such provision, "any dissatisfied party will have to invoke ordinary common law or even administrative law remedies before a court with jurisdiction".¹⁰³⁹ Where social security statutes provide for internal dispute resolution mechanisms, disputes relating to entitlement and access are after the exhaustion of internal dispute

¹⁰³³ Nyenti Developing an Appropriate Adjudicative 31.

¹⁰³⁴ Goolam DateUnknown [Http://www.ajol.info/index.php](http://www.ajol.info/index.php).

¹⁰³⁵ Goolam DateUnknown [Http://www.ajol.info/index.php](http://www.ajol.info/index.php).

¹⁰³⁶ Nyenti Developing an Appropriate Adjudicative 32.

¹⁰³⁷ Olivier *et al Social Security: A Legal Analysis* 170.

¹⁰³⁸ Olivier *et al Social Security: A Legal Analysis* 170.

¹⁰³⁹ Olivier *et al Social Security: A Legal Analysis* 170.

resolution mechanisms, resolved mainly through litigation.¹⁰⁴⁰ As shown below, the point of departure has to be the Constitution.

3.5.1.1 The Constitution

The Constitution protects several rights that are directly relevant to the adjudication of social security.¹⁰⁴¹ These include the right to equality;¹⁰⁴² the right to human dignity,¹⁰⁴³ the right to just administrative action;¹⁰⁴⁴ the right to access courts,¹⁰⁴⁵ and perhaps most importantly, the right to have access to social security.¹⁰⁴⁶ Another fundamental right which should be noted is the right to approach a competent court to enforce and protect the rights which are entrenched in the Bill of Rights whenever they are violated or threatened.¹⁰⁴⁷ The following persons may approach a court: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting in the public interest; and an association acting in the interest of its members.¹⁰⁴⁸

The South African social security adjudication system currently is not exactly uniform because of the manner these social security schemes are set up.¹⁰⁴⁹ Each and every statute comes up with ways in which disputes can be resolved by

¹⁰⁴⁰ Nyenti 2012 *OBITER* 28.

¹⁰⁴¹ Mpedi *Pertinent social security issues in South Africa* 35.

¹⁰⁴² In terms of section 9 of *the Constitution*.

¹⁰⁴³ Section 10 of *the Constitution* provides that "Everyone has inherent dignity and the right to have their dignity respected and protected.

¹⁰⁴⁴ Section 33 of *the Constitution* provides that "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

¹⁰⁴⁵ Section 34 of *the Constitution* provides that "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". See also *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) para 22 where the court stated that "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help." For the applicable principles regarding the interpretation of section 38, see also *Tulip Diamonds FZE v Minister for Justice and Constitutional Development* 2013 2 SACR 443 (CC) paras 28-43.

¹⁰⁴⁶ In terms of section 27(1)(c) of *the Constitution*.

¹⁰⁴⁷ In terms of section 38 of *the Constitution*.

¹⁰⁴⁸ See 38 of the Constitution. See also *Tulip Diamonds FZE v Minister for Justice and Constitutional Development* 2013 2 SACR 443 (CC) paras 28-43

¹⁰⁴⁹ Nyenti *Developing an Appropriate Adjudicative* 233.

initiating its own processes and institutions.¹⁰⁵⁰ It is this fragmentation that leads to time delays and other problems for the aggrieved seeking redress, especially migrant workers who face issues of social security benefits portability.

3.5.1.2 Adjudication system under COIDA

COIDA offers avenues for reviews of decisions, objections to such decisions and appeals against any such decisions made by the Compensation General or Director General.¹⁰⁵¹ Furthermore, any local or provincial division of the High Court with the appropriate jurisdiction may be used as a platform for appealing any redress.¹⁰⁵² On top of this, section 91(1) makes provision for any person so affected by any decision of the Director General or trade union or employer's organisation of which the said person was a member of during the said period to lodge an objection with the commissioner within 180 days preceding the decision.

It is important to note that the Director General is versed with the power to, after notice, if possible, review any decision regarding a claim for compensation or award of compensation after giving the party concerned an opportunity to submit his case or representations.¹⁰⁵³ The grounds of this review entail the fact that the employee has not availed himself to an examination by the medical practitioner as pointed out in the act.¹⁰⁵⁴ Other grounds shall entail the fact that the disablement giving rise to the said award was a result of the unreasonable refusal or failure of the employee to submit himself to medical aid; the said failure, therefore, led to the aggravated disablement.¹⁰⁵⁵ Compensation which was awarded in the form of periodical payments or pension is deemed excessive or insufficient because of existing or changed circumstances and these circumstances may also warrant the

¹⁰⁵⁰ Nyenti Developing an Appropriate Adjudicative 233.

¹⁰⁵¹ Nyenti Developing an Appropriate Adjudicative 242.

¹⁰⁵² Nyenti Developing an Appropriate Adjudicative 242.

¹⁰⁵³ Section 90(1).

¹⁰⁵⁴ Section 90(1) (a). The examination shall be in terms of section 42(1) which states that "an employee who claims compensation or to whom compensation has been paid or is payable shall when so required by Director-General or the employer or himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the Director-General or the employer or mutual association concerned."

¹⁰⁵⁵ Section 90(1) (b).

review.¹⁰⁵⁶ Another ground for review entails the fact that the decision or the award was based on an incorrect view or misrepresentation of facts or that there has been new evidence available to the Director General.¹⁰⁵⁷ Section 90(2) states that the Director General may confirm, amend, set aside, suspend, discontinue, reduce or increase compensation awarded after considering all the representation and evidence submitted to him.

It is important to note that COIDA establishes what is referred to as the Compensation Court which is composed of a presiding officer assisted by two assessors.¹⁰⁵⁸ It is through this Compensation Court that any objections to the decisions of the Director General may be heard. The scope of the jurisdiction of the Compensation Court is only limited to hearing objections as per section 91(2) of COIDA.¹⁰⁵⁹ What is disadvantageous to the aggrieved is the fact that COIDA does not set specific time frames for the resolution of objections.¹⁰⁶⁰ The need to control finances by the Compensation Fund means that hearings in this court are only limited to three hours per day, meaning that migrant workers who have objections will have spent money they do not have to stay in South Africa until the finalisation of the hearing since a speedy resolution of disputes is not guaranteed.

3.5.1.3 Adjudication under ODMWA

When it comes to ODMWA, it is important to point out that this piece of legislation does not have any internal dispute resolution processes regarding any dispute relating to payment for occupational diseases by the Compensation Commissioner.¹⁰⁶¹ Upon dissatisfaction with a decision, the Compensation Commissioner came up with an applicant can only acquire help by bringing an action to the High Court, according to the dispute resolution processes allowed by

¹⁰⁵⁶ Section 90(1) (c).

¹⁰⁵⁷ Section 90(1) (d).

¹⁰⁵⁸ This Compensation Court is a result of section 91(2) read together with section 8 of COIDA. See also Nyenti 2016 *PER/PELJ* 6.

¹⁰⁵⁹ Nyenti Developing an Appropriate Adjudicative 245.

¹⁰⁶⁰ Nyenti Developing an Appropriate Adjudicative 249.

¹⁰⁶¹ Nyenti Developing an Appropriate Adjudicative 250.

the said Court.¹⁰⁶² Disputes that arise from ODMWA are normally related to certification of occupational diseases and payment of compensation for occupational diseases by the Compensation Commissioner.¹⁰⁶³

However, in instances where there is a dispute regarding the presence, nature and degree of a disease to be compensated for or what is referred to as the certification of disputes, such are handled by the Certification of the Medical Bureau for Occupational Diseases (hereinafter Certification Committee).¹⁰⁶⁴ The Medical Reviewing Authority for Occupational Diseases is bestowed with the power to review decisions emanating from the Certification Committee.¹⁰⁶⁵ However, the peculiarity of this review process leaves one wondering if the Review Authority is as independent and effective as we would like to believe.¹⁰⁶⁶ This is because if it happens that the Review Authority disagrees with the Certification Committee, then there has to be a joint meeting between both the Review Authority and the Certification Committee.¹⁰⁶⁷ It is only after this process that a decision can be taken. It is important to note that for the application of certification to be completed, an applicant may have to wait for years. Moreover, after the certification, the same applicant may wait for several years more for the payment to be effected.¹⁰⁶⁸ Mpedi¹⁰⁶⁹ explains this situation in this manner:

...workers who forward their medical reports to the Medical Bureau for Occupational Disease in Johannesburg, for certification and onward forwarding to the Compensation Commissioner for Occupational Diseases for payment, have had to wait years for a response and the eventual resolution of their claims. This process may lead to further difficulties for former workers if the administrative burden of the certification institutions were to rise due to more ex-mineworkers being identified and their claims processed. Persons whose diseases are being certified may not be able to appeal to the Reviewing Authority, due to the delay in finalising the certification.

¹⁰⁶² Nyenti 2012 *OBITER* 28.

¹⁰⁶³ Nyenti Developing an Appropriate Adjudicative 250.

¹⁰⁶⁴ Nyenti 2016 *PER/PELJ* 12.

¹⁰⁶⁵ Nyenti 2016 *PER/PELJ* 12.

¹⁰⁶⁶ Nyenti 2016 *PER/PELJ* 12.

¹⁰⁶⁷ Nyenti 2016 *PER/PELJ* 12.

¹⁰⁶⁸ Nyenti Developing an Appropriate Adjudicative 253.

¹⁰⁶⁹ Nyenti Developing an Appropriate Adjudicative 253.

This issue poses even more problems for migrant workers who are usually back home, starving during these lengthy processes. Another major hurdle for such workers is accessing the Review Authority, which is based in Johannesburg.¹⁰⁷⁰ In order to lodge an application for review, which has to be done within 90 days, an applicant has to travel from his or her home country to Johannesburg. If a person is unable to lodge the review within this period, the right of the applicant to review will be invalidated, meaning that the decision by the Certification Committee will stand despite its irregularities.¹⁰⁷¹

3.5.1.4 Adjudication under the Road Accident Fund

The RAF does not have an internal dispute resolution procedure either to deal with disputes that relate to claims of compensation for death or injury that has occurred.¹⁰⁷² Section 15(2) states that any action to enforce claims against the fund or any agent has to be brought to a competent court which has jurisdiction.¹⁰⁷³ This provision states that any such claims should be brought to a High Court situated in an area where the injury or death took place.¹⁰⁷⁴ However, when it comes to assessing disputes that ensue as a result of motor accidents and resulting injuries, the *Road Accident Fund Act* (Hereafter RAFA) takes precedent. Disputes arising from motor vehicle assessments are to be taken to the Appeal Tribunal.¹⁰⁷⁵ Any dissatisfaction with the decision of the appeals tribunal can only be appealed to the High Court for review.¹⁰⁷⁶ Similar to ODMWA, the RAFA allows claimants to lodge their grievances within 90 days of being informed of the results

¹⁰⁷⁰ Nyenti *Developing an Appropriate Adjudicative* 254. It is also very pivotal to point out that the Road Accident Fund does not only fund South African citizens only, but also all legal migrants within South African borders. Road Accident Fund Date Unknown [Http://www.arivealive.co.za](http://www.arivealive.co.za).

¹⁰⁷¹ Nyenti *Developing an Appropriate Adjudicative* 253. Nyenti points out that the Review authority is not given the power to condone any submission outside the 90-day period prescribed.

¹⁰⁷² Nyenti 2012 *OBITER* 29.

¹⁰⁷³ Section 15(2) states that: "An action to enforce a claim against the Fund or an agent may be brought in any competent court within whose area of jurisdiction the occurrence which caused the injury or death took place."

¹⁰⁷⁴ Nyenti *Developing an Appropriate Adjudicative* 256.

¹⁰⁷⁵ This Appeal Tribunal is appointed by the Registrar of the Health Professions Council of South Africa (hereinafter-HPCSA).

¹⁰⁷⁶ Nyenti *Developing an Appropriate Adjudicative* 265.

of the assessment report, by notifying the registrar that the assessment or rejection is being disputed. This is done by lodging a dispute resolution form with the registrar.¹⁰⁷⁷ However, if the fund rejects the claim application on the basis that it was not submitted within the prescribed time, the Appeal Tribunal is not empowered to condone such an application.¹⁰⁷⁸

3.5.1.5 Adjudication under the Pension Fund

When a member of a pension fund is unhappy with the decision of the fund, the Act requires the pension funds to reconsider such a decision. According to section 30A (1) of the *Pension Fund Act*, notwithstanding the rules of any fund, a complainant has a right to lodge a written complaint with a fund or an employer who partakes in such a fund. Any such complaint shall be considered and replied to in writing by the fund or the participating employer within 30 days of the receipt of the fund.¹⁰⁷⁹ However, if the complainant is still not happy with the outcome or there is no reply within the stipulated 30 days' time frame, the Act allows the complainant to lodge such a complaint with the adjudicator.¹⁰⁸⁰ The said adjudicator has his/her office established in terms of section 30B (1). It is wise to note that the adjudicator only considers complaints submitted in writing and not in any other way.¹⁰⁸¹ Section 30I (3) permits the adjudicator to extend any period in order to investigate any complaint that was not submitted within the prescribed time only on good cause shown. However, the adjudicator will not investigate any complaint if any act or omission relating to it happened three years before the date on which it was received.¹⁰⁸² This provision was better articulated in the case of *Delbridge and Others v Liberty Group Ltd and Others*,¹⁰⁸³ where the complaint was received 10 years prior to the lodging of the said complaint. The adjudicator held that before the *Pensions Funds Amendment Act* 11 of 2007 came into power, *the Pensions Fund Act* allowed the adjudicator to

¹⁰⁷⁷ Regulations to the Road Accident Fund Act of 2008, Regulation 3(4).

¹⁰⁷⁸ Nyenti Developing an Appropriate Adjudicative 265.

¹⁰⁷⁹ Section 30A (2).

¹⁰⁸⁰ Section 30A (3).

¹⁰⁸¹ Nyenti Developing an Appropriate Adjudicative 272.

¹⁰⁸² Section 30I (1).

¹⁰⁸³ 2011 1 BPLR 19 (PFA).

condone three years late submission on account of good cause shown. The adjudicator no longer has the discretion as a result of the Amendment Act.

The adjudicator is located in Johannesburg and all complaints are sent to such an office for investigations.¹⁰⁸⁴ Appeals can be heard by the High Court with jurisdiction, however, if such an appeal has not been lodged, within six weeks after the determination by the adjudicator, such a decision is deemed to be a civil judgement by any court of law.¹⁰⁸⁵

3.5.2 *The challenges and shortcomings*

The South African social security adjudication system is faced with a lot of issues emanating from lack of alternative means of dispute resolution to delays in the finalisation of cases despite expensive costs litigants pay for such cases. Some of the most obvious shortcomings include the fact that some social security statutes do not include internal means of lodging complaints. Legislations like ODMWA and RAFA do not contain internal dispute resolution mechanisms and this is a clear deviation from provisions found in some international and regional instruments that point out the need to have internal dispute resolution mechanisms as a means of ensuring proper and effective social security coverage. For instance, the *Code of Social Security in the SADC*, echoes these sentiments by pointing out that member states should endeavour to establish proper administrative and regulatory frameworks by ensuring integrated, inter-departmental and inter-sectoral structures with adequate and sufficient budgetary support to ensure effective and efficient delivery of social security benefits.¹⁰⁸⁶

Where such internal dispute resolution mechanisms are provided for, problems such as delays in the finalisation of cases are encountered, including access to the courts of law which is generally expensive for litigants.¹⁰⁸⁷ The use of ordinary courts of law plays an essential part in social security adjudication systems of

¹⁰⁸⁴ Nyenti *Developing an Appropriate Adjudicative* 267.

¹⁰⁸⁵ Nyenti 2012 *OBITER* 30. See also Nyenti *Developing an Appropriate Adjudicative* 267.

¹⁰⁸⁶ Article 21.1 of the Code on Social Security in SADC.

¹⁰⁸⁷ Nyenti 2012 *OBITER* 30.

South Africa. Nonetheless, the problem here is the fact that litigation as a whole is expensive, and is very complex and complicated for people who do not understand it. It is also, very slow, especially for people in need of financial support and health care.¹⁰⁸⁸ This lack of internal means of resolving disputes means that court proceedings are not used as a last means of dispute resolution.¹⁰⁸⁹ Litigants to these social security disputes usually depend on their own resources and these also determine the quality of legal representations which is normally not the best. It is, therefore, fitting to conclude that the court-based system has an adverse impact on the right to access social security.¹⁰⁹⁰ Although it is no excuse, lack of knowledge affects litigants directly and hinders their constitutional entrenched rights.¹⁰⁹¹ Using ordinary courts to adjudicate social security disputes is very complex, expensive and time-consuming. They are also not specialised enough to deal effectively with social security issues.¹⁰⁹²

The lack of alternative dispute resolution methods of social security disputes also plays a detrimental role in denying access to the right to proper social security adjudication.¹⁰⁹³ According to section 34 of the Constitution, everyone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or another independent and impartial tribunal or forum where appropriate. Nyenti points out that the term appropriate confers another adjudicating forum that may be empowered to resolve disputes other than ordinary courts of law.¹⁰⁹⁴ He further echoes this sentiment as follows:

The right further requires either a court or another "appropriate" forum to decide a dispute. While the term "appropriate" implies that an adjudicating forum other than a court must be empowered and suitable to resolve a dispute (such as the case where only a magistrate in an ordinary court can adjudicate criminal matters and order committal to prison) an inference can be drawn that the term also requires that the selected adjudication forum should be ideally suited for the type of dispute in question. This implies that where it is appropriate to do so,

¹⁰⁸⁸ Nyenti 2012 *OBITER* 30.

¹⁰⁸⁹ Nyenti 2012 *OBITER* 30.

¹⁰⁹⁰ Nyenti 2012 *OBITER* 30.

¹⁰⁹¹ Sections 27(c) and 34 which provide for the rights to social security and the right to access to court respectively are being infringed.

¹⁰⁹² Mpedi "Social security dispute resolution and the need for a coherent adjudication system" 91.

¹⁰⁹³ Nyenti 2012 *OBITER* 33

¹⁰⁹⁴ Nyenti 2012 *OBITER* 34.

legal disputes can and should be resolved by other tribunals and forums apart from ordinary courts (such as the High Court). Other adjudication forums and procedures apart from the normal courts could be preferable for a particular type of dispute due to their specialization, expertise, the need to consider local circumstances, and the need for the adoption of expeditious, informal and inexpensive procedures.

Furthermore, Mpedi¹⁰⁹⁵ also echoes the same sentiments by pointing out the following:

...social security complainants should be able to approach the social security institution concerned through internal complaints procedures and raise their grievances with an independent authority. In addition, there must a possibility of the dispute being escalated further with an external institution such as a court. Measures aimed at ensuring that social security claimants are assisted by a qualified persons when enforcing their social security rights in a court of law (such as legal aid), will need to be investigated and implemented. This is necessary to counter the balance between destitute social security claimants and the mighty social security institutions. Furthermore, it is of utmost importance that the system is accessible. This would entail that information about the dispute resolution mechanisms is readily accessible to the general public. The dispute resolution process should be free and inexpensive and with the least possible legal formalities. Given the importance of social security benefits for the survival of many claimants and their dependants, disputes must be resolved expeditiously.¹⁰⁹⁶

This lack of internal dispute resolution mechanisms together with the fragmentation of policies and institutions, cause major problems for migrant workers.¹⁰⁹⁷ The other challenge is the issue of the location of social security institutions which are only located in Johannesburg. This means that migrant workers have to travel long distances and spend money they already struggle to obtain in order to gain access to their social security benefits.¹⁰⁹⁸

3.6 Conclusion

The history of migration in South Africa dates back to the pre-apartheid era and this has played a key role in the prevalence of circular migration in Southern Africa as a whole. In South Africa, the history of segregation was seen in immigration legislations that essentially separated people on the basis of their national origin,

¹⁰⁹⁵ Mpedi "*Social security dispute resolution*" 92.

¹⁰⁹⁶ Mpedi "*Social security dispute resolution and the need for a coherent adjudication system*" 92.

¹⁰⁹⁷ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

¹⁰⁹⁸ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>.

class, gender, and race. While examining the immigration policies and legislations of South Africa, one can conclude that they restrict the flow of migrant labourers leading to shortages of skilful workers. Despite all this, to refrain from pointing out all the changes that have positively impacted on the South African immigration sphere would be utterly unfounded. The period between 1991 and 2005 introduced numerous positive changes. Migration policies went through changes, most importantly from the *Aliens Control Act*, to the *Immigration Amendment Act 13 of 2011*. During this period, especially during the reign of the *Aliens Control Act*, the emphasis was not placed on attracting skilled migrants or foreigners as referred to by the Act, instead, more focus was placed on employing citizens. The apartheid-era also engineered social exclusion in its purest form. In this period, social assistance and social security as a whole were generally provided to the white nationals of South Africa while only a few black nationals got the aid they needed. However, in 1992 when *Social Assistance Act* was finally passed, a lot of changes emerged, that saw discriminatory provisions that excluded most black South Africans and migrant workers from the social security sphere finally done away with. Moreover, pensions and grants that were initially bestowed upon white South Africans were extended to cover the black population as well. Although the Constitution of South Africa makes provision for everyone to have the right of access to social security, it is essential to note that in this country social security is made of social insurance and social assistance.

Moreover, it was established that migrant workers are not entitled to social assistance in South Africa. However, they do have access to social insurance. This is comprised of the UIF, RAF and Compensation Funds which are, in essence, the responsibility of the government. The UIF does not provide coverage for temporary migrant workers and other short-term circular migrants. The RAF, which is a compulsory fuel levy and is paid out to third parties for any loss or damage suffered as a result of death or bodily harm, is accessible to migrant workers. Voluntary social insurance schemes on the other hand are comprised of medical schemes, workmen's compensation and retirement schemes. COIDA and ODMWA fall within the category of these voluntary social insurance schemes and

are accessible to migrant workers employed in South Africa. However, migrant domestic workers currently still do not have access to COIDA's coverage meaning that they presently do not get redress for accidents that ensue while at work. COIDA covers employees for injuries and accidents arising out of and in the course of their employment while ODMWA compensates employees in the mining sector for injuries and diseases related to their occupation. It was established that ODMWA's benefits are generally inferior to those of COIDA. ODMWA provides compensation for pneumoconiosis together with TB, pneumoconiosis, permanent obstruction of airways, progressive systemic sclerosis and any other permanent disease of the cardio-respiratory organs attributable to risk work. ODMWA further makes payments in the form of lump-sum payments and payments in the form of pensions. In contrast, COIDA covers temporary disablement, permanent disablement, dependant benefits and medical aid.

Furthermore, it was further established that the legislature enacted several laws with an intention of advancing social security in South Africa; however, these statutes are subject to the limitations as set out in section 36 of the Constitution. These social security laws aim to fulfil the constitutional obligation of the provision of access to social security and social assistance to those individuals who are unable to support themselves and their dependents. The statutes even set out enforcement mechanisms for social assistance. Criticisms were, however, levelled against these wide range of acts and their amendments. These critics argue that such a range add to the ignorance of beneficiaries who lack information regarding their rights. Another criticism is that the difficulty of knowing which version of the law is operative sometimes becomes problematic to the courts while trying to enforce a right because they are often misled. These legislations were further criticised for being fragmented and in conflict with one another. These problems were hailed as being some of the reasons that hinder migrant workers chances of accessing their well-deserved social security benefits because they are usually deported back home upon termination of their employment contracts.

In addition, the Constitutional Court's role in the recognition of the socio-economic rights enforceability was established. It was confirmed that the Constitutional

Court gave heed to the entrenchment of the Bill of Rights which includes the provision of social security rights in the Constitution with the importance of section 36 of the Constitution further realized since these limitations as set out in its provisions also guide the courts of law in their role of adjudicating a broad spectrum of socio-economic rights. The Constitutional Court also stressed the importance of the availability of resources in progressively realising socio-economic rights as provided for in section 26(2) and 27(2) of the Constitution.

Adjudication and enforcement mechanisms are also essential and fundamental parts of the social security system. Moreover, international law also has a role to play, hence it was also defined as acting as a benchmark for evaluating domestic adjudication systems and frameworks in general. It is also important to point out that while dealing with adjudication and dispute resolution of social security disputes, what was discovered is the fact that certain standards are established by a number of different instruments. These instruments include areas that deal with the establishment of independent and impartial courts and tribunals, provision of reasonable time limits for reviews and appeals, establishment of orderly and complementary reviews and appeals procedures, enforcement of procedural guarantees to ensure a fair hearing; guarantee of representation and legal assistance; and provision of effective remedies.

The problem with the South African framework is that some social security laws or statutes do not provide for internal adjudication and dispute resolution mechanisms. These statutes instead insist that any person with any dissatisfaction has to invoke ordinary common law or even other administrative law remedies before any court of law that has jurisdiction. For example, legislations like RAFA and ODMWA do not contain the right to lodge a complaint; in fact, ODMWA has no internal adjudication and dispute resolution mechanisms at all. It is a perfect example of a statute that seems to lack independence. For instance, in ODMWA, disputes that regard the presence, nature and degree of a disease to be compensated for are handled by the Certification of the Medical Bureau for Occupational Diseases (hereinafter Certification Committee). The Medical Reviewing Authority for Occupational Diseases has the power to review decisions

emanating from the Certification Committee. However, the oddness of this review process leaves one wondering if the Review Authority is as independent and effective as we would like to believe. For instance, if the Review Authority disagrees with the Certification Committee, then there has to be a joint meeting between both the sides. It is only after this process that a decision can be taken. The argument here is that all social security statutes should be able to ensure that when it comes to settlements or appeals, such be done by authorities that were not initially involved in reviewing whether or not the injury or disease was of a compensatable nature. Since fairness and impartiality are required when adjudicating matters, the fact that the very same authorities are involved in appeal proceedings creates doubt as to whether fairness and impartiality would be exercised in instances where the aggrieved, especially migrant workers, seek redress.

The access to and adjudication of social security disputes is faced with a number of challenges. Most of these issues are largely, due to the fact that some offices are only located in Johannesburg, making it difficult for migrant workers to access them because of time and financial constraints. The use of ordinary courts of law adds to the problems that migrant workers face in terms of high costs of litigation proceedings, and delays in finalising cases. This, therefore, affects migrant labourers' constitutional rights in South Africa, including the right to have access to social security and the courts of law. The problem with ordinary courts of law is that they are not specialised enough to deal effectively with social security issues. The next chapter discusses social security systems of the Kingdom of Lesotho and the Swaziland as selected migrant-sending in the SADC region.

CHAPTER FOUR: DISPARITIES BETWEEN SOCIAL SECURITY SCHEMES OF SELECTED MIGRANT-SENDING COUNTRIES

4.1 Introduction

This chapter deals with the analysis of the Kingdom of Lesotho and the Kingdom of Swaziland. Both countries are located in the SADC and (like many other countries found in this location) have very weak economic growth, uneven distribution of wealth, and low life expectancy.¹⁰⁹⁹ Lesotho is completely surrounded by South Africa and has a population estimated at around 2 186 865 souls.¹¹⁰⁰ Swaziland is also landlocked by South Africa and Mozambique, with its population estimated around 1.1 million.¹¹⁰¹

According to the World Bank, Lesotho's economic growth over the last three years was estimated at around 3% with the main accelerator to this growth being its textile industry and agriculture.¹¹⁰² This shows that there was a slight increase around these three years, as compared to the era between 2012 and 2013, which had seen a slight decline even though there was still an expectation that such growth will continue in the coming years.¹¹⁰³ Approximately 57% of households in Lesotho were estimated to be living below the poverty line in 2010, while 34% of the population was estimated to be living below the food poverty lines. These lines can be identified as US\$1.08 per day and US\$0.61, per day respectively.¹¹⁰⁴ The truth of the matter is that the distribution of income is immensely uneven. While some people participate in what is termed cash economy for wage employment,

¹⁰⁹⁹ Government of the Kingdom of Lesotho 2015 [Http://www.socialprotection.org](http://www.socialprotection.org).

¹¹⁰⁰ Country meters 2017 <http://www.countrymeters.info.en.Lesotho>.

¹¹⁰¹ Kingdom of Swaziland Central Statistical Office 2017 <https://www.swazi.org.sz>. This is according to the 2016 Swaziland statistics.

¹¹⁰² The World Bank 2018 <http://www.worldbank.org>.

¹¹⁰³ Government of the Kingdom of Lesotho 2015 <http://www.socialprotection.org>.

¹¹⁰⁴ Government of the Kingdom of Lesotho 2015 <http://www.socialprotection.org>.

others are not a part of this.¹¹⁰⁵ Poverty is prominent in the rural areas and it is said to be double that of urban areas.¹¹⁰⁶

A high prevalence of HIV plays a major role in poverty and the halting development in Lesotho because of high death rates that result from it.¹¹⁰⁷ It is estimated that 23 % of adults in Lesotho have this illness, the third highest number in the world.¹¹⁰⁸ Another factor impacting Lesotho is its history of political turmoil and conflicts.¹¹⁰⁹ These issues have resulted in the decline of life expectancy in the country from 56 years of age to a mere 35.2 years in 1997 and 2004, respectively.¹¹¹⁰ However, the 2017 national census indicated that this number has since risen to 51.5 years of age in males and 51.8 years of age in females respectively.¹¹¹¹

Changes in the South African immigration policies have directly influenced a drastic decline in the number of Lesotho mineworkers in South Africa.¹¹¹² Although it is important to point out that the Lesotho Government did not sit idly by and watch poverty escalate, there had to be some kind of intervention by international and regional organisations with enough muscle to aid Lesotho with this battle against poverty.¹¹¹³ Consequently, Lesotho was forced to rely upon comprehensive backing from the United Nations and the European Union.¹¹¹⁴ In 2012, the World Bank ranked the country at position 143 out of 183 countries on the indicators of countries doing business.¹¹¹⁵ Its problems consist of a number of things such as a somewhat impoverished investment sector, which has been described as relatively under-developed with a great deal of room for development.¹¹¹⁶ It is clear,

¹¹⁰⁵ Government of the Kingdom of Lesotho 2015 <http://www.socialprotection.org>.

¹¹⁰⁶ Government of the Kingdom of Lesotho 2015 <http://www.socialprotection.org>.

¹¹⁰⁷ Government of the Kingdom of Lesotho 2015 <http://www.socialprotection.org>.

¹¹⁰⁸ Olivier 2013 Development Southern Africa 98.

¹¹⁰⁹ Olivier 2013 Development Southern Africa 98.

¹¹¹⁰ Olivier 2013 Development Southern Africa 98.

¹¹¹¹ Country meters 2017 <http://www.countrymeters.info/en/Lesotho>.

¹¹¹² Olivier 2013 Development Southern Africa 100.

¹¹¹³ Olivier 2013 Development Southern Africa 101.

¹¹¹⁴ See Doyle "Launch of the National Policy and Social Development and National Social Protection Strategy".

¹¹¹⁵ Government of the Kingdom of Lesotho 2015 <http://www.socialprotection.org>.

¹¹¹⁶ Lesotho has four commercial banks, money-lenders, financial cooperatives and credit only institutions. See Government of the Kingdom of Lesotho 2015

therefore, that there is a lot of work needed to develop this country, hence, the several initiatives that were undertaken. This meant that the international community would be required to offer assistance because of their great deal of experience in this regard.¹¹¹⁷ This, therefore, meant that Lesotho relied upon programmes like the United Nations Assistance Framework which ran from 2008 to 2012, the United Nations Development Programme, the United Nations World Food Programme and the United Nations Children's Fund.¹¹¹⁸ The ILO then intervened by assisting with the establishment of a social security framework to provide both short-term and long-term benefits to Lesotho citizens.¹¹¹⁹ This comprehensive social security framework would include, not only disability, but also survivor benefits, sickness benefits, maternity benefits, unemployment benefits and occupational diseases and injury benefits, all of which would initially be provided for those in formal employment and eventually be extended to those in informal employment and self-employment.¹¹²⁰ Such initiatives meant that the country would be able to take appropriate measures to promote equality of opportunity for the disadvantaged groups within it with the aim of enabling such people to participate more easily in all spheres of public life.¹¹²¹

Swaziland is different from other countries in the SADC region in that its monarch, King Mswati III, exercises all powers of governance in terms of the judiciary, legislative and executive powers.¹¹²² Since he is the head of state, he is responsible for the appointment of the Prime Minister as the head of the country's government and cabinet, respectively.¹¹²³ The country's economy is predominantly agricultural and reports suggest that over 70% of its nationals who live in rural areas make a living through subsistence farming.¹¹²⁴ Swaziland's per capita GDP

[Http://www.socialprotection.org](http://www.socialprotection.org). In 2015, Lesotho was ranked 158th out of 187 countries in the UN's Human Development Index. See Freeland and Khondker 2015 [Http://www.developmentpathways.co.uk](http://www.developmentpathways.co.uk).

¹¹¹⁷ Government of the Kingdom of Lesotho 2015 [Http://www.socialprotection.org](http://www.socialprotection.org).

¹¹¹⁸ Olivier 2013 Development Southern Africa 101.

¹¹¹⁹ Olivier 2013 Development Southern Africa 101.

¹¹²⁰ Olivier 2013 Development Southern Africa 101.

¹¹²¹ *Constitution of Lesotho*, 1993. Section 26(2).

¹¹²² Kingdom of Swaziland Central Statistical Office 2017 <https://www.swazi.org.sz>.

¹¹²³ Swaziland United Nations Development Assistant Framework 2015 <https://www.unicef.org>.

¹¹²⁴ Swaziland United Nations Development Assistant Framework 2015 <https://www.unicef.org>.

has been estimated at \$3.500, while the GDP is \$6.259 billion, figures that further emphasise the urgent need for equal and consistent social security.¹¹²⁵

Factors such as high unemployment rates and sluggish economic growth, together with a high prevalence of HIV and TB, are some of the challenges that have to be overcome. Furthermore, research has indicated the influence that gender inequality exerts on the country. This gender inequality is evidenced by social issues such as the significant lack of women who participate in decision-making processes, high levels of maternal mortality, enduring malnutrition, and a great deal of gender-based violence.¹¹²⁶ Moreover, because citizens are not aware of all the public services they could benefit from, they cannot make use of them. This lack of knowledge aggravates services delivery issues since it results in a populations that seldom exhausts the proffered services.¹¹²⁷ This may indicate why migrant workers returning home from South Africa seldom know of the benefits that are due to them. Swaziland is also criticised for lacking a technically trained workforce with enough technical skills and (know-hows) to implement programmes that are warranted by policies after the latter have been successfully passed.¹¹²⁸ Even after policies are passed, the country is said to lack the capacity to monitor, analyse, and evaluate data and implement such programmes and strategies.¹¹²⁹

Swaziland's social security framework has been seen as relatively basic with old-age pension grants being the most comprehensive part of this system.¹¹³⁰ Moreover, in 2010, it was reported that old-age pension grants covered about 60,000 individuals over the age of 60.¹¹³¹ There is also a National Provident Fund responsible for pension benefits provided for nationals of Swaziland formally employed.¹¹³² Attaining formal employment, and employment as a whole, is a real

¹¹²⁵ Swaziland United Nations Development Assistant Framework 2015 <https://www.unicef.org>.

¹¹²⁶ Swaziland United Nations Development Assistant Framework 2015 <https://www.unicef.org>.

¹¹²⁷ Swaziland United Nations Development Assistant Framework 2015 <https://www.unicef.org>.

¹¹²⁸ Swaziland United Nations Development Assistant Framework 2015 <https://www.unicef.org>.

¹¹²⁹ Swaziland United Nations Development Assistant Framework 2015 <https://www.unicef.org>.

¹¹³⁰ Bellano, Dawes, Hildebrand & Lewis 2013 <https://blogs.ubc.ca>.

¹¹³¹ Bellano, Dawes, Hildebrand & Lewis 2013 <https://blogs.ubc.ca>.

¹¹³² Bellano, Dawes, Hildebrand & Lewis 2013 <https://blogs.ubc.ca>.

problem in Swaziland and unemployment rate is estimated to be around 28.2% while 40% of that was attributed to the youth.¹¹³³ This means that there is about 81% of the population living below \$2 a day, while as many as 63% are said to be living below a poverty line of \$1,25.¹¹³⁴ Like other migrants from the SADC region, Swazi nationals have also been migrating to South Africa because of their need for better socio-economic opportunities.¹¹³⁵

Swaziland (like Lesotho) is faced with a great number of financial struggles coupled with high levels of corruption, and these lead to difficulties in terms of providing nationals with comprehensive social security protection. In light of this, the objective of this chapter is to analyse the disparities between selected migrant-sending countries' social security benefits schemes and regulations to investigate whether these countries do, in reality, provide social security coverage for their nationals. This chapter will then attempt to analyse recent changes in these countries' schemes and determine if they have any significant impact on the portability of social security benefits. Challenges that migrant workers from these countries face upon their return home are sought after and critically analysed. The aim is to urge both Lesotho and Swaziland to meet South Africa half-way by making provision for their own nationals when they get home. To sum up, the chapter starts by analysing the social security framework of Lesotho as a whole, then moves on to the social security framework of Swaziland. It will then discuss access to and the portability of social security benefits of migrant workers from both Swaziland and Lesotho. Finally, the chapter concludes with a summary of its findings.

4.2 Lesotho's social security system overview

When examining the Constitution of Lesotho, it is important to note that although there is no express provision of the right to social security, it provides a list of human rights that are considered as sources of social security rights in Lesotho including other statutory provisions, collective agreements, policy documents and

¹¹³³ Bellano, Dawes, Hildebrand & Lewis 2013 <https://blogs.ubc.ca>.

¹¹³⁴ Bellano, Dawes, Hildebrand & Lewis 2013 <https://blogs.ubc.ca>.

¹¹³⁵ Meny-Gibert & Sintha 2016 <https://africacheck.org>.

some contracts of service.¹¹³⁶ Lesotho's social security measures and policies cover different categories of people, an array of social risks and various benefits.¹¹³⁷ However, despite this, the country's social security system is fragmented, uncoordinated and lacks synergy as a result.¹¹³⁸ Keeping this in mind, this chapter will now open with a discussion of the *Constitution of the Kingdom of Lesotho* and the extent to which it provides for social security and social protection as a whole.¹¹³⁹

4.2.1 *The Constitution of Lesotho*

According to the *Constitution of the Kingdom of Lesotho*,¹¹⁴⁰ more specifically section 2 thereof, states that it is "the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void." The *Constitution of the Kingdom of Lesotho* provides for the right to life and the right to equality, respectively. Moreover, it recognises that every human being has an inherent right to life and no one shall, therefore, be arbitrarily deprived of such.¹¹⁴¹ The right to life, as enshrined in this Constitution, is a forebear of all other rights it names.¹¹⁴² Without the right to life or life itself, one cannot enjoy all other rights that exist. For example, the right to life goes hand-in-hand with the right to dignity. These sentiments were espoused in the South African case of *S v Makwanyane*, which held that:

¹¹³⁶ Mosito 2014 *PELJ* 1573.

¹¹³⁷ Mosito 2014 *PELJ* 1573.

¹¹³⁸ Mosito 2014 *PELJ* 1573.

¹¹³⁹ Mosito 2014 *PELJ* 1573.

¹¹⁴⁰ Constitution of Lesotho, 1993.

¹¹⁴¹ Section 5(1).

¹¹⁴² Mosito 2014 *PELJ* 1573. According to *S v Makwanyane* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) O' Regan J pointed out that: The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.

The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.

However, as previously stated, there is no express provision that specifically provides for the right to social security. A good example of this conflict can be seen in the case of *Khathang Tema Baitsooli and Another v Maseru City Council and Others*¹¹⁴³, which came to the conclusion that the right to life cannot be interpreted and defined to include the right to livelihood; this shows that social security in Lesotho is not provided for in its Constitution.¹¹⁴⁴

4.2.1.1 The Right to Equality

The right to equality is vital in providing for social security and social protection as a whole. The Constitution of Lesotho provides that "everyone shall be entitled to equality before the law and to the equal protection of the law."¹¹⁴⁵ This provision makes it clear that the Constitution does not entail any limitations towards the right to equality. Consequently, this means that the said provision and others similar also play a role in instances where migrants' social security entitlements are in question.¹¹⁴⁶ According to section 26 of its Constitution, Lesotho shall adopt policies intended to promote a society based on equality and justice for everyone without any sort of discrimination since equality and justice go hand-in-hand.¹¹⁴⁷ This provision further states that appropriate measures shall be taken for purposes of promoting equality of opportunities for the disadvantaged groups to enable them to fully participate in the society and all spheres of public life.¹¹⁴⁸

¹¹⁴³ 2004 AHRLR 195 (LeCA).

¹¹⁴⁴ See also Mosito 2014 *PELJ* 1574.

¹¹⁴⁵ Section 19.

¹¹⁴⁶ Mosito 2014 *PELJ* 1574.

¹¹⁴⁷ This provision states that such policies shall be provided to all citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

¹¹⁴⁸ Section 26(2).

4.2.1.2 Freedom from discrimination

The Constitution of Lesotho also makes provision for the prohibition of discrimination. Section 18(1) states that no law shall be discriminatory, either by itself or in its effect and forbids discrimination in its entirety; it forbids discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.¹¹⁴⁹ While this part of the Constitution promotes the full enjoyment of rights and freedoms without any discriminatory effect, its provision of social security is complex; this issue is central to this chapter and this thesis. Mosito¹¹⁵⁰ points out that the most important question is whether this provision can be used to invoke the provisioning of social security to all persons entitled, without any discrimination. He continues by stating that:

The term "law" includes any instrument having the force of law, made in exercise of a power conferred by a law, including the customary law of Lesotho and any other unwritten rule of law. This provision relates to social security in the sense that it would be unacceptable for persons to be discriminated against by laws in Lesotho with respect to benefitting under the social security measures available to persons in the country.¹¹⁵¹

Social security in the Constitution may be drawn from what are referred to as principles of state policy.¹¹⁵² It is these principles which are said to "inform the content of fundamental rights as far as relates to issues of social security and the delivery of social assistance."¹¹⁵³ Nonetheless, it is important to further note that these principles of states policy are subject to the limits of economic capacity and cannot be enforced by the courts of law.¹¹⁵⁴ It is these limits which will guide agencies and authorities, whether private or public, with the goal of progressively

¹¹⁴⁹ Section 18(3).

¹¹⁵⁰ Mosito 2014 *PELJ* 1575.

¹¹⁵¹ Mosito 2014 *PELJ* 1575-1576.

¹¹⁵² These principles of states policy are listed from section 25 to 36 and these are as follows: Application of the principles of State policy, Equality and justice, Protection of health, Provision for Education, Opportunity to work, Just and favourable conditions of work, protection of workers' rights and interests, protection of children and young persons, rehabilitation, training and social resettlement of disabled persons, economic opportunities, participation in cultural activities and protection of the environment.

¹¹⁵³ Mosito 2014 *PELJ* 1576.

¹¹⁵⁴ Section 25.

realising fully these principles.¹¹⁵⁵ The full realisation of these principles is said to be by legislation or otherwise. However, Mosito contends that the word “otherwise” inflicts an obligation for authorities and agencies to search for ways to achieve these principles of state policy by invoking measures such as social policy and social welfare mechanisms.¹¹⁵⁶ This will, therefore, lead to the provisioning of social security in Lesotho. These principles of state policy are required to conform to the fundamental rights, meaning that they have to be subsidiary to such rights.¹¹⁵⁷

4.2.2 *Specific social security legislations*

As mentioned earlier, Lesotho’s social security system is very fragmented and entails social protection legislations which encompass labour and social security issues.¹¹⁵⁸ The country has a few formal social protection strategies and mechanisms aimed at combating poverty and income insecurity.¹¹⁵⁹ Moreover, domestic statutes like the Labour Code Order, ensure the availability of these social protection mechanisms and strategies.¹¹⁶⁰

It is also important to note that although social insurance is a central form of social protection in Lesotho, it only covers the economically active part of the nation or, more specifically the working class.¹¹⁶¹

4.2.2.1 The Labour Code Order

The principal law of labour and employment in Lesotho is the *Labour Code Order* (hereafter Labour Code), which covers all workers and apprentices in both the private sector and public sector.¹¹⁶² One of the duties of the employer, as stipulated in the Labour Code, is to ensure the safety, health and welfare of all his

¹¹⁵⁵ Section 25. see also Mosito 2014 *PELJ* 1576.

¹¹⁵⁶ Mosito 2014 *PELJ* 1577.

¹¹⁵⁷ Mosito 2014 *PELJ* 1577.

¹¹⁵⁸ Mosito 2014 *PELJ* 1577.

¹¹⁵⁹ Tlhaole Social Protection Strategies 2.

¹¹⁶⁰ 24 of 1992 (hereinafter *Labour Code*)

¹¹⁶¹ Tlhaole Social Protection Strategies 24.

¹¹⁶² Tlhaole Social Protection Strategies 25.

or her employees at work so far as is reasonably practicable.¹¹⁶³ According to this provision (stipulating what the duties of the employer are) this duty involves the maintenance of a clean and safe working environment that poses no risks to employee health, and has adequate sanitary facilities and preparations to ensure their welfare at work.¹¹⁶⁴ Further duties include ensuring maintenance of plant and work systems, making arrangements for safety and omission of health related risks regarding the use, handling, storage and transport articles and substances.¹¹⁶⁵ Employers are obliged to also provide the necessary information, instructions, training and supervision required to ensure employee safety and health at work.¹¹⁶⁶ Maintenance of the place of work under the employer's control to ensure safety and elimination of health risks is also required.¹¹⁶⁷ Employers are further required to consult with the employees' representatives and this has been identified as key for purposes of making maintenance arrangements, which will effectively promote measures that will ensure the safety and well-being of employees and will check the effectiveness of measures so adopted.¹¹⁶⁸

Moreover, it is very important to note that while carrying out his or her duties, the employer has to do all this as far as reasonably practicable. Employers are also obligated to keep documents and certificates issued in respect of the place of work by the Labour Commissioner and, most importantly, particulars of every accident, dangerous occurrence or industrial disease occurring at the place of work.¹¹⁶⁹ These documents are to be kept and made available for inspection for at least five years after the date on which they occurred.¹¹⁷⁰ Employers have to notify the Labour Commissioner as soon as is practicable in instances where an

¹¹⁶³ Section 93(1).

¹¹⁶⁴ Section 93(1) (a)

¹¹⁶⁵ Section 93(1) (b) &(c).

¹¹⁶⁶ Section 93(1) (d).

¹¹⁶⁷ Section 93(1) (e).

¹¹⁶⁸ Section 93(4). These employee representatives ought to have a seat at the health and safety committee as provided for by section 98. According to subsection 4 of the already mentioned provision, the health and safety committee shall consist of: "an equal number of members, not less than two on each side, representing the employer and the employees, provided that the representatives of the employees shall be chosen by the employees or designated by a trade union."

¹¹⁶⁹ Section 96(1) (a) (b).

¹¹⁷⁰ Section 96(2).

employee dies or suffers any form injuries as a result of accidents arising out of or in connection with his or her occupation.¹¹⁷¹ Furthermore, an employer has the responsibility to take reasonable care of the safety and health of those who may be affected by any action of his or any omission thereof that takes place at work.¹¹⁷² This same duty includes that the employer also owes it to himself and must take precautions by making sure that he provides himself and his or her employees with protective clothing and equipment, especially in instances where there is clear risk of incurring bodily injuries against which the equipment or clothing affords protection.¹¹⁷³

In its protection of employees, the Labour Code further makes provision for sick pay and severance pay. When it comes to maternity leave benefits, it is interesting to note that the Labour Code does not obligate the employer to pay a female employee her wages during her absence from work as a result of pregnancy.¹¹⁷⁴ Section 134 does, however, states that there is nothing in the Act that bars the employer from making any such payment of wages to the said employee in terms of the contract if the employer so wishes.

Maternity benefits are particularly important for female workers and are recognised as such by the international community. The ILO, as one of its earliest conventions, adopted the *Maternity Protection Convention* 3 of 1919. It has also been argued that the convention was intended to make certain that working females are able to care for themselves and their babies.¹¹⁷⁵ In fact, the Labour Code points out that when it comes to interpretation and administration of the Code, the ILO Conventions and recommendations thereof have to be complied with.¹¹⁷⁶ It is, however, very disappointing to state that this piece of legislation

¹¹⁷¹ Section 101(1) (a).

¹¹⁷² Mpeli and Nyenti *Employment Injury Protection* 39.

¹¹⁷³ Section 94(c). See also Mpeli and Nyenti *Employment Injury Protection* 39.

¹¹⁷⁴ Mpedi and Smit *Access to social services for non-citizens* 72.

¹¹⁷⁵ Mosito 2014 *PELJ* 1582. It must further be noted Lesotho has not ratified this Convention.

¹¹⁷⁶ Section 4 states that: The following principles shall be used in the interpretation and administration of the Code:

(a) the standards laid down in the Code are the minimum legally obligatory standards and are without prejudice to the right of workers individually and collectively through their trade unions to request, to bargain for and to contract for higher standards, which in turn then

does not seem to comply or conform to these international instruments in any express terms.¹¹⁷⁷

Another concern is that the Labour Code also allows deductions from wages of an employee by the employer for purposes of making payments due from such an employee into any provident medical or pension fund or any other fund or scheme approved by the Minister of Labour and Employment.¹¹⁷⁸ It further protects the provident, benevolent or pension fund of a registered trade union or employers' organisation in instances where there are proceedings by and against such.¹¹⁷⁹ Simply put, this legislation obligates such organisations to stay clear of these funds upon litigation for or against them.¹¹⁸⁰ The Labour Code further mandates that such a provision be provided for in the rules of trade unions or employers' associations; that is, there must be a separate fund where all money received or paid out by a trade union or employers' organisation with respect to any contributory provident fund or pension scheme may be kept.¹¹⁸¹ This, however, has not halted those who perceive the Labour Code as falling short of proper protection and benefits of social security. The argument is that there is no provision in the Labour Code which deals with the administration of a provident, medical aid or pension fund.¹¹⁸² Mosito points out that this is disappointingly left in the hands of "market forces", and echoes the need for legislative intervention to ensure proper management of such. Another criticism stems from the fact that the

become the minimum standards legally applicable to those workers for the duration of the agreement;

(b) no provision of the Code or of rules and regulations made there under shall be interpreted or applied in such a way as to derogate from the provisions of any international labour Convention which has entered into force for the Kingdom of Lesotho;

(c) in case of ambiguity, provisions of the Code and of any rules and regulations made thereunder shall be interpreted in such a way as more closely conforms with provisions of Conventions adopted by the Conference of the International Labour Organisation, and of Recommendations adopted by the Conference of the International Labour Organisation.

(d) where, under the provisions of any other legislation, a person may have a remedy as provided for in that legislation, that remedy shall be in addition to and not in place of any remedy provided for by the Code.

¹¹⁷⁷ Mosito 2014 *PELJ* 1582.

¹¹⁷⁸ Section 85(2) (a).

¹¹⁷⁹ 222(4).

¹¹⁸⁰ Mosito 2014 *PELJ* 1582.

¹¹⁸¹ Section 8 of schedule 2

¹¹⁸² Mosito 2014 *PELJ* 1582.

