

**LEGAL PROTECTION OF THE RIGHTS OF
MIGRANT WORKERS IN SOUTH AFRICA**

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Acronyms/List of Abbreviations

Charter	Charter of Fundamental Social Rights
COIDA	<i>Compensation for Occupational Injuries and Diseases Act 130 of 1993</i>
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LAWSA	The Law of South Africa
SADC	Southern African Development Community
SAYIL	South African Yearbook of International Law
Stell LR	Stellenbosch Law Review
UIF	Unemployment Insurance Fund

1 Introduction

Labour migration remains a persistent phenomenon in Southern Africa whether observed from a historical point of view or in contemporary terms. The term migrant worker refers to those persons who cross state borders to come to South Africa to seek employment.¹ With the discovery of minerals in South Africa, people from neighbouring countries, such as Zimbabwe, Mozambique and Lesotho came to seek employment in South Africa. The economic situation in neighbouring countries and the high rates of unemployment as well as poverty and politically related wars are regarded as crucial reasons why foreign nationals depend on this form of employment.

The second chapter in this dissertation describes the historical background of South Africa pertaining to the immigration legislation provided for since the 1913 *Immigration Regulation Act* until the *Immigration Amendment Act* 19 of 2004 (hereafter *Immigration Amendment Act*). The 1913 *Immigration Regulation Act* as well as the 1937 *Aliens Act* are described as the foundational legislation but were however regarded as racist and emphasised control and exclusion of migrant workers. The 1937 *Aliens Act* was repealed by the *Aliens Amendment Act* in 1995.

Chapter 3 deals with the rights of the migrant worker in South Africa, referring to fundamental as well as socio-economic rights which are regulated by the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*), as well as international, regional, multilateral and bilateral agreements that have been concluded between South Africa and other countries.

Section 27(1) of the *Constitution* determines that "everyone has the right to access to social security as well as social assistance". The right of a migrant worker to gain access to social security is a problem at this stage given the fact that migrant workers are indeed excluded from most social protection legislation even though the *Constitution* determines that one should not unfairly discriminate.²

1 Mengelkoch *The right to work in SADC countries* 14.

2 Olivier, Smit & Kalula *Social Security Law* 26.

The right to social security is guaranteed to "everyone", any discrimination based on section 27(1) of the *Constitution* is regarded as unfair and therefore in conflict with the *Constitution* and is not restricted to citizens. Any limitation of this right to citizens would then have to pass the test of the general limitation clause as mentioned in section 36 of the *Constitution*. Section 36(1) of the *Constitution* provides that fundamental rights may be limited but only if this limitation is reasonable and justifiable in an open and democratic society. Section 36(2) of the *Constitution* however, provides that certain rights in the Bill of Rights may not be limited, save for the reason mentioned in subsection (1). The limitation clause provides for the way in which certain rights should be applied, as well as the way these rights may be limited.

Another important aspect that will be discussed is the concept of social security as one of the mechanisms that enable people to escape poverty. The *Constitution* may be said to view the concept of social security as an overarching concept, incorporating the notion of other forms of assistance, such as social assistance. The goal of the *Constitution*, as is highlighted in the preamble of the *Constitution*, includes the following: redressing the injustices of the past; establishing a society based on social justice; improving the quality of life; and unlocking the potential of every individual.

Chapter 4 of the dissertation describes the *Immigration Act 13 of 2002*³ (hereafter the *Immigration Act*) which contains provisions that limits the rights of migrant workers in certain instances. This limitation is contrary to international standards; it is essential that national legislation must comply with and give effect to these international instruments. It will be established in this dissertation whether or not the *Immigration Act*, complies with the provisions mentioned in the *Constitution*, as well as the regional and international standards.