Labour Code makes no provision for pensions for employees or their beneficiaries.¹¹⁸³ Yet another utterly confusing issue is the fact that it also does not provide cover for public service workers or those who are not formally employed.¹¹⁸⁴

4.2.2.1.1 Severance pay

When it comes to severance pay, an employee who has been working for his or her employer for a period of more than one year is entitled to receive a severance pay which is equal to two weeks' pay for each completed year of continuous service with the said employer.¹¹⁸⁵ However, the said severance pay will only be paid out if the employee's contract of employment has been terminated without any misconduct on his or her part.¹¹⁸⁶ Another interesting aspect is that it extends coverage to non-citizens as well. This means that severance payments will be extended to employees, regardless of their residence status.¹¹⁸⁷ However, the Labour Code does explicitly point out that non-citizens will only be employed in Lesotho if they are in possession of a valid work permit.¹¹⁸⁸ Moreover, the law states that any employer who so employs a non-citizen without a work permit shall be guilty of an offence.¹¹⁸⁹ It is, however, visible from the above clause that Lesotho, like its South African counterpart, seems to discourage the unregulated influx of migrants.¹¹⁹⁰

¹¹⁸³ Mosito 2014 *PELJ* 1583.

¹¹⁸⁴ Mosito 2014 *PELJ* 1583.

¹¹⁸⁵ Section 79(1).

¹¹⁸⁶ Section 79(2).

¹¹⁸⁷ Mosito 2014 *PELJ* 1583.

¹¹⁸⁸ Section 165(1) which states that: "No employer shall employ any person in Lesotho who is not a citizen of Lesotho and no such person shall accept employment in Lesotho unless that person is in possession of a valid certificate of employment (work permit) issued by the Labour Commissioner."

¹¹⁸⁹ Section 165(3).

¹¹⁹⁰ According to section 2(1)(j), of the *Immigration Act* 13 of 2002, one of the objectives of the afore mentioned act is to regulate the influx of foreigners by ensuring that businesses in South Africa employ migrants with exceptional skills only and encourages employers to train citizens and reduce their dependency on foreigners.

4.2.2.1.2 Compensation for employment injury

When a worker is injured, due to and in the course of employment, he or she is entitled to compensation under the *Workmen's Compensation Act*.¹¹⁹¹ This Act deals with compensation from the Ministry of Labour to those employees who sustain injuries or illnesses as a result of their occupation.¹¹⁹² Moreover, cover is only extended to all people who have entered in a contract of employment.¹¹⁹³ However, those employees employed by government on temporary basis and those who are employed but are not pensionable are not insured.¹¹⁹⁴ While, the cover also extends to those employed in the private sector, but excludes domestic workers and workers like herd-boys.¹¹⁹⁵ Challenges that are normally encountered when accidents occur and compensations are due are witnessed in cases that are usually referred to the Labour Court of Lesotho, in light of this, a few examples are discussed below.

In *Ramatobo v Security Lesotho*¹¹⁹⁶ the applicant was formerly employed by the respondent, Security Lesotho. The applicant claimed that he had been stationed as a security guard at a certain manufacturing factory located within the Thetsane Industrial Area in Maseru. While travelling with the factory driver on the day of the incident,, the said driver hit a dog and the vehicle subsequently overturned, leading to the applicant being severely injured. The accident was duly reported to the Labour Commissioner in accordance with section 14(1) of the *Workmen's Compensation Act*. Incapacity amounting to 20% was eventually established and the respondent was ordered to pay duly. The respondent denied that the injury was as serious as to warrant compensation and further challenged the manner in which the assessment was arrived at. The respondent's allegation was that the assessment led to two very inconsistent results. Furthermore, it was claimed that

¹¹⁹¹ Act 13 of 1977. See s 5(1).

¹¹⁹² See Ss 2(2), 5(2). See also Tlhaole *Social Protection Strategies* 26.

¹¹⁹³ S4. See also Tlhaole *Social Protection Strategies* 26.

¹¹⁹⁴ Mpedi and Nyenti *Employment Injury Protection* 40.

¹¹⁹⁵ Tlhaole *Social Protection Strategies* 26. Cattle heading is a very popular and normal occupation in Lesotho, especially in the rural areas where sheep and cattle rearing is still very dominant. Herd boys are normally paid on a monthly basis or annually with the common example being a cow.

¹¹⁹⁶ LC 63/07.

initially the assessment was at 0% while the second assessment was at 20%. In this instance, the court showed just what an important role the *Workmen's Compensation Act* plays by pointing out that in section 18(1) of the Act, it is held that if anyone is not satisfied with the findings of the medical practitioner (assessing compensations due to those injured, deceased or those who contracted an occupational illness) they are entitled to lodge an appeal through the office of the Labour Commissioner as warranted by the Act.¹¹⁹⁷ This was summarized as thus:

Workmen's compensation claims are regulated by the *Workmen's Compensation Act, 1977* (hereinafter referred to as the Act). An assessment of compensation due to an injured, deceased, or a workman who has contracted an occupational disease is done by a Medical Practitioner. In terms of the Act, if anyone of the parties is not satisfied with the assessment made by the Medical Practitioner, he or she is entitled to lodge an appeal with the Workman's Compensation Medical Board through the office of the Labour Commissioner.¹¹⁹⁸

The *Workmen's Compensation Act* also prescribes the Medical Board provide the Labour Commissioner with its written findings or opinions when it is done with the referral.¹¹⁹⁹ Since one of the issues was the fact that the respondent was not informed of the appeal to the Medical Board, it was discovered that the respondent was served with a letter that had all the findings of the Medical Board. The court then finally held that:

...the letter from the Medical Board appears authentic and was duly signed by the Board members. It was upon the respondent to adduce evidence to the contrary. The respondent failed to show why they doubted the authenticity of the Board's assessment. Whilst acceding that the respondent ought to have been informed about the appeal as an interested party; we have no reason to doubt the authenticity of the Medical Board's report. The applicant had every right in terms of the Act to appeal against the initial assessment made by the Medical Practitioner. The Medical Board's assessment coupled with the letter from the Labour Department informing the respondent of the assessment made by the Board leaves us with no option but to conclude that the applicant is entitled to workman's compensation following the injuries he sustained as a result of the accident that he incurred...¹²⁰⁰

¹¹⁹⁷ Section 18(1) (d) states that the Labour Commissioner may refer to the Board any dispute regarding an assessment made by a medical practitioner.

¹¹⁹⁸ Par 5.

¹¹⁹⁹ Section 18(2).

¹²⁰⁰ Par 10.

Another case that shows the importance of the *Workmen's Compensation Act* is *Chabeli v Security Lesotho*,¹²⁰¹ where the applicant had claimed for payment of money under the Act. The applicant's case was that he had been shot in the belly while on duty and had been able to bring a medical report to the attention of the respondent who was his employer at the time. The respondent then submitted the said medical report to the Labour Department as required by the Workmen's Compensation Act. The Labour Department dealt with the computations and the respondent was duly served with the computed compensation amounting to LSL 30, 637.35 which the latter was supposed to pay.¹²⁰² However, the respondent neglected and failed to pay the said amount. After the court established that the applicant sustained the injury while on duty. The court held that:

In terms of section 5 (1) of the Workmen's Compensation Act, 'If in any employment, personal injury by accident arising out of and in the course of employment, is caused to a workman, his employer shall be liable to pay compensation in accordance with the provisions of this Act.' Applicant has satisfied us through his unchallenged evidence that he sustained injury while on duty. He has tendered evidence that clearly shows the computations of his compensation in terms of the Act. In law, evidence that has not been challenged is taken to have been admitted as a true and correct reflection of events (see *Lenka Mapiloko v Pioneer Seed (RSA) and others LAC/A/08/08*). We are therefore satisfied through the unchallenged evidence of Applicant that he is deserving of the compensation amount claimed.¹²⁰³

Where injury does not lead to incapacitation of over three days, then the workers will not be awarded any compensation. Other scenarios that lead to non-payment of compensation as per the *Workmen's Compensation Act* include, cases where death or injury was resultant from intentional injury to oneself, misconduct by the employee or worker resulting to an accident, where claims are made six months after the accident and where the illness or diagnosis is made six months after the diagnosis, a false representation by the worker or employee to the employer stating that he was not suffering from a particular illness or had no particular

¹²⁰¹ LC/97/2014.

¹²⁰² LSL stands for the Loti of Lesotho.

¹²⁰³ Par 6-7.

injury while he actually had the said problem is also a ground for non-compensation.¹²⁰⁴

The *Workmen's Compensation Act* points out that every employer is mandated to insure himself together with his employees for liability of occupational diseases and injuries compensation.¹²⁰⁵ The employer has to acquire means to get required private insurance with a private carrier upon receiving approval by the Minister.¹²⁰⁶ However, the Act has been widely criticised for having a number of weaknesses.¹²⁰⁷ One of the first visible challenges or weaknesses facing the employment injury compensation framework of Lesotho is the fact that the system is very fragmented (as previously touched upon).¹²⁰⁸ While some employees are covered by an employer-labile system, other permanent and pensionable employees situated in the public sector are covered by a contribution pension fund.¹²⁰⁹ Another issue that sparks major concern is the delay in the payment of benefits. As a result of employers who neglect or even fail to pay out what is due to employees, beneficiaries or employees usually encounter unnecessary court expenses (which they can hardly afford) and wastage of time especially in terms of the Ministry of Labour that does not always deal with individual cases speedily.¹²¹⁰

This misconduct by the Ministry of Labour was seen in the case of *Labour Commissioner (obo deceased Motlalepula Charles Rakhoba's Family) v Leta Security Services*¹²¹¹ where the deceased was employed by the respondent as a security guard and was assigned to guard a certain supermarket in Maseru. The events occurred as follows: While escorting the owner of the supermarket to his home, the applicant was shot in the head by suspected robbers. It soon emerged

¹²⁰⁴ Schedule 1 read together with Section 37. See also Mpeli and Nyenti *Employment Injury Protection* 41.

¹²⁰⁵ Section 28.

¹²⁰⁶ Section 2(1). Mosito 2014 *PELJ* 1587.

¹²⁰⁷ Mosito 2014 *PELJ* 1587-1588.

¹²⁰⁸ Mpeli and Nyenti *Employment Injury Protection* 42.

¹²⁰⁹ Pensions Proclamation of 1967 provides pensions for public servants and these are paid from the government's consolidation fund.

¹²¹⁰ See *Chabeli v Security Lesotho* where the employer simply neglected to pay the employee who was shot in the belly on duty.

¹²¹¹ 2006 LC /31/05.

that he had been shot after handing guard duty to another security guard as his shift had ended. Several misunderstandings between the respondent and the applicant ensued. The respondent claimed that the deceased was not on duty when he died while he also argued that there were no known dependants of the deceased. A late application for compensation was finally filled in court. It was established that the respondent had not thoroughly investigated as to whether the deceased had any known dependants. The court said:

In the light of the report of the employer that the deceased did not die on duty, one would have expected the Labour Commissioner to have invoked section 14(3) to enable the department to make an informed decision whether a claim for compensation could lie under the Act. No investigation was made, as a result, *ex facie* the papers there is nothing to support counsel's *ipse dixit* that the applicant has a good case on the merits. The only facts we have are the undenied report of the employer that the deceased did not die on duty. We cannot in the circumstances share counsels' submission that the applicants have good prospects of success.

The court's sentiments were that the applicant, as the Ministry of Labour, had refrained from doing its job properly by failing to file on time and investigate the whereabouts of the deceased's dependents. The lax and dilatory conduct was further seen in *Labour Commissioner (obo) Pheello vs Lesotho Electricity Corporation*.¹²¹² In this particular incident, Pheello Lepekola was employed by a company named Roshcon (pty) Ltd, which had been contracted by the respondent to do some work on its behalf in Lesotho. On the day in question, the respondent injured his index finger while carrying out his duty, and the matter was reported to the Labour Commissioner, as required. After undergoing treatment, the doctor concluded that the incapacity was permanent and amounted to 4%. As a result, the compensation payable was calculated to amount to LSL 1.944.00. The company contracted by the respondent was duly informed but never paid out the money. Later, it could no longer be found; hence, an action against the respondent. One of the issues arising was that the founding affidavit was no affidavit in law. This was found based on the following facts: the compiler of the said affidavit did not set it up under oath; not state whether the facts which had been deposed were true and correct, and; lastly, the said document had not been

¹²¹² 2010 LSLC 25.

attested and sworn to before a commissioner of oaths. The respondent therefore prayed that such an application be dismissed because of its failure to conform to the rules in both form and content.¹²¹³ Contrarily, the applicant contested that she had lost all contact with the complainant and further conceded to all the points raised by the respondent; hence, the application was dismissed as contented and prayed by the respondent. It is clear from this particular case that the respondent's inability cost the complainant. Furthermore, this type of inability is a norm and has to be addressed seriously to uphold employees' social security rights.

Moreover, since there is no insurance scheme, beneficiaries normally receive their benefits in the form of lump sums and this was criticised for being an unfavourable practice in that the beneficiaries of such monies do not know how use this money effectively and, as a result of this, are quickly poverty-stricken.¹²¹⁴ Coverage between the employment compensation and occupational health and safety in Lesotho is rightfully criticised for being too narrow.¹²¹⁵ Mpedi and Nyenti¹²¹⁶ share this sentiment and state that:

The personal scope of coverage of OSH and EI compensation in Lesotho is narrow as the Labour Code and the Workmen's Compensation Act extend coverage only to employees and apprentices (and the Public Officers' Defined Contribution Pension Fund covers permanent pensionable public workers). Considering that private sector accounts for 30% of total employment, with the public sector employing 5.5% and state-owned enterprises employing 1.6% (a total of 37.1%); a vast majority of the working population (up to 63% of the working population) is without any coverage in relation to OSH and EI compensation. The scope of occupational diseases covered is also narrow, limited to diseases listed in the First Schedule of the Workmen's Compensation Act.

It is, therefore, safe to conclude the injury compensation systems of Lesotho' fragmentation together with poor administration means that that there are still gaps to be filled because the coverage is inadequate.¹²¹⁷ The penalties for

¹²¹³ Par 1-6.

¹²¹⁴ Mpedi and Nyenti *Employment Injury Protection* 43.

¹²¹⁵ Mpedi and Nyenti *Employment Injury Protection* 43.

¹²¹⁶ Mpedi and Nyenti *Employment Injury Protection* 43.

¹²¹⁷ Mpedi and Nyenti *Employment Injury Protection* 43. The occupational health and safety systems are also poorly enforced and there is generally lack of compliance in Lesotho. A good example is drawn from Daemane who stated that: "violation of health and safety standards

employers who do not comply are also very low and have remained the same from the time the law was passed. The crux of the matter is that it has been four decades since the fines were first issued, and as such, they cannot discourage employers from practising non-compliance. According to section 14(4), a labour officer who does not comply with the provisions of this particular Act is guilty of an offence and is liable to be convicted for six months in prison or pay LSL 600, or both. The *Workmen's Compensation Act*, on the other hand, only imposes a fine of not more than LSL 200 or 12 months' imprisonment in section 45(3) thereof. Needless to say, these fines are mediocre and do not, in any form, discourage public servants from ignoring such provisions and acting as they please. This statute does, however, provide cover to employees regardless of whether they are nationals or non-nationals.¹²¹⁸

4.2.3 Lessons for Lesotho

Lesotho's ratification of the *International Covenant of Economic, Social and Cultural Rights* means that it has an obligation, as provided for in the same covenant, to provide for social security rights of its nationals. It is, therefore, quite surprising to see that both social security rights and access to them is excluded in the Constitution.¹²¹⁹ The inclusion of this right in the Constitution would mean that

such that emergency exits are sometimes locked with padlocks. Factories have no temperature regulations; therefore, they are very hot in summer and very cold in winter. There is hardly any safety equipment in the factories, wherever existent employers rarely condone such equipment use, except when they are sure of the usually communicated visits of labour inspection officers. When such inspection is to be done, adequate light in the factories will be ensured for that day only. Workers wish labour inspectors could come every day especially during winter because heaters only work when they come for inspection." Daemane 2014 *JSDS* 60. See also Mpele and Nyenti *Employment Injury Protection* 43. The inadequacy of Occupational health and safety system of Lesotho is clearly visible in factories because of the harsh conditions employees of this sector of the economy work under. Pregnant women on the other hand are not catered for by any means at all. Garment factory employees normally work on their feet for the entire nine hour shifts and this does not stop at all even when such fall pregnant. Research shows that these female employees are only allowed two weeks maternity leave even though the law clearly stipulates that such women be given twelve weeks' maternity leave instead. Keletso 2015 [Http://:www.equaltimes.org](http://www.equaltimes.org). The fact that these women are not allowed to fully recover shows just how employers neglect to comply with occupational health and safety standards.

¹²¹⁸ Mpedi and Smit (eds) *Access to Social Security for Non-Citizens* 72.

¹²¹⁹ Mosito 2016 *LLJ* 39. According to Section 27(1)(c) of the *Constitution of South Africa Act* 108 of 1996 everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Another country is

coverage of social security would be extended to more people in this country.¹²²⁰ This would mean that the Lesotho's courts would at the very least render the right to social security justiciable. Consequently, this would mean that those who are denied this right would approach the courts of law that would then interpret the law to determine if such aggrieved individuals may gain to access such a right. In respect to this, it is vital to remember that precedence is an integral part of the country's legal system and aids with the interpretation and application of the law.¹²²¹ Furthermore, the role of South African law is crucial to Lesotho nationals, since South African court decisions are persuasive, meaning that Lesotho courts refer to them when formulating their own decisions.¹²²² In light of this, the decisions of the South African Constitutional Court on the justiciability of socio-economic rights can be cited as good examples of how approaching the courts of law could result in individuals accessing certain socio-economic rights.¹²²³ Courts of law in Lesotho would also be assisted since the interpretation of this right would be done relatively easily; in turn, this would have an effect on the provision of socio-economic rights in general.¹²²⁴

Over and above the exclusion of social security being a principal issue in terms of Lesotho, it is not the only problem that the country faces. The compounding fact that the Constitution makes no specific mention of the right to human dignity and

Chile, a constitutional state which assures to all persons the right to social security in its constitution and goes further to state that: "The laws that regulate the exercise of this right will be of qualified quorum. The action of the State will be directed to guarantee the access of all the inhabitants to uniform basic benefits whether granted by public or private institutions. The law can establish obligatory taxations. The State will supervise the adequate exercise of the right to social security." Section 19(18) of the *Constitution of Chile* 1980.

¹²²⁰ Mosito 2016 *LLJ* 39.

¹²²¹ Shale 2019 <http://www.nyulawglobal.com>.

¹²²² Shale 2019 <http://www.nyulawglobal.com>.

¹²²³ See Chapter 4, Par 3.4.1. The Common law of Lesotho was introduced to Lesotho through the General Law Proclamation 2B of 1884. This Proclamation "provided that the law to be administered in Basutoland (Lesotho) shall, as nearly as the circumstances will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope... The common law that was applicable in the Cape of Good Hope at the time was a mixture of the Roman-Dutch Civilian law and the English Common Law. Because of this Proclamation, Lesotho's common law is essentially the same as that of South Africa." See Shale 2019 <http://www.nyulawglobal.com>.

¹²²⁴ Mosito 2016 *LLJ* 39.

its values gives an indication of what needs to be done.¹²²⁵ Failure by any state to make provision for the right to human dignity is detrimental, not only to the health and lives of its people, but also in terms of its own, future socio-economic well-being.¹²²⁶ Moreover, since Lesotho has no distinctive piece of legislation that specifically deals with social security and its provision thereto, it is fair to say that a great deal must still be done, especially if the country aims to effectively align and coordinate its social security legislations.¹²²⁷

4.2.4 Mechanisms of enforcement and adjudication of social security rights in Lesotho

The *Constitution of Lesotho* guarantees entitlement to equality before the law and equal protection thereto.¹²²⁸ This provision may safely be construed as safeguarding the right of access to the courts of law.¹²²⁹ Furthermore, these courts of law are said to be independent and free from any sort of interference in performance of their duties under the Constitution.¹²³⁰ Additionally, Lesotho's courts of law are made up of the Court of Appeal, the High Court and Subordinate Courts, the Court-martial and other tribunals vested with the exercise of judicial functions as per the parliament.¹²³¹ It is, therefore, safe to say that the courts

¹²²⁵ Mosito 2016 *LLJ* 39.

¹²²⁶ Liebenberg "*Socio Economic Rights*" 312.

¹²²⁷ Namibia has the *Social Security Act* 34 of 1994 whose preamble states that its aim is: "To provide for the establishment, constitution and powers duties and functions of the Social Security Commission; to provide for the payment of maternity leave benefits, sick leave benefits and death benefits to employees and to establish for that purpose the Maternity Leave, Sick Leave and Death Benefit Fund; to provide for the payment of medical benefits to employees and to establish for that purpose the National Medical Benefit Fund; to provide for the payment of pension benefits to retired employees and to establish for that purpose the National Pension Fund; to provide for the funding of training schemes for disadvantaged, unemployed persons and to establish for that purpose the Development Fund; and to provide for incidental matters." Mosito insists that Lesotho while trying to improve its social security schemes should enact a piece of legislation similar to this Namibian legislation which he says provides for social security protection through a series of public means social and economic distress which could be caused by poverty and reduction of earnings due to deteriorating health, unemployment, maternity and old age amongst others. Mosito 2016 *LLJ* 18.

¹²²⁸ Section 19.

¹²²⁹ Mosito 2013 *LLJ* 66.

¹²³⁰ Section 118(2) points out that the courts of law will only be subject to the constitution and any other law.

¹²³¹ Section 118(1).

possess the power required to deal with any social security matter appearing before it.¹²³²

4.2.4.1 Courts Jurisdiction over fundamental rights

The High Court has been granted jurisdiction over any sort of violation of fundamental rights by the Constitution.¹²³³ According to section 22(2), the High Court has the original jurisdiction to hear and determine an application, including questions, by any person regarding any violation of fundamental rights. Therefore, the Constitution bestows upon the High Court the power to enforce fundamental rights that need to be secured.¹²³⁴ Furthermore, the High Court is also entitled to decline making any determinations if it is satisfied that enough means of redress regarding any such violation alleged have been availed to any such aggrieved persons.¹²³⁵ However, it (the High Court) is permitted to deliver orders and issue directions and processes it deems necessary for purposes of enforcing and securing these fundamental rights.¹²³⁶

Despite all these powers bestowed upon the High Court, there are those argue that it does not have the power to enforce these principles of state policy so as to provide for social security rights. However, a contrary argument to above premise is that the principles of state policy are used by the Constitution of Lesotho to provide for social security benefits.¹²³⁷ According to section 25 of this particular Constitution, the principles of state policy are not enforceable by any court of law hence they can generally be said to work hand-in-hand with fundamental rights.¹²³⁸ In fact some authors insist that the fact that social security rights are

¹²³² Mosito 2013 LLJ 66.

¹²³³ Mosito 2013 LLJ 69. Section 22.

¹²³⁴ Section 22(2) (b).

¹²³⁵ Section 22(2) (b).

¹²³⁶ Section 22(2) (b).

¹²³⁷ Section 25. See also Mosito 2013 LLJ 69.

¹²³⁸ Mosito 2013 LLJ 70. Reference was also made to the case of *Minerva Mills Ltd v Union of India* 1980 3 SCC 625 which echoed these sentiments as thus: "... To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution." Para 61.

non-justiciable, does not mean that they are mediocre in value.¹²³⁹ However, it is an undeniable fact that the Constitution does not clearly define and describe the relationship between these state policy principles and fundamental rights.¹²⁴⁰ Most important is the critique directed towards the Court of Appeal of Lesotho's approach of not associating fundamental rights with principles of state policy.¹²⁴¹ One of the prime arguments presented is that its courts of law do not have the power to nullify laws on the basis that they infringe such principles. The contention here is that the court should at least give effect to such principles as justly and impartially as possible.¹²⁴² This is because the High Court is bestowed with the power to interpret the law in accordance with section 128(1) of the Constitution which reads as thus:

Where any question as to the interpretation of this Constitution arises in any proceedings in any Subordinate Court or tribunal and the court or tribunal is of

¹²³⁹ Mosito also shares these same sentiments pointing out that in Lesotho, the constitution of Lesotho makes provision of social security benefits, even though non-justiciable, in the nature of state policy. However, the most important thing about this sentiment is the fact that he makes it a point to state that their non-justiciable nature does not in any shape or form mean that they are therefore unnecessary or of a lesser value. Mosito 2013 *LLJ* 70.

¹²⁴⁰ Mosito 2013 *LLJ* 70.

¹²⁴¹ Mosito 2013 *LLJ* 70. The approach was adopted in the case of *Khathang Tema Baitsoholi and Another v Maseru City Council and Others* 2004 AHRLR 195 LeCA 2004 where it was held that the right to life does not include the right to livelihood. The court stated that: "The limitations thereafter specified in section 5(2) are hardly consistent with an interpretation of the right to life as encompassing the right to a livelihood. These limitations are both exclusive and specific, and nowhere authorize curtailment in any circumstances, however pressing, of a right to livelihood. Thus, if the right to life includes the right to a livelihood, the appellants' argument would have the effect of recognizing an absolute right to livelihood in Lesotho. (The same logic would apply, counsel for the appellants acknowledged, to a claim to include the right to health and the procurement of education in the right to life, on the analogous reasoning that survival is endangered without adequate provision for either). This, moreover, in a context where the core right - the entitlement to exist as a human being - is itself derogable. The proposition is clearly not tenable. Appellants' counsel conceded that he could not argue for an absolute right to a livelihood, when the right to life itself is derogable, but he was unable (in the light of the specificity of section 4(1) ad fin and section 5(2) to suggest from what source and in what terms derogation would be derived. The wider context too is further destructive of the argument. The position is not that there is no provision elsewhere in the Constitution of Lesotho relating to the right to livelihood. In accordance with a number of other constitutions and international covenants on human rights, Lesotho has dealt with what are generally described as socio-economic rights (or 'green rights') in a way which is distinct from the treatment of fundamental rights (or 'blue rights'). In Lesotho's case, this is to provide separately for a chapter in the Constitution (Chapter III) entitled 'Principles of State Policy'. One of these (i.e., section 29(1)) is that 'Lesotho shall endeavour to ensure that every person has the opportunity to gain his living by work which he freely chooses or accepts.'" Para 17-18.

¹²⁴² Mosito 2013 *LLJ* 72.

the opinion that the question involves a substantial question of law, the court or tribunal may, and shall, if any party to the proceedings so requests, refer the question to the High Court.

After it has reached a decision, the court will refer the case/decision back to the subordinate court or tribunal to dispose of the matter as decided.¹²⁴³ In light of this, it is imperative to point out that when monitoring the principles of state policy and their observance thereto, the court should refrain from acting in a manner contrary to principles of national policy.¹²⁴⁴ As is the matter with other socio-economic rights, courts of law can protect the principles of state policy by asserting their interpretative powers. Mosito¹²⁴⁵ advocates for this by stating that:

No court should in principle, uphold a conduct which is contrary to the national public policy. Secondly, the courts can protect socio-economic rights such as the principles of state policy either through their law-making powers of interpreting statutes and developing the rules of the common law, or by adjudicating constitutional and other challenges to state measures that are intended to advance those rights.

In order to actively interpret any substantive provision of the Constitution, it is argued that the courts of law should look at the Constitution as a whole including principles of state policies.¹²⁴⁶ Consequently, the High Court has jurisdiction to take over and adjudicate Lesotho's social security matters.

4.2.4.2 The Labour Court and the Labour Appeal Court

According to the Labour Code, the Labour Court has jurisdiction in respect of all matters that elsewhere in terms of the same Labour Code or in terms of any other labour law are to be determined by the Labour Court.¹²⁴⁷ In fact, the Labour Court has been granted exclusive civil jurisdiction in certain matters. According to section 9(1) of *Labour Code (Amendment) Act*, this jurisdiction is exclusive and no other court can excise this civil jurisdiction in respect of matters provided for under the Code.¹²⁴⁸ For purpose of this thesis and this chapter, it is important to

¹²⁴³ Section 128(2).

¹²⁴⁴ Mosito 2013 LLJ 72.

¹²⁴⁵ Mosito 2013 LLJ 73.

¹²⁴⁶ Mosito 2013 LLJ 73.

¹²⁴⁷ *Labour Code (Amendment) Act* 3 of 2000, section 254(1) thereto.

¹²⁴⁸ Mosito 2013 LLJ 78.

point out that the Labour Court of Lesotho has the power to evaluate and assess fairly what has been owed to an employee for services he or she has rendered to the employer in any case or scenario where there has been no agreement regarding the rate of benefits and wages between such an employer and employee.¹²⁴⁹ The Labour Appeal Court, on the other hand, has exclusive jurisdiction to hear and determine all appeals against final judgements, reviews, and any other final orders of the Labour Court.¹²⁵⁰ The Labour Court has jurisdiction over social security disputes and offences that arise from the Labour Code.¹²⁵¹ This, therefore, means that employees that feel aggrieved as a result of issues stemming from the Labour Code have a right to approach the Labour Court to seek redress. On the other hand, the Labour Appeal Court has final appellate jurisdiction of social security claims emanating from the Labour Court, Subordinate Court, Magistrate Courts, and the Director of Dispute Prevention and Resolution.¹²⁵²

4.2.5 The Proposed National Social Security Bill of Lesotho

The Government of Lesotho had to make a choice of implementing a social security scheme comprehensive enough to make meaningful changes in Lesotho.¹²⁵³ This choice has led to the long overdue introduction of the Social Security Bill, among others, which will lead to an easier interpretation and enforcement of social security entitlements by the courts of law. This Bill will aid with better comprehension of the whole concept of social security in Lesotho, its benefits may also lead to generally improved administration of the social security entitlements.¹²⁵⁴ This will definitely aid with weeding out inconsistencies that especially occur in cases where beneficiaries are attempting to lodge a claim. The Bill was passed with the intention of establishing a social security system scheme attuned with international standards for harmonisation of the social security

¹²⁴⁹ Mosito 2013 *LLJ* 78.

¹²⁵⁰ Section 38A of the *Labour Code (Amendment) Act* 3 of 2000.

¹²⁵¹ See Par 4.2.2.1.2 above for social security within the Labour Code.

¹²⁵² Mosito 2013 *LLJ* 78.

¹²⁵³ The Consolidated National Social Security Bill 2000. See also Mosito 2016 *JLSDUP* 46.

¹²⁵⁴ Mosito 2016 *JLSDUP* 46.

sphere of Lesotho as a whole.¹²⁵⁵ It creates an old-age insurance fund, insurance for non-occupational disability, and an insurance fund for death. Furthermore, it presents the ways in which the funds will be financed, lump-sum compensation and its eligibility; computations for all the three insurance funds together with their eligibility is also included.¹²⁵⁶

Employment injuries are also central to what the Bill addresses. It further provides for medical care, compensation, cash benefits and how assessments are undertaken also forms part of the Bill.¹²⁵⁷ Most importantly, however, is the fact that it further deals with how incidents occurring before its passing into law will be handled. These transitional provisions deal with compensation for occupational diseases and employment injuries that were incurred prior to the passing and application of the Act will be treated.¹²⁵⁸

At a glance, the Bill seems to cover more than merely dealing with benefits for a variety of possible risks; in fact, its coverage extends to dealing with marriage and funeral grants.¹²⁵⁹ However, it has been criticised for a number of reasons, which will now be discussed. Firstly, the fact that it is said to cover national employees gives an impression that non-nationals are not catered for, and this contradicts what the research suggests, namely migrants and migrant workers' access to social security rights. The concept also contradicts international and regional standards that clearly advocate for equality of treatment; therefore, it may be regarded as discriminatory in nature.¹²⁶⁰ It is further criticised because the

¹²⁵⁵ The long Title of the National Social Security Bill.

¹²⁵⁶ Mosito 2016 *JLSDUP* 48.

¹²⁵⁷ Mosito 2016 *JLSDUP* 49.

¹²⁵⁸ Mosito 2016 *JLSDUP* 49.

¹²⁵⁹ Mosito 2016 *JLSDUP* 50.

¹²⁶⁰ According to Article 1 of *the Discrimination (Employment and Occupation) Convention 111 of 1958*, Which came to force in June 1998 "the term discrimination includes: any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." The *Code on Social Security in the SADC* despite its non-binding nature primarily advocated for advocates for equal treatment of migrants and citizens in the social security system sphere of host countries. Mosito also points out that the fact that the phrase "National employees" has not been given any sort of definition in the Bill may appear to be inconsistent with the principle of equality of treatment. See Mosito 2016 *JLSDUP* 48.

coverage it provides is not wide enough to refer to it as an instrument of comprehensive social protection.

Subsequently, it should not be assumed that (Mosito¹²⁶¹ puts it) that the term “national comprehensive social security” in the Bill is synonymous with “comprehensive social protection” because of all its shortcomings. Over and beyond this, it does not present feasible strategies and programmes that will ensure that all people can attain at least a minimum living standard.¹²⁶² Since comprehensive social protection aims to provide basic necessities to ensure all people in a certain country can efficiently partake in, and advance, economic and social development.¹²⁶³ This latter concept is much broader and incorporates more than the traditional concept of social security.¹²⁶⁴ Research by Olivier¹²⁶⁵ points out that comprehensive social protection will additionally ensure that traditional measures of social insurance, social assistance and social services are embraced by creating and incorporating programmes to attain a minimum standard of living.¹²⁶⁶ It is these traditional measures that the Bill is critiqued for not heeding.¹²⁶⁷ The argument is that the Bill’s coverage is not wide enough and seems to be more concerned with income protection, which is viewed by many as too restrictive. Other views indicate that social security should go as far as focusing on issues related to employment creation, health and safety and regulations thereto, to say the least.¹²⁶⁸ Du Plessis seems to share these sentiments when pointing out that social protection encompasses responses by both a country and its inhabitants against risks and vulnerabilities, including

¹²⁶¹ Mosito 2016 *JLSDUP* 50.

¹²⁶² Mosito 2016 *JLSDUP* 50.

¹²⁶³ Olivier Social Security Law 17

¹²⁶⁴ Olivier *Social Security Law* 17. “Social security has traditionally taken a risk-based approach to social protection. Consequently, the role of social security has been to compensate beneficiaries for lost income because of exposure to contingencies. This loss of income can either be temporary, as is the case when the risk of unemployment strikes, or permanent as is the case with old age and death. This compensatory function has meant that a key role of social security is to prevent and reduce poverty.” Kaseke 2010 *SAGE* 159. See also Mosito 2016 *JLSDUP* 50.

¹²⁶⁵ Olivier Social Security Law 17

¹²⁶⁶ Kaseke 2010 *SAGE* 159.

¹²⁶⁷ Mosito 2016 *JLSDUP* 50.

¹²⁶⁸ Mosito 2016 *JLSDUP* 50.

strategies and programmes aimed to ensure minimum standards of livelihood for all.¹²⁶⁹ She insists that these measures should comprise of effective ways of securing better education, health care, social welfare, livelihood, access to stable income, including employment.¹²⁷⁰ In essence, her sentiments indicate social protection coverage should exceed traditional measures of social security in order to be recognised as comprehensive.¹²⁷¹

In a nutshell, this Bill is being critiqued for not being comprehensive enough. In fact, the argument is that a more comprehensive social security system should look at promoting the protection through protecting both the society and individual by aiming at wealth distribution.¹²⁷² Measures that deal with uprooting poverty directly should be put in place; firstly, by any such instrument which claims to be regulating the concept. The Bill that deals with social security should focus on promoting social solidarity and shared responsibility.¹²⁷³ Therefore, as clearly indicated by research, the Bill should, strive to create provisions that do more than merely deal with social insurance and social assistance.¹²⁷⁴ Although the Bill has not been passed into law as yet, it is indicated that there is still more work to be done in order to deem it more comprehensive. Since it concentrates more on the formal sector and, it can be labelled as promoting social exclusion due to the employee categories that it does not address.¹²⁷⁵

Moreover, the problem is compounded in Southern Africa in that employees in the informal sector are deprived of social security entitlements in general. They do not have secure work, representation and other benefits.¹²⁷⁶ Adjudication of social security entitlements is of itself an issue of concern. The High Court, which also deals with labour related matters for certain classes of public servants and other members of disciplined forces, has a huge accumulation of cases that have yet to

¹²⁶⁹ Du Plessis *Access to Work* 189.

¹²⁷⁰ Du Plessis *Access to Work* 189.

¹²⁷¹ Du Plessis *Access to Work* 189.

¹²⁷² Mosito 2016 *JLSDUP* 50. Mosito argues that wealth should be distributed from the rich to the poor.

¹²⁷³ Mosito 2016 *JLSDUP* 51.

¹²⁷⁴ Mosito 2016 *JLSDUP* 51.

¹²⁷⁵ Mosito 2016 *JLSDUP* 63.

¹²⁷⁶ Nguluwe *Extending access to social security* 32.

be presided upon; this impairs the process and eliminates the possibility of speedy resolutions in terms of social security issues.¹²⁷⁷ A specialised court does not appear to be in the cards, and the Bill does not seem to advocate for such a court. Furthermore, it is also very interesting to note that no clear reason is given for why a specialised court is not being established.¹²⁷⁸

4.2.6 The nature of contributions provided for in the Bill

According to the Bill, contributions from insured persons should be assessed, based on the amount of monthly wages they are paid.¹²⁷⁹ Monthly contributions, whether from the employer or employee's wage deductions, may be determined on the basis of wages received at the end of Lesotho's financial year (April of each year).¹²⁸⁰ According to clause 19(3), if an employee enters employment after the month that begins the financial year, his or her contribution will be calculated from the month of entry until March end.¹²⁸¹ These contributions are computed on wages the insured or employee gets before any deductions, whether fees, taxes, instalments or any deductions of this manner.¹²⁸² In instances where workers' wages are rated on a daily basis, such a daily rate shall be multiplied by 30 and the result shall be used to calculate the actual insurance contribution for such a worker or workers.¹²⁸³ Clause 26 points out that whatever contributions are payable under the Social Security Bill shall be percentages of salaries or wages received. It is important to point out that the Social Security Bill provides specifically three branches of social insurance. These three branches are insurance against disability, maternity insurance, and employment injury.¹²⁸⁴

¹²⁷⁷ Mosito 2013 LLJ 89.

¹²⁷⁸ Mosito 2013 LLJ 89.

¹²⁷⁹ Clause 19.

¹²⁸⁰ Clause 19 (2). Lesotho's Fiscal year starts in April 1st and ends in March 31st.

¹²⁸¹ Mosito 2015 LLJ 138.

¹²⁸² Clause 21.

¹²⁸³ Clause 20(1). See Mosito 2015 LLJ 138-139. Clause 20(2) states that workers who get remunerated by the hour, piece work or production, will have his contribution calculated based on the monthly average wage for the period of employment or work. This has to be during the period three months previously worked.

¹²⁸⁴ Mosito 2015 LLJ 138.

4.2.6.1 Employment injuries insurance

When it comes to employment injuries, the employer alone takes responsibility for contributions towards such. However, it is important to note this type of insurance can also be funded through investments from such contributions.¹²⁸⁵ The governing board of this proposed scheme may recommend that the minister reduce the contribution's percentage rate by one-third after the said minister's approval in instances where an employer endures the costs of daily allowances in cases of medical care, transportation and injury.¹²⁸⁶ According to clause 39(1), non-compliance with the authorities by any employer regarding any safety and health of employees may lead to an increase of 1% on the rate of contributions.¹²⁸⁷ Any proceeds or profits recovered from investments from these contributions will also become part of the funding of this insurance or scheme.¹²⁸⁸ In this instance also, according to clause 38, the governing board of the scheme may recommend to the Minister that the percentage rate of the contribution be reduced or increased after his approval.¹²⁸⁹ When the former happens, such a reduction will amount to one-third of the contributions of an employer who takes responsibility for the daily allowance costs of transportation, medical care and injury.¹²⁹⁰ Clause 39, on the other hand, stipulates that when an employer refuses to comply with instructions from appropriate authorities then a 1% increase will be imposed upon such an employer regarding employees' health and safety.

4.2.6.2 Maternity insurance

According to the Bill, maternity insurance shall be funded by the employer who is obliged to make monthly contributions amounting to 1% of the female employees' salary or wages to the organisation.¹²⁹¹ Another source of funding will be derived

¹²⁸⁵ Clause 37(b).

¹²⁸⁶ Clause 38.

¹²⁸⁷ Mosito 2015 *LLJ* 141.

¹²⁸⁸ Mosito 2015 *LLJ* 141.

¹²⁸⁹ Mosito 2015 *LLJ* 141.

¹²⁹⁰ Clause 38. Mosito 2015 *LLJ* 141.

¹²⁹¹ Clause 57. Mosito 2015 *LLJ* 141.

from the profits received from investments of contributions.¹²⁹² Just as in employment injury, in maternity insurance as well, the percentage rate mentioned above may undergo a one-third reduction upon the Minister's approval following recommendations by the Board in instances where the employer bears daily allowances costs for medical care and transport costs.¹²⁹³

4.2.7 The Financing of Social Security in Lesotho

For every social security scheme to be functional, its sustainability and affordability are core.¹²⁹⁴ When it comes to financing of social security, great care must be taken not to deplete already scarce resources.¹²⁹⁵ Social security financing encompasses, among other things, taxes from the state specifically set aside for it, insurance contributions for those insured, government participation and other participants willing to contribute.¹²⁹⁶ In essence, social security was established to offer relief for those in need and such persons are normally in no position to offer contributions or finance their own aid.¹²⁹⁷ The financing, therefore, falls to those who are financially better off through the taxes which they pay. This principle is referred to as the principle of solidarity.¹²⁹⁸ The other approach of social security is referred to as self-sufficiency which encourages savings. This principle states that persons should contribute to their own future.¹²⁹⁹ Compulsory contributions from both employers and employees in the form of pay roll taxes is an example of a perfect form of self-sufficiency.¹³⁰⁰

¹²⁹² Mosito 2015 *LLJ* 142.

¹²⁹³ Mosito 2015 *LLJ* 142.

¹²⁹⁴ Ryder 2006 <https://papers.ssrn.com>

¹²⁹⁵ Mosito 2015 *LLJ* 119.

¹²⁹⁶ Mosito 2015 *LLJ* 118. In Latin America specifically, social security is financed specifically by means of contributions from salaries of insured persons. Percentages to be paid by either the insured or the employer are established under law while the government also plays a role by contributing on behalf of public servants. The state plays further through taxation and covers all deficits that may have been encountered during administration of social security entitlements. Mesa-Lago *Ascent to Bankruptcy* 15-16.

¹²⁹⁷ Mosito 2015 *LLJ* 119.

¹²⁹⁸ Mosito 2015 *LLJ* 119.

¹²⁹⁹ Mosito 2015 *LLJ* 119.

¹³⁰⁰ Mosito 2015 *LLJ* 119.

Financing of social security is either contributory or non-contributory. Contributory benefits are funded from contributions from those who are to benefit. While non-contributory benefits are funded directly by the state through taxes paid out by the average citizen.¹³⁰¹

The truth of the matter is that tax-financed social security benefits cannot be undermined in any way, shape or form.¹³⁰² Tax-financed pensions have been pinpointed as a means of supplementing contributory pensions and aiding the process of alleviating poverty, which is the main rationale behind the notion of social security.¹³⁰³ Coverage through contributory pensions also reached a steady decline because of high administrative costs and fiscal costs and more importantly

¹³⁰¹ The non-contributory benefits have been criticised for straining the government reserves. Major critiques of non-contributory social security content that this way of doing things may lead to dependency which will lead to the country missing out on the skills that come with the growth of knowledge and confidence that comes with being part of the labour market. They further argue that it may lead to an issue of 'moral hazard' in that might lead to persons who refuse to see the need of being in the labour market. They argue that this type of choice will lead to poverty and dependency while the pressure will be felt by the working class through taxes they will be forced to cough out. A free riding mentality by the beneficiaries of this scheme is also what these critiques fear the most. They insist that hard working citizens with low wages will feel the pinch harder because of hefty taxes on wages from this low paying jobs. They generally criticize people's freedom to choose benefiting from other people's hard work while there is still choice to refrain from doing as such. In as much as there could be a slightest of changes in the wellbeing of those who seriously need relief, these non-contributory schemes are criticised for their inability to completely get people out of poverty. They seem to contend that the major beneficiaries of this scheme are free riding people who refuse to get jobs on order to fully feel their social obligation. While this is entirely the truth. The problem is that there are people who seriously need relief because of different situations they have encountered. See Plant 2003 *Fiscal Studies* 160-161. This issue of non-contributory benefits as leading to a parasitic mentality was addressed as thus Jon Elster: "Self-esteem is undermined by the belief that one is parasitic on others. If true, this claim implies that highly and visibly subsidised work or make-believe work ... is not a source of self-esteem. The self-esteem of people who are living on unemployment insurance may be damaged because they feel that they are being parasitic, but they would not be happier if they performed work that visibly was not paying its way." Here the contention is that he would be taken not to criticise those who cannot become active contributing members of society and depend on tax based means tested benefits others wise such will become part of a group in the society that feels stigmatised. Plant 2003 *Fiscal Studies* 164. Tax financed social security benefits cannot in anyway shape or form be undermined.

¹³⁰² Bertranou, Solorio & Van Ginneken 2004 *ISSR* 4.

¹³⁰³ Bertranou, Solorio & Van Ginneken 2004 *ISSR* 3. In Latin America there was a decline in contributory pension coverage and this was attributed to weakening labour market. The contention is that pension reforms that had been put in place were initiated with an assumption that employees had stable jobs which would inevitably come to an end. However, the growing informal sector meant that more and more workers were employed under harsh conditions and given inadequate labour contracts this therefore led to, amongst others, inability to have individual savings and individual saving schemes were also unable to extend coverage to such employees.

is the fact that they are more inclined to those who earn more favourable salaries as opposed to those who live from hand to mouth.¹³⁰⁴

However, regular provisioning of tax-financed social security benefits should, without a doubt, be a priority and, among other things, should be provided to old people.¹³⁰⁵ Furthermore, every country needs to take consideration of different schemes and their relationship thereto, public finance revenues and expenditures and an objective look at future and current social protection schemes as a whole in order to effectively budget for social security. ¹³⁰⁶ The fragmentation of the social security system in Lesotho means that social allocations of finances become more of a problem because different ministerial departments budget for different social protection or social policy areas.¹³⁰⁷ The fact that precise allocations are not overtly determined is one of the issues that need to be examined closely.¹³⁰⁸ These obscured and fragmented budgetary allocations mean that the affordability and sustainability of social security programmes are difficult to accurately define.¹³⁰⁹ Lesotho, in particular, raises the question of whether providing for an affordable and sustainable social security system relies solely on the issue of budgetary and financial allocations. Politics play an imperative role in poverty reduction in Africa. Nonetheless, lack of willingness and policy initiatives means that change is bound to be slow. When it comes to the issue of affordability, it has been contested that it is a "function of societal willingness to finance social transfers through taxes and contributions."¹³¹⁰ Social security systems which work properly with the approval of the majority of the people are, therefore, affordable

¹³⁰⁴ Bertranou, Solorio & Van Ginneken 2004 *ISSR* 4. They have also been criticised for not providing adequate and secure pensions. See also Williams 2004 *ISSR* 48. The decline of this type of model in recent years was credited for the most part of history to the fact that it paid out poor returns which were way below inflation.

¹³⁰⁵ Mosito 2015 *LLJ* 144-145.

¹³⁰⁶ Mosito 2015 *LLJ* 145.

¹³⁰⁷ These social policy areas include social security, education, and health services. Mosito 2013 *LLJ* 146.

¹³⁰⁸ Mosito 2015 *LLJ* 146.

¹³⁰⁹ Mosito 2015 *LLJ* 146.

¹³¹⁰ Mosito 2015 *LLJ* 146.

and will be commended by the people; consequently, those who are not functional are rightfully deemed unaffordable and loose support from the masses.¹³¹¹

Lesotho, like some countries in the SADC region, does not have enough finances to guarantee adequate social security coverage to its citizens.¹³¹² This insufficient social security coverage may also be attributed to lack of natural resources.¹³¹³ Moreover, it was established that the Constitution of Lesotho does not make provision for social security rights in its provisions. This, therefore, means that social security rights are not provided for within the sphere of fundamental rights and consequently are unjusticiable. There are, however, some statutes which do provide for social security rights to a certain limited extent. What is further worth noting is the fact that migrant workers are not mentioned in all these statutes including the Constitution. Therefore, the introduction of the *Social Security Bill* is a step in the right direction because of the fragmented nature of social security rights coverage. This introduction will may aid with extending social security coverage for the masses who are still in need of such. The next part of the thesis analyses the social security framework of Swaziland as one of the selected migrant-sending countries in the SADC.

4.3 Social Protection in the Kingdom of Swaziland

Social security and social security rights are not expressly guaranteed in the *Constitution of Swaziland* or the Bill of Fundamental Rights.¹³¹⁴ However, under section 56 of this particular Constitution, provision is made for general objectives in the form of what are referred to as Directive Principles of State Policy, which are aimed at guiding all organs and agencies of the state, citizens, organisations, other bodies, and persons in applying or interpreting the Constitution or any other law and in implementing any policy decisions, for the establishment of a just, free and democratic society.¹³¹⁵ It is important to note that inasmuch as social

¹³¹¹ Mosito 2015 LLJ 146.

¹³¹² Mosito 2013 LLJ 147.

¹³¹³ Mosito 2013 LLJ 147.

¹³¹⁴ The Constitution of the Kingdom of Swaziland Act 2005.

¹³¹⁵ Section 56.

protection and social security rights are not guaranteed in the Constitution, they are one of the objectives of this Directive Principles of State Policy and Duties of the Citizens as referred to in Chapter 5.¹³¹⁶

Social Protection rights are further provided for through social objectives. These objectives include guaranteeing and respecting institutions charged with the protection and promotion of human rights and freedoms by providing them with adequate resources for their effective functioning.¹³¹⁷ The independence of non-governmental organisations which protect and promote human rights shall also be guaranteed and respected by the state.¹³¹⁸ While, ensuring gender balance and fair representation of marginalised groups in all constitutional and other bodies is also part of the objectives.¹³¹⁹ Moreover, further objectives include highest priority to be given to the enactment of legislation for economic empowerment of citizens.¹³²⁰

Economic empowerment and protection of social security as a broader spectrum are a very crucial part of social protection because the intention is to eradicate poverty. Reasonable provision for welfare and maintenance of old aged people together with the protection and recognition of family and its role in society have also been singled out as one of the objectives.¹³²¹ Furthermore, these social objectives include respect of rights of people with disabilities and human dignity.¹³²² Further objectives include the provision of basic health care services, promoting of free and compulsory basic education to the population and aiding those in need as a result of hazards of all kinds, disasters resulting from natural calamities or other scenarios resulting from serious disruption of normal endurable life.¹³²³ The relationship between social objectives or policies and social protection is crucial in understanding the state's intention in eradicating poverty and

¹³¹⁶ Mpedi & Nyenti Key International, Regional and International Instruments 170.

¹³¹⁷ Section 60(1).

¹³¹⁸ Section 60(2).

¹³¹⁹ Section 60(2).

¹³²⁰ Section 60(3) & (4).

¹³²¹ Section 60(5).

¹³²² Section 60(5).

¹³²³ Section 60(8), (9) & (10).

protecting the society against many types of social ills the latter faces. The ILO¹³²⁴ discusses this relationship by stating that:

The domain of social policy is vast. In fact, it serves to define a society. It includes most of what a community collectively does to protect its weakest members, but it also has to meet the social needs of all. Work is a central aspect of social life, and there are a great many concerns...different forms of employment, the distribution of work, a perceived conflict between workers and pensioners, among others. Then there is the need to extend protection to those ... workers, from a global perspective who benefit from little or none. One of the main purposes of social protection is to provide an income floor, and that is generally lacking. Yet following on a century of impressive progress in some countries in providing protection for many historically disadvantaged groups, the elderly, the poorly educated, those with disabilities it is now possible to envisage the progressive extension of protection to the world's poor and disadvantaged.

A truly comprehensive social protection strategy has to examine issues and conflicts arising from different categories of workers and deal with them without compromising rights of other classes of workers.¹³²⁵ Therefore, the same principle applies to the relationship between employees and their employers. It is, therefore, submitted, that social security entitlements or benefits and proper administration of this also forms part of this relationship between social policies or objectives and social protection.

Fundamental rights also play an important role and are ancillary to social protection in Swaziland.¹³²⁶ These fundamental rights and freedoms enshrined in these principles shall be respected and upheld in Swaziland by everyone including all other agencies and organs, natural and legal persons and are enforceable by the courts of law.¹³²⁷ According to section 14(1) of the Constitution listing fundamental rights and freedoms, such rights of the individual are to be protected, promoted and guaranteed. These rights include respect of life, liberty, right to fair hearing, equality before the law and equal protection of the law.¹³²⁸ Another important right is the respect of family, women, children, workers and persons

¹³²⁴ International Labour Organisation 2000 *ILR* 113.

¹³²⁵ International Labour Organisation 2000 *ILR* 113.

¹³²⁶ Mpedi & Nyenti Key International, Regional and International Instruments 171.

¹³²⁷ Section 14(2) of the constitution of the Kingdom of Swaziland. See also Mpedi & Nyenti Key International, Regional and International Instruments 171-172.

¹³²⁸ Section 14(1) (a).

with disability.¹³²⁹ The rights of workers are very essential for this chapter, as the essence of it is to examine the protection Swaziland as a country is affording these individuals.

Equality before the law is also essential to this topic of discussion. The Constitution provides that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and shall in every other respect enjoy equal protection of the law.¹³³⁰ This provision further states that no person shall be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.¹³³¹ The Constitution further bars parliament from enacting laws that are discriminatory either in themselves or their effect.¹³³² It can, therefore, be construed from the above provisions that workers and employees (in general) should also face equal protection from law and other prospective legislations without any discriminatory patterns or behaviour, whatsoever.

Another fundamental right that is protected under the Constitution, in section 21 therein specifically points out that in the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law. This provision specifically states that a person shall be given a fair and speedy hearing publicly within a reasonable time period.¹³³³ This provision adds to one of this chapter's sentiments, advocating for speedy resolution of disputes pertaining to portability of social security benefits of both workers working abroad and locally. Moreover, the Constitution further states that the government shall provide facilities and opportunities necessary to

¹³²⁹ Section 14(1) (b).

¹³³⁰ Section 20(1).

¹³³¹ Section 20(2).

¹³³² Section 20(4). See also Mpedi & Nyenti *Key International, Regional and International Instruments* 172.

¹³³³ Section 21(1). Mpedi & Nyenti *Key International, Regional and International Instruments* 172.

enhance the welfare of the needy and the elderly subject to availability of resources.¹³³⁴

The Constitution of Swaziland does not make provision for social security rights. This, therefore, means that such a right is not regarded as fundamental and is, as a result, unjusticiable. The fact that the Constitution does see the necessity to make provision for the enhancement of the needy and elderly's welfare subject to availability of resources shows clearly that Swaziland does see the importance of providing for social security rights. The following section of this chapter will analyse Swaziland's social security system more thoroughly.

The social security system of Swaziland has been labelled as fairly under-developed. In fact, Dlamini¹³³⁵ states that it is not only under-developed but can also be construed to be undeveloped as well. While Millard¹³³⁶ says that it is still in its initial stages of development. Its social security system consists of social insurance and social assistance.¹³³⁷ This part of the chapter will now discuss the social assistance schemes in Swaziland and then move on to the social insurance schemes.

4.3.2 Social Assistance

4.3.2.1 Old-age grant

Social assistance of this country provides for an old-age grant or old-age benefits. These form of benefits are provided or paid to individuals aged 60 years and over.¹³³⁸ The old-age grant is a means-tested benefit and is provided to those it considers needy.¹³³⁹ Furthermore, the Department of Social Welfare provides quarterly cash payments to nationals who do not receive any private pension.¹³⁴⁰

¹³³⁴ S 27(6). See also Mpedi & Nyenti Key International, Regional and International Instruments 172.

¹³³⁵ Mpedi & Smit Access to Social Security Services 107.

¹³³⁶ Millard 2008 *AHRLJ* 48.

¹³³⁷ Mpedi & Smit Access to Social Security Services 107. See also Mpedi & Nyenti Key International, Regional and International Instruments 178.

¹³³⁸ Mpedi & Nyenti Key International, Regional and International Instruments 172.

¹³³⁹ Mpedi & Smit Access to Social Security Services 109.

¹³⁴⁰ Eldis 2010 <https://www.eldis.org>.

This old-age grant has been credited for reducing poverty and improving the quality of food for the elderly and their households in general.¹³⁴¹ However, the grant administrative system and its administrative framework still requires improvement.¹³⁴² There is still a lot to be done to increase the value of the grant in order to deal with the inflation hence really deal with poverty reduction.¹³⁴³

4.3.2.2 Health care

Swaziland's health care is either free or subsidised. While free healthcare is provided to designated categories of the population, the rest can benefit from subsidised healthcare.¹³⁴⁴ Free healthcare was espoused in the Swaziland National Health Policy, which pointed out that free-of-charge health services shall be provided to eligible children, the elderly, orphans and people living with disabilities;¹³⁴⁵ for example, HIV/AIDS patient willing to go for testing and medication are provided with all their required m and free antiretroviral treatment.¹³⁴⁶ Tuberculosis patients are also among other categories of the population who receive free health care in Swaziland.¹³⁴⁷ This is a very helpful initiative on the part of the Government of Swaziland, considering the fact that 26% of the adult population are infected with HIV and that this particular disease is the leading cause of death among people living with HIV.¹³⁴⁸ The most important part of Swaziland's healthcare is the fact that a person cannot be denied medical care if they are unable to pay for their care.¹³⁴⁹ The subsidised healthcare received by the rest of the population is also provided for in the National Health Policy.¹³⁵⁰ This policy states that revenue for health services may be increased through commercialising some aspects of government-funded facilities, without rendering healthcare and basic clinical packages expensive and unaffordable to

¹³⁴¹ UNICEF, HelpAge International & RHVP 2010 <http://www.eldis.org/document/A62172>.

¹³⁴² UNICEF, HelpAge International & RHVP 2010 <http://www.eldis.org/document/A62172>.

¹³⁴³ UNICEF, HelpAge International & RHVP 2010 <http://www.eldis.org/document/A62172>.

¹³⁴⁴ Mpedi & Nyenti Key International, Regional and International Instruments 172.

¹³⁴⁵ Par 4.29 of the Swaziland's National Health Policy.

¹³⁴⁶ Mpedi & Smit Access to Social Security Services 109.

¹³⁴⁷ Mpedi & Smit Access to Social Security Services 109.

¹³⁴⁸ Moutafis 2014 <https://www.msf.org>.

¹³⁴⁹ Mpedi & Smit Access to Social Security Services 109.

¹³⁵⁰ Mpedi & Smit Access to Social Security Services 109.

the masses.¹³⁵¹ This provision further states that in such commercialising of these facilities and services, all professionals should observe and protect the basic rights of clients as provided for by the Bill of Rights in the Constitution.¹³⁵² Another major aspect of Swaziland's healthcare is the fact that it has programmes intended to enable medical treatment to Swazi nationals abroad.¹³⁵³ This particular aspect is important to this study as it shows that Swaziland attempts to implement initiatives to take care of its nationals in other countries.

The Phalala Fund is used in instances where a Swazi national has been referred for medical attention abroad and has no source of income with which to pay for such treatment.

There is, however, a committee which was set up specifically to examine all requests for referrals and selects the ones that are really deserving.¹³⁵⁴ This committee is also obliged to keep track of and report on the progress of such nationals.¹³⁵⁵ The Phalala Office has been tasked with running this important initiative, and administers it by, firstly, booking the patient with the hospital such has been referred to. The office also helps with the preparations by ensuring that all needed documents are in order, after which such a patient is taken to an appropriate a hospital, with the office constantly consulting with the admitting office. The patient is the responsibility of the office until he or she is back home in Swaziland.¹³⁵⁶ It is important to point out that the Phalala Fund is financed from donations and Government funding.¹³⁵⁷ In light of this, if the government of Swaziland has the ability to refer nationals for medical treatments then it can certainly create bilateral initiatives for its migrants living in South Africa.

¹³⁵¹ Par 4.30.

¹³⁵² Par 4.29 read together with par 4.26. See also Mpeli & Nyenti *Key International, Regional and International Instruments* 172.

¹³⁵³ Mpedi & Smit *Access to Social Security Services* 109.

¹³⁵⁴ This committee is made up of the Director of Health Services who is the chair, then relevant specialists, representative of nurses, representative from the special health unit, medical practitioner in private practice and Senior Medical Officer.

¹³⁵⁵ Ministry of Health Date unknown [Http://www.gov.sz](http://www.gov.sz).

¹³⁵⁶ Ministry of Health Date unknown [Http://www.gov.sz](http://www.gov.sz). Amongst other thing that the office does is to make sure that with all the necessary drugs. If there are any follow up visits, then the office has to keep track on those.

¹³⁵⁷ The World Bank 2012 <http://www.document.worldbank.org>.

4.3.2.4 The Civil Servants Referral Scheme

Another part of the health service that plays a vital role is the Civil Servants Referral Scheme. It was established to aid public servants who have serious medical conditions by evacuating them abroad for assistance and was established in 1995 as a result of a series of negotiations between the government and representatives of civil servants.¹³⁵⁸ It further provides cover for a civil servant and his or her children including the spouse.¹³⁵⁹ These children should be under the age of 21, or should at least be 25 and under, if such are still at school or have a disability.¹³⁶⁰ What is important is that the said child be entirely dependent on the civil servant.¹³⁶¹ This scheme is only for Swazi nationals and their dependants, and it has been clearly stated that expatriates are excluded from receiving aid from it.¹³⁶² Applications for this scheme, like the Phalala Fund, also undergo intense scrutiny by the Medical Referral Board after which, there is also a committee to review its decisions.¹³⁶³

One of the objectives of this chapter is to examine the extent to which migrant-sending countries like Swaziland and Lesotho cater for their nationals working in South Africa in terms of social security and social assistance provision in general. It is, therefore, submitted that similar programmes to the Phalala Fund and the Civil Servants Scheme could be used to provide for medical services to nationals who work in South Africa to ease the pressure on South Africa.

4.3.3 Social Insurance

The Swaziland social security system is also comprises of social insurance whose benefits include Public Service Pensions Fund, workers' compensation scheme, National Provident Fund, Motor Vehicle Accident Fund, and workers' compensation

¹³⁵⁸ The World Bank 2012 <http://www.document.worldbank.org>. See also Mpedi & Smit *Access to Social Security Services* 109.

¹³⁵⁹ The World Bank 2012 <http://www.document.worldbank.org>.

¹³⁶⁰ The World Bank 2012 <http://www.document.worldbank.org>.

¹³⁶¹ The World Bank 2012 <http://www.document.worldbank.org>.

¹³⁶² The World Bank 2012 <http://www.document.worldbank.org>.

¹³⁶³ This committee comprised of Senior Medical Officer of the Mbabane Government Hospital, Four specialists together with Heads of departments from the Mbabane Government Hospital. See The World Bank 2012 <http://www.document.worldbank.org>.

schemes or occupational schemes.¹³⁶⁴ In summary, the social insurance benefits comprise of occupational injury compensation, disability and survivors' benefits, retirement benefits, survivor benefits to dependants and sickness benefits.¹³⁶⁵

4.3.3.1 Swaziland National Provident Fund

This fund was established in 1974 with an intention of providing workers who have become incapacitated while at work or have reached retirement with benefits.¹³⁶⁶ Coverage of this fund is afforded all those who are employed in Swaziland.¹³⁶⁷ In fact, the fund offers voluntary coverage for all those employees whose cover was not compulsory.¹³⁶⁸ However, as is the norm with most Southern African countries, employees in the informal sector and non-citizens are excluded from coverage.¹³⁶⁹ The provident fund is a statutory scheme financed on a pay-as-you-go basis and is self-administered.¹³⁷⁰ It, however, excludes permanent public servants as these find coverage under the Public Servants Pension Fund.¹³⁷¹ Members of parliament are covered by the Members of Parliament and Designated Office Bearers Pension Fund.¹³⁷² Another important issue worth noting is that contribution rates are normally governed by rules and regulations set aside specifically for regulating or governing provident plans.¹³⁷³ When a member's employment concludes (from the age of 45), his or her old-age benefits will be paid out, while retirement benefits eligibility commences at the age of 50.¹³⁷⁴ The disability benefit provided for the by fund is paid out only if the member of the fund, after undergoing assessment, is found to have acquired a permanent or

¹³⁶⁴ Mpedi & Nyenti Key International, Regional and International Instruments 174. See Mpedi & Smit Access to Social Security Services 109.

¹³⁶⁵ Mpedi & Nyenti Key International, Regional and International Instruments 174.

¹³⁶⁶ Solidarity Center 2006 <https://www.solitaritycenter.org>.

¹³⁶⁷ Solidarity Center 2006 <https://www.solitaritycenter.org>.

¹³⁶⁸ Mpedi & Nyenti Key International, Regional and International Instruments 174.

¹³⁶⁹ Mpedi & Nyenti Key International, Regional and International Instruments 174.

¹³⁷⁰ International Organisation of Pension Supervisors 2011 <http://www.oecd.org>.

¹³⁷¹ International Organisation of Pension Supervisors 2011 <http://www.oecd.org>.

¹³⁷² International Organisation of Pension Supervisors 2011 <http://www.oecd.org>.

¹³⁷³ International Organisation of Pension Supervisors 2011 <http://www.oecd.org>.

¹³⁷⁴ International Social Security Association 2015 <https://www.ssa.gov>. Mpedi & Nyenti *Key International, Regional and International Instruments* 174. See Mpedi & Smit *Access to Social Security Services* 110.

partial physical or mental disability (at the least).¹³⁷⁵ Dlamini¹³⁷⁶ points out that this disability benefit is calculated according to contributions sourced from both employer and employee, together with at least 3% interest per annum. According to the International Social Security Association,¹³⁷⁷ these permanent disability benefits are paid out in the form of a lump-sum. However, Dlamini¹³⁷⁸ indicates that they may also be paid out in the form of instalments or may be converted into an annuity. If a member of the fund passes away before retirement, survivor benefits are paid out to one or more dependants, or any other person named by the deceased member.¹³⁷⁹ The main purpose of social security measures such as a survivor benefits fund is to ease the pressure on the government of having to take care of dependents after their bread-winners die. The intention here is to take care of the surviving dependents by making sure that they are not left poor with no means of survival.¹³⁸⁰

4.3.3.2 Public service pension fund

The Public Service Pensions Fund (hereafter, PSPF) is a public organisation established in 1993 to manage and administer pensions of government employees.¹³⁸¹ The PSPF is a scheme run as a defined benefit pension and makes provision for retirement annuities, disability benefits, and other pension related benefits.¹³⁸² According to Nyenti and Mpedi,¹³⁸³ the fund has an estimate of about 36 000 active contributing members and pensioners estimated at about 25 000. It

¹³⁷⁵ International Social Security Association 2015 <https://www.ssa.gov>.

¹³⁷⁶ Mpedi & Smit Access to Social Security Services 110.

¹³⁷⁷ International Social Security Association 2015 <https://www.ssa.gov>.

¹³⁷⁸ Mpedi & Smit Access to Social Security Services 110.

¹³⁷⁹ Mpedi & Nyenti *Key International, Regional and International Instruments* 174. Dlamini goes further and point out that survivor benefits are also calculated by totaling the employer and employee contributions together with 3% interest per annum. See Mpedi & Smit *Access to Social Security Services* 110.

¹³⁸⁰ Mhango & Dyani-Mhango 2016 *IJICL* 206.

¹³⁸¹ Public Service Pension Fund 2017 [Http://www.pspf.co.sz](http://www.pspf.co.sz). The membership of the fund is strictly restricted by the *Public Service Pensions Order*, 1993 meaning that the fund is established in terms this order.

¹³⁸² Public Service Pension Fund 2017 [Http://www.pspf.co.sz](http://www.pspf.co.sz). Defined benefits are sometimes referred to as final salary and are pension benefits one receives while retiring normally known well before on retires. These benefits are related to the person's history of earnings and length of service at work. Pensions Ltd 2017 <https://www.nowpensions.com>.

¹³⁸³ Mpedi & Nyenti *Key International, Regional and International Instruments* 174.

is reported that in 2016, benefits related to pensions disbursed that year increased by 28% and amounted to SZL 948 million, meaning that the fund is a major contributor to the country's GDP.¹³⁸⁴ However, in 2017, the fund was estimated to have about 40 496 members while pensioners and dependents to the fund were estimated at 26 035.¹³⁸⁵ The PSPF is funded by contributions from employees which amount to 5% of their monthly salary and employers who contribute 15% of their basic salaries as well.¹³⁸⁶ One of the most important factors of the PSPF is the fact that it has had an annual increase of assets while an increase in the number of beneficiaries means that funding levels declined.¹³⁸⁷

The PSPF has had its share of issues, one of which was dealing with the definition of the term "dependent", especially in instances of an untimely passing of the fund member. In the case of *Public Pension Fund v Mayisela and Another*¹³⁸⁸ the issue was whether two minor children were really dependents of the late Melvyn Mxolisi Mayisela as defined in the *Retirement Funds Act*.¹³⁸⁹ The issue here was that the two minor children were not the biological children of the deceased. In deciding this matter, the Supreme Court of Swaziland stated that since the deceased had taken care of these children while he was alive, even though he had not adopted them, together with the fact the children are deemed dependents in terms of section 2(b)(i) of the *Retirement Fund Act*, then the two children would be deemed dependents.¹³⁹⁰ This section states that a dependent may be a person to whom a member of the fund may not legally be obliged or liable to maintain but who has been dependent on the member for maintenance. In summarising, the court insisted that there is a possibility for one to have dependents without a legal obligation to that effect.¹³⁹¹ The PSPF does not make provision for non-citizens.

¹³⁸⁴ Public Service Pension Fund 2017 [Http://www.pspf.co.sz](http://www.pspf.co.sz). The monetary currency of Swaziland SZL stands for Swaziland Lilangeni or Emalangeni.

¹³⁸⁵ These statistics were taken by 31 March 2017.

¹³⁸⁶ Public Service Pension Fund 2017 [Http://www.pspf.co.sz](http://www.pspf.co.sz).

¹³⁸⁷ Public Service Pension Fund 2017 [Http://www.pspf.co.sz](http://www.pspf.co.sz).

¹³⁸⁸ (53/10) [2011] SZSC 11 (31 May 2011).

¹³⁸⁹ 5 of 2005.

¹³⁹⁰ See also Mhango & Dyani-Mhango 2016 *IJICL* 211.

¹³⁹¹ Mhango & Dyani-Mhango 2016 *IJICL* 211.

It is important to note that the *Retirement Fund Act* has since been repealed by the *Retirement Bill* of 2011, which has not yet been passed into law, and it is expected to change the position of Mayisela in its entirety. According to this Bill, the term dependent means "in relation to a member or a person in respect of whom the member is legally liable for maintenance." This provision further states that the term includes: a spouse as a result of a marriage, in terms of the *Marriage Act* of 1956, the common law or any customary or religious union and a child of the member, including a posthumous child; and an adopted child.¹³⁹² This is actually a proposal of the definition of the term dependent and, if passed into law, will state that a dependent is one whom a member was legally obliged to maintain.¹³⁹³ The scheme is an indication that the government of Swaziland knows the importance of making its citizens save up for rainy days. This form of social insurance and is a clear indication that social security rights and benefits are provided for in Swaziland. The next part of the thesis will deal occupational injuries and workers' compensation.

4.3.4 Occupational Injury Scheme or Workers Compensation

Before dealing with occupational injury scheme or workers compensation it is important to deal with occupational health and safety of the Kingdom of Swaziland in order to understand the difference between eligible and ineligible benefit claims.¹³⁹⁴ Furthermore, it is important to understand the duties bestowed upon both the employers and employees, which, when omitted, normally lead to such claims.

4.3.4.1 Occupational health and safety

The *Occupational Health and Safety Act*¹³⁹⁵ together with the *Factories, Machinery and Construction Work Act*¹³⁹⁶ oversee and govern the occupational health and

¹³⁹² Section 2 (i) & (ii).

¹³⁹³ Mhango & Dyani-Mhango 2016 *IJICL* 211.

¹³⁹⁴ Boden & Spieler Date unknown <https://www.workerscomphub.com>

¹³⁹⁵ Act 9 of 2001.

¹³⁹⁶ Act 17 of 1972.

safety landscape in the Kingdom of Swaziland.¹³⁹⁷ According to section 3 of the *Occupational Health and Safety Act*, the Act shall be applicable to any workplace, including premises owned or occupied by the government. It further provides that the provisions of this Act will add to the provisions of the *Factories, Machinery and Construction Works Act* and other related laws, unless provided otherwise elsewhere.¹³⁹⁸ This Act further outlines what is expected from both the employers and employees regarding this notion of health and safety. Section 9 bars both the employer and employee from acting in ways that may endanger or is likely to endanger the safety, health or welfare of any person.¹³⁹⁹ The employer is further obliged, in pursuance of his obligations, to provide facilities that are reasonably required by the inspector to enable the latter to perform his duties effectively, as required by the Act.¹⁴⁰⁰ An employer is also bestowed other duties which include ensuring the safety and health of all employees during their tenure of service by securing healthy and safe working conditions for his employees.¹⁴⁰¹ These healthy and safe conditions will only be aided by an employer who ensures that there is effective supervision so that work is performed safely thereby, curbing exposure to danger, a systematic way of dealing with hazards at all times, provision of protective gear, equipment and appliance for those employees who work in conditions warranting such protection, dissemination of information regarding any known hazards or diseases to be expected from the employee's occupation, together with all the necessary training for employees.¹⁴⁰² The employer is also expected to inform a safety and health representative or the safety and health committee or an employee of any directive or instruction, regardless of whether it is written or not, communicated to the employer by the commissioner or inspector.¹⁴⁰³ The protection is not only extended to employees because, even in instances where the employer's activities are harmful to people other than such

¹³⁹⁷ Mpedi & Nyenti *Employment Injury Protection* 70.

¹³⁹⁸ Section 3(1).

¹³⁹⁹ Section 8(1). See Mpedi & Nyenti *Employment Injury Protection* 70.

¹⁴⁰⁰ Section 8(2).

¹⁴⁰¹ Section 9(1).

¹⁴⁰² Section 9(2), (3), (4), (5), (6). See also Mpedi & Nyenti *Employment Injury Protection* 70. Where similar provisions are summarised.

¹⁴⁰³ Section 9(7).

employees, necessary steps will be taken to prevent such harmful conduct.¹⁴⁰⁴ Necessary steps shall also be taken in order to mitigate hazards and danger, even if such do not originate from the employer's activities.¹⁴⁰⁵

The employee, on the other hand, is also required to cooperate and follow all instructions given to him by his employer, the Commissioner, inspector, or any other authorised person authorised to give instructions pertaining to safe working conditions.¹⁴⁰⁶ Furthermore, compliance by employees is required for the use of appliances, equipment or other safety devices to make sure that the health and safety standards are maintained in their workplace.¹⁴⁰⁷ The employee also has a duty to report as soon as possible to an employer or supervisor, any such situations that becomes unsafe or unhealthy or where an accident occurs if that situation has come to the attention of the employee.¹⁴⁰⁸ Most importantly , an employee shall leave or walkaway from any situation upon reasonable justification to believe that there is imminent and serious risk to the safety and health of himself and other employees.¹⁴⁰⁹ This safety precaution is aimed at decreasing chances of accidents occurring. The truth of the matter is that chances of accidents and injuries occurring ought to be decreased as much as possible since social security measures are meant to be implemented in instances of risk and are not supposed to be self-inflicted.

Furthermore, after the employee has removed himself or walked away from a potential risk, then he or she shall inform the employee or supervisor immediately, if such an employee or supervisor was not available during such removal.¹⁴¹⁰ The

¹⁴⁰⁴ Section 9(9).

¹⁴⁰⁵ Section 9(10). The act further requires the employer to prepare written policy concerning employee protection at work including the description of the organisation and arrangements of reviewing the said policy. The employee is also required to prepare a one-page long statement signed by the Chief Executive Officer or any person in charge for purposes of displaying such in the workplace for employees to see when they report for duty. This document should be written in both English and Swati. Section 13(1).

¹⁴⁰⁶ Section 11(1).

¹⁴⁰⁷ Section 11(2). The provision simple urges the employees to follow instruction given to them by their employers regarding the usage of protective gear and equipment.

¹⁴⁰⁸ Section 11(3).

¹⁴⁰⁹ Section 18(2).

¹⁴¹⁰ Section 18(3).

fact that there is compensation for employment injury and workers compensation as discussed below does not mean that no precautionary measures should be taken to prevent injuries pro-actively. Social security measures relating to injuries and accidents at work are meant to protect both employees and employers against hazards which may result from accidents related to their occupation. These safety precautions are specifically meant to halt the occurrence of such. Compensation for employment injuries is a good social security measure and is necessary for purposes of advancing the interests of injured workers; however, if there are no health and safety measures in place, then those vested with the power to disburse these funds will find it hard to pay out compensation when such accidents occur. The next part of the research will analyse employment injury compensation and workers' compensation.

4.3.4.2 Employment injury compensation and Workers compensation

The Swazi Occupational injury compensation is overseen by the *Workmen's Compensation Act*.¹⁴¹¹ In turn, this Act is overseen by the Workmen's Compensation Board, which is referred to as the Board in the Act.¹⁴¹² The Minister appoints three members in writing; these are a medical practitioner under the employment of the government, a medical practitioner appointed by the Federation of Swaziland Employers, and a medical practitioner appointed as workers' representation.¹⁴¹³ Section 31(3) states that the board may call any person to a meeting to give evidence regarding any matter or dispute before it. This provision goes a long way in trying to adjudicate or solve any social security benefits or workers compensation concerns which arise. It is the Labour Commissioner who will refer to this board any dispute or matter regarding whether the workman has incurred permanent disablement, temporary partial disablement or temporary incapacity as pointed out in the Act.¹⁴¹⁴ The Board will

¹⁴¹¹ Act 7 of 1983.

¹⁴¹² Section 31(1). See also Mpedi & Nyenti *Employment Injury Protection* 73.

¹⁴¹³ Section 31(2). The term workmen and employee will be used interchangeably in this part of the chapter.

¹⁴¹⁴ Section 33(1)(a) points out that these disputes will be with regards to the degree and duration of incapacity or disablement under sections 7,8 and 9 and these sections deal

also deal with matters that relate to medical treatment a workman undergoes and, therefore, writes to the Labour Commissioner regarding any decision taken.¹⁴¹⁵ Any such decision will therefore be final and binding on both the Labour Commissioner and the disputing parties.¹⁴¹⁶

The Workers Compensation is an employer-liability system that involves compulsory insurance with a private carrier.¹⁴¹⁷ The Act states that it shall apply to every employer in Swaziland, including the government and every workmen employed both in and outside Swaziland by such an employer, unless in situations where a workmen is employed in another country and is subject to the said country's law which provides for compensation for employment accidents.¹⁴¹⁸ This, in essence, means that a Swazi national employed in another country is not covered by this social security statute.

The Act further defines a "workman" as any individual who has entered into work or works under a contract of service or apprenticeship or of traineeship whether implied or express, written or oral or in writing despite whether such a contract is calculated by work done or by time.¹⁴¹⁹ This clearly indicates that there are other categories of people excluded from coverage of this statute. For instance, section 2(2) lists categories of people excluded from coverage of the *Workmen's Compensation Act* and these include, people whose manner of work is of a casual nature but not employed for purposes of the employer's trade or business. However, this does not include individuals employed for purposes of any game or recreation and are paid through a club.¹⁴²⁰ Moreover, an outworker, domestic servants, a member of a family who dwells in the house, members of the Umbutfo

comprehensively with compensation for permanent disablement, temporary partial disablement and temporary incapacity.

¹⁴¹⁵ Sections 31(1)(b) and 32(2).

¹⁴¹⁶ Section 32(2).

¹⁴¹⁷ Mpedi & Nyenti *Key International, Regional and International Instruments* 174. Mpedi & Smit *Access to Social Security Services* 111. See also International Social Security Association 2015 <https://www.ssa.gov>.

¹⁴¹⁸ Section 1(2).

¹⁴¹⁹ Section 2(1).

¹⁴²⁰ Section 2(1)(a).

Swaziland Defence Force and any person expressly excluded by a Minister through a Gazette are also excluded from coverage.¹⁴²¹

The Act was passed to provide compensation together with medical treatment for workers who incur injuries or contract diseases while employed.¹⁴²² However, an accident will only be deemed an employment accident if it arose in the course of a workman's employment, without any contradicting evidence.¹⁴²³

The employer pays insurance premiums to an insurance company for the above-mentioned reason.¹⁴²⁴ However, if an accident leading to an injury occurs but death does not ensue, and a workman is not incapacitated for more than three days from earning a full salary, then the employer will be exempted from paying compensation.¹⁴²⁵ Nonetheless, the employer will also not be found liable if incapacity, injury or even disablement ensues as a result of occupational disease or employment injury if such a workman had at some point misrepresented his employer in writing stating that he had not previously suffered from a similar serious incapacity or disablement yet that was not the case.¹⁴²⁶

The Act further makes provision for employment accident leading to a permanent or temporary disablement of a workman.¹⁴²⁷ When it comes to an incurrance of

¹⁴²¹ Section 2(1)(b)-(f). See also Mpedi & Nyenti *Employment Injury Protection* 72. Mpedi & Nyenti *Key International, Regional and International Instruments* 174. Mpedi & Smit *Access to Social Security Services* 111.

¹⁴²² Mpedi & Nyenti *Employment Injury Protection* 72. According to section 4 employment accident has been defined as an occurrence which causes personal injury to a workman as a result of an arising out of and in the cause of his employment. This shall also include travelling by any reasonable means and route between the place of work and place of residence. The act further stipulates that as long as a workman encounters an accident while acting for purposes of the employer's trade or business then the accident will be deemed an employment accident despite the fact that such a workman was acting in contravention of any regulations applicable to his employment or orders or instructions by his employer. Included is also instances where an accident happens while a workman is taking steps on an emergency at premises he or she is employed for the time being to rescue succour or protect persons who are, or are thought to be, or possibly to be, injured or imperilled, or to avert or minimise serious damage to property and in situations where such an action occurs in the course of employment as a result of another animal, insect, fish, bird or person's negligence or misbehaviour as a case maybe. See also Mpedi & Nyenti *Employment Injury Protection* 73.

¹⁴²³ Section 4.

¹⁴²⁴ Mpedi & Smit *Access to Social Security Services* 111.

¹⁴²⁵ Section 5(2) (a).

¹⁴²⁶ Section 3.

¹⁴²⁷ See Section 7-8.

permanent disability as provided for in section 7 and the second schedule of the Act and total disability is a result of the employment accident, then the insured or workman will be compensated with a lump-sum 54 times his or her monthly earnings at the time of the accident.¹⁴²⁸ However, if the injury or disability is not mentioned in the second schedule, the workman will still be compensated 54 times the monthly salary at the time of the accident after the assessment of the Medical Practitioner as to the percentage of disablement caused by the injury.¹⁴²⁹ If the total disablement leads to a workman getting assistance from another individual constantly, then additional compensation equal to one-quarter of the said compensation shall also be paid.¹⁴³⁰

In cases where partial temporary disablement takes place, the benefits amount to 75% of the workman's salary if the injury or disablement persists for more than three days until the workman fully recovers or is assessed as permanently disabled.¹⁴³¹ Section 8 points out that where the workman is assessed and certified to be temporarily disabled for more than 24 months, such a disability shall be regarded as permanent after re-examination by the Medical Practitioner and certification that such a workman is permanently disabled.¹⁴³²

Medical expenses are also part of the benefits that a worker is afforded in instances where an employment accident occurs. The Act points out that an employer shall bear the expenses reasonably and necessarily incurred by the workman upon the occurrence of an employment accident.¹⁴³³ Therefore, these medical benefits will include expenses for a general practitioner, dental care, nursing at home or in a hospital or other medical institution, pharmaceutical and other medical or surgical supplies, which may also include eye glasses.¹⁴³⁴ Further expenses include emergency and first-aid treatment, transportation to and from

¹⁴²⁸ Section 7(1) (a). International Social Security Association 2015 <https://www.ssa.gov>. Mpedi & Nyenti *Employment Injury Protection* 73. Mpedi & Smit *Access to Social Security Services* 111.

¹⁴²⁹ Section 7(1) (b).

¹⁴³⁰ Section 7(3).

¹⁴³¹ International Social Security Association 2017 <https://www.ssa.gov>.

¹⁴³² See also Mpedi & Nyenti *Employment Injury Protection* 73.

¹⁴³³ Section 30(1).

¹⁴³⁴ Section 30(1) (a)-(e).

the place of medical treatment, and other expenses pertaining to any supply, maintenance, repair and renewal of artificial limbs and apparatus necessitated by the employment accident.¹⁴³⁵

When it comes to survivor benefits, in instances where a workman dies as a result of an employment accident, then the dependents of the deceased workman will receive a lump-sum equivalent to 48 times the deceased's monthly earnings at the time of the accident.¹⁴³⁶ However, any amount that was paid towards permanent disability will be deducted from these survivor benefits.¹⁴³⁷ Those who are eligible include children, and unemployed or disabled widows.¹⁴³⁸ Those who are partially dependent on the deceased are also to receive reduced benefits.¹⁴³⁹ There are also funeral grants which amount to a lump-sum of up to SZL 500.¹⁴⁴⁰

Swaziland does not make provision for social security rights as a fundamental right in its Constitution. Apart from section 27(6), which provides that there shall be a provision of facilities and opportunities necessary to enhance the welfare of the needy and the elderly, social security rights are not mentioned at all. However, since there are some statutes, as already mentioned which do make provision for such rights and benefits, it can safely be construed that Swaziland does make provision for social security rights to a certain limited extent. The following section of this chapter will analyse the mechanisms of enforcement and adjudication of social security rights in Swaziland to see exactly how disputes pertaining to social security rights are managed in this country.

4.3.4.3 Mechanisms of enforcement and adjudication of social security rights in Swaziland

The Constitution of Swaziland, like other SADC member states' constitutions, makes provision for rights that have an impact in the establishment of the

¹⁴³⁵ Section 30(1) (f)-(h).

¹⁴³⁶ International Social Security Association 2017 <https://www.ssa.gov>.

¹⁴³⁷ International Social Security Association 2017 <https://www.ssa.gov>.

¹⁴³⁸ International Social Security Association 2017 <https://www.ssa.gov>.

¹⁴³⁹ International Social Security Association 2017 <https://www.ssa.gov>.

¹⁴⁴⁰ International Social Security Association 2017 <https://www.ssa.gov>. The currency of Swaziland is Emalangeni hence the E in E500.

adjudication of social security system.¹⁴⁴¹ This Constitution, most importantly, guarantees the right to equality before the law by pointing out that the everyone is equal before and under the law, and shall enjoy equal protection of the law.¹⁴⁴² This provision in its entirety safe guards the right to access the courts of law.¹⁴⁴³ Further provisions in the Constitution make reference to the right to a fair hearing within reasonable time by an independent and impartial court of law, or any such adjudicating authority established by law.¹⁴⁴⁴

In Swaziland, the Constitution states clearly that the High Court is bestowed with the original jurisdiction over matters that relate to the violation of any fundamental rights mentioned in it.¹⁴⁴⁵ The Constitution further states that in issues related to any contravention of provisions of the Constitution, which include fundamental rights (for purposes of this chapter), any subordinate court handling the proceedings may refer the matter to the High Court upon request by any party, unless the question so raised is merely deemed vexatious and frivolous by the subordinate court.¹⁴⁴⁶ No clear expression of social security in the Constitution means that reference has to be drawn from principles of state policy. Mosito¹⁴⁴⁷ has pointed out that such principles are used by the Constitution to provide for social security benefits. As already mentioned, such principles and fundamental rights run parallel with each other.¹⁴⁴⁸ Oliver¹⁴⁴⁹, on the other hand, points out that the right to social security may be drawn from section 60(5) of the Constitution, even though it is mentioned in less unambiguous and non-binding expressions.¹⁴⁵⁰

¹⁴⁴¹ Nyenti Developing an Appropriate Adjudicative and Institutional Framework 153.

¹⁴⁴² Section 20(1). This equal protection before the law applies in all spheres of political, economic, social, and cultural life and in every other manner.

¹⁴⁴³ Mosito 2013 *LLJ* 66.

¹⁴⁴⁴ Section 21(1).

¹⁴⁴⁵ Section 35 of The Constitution of the Kingdom of Swaziland Act 2005.

¹⁴⁴⁶ Section 35(3).

¹⁴⁴⁷ Mosito 2013 *LLJ* 69.

¹⁴⁴⁸ Mosito 2013 *LLJ* 69. See Par 4.2.4.1.

¹⁴⁴⁹ Oliver 2011 <http://wwwS.austlii.edu.au/journals/intJLSSWC/2011/S.pdf>.

¹⁴⁵⁰ Oliver 2011 <http://wwwS.austlii.edu.au/journals/intJLSSWC/2011/S.pdf>. Section 60(5) of the constitution states that they shall make reasonable provision for the welfare and maintenance of those of old age and provide protection for families and further recognise the importance of the role played by such.

Dispute resolution institutions, especially from a labour law point of view are normally assigned with dealing with certain aspects of social security disputes because of the absence of a specialised court that deals directly with social security disputes.¹⁴⁵¹ This is normally resultant of issues like occupational injuries and diseases, maternity and even pensions which are incorporated in labour law systems of countries like Swaziland because of the absence of comprehensive social security systems in these countries.¹⁴⁵² The next part of the chapter deals with the access to and portability of social security rights in terms of migrants from other countries, living in Swaziland and Lesotho.

4.4 Access and Portability of Social Security Benefits

Before dealing with the issue of the portability of social security benefits from Swaziland as a migrant-sending country, it is reasonable to examine the degree of access to social security benefits available in each country. The aim here is to analyse how migrants from other countries are treated in Lesotho and Swaziland in terms of social security benefits. This will provide a foundation upon which we will advocate for better treatment of migrants in South Africa as major migrant-receiving country of people from the said countries.

4.4.1 Swaziland

In Swaziland, forms of social assistance like old-age grant are accessible to nationals only.¹⁴⁵³ As already stated, old-age grant is a non-contributory scheme and is financed by the state. However, when it comes to healthcare, it is safe to say that non-nationals do receive these benefits to a certain limited extent. Non-nationals in Swaziland receive partial healthcare as they are able to receive treatment from public clinics, public hospitals, and other public healthcare facilities in the country.¹⁴⁵⁴ Other services provided for by the Swaziland health system, like the Phalala Fund and Civil Servants' Referral Scheme, are off limits to non-

¹⁴⁵¹ Oliver 2011 <http://wwwS.austlii.edu.au/journals/intJLSSWC/2011/S.pdf>.

¹⁴⁵² Oliver 2011 <http://wwwS.austlii.edu.au/journals/intJLSSWC/2011/S.pdf>.

¹⁴⁵³ Mpedi & Smit *Access to Social Security Services* 112.

¹⁴⁵⁴ Mpedi & Smit *Access to Social Security Services* 113. These non-nationals include permanent residents, temporary residents, refugees, asylum-seekers and even undocumented migrants.

nationals.¹⁴⁵⁵ The Provident Fund also excludes all non-citizens from its coverage.¹⁴⁵⁶ When it comes to employment-related illness or sickness benefits, the *Employment Act of Swaziland*¹⁴⁵⁷ is a necessary point of departure. This Act provides that after three months of continuous employment with one employer, an employee is eligible for a maximum of fourteen days of full pay sick leave and a maximum of a further fourteen days sick leave on half pay.¹⁴⁵⁸ The Act further provides as follows:

Payment for sick leave shall be made by the employer at the employee's basic rate of wages, except that where the employee is employed on a wage other than a fixed wage he shall be paid, in respect of each day's sick leave on full pay the same amount, and in respect of each day's sick leave on half pay, half such amount, as equals the average amount of wages he received in respect of each day's employment during the week in which he was last employed before the week during which his sick leave commenced.

Note that the provision strictly talks about employees and does not (in no way shape or form) mention any exclusion of non-nationals. It is, therefore, safe to state that when it comes to these type of benefits, all non-nationals including permanent, temporary residents, and even those migrants which are undocumented do receive sick leave, especially if they are formally employed.¹⁴⁵⁹ What can be gathered from the above information is that non-nationals in Swaziland are able to obtain some form of social insurance from the Motor Vehicle Fund and private healthcare.¹⁴⁶⁰ However, it is very difficult for them to obtain other forms of social security benefits and social services as a whole.¹⁴⁶¹

¹⁴⁵⁵ Mpedi & Smit *Access to Social Security Services* 113.

¹⁴⁵⁶ Mpedi & Smit *Access to Social Security Services* 113.

¹⁴⁵⁷ Act 5 of 1980.

¹⁴⁵⁸ Section 129(1).

¹⁴⁵⁹ Mpedi & Smit *Access to Social Security Services* 113. The Employment Act further prohibits discrimination on the grounds of national origin. See section 29.

¹⁴⁶⁰ Mpedi & Smit *Access to Social Security Services* 113.

¹⁴⁶¹ Mpedi & Smit *Access to Social Security Services* 113. Refugees do get some social security benefits like health care which access to has been described as easy and free. OSISA 2012 <http://www.osisa.org>. Refugees also pay the same fees as other Swaziland citizens.

4.4.2 Lesotho

Lesotho does not have specific laws which directly deal with social security benefits or socio-economic rights of migrants, let alone migrant workers.¹⁴⁶² Most unfortunate is the fact that the laws on this part of the world remain silent on the issue of providing social security rights and socio-economic rights to migrant workers and migrants in general.¹⁴⁶³ Laws that deal with migrants are the *Aliens Control Act*, which deals with movement regulation of migrants, and the *Refugees Act*, which administers how refugees are dealt with in Lesotho.¹⁴⁶⁴ It seems as if social security benefits have never really been pursued by migrant workers in Lesotho, especially by both temporary and permanent residents alike.¹⁴⁶⁵ Another reason behind lack of claims is the undeniable truth that there are not many migrants in Lesotho; hence, most people migrating to this country have their own social security measures intact.¹⁴⁶⁶ Lesotho's legislative silence on social security benefits of migrant workers is also not very helpful. In fact, legislations like the *Workmen's Compensation Act*, which relates to death and injuries of workmen encountered during work, is silent as well.¹⁴⁶⁷ There is no provision in this Act where there is a clear distinction between both nationals and non-nationals.¹⁴⁶⁸ The *Labour Code Order*, on the other hand, also refers to workers and employees, and does not distinguish between national and non-nationals.¹⁴⁶⁹ It is safe to conclude that when migrant workers encounter employment-related injuries, they will certainly receive their entitlements.¹⁴⁷⁰ Nonetheless, refugees seem to be more on the receiving side of social security benefits, especially in Lesotho.¹⁴⁷¹

¹⁴⁶² OSISA 2012 <http://www.osisa.org>.

¹⁴⁶³ OSISA 2012 <http://www.osisa.org>.

¹⁴⁶⁴ Act 16 Of 1966 and Act 18 of 1983, respectively. See also OSISA 2012 <http://www.osisa.org>.

¹⁴⁶⁵ Mpedi & Smit Access to Social Security Services 81.

¹⁴⁶⁶ Mpedi & Smit Access to Social Security Services 81.

¹⁴⁶⁷ Act 13 of 1077.

¹⁴⁶⁸ Mpedi & Smit Access to Social Security Services 81.

¹⁴⁶⁹ Mpedi & Smit Access to Social Security Services 81.

¹⁴⁷⁰ Bitso points out that they were 10 migrant workers without documentation or work in Letšeng diamond mines during a labour inspection carries out in 2008. The same allegation was made this year and this were vehemently denied by the mining company. See Mpaki2017<http://www.lestimes.com>. (28 July).

¹⁴⁷¹ As has already being stated, Lesotho's health care services are generally subsidised by the government making them affordable to all and sundry. In fact when one goes to a public

4.5 Portability of Social Security Benefits in Lesotho and Swaziland

Reports suggest that the Mineworkers Provident Fund paid out an approximate ZAR 61.55 million worth of social security benefits to about 834 Basotho formally employed in South African mines.¹⁴⁷² However, further reports from the Fund state that there is still a total of 11, 209 (ex-)mine workers who are yet to receive their duly earned employment benefits, estimated to amount to ZAR 220 million.¹⁴⁷³

4.5.1 The Employment Bureau of Africa

According to reports by The Employment Bureau of Africa (hereafter, TEBA), Lesotho has an estimated number of 25, 852 migrant mine workers in South Africa.¹⁴⁷⁴ TEBA is administered and licensed under the *Labour Code Order of Lesotho* and conforms to the fundamental rights principles and the right of migrant workers to work.¹⁴⁷⁵ The most pertinent issue regarding TEBA is the fact that it is governed by the bilateral agreement between the Government of the Republic of South Africa and the Kingdom of Lesotho.¹⁴⁷⁶ The organisation offers services to prospective employees undergoing recruitment processes; these include assessments and registration for those who seek employment.¹⁴⁷⁷ The individual seeking work is given information regarding the economic, legal, and social consequences of moving to South Africa.¹⁴⁷⁸ Furthermore, TEBA ensures that such individuals undergo medical examinations before being employed; this

health facility hardly any identification is required. This combined with the fact that the laws in this country do not make specific reference to migrant's means that refugees do access health care services. Refugees do have access to free primary education and secondary education from public schools which also include church owned schools. Credit has to be attributed to section 28 of the constitution of Lesotho which provides that everyone has a right to education. This provision also provides that Lesotho shall endeavour to make education available to all and obliges the country to adopt policies intended to make sure that such is achieved. The word "all" can be construed as encompassing the word refugees. See OSISA 2012 <http://www.osisa.org>. at 42. Other benefits that migrants receive include, monthly stipends that were estimated to be around M400 in 2014. While some refugees indicated that they were given assistance in the form of food and blankets. See also Mpeli & Smit Access to Social Security Services 81.

¹⁴⁷² Mpaki 2017 <https://www.pressreader.com>.

¹⁴⁷³ Mpaki 2017 <https://www.pressreader.com>.

¹⁴⁷⁴ TEBA 2015 <https://www.ilo.org>.

¹⁴⁷⁵ TEBA 2015 <https://www.ilo.org>.

¹⁴⁷⁶ *Treaty Series* 1/1973.

¹⁴⁷⁷ TEBA 2015 <https://www.ilo.org>.

¹⁴⁷⁸ TEBA 2015 <https://www.ilo.org>.

includes the issuing of an exit medical examination certificate upon employment termination in South Africa.¹⁴⁷⁹ The recruitment process includes taking miners to the Department of Labour in Lesotho before their journey to South Africa, and transport to and from their places of employment.¹⁴⁸⁰ These process also include ensuring that they have the necessary skills required by their employer, giving information to the Department of Labour regarding the working and living conditions, making sure that employees are accordingly trained and tested for the occupation, and making sure that the employer pays for all the recruiting fees.¹⁴⁸¹ It also looks at the working conditions by helping with contract negotiations and liaising with various trade unions representatives.¹⁴⁸² However, for purposes of this chapter, is the fact that TEBA aids in the facilitation of the system of remittances for mine workers, for their families and dependents in Lesotho.¹⁴⁸³ It was mainly a route for deferred payments from migrant mineworkers.¹⁴⁸⁴ Moreover, It also provides assistance in the facilitation of the terminally ill migrant mine workers.¹⁴⁸⁵ However, it is faced with several challenges ranging from a lack of concrete statistics regarding retrenchment to the number of irregular migrants crossing over to South Africa.¹⁴⁸⁶

Furthermore, TEBA has also been credited for its services which saw an estimated six hundred and fifty Swazi nationals being employed in the early 2000s.¹⁴⁸⁷ Although reports suggest that there has been a steady decline from 1997, which saw TEBA administer employment for approximately 11 500 workers, this is still proof enough that it functions in Swaziland in a similar manner to Lesotho. It is, however, possible that there are still a number of migrant workers from Swaziland who are not profiled in TEBA's database. This is due to report that indicate an approximate of about 30 000 unprofiled Swazi former mine workers from South

¹⁴⁷⁹ This is a requirement of the *South African Health and Safety Act* 85 of 1993.

¹⁴⁸⁰ TEBA 2015 <https://www.ilo.org>.

¹⁴⁸¹ TEBA 2015 <https://www.ilo.org>.

¹⁴⁸² TEBA 2015 <https://www.ilo.org>. These remittances were approximated at about M370 million in 2014.

¹⁴⁸³ TEBA 2015 <https://www.ilo.org>.

¹⁴⁸⁴ Mabote 2017 <https://essa.org.za>.

¹⁴⁸⁵ TEBA 2015 <https://www.ilo.org>.

¹⁴⁸⁶ TEBA 2015 <https://www.ilo.org>.

¹⁴⁸⁷ FAO 2002 <http://www.fao.org/docrep/005/Y6815e/Y6815e00.htm>.

Africa together with their dependents alive even today.¹⁴⁸⁸ Reports further suggest that Swaziland and Lesotho seem to experience similar problems when it comes to the portability of social security benefits.¹⁴⁸⁹ It is, therefore, safe to conclude that TEBA faces similar problems in both countries. The next part of the chapter analyses the bilateral agreement between South Africa and both countries. to understand why there is still an issue of unpaid social security benefits to migrant workers who have returned home after working for years in South Africa.

4.6.1 Bilateral Agreements Between the Republic of South Africa, Lesotho, and Swaziland

South Africa and Lesotho entered into an agreement in 1973, which led to the establishment of an institution that would make it possible for officials in Lesotho to liaise with South African officials regarding issues relating to compensation and pneumoconiosis.¹⁴⁹⁰ The agreement was said to provide for payment of deferred payments to Lesotho migrants returning home, together with allowances to be paid to such migrants' families who were left back home.¹⁴⁹¹ History tells that in the early 1960s, the Republic of South Africa concluded agreements with Botswana, Lesotho and Swaziland (formally known as the BOLESWA countries).¹⁴⁹² However, for purposes of this research, the discussion will focus on Lesotho and Swaziland. The aim of these agreements was to ensure that citizens of these countries are controlled within their borders, and that they have proper documentation for their stay in South Africa.¹⁴⁹³ This bilateral agreement was established to assist with the recruitment of contract labourers to supplement South Africa's worker shortage as long as required.¹⁴⁹⁴ Further agreements were concluded in 1973 and 1975 between South Africa and Lesotho and Swaziland

¹⁴⁸⁸ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 16.