The International Labour Organisation is discussed in Chapter 5 with specific reference to the international standards that should be met. This chapter aims at identifying the obligations on South Africa in terms of the *Constitution* as well as requirements of international instruments signed and ratified by South Africa. South Africa has assumed obligations under various international human rights treaties with regard to the right to

3 The *Immigration Act 13 of 2002* was published in *Government Gazette* no 23478 of 31 May 2002.

social security. The conventions that have been ratified by South Africa include the Freedom of Association and Protection of the Right to Organise Convention 87 of 1984 and the Right to Organise and Collective Bargaining Convention 98 of 1949. The Migration for Employment Convention (Revised) 97 of 1949 (hereafter Convention 97) may also be referred to as one of the migrant specific conventions. Convention 97 has, however, not been ratified by South Africa. These conventions as well as their recommendations should be implemented to apply equally to national as well as migrant workers.

In Chapter 6 the Treaty of the Southern African Development Communities (hereafter the SADC Treaty) is discussed, describing all regional instruments such as the Charter of Fundamental Social Rights as well as bilateral treaties entered into by South Africa. South Africa entered into a number of bilateral treaties with, Mozambique, Lesotho and Swaziland, to mention but a few, which set out the rights of migrant workers in the mining and farming industries. The SADC Treaty adopted in 1992 declares that each one of the member states is responsible for the implementation of programmes and policies that give effect to the treaty in their own countries by the promotion of sustainable economic growth and socio-economic development to ensure that the standard and quality of life is enhanced. In this dissertation it will be established if the *Immigration Amendment Act* 19 of 2004 complies with the regional and international standards provided *inter alia* in the *Constitution* as well as other international treaties, conventions and charters.

The research will mainly be based on a study of relevant literature including the Constitution of the Republic of South Africa, the Immigration Amendment Act, decided cases, articles in journals, text books and other relevant materials.

2 Historical Background to South African Migration

Cross-border migration is not a novel phenomenon in South Africa. Since the early 1900s, during the period when diamonds and gold were discovered, thousands of migrant workers came to South Africa.⁴ For many years, men and women left their countries of origin for other countries so that they could earn money from their labour. Various push and pull factors cause people to migrate. The migrant workers' reasons for leaving their own countries (push factors) include reasons such as their inability to support their families in their countries of origin, war and war-related reasons, discrimination on the basis of race, colour, religion, political opinion.⁵ Higher standard of living, better employment opportunities and living conditions are said to be the reasons (pull factors) for migration to South Africa.⁶

2.1 Human Rights and the Aliens Control Act of 1991

The *Aliens Control Act* 96 of 1991⁷ (hereafter *Aliens Control Act*) is regarded as the most important piece of legislation that governs immigration to South Africa.⁸ The *Aliens Control Act* did not comply with the human rights contained in the *Constitution* and international standards regarding the movement of people, and therefore various provisions were found to be contrary to the provisions of the Bill of Rights and were declared unconstitutional.⁹ These provisions were accordingly amended in 1995 by the *Aliens Control Amendment Act* of 1995. Many problems arose such as the exclusion of black immigrants who were hired under bilateral contract labour agreements, while only white people were regarded as immigrants. Sanctions imposed due to South Africa's Apartheid-related policies resulted in South Africa having been isolated from the rest of the world. Because of this, South Africa had neither the opportunity to attract international investments, nor the privilege to gain from skilled labour forces.¹⁰

4 Kok *Migration in South and southern Africa* 76.

5 Fact Sheet no 24, The Rights of Migrant Workers <http://www.unhchr.ch/html/menu6/2/fs24.htm>.

6 Dupper 2007 *Stell LR* 219.

7 *Aliens Control Act* 96 of 1991.