¹⁴⁸⁹ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 18.

¹⁴⁹⁰ Smit Access to Social Security for Non-Citizens and the portability of social benefits 83.

¹⁴⁹¹ Smit *Access to Social Security for Non-Citizens and the portability of social benefits* 83. Bitso explains that these provisions were found in article IV and further states that such would be provided or from deductions from those migrant labourers' salaries.

¹⁴⁹² Bamu 2014 <https://www.ilo.org>.

¹⁴⁹³ Bamu 2014 <https://www.ilo.org>.

¹⁴⁹⁴ Bugar A critical Evaluation of the 1964 Preferential Agreement 5.

respectively.¹⁴⁹⁵ These latter agreements would eventually override the 1963 agreements and were hailed for introducing five major clauses to the notion of employment of migrant workers to South Africa.¹⁴⁹⁶ According to Bamu,¹⁴⁹⁷ the five provisions related to the creation of selection and interview facilities in these migrant-sending countries, launching labour offices in South Africa, authorisation of recruitment measures, protection from double taxation and remittances, and other issues closely related to it.¹⁴⁹⁸

These agreements were criticised for lacking any provisions that deal with migration and development.¹⁴⁹⁹ Bamu¹⁵⁰⁰ points out that the impact of migration on both South Africa and these migrant-sending countries development are not mentioned at all. Bamu¹⁵⁰¹ criticises the fact that there are no measures in place (investigative or otherwise) that can respond to the developmental impact that migration presents these countries.¹⁵⁰² Vallentgoed,¹⁵⁰³ on the other hand, criticises these agreements for being unconstitutional and points out that attempts were made to abolish them. One of their greatest deficiencies is that there are no provisions regarding exchange of information between migrant-sending and receiving countries concerning living conditions and social security systems available in the receiving country.¹⁵⁰⁴ There are also no provisions for a migrant worker and / or his family's participation in their receiving country's social security schemes and systems.¹⁵⁰⁵ Furthermore, such agreements are flawed in the sense that they do not address the migrant worker's positing in terms of the provision of social security benefits and the portability thereof. Moreover, Buma goes on to

¹⁴⁹⁵ 2014 Bamu <https://www.ilo.org>.

¹⁴⁹⁶ 2014 Bamu <https://www.ilo.org>.

¹⁴⁹⁷ Pp 16. 2014 Bamu <https://www.ilo.org>.

¹⁴⁹⁸ 2014 Bamu <https://www.ilo.org>.

¹⁴⁹⁹ 2014 Bamu <https://www.ilo.org>.

¹⁵⁰⁰ 2014 Bamu <https://www.ilo.org>.

¹⁵⁰¹ 2014 Bamu <https://www.ilo.org>.

¹⁵⁰² Pp 17. 2014 Bamu <https://www.ilo.org>.

¹⁵⁰³ Vallentgoed Legal Protection of Rights of Migrant Workers 31.

¹⁵⁰⁴ Bamu <https://www.ilo.org>.

¹⁵⁰⁵ Bamu <https://www.ilo.org>.

point out that these agreements do not provide for procedures that will be followed in instances where migrant workers return home.¹⁵⁰⁶

Among other issues, the agreements do not mention the fundamental rights that migrant workers from Lesotho and Swaziland are entitled to.¹⁵⁰⁷ Additionally, the issue of unlawful detentions that migrant workers may face in the receiving country is also not addressed. These detentions go hand-in-hand with the destruction of identity documents and passports by South African officials.¹⁵⁰⁸ The fact that there are no provisions relating to equal treatment of migrant workers from Lesotho and Swaziland, including other migrant-sending countries and South African nationals, highlights the degree to which the agreements are lacking, especially from a social security point of view.¹⁵⁰⁹ The fact that there are also no provisions regarding governance of recruiting agencies (and their conduct) means that these agreements care little to nothing about exploitation of migrant workers in their receiving countries.¹⁵¹⁰ Essentially, the agreements do not provide for access to and portability of social security rights and benefits in terms of migrant workers in South Africa. This, Therefore, means that they (the workers) may encounter problems regarding social security rights entitlements when they enter and work in South Africa. Moreover, they further encounter problems accessing their well-deserved social security benefits upon termination or expiry of their employment contracts (upon their return home). However, despite all these issues, migrant workers have still been remitting money to their countries of origin and a blind eye cannot be turned to the fact that at least some measures put in place to assist such workers with their remittances and money that could be saved up for rainy days. The next part of the research analyses the measures designed to assist migrant workers manage their remittances.

¹⁵⁰⁶ Pp 18.

¹⁵⁰⁷ Bamu <https://www.ilo.org>.

¹⁵⁰⁸ Bamu <https://www.ilo.org>.

¹⁵⁰⁹ Bamu <https://www.ilo.org>.

¹⁵¹⁰ Bamu <https://www.ilo.org>.

4.6.2 Management of Remittances in Lesotho and Swaziland

The Deferred Pay Scheme was established in 1974 to make sure that migrant mine workers' salaries are invested in their countries of origin.¹⁵¹¹ The other reason was to make sure that a "culture of saving" is instilled in the workers who eventually return home when their services were no longer required.¹⁵¹² The fund's administration is undertaken by a board of trustees headed by the principal secretary of Labour and employment, representatives from the Central Bank of Lesotho, representatives from the Ministry of Employment and Labour, Ministry of Agriculture, Ministry of Finance and representatives from South Africa's Ministry of Labour.¹⁵¹³ According to the law governing the scheme, money that is not immediately needed is to be deposited in the treasury bills for investment purposes. The Act was revised in 1979 and stipulated that 60% of the money would be deferred from workers' basic wage and deposited to the (then) Lesotho Bank.¹⁵¹⁴

According to Maimbo and Ratha, the *Deferred Payment Act* was eventually amended in 1990 and the deferred pay deductions were decreased from the original 60% to 30%. This amendment also meant that migrant workers had the liberty to agree to a deferment or deduction of up to 50% if they so wished.¹⁵¹⁵ It is important to note that remittances officially recorded in Lesotho are said to be mainly administered by the *Deferred Pay Act*.¹⁵¹⁶ However, the scheme's compulsory character has meant that most Basotho have refrained from disclosing their employment status in South Africa to protect their wages.¹⁵¹⁷ This has also meant that some did not make use of the proper, agreed-upon channels specified in the bilateral agreements; hence, workers have found themselves in unanticipated and unwelcome situations. Bitso¹⁵¹⁸ states that the the deferred pay

¹⁵¹¹ Deferred Payment Act 18 of 1974.

¹⁵¹² Maimbo & Ratha Remittances: *Development Impact* 124.

¹⁵¹³ Maimbo & Ratha Remittances: *Development Impact* 124.

¹⁵¹⁴ Burger & Sparreboom Date unknown <http://www.ilo.org>.

¹⁵¹⁵ Maimbo & Ratha Remittances: *Development Impact* 124-125.

¹⁵¹⁶ Chikanda, Crush & Nalane 2012 <http://www.researchgate.net>.

¹⁵¹⁷ Chikanda, Crush & Nalane 2012 <http://www.researchgate.net>.

¹⁵¹⁸ Smit "Access to Social Security for Non-Citizens and the portability of social benefits" 84.

scheme was formerly administered in the pool which would eventually become insolvent as a result of bad management. Reports point out that problems included the fact that migrant workers complained about not being involved in selection processes of the Deferred Pay Board and mismanagement of funds.¹⁵¹⁹ Initiatives would eventually be taken to revive the scheme, with the Government of Lesotho requesting TEBA to administer the Deferred Pay Scheme.¹⁵²⁰ TEBA's initiatives were successful and the government got involved again, by trying to lure migrant workers to revert back to the scheme by encouraging such to open private bank accounts.¹⁵²¹ These attempts would eventually fail and migrant workers would close their private bank accounts and decide to work with TEBA; mainly because the fees they paid in their private accounts did not apply in TEBA.¹⁵²² Another hurdle that migrant workers faced came in the form of foreign exchange controls and regulations which meant that such workers were not allowed to remit more than 80% of their net income to their countries of origin.¹⁵²³ Swaziland nationals, on the other hand, are not privy to compulsory schemes like the Deferred Pay Scheme. In fact, they participate in voluntary schemes and their participation was significantly lower than participation in a compulsory scheme in Lesotho.¹⁵²⁴

Schemes like the Refereed Pay Scheme and other voluntary schemes, as already indicated, were designed to instil a "culture of saving" in nationals of Lesotho and Swaziland, respectively. These schemes can, therefore, be construed as social security measures since they were designed to assist migrant mine workers in cases where their contracts of employment expired. Further social security initiatives meant to assist migrant workers were designed in the form of funds which would pay out benefits to migrant workers in instances of death, retirement, injuries, and diseases. It is, however, unfortunate that these funds report that there are vast amounts of monies due to migrant workers still unclaimed. This

¹⁵¹⁹ Chikanda, Crush & Nalane 2012 <http://www.researchgate.net>.

¹⁵²⁰ Chikanda, Crush & Nalane 2012 <http://www.researchgate.net>.

¹⁵²¹ Chikanda, Crush & Nalane 2012 <http://www.researchgate.net>.

¹⁵²² Chikanda, Crush & Nalane 2012 <http://www.researchgate.net>. Pp 20-21.

¹⁵²³ Chikanda, Crush & Nalane 2012 <http://www.researchgate.net>. Pp 21.

¹⁵²⁴ Burger & Sparreboom Date unknown <http://www.ilo.org>.

next part of the research analyses these funds, especially with regard to these unclaimed benefits.

4.6.3 Unpaid Social Security Benefits

Migrant mine workers have access to a variety of social security benefits with pensions being secured by numerous pension administrators, most notably by the RSA Compensation Fund and Rand Mutual Insurance, which provide pension benefits to Lesotho migrant workers who had to retire due to injury or disease.¹⁵²⁵ However, there are still unclaimed funds, with reports suggesting an uncertainty as to how much of this money belongs to migrant workers.¹⁵²⁶

4.6.3.1 Compensation fund

The Compensation Fund is provided by the South African Department of Labour and used to compensate workers or employees for occupational injuries and diseases.¹⁵²⁷ It is administered under COIDA and only compensates those employees registered under the COIDA Compensation Commissioner. It pays out monthly pensions until death, lump-sum benefits, medical expenses not exceeding 24 months, recovery pay not exceeding 24 months, assistive devices and chronic medication including rehabilitation, death and medical expenses.¹⁵²⁸ Reports suggest that this fund covers only 2% of workers in the mining industry, with the other 98% being insured by the Rand Mutual Insurance.¹⁵²⁹ However, the fund has witnessed an astonishing figure of 600, 000 unpaid claims with an estimated ZAR 97.557 reported to be unpaid to beneficiaries by 31 March 2017.¹⁵³⁰ Beneficiaries owed money under this fund are given 12 months to claim their monies, and if they could not be traced within the time period, the Department of

¹⁵²⁵ Smit "Access to Social Security for Non-Citizens" 84.

¹⁵²⁶ See chapter 1, Par 1.2.

¹⁵²⁷ Department of Labour 2014 <https://www.health-e.org>.

¹⁵²⁸ Department of Labour 2014 <https://www.health-e.org>.

¹⁵²⁹ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 30.

¹⁵³⁰ According to the Annual Report of the Compensation Fund, 2016-2017 report at the end of 2016 it was estimated that R 61,463 was money unclaimed during that year. See Republic of South Africa Labour Department 2017 <https://www.labour.gov.za>. See also Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 30.

Labour, through the Compensation Commissioner, will publish a notice of such in the government gazette.¹⁵³¹ It is, therefore, safe to conclude that migrant workers are among these beneficiaries who have not laid claim to their benefits as COIDA covers migrant workers as well.¹⁵³²

4.6.3.2 Rand mutual assurance insurance

The Rand Mutual Assurance (hereafter, RMA) provides compensation for employees disabled as a result of occupational diseases, or diseases sustained in the course of their employment.¹⁵³³ Death resulting from such injuries or illnesses is also covered under the RMA.¹⁵³⁴ The insurance scheme was licensed by the Department of Labour in order to compensate workers in the mining industry covered by COIDA and the *Compensation Act*.¹⁵³⁵ RMA governs compensation for workers claims, together with medical payments costs, lump-sum payments for disabilities, lump-sum payments for funeral and burial expenses, and family allowances for pensioners assessed with a 100% permanent disability.¹⁵³⁶ In 2012, outstanding claims amounted to an estimated ZAR180 790 000, an increase from the reported ZAR174 299 000 of the previous year.¹⁵³⁷ The RMA has, however, commented on this issue by pointing out that they are still committed to tracing as many beneficiaries as possible, even though this task has proven to be difficult.¹⁵³⁸ Furthermore, the RMA indicated that enhanced ties with migrant-sending countries would help improve the verification of beneficiaries from such countries.¹⁵³⁹

¹⁵³¹ Republic of South Africa Labour Department 2017 <https://www.labour.gov.za>. Pp 90.

¹⁵³² Bitso points out that Lesotho citizens also receive cover from the Compensation fund. Smit "Access to Social Security for Non-Citizens and the portability of social benefits" 84.

¹⁵³³ Department of Labour 2014 <https://www.health-e.org>. Pp 5.

¹⁵³⁴ Department of Labour 2014 <https://www.health-e.org>.

¹⁵³⁵ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 30.

¹⁵³⁶ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 31.

¹⁵³⁷ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 31.

¹⁵³⁸ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 31.

¹⁵³⁹ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 31.

4.6.3.3 Mineworkers Provident fund benefits

The provident fund was created in 1989, and has been reported to have millions of unclaimed and unpaid benefits.¹⁵⁴⁰ The fund is a creation of the National Union of Mineworkers and the Chamber of mines, and was established as a retirement scheme for unskilled workers, who were generally black miners.¹⁵⁴¹ In 2012, it reported that there were unclaimed benefits amounted to an estimated ZAR 3 008 289 913, increased from ZAR 2 634 259 040 in 2011 meaning that the amount went up instead of declining.¹⁵⁴² According to the Annual Financial Statements of the Mineworkers Provident Fund for the period of 1st January 2016 to 31 December 2016, unclaimed benefits on the 1st January 2016 amounted to ZAR3 980 035 134, and ZAR 3.756 932 613 by the 31st December 2016.¹⁵⁴³ Although there is not much data available as to how much is owed to migrant workers from both Swaziland and Lesotho, what is clear that there is a significant portion of this value or benefits allocated to miners from other migrant-sending countries.

4.6.3.4 Sentinel mining industry retirement fund

This fund is described as one of the prime self-administered pension funds in South Africa.¹⁵⁴⁴ It is also described as a defined contribution pension fund; it provides self-insured risk benefit cover for death and disability, together with monthly pensions for those who are insured.¹⁵⁴⁵ According to the fund's annual financial statement of 2017, unclaimed benefits are defined as benefits that stay outstanding for 24 months and more.¹⁵⁴⁶ Pensioners and beneficiaries of this fund

¹⁵⁴⁰ Jansson 2013 <https://mg.co.za>.

¹⁵⁴¹ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 25.

¹⁵⁴² Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 28.

¹⁵⁴³ Mineworkers Provident Fund 2016 <https://www.mwvf.co.za>. The annual reports also indicate that by 2014 December 31st, there was still a staggering amount of unclaimed benefits which amounted to R 3 219 593 146 which increased to R 3 756 932 613 in 2015. This increase in the value of unclaimed benefits proves that there is still much to be done when it comes to the tracing of former workers.

¹⁵⁴⁴ Sentinel Retirement Fund 2017 <https://www.sentinel.za.com>.

¹⁵⁴⁵ Sentinel Retirement Fund 2017 <https://www.sentinel.za.com>. See also Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 29.

¹⁵⁴⁶ Sentinel Retirement Fund 2017 <https://www.sentinel.za.com>.

amounted to 34 420 individuals and these received a staggering amount of ZAR 4 113 million that year.¹⁵⁴⁷ It is further estimated that 39 635 members are responsible for contributions amounting to ZAR2 846 million.¹⁵⁴⁸ However, it is reported that in 2017 there was an estimate of about 6 183 members who had not claimed their benefits.¹⁵⁴⁹ It is safe to conclude that migrant workers are part of the people who have not received their benefits because it has been reported that 4.8% of pensioners under this fund were foreign nationals.¹⁵⁵⁰ The fund's unclaimed benefits are also estimated to be around ZAR 101 million.¹⁵⁵¹

4.6.3.5 Living hands umbrella trust

This trust or fund is responsible mainly for monthly payments to beneficiaries of former mine workers. It pays benefits to beneficiaries of the mine workers' pension fund.¹⁵⁵² This trust was supposed to be paying funds for survivors of mine workers who died while they were still employed by the mines.¹⁵⁵³ The trust was reported to have been defrauded; however, the trustees have since been engaged in efforts to remedy the situation.¹⁵⁵⁴ The trustees have reported that the trust was comprised of an estimated 60, 000 beneficiaries from different countries in the SADC region and had about 400 funds under it.¹⁵⁵⁵ It is however encouraging to hear that the said trustees have paid out an estimated ZAR 31 million in 2015.¹⁵⁵⁶ The process of trying to recover an estimated ZAR 1.2 billion alleged to have been embezzled is still ongoing.¹⁵⁵⁷

¹⁵⁴⁷ Sentinel Retirement Fund 2017 <https://www.sentinel.za.com>.

¹⁵⁴⁸ See Annual Financial Statement of 2017.Pp 5.

¹⁵⁴⁹ See Annual Financial Statement of 2017.Pp 103.

¹⁵⁵⁰ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 29.

¹⁵⁵¹ Nyenti & Mpedi 2015 <https://www.saspen.org>.

¹⁵⁵² Nombembe 2016 <https://www.timeslive.co.za>.

¹⁵⁵³ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 27.

¹⁵⁵⁴ The fidentia Group was reported to have embezzled money amounting to millions from the Living Hands Umbrella Group. Sanlam Trust 2015 <https://www.fanews.co.za>. Fidentia controlled the Living Hands Umbrella Trust. Nombembe 2016 <https://www.timeslive.co.za>.

¹⁵⁵⁵ Nombembe 2016 <https://www.timeslive.co.za>.

¹⁵⁵⁶ Nombembe 2016 <https://www.timeslive.co.za>.

¹⁵⁵⁷ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 27.

4.6.3.6 Mines 1970's Pension and Provident Funds benefits

In 2015, reports suggested that this fund owed its beneficiaries an amount estimated at about ZAR200 million. Both the Mines 1970's pension Fund and the Provident Fund were established in January 1970 with an aim of benefitting those workers under the Chamber of mines.¹⁵⁵⁸ There was however a mass exodus of members from the Provident Fund due to the establishment of the Mineworkers Provident Fund and other funds such as the Hartebeesfontein Provident Fund, Impala Workers Provident Fund, Lorraine Provident Fund and Masakhane Provident Fund.¹⁵⁵⁹ This mass exodus clearly had a role in the declining contributions in the fund and this led to the winding up the fund in 1995.¹⁵⁶⁰ The decision to wind up the fund meant that lapsed members' funds were retained with the aim of trying to trace such.¹⁵⁶¹ It has however been reported that the tracing of beneficiaries and other members of the fund had been a difficult task, one of the reasons being the fact that these people originate from rural areas and neighbouring countries which have culturally been supplying South Africa with migrant labourers.¹⁵⁶² The fund also encountered problems with the incompleteness of data making tracing agents like TEBA and Data factory find this very hard.¹⁵⁶³ It is further important to note that this only contains unclaimed benefits and has been divided into two parts, with the other part comprising of pension benefits and the other comprising provident benefits.¹⁵⁶⁴ Mpedi and Nyenti¹⁵⁶⁵ suggest that it is highly impossible that the fund was able to trace all the lapsed members who were estimated to be about 59 702 by January 2008.

¹⁵⁵⁸ Erasmus, Nkosi & Winson 2008 <https://www.tuugo.co.za>.

¹⁵⁵⁹ Erasmus, Nkosi & Winson 2008 <https://www.tuugo.co.za>.

¹⁵⁶⁰ Erasmus, Nkosi & Winson 2008 <https://www.tuugo.co.za>.

¹⁵⁶¹ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 28.

¹⁵⁶² Jansson 2013 <https://www.mg.co.za>.

¹⁵⁶³ Jansson 2013 <https://www.mg.co.za>.

¹⁵⁶⁴ Jansson 2013 <https://www.mg.co.za>.

¹⁵⁶⁵ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 28.

4.6.3.7 Medical Bureau for Occupational Diseases (hereinafter-MBOD) and the Compensation Commissioner for Occupational Diseases (hereafter-CCOD) benefits

The South African National Department of Health makes provision for these benefits and they are administered by the ODMWA and by the Minister of Health.¹⁵⁶⁶ These benefits were said to have originated from the *Miners' Phthisis Act* of 1912 and were established for the purpose of dealing with claims from both current and former mine workers.¹⁵⁶⁷ Non-submission of both annual reports and annual financial reports have been labelled as some of the major problems that had been making administration of these benefits difficult.¹⁵⁶⁸ There were further documents that were missing and these included source documents from 2000 to 2003.¹⁵⁶⁹ Further problems included speculations that there were not enough staff members to carry on with the administration these social security benefits.¹⁵⁷⁰ The lack of finances also led to a huge build-up of claims, some of which, end up on the lapsed or unpaid list.¹⁵⁷¹ It is reported that the fund is bankrupt but continues funding because those who need to claim seldom do, meaning there is only a small number of people who claim.¹⁵⁷² Moreover, it was reported that only 2% of individuals eligible for compensation have been compensated, meaning that a further 98% have not received what is due to them.¹⁵⁷³ This means that there are a number of migrant workers from both countries who have not received their entitled compensation by the fund.¹⁵⁷⁴

¹⁵⁶⁶ Southern Africa Trust Date unknown <https://www.southernafricatrust.org>. ODMWA Act 78 of 1973 as amended.

¹⁵⁶⁷ Dunjwa 2014 <https://www.pmg.org.za>.

¹⁵⁶⁸ Dunjwa 2014 <https://www.pmg.org.za>. This report suggests that this non-submission had taken place since 2000.

¹⁵⁶⁹ Dunjwa 2014 <https://www.pmg.org.za>.

¹⁵⁷⁰ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 28.

¹⁵⁷¹ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 28.

¹⁵⁷² Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 30.

¹⁵⁷³ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 30.

¹⁵⁷⁴ Southern Africa Trust and Southern Africa Miners Association "The portability and access of social security" 30.

4.6.3.8 1970 Long Service Award Fund

The Chamber of mine administers the Long Service Award Fund benefits on behalf of TEBA.¹⁵⁷⁵ Suggestions report that the Chamber of mines requested that TEBA administers this fund in 1995.¹⁵⁷⁶ A worker needs to be 55 years and above and must have been employed for at least 15 years as an “out-of-service miner” and 10 year employed as an in-service-miner to be eligible for these benefits.¹⁵⁷⁷ Tracing formers workers, especially former migrant mine workers has also been described as a tolling process especially because of individuals who could not be traced.¹⁵⁷⁸

4.7 Tracing of Those Who Are Eligible for Benefits

TEBA, which traditionally played a role as a recruiting and employment agency also takes on the role of tracing former migrant workers and assist them to get their work-related benefits.¹⁵⁷⁹ It is said to keep a record of all the beneficiaries and former mine-workers to enable tracing such for their compensations.¹⁵⁸⁰ Lack of documentation has been highlighted as one of the biggest problems surrounding the difficulties encountered while trying to trace beneficiaries of unclaimed benefits.¹⁵⁸¹ The lack of physical addresses for people who live in rural areas especially in migrant-sending countries has also been highlighted as a major hurdle.¹⁵⁸² Migrant workers from different sectors are also part of this issue of unclaimed benefits. Reports by the Financial Service Board indicate that this issue of unclaimed benefits also applies to industries such as the metal, engineering and the motor industry.¹⁵⁸³ Lack of documentation and constantly upgraded contact

¹⁵⁷⁵ Sonto 2008 <https://png.org.za>.

¹⁵⁷⁶ Sonto 2008 <https://png.org.za>.

¹⁵⁷⁷ Southern Africa Trust and Southern Africa Miners Association “The portability and access of social security” 30. See also Sonto 2008 <https://png.org.za>.

¹⁵⁷⁸ Southern Africa Trust and Southern Africa Miners Association “The portability and access of social security” 30.

¹⁵⁷⁹ Jansson 2013 <https://www.mg.co.za>.

¹⁵⁸⁰ Jansson 2013 <https://www.mg.co.za>.

¹⁵⁸¹ Fisher-French 2017 <https://www.city-press.news24.com>.

¹⁵⁸² Fisher-French 2017 <https://www.city-press.news24.com>.

¹⁵⁸³ Fisher-French 2017 <https://www.city-press.news24.com>.

details as stated earlier is a major problem.¹⁵⁸⁴ The fact that there is a large number of migrant workers who acquire employment in different industrial sectors in South Africa using illegal means also makes tracing very difficult. This is the reason behind inadequate data of migrant labourers.¹⁵⁸⁵ The workers have also been accused of refusing to give out their proper details including correct names.¹⁵⁸⁶ The responsibility of tracing individuals to be paid is in the hands of trustees regardless of whether such a service was outsourced to a private organisation or not.¹⁵⁸⁷ The Financial Service Board also indicates that there is over ZAR 42 billion worth of unclaimed benefits, the bulk of which also belongs to migrant workers from other countries which include Lesotho and Swaziland.¹⁵⁸⁸ The Financial Service Board states that efforts have been made to try and find beneficiaries of these unclaimed benefits and this led to an estimate of about ZAR18 million being paid out to 680 000 members yet there are still more efforts to be made with more difficulties being encountered.¹⁵⁸⁹ The Financial Service Board has increased efforts and developed a “search engine on their website” which will enable members of the public to verify if there are any benefits owed.¹⁵⁹⁰ It remains to be seen if this entity will really become beneficial as most former migrant labourers are not well acquainted with the use of technology as a whole. This entity is said to be accessible via the internet, email, or the use of faxes.¹⁵⁹¹ It is however further perplexing for the board to expect most of these ex-workers to access these services as these are foreign concepts to most of these people who are usually residents in the rural areas of already less developed countries.

The difficulty of tracing is due to several reasons which further include the fact that employers also fail to provide fund administrators with full and necessary

¹⁵⁸⁴ Fisher-French 2017 <https://www.city-press.news24.com>.

¹⁵⁸⁵ Fisher-French 2017 <https://www.city-press.news24.com>.

¹⁵⁸⁶ Fisher-French 2017 <https://www.mayaonmoney.co.za>.

¹⁵⁸⁷ Financial Service Board 2017 <https://www.fsb.co.za>.

¹⁵⁸⁸ Financial Service Board 2017 <https://www.fsb.co.za>.

¹⁵⁸⁹ Fisher-French 2017 <https://www.mayaonmoney.co.za>.

¹⁵⁹⁰ Fisher-French 2017 <https://www.mayaonmoney.co.za>.

¹⁵⁹¹ Fisher-French 2017 <https://www.mayaonmoney.co.za>.

details required.¹⁵⁹² There is also a tendency by migrant workers to refrain from telling their dependents about monies that will be granted to them upon death and these may be due several reasons including a fear that such might actually kill them and lack of knowledge about these funds. Poor administration on the part of the board, administrator, and funding agencies is also one of the biggest reasons for unclaimed benefits.¹⁵⁹³

4.8 Conclusion

The portability of social security benefits in the SADC region is accompanied by a lot of obstacles that have seemingly been credited for hindering access to social security benefits of migrant workers who return home. Hurdles that hinder this process include the fact that there is a lot of documents that need to be addressed and these complicated documents are needed for applications to be processed and be successful. There is also very problematic because former migrant workers lack the information needed to get their benefits, these problems are also faced by their beneficiaries who are normally so clueless about what is due to them leading to them being exploited hence they sink further in poverty. There is also a very daunting issue of trying to make legislatures from migrant-sending countries to make provision not only for social security benefits for their nationals who remain in these countries but also to legislate the issue of portability of social security benefits. Both Lesotho and Swaziland do not have in their constitutions provisions specifically regulating social security rights and benefits. Workers who encounter occupational diseases and illnesses also come across issues such as accessibility of health services that also aid with establishing if there is a connection or causal link between the illness and the accident or occupation. This also means that migrant workers eventually find it extremely hard get to their illnesses classified as occupational. Awareness is one of the biggest problems that migrant workers face, these people are faced with the issues, which include not knowing how their compensations are computed. The other major issue that cannot be denied is the problem that surrounds banking systems in both the migrant-sending country and

¹⁵⁹² Fisher-French 2017 <https://www.mayaonmoney.co.za>.

¹⁵⁹³ Fisher-French 2017 <https://www.mayaonmoney.co.za>.

migrant-receiving country. Former migrant workers prone to the issue of unpaid social security benefits originate from what is traditionally known as rural areas of undeveloped countries such as Lesotho and Swaziland. Other reports suggest that migrant workers from sectors such as the railway industry and other industries that work with resources related to metal are not provided with monthly pensions.

This, therefore, begs the question whether, as a fundamental right, social security which should be afforded to all without any discrimination is being upheld by both the sending and the receiving country. The problem that most former migrant workers face is that even where they are entitled to these benefits, they are required to be physically present for their benefits to be duly allocated to them and this poses a lot of problems to them because they usually lack the means to do so.

Both Lesotho and Swaziland are dependent on South Africa in one way or the other. Lesotho's borders all lead to South Africa, because of the fact it is completely surrounded by the latter. This, therefore, means that most Lesotho citizens leave the country and escape to South Africa with an intention of economic liberation. In fact, Lesotho unlike Swaziland which also shares a boarder with Mozambique is entirely dependent on South Africa not just for employment but for trade routes as well. The geographical position of Lesotho no doubt makes it wholly dependent on South Africa. Another interesting point is the fact that migrant workers from Lesotho's remittances are said to form a significant part of the country's GDP. In fact, Lesotho is said to have the highest proportion of GDP emanating from remittances from migrant workers in the world.

The agreements that South Africa concluded with both Lesotho and Swaziland did not specifically deal with the portability of social security benefits but instead looked to be inclined at making sure that the recruitment of employees is a smooth transition. One of the issues that are often raised while critiquing these agreements is the fact that there are no provisions in these agreements that thoroughly detail the migrant worker's participation in any social security schemes.

Simply put, these agreements, did not detail or even point out how migrant workers who finally go back home would receive their social security benefits.

Steps were taken to make sure that migrant workers have savings that would eventually assist when their employment contracts come to the end. These steps include the *Deferred Payment Act* which mandated that migrant workers remit at least 30% of their earnings. Reports on the issue of portability of social security point out that despite all these efforts, the Ministry of Labour, and Employment states that problems in Lesotho include lack of financial means, communication difficulties resulting from language barriers and inability to contact necessary social security authorities and entities responsible for social security benefits. With distances travelled for benefits to be claimed prove to be long and strenuous for claimants who are at times at home because of occupational accidents and diseases. The above-mentioned scenarios mean that the inability to trace beneficiaries is not easily overcome.

Swaziland on the other hand like Lesotho has not provided for social security rights as a fundamental right expressly in its Constitution. Moreover, Swaziland also does not have an agreement in place with any other SADC state regarding the portability of social security benefits. The most notable issue surrounding the migration of Swazi nationals is the fact that there is simply no agreement dealing with portability between it and other SADC member states. The Swazi government has passed laws that may be construed as advancing portability of social security benefits to a certain limited extent. One such piece of legislation is the *Swaziland National Provident Fund Order* which permits the Swazi government to enter into agreements with other countries with schemes similar to the one mentioned. This fund went as far as allowing Swazi nationals abroad to acquire their benefits without having to be physically present in Swaziland. The fact that this fund permits contributing members to access their benefits even when they no longer live in Swaziland are a good example of what among others this chapter intends to advocate for.

It is without a doubt also important to point out that adjudication of social security benefits both in Lesotho and Swaziland is another hurdle that needs to be resolved in order to have a smooth transition of social security benefits of migrant workers who return home after the expiration of their service contracts. The problem here is the fact that social security issues are normally left in the hands of other courts of law which normally have a backlog of cases awaiting attention. The other problem is that migrant-sending countries namely Lesotho and Swaziland's social security frameworks are not comprehensive enough to end up developing measures that would eventually lead to non-reliance on the courts of law whenever disputes arise. These, therefore, are some of the reasons why these countries find it hard to deal with issues that arise when their nationals return home. Another problem that migrant-sending countries are faced with is the issue of financing social security and this hinders unilateral arrangements they enforce to provide for their nationals abroad.

The next chapter will discuss best practices and comparative bilateral social security agreements from around the world to draw examples from such. The intention is to analyse these agreements in order for South Africa, Lesotho, and Swaziland to learn from them.

CHAPTER FIVE: BEST PRACTICES AND COMPARATIVE BILATERAL SOCIAL SECURITY AGREEMENTS

5.1 Introduction

The objective of this chapter is to look at best-practice multilateral, bilateral and unilateral agreements that are used by other regions of the world to tackle this issue of portability of social security rights or benefits. The chapter discusses three regions, namely the Southeast Asian Nations Region, Caribbean Community, and Common Market and the Southern Common Market. The chapter also looks at all the multilateral social security agreements and other related agreements for purposes of drawing from the good practices that could be beneficial to the SADC region. This is because it is an undeniable truth that these multilateral agreements normally endorse the principle of the extension of basic labour law and social security law coverage to those who are employed in foreign territories lawfully. The intention is not to urge SADC as a region to adopt similar instruments as the above-mentioned regions, however, examples could be drawn from their good practices especially because most of the countries in these regions are still at a developing stage.

Bilateral agreements between Zambia and Malawi are examined as well. This is because these two countries are both found in the SADC region and are therefore the closest example to draw from. From here, another discussion is based upon the social security bilateral agreement between Sweden and the Philippines. The two countries were selected because their agreement was recent and therefore focused on the challenges that modern migrant workers are faced with. Lastly, unilateral initiatives from the Philippines are also examined because this country has produced unilateral initiatives that assist its migrants abroad regardless of whether they receive social security benefits coverage or not. The Philippines is largely a migrant-sending country and has realised this hence it has put much effort into managing migration and working towards making sure that its nationals

benefit from this strenuous effort.¹⁵⁹⁴ These efforts by the Philippines have also been greatly improved especially because of the realisation that it has a significant role in improving the economy of the country hence Filipino migrant workers are currently referred to as “active development agents.”¹⁵⁹⁵ The truth of the matter is that social security agreements and unilateral initiatives from both migrant-sending and receiving state parties aid these two sets of countries overcome any hurdles that may be encountered by migrant workers and members of their families from receiving their benefits from social security systems and legislations of countries in which they have provided their services to.¹⁵⁹⁶

5.2 Good practices social security agreements

5.2.1 Southeast Asian Nations Region

Reports in 2016 suggest that an estimated 6.7 million migrant workers were originating from countries in Southeast Asian countries residing and working in other Southeast Asian countries.¹⁵⁹⁷ The problem concerning these migrant workers is the fact that they are either unskilled or possess very low skill sets with the Philippines being one of the major countries of origin for these migrants in the ASEAN region.¹⁵⁹⁸ The major problem facing migrant workers in this region is the fact that they get employment in sectors that are prone to human rights violations such as abuse and exploitation because of their low skill levels and predominantly odd working conditions.¹⁵⁹⁹ Migrant workers from regions that generate low incomes such as the ASEAN region and the SADC region are faced with issues such as inadequacy of information regarding their rights in migrant-receiving countries. The problem is that these people do not know if they are afforded any

¹⁵⁹⁴ Calzado “Labour Migration and Development Goals” 1.

¹⁵⁹⁵ Calzado “Labour Migration and Development Goals” 1.

¹⁵⁹⁶ Calzado “Labour Migration and Development Goals” 1.

¹⁵⁹⁷ Olivier & Govindjee 2016 *Institutions and Economics* 60.

¹⁵⁹⁸ Olivier & Govindjee 2016 *Institutions and Economics* 61. The Association of Southeast Asian Nations was established in 1967 and is made up of Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei, Lao, Burma, Cambodia, Vietnam, and Myanmar. This association was said to be established for the purpose of promoting economic, political, and regional cooperation and stability.

¹⁵⁹⁹ ILO 2010 <http://digitalcommons.illr.cornell.edu>. See also Olivier & Avinash 2016 *Institutions and Economics* 61.

social protection in these host countries or not.¹⁶⁰⁰ Migrant workers in these regions are prone to lack of and poor health facilities, education facilities for themselves and their families.¹⁶⁰¹ The other problem is the fact that such workers find it difficult to access legal assistance with regard to all the difficulties they face in their various occupations because of their nationalities and citizenship status, while they are generally excluded from social assistance mechanisms that are tax-financed in these host countries¹⁶⁰² Paperwork acquisition for purposes of gaining all the compensation deserved by the migrant workers has also proven to be a daunting task.¹⁶⁰³ The latter is also aggravated by the fact that in host countries, officials usually treat them in discriminatory ways when they have to offer such migrant workers their well-deserved social security entitlements.¹⁶⁰⁴ These legislative limitations which include boundaries relating to migrant workers' freedom to contribute to social security schemes offered by their home countries also add on to frailties such individuals encounter.¹⁶⁰⁵ Olivier¹⁶⁰⁶ also points out that migrant workers also face difficulties transferring their acquired rights especially accrued contributions between one social security scheme in the home country to another in the host country. Another issue that cannot be ignored, especially in the ASEAN region is the fact that, as Olivier puts it, there is a blend of social insurance and provident funds programmes which pose practical challenges when trying to merge the two for coordination purposes in order to engage in agreements that may aid in the process of portability of social security benefits.¹⁶⁰⁷

The uncertain nature of the social security system of the ASEAN region does not mean that there are no significant strides achieved in this region. In fact, in 2007, there was an adoption of the highly-heralded *ASEAN Declaration on the Protection and Promotion of the Rights of Migrants Workers* (hereafter the Declaration) which points out that both migrant-sending and receiving countries have a duty to

¹⁶⁰⁰ Olivier & Govindjee 2016 *Institutions and Economics* 61.

¹⁶⁰¹ Olivier & Govindjee 2016 *Institutions and Economics* 61.

¹⁶⁰² Olivier & Govindjee 2016 *Institutions and Economics* 61.

¹⁶⁰³ Olivier & Govindjee 2016 *Institutions and Economics* 62.

¹⁶⁰⁴ Olivier & Govindjee 2016 *Institutions and Economics* 62.

¹⁶⁰⁵ Olivier & Govindjee 2016 *Institutions and Economics* 62.

¹⁶⁰⁶ Olivier & Govindjee 2016 *Institutions and Economics* 62.

¹⁶⁰⁷ Olivier & Govindjee 2016 *Institutions and Economics* 62.

promote the dignity and full potential of migrant workers.¹⁶⁰⁸ Perhaps of further importance is the fact that this declaration seems to take into consideration the importance and sovereignty of both the receiving and the sending country. Article 3 points out that the fundamental rights and dignity of migrant workers already residing in receiving countries shall without a doubt be respected without undermining the receiving country's sovereignty or simply put laws that govern such. Such consideration of the rights of migrant workers is further extended to migrant workers' families as well making it easier for migrant workers to carry on with their daily activities without having to worry about their families' safety.¹⁶⁰⁹ Further respect to the sovereignty of other countries is seen in the provision which highlights the importance of documented migrants. The Declaration states that there is no provision which shall be construed as giving an implication that the Declaration regularises irregular migrant workers.¹⁶¹⁰ Another important aspect of the Declaration is the fact that it places obligations on both migrant-sending and migrant-receiving countries. Among obligations placed on migrant-receiving countries is the fact that such countries are urged to step up initiatives to promote and protect fundamental human rights, welfare, and human dignity of migrant workers.¹⁶¹¹ Tolerance has also been highlighted as one of the key areas that receiving states need to work towards achieving.¹⁶¹² This harmony and tolerance between migrant workers and receiving states will definitely halt xenophobic attacks which definitely hinder economic progress and regional progress as a whole. Social welfare services are also one of the obligations that receiving states are urged to provide to migrant workers in instances where the latter have abided and fulfilled their obligation under law to qualify for such.¹⁶¹³ This declaration also importantly advocates for the conclusion of bilateral and multilateral agreements which would and aid accelerate the provision of social security benefits to migrant

¹⁶⁰⁸ Article 1 of the *ASEAN Declaration on the Protection and Promotion of the Rights of Migrants Workers* which was signed on the 13th January 2007 during the 12th ASEAN Summit.

¹⁶⁰⁹ Article 3 of the *ASEAN Declaration on the Protection and Promotion of the Rights of Migrants Workers*. See also Olivier & Govindjee 2016 *Institutions and Economics* 66.

¹⁶¹⁰ Article 4.

¹⁶¹¹ Article 5.

¹⁶¹² Article 6.

¹⁶¹³ Article 7.

workers in receiving states in the ASEAN region.¹⁶¹⁴ Appropriate protection offered to migrant workers is also one of the key areas the Declaration is advocating for. Article 8, advocates for the promotion of sufficient access to both decent living conditions and working conditions, payment of wages, and employment protection. Upon arresting a migrant worker, the receiving state is further urged to engage and inform diplomatic authorities from the migrant labourers' country of origin under international law.¹⁶¹⁵

Migrant-sending countries do also have obligations that range from the enhancement of measures aimed at promoting and protecting migrant workers' rights in their entirety.¹⁶¹⁶ To make sure that citizens are given employment and livelihood opportunities in their countries of origin.¹⁶¹⁷ The provision seems to suggest that these migrant-sending countries should make sure that migration is not the only alternative for their nationals, that there should be enough jobs created and other opportunities for their citizens to promote their livelihood. These are part of the unilateral measures that the Declaration advocates for. The Declaration states that migrant-sending countries came up with lawful ways of recruiting, equipping, and preparing migrant workers with the necessary knowhow and information before sending them to other countries.¹⁶¹⁸ These countries are urged to make sure that migrant workers go to receiving countries for valid employment contracts and can only be done by doing away with all illegal recruitment agencies and other suspicious recruitment activities.¹⁶¹⁹

In its quest to achieve coordination in the region, the ASEAN region produced the *ASEAN Agreement on the Movement of Natural Persons in 2012* (hereafter the Agreement). This was established with the desire to come up with an effective way of aiding and advancing free movement of natural persons and the free flow

¹⁶¹⁴ See Article 7 and its advocacy for bilateral and multilateral agreements.

¹⁶¹⁵ Article 10.

¹⁶¹⁶ Article 11.

¹⁶¹⁷ The declaration points out that these livelihood and employment opportunities for nationals are sustainable alternatives to migrant workers. Article 12.

¹⁶¹⁸ Article 14.

¹⁶¹⁹ Article 14.

of skilled labour in the ASEAN region.¹⁶²⁰ This, however, has to be done with close cooperation with the necessary regional bodies and includes immigration and labour, trade in goods, trade in services among others.¹⁶²¹ The agreement was also entered into with the desire to do away with any limitations of temporary cross-border movement that hinder the movement of natural persons associated with the trading of goods or services as long as those are within the confines of the agreement.¹⁶²²

The objectives of the agreement include the provision of rights and obligations additional to those set out in the ASEAN Framework Agreement on Services and its implementing protocols that relate to the movement of natural persons between member states.¹⁶²³ The agreement further points out that as an objective, there shall be streamlined and transparent procedures for the application for immigration formalities for temporary entry or stay of natural persons governed by the agreement.¹⁶²⁴ The other objective of the agreement points out as the facilitation of natural persons' movement in the region while trading in goods and services and investing between member states.¹⁶²⁵ While the sovereignty of member states is still under immense protection because of the intention to protect the integrity of member states' borders while also protecting the domestic labour force and permanent employment within the territory of member states.¹⁶²⁶ The agreement desires a region with free-flowing goods, services, labour force and investment without any restrictions as long as such a flow is done within the confines of the very same agreement. It is important to note that this agreement does not extend its coverage to people seeking to be granted citizenship, residence, permanent employment, or access to the

¹⁶²⁰ The Preamble.

¹⁶²¹ The Preamble.

¹⁶²² The Preamble.

¹⁶²³ Article 1(a). The ASEAN Framework Agreement on Services was established to with an aim of moving towards free flow of services trade in the region. Author unknown 2018 <http://investasean.asean.org>.

¹⁶²⁴ Article 1(c).

¹⁶²⁵ Article 1(b).

¹⁶²⁶ Article 1(d). See also Mpedi and Nyenti *Revised Portability* 66.

employment market of another country.¹⁶²⁷ In fact, member states are at liberty to control any entry or temporary stay of natural persons in their land.¹⁶²⁸ Member states have the liberty to enforce measures needed to defend its integrity while at the same time making sure that there is a systematic movement across its borders without prejudicing other member states especially with regards to any such benefits due to the latter.¹⁶²⁹ It is imperative to note that the agreement only applies to temporary entry or stay of natural persons which only include business visitors, intra-corporate transferees, and contractual service suppliers.¹⁶³⁰

These are some of the few commitments shown by authorities of the ASEAN region to try and protect the needs of migrant workers while at the same time trying to advance coordination in the region. Further advances in the region include the ASEAN Consensus that was signed on the 14th November 2017 by member states with one of the agendas on the cards being the importance of protecting the rights of migrant workers in the region.¹⁶³¹ The *ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers* (hereinafter, Consensus) is not a legally binding document but was signed to create a framework that would aid with the cooperation on migrant workers' needs and issues.¹⁶³² It is, however, considered a "living, evolving document" despite its non-binding nature.¹⁶³³ The Consensus looks to respect, promote and protect human rights and fundamental freedoms while at the same time adhering to the principles of democracy, good governance, and the rule of law.¹⁶³⁴ It seeks to commit to the implementation of the provisions contained in the *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers* while recognising the importance of both already concluded and yet to be

¹⁶²⁷ Article 2(2).

¹⁶²⁸ Article 2(3).

¹⁶²⁹ Article 2(3).

¹⁶³⁰ Article 1.

¹⁶³¹ Author unknown 2017 <http://asean.org>.

¹⁶³² Preamble of The ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers which was signed in the Philippines, Manila on the 14th November 2017.

¹⁶³³ Author unknown 2017 <http://asean.org>.

¹⁶³⁴ The Preamble.

concluded bilateral and multilateral agreement in the region.¹⁶³⁵ The important thing about this consensus is the fact that it recognises the importance of migration and migrant workers to both migrant-sending and migrant-receiving countries. The preamble states that it recognises the importance of migrant workers to the economies of both migrant-sending and migrant-receiving countries while acknowledging concerns of both sending and receiving countries regarding migrant workers. The Consensus further heeds the need to adopt appropriate policies on migration and migrant workers within the jurisdiction of both sets of states.¹⁶³⁶

Among the provisions that the Consensus has is the one that deals with the fundamental rights of migrant workers and their family members. Migrant workers are to be subjected to rights that are not less favourable to those that are afforded to nationals of the receiving country in instances where they are in custody, awaiting trial or imprisoned for any other reason.¹⁶³⁷ The provision is important as it clearly prohibits discrimination against migrant workers or their families who are usually vulnerable in receiving countries. This shows good intent on the part of ASEAN countries and is a good initiative overall. Migrant workers' specific rights include the right to have access to employment and employment conditions related information from the necessary authorities of both migrant-sending and receiving states.¹⁶³⁸ They also have the right to be granted documentation and employment contracts containing understandable employment conditions and stipulations including the right fair treatment in the workplace subject to policies, national laws, and conditions.¹⁶³⁹ The right to fair and appropriate remuneration is also provided for in the Consensus.¹⁶⁴⁰ Most importantly is the fact that there is provision for acquired rights and benefits to be transferred to the migrant worker upon the expiry of his or her contract of

¹⁶³⁵ The Preamble. The Consensus is established to follow up on the declaration in order to settle the differences that were espoused by member state after the later was created.

¹⁶³⁶ The Preamble.

¹⁶³⁷ Article 10.

¹⁶³⁸ Article 13.

¹⁶³⁹ Article 14 and 15.

¹⁶⁴⁰ Article 17.

service.¹⁶⁴¹ This provision intensifies the intent on the part of the ASEAN authorities to make sure that the portability of social security benefits is a smooth process. Migrant workers are further allowed to transfer their remittances in accordance with national laws, regulations, and policies of the state of employment.¹⁶⁴² Further migrant worker specific rights include the right to lodge a complaint or make any representation under the law of the receiving state regarding any labour dispute versus any employment termination or breach of the latter's employment contract.¹⁶⁴³ This right also includes the right to receive any relief for the loss of rights emanating from employment contracts.¹⁶⁴⁴ The right of association is also afforded a migrant worker under this Consensus. Migrant workers are allowed to become part of trade unions and any such associations subject to national laws, policies, and regulations of the receiving state.¹⁶⁴⁵

The Consensus also outlines obligations bestowed upon both the migrant-sending and migrant-receiving countries. It points out that sending states in close coordination with receiving states have to produce ways to educate migrant workers before they depart to host countries. According to the Consensus, migrant workers need to be informed about their rights in general including human rights and labour rights, living and working conditions, policies, laws, regulations, norms, and cultural conditions of the receiving states.¹⁶⁴⁶ These education programmes have to include any such matters that would aid migrant workers to conform with any other administrative formalities needed by such in receiving states.¹⁶⁴⁷ This information includes awareness on terms and conditions of work which should be done through a written employment contract together with all the other necessary paperwork in clear language that can be understood by migrant workers.¹⁶⁴⁸ Administrative processes to overseas receiving states are to be made easy and

¹⁶⁴¹ Article 17.

¹⁶⁴² Article 18.

¹⁶⁴³ Article 19(a).

¹⁶⁴⁴ Article 19(b).

¹⁶⁴⁵ Article 20.

¹⁶⁴⁶ Article 21.

¹⁶⁴⁷ Article 21.

¹⁶⁴⁸ Article 22.

simplified by sending states as well.¹⁶⁴⁹ Further obligations on sending countries include making sure that migrant workers' health meet health requirements of the receiving states, comprehensive reintegration programmes for returned migrant workers and their families together with other employment programmes ought to be developed putting in mind the skills obtained while in receiving countries.¹⁶⁵⁰ These programmes are important and would definitely enhance the economies of migrant-sending countries which are normally desperate for growth hence high numbers of their citizens depart every year. Local employment and livelihood measures need to be promoted by sending countries to make sure that such countries' citizens view this as an alternative for migration.¹⁶⁵¹

Migrant workers ought to take the necessary precautions to ensure that migrant workers are fairly treated, are not exploited, abused, or exposed to any sort of violence in accordance with national laws, regulations, and all other policies.¹⁶⁵² Receiving states are also obliged to take action against any employees who tend to illegally undertake employment activities. Employers are supposed to establish programmes that aid and inform them on how to appropriately hire migrants legally.¹⁶⁵³ Employers who illegally detain, wilfully destroy, mutilate or confiscate migrant workers' passports and those who employ migrant workers illegally would appropriately be dealt with in accordance with the national laws, regulations, and policies of the receiving states.¹⁶⁵⁴ These measures will surely enhance measures meant to curb any sort of exploitation on migrant workers by their employers and prospective employees.

Information regarding rights and responsibilities, occupational health and safety measures and other ways and avenues to be explored should be provided to migrant workers within a reasonable time by receiving states.¹⁶⁵⁵ Just as sending states are supposed to do, migrant-receiving are also supposed to give out

¹⁶⁴⁹ Article 24.

¹⁶⁵⁰ Articles 25 and 26.

¹⁶⁵¹ Article 27.

¹⁶⁵² Article 30.

¹⁶⁵³ Article 32(a).

¹⁶⁵⁴ Article 32.

¹⁶⁵⁵ Article 35.

prescribed regulations and guidelines dishing out all terms and conditions necessary for an employment contract and all other documentation to be issued to migrant workers in order to simplify migrant workers' employment in receiving states.¹⁶⁵⁶ The said employment contract together with all the necessary documentation will accordingly be provided to the migrant worker as required by the law of the receiving state.¹⁶⁵⁷ While further initiatives have to be put in place to make sure that migrant workers are provided with clearly stipulated working terms and conditions which include wages, employment benefits, mechanisms of employment disputes, health and safety and terms repatriation as provided by law.¹⁶⁵⁸ It is these employment benefits that form the bulk of this thesis. Clearly stipulated employment benefits will make it easier for migrant workers to know exactly what their entitlements are when their contracts of service eventually reach an inevitable end. Migrant-receiving countries are briefly required to act in more or less similar ways as migrant-sending countries. They are also required to ensure that migrant workers are provided with fair and appropriate remuneration and offer extensive protection to migrant workers in accordance with national legislation, policies, and regulations.

5.2.2 Social security in the Caribbean Community and Common Market (hereafter CARICOM)

This region was initially established in the year 1965 and was referred to as the Caribbean Free Trade Association (hereinafter-CARIFTA) which would prove to be problematic because of several issues the region faced.¹⁶⁵⁹ One of the reasons which saw CARIFTA become ineffective was the fact that it did not permit the free movement of labour and harmonisation of foreign and industrial policies.¹⁶⁶⁰ CARIFTA was eventually replaced with the Caribbean Community and Common Market in 1973.¹⁶⁶¹ It is reported that CARIFTA was replaced because, in as much

¹⁶⁵⁶ Article 36(a).

¹⁶⁵⁷ Article 36(b).

¹⁶⁵⁸ Article 36(c).

¹⁶⁵⁹ Anon 2017 <https://www.globalsecurity.org>.

¹⁶⁶⁰ Anon 2015 <https://www.csmeonline.org>.

¹⁶⁶¹ Anon 2015 <https://www.csmeonline.org>.

as it was established to form a Free Trade Area, it operated rather differently. The issue was that members to the CARIFTA, despite it being a Free Trade Area still imposed duties on certain goods from certain countries and quotas as well were not eliminated.¹⁶⁶² CARIFTA would eventually be replaced by CARICOM in 1973 when the *Treaty of Chaguaramas* (hereinafter The Treaty) was signed that same year by Barbados, Jamaica, Guyana, and Trinidad & Tobacco.¹⁶⁶³ The above-mentioned countries would eventually be joined by other Caribbean states totalling ten in all increasing the membership of the region to fourteen.¹⁶⁶⁴

5.2.2.1 Treaty of Chaguaramas

The Treaty which was signed on July 4, 1973, in Chaguaramas most importantly prohibits discrimination on the grounds of nationality. It points out that any type of discrimination on these grounds shall be prohibited.¹⁶⁶⁵ This prohibition of discrimination shall be done by the Community Council through establishing rules that curb and prohibits any such discrimination after proper consultation with all other competent organs.¹⁶⁶⁶ The Treaty further strives to make sure that there is equality of treatment between member states and that no third-party states get better treatment than other member states. Article 8 states that subject to the provisions of the treaty, each member state shall accord to another member state treatment no less favourable than that accorded to a third member state or other third states, regarding rights provided for in the Treaty.¹⁶⁶⁷ The Treaty further requires member states to undertake appropriate measures, whether general or particular, to make sure that obligations emanating from the treaty or decisions

¹⁶⁶² Anon 2015 <https://www.csmeonline.org>. When a Free Trade Area is established, member states agree and eliminate barriers that restrict trade, such as tariffs and quotas for all types of goods produced in that part of the region or area as the case maybe.

¹⁶⁶³ Haughton 2014 <https://aquaticcommons.org>.

¹⁶⁶⁴ Haughton 2014 <https://aquaticcommons.org>. According to article 3 of the *Revised Treaty of the Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market Economy* members to the CARICOM include, Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago.

¹⁶⁶⁵ Article 7(1).

¹⁶⁶⁶ Article 7(2).

¹⁶⁶⁷ Third member states are those countries that are not part of CARICOM.

taken by any organ or body of CARICOM are carried out.¹⁶⁶⁸ Member states are further obliged to ease the furtherance or success of the said objectives and ought to make sure that such measures that could put at risk the attainment of the objectives Article of the treaty are in no way shape or form undertaken.¹⁶⁶⁹

These objectives include improving the standard of living and work.¹⁶⁷⁰ The realisation of full employment of labour and other factors of production including accelerated, coordinated and sustained economic development and convergence.¹⁶⁷¹ The Treaty also intends to expand trade and economic relations with third states, improve levels of international competitiveness, and enhance production and productivity.¹⁶⁷² Other objectives include the achievement of a greater measure of economic leverage and effectiveness of member states in dealing with third states, groups of states and entities of any description together with enhanced functional cooperation, including more efficient operation of common services and activities for people's benefit.¹⁶⁷³

More importantly is the accelerated promotion of what is referred to as greater understanding between people and the advancement of their social, cultural, and technological development.¹⁶⁷⁴ The advancement of people's social development includes taking care of their social security needs, and this objective is therefore very important as it shows that the treaty intends to attend to all the social security-related issues. The last objective on the list is to intensify activities in health, education, transportation, and telecommunications.¹⁶⁷⁵

The treaty also points out that member states have committed themselves to achieve the goal of free movement of nationals within CARICOM.¹⁶⁷⁶ In pursuit of this goal, member states have agreed to grant university graduates, media

¹⁶⁶⁸ Article 9.

¹⁶⁶⁹ Article 9.

¹⁶⁷⁰ Article 6(a).

¹⁶⁷¹ Article 6(b).

¹⁶⁷² Article 6(d), (e)&(f).

¹⁶⁷³ Article 6(g)&(i).

¹⁶⁷⁴ Article 6 (a)-(1).

¹⁶⁷⁵ Article 6(iii).

¹⁶⁷⁶ Article 45

workers, sportspersons, artists and musicians the right to search for employment in other member states' jurisdictions.¹⁶⁷⁷ The said categories of people will only be permitted to seek such employment only if they are recognised by competent authorities of receiving member state.¹⁶⁷⁸ However, the treaty has pointed out that such movement or rights will be granted without prejudice to the rights granted in Article 32 which provides for prohibition of new restrictions on the right of establishment, Article 33 which details the removal of restrictions on the right of establishment, Article 37 which talks about the removal of restrictions on provisions of service, Article 38 detailing the removal of restrictions on banking, insurance, and other financial services and Article 40 which relates to the removal of restrictions on the movement of capital and current transactions.¹⁶⁷⁹

This goal will become a reality if member states come up with suitable legislative, administrative, and procedural arrangements to facilitate the movement of skills within the confines of Article 46 which deals with the movement of skilled community nationals. Member states also have to allow movement of the community nationals into and within their territories, harassment-free, and without any sort of impediments in general.¹⁶⁸⁰ Member states are also to establish the elimination of the requirement of carrying a passport for nationals of the community who travel in their territories.¹⁶⁸¹ Work permits will also be a requirement that will be done away with for community nationals who seek approved employment in their territories and jurisdiction.¹⁶⁸² Member states are further to establish appropriate legislative, administrative and procedural arrangements to create means for certifying and establishing equivalency of degrees and for accreditation institutions ¹⁶⁸³ However, harmonisation and transferability of social security benefits play a major role in the core rationale behind this thesis. Portability of social security benefits is what this provision

¹⁶⁷⁷ Article 46(1).

¹⁶⁷⁸ Article 46(1).

¹⁶⁷⁹ See also Mpedi and Nyenti *Revised Portability* 58.

¹⁶⁸⁰ Article 46(2).

¹⁶⁸¹ Article 46(2)(b)(I).

¹⁶⁸² Article 46(2) (b) (ii).

¹⁶⁸³ Article 46(2) (b) (iii).

addresses and the CARICOM community is obliged to take all necessary steps to establish appropriate legislative, administrative, and procedural arrangements to make sure that this process happens.¹⁶⁸⁴ The treaty further dictates that in instances where the rights granted under the treaty and their exercise thereto become a problem and create any sort of hurdle in any sector of the economy of any member state, then such a member may come up with restrictions on the exercise of such rights as it considers necessary to resolve any such hardship subject to the provisions of the treaty.¹⁶⁸⁵ This provision shows that this community intends to see to it that all the rights provided for in the treaty are not subjected to any restrictions without any valid reasons. The treaty further states that in establishing its industrial policies, CARICOM is required to promote appropriate measures for the establishment of adequate social infrastructure, the alleviation of poverty and securing social stability in member states.¹⁶⁸⁶ The treaty states that the community shall, in the member states promote the establishment and improvement of health, education, sports, and social security institutions and facilities.¹⁶⁸⁷ The community shall also see to it that social security agreements are concluded among member states for purposes of easing the movement of skills.¹⁶⁸⁸ This provision shows that the community places importance on the alleviation of property and aiding migrant workers and other workers in general in getting their duly earned benefits when their contracts of service eventually reach their inevitable end. The fact that the community obliged member states to conclude social security agreements will make the portability of social security benefits an easier process. The promotion of training and retraining of workers, mobility of infrastructure and trainees shows the vital protection that the community intends to provide to workers. The community also has a Council for Human and Social Development (hereinafter COHSOD) which is made up of representatives from all member states.¹⁶⁸⁹ It is this COHSOD that is bestowed

¹⁶⁸⁴ Article 46(2) (b) (iv).

¹⁶⁸⁵ Article 47. This provision outlines all the necessary steps and requirements needed for restrictions on any rights to become valid.

¹⁶⁸⁶ Article 75(1).

¹⁶⁸⁷ Article 75(2) (a).

¹⁶⁸⁸ Article 74(2) (b). See also Mpedi and Nyenti *Revised Portability* 58-59.

¹⁶⁸⁹ Article 17(1).

with the power to promote human and social development in the community.¹⁶⁹⁰ Article 17(2)(c) in particular states that the COHSOD shall promote and coordinate policies and programmes that will advance the working and living conditions of workers and take appropriate measures to ease the organisations and labour and industrial relations in the community.¹⁶⁹¹ Another organ of the community which was established in terms of the Treaty is the Council of Trade and Economic Development (hereinafter COTED) which plays a role in the promotion of social security in the community. According to Article 73(a) of the treaty, COHSOD shall consult with COTED, for purposes of formulating proposals and adopting suitable measures to promote harmonious, steady, and enlightened industrial relations in the community.¹⁶⁹² These proposals shall among others promote the objectives of full employment, improved living, and working conditions together with adequate social security policies and programmes.¹⁶⁹³

The said proposals shall also promote tripartite consultations among governments, workers and employers' organisations and cross-border movement of labour.¹⁶⁹⁴ The proposals shall see to it that the principle of non-discrimination is upheld in order to aid those community workers seeking employment within the community.¹⁶⁹⁵ Collective bargaining and awareness to both community workers and their employers thereto and the fact that competing internationally play a pivotal role in the social and economic development of all member states is also part of what COHSOD seeks to promote.¹⁶⁹⁶ The above-stated provisions show without a doubt that CARICOM was established with a clear vision of also putting workers' interests at heart. The treaty points out that COHSOD also has to promote the establishment of efficient means for purposes of enhancing effective collective bargaining.¹⁶⁹⁷

¹⁶⁹⁰ Article 17(2).

¹⁶⁹¹ Article 17(2) (c).

¹⁶⁹² Article 17.

¹⁶⁹³ Article 17(a).

¹⁶⁹⁴ Article 73(a).

¹⁶⁹⁵ Article 73(b).

¹⁶⁹⁶ Article 73(d).

¹⁶⁹⁷ Article 73(c).

5.2.2.2 Charter of Civil Society for the Caribbean Community

The CARICOM community has also established a *Charter of Civil Society for the Caribbean Community* (hereafter – the Caribbean Charter).¹⁶⁹⁸ It is this Caribbean Charter that Nyenti and Mpedi describe as an instrument that acts as a Bill of Rights in the community.¹⁶⁹⁹ The introduction to the Caribbean Charter seems to share the same sentiments as Nyenti and Mpedi because it points out that the leaders to the community intend to address among others a broad spectrum of human endeavour and behaviour including respect for fundamental human rights and freedoms.¹⁷⁰⁰ According to the preamble of the Caribbean Charter, the community is determined to ensure that there are continued respect for rights recognised by international law, that is, civil, political, economic, social, and cultural rights.¹⁷⁰¹ According to Article 11 of the Caribbean Charter, member states are obliged to respect the fundamental human rights and freedoms of every person without distinction as to age, colour, creed, disability, ethnicity, gender, language, place of birth or origin, political opinion, race, religion, or social class.¹⁷⁰² These fundamental rights are summarised by Nyenti and Mpedi¹⁷⁰³ as follows:

Fundamental human rights and freedoms protected in the Charter include the rights to life, liberty and security of the person; protection of the privacy of the home and other property of the individual; protection from deprivation of property without due process and just compensation within a reasonable time; freedom of conscience, of expression, and of assembly and association within the meaning of the constitutions of states; and freedom of movement within the Caribbean Community (subject to such exceptions and qualifications as may be authorised by national law and which are reasonably justifiable in a free and

¹⁶⁹⁸ The resolution adopting the Charter of Civil Society was signed by heads of governments of the CARICOM on Wednesday, February 19, 1997 in St John's, Antigua, and Barbuda. See Anon 2015 <https://caricom.org>. Mpedi and Nyenti *Revised Portability* 59.

¹⁶⁹⁹ Mpedi and Nyenti *Revised Portability* 59.

¹⁷⁰⁰ Mpedi and Nyenti *Revised Portability* 59.

¹⁷⁰¹ The introduction to the Caribbean Charter points out that "We attach much importance to this proposal for a Charter of Civil Society. CARICOM needs normative moorings; we have found widespread yearning for giving the Community a qualitative character – values beyond the routine of integration arrangements themselves can be judged and to which they can be made to conform. The Charter can become the soul of the Community, which needs a soul if it is to command the loyalty of the people of CARICOM. "

¹⁷⁰² Article 11(1).

¹⁷⁰³ Mpedi and Nyenti *Revised Portability* 59.

democratic society); human dignity; equality before the law; health; and to basic necessities.

The Caribbean Charter also has provisions that deal specifically with social security provisioning. The Charter points out that member states agree to provide enough period of leave with pay with adequate social security benefits for women workers before and after giving birth.¹⁷⁰⁴ This provision makes it unlawful for employers to terminate the employment of women or act in any sort of manner that would affect the women's status at work in any adverse manner.¹⁷⁰⁵ The provision goes on further to state that member states agree to provide workers in general with sufficient social security benefits.¹⁷⁰⁶ This recognises that all workers are eligible for social security benefits.

5.2.2.3 CARICOM agreement on social security

The community eventually established the *CARICOM Agreement on Social Security*.¹⁷⁰⁷ This agreement was entered into to protect nationals of the CARICOM community's benefits while also providing such nationals with equal treatment while venturing from one state to the other.¹⁷⁰⁸ The agreement is also regarded as pivotal to achieving the goal of free movement of labour within the CARICOM.¹⁷⁰⁹ According to the preamble of this agreement on social security, contracting parties realise that harmonisation of social security legislation of member states of the CARICOM would aid in the promotion of regional unity and functional corporation. The preamble further confirms that contracting member states assert the equality of treatment for nationals of contracting parties under all social security legislations. Contracting parties further affirm the equality of treatment in the maintenance of acquired rights or in the course of acquiring such rights and protection of such rights regardless of resident changes within their respective

¹⁷⁰⁴ Article XIX(3) (g)

¹⁷⁰⁵ Article XIX(3) (g).

¹⁷⁰⁶ Article XIX (3) (i).

¹⁷⁰⁷ The CARICOM Agreement on Social Security was attested to in Georgetown, in Guyana on the 1st March 1996 and eventually came in effect on the 1st of April 1997. Anon 2015 <https://www.ilo.org>.

¹⁷⁰⁸ Anon 2015 <https://www.ilo.org>.

¹⁷⁰⁹ Anon 2015 <https://www.ilo.org>.

jurisdictions.¹⁷¹⁰ Maintenance of acquired rights goes a long way in achieving portability of social security benefits because it means that once the contract of service reaches an end, then the worker gets all that he or she acquired along the course of his employment life. In fact, in accordance with the agreement, there are provisions relating to the regulations of invalidity, old-age, retirement, survivors, disablement pensions, and death benefits.¹⁷¹¹ When dealing with the determination of such benefits, when an individual has been subjected to the laws of two or more CARICOM members, whether successively or alternatively, and has satisfied all the conditions required in any of the CARICOM states. That individual, therefore, qualifies for any benefit, the said insured individual or his or her survivors will get his or her entitled benefits according to the legislation of each CARICOM members concerned.¹⁷¹²

In instances where CARICOM member's legislation makes an individual's qualification or entitlement to benefits only possible upon completing a certain amount of insurance period then the institution bestowed with the power will consider all periods of insurance qualified for under different CARICOM member states before determining where the individual qualifies and fulfils the necessary conditions.¹⁷¹³ Article 17 deals with the totalisation of insured individuals' contribution periods, and this makes it easy for migrant workers to keep track of their contributions and benefits thereto. It means that migrant workers can get access to all their social security benefits without loss of any scheduled periods.¹⁷¹⁴ Cosmas explains that the social security of the CARICOM permits migrant workers to "accumulate credits" in different countries for purposes of eventually qualifying for their pensions.¹⁷¹⁵

Article 2 of the agreement on social security points out that the scope of the agreement covers invalidity pensions, disablement pensions, old-age or retirement

¹⁷¹⁰ The Preamble.

¹⁷¹¹ Part III of the Agreement

¹⁷¹² Article 16.

¹⁷¹³ Article 17.

¹⁷¹⁴ Cosmas 2015 *JAASSH* 56.

¹⁷¹⁵ Cosmas 2015 *JAASSH* 56. See also Taha, Messkoub & Siegmann 2013 <http://www.researchgate.net>.

pensions, survivors' pensions, and death benefits in the form of pensions. Insured persons together with their dependents or survivors who have been subjected to the law of any contracting state will also be covered by the agreement.¹⁷¹⁶ As long as these insured individuals qualify for social security benefits in these contracting parties then they will get what they are entitled to. The agreement recognises that migrant workers are normally disadvantaged when they move from one state to the other especially if they had not made enough contributions to qualify for benefits.¹⁷¹⁷ The agreement, therefore, plays a role by making sure that migrant workers' benefits and related entitlements are protected.¹⁷¹⁸ The agreement further makes provision for the law which will apply in instances where an insured person has worked in different jurisdictions or different contracting parties.¹⁷¹⁹ Some provisions deal with the determination of the applicable law together with the exact law applicable to certain categories of insured persons. For instance, the agreement affords protection to workers employed in transitional enterprises, Itinerant work, International Transportation, in ships, Diplomatic Missions Consulates, and International Organisations and Self-employed Persons.¹⁷²⁰

The agreement makes sure that insured workers are subjected to legislations of one contracting member state which is the law of a contracting state of employment.¹⁷²¹ This will take place despite the fact that a worker lives or is resident in the territory of another contracting state. However, the above-mentioned categories of workers are an exception to the rule. For example, workers who are employed in transitional enterprises are regulated in Article 7 of the agreement. According to this provision, an insured person who is employed in the territory of a certain contracting member state will be subjected to the laws of the said member state despite the fact that such an individual might be resident in another member state's territory. This shall continue to be the case even if such

¹⁷¹⁶ Article 3(1) on the Application of the Agreement.

¹⁷¹⁷ Anon 2015 <https://www.ilo.org>.

¹⁷¹⁸ Anon 2015 <https://www.ilo.org>.

¹⁷¹⁹ Article 6.

¹⁷²⁰ Anon 2015 <https://www.ilo.org>. Mpedi and Nyenti *Revised Portability* 60. See also articles 7 to 12.

¹⁷²¹ Kulke Date Unknown <https://europa.eu>.

an individual's employer's principal place of business is situated in the territory or jurisdiction of another contracting state. If an insured person has been sent to conduct work in another contracting state, for less than 24 months, the insured will remain a subject of the laws of the previous contracting state.¹⁷²² However, if it so happens that the 24 months period is exceeded due to unforeseen circumstances, then the insured will still be subjected to the laws of the previous contracting member state in which the employer is located. However, this will only take place upon agreement of the competent authorities of both the contracting parties.¹⁷²³

Itinerant Employed persons, on the other hand, are subjected to legislation of the territory of a contracting state to which he was employed even if the said individual is a resident of another contracting state. This is also the case even if the main place of the business or undertaking that employs the said insured is at another contracting state, the said individual will nonetheless still be a subject of laws of a contracting state of his initial employment.¹⁷²⁴ In instances where an individual works in two contracting member states, then that individual will be a subject of his place of residence. This will, however, take place if the individual undertakes part of his work in his place of residence or if the individual works for two or more undertakings situated in different contracting member states.¹⁷²⁵ If the employed person is an itinerant employee employed differently from the above-mentioned scenarios then such an individual will be subjected to the laws of his undertaking principal place of business or his employer's territory of residence.¹⁷²⁶ However, these provisions only apply to itinerant work and exclude those who carry out International Transportation.¹⁷²⁷

Persons who are employed in International Transportation and are insured in the jurisdiction of a contracting member state are subjected to legislations of the said

¹⁷²² Article 7(i).

¹⁷²³ Article 7(ii).

¹⁷²⁴ Article 8.

¹⁷²⁵ Article 8(i) & (ii). See also Anon 2015 <https://www.ilo.org>.

¹⁷²⁶ Article 8(b).

¹⁷²⁷ Article 8.

contracting member state even if the undertaking's core place of business is at a territory of another member state or the insured person's employer is a resident of another contracting member state.¹⁷²⁸ In a scenario where an insured individual undertakes transportation internationally in two or more territories of contracting member states, and such an individual is engaged in the transportation of goods, passengers by air, inland waterways or by road then such an individual will be insured in a CARICOM state of his principal business location.¹⁷²⁹ An individual may also be subjected to the laws of a CARICOM state where a subsidiary, branch or agency of an undertaking or in general terms an employer is located in instances where such an insured is employed by any of the mentioned if such a branch, subsidiary, or agency is located in a territory that is not one of its principal undertakings.¹⁷³⁰ The applicable law may also be a place of residence or where an individual is generally employed even though the employing branch, subsidiary, or agency does not have a principal place of business in the said CARICOM state.¹⁷³¹

Individuals employed on ships that fly a flag of a certain CARICOM state are generally subjected to laws of the said CARICOM state.¹⁷³² In instances where one is an employee of a certain undertaking or are employed in a ship that flies a flag of a certain CARICOM state then the said insured or employee is instructed by his employer to go onboard another ship flying a flag of another CARICOM member state, that employee will remain a subject of laws of the undertaking that is his regular employer.¹⁷³³ However, the employee must not be working onboard that ship for a period exceeding 24 months. If this period is exceeded, then the laws of the previous employer will still prevail subject to negotiations and agreement between the two countries.¹⁷³⁴

Moreover, if the employed individual works in territorial waters, at a port of a CARICOM member or in a ship flying a ship of another CARICOM member but are

¹⁷²⁸ Article 9.

¹⁷²⁹ Article 9(a).

¹⁷³⁰ Article 9(b).

¹⁷³¹ Article 9(c). Anon 2015 <https://www.ilo.org>.

¹⁷³² Article 10.

¹⁷³³ Article 10.

¹⁷³⁴ Anon 2015 <https://www.ilo.org>.

not part of the crew of the said ship, then such an individual will be subjected to laws of the CARICOM member that employed him.¹⁷³⁵ The agreement further provides that if an insured individual works on a ship carrying a flag of a certain CARICOM member but gets paid by an employer or organisation whose principal place of business or place of residence is in another CARICOM member's territory, the individual will be subjected to the laws of the latter CARICOM member if he or she is a resident of the said state. The rationale behind all this is that the one who pays the individual's salary is considered the rightful employer for purposes of the proper application of the legislation.¹⁷³⁶

Persons employed in diplomatic missions, Consulates, and International Organisations will also be subjected to the same laws as itinerant employed persons, persons employed in international transport and persons employed on ships. Individuals employed in diplomatic missions, consulates and international organisations and individuals employed to privately serve such officials employed in these organisations will also be subjected to the above-stated provisions.¹⁷³⁷ However, nationals of a CARICOM member have the option of choosing to be subjected to laws of that member state.¹⁷³⁸

Self-employed individuals are also provided for in the agreement. The agreement states that self-employed individuals whose occupation leads them to territories of other CARICOM members will still be subjected to laws of the said contracting party despite the fact that he or she is a resident of another CARICOM state.¹⁷³⁹ However, if the latter CARICOM state does not have any legislation applicable to the self-employed individual then such a person will be subjected to the laws of the CARICOM state which he comes from.¹⁷⁴⁰ If the self-employed individual's work leads to him working in two or more CARICOM states, then he shall be a

¹⁷³⁵ Article 10(ii).

¹⁷³⁶ Article 10(iii).

¹⁷³⁷ Article 11.

¹⁷³⁸ Anon 2015 <https://www.ilo.org>.

¹⁷³⁹ Article 12

¹⁷⁴⁰ Article 12(a).

subject of laws of the CARICOM state to which he resides, that is, if the self-employed individual carries out part of his occupation in the latter state.¹⁷⁴¹

If the self-employed individual does not carry out part of his work in his country of residence, or there is no law found to apply to such an individual, then the only option would be to subject such an individual to jointly agreed on regulations by competent institutions of the CARICOM region.¹⁷⁴²

Another interesting aspect of the agreement is the fact that permits investigations or medical examinations required by one CARICOM state's legislation to be carried out in the territory of another CARICOM state.¹⁷⁴³ These investigations and medical examinations will be carried out at the request of institutions that administer the prescribed legislation and such will be considered as if they were carried out at the territory of the first CARICOM state.¹⁷⁴⁴ This is a good initiative on the part of the part of the CARICOM because it makes it easier for the community nationals who have returned home to go through the necessary processes that would eventually lead to them getting their rightfully earned benefits. The agreement further obliges any CARICOM state or institution that is supposed to pay out a benefit to an individual or any beneficiary whose place of residence is in another CARICOM state to pay out such in a currency of the latter.¹⁷⁴⁵ Provisions like this make it easy to see the kind of steps the community is taking to make sure that their nationals are protected, especially migrant workers who are usually faced with difficulties when they are supposed to receive their benefits.

The settlement of disputes is also provided for in the agreement. According to Article 57 negotiations shall be held between CARICOM members if there is a dispute between two or more CARICOM states regarding the interpretation or

¹⁷⁴¹ Article 12(b).

¹⁷⁴² Article 12(c). See also Anon 2015 <https://www.ilo.org>.

¹⁷⁴³ Article 55.

¹⁷⁴⁴ Article 55.

¹⁷⁴⁵ Article 56.

negotiations of the agreement.¹⁷⁴⁶ The provision points out that the said negotiations be between member states concerned because of their peaceful nature and smooth way of settling any dispute.¹⁷⁴⁷

If within three months from the request of the start of the negotiations as set out above, the dispute is still not settled, the said dispute shall be referred to arbitration upon written requests by any of the CARICOM members to the Secretary-General who will cordially alert those in dispute about the request for arbitration.¹⁷⁴⁸ It is submitted that this process is entered into with the sole purpose of providing the highly needed assistance to migrant workers with the CARICOM member states.¹⁷⁴⁹ Once the dispute is referred to arbitration, it shall be in front of a tribunal consisting of persons with social security practice experience.¹⁷⁵⁰ Another interesting provision worth pointing out is Article 60(1) which states that CARICOM member states are allowed to invite any other country to accede to the agreement by unanimous vote.¹⁷⁵¹ The rationale behind this seems to be the opening up of opportunities to enter into both bilateral and multilateral agreements with third member states which will, in turn, make it easier for migrant workers in such states to have access to their benefits and other acquired rights when they return home.¹⁷⁵² Taha and others¹⁷⁵³ summarise social security in the CARICOM as thus:

Caribbean region, migrants can take advantage of social security provisions that have been established in the multilateral framework of the Caribbean Community (CARICOM) Agreement on Social Security since 1996, although the process of pension harmonisation has only been partial. The issue of portability is particularly relevant for the Caribbean countries because of their small size and increasing number of migrant workers. The CARICOM agreement allows for migrant workers to accumulate contributions credits in more than one country to qualify for pension. However, the agreement only applies in countries in which workers have not completed the minimum years of service in the scheme

¹⁷⁴⁶ Article 57(1).

¹⁷⁴⁷ Cosmos 2015 *JAASSH* 56.

¹⁷⁴⁸ Article 57(2).

¹⁷⁴⁹ Cosmos 2015 *JAASSH* 56.

¹⁷⁵⁰ Article 57(3) & (4).

¹⁷⁵¹ Cosmos 2015 *JAASSH* 56. This can only take place after entry into force of the agreement.

¹⁷⁵² Cosmos 2015 *JAASSH* 56.

¹⁷⁵³ Taha, Messkoub & Siegmann 2013 <http://www.researchgate.net>.

required to receive the benefit, which excludes long-staying migrant workers. In practice, there have also been problems with calculating pensions. Nevertheless, the agreement works well for temporary workers, who may now receive pensions where 'otherwise they would have received a grant for "short service". The plans differ per country, with some having more convenient conditions than others... However, find that despite being in operation for more than 10 years, the CARICOM agreement has had few benefits applications, mostly due to lack of awareness of the benefits of the agreement, thus not much is known about whether it contributes to migrant workers' ability to access social security.

5.3 Social Security in the Southern Common Market (Hereafter MERCOSUR)

When the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay signed a Treaty establishing the Common Market on the 21 March 1991, the Southern Common Market or MERCOSUR was established.¹⁷⁵⁴ The preamble states that one of the member states' objectives is to make the effective use of available resources, advance physical links between member states, preserve the environment, preserving micro-economic policies, and making sure that different economic sectors complement each other by relying on principles of gradualism, flexibility, and balance.¹⁷⁵⁵ The Treaty had to consider the importance of expanding their domestic markets by integrating the region and all their markets thereto and therefore admitting to the fact that such a process is an integral part of achieving economic development and social justice.¹⁷⁵⁶

The treaty was established to create MERCOSUR, and the latter involved the free movement of goods and services including all other factors of production by doing away with customs duties and non-tariffs restrictions on the movement of goods and any other measures related to the ones mentioned.¹⁷⁵⁷ There shall also be an establishment of external tariffs common across MERCOSUR together with the approval of a common trade policy when dealing with third states or groups of

¹⁷⁵⁴ Mpedi and Nyenti *Revised Portability* 67. Preamble to the Southern Common Market (MERCOSUR) Agreement.

¹⁷⁵⁵ See also Mpedi and Nyenti *Revised Portability* 67.

¹⁷⁵⁶ The Preamble.

¹⁷⁵⁷ Article 1. See also Mpedi and Nyenti *Revised Portability* 67.

states.¹⁷⁵⁸ Moreover, there shall also be an establishment of coordination of positions in regional and international economic and commercial forums.¹⁷⁵⁹

Speaking about coordination, the MERCOSUR shall further involve coordination of micro-economic and sectoral policies among member states in areas such as foreign trade, agriculture, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport, and communications, not excluding any other matters and areas agreed upon for purposes of making sure that there is fair competition between parties to MERCOSUR.¹⁷⁶⁰ Member states are also obliged to commit to the process of harmonising all the relevant laws in pivotal areas to strengthen integration in this region.¹⁷⁶¹ Reciprocity of rights and obligations between parties to MERCOSUR is what the region or the Common Market is based upon.¹⁷⁶² While committing to this process of integration, states parties are urged to eliminate all unfair practices by ensuring that there are unbiased trade terms while dealing with third member states.¹⁷⁶³ Domestic legislation shall be applied while restricting any imported goods influenced by dumping.¹⁷⁶⁴ Before any further discussions on MERCOSUR, it is important to note that it is an inter-governmental organisation, meaning that its laws, and rules do not attain direct application within the member states.¹⁷⁶⁵ This further means that individual member states are not pressured to implement such rules hence countries such as Brazil and Uruguay have been reluctant recognise the supremacy of such rules and regulations in their constitutions.¹⁷⁶⁶

However, it is reported that from the minute negotiations that led to the establishment of MERCOSUR were undertaken, member states were fully aware of the need to tackle social and labour issues during that stage in order make sure that there is hasty economic development and social justice in this part of the

¹⁷⁵⁸ Article 1.

¹⁷⁵⁹ Article 1.

¹⁷⁶⁰ See also Mpedi and Nyenti *Revised Portability* 67.

¹⁷⁶¹ Article 1.

¹⁷⁶² Article 2.

¹⁷⁶³ Article 4.

¹⁷⁶⁴ Article 4.

¹⁷⁶⁵ Pucheta 2014 *CELLS* 3.

¹⁷⁶⁶ Pucheta 2014 *CELLS* 3.

world.¹⁷⁶⁷ It should also be born in mind that MERCOSUR has members with very different aspects to them, that is, their characteristics are very contrasting from their political, economic, and social sides.¹⁷⁶⁸ The need to make sure that the gap between poor and rich member states was dealt with indicates that there be an establishment of rules that would deal with the social dimensions in this region.¹⁷⁶⁹ This further meant that there was clearly a realisation on the part of the negotiators that the region be made up of rules that would ensure that natural persons were allowed to move, reside, and even search for work freely in the region.¹⁷⁷⁰ In the late nineties, social rules which were meant to aid in the process of integration and afford comprehensive social protection were bolstered by the enactment of the Socio-Labour Declaration and the MERCOSUR Multilateral Agreement on Social Security.¹⁷⁷¹ Pucheta¹⁷⁷² says that both these instruments were enacted to advance the objective of labour mobility and the coordination of policies on labour relations and migration. For purposes of this chapter, the MERCOSUR Multilateral Agreement on Social Security is discussed below, followed by the Socio-Labour Declaration.

5.3.1 MERCOSUR Multilateral Agreement on Social Security

In 1997, this multilateral agreement was adopted mainly to acquire what is referred to as a “standardised coordination mechanism of social welfare systems” within MERCOSUR.¹⁷⁷³ In this agreement, workers and their dependents are permitted to safeguard all their acquired rights while in other member states¹⁷⁷⁴ It further allows such workers to acquire these rights while they are already in the territory of another member state.¹⁷⁷⁵ Even insurance periods paid in territories

¹⁷⁶⁷ Pucheta 2014 *CELLS* 11.

¹⁷⁶⁸ Pucheta 2014 *CELLS* 12.

¹⁷⁶⁹ Pucheta 2014 *CELLS* 12.

¹⁷⁷⁰ Pucheta 2014 *CELLS* 12.

¹⁷⁷¹ Pucheta 2014 *CELLS* 12.

¹⁷⁷² Pucheta 2014 *CELLS* 12.

¹⁷⁷³ Pucheta 2014 *CELLS* 13.

¹⁷⁷⁴ Pucheta 2014 *CELLS* 13.

¹⁷⁷⁵ Pucheta 2014 *CELLS* 13.

and jurisdictions of member states are taken into consideration for purposes of calculating due entitlements.¹⁷⁷⁶

Before this agreement was endorsed, member states had to compile the data of workers manually hence this system had to be faced out because of its expensive and time-consuming nature.¹⁷⁷⁷ It is therefore important to note even further that the rationale behind the conclusion of this agreement was to ensure that all social security systems of member states were coordinated.¹⁷⁷⁸ Despite its coordination nature, the agreement intends to develop social security systems in this region by implementing data transfer and develop validation systems to process the benefits of individuals when the time has finally arrived.¹⁷⁷⁹

The agreement further spells out social security rights and benefits due to workers who have provided their services in any MERCOSUR state. According to Article 2 of the MERCOSUR Multilateral Agreement, these rights:

...will be afforded to workers that render or have rendered services in any of the member states, the same rights being afforded to them, their families and dependants while being subject to the same obligations as the nationals of the member states regarding those specifically mentioned by the Agreement.¹⁷⁸⁰

Pucheta¹⁷⁸¹ argues that this principle guarantees the equality and non-discrimination between citizens and migrant workers in this region. The agreement encompasses retirement benefits, whether voluntary or compulsory, survivors' benefits together with disability retirement benefits.¹⁷⁸² However, those migrant workers who are temporarily displaced in another country are barred from making contributions in such countries if their stay is for less than twelve months, which may still be extended to a similar period.¹⁷⁸³ These temporarily displaced migrant workers are, however, guaranteed to get free medical assistance in public health-

¹⁷⁷⁶ Article 2. See also Mpedi and Nyenti *Revised Portability* 68.

¹⁷⁷⁷ Pucheta 2014 *CELLS* 17.

¹⁷⁷⁸ Pucheta 2014 *CELLS* 17.

¹⁷⁷⁹ Pucheta 2014 *CELLS* 17-18.

¹⁷⁸⁰ Pucheta 2014 *CELLS* 17-18.

¹⁷⁸¹ Pucheta 2014 *CELLS* 17-18. See also Mpedi and Nyenti *Revised Portability* 68.

¹⁷⁸² Mpedi and Nyenti *Revised Portability* 68.

¹⁷⁸³ Mpedi and Nyenti *Revised Portability* 68.

care facilities whenever the need arises.¹⁷⁸⁴ The interpretation and implementation of the agreement is a responsibility of the Multilateral Committee set up in terms of Article 16 of the agreement.¹⁷⁸⁵ The responsibility of the committee does not end here, whenever potential conflicts arise in the application of this agreement, the multilateral committee reaches an agreement by consensus.¹⁷⁸⁶

5.3.2 MERCOSUR Social and Labour Declaration (Hereafter Socio-Labour Declaration.)

The MERCOSUR region sees the importance of including social issues in their process of trying to integrate the regional as per agreement.¹⁷⁸⁷ These social issues will be incorporated regarding the adaption of regulatory frameworks for labour to the new circumstances that come about as a result of the said integration, the process of economic globalisation and the recognition of a minimum floor of workers' rights in line with fundamental ILO Conventions within Southern Common Market.¹⁷⁸⁸ The Socio-Labour Declaration recognises that the process of integration has certain effects and social dimension therefore the region needs to make sure that such are properly addressed.¹⁷⁸⁹

Article 1 of the Socio-Labour Declaration, guarantees all workers the effective equality of rights, treatment, and opportunity in their workplaces without any discrimination on the grounds of race, national origin, colour, sex or sexual orientation, age, belief, political or trade union views, ideology, economic situation or any other social or family circumstance, in accordance with the laws in operation. The provision states that member states commit themselves to guarantee the application of the above principles and do away with discrimination with regards to those groups of people who are disadvantaged in the labour market. In fact, MERCOSUR member states are obliged to treat individuals with special needs with dignity and non-discrimination for purposes of integrating them

¹⁷⁸⁴ Mpedi and Nyenti *Revised Portability* 68. See also Pucheta 2014 *CELLS* 18.

¹⁷⁸⁵ Pucheta 2014 *CELLS* 18.

¹⁷⁸⁶ Mpedi and Nyenti *Revised Portability* 68.

¹⁷⁸⁷ Mpedi and Nyenti *Revised Portability* 69.

¹⁷⁸⁸ Preamble to the Socio-Labour Declaration. See also Mpedi and Nyenti *Revised Portability* 68.

¹⁷⁸⁹ Preamble.

in their labour markets in the right manner.¹⁷⁹⁰ Effective measures regarding education, training, retraining and vocational reorientation, the adaption of the work environment and access to collective goods and services shall be adopted to make it a point that such individuals with special needs get a chance to be a productive part of MERCOSUR population.¹⁷⁹¹

Migrant workers, on the other hand, are entitled to the same assistance, information, working conditions, protection, and equality of rights as afforded to citizens of the country to which they render their services.¹⁷⁹² Regarding the movement of workers in border areas, measures shall be adopted to create common standards and procedures at such border posts for purposes of improving working and living conditions together with employment opportunities of workers by member states.¹⁷⁹³ Article 17, on the other hand, states that all workers have a right to carry out their work in healthy and safe working conditions which also protect their health by all means and further advance careers by all means.¹⁷⁹⁴ Member states are obliged to establish policies and programmes relating to the health and safety of workers and the working environment for purposes of preventing occupational hazards and for promoting environmental conditions suitable for developing activities of workers. State parties shall undertake these measures together with workers and employer's organisations on a continuous basis.¹⁷⁹⁵

Social security, on the other hand, is granted in accordance with the levels and conditions established by respective MERCOSUR national laws. It is in accordance with these national laws that workers of MERCOSUR will be granted or entitled to social security.¹⁷⁹⁶ Members to MERCOSUR guarantee that at least a minimum social security safety net will be afforded to nationals of the region and shall be

¹⁷⁹⁰ Article 2.

¹⁷⁹¹ Article 2.

¹⁷⁹² Article 4.

¹⁷⁹³ Article 4.

¹⁷⁹⁴ See also article 18.

¹⁷⁹⁵ Article 17.

¹⁷⁹⁶ Article 19.

against contingencies such as illness, old-age, invalidity and death.¹⁷⁹⁷ The coordination of social security systems state parties seems to be a priority as the provision states that MERCOSUR state parties seek further to coordinate policies in the social security sphere in a manner that eliminates discrimination based on the national origin of those who are entitled.¹⁷⁹⁸ The provision points out that social security benefits will be provided to citizens and non-citizens alike in receiving countries as per the MERCOSUR Socio-Labour Declaration.

5.3.3 The Agreement Relating to Residence Permits for Nationals of State Parties to MERCOSUR, Bolivia, and Chile

The Agreement Relating to Residence Permits for Nationals of State Parties to MERCOSUR, Bolivia, and Chile was also adopted.¹⁷⁹⁹ This agreement was established with an intention or desire to assert the process of integration by MERCOSUR members and its associates while at the same time looking to implement the policy of free movement of nationals of the region for purposes of deepening and strengthening this process of integration.¹⁸⁰⁰ The agreement was established to promote regular migration and equality between citizens and migrants in receiving states and all other members of MERCOSUR.¹⁸⁰¹ Fundamental rights of migrants which also include migrant workers are recognised within territories of their host countries regardless of their citizenship status.¹⁸⁰² It further provides order and regulation regarding the entry by citizens of another state party into the territory of another state party.¹⁸⁰³

This agreement means that nationals of member states, as well as their associates, are granted automatic visas to enter and stay in the territory of another state party for the duration of four years to provide services.¹⁸⁰⁴ Family reunification and transfer of remittances are at the pinnacle of the agreement's

¹⁷⁹⁷ Article 19.

¹⁷⁹⁸ Article 19.

¹⁷⁹⁹ The Agreement as approved by the Council of MERCOSUR. MERCOSUR/CMC/DEC No 28/02.

¹⁸⁰⁰ The Preamble. See also Mpedi and Nyenti *Revised Portability* 70.

¹⁸⁰¹ Pucheta 2014 *CELLS* 18-19.

¹⁸⁰² Pucheta 2014 *CELLS* 19.

¹⁸⁰³ Mpedi and Nyenti *Revised Portability* 70.

¹⁸⁰⁴ Pucheta 2014 *CELLS* 19. See also Mpedi and Nyenti *Revised Portability* 70.

desires. The agreement confers to all nationals of the region the right to family reunification and the right to transfer remittances while their children's rights are protected in an equal manner as those of nationals of the host country.¹⁸⁰⁵ These rights are also afforded to associate members to MERCOSUR and Pucheta¹⁸⁰⁶ explains this scenario as thus:

Moreover, given that Venezuela has fully joined MERCOSUR, its citizens are entitled to circulate and work freely respecting the terms of the agreement. Later on, Peru (2011), Colombia (2012), and Ecuador (2011) also joined the agreement, which has created a substantial area of freedom of movement.

MERCOSUR's intention to integrate the region includes a plan to facilitate free movement of the labour force in the region.¹⁸⁰⁷ This free movement of citizens and workers is facilitated by the *Regional Plan to facilitate the free movement of workers within the MERCOSUR*.

5.3.4 Joint Database for Migrant Workers

When countries in the MERCOSUR region realised that there was a need to advance the issue of access and portability of social security of migrant workers, they came up with an idea of establishing an integrated social security system for the region in form of a database.¹⁸⁰⁸ The integrated database was established as a result of the realisation that there were clear indications that technological disparities within countries in the MERCOSUR played a part in the frailties faced by migrant workers.¹⁸⁰⁹ Before the introduction of the Integrated Data Base (hereafter, IDB) transfer and validation of data had to be done manually.¹⁸¹⁰ This manual transfer of data always meant that migrant workers and other beneficiaries' social security benefits were delayed upon retirement.¹⁸¹¹ This further meant that the portability of social security benefits would always take longer than anticipated.

¹⁸⁰⁵ Mpedi and Nyenti *Revised Portability* 70-71. Pucheta 2014 *CELLS* 19.

¹⁸⁰⁶ Pucheta 2014 *CELLS* 19.

¹⁸⁰⁷ Mpedi and Nyenti *Revised Portability* 71.

¹⁸⁰⁸ Anon 2010 <http://www.southsouth.org>.

¹⁸⁰⁹ Anon 2010 <http://www.southsouth.org>.

¹⁸¹⁰ Anon 2010 <http://www.southsouth.org>.

¹⁸¹¹ Pucheta 2014 *CELLS* 17. See also Anon 2010 <http://www.southsouth.org>.

The IDB as an initiative was introduced as a data and validation system aimed at reducing the time it took for beneficiaries within the region to receive their duly earned social security benefits.¹⁸¹² This system was also established with the anticipation of curbing the number of migrant workers choosing to avoid social security contributions.¹⁸¹³ It further aimed at doing away with double payment of benefits by reducing the payment of benefits to beneficiaries who had died. Reports suggest that before the IDB came into operation, it took about eight years for migrant workers to receive their benefits, however, the system reduced this waiting period to a total of three months.¹⁸¹⁴

The introduction IDB was further hailed for a great deal of achievements which include agreements with financial institutions to refrain from charging transfer fees migrant workers.¹⁸¹⁵ This can simply be construed as an achievement that advanced the process of portability of social security benefits to migrant workers who have retired. By eliminating these charges, IDB actually made sure that migrant workers get all of their benefits without worrying that their benefits will be charged. IDB further improved relations between member states because it led to the conducting of annual meetings between those hence communication and trust were advanced.¹⁸¹⁶

The next part of the study discusses and analyses best practices bilateral social security agreements for the SADC region to draw examples from.

5.4 Bilateral Agreements: (Best Practices)

5.4.1 Social Security Agreement Between Zambia and Malawi

A bilateral agreement was concluded between Malawi and Zambia to find solutions to the problems that nationals from Malawi had faced while trying to get access to

¹⁸¹² Pucheta 2014 *CELLS* 17. See also Anon 2010 <http://www.southsouth.org>.

¹⁸¹³ Anon 2010 <http://www.southsouth.org>.

¹⁸¹⁴ Anon 2010 <http://www.southsouth.org>.

¹⁸¹⁵ Anon 2010 <http://www.southsouth.org>.

¹⁸¹⁶ Anon 2010 <http://www.southsouth.org>.

their social security benefits from Zambia.¹⁸¹⁷ This poverty reduction measure between Zambia and Malawi meant that Zambia was agreeing to grant social security benefits to migrant mineworkers from Malawi without the latter having to travel to Zambia.¹⁸¹⁸ Among the contents of the agreement is the need to have reciprocal visits from social security officials of the two countries for purposes of being aware of any pertinent issues that need immediate attention and resolution.¹⁸¹⁹ The agreement further encompasses the need for a joint compensation fund which would aid in the identification of a medical practitioner based in Malawi for purposes of undertaking any necessary medical assessments and examination on migrant mineworkers who are already back in Malawi.¹⁸²⁰ It also entails the establishment of payment facilitation mechanisms of social security benefits for these workers who are back in Malawi.

In fact, a report to the World Bank by one Muyembe¹⁸²¹ from the Ministry of Labour and Social Security in Zambia summarised this agreement as thus:

Zambia has a benefit transfer agreement with Malawi, specifically for the Malawians who had worked for the mines. This agreement entails that Malawians who had retired in the mine and have returned home can get their benefits from Malawi without necessarily travelling to Zambia. And since most of the miners were contributing to the then National Provident Fund (NPF), now NAPSA, the benefits are paid as a lump-sum through any bank in Malawi where the retiree has an account.

Many have blatantly have called out this agreement as one of the best examples of what should happen in regions that face portability of social security benefits issues.¹⁸²² In fact, this agreement was said to have contributed significantly to

¹⁸¹⁷ Millard 2008 *AHRLJ* 45. Despite numerous attempts to get hold of the full agreement, a full document of the agreement could not be accessed. These attempts included liaising with different labour law and social security experts and officials from Zambia who work directly with social protection issues. These attempts proved to be futile so other sources had to be relied upon.

¹⁸¹⁸ Millard 2008 *AHRLJ* 45.

¹⁸¹⁹ Millard 2008 *AHRLJ* 45.

¹⁸²⁰ Mpedi and Nyenti *Revised Portability* 32.

¹⁸²¹ Muyembe 2007 <http://siteresources.worldbank.org>.

¹⁸²² Millard 2008 *AHRLJ* 43.

addressing the issue of portability of social benefits, migration, and remittances between Malawi, and Zambia.¹⁸²³

5.4.2 Agreement on Social Security Between the Kingdom of Sweden and the Republic of the Philippines

The Filipino community has decided to refrain from turning a blind eye to the ever-growing number of Filipinos in the Nordic region where it is estimated that at least 50.000 Filipinos are residing there, with one-third of this estimated to be found in Sweden.¹⁸²⁴ This, therefore, meant that the two countries had to enter into a social security agreement that would help and ensure that nationals of both these countries' social security rights are maintained.¹⁸²⁵ Senior Vice President and Head of the International Operations of the Philippine Social Security System¹⁸²⁶ was quoted as having said:

...as we have many, many Filipinos working or living in Sweden, contributing to our welfare and to making Sweden one country in the north a little more happy... we have many Filipino seafarers on our ships...a growing movement in both countries, with even Swedes coming to the Philippines.

This agreement uses "mutual administrative assistance" in different phases which include manners such a filing of claims for social security benefits.¹⁸²⁷ This agreement makes it possible for a Filipino migrant worker who was covered by the laws of Sweden to claim for the social security benefits of Sweden in the Philippines if he or she has already decided to stay in the Philippines.¹⁸²⁸ According to Article 3 of the agreement, the agreement shall apply to any individual who has either been subjected to both countries' laws and who currently a subject of the two countries' laws or such individuals' dependents. The agreement further states that these individuals are to receive equal treatment with the nationals of the

¹⁸²³ Millard 2008 *AHRLJ* 43. See also Mpedi and Nyenti *Revised Portability* 32.