8 Crush & Mojapelo *Towards a New South African Immigration Policy* Migration Policy Paper No 3 8.

9 Crush & Mojapelo *Towards a New South African Immigration Policy* Migration Policy Paper No 3.

10 Crush (ed) *Beyond Control* 1998 18-19.

The *Aliens Control Act* applied from 1991 until 1994. The *Aliens Control Act* was repealed by the *Aliens Control Amendment Act* of 1995. This *Aliens Control Act* was designed to keep people out rather than encourage them to come to South Africa and was regarded as being a product of early colonialism, segregation and Apartheid.¹¹ An example that demonstrates this view is that only whites were allowed to be immigrants, exemplifying the racial connotation with reference to the Apartheid regime.¹² Section 32 of the *Aliens Control Act* provides that no employer shall employ or continue to employ any alien who is in South Africa in contravention of the provisions of the *Aliens Control Act*.¹³ Section 32 of the *Aliens Control Act* also made provision that it was an offence to carry on business with such an alien. Immigration legislation such as the *Aliens Control Act* was used to determine exactly who could become new citizens of the country. Section 39 of the *Aliens Control Act* provides that any person who is not recognised as a legal citizen of South Africa (in other words, someone who is not legally domiciled in the country and who has contravened certain provisions of the Act), were "prohibited" from entering South Africa.¹⁴

The 1913 *Immigration Regulation Act* provided for the creation of a separate Department of Immigration, as well as the institution of an immigration board. Section 4(1)(a) of the 1913 *Immigration Regulation Act* outlines the criteria for entry into and from South Africa. It also prohibits entry of "any persons or class of persons deemed to be unsuited to the requirements by the Union" from entering South Africa. Those not able to read and write any European language were also excluded. Certain exemptions to the Act, such as the retention of labour power, existed. Wives and children of men admitted as permanent residents were allowed entry. A husband however could not enter South Africa under this exemption and women married in terms of Islamic Law as well as Indian women were excluded.¹⁵ This clearly reflects discrimination on the grounds of religion and race.

11 Crush (ed) *Beyond Control* 18.

12 Crush (ed) *Beyond Control* 18.

13 S 32(1)(a) of the *Aliens Control Act* 96 of 1991.

14 S 39 of the *Aliens Control Act* of 1991.

15 Crush (ed) *Beyond Control* 21-22.

In the 1937 *Aliens Act* the word "aliens" were used to describe prohibited or unwanted immigrants. Temporary permits could be issued; the application form, however, required all applicants to disclose their race.¹⁶ The objectives behind the implementation of the immigration policy seem to have been reform and reconstruction of the way in which immigration to and from South Africa were conducted. Despite the objectives, accountability, transparency and due process were disregarded, thereby entrenching policies that were based on racial discrimination.¹⁷

The South African migrant labour system provided that no permanent rights to work or residency were to be assigned to foreign workers;¹⁸ not even in those instances where foreign workers had been working in South Africa for quite some time and had entered into a contract of employment, being two of the conditions for obtaining the right to permanent residency. On completion of the projects these migrant workers had been working on, they were compelled to return to their countries of origin.¹⁹ Temporary residents were denied employment, residence and further training in South Africa.²⁰ These migrants were entitled to those human rights, which were portable and extended beyond state boundaries, such as the right to not be discriminated against, unlike other rights such as the right to employment and the right to freedom of movement.²¹

2.2 Two Gates Policy

A dual system was the manner of control used to enable non-South Africans to obtain legal access to South Africa. The *Aliens Control Act* as well as the various bilateral labour agreements agreed to by the South African and neighbouring countries' governments, such as Botswana, Lesotho, Swaziland and Mozambique were the two gates used to obtain access into South Africa. Migrant workers who entered South Africa in terms of the *Aliens Control Act* needed skills. Entry was authorised by the issuing of a permit which allowed the person to work or search for work in South Africa. Once these migrant workers had obtained permanent residency, they became eligible

16 Crush (ed) *Beyond Control* 26-27.

17 Crush (ed) *Beyond Control* 18-19.

18 Kok *Migration in south and southern Africa* 75; s 23 of the *Aliens Control Act* 96 of 1991.

19 Kok *Migration in south and southern Africa* 76; s 23 of the *Aliens Control Act* 96 of 1991.

20 S 32(3) of the *Aliens Control Act* of 1991.

21 Crush (ed) *Beyond Control* 45.

for social protection and assistance; in other words, they were given the same benefits that South Africans were entitled to.²²

The legislation that governed immigration to South Africa made provision for bilateral labour treaties with other countries. In terms of these treaties non-South African workers could become part of the temporary employment schemes.²³ These bilateral treaties form the second "entry gate" and apply to migrants who came to South Africa on a temporary labour contract. These temporary migrant workers were not afforded the protection of social benefits but did in some instances receive private benefits from their employers.