¹⁸²⁴ Embassy of the Philippines to the Nordic Date Unknown <https://www.philembassy.no/filipino-community>.

¹⁸²⁵ PhilHealth 2015 <https://www.philhealth.gov>.

¹⁸²⁶ PhilHealth 2015 <https://www.philhealth.gov>.

¹⁸²⁷ PhilHealth 2015 <https://www.philhealth.gov>.

¹⁸²⁸ PhilHealth 2015 <https://www.philhealth.gov>.

contracting party in which they reside.¹⁸²⁹ This is to say that a covered Filipino and his or her dependents and survivors in Sweden shall be afforded the same treatment as Swedish nationals.¹⁸³⁰ The agreement further allows migrant Filipino workers who return home to have access to and receive their benefits upon their return home.¹⁸³¹ The agreement provides that unless otherwise provided for in the same agreement, all the social security benefits payable to individuals as per Article 3 under laws of the parties to this agreement shall not be subjected to any reduction, modification, suspension, cancellation, or any confiscation for a mere fact that an entitled individual resides in another contracting party's territory.¹⁸³² The agreement provides that such benefits be paid as they are even when a person resides in the territory of another contracting party.¹⁸³³ This Agreement even permits individuals who reside in third states to receive all benefits payable under it.¹⁸³⁴ However there are exceptions to the above-mentioned provisions, as regards to Sweden, individuals who reside in the territory of another member state will not have access to sickness compensation in the form of guarantee compensation or activity compensation in the form of guarantee compensation.¹⁸³⁵ The said provisions will also not apply to guarantee pensions and surviving children's allowance.¹⁸³⁶

In instances where a person's occupation makes him pursue such activities as required by his employment in the territory of another member state on behalf of his or her employer or as per instruction of the said employer who normally carries out the activities of his occupation in that other contracting state, then such a person will be subjected to the legislation of the contracting to which he comes from.¹⁸³⁷ However, this will only be the case if the said employee does not carry out his activities for a period exceeding 24 months and is not a replacement of

¹⁸²⁹ Article 4.

¹⁸³⁰ PhilHealth 2015 <https://www.philhealth.gov>.

¹⁸³¹ PhilHealth 2015 <https://www.philhealth.gov>.

¹⁸³² Article 5(1) on Exportability of Benefits.

¹⁸³³ Article 5. (1).

¹⁸³⁴ Article 5(2).

¹⁸³⁵ Article 5(3) (a).

¹⁸³⁶ Article 5(3) (b).

¹⁸³⁷ Article 7(1).

another worker who was detached in the latter contracting state.¹⁸³⁸ If it so happens that the period of durations exceeds 24 months, then institutions of both contracting parties agree to extend the duration by a further 24 months then the detached individual will remain subject to the laws of the first contracting party upon request of an extension by both parties.¹⁸³⁹ The agreement further makes provision for applicable legislation in instances where a worker is a travelling personnel member, and persons engaged in government employment, locally engaged government employees, and members of diplomatic missions and consular posts.¹⁸⁴⁰ For travelling personnel, any individual who travels onboard a ship flying the flag of a contracting party shall be subjected to laws of the said contracting party, however, for individuals whose employer is registered in one contracting party yet working on aircraft flying in international traffic, the said individuals will be subjected to laws of the employer's country of office registration.¹⁸⁴¹

The agreement is further important because of the fact that it provides for totalisation of creditable periods. The agreement provides that in instances where a person has completed what is referred to as creditable periods in accordance with the laws of both Sweden and the Philippines, the sum period will be brought together and totalised if necessary, to award those entitled if such do not coincide.¹⁸⁴² This is done for purposes of enabling nationals of either Sweden or the Philippines to become qualified for social security benefits of either one of the countries depending on the origin of the individual so entitled.¹⁸⁴³ This is to say

¹⁸³⁸ Article 7(1).

¹⁸³⁹ Article 7(2).

¹⁸⁴⁰ Article 8&9.

¹⁸⁴¹ Article 8. For persons engaged in government employment, locally engaged government employees and members of diplomatic missions and consular post, article provides that: "A person being employed by the government, to whom paragraph 3 of this Article does not apply and who is sent to work in the territory of the other Contracting State, is subject only to the legislation of the first Contracting State.... A person who is locally engaged in the territory of a Contracting State in government employment for the other Contracting State shall, in respect of that employment, be subject to the legislation of the first Contracting State.... This Agreement shall not affect the provisions of the Vienna Convention on Diplomatic Relations of April 18, 1961, or the Vienna Convention on Consular Relations of April 24, 1963."

¹⁸⁴² Article 13.

¹⁸⁴³ PhilHealth 2015 <https://www.philhealth.gov>.

that if a Philippines citizen has been contributing for several years and has been covered for several years in the social security system of Sweden, then such an individual will be eligible for social security benefits of both countries after totalisation of credits periods from both countries.¹⁸⁴⁴ However it worth noting that the said contracting party eligible to pay will only pay in proportion or pro-rata depending on the individual's periods in that contracting party.¹⁸⁴⁵

The agreement further makes provision for calculations of benefits under both legislations of Sweden and the Philippines, making it possible for authorities in either country to calculate duly owed benefits to those who are entitled. In this manner, migrant workers in either country will not miss out on their duly earned social security benefits upon their return home.¹⁸⁴⁶ Perhaps even more important is the fact that this bilateral agreement makes provision for information exchanges and mutual assistance which points out that competent authorities and institutions shall communicate with other any information necessary for the application of the agreement.¹⁸⁴⁷ This provision also stipulates that the said authorities and competent institutions should lend their offices and provide each other with assistance for the determination of eligibility or the amount of any benefit as per the agreement.¹⁸⁴⁸ Communication of any information and measures taken regarding the application of the agreement and legislative changes in their respective jurisdictions should be done as soon as possible.¹⁸⁴⁹ These provisions on information exchanges and exportability of benefits aid the process of portability of migrant workers immensely because it means that all the necessary information required for this process is made available to both the migrant-sending and migrant-receiving countries.

The bilateral agreement between the Philippines and Sweden is made up of standard provisions consistent with those of the *International Labour Convention*

¹⁸⁴⁴ PhilHealth 2015 <https://www.philhealth.gov>.

¹⁸⁴⁵ PhilHealth 2015 <https://www.philhealth.gov>.

¹⁸⁴⁶ Article 15 & 16.

¹⁸⁴⁷ Article 18(1)(a).

¹⁸⁴⁸ Article 18(1)(b).

¹⁸⁴⁹ Article 18(1)(c).

*157 on the Maintenance of Social Security Rights and Convention 118 on the Equality of Treatment.*¹⁸⁵⁰

The next part of the study analyses best practices unilateral social security initiatives from selected countries to see how other migrant-sending countries protect their nationals working abroad.

5.5 Best Practices Unilateral Initiatives

5.5.1 Philippines Unilateral Initiatives

Philippines migrant labourers were estimated to be about 8 million by the end of 2007 making this country the largest migrant workers sending country in Southeast Asia while in 2015 the estimation was at about 8 million overseas Filipino workers were pointed out as deserving special attention especially looking at the value they bring in both their host countries and countries of origin.¹⁸⁵¹ The truth of the matter is that The Republic of Philippines sends hundreds of thousands of migrant workers to countries abroad making the Philippines one of the largest migrant-sending countries in the world.¹⁸⁵² Remittances emanating from migrant workers from this country were estimated to be around \$16 million.¹⁸⁵³ This was, therefore, a result of hundreds of thousands of Filipino migrant labourers being sent to foreign countries each year.¹⁸⁵⁴ The dynamics of overseas Filipino migrant labourers are amazing, it is estimated that 75% of these individuals' occupations were land-based while the rest were not and these were greatly improving the country's economy in terms of the country's cash position and balance of payment.¹⁸⁵⁵

In hindsight, major problems that were faced by Filipino nationals employed in nations abroad included unequal treatment between them and nationals of their host nations, low awareness of workers when it comes to general information and

¹⁸⁵⁰ Elemia 2018 <https://www.rappler.com>

¹⁸⁵¹ ILO 2015 <https://www.socialprotection.org>.

¹⁸⁵² ILO 2015 <https://www.socialprotection.org>.

¹⁸⁵³ ILO 2015 <https://www.socialprotection.org>.

¹⁸⁵⁴ ILO 2015 <https://www.socialprotection.org>.

¹⁸⁵⁵ ILO 2015 <https://www.socialprotection.org>.

rights, undocumented migrants' eligibility to social security benefits and unfavourable working and living conditions.¹⁸⁵⁶ It is clear is that most migrant workers are not necessarily concerned about social protection they get during those active years of service but the benefits they receive upon retirement.¹⁸⁵⁷

In trying to tackle this issue, the Philippines launched an initiative aimed at ensuring voluntary social security coverage of migrant Filipino workers especially in countries that did not offer protection for such workers.¹⁸⁵⁸ A Memorandum of agreement was established for purposes of overseas Filipino workers to cover those migrant workers who were recruited in foreign lands using proper means and channels regardless of whether they were already working in foreign territories or intending to do so.¹⁸⁵⁹ On top of all this, the Philippines also established what has been hailed as a good measure of social security when they created the Flexi Fund Programme which was established to secure Filipino migrant workers' long-term financial security.¹⁸⁶⁰ This programme was established to urge migrant workers to contribute more towards their retirement benefits.¹⁸⁶¹ This programme is characterised with easy payment and withdrawal conditions, this together with the fact that it is tax-exempt makes it a very good initiative on the part of the Philippines.¹⁸⁶²

The Philippines also offers coverage to its migrants through what is referred to as the Overseas Filipino Workers Programme.¹⁸⁶³ Overseas Filipino Workers are referred to as migrant Filipino workers recruited by using proper channels by an employer in another country or permanent resident in a foreign country.¹⁸⁶⁴ The OFW programme essentially covers all Filipino migrant workers of ages 60 and below and is done voluntarily.¹⁸⁶⁵ This programme is also important as it offers

¹⁸⁵⁶ ILO 2015 <https://www.socialprotection.org>.

¹⁸⁵⁷ ILO 2015 <https://www.socialprotection.org>.

¹⁸⁵⁸ ILO 2015 <https://www.socialprotection.org>.

¹⁸⁵⁹ ILO 2015 <https://www.socialprotection.org>.

¹⁸⁶⁰ Rea Cu 2016 <https://businessmirror.com>.

¹⁸⁶¹ Rea Cu 2016 <https://businessmirror.com>.

¹⁸⁶² Rea Cu 2016 <https://businessmirror.com>.

¹⁸⁶³ Center for Migrant Advocacy 2012 <https://www.fes.org>. (hereinafter-OFW program)

¹⁸⁶⁴ Center for Migrant Advocacy 2012 <https://www.fes.org>.

¹⁸⁶⁵ Center for Migrant Advocacy 2012 <https://www.fes.org>.

incentives like member loans which include salary loans, housing loans, and house repair and improvement loans for members who actively participate in programme.¹⁸⁶⁶ By being part of these voluntary social security schemes, overseas Filipino migrant workers may avail themselves to social security benefits namely disability, retirement, maternity and sickness, death, and funeral benefits.¹⁸⁶⁷

The Philippines is making more efforts in this field of social security to the extent that they are even contemplating making coverage of Filipino migrant workers mandatory and efforts include making proposals to the social security legislation of the Philippines.¹⁸⁶⁸ However, this mandatory initiative has still not proceeded because of issues like the high costs of remittances migrants are faced with while sending money home due to a lack of coordination between financial institutions of both the Philippines and receiving countries.¹⁸⁶⁹ This scenario has been explained as thus:

Attorney Sylvette Sybico, who works with the SSS OFW Programme, identified the high cost of remittances as one concern of OFWs. This could be addressed by coordinating with PagIBIG, Phil Health, and an accredited bank about all remittance charges for all three services.¹⁸⁷⁰

The financial responsibility of migrant workers is another issue identified. The problem is that employers of these migrant workers cannot be forced to make contributions to this social security scheme and this, therefore, leaves the migrant worker with the responsibility to shoulder all the contributions making this a difficult task on migrant Filipino workers.¹⁸⁷¹

5.6 Conclusion

This chapter looked at best practices multilateral and bilateral agreements that could be followed by SADC as a region to combat this issue of portability of social security benefits for migrant labourers specifically from Lesotho and Swaziland.

¹⁸⁶⁶ Center for Migrant Advocacy 2012 <https://www.fes.org>.

¹⁸⁶⁷ Center for Migrant Advocacy 2012 <https://www.fes.org>.

¹⁸⁶⁸ Center for Migrant Advocacy 2012 <https://www.fes.org>.

¹⁸⁶⁹ Center for Migrant Advocacy 2012 <https://www.fes.org>.

¹⁸⁷⁰ Center for Migrant Advocacy 2012 <https://www.fes.org>.

¹⁸⁷¹ Center for Migrant Advocacy 2012 <https://www.fes.org>.

The problem of portability in the SADC region is among others caused by the fact that it does not have social security coordination agreements. There are lessons to be learned from other regional social security coordination instruments especially from ASEAN, CARICOM and MERCOSUR regions which have adopted social security instruments that seek to achieve integration of their regions.¹⁸⁷² These multilateral and bilateral agreements contain provisions that deal with the choice of law applicable in instances of portability of these migrant workers social security benefits, they guarantee equality of treatment between nationals and non-nationals and even move on to offer totalisation of insurance periods to make sure that migrant workers are not robbed of their hard-earned benefits. The agreements are also essential because they point out the branches of social security benefits and rights that these migrant workers are entitled to when they are providing their services in their host countries or state parties.

Another interesting issue is drawn from the fact that the MERCOSUR region established a database referred to as the IDB was an initiative for purposes easing the process of access and portability of social security benefits for migrant workers within the region. The bilateral agreement between Sweden and the Philippines was specifically discussed and examined because it is a good example of what a modern bilateral agreement should look like. It ensures equality of treatment between Swedish nationals and Philippines nationals regardless of each of these groups of people's nationality status. Filipino workers, their dependents, and survivors are entitled to the same social security benefits and conditions as Swedish Nationals in Sweden. Workers are guaranteed social security benefits whether they reside in Sweden or the Philippines and further improves the processing of claims and prevents clustered and unregulated coverage of workers. Another critical issue is the fact that both workers from the Philippines and Sweden are offered protection in this agreement and makes sure that each get protection when they live and work in another state. For example, reports have shown that there is a sizeable number of Swedish nationals working in the Philippines, they too are provided for in this agreement making this beneficial for

¹⁸⁷² Mpedi and Nyenti *Revised Portability* 80.

both contracting parties. This does away with the notion that large migrant-receiving countries do not have employees in migrant-sending countries.

The Philippines also established unilateral initiatives aimed at extending social security coverage to its citizens employed in other countries. This country unilaterally extends social security to its migrant workers whether covered by the host country or not. Despite all these initiatives, this country is constantly in negotiations with other countries that host its nationals to enter into social security bilateral agreements.

The next chapter discusses conclusions drawn from all the chapters combined together and finally discuss recommendations that directly answer the research question of the study.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

This study was centred on the issue of access and portability of social security benefits of circular migrant workers in selected SADC member states. All the prior chapters were written with a specific objective in mind. The study was motivated by the fact that there is a staggering amount of money worth of retirement benefits reported to be unclaimed in South Africa.¹⁸⁷³ This research was further stirred by the fact that reports clearly indicate that a portion of this money does belong to former migrant workers from around the SADC region.¹⁸⁷⁴ This, therefore, led to the construction of the main research question which is how the portability of social security benefits for circular migrant workers can be enhanced in selected SADC member states.¹⁸⁷⁵ The following question was advanced mainly because both international and regional social security instruments make provision access and portability of social security rights and benefits for migrant workers to a certain limited extent.¹⁸⁷⁶

Each chapter was specifically designed with a purpose. From the first chapter to the chapter preceding this one, objectives were being undertaken. These objectives included a critical analysis of international and SADC regional instruments to figure out if they really do offer protection to this issue of unclaimed social security benefits that are due to migrant workers who have gone back home.¹⁸⁷⁷ South Africa's as a receiving country of choice for this study was also examined. This examination analysed its social security regulations to establish if they offer adequate protection to those migrant workers employed in its jurisdiction.¹⁸⁷⁸ Selected migrant-sending countries, namely Lesotho, and Swaziland were also analysed. These countries' social security systems were

¹⁸⁷³ Chapter 1, par 1.2. For a discussion of the objectives of the study.

¹⁸⁷⁴ Chapter 1, par 1.2. For the amount of money in unclaimed benefits.

¹⁸⁷⁵ Chapter 1, par 1.3. For the discussion of the research question.

¹⁸⁷⁶ Chapter 2, par 2.2. For the discussion of international and Par 2.4 for the discussion on regional standards of social security.

¹⁸⁷⁷ Chapter 1, par 1.6. Regarding the objectives of the thesis.

¹⁸⁷⁸ Chapter 3. Regarding Access and portability of social security rights of migrant workers in South Africa.

analysed in-depth to establish whether they make provision for social security rights in their statutes and further if their systems have an impact on portability of social security benefits between themselves and South Africa. The study further wanted to establish if there are unilateral initiatives undertaken by migrant-sending countries to protect their nationals abroad. Challenges that these migrant workers face upon their return home were analysed closely.¹⁸⁷⁹ An analysis of best practices from bilateral and multilateral social security was also undertaken. Unilateral initiatives that have had a positive impact on the provision of social security benefits and portability thereof also took focal point, and all these were done to examine how other regions and countries have offered a helping hand to their migrant labourers.¹⁸⁸⁰

6.2 Summary of Conclusions and Observations

The ILO has defined social security as the protection offered to individuals and their families for purposes of guaranteeing access to health-care and to guarantee income security in particular income for unemployment, invalidity, cases of old-age, maternity, work injury, loss of a breadwinner, and sickness.¹⁸⁸¹ History dictates that the industrialisation era led to the society aiding each other through measures such as contributing equally. This era also meant that a contract of employment was introduced leading to wages being paid which eventually led to the social security system that we see today.¹⁸⁸² Considerable progress was seen after the Second World War when social security was finally seen as a human right at national, regional, and international levels.¹⁸⁸³ After this war, schemes were introduced to eradicate poverty and these comprised of employers' liability schemes and service pension schemes such as the workmen's compensation created to protect employees from factors that would hinder their means of

¹⁸⁷⁹ Chapter 4. For a discussion on selected migrant sending countries namely Lesotho and Swaziland.

¹⁸⁸⁰ Chapter 5.

¹⁸⁸¹ See chapter 2 for the definition of social security from an ILO perspective.

¹⁸⁸² Chapter 2, par 2.1, for the history of social security in the SADC region.

¹⁸⁸³ Servais 2014 http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf

livelihood.¹⁸⁸⁴ When African countries regained their independence, some issues that were formally not addressed by colonial powers were eventually addressed.¹⁸⁸⁵ These, therefore, meant that most contingencies were covered which were not covered under colonial rule, however, there are some issues that are still prevalent even today, and the ILO has tried to tackle them to a certain extent.¹⁸⁸⁶

6.3.1 *International and Regional Law Application*

Social security in the SADC is effected by the principle of territoriality and the principle of asymmetrical reciprocity.¹⁸⁸⁷ The former principle dictates that social security legislation's applicability should be restricted within the borders or territories of a country of its enactment.¹⁸⁸⁸ This, therefore, means that migrant workers are likely to be excluded from social security coverage of their countries of origin while they will only be afforded limited social security coverage in their host countries.¹⁸⁸⁹

To this end, it was established that migrant workers from Lesotho and Swaziland are provided with some form of coverage by social security statutes of South Africa. However, they only receive coverage to a certain limited extent because they are excluded from social assistance.¹⁸⁹⁰ These migrants are further excluded from coverage from some social insurance funds like the UIF, while migrant domestic workers are excluded entirely from coverage by COIDA.¹⁸⁹¹ When it comes to migrant workers coverage by Lesotho and Swaziland, the former makes provision for what is termed the *Deferred Payment Act* which makes provision for a compulsory scheme which mandating migrant mine workers to remit 30% of

¹⁸⁸⁴ Msalangi Date Unknown *AJFM* 63.

¹⁸⁸⁵ Chapter 2, par 2.1. For the discussion of the Principle of territoriality.

¹⁸⁸⁶ Chapter 2, par 2.1. For the discussion of poverty eradication during the pre-colonial era.

¹⁸⁸⁷ Chapter 1, par 1.4.4.3. For the discussion of the Principle of Territoriality.

¹⁸⁸⁸ Chapter 1, par 1.4.4.3. For the discussion of the Principle of Territoriality.

¹⁸⁸⁹ Chapter 2, par 2.2. For an in-depth discussion of international standards on social security and portability of social security benefits.

¹⁸⁹⁰ Chapter 3, par 3.3. For the discussion of social security rights in the current South African Constitutional dispensation.

¹⁸⁹¹ Chapter 3, par 3.3. For the discussion of UIF and its exclusion of migrant workers.

their earnings. There is no similar scheme for other migrant workers in Lesotho.¹⁸⁹² Swaziland, on the other hand, makes provision for voluntary schemes for migrant mine workers and does not have any compulsory schemes in place for coverage for migrant workers.¹⁸⁹³

The latter principle, on the other hand, narrates that in instances where the domestic legislation of a certain country excludes certain social security branches, the international community may not expect the said country to include or apply that branch of social security upon ratification of any international instrument.¹⁸⁹⁴ This principle points out that if a certain state has chosen to apply a certain branch of social security upon ratification, and the said branch is already part of its domestic legislation yet the said state refrains from providing such a branch to migrants from other states, then the latter state may not expect other states to make provision of that branch to migrants from such a state.¹⁸⁹⁵ A typical example is Workmen's Compensation Acts of both Swaziland and Lesotho which provide coverage for employment injury in both these selected migrant-sending countries.¹⁸⁹⁶ These two statutes intentionally exclude domestic workers from their coverage. So according to this principle, they cannot, therefore, expect South Africa to provide coverage for their nationals plying their trade as domestic workers under COIDA.

It is, therefore, safe to insist that this principle of asymmetrical reciprocity advocates for reciprocal application of international law instruments between contracting or ratifying member states.¹⁸⁹⁷ This means that if all ratifying member states should take heed in their coverage of certain branches of social security rights and benefits if they expect other member states to do the same, especially

¹⁸⁹² Chapter 4, par 4.6.2. For the discussion of the *Deferred Payment Act*.

¹⁸⁹³ Chapter 4, par 4.3. For the discussion of social protection in the Kingdom of Swaziland.

¹⁸⁹⁴ Chapter 2, par 2.2. For a discussion of the principle of asymmetrical reciprocity.

¹⁸⁹⁵ Chapter 2, par 2.2. For a discussion of the principle of asymmetrical reciprocity.

¹⁸⁹⁶ See Chapter 4, par 4.2.2.2 for Lesotho and par 4.3.4.2 for Swaziland.

¹⁸⁹⁷ This principle is also seen in the execution of Bilateral Social Security Agreements. See Article 4 of The Agreement on Social Security between the Kingdom of Sweden and The Republic of Philippines which states: "Unless otherwise provided in this Agreement, in applying the legislation of a Contracting State, the persons specified in Article 3 shall receive equal treatment with nationals of that Contracting State."

for their emigrants. This will lead to the coordination of social security systems in the SADC region, which for purposes of this study relates to Lesotho, Swaziland, and South Africa. It is this coordination that will aid the SADC region with the issue of portability of social security benefits for retired migrant workers.

The Constitutions of Lesotho and Swaziland, as already established do not expressly provide for the right to social security as a fundamental right.¹⁸⁹⁸ The Constitution of South Africa, on the other hand, does expressly make provision for social security rights in its Bill of Rights.¹⁸⁹⁹ These three countries are members of the ILO and to this end have ratified some of the instruments as provided for by this organisation.¹⁹⁰⁰ It was further established that Lesotho, Swaziland, and South Africa ratified only one ILO instrument, for purposes of this study that make provision for social security rights and benefits. This instrument is *Equality of Treatment (Accident Compensation) Convention* 19 of 1925.

It is, however, important to note that, as established, The ILO has passed several instruments which have a direct correlation on the treatment of migrant workers abroad or in foreign countries and all of the said instruments advocate for equality of treatment between nationals and non-nationals and therefore prohibit discrimination based on nationality. The *Equality of Treatment (Accident Compensation) Convention*¹⁹⁰¹ was adopted in 1925 and it assured nationals of ratifying member states who may encounter personal injuries as a result of accidents happening to them or their dependents the same treatment with regard to workmen's compensation as it provides to its nationals.¹⁹⁰² The Convention

¹⁸⁹⁸ Chapter 4, par 4.2. for Lesotho's social security system overview. Chapter 4, par 4.3 for Swaziland's social protection.

¹⁸⁹⁹ Chapter 3, par 3.3. For the discussion of social security rights under the current South African Constitutional dispensation.

¹⁹⁰⁰ Chapter 2, par 2.2. For an in-depth discussion of social security standards of the ILO.

¹⁹⁰¹ Equality of Treatment (Accident Compensation) Convention 19 Of 1925. See article 1(1) thereof which states as thus: "Each Member of the International Labour Organisation which ratifies this Convention undertakes to grant to the nationals of any other Member which shall have ratified the Convention, who suffer personal injury due to industrial accidents happening in its territory, or to their dependants, the same treatment in respect of workmen's compensation as it grants to its own nationals."

¹⁹⁰² See chapter 2, par 2.2.2.1. Regarding the Equality of Treatment (Accident Compensation) Convention.

guarantees similar treatment to migrant workers and their dependents regardless of their residency status and further advocates for bilateral agreements between the receiving and sending states to make payment of benefits easier when it is to be done outside the paying state's territory.¹⁹⁰³ Lesotho, Swaziland, and South Africa as established have all ratified this instrument and do make provision for benefits it covers in the form of *Workmen's Compensation Act* for both Lesotho and Swaziland, while South Africa's coverage is in the form of COIDA and ODMWA. All these statutes provide coverage for migrant workers who encounter illnesses while employed in these three countries¹⁹⁰⁴

There was also the *Equality of Treatment Convention*¹⁹⁰⁵ which states without a doubt that it intends to deal with the issue of equality of treatment between nationals and non-nationals in the social security sphere.¹⁹⁰⁶ This Convention sets out nine branches of social security and namely medical care, sickness benefit, maternity benefit, invalidity benefit, old-age benefit, employment injury benefit, unemployment benefit, and family benefit.¹⁹⁰⁷ Convention 118 obliges ratifying member states to cover both nationals and non-nationals with any or more of the stated branches of which the said state already has effective operating legislation covering its nationals.¹⁹⁰⁸ There is also what is referred to as the *Maintenance of Social Security Rights Convention No 157* of 1982 together with the *Maintenance of Social Security Rights Recommendation 167* of 1983 which applies to all contributory and non-contributory social security schemes together with schemes consisting of employer imposed obligations as regulated by law.¹⁹⁰⁹ This Convention applies to all general and special social security schemes namely medical care, sickness benefit, invalidity benefit, maternity benefit, old-age

¹⁹⁰³ Article 1(2).

¹⁹⁰⁴ See chapter 4, par 4.2.2.1.2 and par 4.3.4.2 for Lesotho and Swaziland respectively for discussions of the Workmen's Compensation of both these countries. Also see chapter 3, par 3.3 for discussions on COIDA and ODMWA.

¹⁹⁰⁵ (Hereinafter-Convention 118). Equality of Treatment (Social Security) Convention 118 of 1962.

¹⁹⁰⁶ See Chapter 2, par 2.2.2.2. For the *Equality of Treatment Convention*.

¹⁹⁰⁷ Article 2(1).

¹⁹⁰⁸ See chapter 2, par 2.2.2.2. For the provision of both nationals and non-nationals.

¹⁹⁰⁹ Article 2(3) of the *Maintenance of Social Security Rights Convention*. See also Chapter 2, par 2.2.2.3 and par 2.2.2.3.1 for the full discussion of this Convention and Recommendation, respectively.

benefit, employment injury benefit, namely benefit in respect of occupational injuries and diseases, unemployment benefit, and family benefit.¹⁹¹⁰ This Convention advocates for the establishment of both multilateral and bilateral social security agreements and further sets out guidelines for the formation of these agreements.¹⁹¹¹ The Convention further lays down those provisions that need immediate application upon enforcement of the Convention and those that need to await the establishment of social security multilateral and bilateral agreements to come into existence.¹⁹¹² There was a further passing of the *Maintenance of Social Security Rights Recommendation* which was established for purposes of assisting with the implementation of Convention 157 which also advocates for the conclusion of bilateral and multilateral social security agreements.¹⁹¹³ The Convention in article 4(3) stipulates that these social security instruments should entail as thus:

(a) the branches of social security to which they apply, having regard to the requirement of reciprocity referred to in... the Convention; these branches shall, where the Members concerned have legislation covering them, comprise at least invalidity benefits, old-age benefits, survivors' benefits and pensions in respect of employment injuries, including death grants, as well as,... medical care, sickness benefits, maternity benefits, and benefits in respect of employment injuries, other than pensions and death grants;

(b) the categories of persons to which they are applicable; these categories shall comprise at least employees (including, as appropriate, frontier workers and seasonal workers), as well as the members of their families and their survivors, who are nationals of one of the Members

¹⁹¹⁰ Article 2(4).

¹⁹¹¹ Article 4 of Convention 157. Chapter 2, 2.2.2.3.

¹⁹¹² .See chapter 2, Par 2.2.2.3. Still on the discussion of the *Maintenance of Social Security Rights Convention*.

¹⁹¹³ Article 2 of the *Maintenance of Social Security Rights Recommendation*, 1983 (No. 167). See chapter 2.2.2.3.1.

concerned or who are refugees or stateless persons resident in the territory of one of these Members;

(c) the arrangements for the reimbursement of the benefits provided and other costs borne by the institution of one Member on behalf of the institution of another Member unless it has been agreed that there shall be no reimbursement;

(d) the rules to avoid undue plurality of contributions or other liabilities or of benefits.

The *Convention on Minimum Standards in Social Security 102 of 1952* was passed and has been hailed as a flagship of ILO social security conventions especially because it sets out global minimum standards of all nine branches of social security.¹⁹¹⁴ In fact, it is this piece of instrument that has been used by many countries worldwide to try and establish the best social security systems they could possibly come up with.¹⁹¹⁵ This instrument's far-reaching influence has further been seen in different regions. As a matter of fact, it has been contended that the principles found in *Convention 102* are reflected in other regional instruments specifically in the European Union, Africa, and in Latin America.¹⁹¹⁶ The *Domestic Workers Convention 189* of 2011 also comes up with initiatives aimed at protecting migrant domestic workers at large.¹⁹¹⁷ Among other reasons, is the fact that this Convention was established to improve domestic workers' access to social security, hours of work, working conditions, and freedom of association.¹⁹¹⁸

Several international instruments also have a significant impact on social security worldwide and these include *The United Nations International Covenant on*

¹⁹¹⁴ See Chapter 2, 2.2.1.1 for the discussion of *Convention 102*.

¹⁹¹⁵ Hirose, Nikac & Tamagno 2011 <http://www.ilo.org>. Chapter 2, par 2.2.1.1 still on the analysis of *Convention 102*.

¹⁹¹⁶ See chapter 2, 2.2.1.1. See also Nyenti & Mpeli 2015 <http://www.sapen.org>. For further discussions of *Convention 102*.

¹⁹¹⁷ Chapter 2, par 2.2.2.4 for the discussion of the *Domestic Workers Convention*.

¹⁹¹⁸ Seepamore 2016 <http://www.uj.ac.za>. See chapter 2, par 2.2.1.1.

Economic, Social and Cultural Rights,¹⁹¹⁹ *The International Convention on the Elimination of All Forms of Racial Discrimination*,¹⁹²⁰ *The Convention on the Elimination of All Forms of Discrimination against Women*,¹⁹²¹ *The Convention on the Rights of the Child*,¹⁹²² *International Covenant on Civil and Political Rights*,¹⁹²³ *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.¹⁹²⁴ These United Nations instruments recognise the need to provide social security and even go to the extent of providing for equality of treatment for all and prohibition of all forms of discrimination.¹⁹²⁵

On a regional level as well, the provision of social security has been an aspect that has been given priority. The African Union has what is referred to as the *Constitutive Act* which can safely be construed as establishing the African Union.¹⁹²⁶ This *Constitutive Act* contains objectives that do have a bearing on the development of social development; and, therefore, have an impact on the development of such in the African region or continent as a whole. Although the *Constitutive Act* does not have provisions that directly guarantee social protection and no specific mention of migrant workers protection and social security provision thereto, provisions that guarantee social protection and human rights are a good step towards providing social security to all including migrant workers.¹⁹²⁷

The AU further adopted the *African Charter on Human and Peoples' Rights*.¹⁹²⁸ The *African Charter* is important as it guarantees and recognises the need and protect

¹⁹¹⁹ Chapter 2, Par 2.2.1. Regarding The United Nations International Covenant on Economic, Social and Cultural Rights.

¹⁹²⁰ Chapter 2, Par 2.2.2. For discussions on International Convention on the Elimination of All Forms of Racial Discrimination.

¹⁹²¹ Chapter 2, Par 2.2.3. Regarding The Convention on the Elimination of All Forms of Discrimination against Women.

¹⁹²² Chapter 2, Par 2.2.4. On discussions about *The Convention on the Rights of the Child*.

¹⁹²³ Chapter 2, Par 2.2.5. Regarding International Covenant on Civil and Political Rights.

¹⁹²⁴ See chapter 2, Par 2.2.6. Regarding International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

¹⁹²⁵ See chapter 2, par 2.3 for the discussion of other instruments impacting on social security rights.

¹⁹²⁶ See chapter 2, par 2.4.1. Regarding the *Constitutive Act*.

¹⁹²⁷ See chapter 2, par 2.4.1 for the analysis of the *Constitutive Act*.

¹⁹²⁸ The African Charter as adopted in June 1981 and came into force in October the 21st 1986.

and guarantee human rights.¹⁹²⁹ In fact, in the case of *SERAC v Nigeria*,¹⁹³⁰ the court showed the importance of providing social security as drawn from the provisions of the *African Charter*.¹⁹³¹

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa aimed at protecting women against all forms of discrimination also provides for social security in its provisions.¹⁹³² This protocol makes it very clear that state parties to the *African Charter* shall adopt and enforce legislative and other measures for purposes of guaranteeing women equal opportunities in work and career advancements and other economic opportunities by establishing a system of social protection and social insurance for women working in the informal sector.¹⁹³³ There is also what is referred to as the *Social Policy Framework for Africa*.¹⁹³⁴ This instrument was passed to address sufficiently the high burden of disease in Africa together with lack of basic infrastructure, social services, inadequate health-care and services, poor access to education and training, high illiteracy rates, gender inequality, youth marginalisation, and political instability in most of the countries in the African region.¹⁹³⁵ The *Social Policy Framework for Africa* also states that migration is important and is an issue that has to be appreciated especially in the context of what it has done in the African continent hence its positive aspects have to be enhanced.¹⁹³⁶

The *Ouagadougou Declaration and Plan of Action* was adopted in 2004 to deal with poverty alleviation and unemployment with heads of states concerned with lack of social protection particularly affecting women, youth, and persons with

¹⁹²⁹ The Preamble of the *African Charter*. See chapter 2, par 2.4.2 for details on the *African Charter*.

¹⁹³⁰ 2001 AHRLR 60 (ACHPR 2001). Chapter 2, par 2.4.2 for the case and its analysis.

¹⁹³¹ Par 46-47. See also Par 68 of *SERAC v Nigeria*. See also Chapter 2, par 2.4.2.

¹⁹³² Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 September 13th, 2000). See chapter 2, par 2.4.3.

¹⁹³³ Article 13. See further chapter 2, par 2.4.3 for legislative measures adopted by the *African Charter*.

¹⁹³⁴ First Session of the AU conference of ministers in charge of social development Windhoek, Namibia 27 - 31 October 2008, adopted in 2009. See also chapter 2, par 2.4.4. for the discussion of the *Social Policy Framework*.

¹⁹³⁵ Executive summary of the *Social Policy Framework*.

¹⁹³⁶ Social security Framework. Article 23, 2.2.6. See also chapter 2, par 2.4.4.

disabilities in the continent.¹⁹³⁷ The issue of poor occupational health and safety conditions of workers is also dealt with in this declaration.¹⁹³⁸ Most importantly is the fact that this instrument goes on further to state in Article 8(f) thereof that equal opportunities for vulnerable and marginalised groups will be ensured by establishing a conducive environment and by ensuring protection and assistance for migrant workers and other vulnerable groups.¹⁹³⁹

The *AU Migration Policy Framework*, on the other hand, was established with the intention of providing guidelines needed to assist states and other concerned institutions with the creation or formulation of regional migration policies.¹⁹⁴⁰ This Framework comes up with a wide array of recommendations on various issues concerning migrants and finally recommends that states choose principles that would deal with issues that affect them.¹⁹⁴¹ The Framework further calls for the incorporation of principles emanating from *Convention concerning Migration for Employment 97 of 1949* and *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers 143 of 1975* which specifically deal with the rights of migrant workers and social security provision thereto.¹⁹⁴²

On a sub-regional level, the *SADC* region was established to eventually establish a community with a common vision and future.¹⁹⁴³ The vision included the abolishment of obstacles associated with free movement of labour, capital, and people in the region while also coordinating political and socio-economic policies. To help with this vision, the *SADC Treaty* was adopted in 1992 and came into force in 1993.¹⁹⁴⁴ In 2003, there was an adoption of the *Charter of Fundamental Social Rights in SADC* which among others was aimed at inducing the objectives of

¹⁹³⁷ The Preamble. See chapter 2, par 2.4.5.

¹⁹³⁸ The Preamble. See also chapter 2, par 2.4.5. Ouagadougou Declaration and Plan of Action.

¹⁹³⁹ Chapter 2, par 2.4.5. Regarding the Ouagadougou Declaration and Plan of Action.

¹⁹⁴⁰ See chapter 2, par 2.4.6. On the *AU Migration Policy Framework*.

¹⁹⁴¹ African Union 2006 <http://www.sa.au.int>.

¹⁹⁴² See chapter 2, par 2.4.6. For a discussion of the said principles

¹⁹⁴³ See chapter 2, par 2.5. For the discussion of the SADC region. See also Olivier 2011 *SADC Law Journal* 122.

¹⁹⁴⁴ See chapter 2, par 2.5.1. For information on the *SADC Treaty*.

the *SADC Treaty*.¹⁹⁴⁵ The *Social Charter* was aimed at alleviation of poverty, development and economic growth, enhancement of quality, and standard of living of nationals of the region, while promoting the protection of those who are socially disadvantaged.¹⁹⁴⁶ In this instrument, integration, provision of social assistance, and social security are encouraged.¹⁹⁴⁷ There is also a distinction drawn between citizens and non-citizens, meaning that there is advocacy for the provision of social security benefits for both migrant workers and citizens of the host country.¹⁹⁴⁸ However, the problem with the *Social Charter* is the fact that there is no independent mechanism aimed at supervising any breaches to its provisions like other ILO Conventions.¹⁹⁴⁹

While still on the topic of social security, the region adopted *the Code on Social Security in the SADC* which was summarised as providing SADC member states with an effective instrument for purposes of coordination, convergence, and harmonisation of social security systems in the SADC.¹⁹⁵⁰ This instrument affords protection, including social security protection to all lawfully employed migrant workers through the advancement of national laws, bilateral, and multilateral social security agreements between member states.¹⁹⁵¹ The Code on Social Security in the SADC, further advocates for migrant workers' participation in social security schemes of host countries including blatant advocacy of exportability of social security benefits for migrant workers who return home.¹⁹⁵² Portability of social security benefits in the region is further aided by instruments such as the *Draft Policy Framework on Portability of Accrued Social Security Benefits within the Region*.¹⁹⁵³ The *Draft Policy*' also advocates for the facilitation and development of

¹⁹⁴⁵ Chapter 2, par 2.5.2. Regarding the Charter of Fundamental Social Rights in the SADC.

¹⁹⁴⁶ Mpedi and Smit Access to Social Security for Non-Citizens and the portability of social benefits 35. See chapter 2, par 2.5.2.

¹⁹⁴⁷ Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu). Nyenti and Mpedi 2012 *PELJ* 254.

¹⁹⁴⁸ Nyenti and Mpedi 2012 *PELJ* 254.

¹⁹⁴⁹ Smit "SADC Charter on Fundamental Social rights" 8.

¹⁹⁵⁰ Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu). See chapter 2, par 2.5.3. For the *Code on Social Security in the SADC*.

¹⁹⁵¹ Article 17. 2 of the *Code on Social Security in the SADC*. See also Chapter 2, par 2.5.3.

¹⁹⁵² Article 17.Chapter 2, par 2.5.3.

¹⁹⁵³ Chapter 2, par 2.5.4. For discussions of the Draft Policy Framework on Portability of Accrued Social Security Benefits within the Region.

policies and programmes created to progressively enhance sufficient and effective regional coordination of social security systems between SADC member states.¹⁹⁵⁴ This instrument further provides for portability of social security benefits while advocating for equal treatment between nationals and non-nationals alike.¹⁹⁵⁵ Perhaps, it is worth mentioning that the *Draft Policy Framework* does, in fact, make it clear that there shall be no reductions, amendments, suspensions, withdrawals, or confiscations on social security benefits solely on the fact that the beneficiaries are migrants.¹⁹⁵⁶ The 2014 adoption of the *SADC Protocol on Employment and Labour* meant that SADC member states do realise the importance of tackling the issue of portability of social security benefits as this instrument clearly portrays and foresees the adoption of ways of facilitating coordination and portability of social security benefits.¹⁹⁵⁷ This instrument further provides for the facilitation of migrant workers' remittances to their home countries.¹⁹⁵⁸

The scarcity of work means that the two important principles, mainly the principles of non-discrimination and equality of nationals in relation to migrant workers are being challenged worldwide because of the economic crisis being experienced recently.¹⁹⁵⁹ In fact, this is not the only problem that is being experienced in the social security sphere. When it comes to international social security instruments, research has shown that compliance with these instruments has been a challenging norm especially for developing countries, not only in Africa South of the Sahara but worldwide due to the history of colonialism in some parts of the world.¹⁹⁶⁰

The quality of employment in many developing countries means that only a certain percentage of the population will have coverage to social security in the

¹⁹⁵⁴ Section 2 of the *Draft Policy Framework*.

¹⁹⁵⁵ See Chapter 2, par 2.5.4. for portability of social security benefits provisions under the *Draft Policy Framework*.

¹⁹⁵⁶ Section 6(3).

¹⁹⁵⁷ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>. Chapter 2, par 2.5.5.

¹⁹⁵⁸ Chapter 2, par 2.5.5. Regarding the SADC Protocol on Employment and Labour.

¹⁹⁵⁹ Du Toit Domestic Workers 351.

¹⁹⁶⁰ Chapter 2, par 2.6.1. for an in depth analysis of that state of social security and its challenges.

form of social insurance.¹⁹⁶¹ While the rest of the population receive little to no coverage at all, since non-contributory schemes in these countries are inadequately developed.¹⁹⁶² Lack of financial muscle means that countries run to the IMF and other regional development banks to seek financial assistance.¹⁹⁶³ The problem they usually come across stems from the fact that this money usually has terms and conditions inclined to economic efficiency and nothing on social security or regulation of labour markets.¹⁹⁶⁴ Consistent meddling with social security administration governing bodies by governments means that funds from social security schemes also get depleted.¹⁹⁶⁵

The universality of international labour standards also leads to further criticism.¹⁹⁶⁶ Social security provisions in some human rights instruments are mentioned conditionally and less precisely because they need resources to be advanced, unlike other rights namely civil and political rights.¹⁹⁶⁷ Another challenge emanates from the fact that certain countries prioritise certain rights over others which means that some social security rights are always ignored, to say the least.¹⁹⁶⁸ The long and short of the above sentiments is that the universality of international labour standards will always come across criticism because of the diverse economic muscles of countries among others.¹⁹⁶⁹ Adjudication of social security also plays a pivotal role in this issue of portability of social security benefits of migrant workers.¹⁹⁷⁰ Lack of independence is one major problem facing adjudicating forums in SADC, especially because members of these are normally political delegates.¹⁹⁷¹ There is, therefore, a need to have, as Olivier puts it, a “supra-natural authority” that would deal with enforcement, setting of standards,

¹⁹⁶¹ ILO 2011 <http://www.ilo.org>.

¹⁹⁶² See Chapter 2, par 2.6.1. For a discussion of social security state and challenges.

¹⁹⁶³ See chapter 2, par 2.6.2. For discussions on the IMF.

¹⁹⁶⁴ Weiss 2013 *IJCLIR* 7. chapter 2, par 2.6.2. For discussions on the IMF.

¹⁹⁶⁵ Olivier 2013 *IJCLIR* 2.

¹⁹⁶⁶ Chapter 2, par 2.6.3. Regarding universality of International Labour Standards.

¹⁹⁶⁷ See Chapter 2, par 2.6.1. For a discussion of social security state and challenges.

¹⁹⁶⁸ Chapter 2, par 2.6.3 for discussions on the universality of International Labour Standards.

¹⁹⁶⁹ Chapter 2, par 2.6.3. for discussions on the universality of International Labour Standards.

¹⁹⁷⁰ Chapter 2, Par 2.7. regarding adjudication of social security disputes.

¹⁹⁷¹ Olivier 2011 *International Journal of Social Security and Workers Compensation* 46.

and effective establishment appropriate of social security principles to aid those individuals who seek redress.¹⁹⁷²

6.3.2 Access of Social Security Rights for Migrant Labourers in South Africa

South Africa is the highest migrant-receiving country in the SADC.¹⁹⁷³ However, despite all this, unemployment in this part of the world has escalated while social security benefits are limited. In fact, this has led to a series of xenophobic attacks that caught the eyes of the world since 2008.¹⁹⁷⁴ These xenophobic attacks have not deterred migration into this country especially because of poverty in other SADC countries coupled with an increase in labour demands in South Africa.¹⁹⁷⁵ This increase in migrant workers in South Africa meant that South Africa had to come up with a series of immigration and social security laws and policies aimed at regulating the entry and exit of migrants in South Africa. History shows that migrant workers in South Africa were largely from neighbouring countries, namely Swaziland, Botswana, Mozambique, and Zimbabwe with labour movements in this country dating back to the days of colonialism.¹⁹⁷⁶ Despite the fact that there was segregation during the apartheid era in South Africa in the early nineties, the immigration laws of this country at the time still advocated for entry of migrant workers to come and work in farms and mines in South Africa.¹⁹⁷⁷ In fact, it has been reported that before 1961, citizens of Lesotho, Botswana, Swaziland, and Namibia were permitted to enter South Africa without excessive limitations and were considered as nationals of South Africa to a certain limited extent especially because they would receive similar treatment as black South Africans during this era of history.¹⁹⁷⁸ However, as time went by, further laws were passed, this time to regulate the flow of migrants in and out of South Africa.¹⁹⁷⁹ The apartheid

¹⁹⁷² Chapter 2, par 2.6. Regarding Adjudication of social security.

¹⁹⁷³ Chapter 3, par 3.1. Regarding social security in South Africa.

¹⁹⁷⁴ Chapter 3, 3.2. Regarding migration movements into South Africa.

¹⁹⁷⁵ Chapter 3, par 3.2. Regarding migration movements into South Africa. Olivier "Labour rights and social protection of migrant workers" 6.

¹⁹⁷⁶ Wentzel and Tlabeli Date unknown <http://www.hsrapress.ac.za>. Kitimbo 2014 Discussion Paper. Chapter 3, par 3.1.

¹⁹⁷⁷ See Chapter 3, par 3.2. Regarding An Overview of South Africa's Immigration Policy.

¹⁹⁷⁸ Peberdy 2013 Journal Für Entwicklungspolitik 69.

¹⁹⁷⁹ Chapter 3, par 3.2. For migration movements into South Africa.

regime made sure that border posts were tightened, nonetheless, cheap labour from neighbouring countries was never neglected.¹⁹⁸⁰ As a matter of fact, reports suggest that between 1913 and 1986, migrant workers' only way of entering South Africa was through recruitment agencies making any other way of entering illegally.¹⁹⁸¹ Migration reforms were pioneered in 1995, the year which saw amendments to the *Aliens Control Act*.¹⁹⁸² In 1997, the insufficiency of the *Aliens Control Act* led to further reforms which prompted the introduction of the *Green Paper on International Migration* which was concerned with border controls mainly because of the influx of migrants into South Africa.¹⁹⁸³ The Green Paper also wanted to deal with the issue of temporary migrant workers, the contention being that the migration policy of South Africa at the time did not offer enough assistance to those migrants who intended to stay temporarily in South Africa.¹⁹⁸⁴ There would eventually be a passing of the *Immigration Act 13* of 2002 which recognised the need to promote fundamental human rights with respect to immigration control.¹⁹⁸⁵ This Act also recognised the need for migrant workers to have social security protection while allowing migrant workers to apply for permanent residency.¹⁹⁸⁶ This legislation was also hailed as supporting the notion that migration supports economic growth.¹⁹⁸⁷ The *Immigration Amendment Act 19* of 2004 was passed to establish an entirely new system of immigration control aimed at ensuring economic growth through the employment of migrant workers and enabling the entry of exceptionally skilled or qualified people, skilled human resources, and academic exchanges with other SADC member states.¹⁹⁸⁸ When the *Immigration Amendment Act 13* of 2011 was finally introduced, the paradigm had shifted drastically with emphasis placed on the employment of nationals of South

¹⁹⁸⁰ Chapter 3, par 3.2. For migration movements into South Africa.

¹⁹⁸¹ Department of Home Affairs 2016 <http://www.home-affairs.gov.za>. See chapter 3, Par 3.2.

¹⁹⁸² See Chapter 3, par 3.2. For the *Aliens Control Act* and the *Green Paper on International migration*.

¹⁹⁸³ *Green Paper*, par 3.3.1. p 15. See Chapter 3, par 3.2. For the *Aliens Control Act* and the *Green Paper on International migration*.

¹⁹⁸⁴ Chapter 3, par 3.2.

¹⁹⁸⁵ See Chapter 3, par 3.2. For the *Aliens Control Act*.

¹⁹⁸⁶ See sections 20, 25, 26, 27 & 28 of the *Immigration Act*. See also Chapter 3, par 3.1.2. For discussions on the *Green Paper*.

¹⁹⁸⁷ Chapter 3, par 3.2. For the discussion of the *Immigration Act 13* of 2002.

¹⁹⁸⁸ Chapter 3, par 3.2. For the discussion of the *Immigration Amendment Act 19* of 2004.

Africa and not the attraction of skilled foreign workers as previously thought.¹⁹⁸⁹ It, however, be noted that the process of recruiting migrant workers has been carried out by recruitment agencies such as TEBA from as early 1912.¹⁹⁹⁰ It is through these agencies that the process of portability of migrant workers' social security benefits is still being carried out.