Exemption of persons who enter South Africa for employment may be regarded as one of the main reasons why the *Aliens Control Amendment Act*²⁴ pursued the *status quo*. The conditions mentioned in this Act were that persons could be exempted to enter South Africa for employment in the following two circumstances, namely if a convention exists between South Africa's government and that of the neighbouring country; and in accordance with the Minister's approval given to the "scheme of recruitment".²⁵

The result of these exemptions were that employers, in specific circumstances, obtained the right to employ non-South African citizens under separate terms and conditions as those provided for under the *Aliens Control Amendment Act*.

New categories for temporary residence, as mentioned in the *Aliens Control Amendment Act*, provided that foreigners could apply for work permits, a visitor's permit, a temporary work permit,²⁶ a business permit, a study permit and even a work seeker's permit.²⁷ The early South African migrant labour system provided that migrant workers were only allowed to settle in South Africa on a temporary basis. The reason for this is that the government had a policy which provided that the settlement of migrant workers in urban areas should be prevented. Residential rights as seen above were another

22 www.ilo.org/public/english/region/afpro/pretoria/papers/1997/popap3/intro.html.

23 Crush (ed) *Covert Operations* 8.

24 *Aliens Control Amendment Act* 76 of 1995.

25 Crush (ed) *Covert Operations* 8.

26 S 13 of the *Aliens Control Amendment Act* 76 of 1995.

27 *Aliens Control Amendment Act* 76 of 1995.

benefit that these migrant workers could not obtain.²⁸ Another important factor that the *Aliens Control Amendment Act* provided for was that immigrants could not come to South Africa on holiday and change the purpose of the visit after their arrival to that of permanent residency. Even in the *Immigration Act* immigrants were not allowed to change the purpose of the visit after arriving in South Africa. In some instances immigrants were still gaining entry into South Africa under the guise of holiday visas and, once here, would apply for work permits. These immigrants came to South Africa under the pretext of holiday visas so that they could obtain employment. They worked for lower wages and were more likely to be employed than the local South African workforce.

Social and economic costs were externalised and the labour of migrant workers who came to South Africa to work in the mines or on farms was cheap.²⁹ Some migrant workers only entered South Africa for a brief period of time, they entered with temporary residence permits and therefore social protection should not be regarded as the responsibility of the host country.

It is obvious from the above that immigration could benefit South Africa economically, socially and even culturally. It was necessary that new immigration legislation should be promulgated to amend South Africa's immigration policy and new mechanisms for the governance of immigration should be put in place.³⁰ There was the further imperative to comply with international standards and SADC agreements.

28 Kok *Migration in South and southern Africa* 76.

29 Kok *Migration in South and southern Africa* 76.

30 Crush (ed) *Beyond Control* 34.

3 The Constitution of South Africa

Another very important aspect that should be included in this discussion is the *Constitution of the Republic of South Africa, 1996* which provides the basis of the legal framework for the protection of worker's rights. The *Constitution* is the supreme law of the country and enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom.³¹ The rights and freedoms mentioned in the Bill of Rights are extended to everyone living within the borders of South Africa, unless these rights are reserved for citizens or other classes or groups of people only. The best example here is political rights which are reserved for "every citizen".