When it comes to the issue of social security in South Africa, 1992 saw the establishment of the *Social Assistance Act* 59 of 1992 which saw most discriminatory provisions that had previously excluded most black South Africans from the social security protection sphere get done away with.¹⁹⁹¹ In short, social security benefits such as pensions and grants that were initially afforded to the white community only were finally extended to cover the black population as well.¹⁹⁹² The South African social security system is made up of social assistance and social insurance and the Constitution thereto makes it very clear that everyone has the right to access social security.¹⁹⁹³ The role played by the courts of law in the development of social security rights cannot be denied as well. The *Khosa*-case is one of those cases which portrayed the courts of law stance regarding the social security provision to migrant workers.¹⁹⁹⁴ The courts of law in this instance pointed out the reasonableness of excluding temporary migrant workers from the social security system of South Africa.¹⁹⁹⁵

The fact of the matter is that the immigration status of an individual plays a very vital role in his or her access to social security benefits. In fact, migrant workers are some of the most inadequately covered individuals in the world.¹⁹⁹⁶ The impact of immigration laws and policies in granting migrant workers social security rights

¹⁹⁸⁹ Chapter 3, par 3.2. For the discussion of the the *Immigration Amendment Act* 13 of 2011.

¹⁹⁹⁰ Chapter 3, par 3.2. For migration movements into South Africa.

¹⁹⁹¹ Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358.

¹⁹⁹² Harttgen, Klasen & Woodlard 2011 *Canadian Journal of Development Studies* 358. Chapter 3, par 3.2.

¹⁹⁹³ Chapter 3, par 3.3. See also section 27 of the *Constitution of the Republic of South Africa*.

¹⁹⁹⁴ 2004 6 SA 505 (CC). See chapter 3, par 3.4.2.2 Regarding the *Khosa*-case.

¹⁹⁹⁵ See chapter 3, par 3.4.2.2. For the judgement of the *Khosa*-case.

¹⁹⁹⁶ Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers". See Dupper 2014 [http:// www.transformeurope.eu](http://www.transformeurope.eu). See chapter 3, par 3.4 for a discussion of the South African social security system.

and benefits cannot be denied as well.¹⁹⁹⁷ The other issue that cannot be denied is the fact that the South African social security framework largely prohibits the granting of social security benefits to certain categories migrant workers, however, those migrant workers with permanent residency do have access to these benefits.¹⁹⁹⁸

In fact, migrant workers do get compensation for occupational diseases, injuries or death arising out of, or in the course of employment. Legislations like COIDA, ODMWA, and RAFA do pay out money for compensable illnesses.¹⁹⁹⁹

Mechanisms of enforcement and adjudication of social security rights also play a vital role in the development of social security systems.²⁰⁰⁰ In fact, the important role played by international law in this sphere of the law cannot in any shape or form be ignored as well. International law acts as a benchmark for evaluating domestic adjudication frameworks and systems as a whole.²⁰⁰¹ The issues that migrant workers are faced with in this regard vary, ranging from the fact that offices are located in Johannesburg making it difficult for migrant workers to access them due to time and financial constraints. Ordinary courts also mean that migrant workers experience high financial costs together with delays in finalising cases because of the backlog of cases in courts of law in general.²⁰⁰² This, therefore, means that migrant workers' constitutional rights get adversely affected. It is therefore important to point out that there is a need for a specialised court that would deal with social security issues. Ordinary courts of law

¹⁹⁹⁷ Deacon, Olivier and Beremauro 2015 <http://www.miworc.org.za>. Chapter 3, par 3.4. Discussion of the South Africa social security framework.

¹⁹⁹⁸ Khosa v Minister of Social Development 2004 6 SA 505 (CC). Par 85.

¹⁹⁹⁹ Chapter 3, par 3.4.2.2. Regarding compensation for occupational diseases, injuries or death arising out of, or in the course of employment.

²⁰⁰⁰ Mpedi *Pertinent social security issues in South Africa* 35. See chapter 3, par 3.4.2 for an analysis of the courts as mechanisms of enforcement of social security and other related rights.

²⁰⁰¹ Nyenti *et al* "Reforming the South African Social Security Adjudication System: The Role and Impact of International and Regional Standards" 288. See chapter 3, par 3.5

²⁰⁰² Chapter 3, par 3.5 for the discussion of Issues surrounding dispute resolution and adjudication of social security in South Africa.

are not specialised enough to handle social security disputes.²⁰⁰³ Lack of internal dispute resolution mechanisms and fragmented policies and institutions mean that migrant workers always have to seek redress somewhere else before getting their duly earned social security benefits.²⁰⁰⁴

6.3.3 Disparities Between Social Security Schemes of Selected Migrant-sending Countries

Both Lesotho and Swaziland have been supplying South Africa with migrant workers for several years now. With Lesotho completely landlocked by South Africa while Swaziland is landlocked by both South Africa and Mozambique.²⁰⁰⁵ Lesotho's economy has been explained as having slightly declined during the period between 2012 and 2013 even though more growth was expected to take place during the coming years.²⁰⁰⁶ High HIV prevalence means that there is a decline of life expectancy in Lesotho, with the 2017 census estimating the life expectancy to be around 50 years.²⁰⁰⁷ Changes in the South African migration policies have led to a steady increase in poverty levels in Lesotho because it means that more and more Basotho were left without jobs leading to financial interventions by international and regional organisations.²⁰⁰⁸ This intervention includes the aid provided by the ILO in developing the social security framework that would eventually aid with the provision of both long and short-term social security benefits.²⁰⁰⁹

²⁰⁰³ Chapter 3, par 3.5 for the discussion of Issues surrounding dispute resolution and adjudication of social security in South Africa. See Mpedi "*Social security dispute resolution and the need for a coherent adjudication system*" 91.

²⁰⁰⁴ Chapter 3, Par 3.5.2. For discussions on challenges and shortcoming of the South African Framework.

²⁰⁰⁵ Kingdom of Swaziland Central Statistical Office 2017 <https://www.swazi.org.sz>. This is according to the 2016 Swaziland statistics. Chapter 4, par 4.1.

²⁰⁰⁶ Chapter 4, par 4.1. Government of the Kingdom of Lesotho 2015 <http://www.socialprotection.org>.

²⁰⁰⁷ Country meters 2017 <http://www.countrymeters.info/en/Lesotho>. See chapter 3, par 4.1.

²⁰⁰⁸ Olivier 2013 *Development Southern Africa* 101. Government of the Kingdom of Lesotho 2015 <Http://www.socialprotection.org>. Freeland and Khondker 2015 <Http://www.developmentpathways.co.uk>. See also chapter 4, par 4.1.

²⁰⁰⁹ Chapter 4, par 4.1. For the introduction of Lesotho and Swaziland's social security system overview.

Swaziland, on the other hand, is faced with similar problems to those Lesotho is faced with. In Swaziland, there are high unemployment rates, sluggish economic growth combined with a high prevalence of HIV/AIDS.²⁰¹⁰ This country is faced with challenges ranging from poor service delivery, unawareness regarding services offered, enduring malnutrition, and gender-based violence.²⁰¹¹ Critics also suggest that lack of enough technical knowhow that would aid the country in every aspect still has room for growth.²⁰¹² Swaziland's social security framework has been explained as very basic with old-age being the most comprehensive part of it.²⁰¹³

High levels of unemployment coupled with a sluggish economy mean that nationals from these countries leave and go to South Africa in search of means of survival.²⁰¹⁴ These factors together with a high prevalence of corruption mean that both Swaziland and Lesotho are unable to offer their nationals with comprehensive social protection.²⁰¹⁵ This situation means that even those migrant workers who return home after offering their services in South Africa encounter a lot of problems when they return home. In both these countries, several hurdles hinder the process of portability of migrant workers' social security, ranging from a lot of documentation that is complicated leading to problems when not processed on time.²⁰¹⁶ Lack of information is also another vital issue that has led to hindrances in the provision of social security benefits to migrant workers from abroad. Migrant workers' lack of information means that they are often glued and do not know which avenues to pursue when it is time to claim their social security

²⁰¹⁰ Chapter 4, par 4.1. For the introduction of Lesotho and Swaziland's social security system overview.

²⁰¹¹ See chapter 4, par 4.1. For social security schemes of Lesotho and Swaziland See also Swaziland United Nations Development Assistant Framework 2015 <https://www.unicef.org>.

²⁰¹² Swaziland United Nations Development Assistant Framework 2015 <https://www.unicef.org>.

²⁰¹³ See chapter 4, par 4.1. For social security schemes of Lesotho and Swaziland. See also Bellano, Dawes, Hildebrand & Lewis 2013 <https://blogs.ubc.ca>. See Chapter 4, Par 4.1.

²⁰¹⁴ See chapter 4, par 4.1. For social security schemes of Lesotho and Swaziland.

²⁰¹⁵ Chapter 4, par 4.1.

²⁰¹⁶ Nyenti & Mpedi 2015 <https://www.saspen.org>. See Chapter 4, par 4.8.

benefits, these means that such individuals are exploited and end up receiving nothing hence they normally sink further and further into poverty.²⁰¹⁷

Lesotho and Swaziland do not have constitutional provisions expressly providing for the right social security.²⁰¹⁸ In Lesotho for example, there is a list of human rights provided for in the Constitution, and it is such provisions that are considered as a source of social security rights.²⁰¹⁹ There are also statutory provisions, collective agreements, policy documents, and other contracts of service.²⁰²⁰ This does not, however, deal with the problems posed by the fragmented nature of the social security framework of Lesotho.²⁰²¹

Social security and social protection rights are also not guaranteed in the Constitution of Swaziland and its Bill of fundamental rights.²⁰²² However, the Constitution does make provision for general objectives in the form of Directive Principles of State Policy aimed at guiding all organs and agencies of the state, citizens, organisations and other bodies and individuals in applying or interpreting the Constitution or any other law and in taking and implementing any other policy decisions, for the establishment of a just, free and democratic society.²⁰²³ Social protection rights are further guaranteed through social objectives which include respecting and guaranteeing institutions tasked with promoting and protecting human rights and freedoms by providing those institutions with adequate resources for effective functioning.²⁰²⁴

²⁰¹⁷ Nyenti & Mpedi 2015 <https://www.saspen.org>.

²⁰¹⁸ Chapter 4, par 4.2.1. For a discussion of the *Constitution of Lesotho* and chapter 4, par 4.3 for a discussion of the provision of social security rights in the Constitution of Swaziland.

²⁰¹⁹ See Chapter 4, par 4.2.1. For further discussions of the Constitution of Lesotho and social security rights provisioning.

²⁰²⁰ Chapter 4, par 4.2. For discussions of social security system of Lesotho. See also Mosito 2014 *PELJ* 1573.

²⁰²¹ Chapter 4, par 4.2. For discussions of social security system of Lesotho. Mosito 2014 *PELJ* 1573.

²⁰²² The Constitution of the Kingdom of Swaziland Act 2005. See chapter 4, par 4.3.

²⁰²³ Section 56. See also Mpele & Nyenti Key International, Regional and International Instruments 170.

²⁰²⁴ Section 60(1). See Chapter 4, par 4.3. For provision of the Constitution of Swaziland relating to social security rights.

The above-mentioned provisions show that there is no express right to social security in the constitutions of both Lesotho and Swaziland.²⁰²⁵ This, therefore, means that there is a very daunting task of making legislatures from migrant-sending countries to make provision for their nationals who remain in their territories and provision for those who go and work in other countries.²⁰²⁶ Migrant workers from these two countries further run into issues such as situations where occupational diseases and illnesses are encountered. When situations like these ones are encountered by migrant workers, accessibility of health services that assist with the establishment of whether there is a connection or causal link between illnesses and the accident or occupation leads to difficulties in classifying such illnesses or accidents as occupational.²⁰²⁷ It is worth noting that migrant workers from both Swaziland and Lesotho are normally from rural areas of these countries and are normally unable to understand how their benefits are computed.²⁰²⁸

South Africa concluded a bilateral agreement with both Lesotho and Swaziland.²⁰²⁹ These agreements were established to make it possible for institutions that would enable the liaising officials from both the migrant-sending and receiving country regarding issues of compensation and pneumoconiosis.²⁰³⁰ These agreements were criticised for several reasons, with other critics referring to these agreements as unconstitutional and stating that attempts were made to abolish these agreements.²⁰³¹ These agreements do not have provisions regarding exchanges of information between sending and receiving states, especially regarding social security systems of such countries and prevailing conditions of living.²⁰³² There are

²⁰²⁵ Chapter 4, par 4.8. Conclusions regarding social security provisioning in both Lesotho and Swaziland.

²⁰²⁶ Chapter 4, par 4.8. For discussions on Lesotho and Swaziland.

²⁰²⁷ Chapter 4, par 4.8. Nyenti & Mpedi 2015 <https://www.saspen.org>.

²⁰²⁸ Chapter 4, par 4.7. For issue surrounding tracing of beneficiaries

²⁰²⁹ See Chapter 4, par 4.6.1 for a bilateral agreement between South Africa, Lesotho and Swaziland.

²⁰³⁰ Chapter 4, par 4.6.1 for a bilateral agreement between South Africa, Lesotho and Swaziland. 2014 Bamu <https://www.ilo.org>.

²⁰³¹ See chapter 4, par 4.6.1. See also Vallentgoed *Legal Protection of Rights of Migrant Workers* 31.

²⁰³² Chapter 4, par 4.6.1 for a bilateral agreement between South Africa, Lesotho and Swaziland.

also no provisions regarding participation in the social security systems of the receiving country, which in this case is South Africa by migrant workers and their families.²⁰³³ There is no provision dealing with provisions to be followed regarding the portability of migrant workers' social security benefits when migrants from Lesotho and Swaziland return home.²⁰³⁴ These agreements further lack, any mention of fundamental rights entitled to migrant workers, no provisions regarding equality of treatment and prohibitions of unlawful detentions coupled with the destruction of identity documents to mention but a few.²⁰³⁵ Lesotho and Swaziland do not have any unilateral social security initiatives that would aid portability of social security benefits for their migrants whose contracts of service have come to an end.²⁰³⁶

The issue of adjudicating social security disputes is another issue that surely has to be taken into consideration while dealing with the issue provision of social security rights and benefits.²⁰³⁷ Social security rights disputes are normally left in the hands of ordinary courts of law in Lesotho and Swaziland. The amount of cases that are not finalised by these institutions means that social security rights disputes also take a long time before they are attended to leaving those who are seeking redress deep in poverty.²⁰³⁸ If issues like the establishment of a specialised court that deals specifically with social security dispute resolutions are not urgently attended to, the issues such as portability of migrant workers' social security benefits will also take a back seat.

²⁰³³ Chapter 4, par 4.6.1. For issues surrounding the bilateral agreement between South Africa, Lesotho and Swaziland.

²⁰³⁴ Chapter 4, par 4.6.1 For Social security Agreements between Lesotho, Swaziland and South Africa.

²⁰³⁵ Chapter 4, par 4.6.1 For Social security Agreements between Lesotho, Swaziland and South Africa.

²⁰³⁶ Chapter 4, par 4.6.1. For issues surrounding the bilateral agreement between South Africa, Lesotho and Swaziland.

²⁰³⁷ Chapter 4, par 4.3.4.3 for mechanisms of enforcement and adjudication of social security rights in Swaziland and chapter 4, par 4.2.4 for mechanisms of enforcement and adjudication of social security rights in Lesotho.

²⁰³⁸ Chapter 4, par 4.8. For findings and conclusions in chapter 4.

6.3.4 Best Practices and Comparative Bilateral Agreements

Lesotho, Swaziland, and South Africa are countries in the SADC region tasked with an issue of dealing with an influx of migrant workers who leave these two countries in search of work in the later. It is therefore important for these two countries and the SADC region as a whole to investigate ways of making this migration process beneficial for all parties involved. The issue of unclaimed migrant workers' social security benefits also must be looked into very closely especially looking at the key role these individuals play in those sets of countries' economies. Multilateral, bilateral, and unilateral social security agreements are therefore especially important if this issue is to be tackled properly. For purposes of multilateral social security agreements, best practices multilateral agreements from three regions were discussed. The focus was on the Southeast Asian Nations Region, Caribbean Community, and Common Market and the Southern Common Market for purposes of drawing examples that would be beneficial for the SADC region.²⁰³⁹

In 2016, it was reported that the ASEAN region was estimated to have at least 6.7 million migrant workers originating from it.²⁰⁴⁰ The majority of migrant workers from this region are either unskilled or possess very low skill sets and are normally prone to very horrible working conditions together with human rights violations.²⁰⁴¹ Just as it happens in the SADC region, migrant workers from this part of the world lack information regarding their social security entitlements, are prone to poor health and education facilities and find it hard to get legal assistance when the need arises.²⁰⁴² Acquiring all the necessary documents for purposes of filing for compensation has also proven to be a daunting task while legislative limitations mean that such migrant workers are prohibited from contributing to some social security schemes offered in both the receiving and

²⁰³⁹ See Chapter 5, par 5.1. For best practices and comparative bilateral social security agreements

²⁰⁴⁰ Chapter 5, par 5.2.1 Regarding the ASEAN Region.

²⁰⁴¹ Chapter 5, par 5.2.1 Regarding the ASEAN Region.

²⁰⁴² Chapter 5, par 5.2.1. Regarding issues surrounding migrant workers from the ASEAN region.

sending countries.²⁰⁴³ It is, however, important to note that these difficulties do not mean that the ASEAN region has not achieved any important strides. In 2007, the region adopted the much-heralded *ASEAN Declaration on the Protection and Promotion of the Rights of Migrants Workers* which obliged both sending and receiving states to promote the dignity and protect the full potential of migrant workers.²⁰⁴⁴ Both sets of countries are further urged to respect the fundamental rights of migrant workers and their families.²⁰⁴⁵ Member states are more importantly advised to enter into multilateral and bilateral social security agreements to speed up the process of affording migrant workers with social security rights and benefits.²⁰⁴⁶ There was further adoption of the *ASEAN Agreement on the Movement of Natural Persons* in 2012 which was seen as a step in the right direction towards gaining coordination in the region. Free movement of natural persons and the free flow of skilled labour is what this instrument seeks to achieve.²⁰⁴⁷ This together with the fact that the instrument has an objective of seeking a streamlined and transparent procedure for application of immigration formalities shows that the region sees the importance of migrant workers.²⁰⁴⁸ Further commitments were realised in 2017 when the *ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers* came to be. Despite its non-binding nature, this instrument was adopted to come up with a framework that would help with addressing migrant workers' needs and all other issues they are faced with.²⁰⁴⁹ This Consensus most importantly also recognises the need for the conclusion of both bilateral and multilateral social security agreements in this part of the world and further acknowledges the importance of migrant workers in both the sending and receiving country.²⁰⁵⁰ These bilateral and multilateral social

²⁰⁴³ Chapter 5, par 5.2.1. Regarding issues surrounding migrant workers from the ASEAN region.

²⁰⁴⁴ See chapter 5, par 5.2. Regarding the ASEAN Declaration on the Protection and Promotion of the Rights of Migrants Workers.

²⁰⁴⁵ Chapter 5, par 5.2.1. Regarding issues surrounding migrant workers from the ASEAN region.

²⁰⁴⁶ See Article 7 of the Declaration.

²⁰⁴⁷ Chapter 5, par 5.2.1. Regarding the ASEAN Region.

²⁰⁴⁸ See Chapter 5, par 5.2.1. Regarding the ASEAN Region.

²⁰⁴⁹ Chapter 5, par 5.2.1. ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers

²⁰⁵⁰ Chapter 5, par 5.2.1. ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers

security agreements can be constructed in the following manner as indicated in the Consensus:

1. General principles governing the Agreement

These general principles indicate the obligation of both the migrant-sending and migrant-receiving states towards migrant workers of another. These obligations include the strengthening of the political, economic and social pillars of the ASEAN community in trying to promote the full potential and dignity of migrant workers in an environment entailing freedom and impartiality under the laws of the respective ASEAN member state.²⁰⁵¹ This clearly shows that there is a need to stabilise more than just the laws governing migration and social security for the well-being of migrant workers to be realised. Obligations further include close corporation between the two sets of countries for purposes resolving issues surrounding instances of migrant workers who become undocumented or irregular due to no fault of their own.²⁰⁵² Typical examples may include instances where migrant workers' passports are destroyed, either by authorities, or other uncontrollable situations. Both the receiving and sending countries are further obliged to consider the fundamental rights of migrant workers and their family members who reside with them in the territory of the receiving member state. This should, however, be done without undermining the laws of the latter state.²⁰⁵³

2. Obligations of the receiving state

The importance of migration and migrant workers cannot be denied, however, receiving states also have an obligation to protect and promote the welfare and fundamental rights of their nationals abroad.²⁰⁵⁴ Migrant-receiving states also ought to strengthen initiatives to promote and protect fundamental human rights, welfare and human dignity of a migrant worker, together with striving towards the

²⁰⁵¹ Article 1 of the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (hereafter Consensus)

²⁰⁵² See Chapter 5, par 5.2.1 article 2 of the Consensus.

²⁰⁵³ See Chapter 5, par 5.2.1 article 3 of the Consensus.

²⁰⁵⁴ See Chapter 5, par 5.2.1 article 5 of the Consensus.

achievement of harmony and tolerance nationals and non-nationals.²⁰⁵⁵ More importantly is an obligation towards the facilitation of access to resources and information, training and education, access to justice and welfare services in accordance with the laws of the receiving state.²⁰⁵⁶ This would mean that migrant workers are familiarised with their social security rights in the receiving state leading to the knowledge of the type of benefits they can access. The promotion of fair and appropriate employment protection together with the provision of adequate access to the legal and judicial system are some of the other obligations bestowed on receiving countries.²⁰⁵⁷

3 Obligations of the sending state

Migrant-sending states are expected to advance measures meant to promote the provision of human rights to migrant workers as well as ensuring access to employment and other livelihood opportunities for their citizens.²⁰⁵⁸ These provisions are a call for unilateral initiatives to be embarked on by migrant-sending member states. The provision wants migrant-sending member states to also produce sustainable options to migration of workers to other states. The other obligation for sending member states is formally established policies and procedures which govern the migration of workers.²⁰⁵⁹ These procedures encompass preparation for migrant workers to be deployed, including the protection of migrants in sending countries as well as proper integration into these migrant-receiving member states. This recruitment of migrant workers should also be advanced through the elimination of recruitment malpractices through legal and valid contracts, among others.²⁰⁶⁰

A typical social security agreement will provide coverage of some or more benefits as thus:

²⁰⁵⁵ See Chapter 5, par 5.2.1 articles 5-6 of the Consensus.

²⁰⁵⁶ See Chapter 5, par 5.2.1 article 7 of the Consensus.

²⁰⁵⁷ See Chapter 5, par 5.2.1 article 8-9 of the Consensus.

²⁰⁵⁸ See Chapter 5, par 5.2.1 for article 11-12 of the Consensus.

²⁰⁵⁹ See Chapter 5, par 5.2.1 article 13 of the Consensus.

²⁰⁶⁰ See Chapter 5, par 5.2.1 article 14 of the Consensus.

- (a) It entails an equality clause that details out restrictions based on nationality for access to social security benefits. Member states may decide which benefits require nationality or residency requirements to be accessed.
- (b) Exporting of benefits: This clause will address issues such as whether social assistance is accessible to migrant workers. This clause will further single out the type of benefits to be exported and through which mediums such a process will take place.
- (c) Double Taxation Clause: This provision typically deals with the issues surrounding taxes. It details out processes that will be undertaken to avoid migrant workers being taxed from both the sending and receiving country.
- (d) Totalisation of creditable periods: This clause makes provision for how social security contributions can be calculated, especially in instances where a migrant worker was employed in different ASEAN member states. This clause or provision enables migrant workers to qualify for benefits, that is, minimum qualifying periods. It allows migrant workers to attain social security benefits they would have instead missed as a result of not meeting their qualifying periods in other member states. These totalisation clauses normally include third part member states.²⁰⁶¹

Its instruments like this that make the issue of portability of migrant workers social security benefits an easier task and this is to the benefit of both sending and receiving states.

The CARICOM region is another region that was analysed. This region was established in terms of the *Treaty of Chaguaramas* which among others prohibited discrimination based on nationality.²⁰⁶² It also advocates for the improvement of the standard living for CARICOM nationals while at the same time accelerating the promotion of social development which can be construed as including social security and protection.²⁰⁶³ The other objective of the Treaty is said to be the need

²⁰⁶¹ A third party member state is country which is not part of the ASEAN community.

²⁰⁶² Article 7(1) of the *Treaty of Chaguaramas*. Chapter 5, par 5.2.2.1.

²⁰⁶³ Chapter 5, par 5.2.2.1. For discussions of Article 6 (a)-(1) of the *Treaty of Chaguaramas*.

to intensify activities in health, education, transport, and telecommunications.²⁰⁶⁴ The treaty further urges the CARICOM community to strive to achieve harmonisation and transferability of social security benefits.²⁰⁶⁵ The treaty points out that member states ought to establish appropriate legislative, administrative, and procedural arrangements to ensure that the process of portability of social security benefits takes place.²⁰⁶⁶ It also urges that social security agreements be concluded among member states to ease the process of movement of skills.²⁰⁶⁷

In 1997, the *Charter of Civil Society for the Caribbean Community* was adopted and has been cited as an instrument that acts as a Bill of Rights to the community.²⁰⁶⁸ This instrument points out that members of it agree to provide enough leave with pay together with adequate social security benefits for women workers before and after they have given birth.²⁰⁶⁹ Member states of the region are also urged to agree on providing members with sufficient social security benefits.²⁰⁷⁰ The *CARICOM Agreement on Social Security* came in being in 1996 and was aimed at establishing equal treatment between member states' nationals while travelling and venturing between one state to another.²⁰⁷¹ The preamble of this instrument points out that member states realise that the harmonisation of social security legislation would promote regional unity and functional corporation.²⁰⁷² Contracting parties to this agreement affirm the equality of treatment in the maintenance of acquired rights or in the course of acquiring such rights and protection of such rights regardless of resident changes within their respective jurisdictions.²⁰⁷³ There are also provisions regarding the determination of the applicable laws and others regarding the totalisation of contribution period

²⁰⁶⁴ Chapter 5, par 5.2.2.1 for the discussions of article 6(iii) of the *Treaty of Chaguaramas*.

²⁰⁶⁵ Chapter 5, par 5.2.2.1 for the discussion of article 5 of the *Treaty of Chaguaramas*.

²⁰⁶⁶ Chapter 5, par 5.2.2.1 for the discussion of article 46(2)(b)(iv) of the *Treaty of Chaguaramas*

²⁰⁶⁷ Chapter 5, par 5.2.2.1. See also article 74(2)(b) of the *Treaty of Chaguaramas*

²⁰⁶⁸ Chapter 5, Par 5.2.2.1. Regarding the *Charter of Civil Society for the Caribbean Community*. See also Mpedi and Nyenti *Revised Portability* 59.

²⁰⁶⁹ Chapter 5, par 5.2.2.2 for article XIX (3) (g) of the *Charter of Civil Society for the Caribbean Community*.

²⁰⁷⁰ Chapter 5, par 5.2.2.2 for article XIX(3) (i) of the *Charter of Civil Society for the Caribbean Community*.

²⁰⁷¹ Chapter 5, par 5.2.2.3 for the discussion of the *CARICOM Agreement on Social Security*

²⁰⁷² Chapter 5, par 5.2.2.3. For discussions on the *CARICOM Agreement on Social Security*.

²⁰⁷³ Chapter 5, Par 5.2.2.3. For discussions on the *CARICOM Agreement on Social Security*.

which definitely makes it easy for migrant workers to access benefits due to them.²⁰⁷⁴ The agreement also outlines the scope of benefits covered and these include, invalidity pensions, disablement pensions, old-age or retirement pensions, survivors' pensions, and death benefits in the form of pensions.²⁰⁷⁵ There are a number of provisions in this agreement that make providing for social security agreements to migrant workers an easier task to member states. This together with the fact that the agreement also provides room for the establishment of bilateral and multilateral social security agreements means that the portability of migrant workers' social security benefits would be an easier task when migrant workers return back home.²⁰⁷⁶

The social security agreement from the CARICOM region typically contains any or more of the provisions stated below:

- (a) Scope of coverage: this multilateral or bilateral agreement will have to stipulate the types of benefits that are covered by the agreement. These benefits as already stipulated include invalidity pensions, disablement pensions, old-age or retirement pensions, survivors' pensions, and death benefits in the form of pensions. Insured persons together with their dependents or survivors who have been subjected to the law of any contracting state will also be covered by the agreement.²⁰⁷⁷
- (b) Eligibility for benefits: This clause stipulates the conditions that a migrant worker must satisfy to be eligible for social security benefits. In the CARICOM, when dealing with the determination of such benefits, when an individual has been subjected to the laws of two or more CARICOM members, whether successively or alternatively, and has satisfied all the

²⁰⁷⁴ Chapter 5, par 5.2.2.3. For article 17 of the *CARICOM Agreement on Social Security*.

²⁰⁷⁵ Chapter 5, par 5.2.2.3. For article 2 of the *CARICOM Agreement on Social Security*.

²⁰⁷⁶ Chapter 5, par 5.2.2.3. See also Cosmos 2015 *JAASSH* 56.

²⁰⁷⁷ Chapter 5, par 5.2.2.3 for provisions of the CARICOM agreement on social security. These agreements can be used as examples for the conclusion of both multilateral and bilateral social security agreements.

conditions required in any of the CARICOM states then he or she will be eligible for payments.²⁰⁷⁸

- (c) The choice of law: The agreement further makes provision for the law which will apply in instances where an insured person has worked in different jurisdictions or different contracting parties. This means that there will have to be provisions that deal with the determination of the applicable law for various categories of insured migrant workers.²⁰⁷⁹
- (d) Calculation of contributions: this clause deals with the totalisation of insurance contribution periods. This makes it easy for migrant workers to keep track of their social security contributions and benefits. This clause also allows migrant workers within the CARICOM to accumulate what is referred to as credits to qualify for pensions. This is also true in situations whereby a migrant worker worked in more than one CARICOM state.²⁰⁸⁰
- (e) Equality of treatment: This provision also entails an equality clause that details out restrictions based on nationality for access to social security benefits. Member states may decide which benefits require nationality or residency requirements to be accessed.²⁰⁸¹
- (f) Exportability clause: This clause stipulates steps to be taken in order to claim benefits and make the portability of social security benefits easier. This clause will further single out the type of benefits to be exported and through which mediums such a process will take place. This clause will entail the procedure of claiming or making a submission for claims. The submission will be made in the social security institution found in the beneficiary's country of residence. The claim will eventually be sent to the proper institution for processing. This clause will also have to stipulate the choice of currency to be used, which is normally the currency of the beneficiary's country of residence. For portability of social security benefits to be effected, the examination of claims will be done by the institution to

²⁰⁷⁸ Chapter 5, par 5.2.2.3 for eligibility for benefits.

²⁰⁷⁹ Chapter 5, par 5.2.2.3 for provisions regarding the choice of law.

²⁰⁸⁰ Chapter 5, par 5.2.2.3 for calculation of contributions

²⁰⁸¹ Chapter 5, par 5.2.2.3 for clauses of equality of treatment under the *CARICOM agreement on social security*.

which the claim was submitted. The social security institutions that have to pay out these benefits will eventually be advised, as soon as possible to process the payment of benefits.²⁰⁸²

It is this exportability clause that will ease the process of paying out these benefits. This, therefore, means that the portability of social security benefits as a process depends on clauses like this to be effected easily.

The MERCOSUR region was established in 1991 to achieve integration in the region.²⁰⁸³ It is reported that during the negotiations phase of the Treaty establishing MERCOSUR, member states acknowledged the need to tackle social and labour issues for purposes of making hasty economic development and social justice in this region.²⁰⁸⁴ This, therefore, led to the adoption of the *MERCOSUR Multilateral Agreement on Social Security* aimed at acquiring coordination of social welfare systems and therefore permitted migrant workers and their families to safeguard all their acquired rights while in receiving or host countries.²⁰⁸⁵ Migrant workers are also enabled to acquire rights while in the territory of receiving states.²⁰⁸⁶ Insurance periods paid up in other territories of member states are taken into consideration when computing what is due to member states.²⁰⁸⁷ This agreement was entered into with a rationale for achieving the coordination of social security systems in the region.²⁰⁸⁸ It further provides for equality and non-discrimination between nationals and migrant workers and clearly stipulates social security benefits that migrant workers are eligible to receive under the agreement.²⁰⁸⁹ Benefits under this agreement are retirement benefits, whether voluntary or compulsory, survivors' benefits together with disability retirement

²⁰⁸² Chapter 5, par 5.2.2.3 for provisions relating to portability of social security benefits in the *CARICOM agreement on social security*.

²⁰⁸³ Chapter 5, par 5.3. Regarding the *MERCOSUR* Region.

²⁰⁸⁴ Chapter 5, par 5.3. For discussions regarding the *MERCOSUR* Region.

²⁰⁸⁵ Chapter 5, par 5.3.1. Regarding the *MERCOSUR Multilateral Agreement on Social Security*.

²⁰⁸⁶ Chapter 5, par 5.3.1. Regarding the *MERCOSUR Multilateral Agreement on Social Security*.

²⁰⁸⁷ Chapter 5, Par 5.3.1. Regarding the *MERCOSUR Multilateral Agreement on Social Security*.

²⁰⁸⁸ Chapter 5, Par 5.3.1. Chapter 5, par 5.3.1. Regarding the *MERCOSUR Multilateral Agreement on Social Security*.

²⁰⁸⁹ Chapter 5, par 5.3.1. Chapter 5, par 5.3.1. Regarding the *MERCOSUR Multilateral Agreement on Social Security*.

benefits, with temporary migrant workers clearly barred from making contributions if their stay is for a period less than a year.²⁰⁹⁰ The MERCOSUR region also adopted the *MERCOSUR Social and Labour Declaration* which was said to be a realisation by the region that the inclusion of social issues while trying to integrate is also pivotal.²⁰⁹¹ This instrument points out that migrant workers be afforded the same assistance, information, working conditions, protection and equality of rights as afforded to citizens of the country to which they render their services.²⁰⁹² At least a minimum social security net will be afforded to nationals of the MERCOSUR region and shall be against contingencies such as illness, old-age, invalidity and death.²⁰⁹³ This instrument further seeks to achieve coordination of social security systems in a manner that does away with discrimination on the basis of national origin.²⁰⁹⁴

The *Agreement Relating to Residence Permits for Nationals of State Parties to MERCOSUR, Bolivia, and Chile* was also adopted in 2002 with the desire of achieving integration in the region coupled with the implementation of free movement of nationals of the region to deepen and strengthen integration.²⁰⁹⁵ Regular migration is what the agreement seeks to achieve.²⁰⁹⁶

6.3.5 Best Practices Bilateral Agreements

Malawi and Zambia concluded a bilateral agreement that was intended to solve issues that migrant mineworkers from Malawi had to deal with regarding their social security benefits from Zambian mines.²⁰⁹⁷ This agreement was intended to

²⁰⁹⁰ Chapter 5, par 5.3.1. Chapter 5, par 5.3.1. Regarding the MERCOSUR Multilateral Agreement on Social Security.

²⁰⁹¹ Chapter 5, par 5.3.2. Regarding the *MERCOSUR Socio-Labour Declaration*.

²⁰⁹² Chapter 5, par 5.3.2. Regarding article 4 of the *MERCOSUR Social and Labour Declaration*.

²⁰⁹³ Article 10.

²⁰⁹⁴ Article 19. Chapter 5, par 5.3.2.

²⁰⁹⁵ Chapter 5, par 5.3.3. For the Agreement Relating to Residence Permits for Nationals of State Parties to MERCOSUR, Bolivia, and Chile.

²⁰⁹⁶ Pucheta 2014 *CELLS* 18-19. Chapter 5, Par 5.4.3.

²⁰⁹⁷ Chapter 5, par 5.4.1. For the Social Security Agreement between Zambia and Malawi. The full article could not be accessed despite numerous attempts to liaise with officials from Zambia who work at the Department of Social Development and other academics who work on this field of social security. This therefore meant that other sources from the internet, journals and

make the portability of social security benefits easier for these migrant mineworkers after their contracts of service have come to an end.²⁰⁹⁸ It makes it easy for migrant mine workers to access their benefits without having to travel back to Zambia to access what is duly theirs.²⁰⁹⁹ This agreement provides for a joint compensation fund that would aid in the identification of a medical practitioner based in Malawi for purposes of undertaking any necessary medical assessments and examination on migrant mineworkers who are already back in Malawi. It further entails the establishment of payment facilitation mechanisms of social security benefits for these workers who are back in Malawi.²¹⁰⁰

Another bilateral agreement worth noting is the *Social Security agreement between The Kingdom of Sweden and the Republic of the Philippines* which is a perfect example of what a modern-day social security agreement looks like.²¹⁰¹ This agreement includes ways in which claims are filed.²¹⁰² There is also a provision for equal treatment between migrant workers together with their dependents and survivors and nationals of contracting receiving parties.²¹⁰³ The agreement most importantly offers ways in which portability of social security benefits may be attained without any reduction, modification, suspension, cancellation, or any confiscation for a mere fact that an entitled individual resides in another contracting party's territory.²¹⁰⁴ Another interesting issue regarding this

books had to be relied upon. It is important to note that even such did not portray the agreement in full.

²⁰⁹⁸ Chapter 5, par 5.4.1. For the discussion of the Social Security Agreement between Zambia and Malawi.

²⁰⁹⁹ Chapter 5, par 5.4.1. For the discussion of the Social Security Agreement between Zambia and Malawi.

²¹⁰⁰ Chapter 5, par 5.4.1. For the discussion of the Social Security Agreement between Zambia and Malawi.

²¹⁰¹ Chapter 5, par 5.4.2. For the Agreement on Social Security between Sweden and Philippines.

²¹⁰² Chapter 5, par 5.4.2. For the process of how claims are filed under the agreement on Social Security between Sweden and Philippines.

²¹⁰³ Chapter 5, par 5.5.2. For equality provisions within the Agreement on Social Security between Sweden and Philippines.

²¹⁰⁴ Chapter 5, par 5.4.2. For the Agreement on Social Security between Sweden and Philippines.

agreement is the fact it even details out how social security benefits of a temporary migrant worker will be handled and the applicable law thereto.²¹⁰⁵

When it comes to the issue of portability of social security benefits, the Agreement stipulates that such payments to benefits acquired shall not be subjected to any reductions, modifications, suspensions, cancellations, or confiscations by the mere reason that the beneficiary is a resident of another member state. The agreement stipulates that such benefits will be paid out even if such a beneficiary resides in the territory of another member state.²¹⁰⁶ This Agreement also provides for portability of benefits to beneficiaries who reside in the territory of third member states. This exportability clause together with the fact that the Agreement provides for communication of information between competent authorities and institutions advances the issue of portability of social security benefits.²¹⁰⁷ These exchanges of information and mutual assistance also include the lending of each other's offices for purposes of determining eligibility, communicating with each other all information and measures taken regarding changes in legislation and exchanging statistics as specified in administrative arrangements of the Agreement.²¹⁰⁸ This agreement further makes provision for the totalisation of creditable periods and calculations of benefits under both Swedish and Filipino laws.²¹⁰⁹

Unilateral initiatives undertaken by the Philippines were also closely examined. It is through these unilateral initiatives that the Philippines will at least have assurances that their nationals employed in other countries are taken care of.²¹¹⁰ The Philippines came up with initiatives intended to make sure that there is voluntary social security coverage of Filipino migrant workers, especially those

²¹⁰⁵ Chapter 5, par 5.4.2. See article 7, 8 & 9 of the Agreement on Social Security between Sweden and Philippines.

²¹⁰⁶ Chapter 5, par 5.4.2. See article 5 of the Agreement on Social Security between Sweden and Philippines.

²¹⁰⁷ Chapter 5, par 5.4.2. For the Agreement on Social Security between Sweden and Philippines.

²¹⁰⁸ Chapter 5, par 5.4.2. For the Agreement on Social Security between Sweden and Philippines.

²¹⁰⁹ Chapter 5, par 5.4.2. For totalisation of creditable periods and calculations of social security benefits.

²¹¹⁰ Chapter 5, par 5.5.1. Regarding unilateral initiatives of the Philippines.

who have found employment in countries that do not offer such protection.²¹¹¹ Programmes such as the Flexi Fund were introduced to secure migrant workers' long-term financial security and is characterised with easy payment and withdrawal conditions coupled with the fact that such payments are exempt from tax.²¹¹² These voluntary social security schemes include disability, retirement, maternity and sickness, death and funeral benefits.²¹¹³ The Philippines is actively pursuing other social security bilateral agreements with countries that its nationals migrate to, for purposes of affording its nationals social security protection.

6.4 Recommendations

It has already been established in this study that migrant workers are not always granted access to social security benefits and certain social security rights in receiving countries because of provisions in these countries' legislation which clearly discriminate against these set of people. In the SADC region, especially in relation to migrant workers from Lesotho and Swaziland who have gone to South Africa under a contract of service, when such do become eligible for certain social security benefits, they can only get access to such if they are physically present or available to claim them and undergo all the necessary steps required for one to get compensation. International instruments have been discussed and the study further established that they provide for the conclusion of bilateral and multilateral social security agreements which entail equality of treatment between nationals and non-nationals in receiving countries, exportability of social security benefits to migrant-sending countries, aggregation of insurance periods, and maintenance of acquired rights, the choice regarding the applicable law to be used and exchanges of information between institutions of migrant-sending and migrant-receiving states among others. The study's conclusion, therefore, led to the following recommendations.

²¹¹¹ Chapter 5, par 5.5.1. Regarding unilateral initiatives of the Philippines.

²¹¹² Chapter 5, par 5.5.1. Regarding unilateral initiatives of the Philippines.

²¹¹³ Chapter 5, par 5.5.1. Regarding unilateral initiatives of the Philippines.

6.4.1 Human Rights-based Approach to Social Security

A human rights-centred approach envisions social security as a fundamental human right and is especially important with respect to comprehending the situation of migrant workers' legal status in both migrant-sending and receiving countries. This human rights-based approach has also been clearly stipulated in the UN Human rights instruments.²¹¹⁴ The ILO on the other hand also clearly considers social security as a fundamental right and specifically points out that such is a measure that combats poverty, inequality, and social exclusion.²¹¹⁵

The issue of social security benefits has to be addressed firstly by sending countries who know the important part played by their migrant workers abroad. For Lesotho and Swaziland to protect their migrant workers' interests abroad, they first have to adopt the right to social security expressly in their constitutions. Protection of migrant workers' rights in receiving countries need precise intervention which is normally guided by constitutional guarantees together with other legal frameworks intended to offer such support.

6.4.2 Establishment of a Database of Migrant Workers

The problem in the SADC region that has played a significant role in the hindrance of the portability of social security benefits of migrant workers is aggravated by a lack of effective information exchanges. The major problem is that institutions in both Lesotho and Swaziland as migrant workers sending countries are not well equipped to provide the necessary documentation that could be required by social security institutions in South Africa. There is, therefore, a need to establish a database that could be used regionally for purposes of keeping track of all migrant workers moving about in the region. A single joint database would go a long way in integrating the region. Lesotho, Swaziland, and South Africa could use this database in trying to deal with the issue of keeping track of all the migrant workers moving in and out of these countries. This database would help with

²¹¹⁴ See chapter 2, par 2.2.

²¹¹⁵ Chapter 2, Par 2.2.1.1-2.2.2.4.

transferring data of all those people whose social security benefits are due. Current and future beneficiaries and their families would be tracked down using this database and manual tracking down of individuals whose social security benefits are due would end. Lesotho, Swaziland, and South Africa could use a mechanism like this which would eventually lead to speedy processing of claims. Indeed, there are always going to be disparities in technological capacities between Lesotho, Swaziland, and South African, however, if these countries constantly liaise and learn from each other, then such a problem would eventually be done away with. A single joint database would definitely do away with these disparities.

There is also a problem of fragmentation of social security institutions in both migrant-sending and receiving states. This single database would resolve this problem because associated institutions would have access to it and therefore function as a one-stop-shop. This database would keep track of all migrant workers, retired and active and would resolve issues such as payment to beneficiaries who have passed on.²¹¹⁶ For this initiative to work properly and effectively, there has to be active participation of all concerned state parties, in this case, Lesotho, Swaziland, and South Africa.²¹¹⁷

This system will also deal with pop up agencies that are the cause of migrant workers' woes. In Lesotho especially, several agencies claim the social security benefits of former migrant mine workers. These institutions claim a certain percentage from these individuals while undergoing this process and end taking more than what was eventually agreed upon. This data base may be used to identify only a certain, selected few institutions that are eligible to claim on behalf of beneficiaries and their families and therefore make sure that such beneficiaries are not exploited in the process. The establishment of a single database such as the one developed in the MERCOSUR region will certainly go a long way in dealing

²¹¹⁶ See chapter 5, par 5.3.4 for single joint data base for migrant workers in the MERCOSUR region.

²¹¹⁷ See Anon 2010 <http://www.southsouth.org>.

with delays in social security benefits.²¹¹⁸ This database will also do away with problems associated with the burdensome documentary requirements associated with the application of social security benefits.

6.4.3 Migrant Workers Coverage in Their Countries of Origin

Another major hurdle that most migrant workers are faced with is the principle of territoriality which dictates that migrant workers be excluded from social security systems of their countries of origin.²¹¹⁹ This means that some migrant workers from Lesotho and Swaziland are excluded from social security coverage in their countries of origin while also being excluded from coverage in South Africa as well. The fact that there are inadequate portability regimes in all these three countries means that there is a need to produce means of providing social security to migrant workers in their countries of origin. The idea here is to establish a mechanism of coverage for migrant workers in their host countries. The proper establishment of such a mechanism would play a significant role in actually supporting migrant workers who return home. The argument here is that there has to be a departure from the territoriality principle meaning that Lesotho and Swaziland have to establish unilateral initiatives as migrant-sending countries to provide some sort of coverage for their migrants who work abroad.

In order to deal with a number of vulnerable migrant workers who often get exploited because of the flexible working conditions they are employed under Lesotho and Swaziland need to establish interventions such as the ones that are established by the Philippines. The countries separately have to produce a voluntary Welfare or insurance fund specifically for migrant workers who are not covered to host or receiving countries or South Africa. The initiative is specifically good for those migrant workers who work on a seasonal basis, on construction sites, or even farms for example. The governments of these sending countries ought to be hands-on by employing the necessary personnel tasked specifically

²¹¹⁸ See chapter 5, par 5.3.4 for single joint data base for migrant workers in the MERCOSUR region.

²¹¹⁹ Chapter 2, par 2.2 for discussions of the Principle of territoriality.

with informing migrant workers of this voluntary initiative which would eventually become compulsory. Lesotho and Swaziland may use several social insurance schemes to extend coverage to such migrant workers in vulnerable positions. There has to be awareness and voluntary affiliation or voluntary relationships with national insurance schemes by these migrant workers who have gone abroad.²¹²⁰ The governments of Lesotho and Swaziland are further urged to establish practical interventions such as the Ministry of migration which will be tasked solely with the protection of migrants who are exploited day in and day out in South Africa. There also has to be a link between these ministries and consuls in South Africa. What is needed in this instance is the dedication from the government's point of view because there have been a few non-governmental institutions which have tried to lobby for protection of these migrant workers in South Africa such as the Ex-Miners Association which generally also provides support to migrant workers by all means possible.²¹²¹

6.4.3.1 An establishment of unilateral voluntary social insurance initiatives for migrant workers abroad

This should be an initiative intended to protect migrant workers from sending countries in the SADC such as Lesotho and Swaziland to cover those migrant workers employed through proper means in South Africa and other major migrant-receiving countries like it in the SADC region. There should be an establishment of a voluntary social insurance scheme in Lesotho and Swaziland intended to cover social security benefits that are not made accessible to migrant workers in receiving countries or South Africa to be precise. The scheme should select a foreign financial institution or bank that will enable such migrant workers to contribute their monthly remittances while still in their country of employment.

It should, however, be noted that such an initiative should include a Memorandum of understanding or agreement between the Departments of Foreign Affairs in

²¹²⁰ Olivier & Govindjee 2016 *Institutions and Economics* 35.

²¹²¹ See Olivier & Govindjee 2016 *Institutions and Economics* 35. For the discussion on institutions which have offered complementary measures aimed at extending protection to migrant workers.

migrant-sending countries and financial institutions in receiving countries and sending countries for the systemisation of this voluntary social insurance schemes. Alternatively, these South African financial institutions may establish representative offices as per the agreement in both Swaziland and Lesotho, preferably in South African consular missions in these countries for purposes of registration and information management. The agreement may further include clauses on tax exemptions to encourage migrant workers to contribute to such schemes. These types of schemes should be made available to those migrant workers who are not privy to access social security benefits especially in the form of pensions in South Africa. Domestic workers are an example of migrant workers who do not receive compensation for employment injuries.

6.4.4 Bilateral Social Security Agreements

As already pointed out, South Africa has already entered into bilateral agreements with both Lesotho and Swaziland.²¹²² These agreements were criticised for a number of things, namely, lack of social security benefits portability provisions, no provisions regarding exchanges of information, no provisions regarding migrant workers' participation in social security schemes of receiving countries, lack of provisions dealing with procedures to be followed upon migrant labourers return home, there is no mention of fundamental rights in these agreements, no mention of how unlawful detentions are dealt with and no provisions dealing specifically with governance and regulations of recruiting agencies.²¹²³ This, therefore, means that there are no bilateral social security agreements, a position which ultimately leaves migrant workers in vulnerable positions. Bilateral social security agreements are important for purposes of attaining equality of treatment between nationals and migrant workers in receiving countries. Lesotho and Swaziland have to engage with South Africa for purposes of entering into social security agreements which would among others aid with the process of portability of social security benefits. For this process to happen in a regulated manner there has to be an

²¹²² Chapter 4, par 4.6.1 for bilateral agreement between South Africa, Lesotho, and Swaziland.

²¹²³ Chapter 4, Par 4.6.1 for issues surrounding the bilateral agreement between South Africa, Lesotho and Swaziland.

establishment of social security bilateral agreement that deals specifically with social security benefits. In this agreement, there has to be an agreement on how a database is going to be established together with a supporting framework. There has to be a commitment by all parties concerned, in this instance, Lesotho and Swaziland as migrant-sending countries should compile all the names of documented migrant workers and give them to South Africa as a starting point. This bilateral agreement would have to make provision for administrative corporation between social security institutions in both Swaziland and Lesotho as migrant-sending countries and South Africa as a migrant-receiving country.²¹²⁴ This provision would help with eradicating agents that normally claim on behalf of former migrant workers by exploiting such individuals because of their ignorance.

The bilateral agreement should further provide for payment of social security benefits regardless of the migrant worker's place of residence while at the same time providing for procedures of how migrant workers' whose contract of service has expired be treated before going home. There should also be a provision regarding the duration of stay for a migrant worker whose contract of service has come to an end, to aid such individuals with all the necessary arrangements they need to undergo especially in instances of occupational hazards. It should be understood that the portability of social security rights has been defined as the capacity to preserve, transfer, and maintain social security benefits and rights regardless of nationality or place of residence.²¹²⁵ This clause also dictates that the bilateral agreement that both Lesotho and Swaziland will have to conclude with South Africa. It also entails maintenance of acquired rights and aggregation of insurance periods together with the choice of law which will generally be pinpointing the applicable legal system to be used in instances where disputes arise and there is a need for redress.²¹²⁶

²¹²⁴ See Olivier & Govindjee 2016 *Institutions and Economics* 26. For discussion of contents of both Multilateral and Bilateral social security agreements.

²¹²⁵ Olivier & Govindjee 2016 *Institutions and Economics* 26.

²¹²⁶ See chapter 5, Par 5.5.2 for an ideal modern social security agreement which could be used to mould a social security bilateral agreement between South Africa and Lesotho and Swaziland.

6.4.4.1 Bilateral social security Agreement in the Mining Sector

The mining industry is a sector that employs a lot of migrant workers from both Lesotho and Swaziland in South Africa. This, therefore, means that there is an abundance of unclaimed benefits from this sector of the economy.²¹²⁷ The scope of unclaimed social security benefits from this sector warrants that there be a bilateral social security agreement that deals specifically with this sector. For instance, there is a backlog of unclaimed social security benefits emanating from social security schemes such as the Compensation Commissioner for Occupational Diseases, the Compensation Fund, and the Rand Mutual Assurance Company Limited. Former migrant workers are further faced with challenges such as general information lack thereof, ineligible recruitment agencies, institutional and administrative challenges, together with the determination of eligibility for compensation especially in instances where occupational diseases occur.²¹²⁸ Some of the major concerns that would be tackled by such an agreement are the fact that they find it hard to access health services that would determine if they are eligible for compensation certification required by compensation institutions.²¹²⁹

Lesotho, Swaziland, and South Africa need to create an agreement specifically designed to deal with issues such as occupational injury and disease protection and compensation thereof. This will further aid with the identification of medical centres located in both Lesotho and Swaziland so as to do away with migrant workers having to travel back to South Africa with their already depleted funds for medical examinations and assessments for silicosis and pneumoconiosis.²¹³⁰ The alternative would be to make provision for mobile medical clinics that would be deployed to Lesotho and Swaziland to examine and assess former migrant workers for certification of compensation.²¹³¹

²¹²⁷ Mpedi and Nyenti 2015 <https://www.saspen.org>.

²¹²⁸ See Mpedi and Nyenti 2015 <https://www.saspen.org>. P 14.

²¹²⁹ Mpedi and Nyenti 2015 <https://www.saspen.org>. P 15.

²¹³⁰ See Mpedi and Nyenti 2015 <https://www.saspen.org>. P 19 for a discussion to come up with a database specifically designed to tackle this issue for Malawian migrant workers who worked in Zambian mines.

²¹³¹ Mpedi and Nyenti 2015 <https://www.saspen.org>. P22.

There has to be a database specifically designed to collect all the necessary information about current and former migrant workers.²¹³² The governments of Lesotho and Swaziland will have to come up with communications platforms such as the radio for purposes of making migrant workers aware²¹³³ This agreement is essential mainly because it is an undeniable truth that several migrant mineworkers have lost their jobs and returned home due to occupational illnesses and diseases.²¹³⁴ These people are unable to get their duly earned social security benefits although they are illegible for such. It should be noted that this social security agreement will also entail all the contents that a general social security agreement should entail as mentioned earlier. However, the advocacy for a mining sector-specific social security agreement is to make sure that former migrant mine workers who are normally vulnerable because of illnesses and injuries are not burdened with unnecessary expenses that they cannot even afford. This should further contain the necessary provision for payment modes and specifically provide for the determination of how compensations are computed in the mining sectors.

6.4.4.2 A recommended specimen for access and portability of social security benefits for migrant workers in the SADC region

For access and portability of social security benefits effected with ease, the four principles as illustrated by the ILO Conventions should be considered as a point of departure in the drafting of a proper social security agreement. The contracting parties to any social security agreement should align themselves with the following principles:

- (1) Equality of treatment: Whenever social security rights and access thereto has to be guaranteed to migrant workers, there should always be a clause guaranteeing equality of treatment between nationals and non-nationals. However, in this instance, equality of treatment has to be guaranteed to all

²¹³² See chapter 6. Par 6.4.2 for an in-depth recommendation on a single database on migrant workers.

²¹³³ Mpedi and Nyenti 2015 <https://www.saspen.org>. P19.

²¹³⁴ Mpedi and Nyenti 2015 <https://www.saspen.org>. P21.

migrant workers by the agreement that have contributed to the schemes governed by the agreement.

- (2) Determination of the applicable laws: Social security agreements deal with social security issues surrounding nationals of different jurisdictions. This means that the agreement should contain a clause specifying the choice of law to be applied in the agreement. This choice of law should also entail issues that surround how coordination arrangements shall be implemented.
- (3) Exportability clause: This process cannot be properly undertaken without the assistance of agreed-upon financial institutions. This means that the agreement has to make stipulations regarding which financial institutions will function as intermediaries. There have to be provisions relating to the types of benefits to be exported. This will further include the procedure of claiming or making a submission for claims. Moreover, the choice of currency is also important when dealing with portable benefits, this, therefore, means that the agreement has to stipulate and determine the currency to be used.
- (4) Totalisation of creditable periods or Maintenance of acquired rights: There has to be totalisation of all creditable periods by migrant workers who have worked in one or more members of the agreement. This said clause will deal with the totalisation of insurance contribution periods. This makes it easy for migrant workers to keep track of their social security contributions and benefits. It, however, important to note that this will only be possible through coordination within the region which can only be done via the establishment of a multilateral social security agreement entered into by different countries within the SADC. This agreement can start with selected countries for the purposes of this study.

An agreement aligned with this specimen will not do away with the issues surrounding the portability of social security benefits all at once. However, the progressive realisation of the above principles will certainly advance this issue. Bilateral agreements by themselves will not reach the desired outcome. This, therefore, means that the region has to establish multilateral social security

agreements for purposes of achieving coordination in the SADC region, among others. The next part of the study discusses recommendations regarding the establishment of a SADC social security multilateral framework.

6.4.5 Social Security Multilateral Framework

Multilateral agreements are advantageous in the sense that they can be used to address the limitations of bilateral agreements by establishing common standards that may be used to administer and implement bilateral agreements. These multilateral agreements further aid in the process of regional integration especially in instances of integrating principles such as equality of treatment.²¹³⁵ Multilateral agreements can create a "standardised framework for more detailed, context-sensitive, and country-specific bilateral agreements."²¹³⁶ The premise clearly points out that adopting multilateral agreements may help guide countries in the said region or countries party to the multilateral agreement with adopting their own bilateral social security agreements. Multilateral agreements are beneficial in the sense that they establish a common standard and regulations and therefore result in the prohibition of discrimination among migrants as a whole who would in other circumstances be provided with different rights under differing social security agreements.²¹³⁷ The point here is that multilateral agreements are important as they undergird bilateral agreements which should, on the other hand, contain country-specific arrangements.²¹³⁸ There is, therefore, a need for implementation of a multilateral agreement or framework in the SADC which specifically deals with the social security of migrant workers and access thereto. The said multilateral agreement and framework will have to speak to issues such as the transfer of remittances.²¹³⁹ This means that there have to be provisions in the agreement that speak to how remittances would be facilitated, to deal with issues such as double taxation.

²¹³⁵ Olivier & Govindjee 2016 *Institutions and Economics* 30.

²¹³⁶ Olivier & Govindjee 2016 *Institutions and Economics* 31.

²¹³⁷ Beremauro, Deacon & Olivier 2015 <https://www.miworc.org>. P 74.

²¹³⁸ Beremauro, Deacon & Olivier 2015 <https://www.miworc.org>.

²¹³⁹ Beremauro, Deacon & Olivier 2015 <https://www.miworc.org>.

The agreement will deal with the conclusion of social security bilateral agreements for purposes of migrant workers and should specifically deal with issues surrounding portability of social security agreements, access to social security agreements by migrant workers and their families and social security contributions. The multilateral agreements and general framework should further make provisions for occupational health and safety in the mining sector by developing policies that deal with migrant workers who are employed specifically in poor working conditions.²¹⁴⁰ The Multilateral frameworks will also have to establish a database for migrant workers or the Labour Market Information System at the regional level which would eventually be used as a skeleton in the country level for purposes of information and data collections and analysis.²¹⁴¹ Multilateral frameworks and agreements will help guide member states in the SADC region with the development of labour migration policies and regulations that are associated with the SADC policies.²¹⁴²

There is, therefore, a need to revisit the *SADC Treaty* which as a starting point does not prohibit discrimination on the grounds of nationality. According to Article 6(2), discrimination is prohibited, but there is no mention of such prohibition on the ground of nationality.²¹⁴³ There is also a need to adopt the *Draft Policy Framework on Portability of Accrued Social Security Benefits within the Region* which will act as a multilateral agreement in the region to act as an instrument of coordination. A single SADC social security multilateral framework will not change and replace state parties' social security framework but instead, an agreement on the principles to be applicable will help attain coordination in the region and therefore help countries deal with issues that need resolving such as portability of social security benefits.²¹⁴⁴ This *Draft Policy Framework on Portability of Accrued*

²¹⁴⁰ Beremauro, Deacon & Olivier 2015 <https://www.miworc.org>.

²¹⁴¹ Beremauro, Deacon & Olivier 2015 <https://www.miworc.org>.

²¹⁴² Beremauro, Deacon & Olivier 2015 <https://www.miworc.org>.

²¹⁴³ Olivier 2014 *Kluwer Law International* 86. Mpedi and Nyenti *Revised Portability* 119.

²¹⁴⁴ Nyenti and Mpedi draw reference from European Union Rules which specifically point out that when it comes to coordination of regulations, policies of each country will remain unchanged while they will instead be an agreement regarding which rules to implement or rather more specifically coordinate in order to attain free movement in the region. See Mpedi and Nyenti

Social Security Benefits within the Region will only be effective if it strives to attain coordination of national social security regulations which for purposes of this study will be social security regulations of Swaziland, Lesotho, and South Africa. When the study was initially undertaken the idea was that there was a need to attain both harmonisation and coordination, but since harmonisation will entail changing rules of individual countries, such will not work or would rather take a long time and therefore leave the current issues and challenges facing migrant workers unresolved.²¹⁴⁵ It is therefore important to come up with a framework that will aid and advance the process of establishing social security multilateral agreements and further effect the process of portability of social security benefits.

6.4.5.1 Recommended framework for portability of social security benefits in the SADC

(a) The first step should be the establishment of binding agreements intended to coordinate schemes within the region. This should be done by producing measures and mechanisms intended to coordinate schemes within the member states before coordinating schemes within the countries in the region. Coordination of schemes between member states would have to start with two or three member states before moving on to more states within the region. Governments would have to get involved in these processes by setting up binding agreements between themselves.

(b) Enhancing already existing bilateral social security agreements

Lesotho, Swaziland, and South Africa already have bilateral agreements in place. Nonetheless, the said agreements may be improved by inserting a few clauses that will advance access and portability of social security benefits. These insertions will have to entail obligatory provisions of social security and portability thereof.²¹⁴⁶

Revised Portability 116. See also European Commission 2015
<http://ec.europa.eu/social/main.jsp?langId=en&catId=850>.

²¹⁴⁵ Harmonisation entails replacing different definitions and rules of each member state with similar definitions and rules.

²¹⁴⁶ Chapter 6, par 6.4.4.2 for provisions of an ideal bilateral agreement.

(c) Establishment of a single financial institution intended to aid portability of social security benefits

If effective coordination is to exist, then regulations governing regional central banks have to be harmonised. This would mean that there at least be a common currency throughout the region to be used in the portability of social security-related matters. This can only be done through an establishment of a central clearing institution that would only operate if countries in the SADC region produce common measures of transmitting benefits across borders.

(d) An establishment of a common framework for SADC member states

The *Draft Policy Framework on Portability of Accrued Social Security Benefits within the Region* in section 5 outlines social security schemes which it deems as a priority in the SADC.²¹⁴⁷ For a proper framework to be established, all countries in the region and establishment of a common framework by all SADC member states is necessary to aid this process of portability of social security benefits. In order to produce an effective portability framework, member states have to target the said schemes as stipulated in the Framework. Lesotho and Swaziland have fairly under-developed social insurance systems. Including these benefits in their social security systems together with portability provisions and principles will aid this process.

(e) A review of social security laws and adoption of core ILO standards on social security

A review of domestic laws, especially in instances where such are hindrance to portability of social security benefits is also necessary. For instance, Lesotho has what is referred to as a *Deferred Payment Act* which makes compulsory provision for migrant workers to remit a portion of their salaries to a Deferred Pay Scheme. Swaziland on the other hand only makes provision for voluntary social insurance similar to the Deferred Pay Scheme. This shows that there are clear disparities in

²¹⁴⁷ See chapter 2, par 2.5.4 for coverage and discussions of the Draft Policy Framework on Portability of Accrued Social Security Benefits within the Region.

migrant-sending countries social security schemes. To solve issues like this, SADC member states have to embark on this review by seeking to guide from ILO standards on social security. This can only be done through the ratification and implementation of the said agreements.²¹⁴⁸ South Africa will only ratify and implement the said standards once there is clear synergy and coordination within social security schemes in the region. Best practices from around the world should and could also be considered in this review of laws. The SADC region should also recommend and produce timeframes for reviewing laws and amending such for purposes of refraining from delaying the implementation of portability systems.

6.4.5.2 Adjudication of social security in the SADC

The SADC multilateral framework should also strive to attain adjudication mechanisms that would eventually deal with compliance with the multilateral agreement. It is important to point out that SADC instruments portray very weak adjudicative mechanisms at the regional level.²¹⁴⁹ It is the *Code of Social Security in the SADC* which seems to envision the establishment of an adjudicative mechanism.²¹⁵⁰ According to the *Code of Social Security in the SADC*, Article 21.2(b) thereof, members of the SADC should make an effort to establish proper administrative and regulatory frameworks for purposes of ensuring delivery of social security benefits through access to independent adjudication institutions empowered to resolve social security disputes.²¹⁵¹ It is further important to note that the *SADC Treaty* also referred to the establishment of a tribunal of social security which is unfortunately suspended.²¹⁵² The other problem that adjudication in the SADC region was faced with is the fact that the SADC tribunal was not

²¹⁴⁸ See chapter 2, par 2.2 for ILO social security standards ratified by member states relevant to this study.

²¹⁴⁹ Chapter 2, par 2.7 for discussions on challenges impacting on international and regional standards on social security adjudication.

²¹⁵⁰ See chapter 2, par 2.7. for the Code of Social Security in the SADC and its envisioning of adjudicative mechanisms.

²¹⁵¹ Chapter 2, par 2.7 for the Code of Social Security in the SADC and its envisioning of adjudicative mechanisms.

²¹⁵² Chapter 2, par 2.7. for discussions of the SADC Treaty and how refers to the establishment of a social security Tribunal.

independent of SADC member states.²¹⁵³ There is a need for a “supra-natural authority” which would deal with enforcement, standard-setting, and effective establishment of appropriate social security principles.²¹⁵⁴ This “supra-natural authority” should be established and be made available to nationals of the region to make sure that such can get redress whenever they feel like an entity as big as a state has done them wrong.

6.4.5.2.1 An establishment of independent adjudication institution

It is recommended that Lesotho, Swaziland, and South Africa for purposes of this study establish an independent social security tribunal and social protection court. These countries need to establish the said tribunal so as to tackle issues that arise from social security funds or institutions. The aggrieved individuals should be able to have access to independent tribunals so as to review issues arising from institutions bestowed with powers to control these funds. The social protection court on the other hand will have to be specialised in a manner that will enable it to undertake appeals that emanate from this tribunal. Both the tribunal and the court should be chaired by individuals with relevant expertise, in that they should be labour and social security law experts. These experts should preferably be members of the judiciary, with powers equivalent to those of judges so as to make their decisions binding. If the said tribunal is set up across the board by different SADC member states with at least similar modes of operation, then setting up a SADC Tribunal on social security will be easier because coordination would at least be close to being attained.

The establishment of this SADC judicial institution would mean that there is a regional institution bestowed with the power to oversee matters emanating from domestic tribunals and specialised courts as suggested above. This SADC judicial institution on social security should be established in terms of the *SADC Treaty*

²¹⁵³ Chapter 2, par 2.7. for discussions of the SADC Treaty and how it refers to the establishment of a social security Tribunal.

²¹⁵⁴ Chapter 2, par 2.7 for discussions on challenges impacting on international and regional standards on social security adjudication.

and would be made available to all nationals of the region. This would mean that those who seek redress for issues they hold against the state may have a place to go to. It is also a well-known fact that portability issues entail different states, this therefore means that in instances where migrant workers cannot access their well-earned social security benefits, then such regional judicial institutions bestowed with binding powers may intervene and help those in need.

In conclusion, the assumption is that this research will make a considerable contribution in this sphere of access and the portability of social security benefits for circular migrant workers. The study was initiated to reach conclusions that would enhance the process of access and portability of social security benefits for migrant workers in the SADC region. It is therefore hoped that the implementation of the above-recommended initiatives would certainly add on to other recommendations by different scholars and certainly advance this process.

BIBLIOGRAPHY

Literature

B

Barrie 1998 *TSAR*

Barrie G "Culture of non-payment, Local Government and the mandamus: a right also has a duty" 1998 *TSAR* 593-598

Bertranou, Solorio & Van Ginneken 2004 *ISSR*

Bertranou F M, Solorio C & Van Ginneken W "The impact of tax-financed pensions on poverty reduction in Latin America: Evidence from Argentina, Brazil, Chile, Costa Rica and Uruguay" 2004 *International Social Security Review*

Biney "Understanding the problem: A South African policy reflection on the social protection of unauthorized migrant workers"

Biney E "Understanding the problem: A South African policy reflection on the social protection of unauthorised migrant workers" (Presentation delivered at SASPEN and FES International Conference on Social Protection for Migrants in the SADC: Prospects, Vulnerability and Benefits across Borders in Johannesburg, 29-30 October 2014)

Botha 1994 *SAPL*

Botha N "International Law and the South African Interim Constitution" 1994 *South African Public Law* 245-256

Bugan *A critical Evaluation of the 1964 Preferential Agreement*

Bugan N A *A critical Evaluation of the 1964 Preferential Agreement (Labour Agreement) For Mozambique mineworkers in the light of the South Africa-Mozambique DTC and the SADC Treaty* (Dissertation University of Cape Town)

C

Carney 2010 *African Journal of International Comparative Law*

Carney T "Securing Social Security for migrant workers: Orthodox Approaches or an alternative (Regional/Political) Path for Southern Africa? 2010 *African Journal of International Comparative Law* 24-45

Cosmas 2015 *JAASSH*

Cosmas G L "Labour Migration and Social Security in the selected regions (EU, CARICOM AND EAC,)" 2015 *A Review Journal Asian and African Social Science and Humanities* 43-61

Crush and Dobson "Migration governance and migrant rights in the Southern African Development Community"

Crush J and Dobson B "Migration governance and migrant rights in the Southern African Development Community (SADC) Attempts at Harmonization in Disharmonious Region" (Research Paper prepared for the Conference for Regional Governance of Migration and Socio-Political Rights: Institutions, Actors and Processes United Nations Research Institute for Social Development October 2015).

D

Daemane 2014 *JSDS*

Daemane M M M "The Critical Exposure of Lesotho's Labour Law Effectiveness: Industrial Relations' Calamity of Textile Industry Workers in Lesotho" 2014 *Journal of Social and Development Sciences* 58-72

Dekker 2010 *SA Merc LJ*

Dekker A "The social protection of non-citizen migrants in South Africa" 2010 *SA Merc LJ* 388-404

Du Plessis *Access to Work*

Du Plessis M C *Access to work for the disabled persons in South Africa: The intersections of social understanding of disability, substantive equality and access to social security* (Doctoral Thesis University of Cape Town 2015)

Du Toit (ed) 2013 *Exploited, Undervalued and Essential*

Du Toit D (ed) *Exploited, Undervalued and Essential: Domestic Workers and the Realization of their rights* (Pretoria University Law Press Johannesburg 2013)

Dugard 1996 *ASSAL*

Dugard J "Public International Law" 1996 *Annual Survey of South African Law*

Dupper 2007 *SLR*

Dupper O "Migrant workers and the right to social security: An International perspective" 2007 *Stellenbosch Law Review* 219-254

Du Plessis & Fuo 2015 *LDD*

Du Plessis A & Fuo O In the face of judicial deference: Taking the "minimum core" of socio-economic rights to the local government sphere 2015 *Law Democracy & Development* 1-28

E

Erusmas 2011 *SADCLJ*

Erusmas G Is SADC trade regime a rules-based system? 2011 *SADC Law Journal* 17-34

F

Finger 2014 *De Rebus*

Finger J "Criminal and intentional acts versus COIDA" 2014 *South African's Attorneys' Journal* 40

Fouche *Forms and Precedents*

Fouche M *Forms and Precedents Employment 3 - Social Legislation Compensation for Occupational Injuries and Diseases Act COID (3) - Compensation Preliminary Note* (Butterworths 2008)

H

Harttgen, Klasen & Woodlard 2011 *CJDS*

Harttgen I, Klasen S & Woodlard I "The history and impact of social security in South Africa: experiences and lessons" 2011 *Canadian Journal of Development Studies* 356-380

Holzman and Werding 2015 *CESifo Economic Studies*

Holzman R and Werding M "Portability of Social Benefits: Research on a Critical Topic in Globalization" *2015 CESifo Economic Studies* 335-345

I

ILO *Social Security and the Rule of Law*

ILO "Social Security and the Rule of Law General Survey concerning social security instruments in the light of the 2008 Declaration on Social Justice for a Fair Globalization" (International Labour Office, Geneva)

International Labour Organisation 2000 *ILR*

International Labour Organisation "Introduction: Social Policy and Social Protection" 2000 *International Labour Review* 113-117

K

Kapindu 2011 *AHRJ*

Kapindu R E "Social protection for Malawian migrants in Johannesburg: Access exclusion and survival strategies" 2011 *African Human Rights Journal* 93-119

Kaseke 2010 *SAGE*

Kaseke E "The role of social security in South Africa" 2010 *International Social Work* 159-168

Kaseke "Underlying drivers of migration in SADC"

Kaseke E "Underlying drivers of migration in SADC" (Unpublished Power Point Presentation delivered at the SASPEN Annual Conference for Social Security for Migrants in SADC in Johannesburg, 29-30 October 2014.)

L

Langille 2010 *CLLPJ*

Langille B "Imagining Post 'Geneva Consensus' Labor Law for Post Washington consensus' Development" 2010 *Comparative Labour Law and Policy Journal* 523-552

Le Roux and Rycroft *Reinventing Labour Law*

Le Roux Rand Rycroft A (eds) *Reinventing Labour Law. Reflections on the first 15 years of the Labour Relations Act and future challenges* (Juta Cape Town 2012)

Leibenberg "Socio-Economic Rights"

Leibenberg S Socio-Economic Rights. Adjudication under a Transformative Constitution (Juta, Claremont 2010)

Lund 2012 *ISSR*

Lund F "Work-related social protection for informal workers" 2012 *International Social Security Review* 9-30

M

Maimbo & Ratha *Remittances: Development Impact*

Maimbo S M & Ratha D (eds) *Remittances: Development Impact and Future Prospects* (The World Bank Washington 2005)

Meknassi 2006 *Comparative Labour Law and Policy Journal*

Meknassi J D "Accomplishments and challenges for partnerships in development in the transformation of social security in South Africa" 2006 *Comparative Labour Law and Policy Journal* 209-210

Mesa-lago *Ascent to Bankruptcy*

Mesa-lago C *Ascent to Bankruptcy: Financing Social Security in Latin America* (University of Pittsburgh Press)

Mhango & Dyani-Mhango 2016 *AJICL*

Mhango M & Dyani-Mhango N Reform of the death benefit provision in Lesotho's Public Sector Pension Fund: Lessons from South Africa and Swaziland 2016 *African Journal of International Comparative Law* 206

Millard 2008 *African Human Rights Journal*

Millard D "Migration and the portability of social security benefits: The position of non-citizens in the Southern African Community" 2008 *African Human Rights Law Journal* 37-59

Mosito 2013 *LLJ*

Mosito K E "The enforcement, adjudication and monitoring of social security rights in Lesotho" 2013 *Lesotho Law Journal* 65-89

Mosito 2014 *PELJ*

Mosito K E "A Panoramic view of the social security and social protection provisioning in Lesotho" 2014 *Potchefstroom Electronic Law Journal* 1572-1630

Mosito 2015 *LLJ*

Mosito K E "Optimal Financing of the proposed consolidated National Social Security Scheme for Lesotho: Options for the future" 2015 *Lesotho Law Journal* 117-160

Mosito 2016 *JLSDUP*

Mosito K E "An Evaluation of the consolidated National Social Security Bill for Lesotho" 2016 *Journal of Law, Society and Development and Unisa Press* 45-66

Mosito 2016 *LLJ*

Mosito K E "Emerging Social Security Systems in Chile, Namibia and South Africa: A quest for comparative critical bench marks for Lesotho" 2016 *Lesotho Law Journal* 1-45

Mpedi & Nyenti *Employment Injury Protection*

Mpedi L G and Nyenti M A T *Employment Injury Protection in Eastern and Southern African Countries* (Sun Press Johannesburg 2016)

Mpedi and Smit *Access to Social Security for Non-Citizens*

Mpedi L G and Smit N (eds) *Access to Social Security for Non-Citizens and the Portability of Social Benefits within the Southern African Development Community* (Sun Press Johannesburg 2011)

Mpedi *Pertinent social security issues in South Africa*

Mpedi L *Pertinent social security issues in South Africa* (Community Law Centre Cape Town 2008)

Mpedi & Nyenti *Key International, Regional and International Instruments*

Mpedi L G & Nyenti M "Key International, Regional and International Instruments" (Sun Press Stellenbosch 2015)

Msalangi Date Unknown *AJFM*

Msalangi H K M "Origins of social security in developing countries. The case of African countries" Date Unknown *African Journal Finance Management* 61-68

Mubangizi *The Protection of Human Rights in South Africa*

Mubangizi J C *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Juta Cape Town 2004)

N

Ndlovu 2001 *De Rebus*

Ndlovu T "Compensation for Occupational Injuries and Diseases Act: A case for amendment" 2001 *South African's Attorneys' Journal*

Nguluwe *Extending access to social security*

Nguluwe M S N *Extending access to social security to the informal sector in South Africa: Challenges and prospects* (Masters' Mini Dissertation North-West University)

Nyenti 2012 *Obiter*

Nyenti M "Dispute resolution in the South African social security system: the need for more appropriate approaches" 2012 *Obiter* 27-46

Nyenti 2016 *PER/PELJ*

Nyenti M "Reforming the South African Social Security Adjudication System: Innovation Experiences from South African Non-Social Security Jurisdictions" 2016 *Potchefstroom Electronic Law Journal* 6

Nyenti and Mpedi 2012 *PELJ*

Nyenti M and Mpedi L G "The Impact of SADC Protection instruments on the setting up of a Minimum Social Protection Floor in Southern African Countries" 2012 *Potchefstroom Electronic Law Journal* 244-281

Nyenti *et al* *Reforming the South African Social Security Adjudication System: The Role and Impact of International and Regional Standards*

Nyenti M *et al* *Reforming the South African Social Security Adjudication System: The Role and Impact of International and Regional Standards* in Olivier M *et al* (eds) *The Role of Standards in Labour Law and Social Security Law: International, Regional and National Perspectives* (Juta Cape Town 2013) 287-304

O

Olivier 2014 *KLI*

Olivier "Social Security Developments in the SADC Region and Future Prospects" 2014 *Kluwer Law International* 81-115

Olivier & Govindjee 2016 *Institutions and Economic*

Olivier M & Govindjee "Protecting and Integrating Migrant Workers in ASEAN Social Security Systems" 2016 *Institutions and Economics* 59-79

Olivier and Govindjee "Labour rights and social protection of migrant workers: In search of a coordinated legal response"

Olivier and Govindjee "Labour rights and social protection of migrant workers: In search of a coordinated legal response" in *Labour Law Research Network (LLRN)* 13-15 June 2014 in Barcelona 4

Olivier 2011 *SADCLJ*

Olivier M "Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework" 2011 *SADC Law Journal* 121-148

Olivier "Social protection for migrant workers from Malawi"

Olivier M "Social protection for migrant workers from Malawi" (Presentation delivered at a SASPEN-FES International Workshop on Social Protection in Malawi, 12-14 November 2013)

Olivier 2013 *IJCLLR*

Olivier M "International Labour and Social Security Standards: A Developing Country Critique" 2013 *The International Journal of Comparative Labour Law and Industrial Relations* 21-38

P

Paskalia *Free movement, social security and Gender*

Paskalia V *Free movement, social security and Gender in the Gender in the EU* (Bloomsbury Publishing PLC, Oxford United Kingdom 2007)

Peberdy 2013 *Journal Für Entwicklungspolitik*

Peberdy S 2013 "From the Past to the Present: Regulating Migration and Immigration in Post-Apartheid South Africa" *Journal Für Entwicklungspolitik* 69

Pennings *Introduction to European Social Security Law*

Pennings F *Introduction to European Social Security Law* (Intersentia Publishers, Belgium 1998)

Pieterse 2014 *PULP*

Pieterse M "Can Rights Cure? The impact of human rights litigation on South Africa's health system" 2014 *Pretoria University Law Press* 108

Plant 2003 *Fiscal Studies*

Plant R 2003 "Citizenship and Social Security" 2003 *Fiscal Studies* 153-166

Pucheta 2014 *CELLS*

Pucheta M "The Social Dimension of MERCOSUR" 2014 *Centre for European Law and Legal Studies* 1-26

R

Rambau *The Constitutional Impact of Social Security*

Rambau L P *The Constitutional Impact of Social Security of South Africa in the context of Enforcement by the courts* (Msc-Dissertation University Rand Afrikaans University)

Ramonate "Portability and Access of Social Security Benefits by Former mineworkers"

Ramonate A "Portability and Access of Social Security Benefits by Former mineworkers" *in the Regional Dialogue Report* 27-28 February 2014 Pretoria 17-18

S

Sengenberger "Globalization and Social Progress The Role and Impact of International Labour Standards"

Sengenberger W "Globalization and Social Progress The Role and Impact of International Labour Standards" *A Report Prepared for the Friedrich-Ebert-Stiftung* July 2005 Bonn 1-135

Slade *International law in the Interpretation*

Slade B V *International Law in the Interpretation of Sections 25 and 26 of the Constitution* (Master's Thesis Stellenbosch University 2018)

T

Tlhaole *Social Protection Strategies*

Tlhaole T *Social Protection Arrangements for retired mineworkers with physical disabilities in Maseru Urban, Lesotho* (Research Report presented in partial fulfilment of Master's Degree, University of Witwatersrand)

Trebilcock 2010 *CLLPJ*

Trebilcock A 2010 Putting the Record Straight about International Labor Standard Setting *Comparative Labour Law and Policy Journal* 553-570

Tshoose 2011 *PELJ*

Tshoose CI "Justice Delayed Is Justice Denied: Protecting Miners against Occupational Injuries and Diseases: Comments on Mankayi v AngloGold Ashanti Ltd 2011 32 ILJ 545 (cc)" 2011 *Potchefstroom Electronic Law Journal* 233

V

Vallentgoed *Legal protection of the rights of migrant workers*

Vallentgoed N *Legal protection of the rights of migrant workers in South Africa* (LLM-Dissertation North-West University, Potchefstroom Campus 2008).

Van der Linde *De Jure*

Van der Linde A "Immigration and the right to respect for family life in the European context: A reflection on the states' positive obligations and possible lessons for South Africa" 2015 *De Jure* 438-455

Van Ginneken 2013 *EJS*

Van Ginneken W "Social Protection for migrant workers: National and International Policy Challenges" 2013 *European Journal of social security* 214

W

Weiss 2013 *IJCLLIR*

Weiss "International Labour Standards: A Complex Public-Private Policy Mix" 2013 *International Journal of Comparative Labour Law and Industrial Relations* 7-20

White *et al* 2001 *SAMJ*

White NW, Steen TW, Trapido ASM, Davies JCA, Mabongo NM, Monare N, I. Occupational lung diseases among former goldminers in two labour sending areas. 2001 *South African Medical Journal* 599-604

Wilson "Labour in South African Gold Mines"

Wilson F *Labour in South African Gold Mines*" (Cambridge University Press, New York 1979)

Case Law

Lesotho

Chabeli v Security Lesotho LC/97/2014

Khathang Tema Baitsoholi and Another v Maseru City Council and Others 2004 AHRLR 195 (IeCA)

Labour Commissioner (obo deceased Motlalepula Charles Rakhoba's Family) v Leta Security Services 2006 LC /31/05

Labour Commissioner (obo) Pheello vs Lesotho Electricity Corporation 2010 LSLC 25

Lenka Mapiloko v Pioneer Seed (RSA) and others LAC/A/08/08)

Ramatobo v Security Lesotho LC 63/07

South Africa

Cele v South African Social Security Agency 2008 (7) BCLR 734

Chief Lesapo v North West Agricultural Bank 2000 1 SA 409 (CC)

Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck 2007 28 ILJ 307 (SCA)

Delbridge and Others v Liberty Group Ltd and Others 2011 1 BPLR 19 (PFA)

Etsebeth v Minister of Defence CASE NO: 23698/2002

Ex Parte Workmen's Compensation Commissioner: In re Manthe 1979 4 All SA 885 (E).

Gunter v Compensation Commissioner 2009 30 ILJ 2341 (O)

Human v Workmen's Compensation Commissioner 1956 (2) SA 461(T).

Innes v Johannesburg Municipality 1911 TPD 12

Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)
1999 2 SA 1 (CC)

Jooste v Score Supermarket Trading (Pty) Ltd 1998 9 BCLR 1106 (E)

Kaunda v President of the Republic of South Africa 2 2004 10 BCLR 1009 (CC)

Khosa and Others v The Minister of Social Development and Others; Mahlaule and others v The Minister of Social Development and Others 2004 (6) BCLR 569 (CC)

Mankayi v Anglogold Ashanti Limited 2011 5 BCLR 453 (CC) ; 2011 3 SA 237 (CC)
; 2011 6 BLLR 527 (CC).

MEC for Education, Western Province v Strauss 2007 SCA 155 (RSA)

Michael Freemantle v Jamaica, Communication No. 625/1995

Minerva Mills Ltd v Union of India 1980 3 SCC 625

Minister of Health v Treatment Action Campaign 2002 5 SA 721 (CC)

Nicosia v Workmen's Compensation Commissioner 1954 (3) SA 897 (T)

President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC)

Road Accident Fund v Duma and Three Related Cases (Health Professions Council of South Africa as amicus curiae) 2013 1 All SA 543 (SCA)

S v Zuma 1995 4 BCLR 40 I

SANDU v Minister of Defence 1999 20 ILJ 2265 (CC)

Soobramoney v Minister of Health (KwaZulu-Natal) 1997 12 BCLR 1696 (CC)

The Government of the Republic of South Africa and Others v Grootboom and Others 2001 1 SA 46 (CC)

The Government of the Republic of South Africa and Others v Grootboom and Others 2001 1 SA 46 (CC)

Tulip Diamonds FZE v Minister for Justice and Constitutional Development 2013 2 SACR 443 (CC)

Twalo v The Minister of Safety and Security and Another 2009 2 All SA 491 (E)

Urquhart v Compensation Commissioner 2006 27 ILJ 96 (E)

Xakaxa v Santam Insurance Co Ltd 1967 4 SA 521 (E)

Swaziland

Public Pension Fund v Mayisela and Another (53/10) 2011 SZSC 11 (31 May 2011)

Legislations

Chile

The Constitution of Chile 1980.

Lesotho

Aliens Control Act 16 of 1966

Constitution of Lesotho, 1993

Labour Code (Amendment) Act 3 of 2000

Labour Code Order 24 of 1992

Refugees Act 18 of 1983

The Consolidated National Social Security Bill 2000

Workmen's Compensation Act 13 of 1977

South Africa

Colonial Development Act of 1940

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Constitution of the Republic of South Africa, 1996

Immigration Act 13 of 2002

Medical scheme Act 131 of 1998

Mine Health and Safety Act 29 of 1996

Occupational Diseases in Mines and Works Act 78 of 1973

Occupational Health and Safety Act 85 of 1993

Pension Funds Act 24 of 1956

Public Officers Defined Contribution Pension Fund Act 8 of 2008

Road Accident Fund Act 56 of 1996

Social Assistance Act 13 of 2004 Military Pensions Act 84 of 1976

Special Pensions Act 69 of 1996

Unemployment Insurance Act 63 of 2001

Workmen's Compensation Act 13 of 1977

Swaziland

Employment Act 5 of 1980

Factories, Machinery and Construction Work Act 17 of 1972

Marriage Act of 1956

Occupational Health and Safety Act 9 of 2001

Retirement Fund Act 5 of 2005

Retirement Bill of 2011

Occupational Health and Safety Act 9 of 2001

Workmen's Compensation Act 7 of 1983

The Philippines

Social Security (Philippines) Order 2002 of 1989

International, sub-regional and regional Instruments

Abuja Treaty (1991)

Agreement on Social Security between The Kingdom of Sweden and The Republic of the Philippines 2015

ASEAN Declaration on the Protection and Promotion of the Rights of Migrants Workers (2007)

ASEAN Agreement on the Movement of Natural Persons (2012)

ASEAN Framework Agreement on Services, Bangkok (1995)

ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers (2017)

AU Migration Policy Framework (2006)

CARICOM Agreement on Social Security 1996

Charter of Civil Society for the Caribbean Community (1997)

Code on Social Security in the SADC (2008)

Convention on the Elimination of All Forms of Discrimination against Women (1979)

Convention on the Rights of the Child (1989)

Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers 1975

Convention concerning Migration for Employment 97 of 1949

Domestic Workers Convention 189 of 2011

Equality of Treatment (Social Security) Convention 118 of 1962

Equality of Treatment Convention 118 of 1962

Equality of Treatment (Accident Compensation) Convention 19 of 1925

Grand Bay Declaration and Plan of Action (1999)

Hours of Work (Industry) Convention 1 of 1919

International Convention on the Elimination of All Forms of Racial Discrimination (1969)

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)

Maintenance of Social Security Rights Convention 157 of 1982

Maintenance of Social Security Rights Recommendation 167 of 1983

MERCOSUR Multilateral Agreement on Social Security (1997)

MERCOSUR Social and Labour Declaration (1998)

Minimum Standards in Social Security Convention 102 of 1952

The International Covenant on Civil and Political Rights (1966)

The United Nations International Covenant on Economic, Social and Cultural Rights (1966)

United Nations General Comment 19 of 2008

Kigali Declaration of (2003)

Ouagadougou Declaration and Plan of Action (2004)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa CAB/LEG/66.6 (2000)

SADC Treaty (1992)

Social Policy Framework for Africa (2009)

Social Security Agreement between Zambia and Malawi (2004)

The African Charter on Human and Peoples' Rights (1981)

The Constitutive Act of the African Union (2000)

The Protocol on the Facilitation of Movement of Persons (2005)

The SADC Protocol on Employment and Labour (2013)

The SADC Charter of Fundamental Social Rights (2003)

The Code on Social Security in the SADC (2007)

Treaty of Chaguaramas (1973)

The Agreement Relating to Residence Permits for Nationals of State Parties to MERCOSUR, Bolivia and Chile MERCOSUR/CMC/DEC No 28/02

Internet Sources

A

Anon 2016 *International migration report*
<http://www.un.org/sustainabledevelopment> accessed 10 October 2016

Apon L A, Du Plessis M & Nyenti M 2007 *Access to Social Services for Non-citizens and Portability within the Southern African Development Community (SADC)*
<http://www.siteresources.worldbank.org> accessed 10 March 2016

Avato J 2008 *Portability of social security and health care benefits in the United Kingdom* <http://www.siteresources.worldbank.org> accessed 10 March 2016

B

Bailey C Date Unknown *Extending Social Security Coverage in Africa*
<http://www.ilo.org>. accessed 04 November 2016

Bamu P H 2014 *An analysis of SADC migration instruments in light of ILO and UN principles on labour migration* <https://www.ilo.org>. accessed 24 June 2017

BBC 2014 Beveridge Report <http://www.bbc.co.uk> accessed 07 October 2017

Bellano L, Dawes B, Hildebrand C & Lewis J 2013 *Swaziland: Pensions & Child-Headed Households* <https://blogs.ubc.ca> accessed 07 December 2017

Bisschoff, Botha & Rasool 2012 *The Effectiveness of South Africa's Immigration*
<http://www.fm-kp.si/en/zalzba> accessed 07 March 2015

Boden L I & Spieler E A DateUnknown *The relationship between workplace injuries and workers' compensation claims: The importance of system design*
<https://www.workerscomphub.com> Date accessed 14 October 2016

Brockerhof S 2013 "A Review of the Development of Social Security Policy in South Africa: Monitoring the Progressive Realisation of Socio Economic Rights Project" <http://www.spii.za> accessed 11 August 2016

Broomfield L date unknown *Migrant access to social security: Policies and practice in the United Kingdom National Contribution from the United Kingdom* <http://www.eu.europa.eu> accessed 22 April 2016

Burger P S & Sparreboom T DateUnknown *Migrant worker remittances in Lesotho: A review of the Deferred Pay Scheme* <http://www.ilo.org> accessed 23 Mar 2017

C

Center for Migrant Advocacy 2012 *Social Security for Overseas Filipino workers in the top ten countries of destination* <https://www.fes.org> accessed 06 Apr 2016

Chelkowska EZ, Harington J S, McGlashan N D 2014 *A century of migrant labour in the gold mines of South Africa* <https://www.saimm.co.za/Journal/v104n02p065.pdf> accessed 05 April 2017

Chikanda A, Crush J & Nalane L J 2012 *The remittances framework in Lesotho: Assessment of policies and programmes promoting the multiplier* <http://www.researchgate.net> accessed 14 November 2017

Country meters 2017 *Live Lesotho Population* <http://www.countrymeters.info/en/Lesotho> accessed 14 November 2017

Cronjé, 2016 *South Africa's new draft policy on international migration* <http://www.tralac.org> accessed 06 June 2017

Crush J & Bobson B 2015 *Migration governance and migrant rights in the Southern African Development Community* <http://www.nanseninitiative.org/wp-content> accessed 02 February 2016

Crush J and McDonald D A 2001 *Introduction to Special Issue: Evaluating South African Immigration Policy after Apartheid* <http://www.jstor.org> accessed 15 June 2016

D

Deacon B, Olivier M and Beremauro R 2015 *Social Security and Social Protection of Migrants in South Africa and SADC* <http://www.miworc.org.za> accessed 27 July 2015

Department of Home Affairs 2016 *Green Paper on International migration* <http://www.Green Paper on the International Migration.com> or <http://www.home-affairs.gov.za>. accessed 21 November 2016

Department of Labour 2014 *Compensation and other Social Protection Benefits for Workers and Ex-Workers in the Mining Sector* <https://www.health-e.org> accessed 03 December 2017

Dupper O 2014 *Coordination of Social Security Schemes. The Case of SADC* <http://www.transformeurope.eu> accessed 14 October 2015

E

Eldis 2010 *Swaziland old-age grant impact assessment* <https://www.eldis.org> accessed 06 November 2019

F

Financial Service Board 2017 *Unclaimed Benefits* <https://www.fsb.co.za> accessed 05 December 2017

Freeland N and Khondker B 2015 *Launch of Lesotho's National Social Protection Strategy* <http://www.developmentpathways.co.uk> accessed 14 August 2017

G

Goolam DateUnknown *Human Dignity_ Our Supreme Constitutional Value*
<http://www.ajol.info/index.php> accessed 31 March 2017

Government of the Kingdom of Lesotho 2015 *Lesotho National Social Protection Strategy* <http://www.socialprotection.org> accessed 14 November 2017

Grenfell Date Unknown *Social security and international migrants: global examples and lessons for Russia* <http://www.moscow.iom.int> accessed 27 May 2016

H

Harington, J.S., McGlashan, N.D. & Chelkowska, E.Z. 2004. *A century of migrant labour in the gold mines of South Africa. The Journal of The South African Institute of Mining and Metallurgy.*
<https://www.saimm.co.za/Journal/v104n02p065> accessed 21 May 2016

Haughton M O 2014 *The Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy and its Implications for Fisheries in the Region* <https://aquaticcommons.org>. accessed 16 March 2018

Hirose K, Nikac M & Tamagno E 2011 *Social Security for Migrant Workers* <http://www.ilo.org> accessed 12 October 2015

Hubbard D 1997 *Equality in an unequal world* <http://www.lac.org.za>. accessed 30 March 2017

I

ILO 2011 *Social Security for Social justice and a fair globalisation* <http://www.ilo.org> accessed 12 May 2017

K

Kingdom of Swaziland Central Statistical Office 2017 *Swaziland*
<https://www.swazi.org.sz> accessed 14 November 2017

Kitimbo A 2014 *Is time for open borders for Southern Africa?*
<http://www.thebrenthurstfoundation.org> accessed 24 Mar 2015

Kulke DateUnknown *Filling the Gap of Social Security for Migrant Workers: ILO Strategie* <http://www.social-protection.org> accessed 07 Dec 2017

M

Mabote R S 2017 *The role of non-bank financial intermediation in Lesotho: Challenges and possible remedies* <https://essa.org.za> accessed 23 Nov 2017

Meny-Gibert S & Sintha S 2016 *Where do South African's International migrants come from* <https://africacheck.org> accessed 04 November 2019

Ministry of Health DateUnknown *Ministry of Health Mission, Vission and Sector Objectives* <http://www.document.worldbank.org> accessed 03 May 2017

Moustafis G 2014 *Treating HIV and TB in Swaziland: "We didn't know what to expect"* <http://www.document.worlbank.org> accessed 10 May 2017

N

Núñez RJ 2009 *Circular Migration and Employment in Southern Africa* <http://www.tips.org.za> accessed 01 February 2016

Nyenti M & Mpelu L G 2015 *Challenges experienced by former mine workers in accessing social security benefits in SADC* <http://www.sapen.org> accessed 3 February 2016

O

Oberdabernig D 2014 *The Effects of Structural Adjustment Programs on Poverty and Income Distribution* <http://wiiw.ac.at/the-effects-of-structural-adjustment-programs> accessed 18 September 2014

Olivier M 2009 *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community* <http://www.siteresources.worldbank.org> accessed 12 May 2015

Olivier M & Van Rensburg L J 2008 *Protection and enforcement of the right to social security* <http://www.saflii.org/journals/LDD/2008/8> accessed 12 May 2015

Olivier M 2009 *Extension of Labour Law and Social Security Protection to the Informal Sector: Developing Country Perspectives, with Specific Reference to Southern Africa* <http://www.siteresources.worldbank.org> accessed 15 July 2017

P

Pauw K & Mncube L 2007 *Expanding the Social Security Net in South Africa: Opportunities, Challenges and Constraints*. <https://open.uct.ac.za>. accessed 15 November 2016

Peberdy S 2013 *From the past to the present: Regulating migration and immigration in post-apartheid South Africa* <http://www.queensu.ca/samp/transform/Peberdy.htm> accessed 21 November 2016

Peberty S Date Unknown *A Brief history of South African Migration Policy* <http://www.queensu.ca/samp/index/html> accessed 15 Aug 2016

Public Service Pension Fund 2017 *Annual Report* <http://www.pspf.co.sz> accessed 13 November 2017

R

Republic of South Africa Labour Department 2017 *Annual Report of the Compensation Fund* <https://www.labour.gov.za> accessed 30 November 2017

Ryder R 2006 *Social security for all- A human right must become reality* <https://papers.ssrn.com> accessed 13 October 2017

S

Schutte J 1977 *The Origins of WENELA and TEBA* <https://www.uj.ac.za> accessed 12 May 2015

Seepamore B 2016 *Domestic Workers and Social Security Policy: Implications for Practice* <http://www.uj.ac.za> accessed 20 June 2016

Sentinel Retirement Fund 2017 *Intergrated Annual Report* <https://www.sentinel.za.com> accessed 03 December 2017

Servais J 2014 *The New ILO Recommendation on Social Security* http://www.isssl.org/wp-content/.../2014/12/Servais_2014_Asian_Conf.pdf accessed 09 October 2015

Shale I 2019 *The law and legal research in Lesotho* <http://www.nyulawglobal.com> accessed 05 November 2019

South African History Online 2011 *Towards a People's History* <http://www.sahistory.org.za> accessed 21 November 2016

Southern AfricaTrust DateUnknown *Ensuring Access to Social Security Benefits and Workplace Place Compensation in the Mining Industry* <https://www.southernafricatrust.org> accessed 14 May 2017

Southern AfricaTrust DateUnknown *Portability of Social Security benefits in mining sector* <https://www.southernafricatrust.org> accessed 02 Sep 2016

Sowetanlive 2017 *New Social grant payment system unveiled* <http://www.sowetanlive.co.za> accessed 20 December 2017

Sunday Times 2017 *New Social Grant payment system unveiled* <http://www.timeslives.co.za> accessed 20 Dec 2017

Swaziland United Nations Development Assistant Framework 2015 *Swaziland United Nations Development Framework 2016-2020* <https://www.unicef.org> accessed 20 September 2016

T

Taha N, Messkoub M & Siegmann KA 2013 *How portable is social security for migrant workers? A review of the literature* <http://www.researchgate.net> accessed 13 March 2016

TEBA 2015 *TEBA's Perspective on Lesotho Labour Migration* <https://www.ilo.org> accessed 23 November 2015

The World Bank 2012 *Swaziland Referrals about assessment of the Phalala and civil servants' medical schemes and options for improvement* <http://www.document.worldbank.org> accessed 04 August 2017

The World Bank 2018 *Lesotho Overview* <http://www.worldbank.org> accessed 10 April 2018

Thimothy R 2013 *Social Security for International Labour Migrants: Issues and Policy Options* <http://www.vvgnli.org> accessed 09 June 2016

Tlabela K & Wentzel M Date Unknown "Historical background to South African migration" <Http://www.hsrcpress.ac.za> accessed 29 July 2016

Triegaardt J D Date Unknown *Assessing local economic development and social welfare benefits in a global context* <http://www.dbsa.org> accessed 15 July 2017

U

UNICEF, HelpAge International & RHVP 2010 *Swaziland old-Age Grant Impact Assessment* <http://www.eldis.org/document/A62172> accessed 08 November 2017

V

Van Assen L 2012 *Claims for compensation* <http://www.wcawca.co.za> accessed 10 June 2017

Vonk D G Date Unknown *Observations on the impact of migration policies upon the position of migrants in social security law in Europe* <http://www.rug.nl/research/portal/files> accessed 21 Sep 2016

W

Weigi law and Informality Project 2014 *Towards Inclusion of South African Domestic Workers Under the Compensation for Occupational Injuries and Diseases Act* <http://www.wiego.org> accessed 24 April 2017

Wickramasekara P 2015 *Enhancing the protection of Indian migrant workers through Bilateral Agreements and Memoranda of Understanding* <http://www.ilo.org> accessed 24 November 2017

Z

Zimmermann K F 2014 *Circular migration: Why restricting labor mobility can be counter productive* [http:// wol.iza.org](http://wol.iza.org) accessed 04 Feb 2016