The rights of "everyone" are entrenched in the Bill of Rights with specific reference to equality before the law,³² human dignity,³³ personal freedom and security,³⁴ privacy³⁵ and social security.³⁶ Specific rights as mentioned in the Bill of Rights are limited to South African citizens only; these include the right to vote, forming of a political party, to obtain a passport to enter into the country.³⁷

3.1 The concept of social security

In terms of Section 27 of the *Constitution* "everyone has the right to have access to health care, food, water and social security".³⁸ Section 19(2) of the *Constitution* provides that "every citizen has the right to free, fair and regular elections for any legislative body established in terms of the *Constitution*".³⁹ Where such rights are not clearly limited to citizens only or the "arrested, detained and accused persons"⁴⁰ in terms of section 35 of the *Constitution*, the rights in the Bill of Rights extend to everyone

31 S 7(1) of the *Constitution of the Republic of South Africa, 1996*. (hereinafter the 1996 Constitution).

32 S 9 of the 1996 *Constitution*.

33 S 10 of the 1996 *Constitution*.

34 S 12 of the 1996 *Constitution*.

35 S 14 of the 1996 *Constitution*.

36 S 27 of the 1996 *Constitution*.

37 As is mentioned in ss 19, 21, 22 and 25(5) of the 1996 *Constitution*.

38 S 27 of the 1996 *Constitution*.

39 S 19(2) of the 1996 *Constitution*.

40 S 35 of the 1996 *Constitution*.

within the borders of South Africa. Neither South African nor international literature provides a lucid and consistent approach as to what exactly the concept of social security entails. The right to social security is entrenched in section 27(1)(c) of the *Constitution*. South Africa is regarded to have a very broad social protection-oriented approach as to whom it includes in having the rights to social security and social assistance.⁴¹

In the ILO Convention on Social Security, social security is defined as:

...the protection which (Southern African) societies provide for their members, through a series of public measures, against economic and social distress that otherwise would be caused by stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, disability, old age and death; the provisions of medical care; and the provision of subsidies for families with children.⁴²

The right to social security is a right of admission which implicates that South Africa should not be the only and direct provider of social security in all circumstances. It is very important that favourable legislative and policy considerations should be created in order to provide social security for all individuals and groups of persons. It would seem that it could become the obligation of the destination country to provide for protection against any negative effects of social risks. It is however very important to take all necessary steps to prevent individuals from being an unnecessary obligation to a destination country. Key elements such as coverage provided to persons in order to ensure comprehensive coverage for contingencies and occurrence that have an effect on their income ability should be mentioned as a key element obtained in the right to social security.⁴³

It is very important to realise that for years now the need in South Africa for a proper concept of social security has been emphasised. As mentioned above, it is apparent

41 Olivier, Smit & Kalula *Social Security Law* 24-25.

42 Olivier, Smit & Kalula *Social Security Law* 26.

43 Olivier, Smit & Kalula *Social Security Law* 26.

that a very close relationship exists between concepts that constitute the bases of fundamental rights and the concept of social security.⁴⁴

3.2 The constitutional obligation

3.2.1 Section 27 of the Constitution

The aim of fundamental reform of South Africa's social security is to address the injustices of the past pertaining to equality and other socio-economic rights. However, questions arise about the discrepancy in the exclusion of migrant workers while it is apparent from section 27(1)(c) of the *Constitution*, as mentioned above, that "everyone" has the "right to access to social security". The fundamental rights to equality, as enshrined in the *Constitution*, jurisprudentially imply that no distinction should be made between those that have obtained the right to permanent residence and South African citizens.⁴⁵ In this regard the right to equality in terms of section 9 of the *Constitution* should be referred to and that no discrimination, directly or indirectly against any person, should be allowed to occur. When excluding non-citizens' rights to social security, it creates a constitutional concern. Two conflicting values exist and should be considered. States ensure that their citizens are provided for by maintaining an active interest in policies designed for this purpose. The second value provides that all business conduct should be according to international standards. Adherence to these standards would indeed be to the advantage of the non-citizen as well as citizens of South Africa.

The state is compelled to take the necessary and reasonable legislative measures in order to achieve progressive realisation of those rights mentioned in section 27 of the *Constitution*, while section 7(2) of the *Constitution*⁴⁶ states that all rights as mentioned in the Bill of Rights should be respected, protected, promoted and fulfilled.⁴⁷

44 Olivier, Smit & Kalula *Social Security Law* 26.

45 *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1997 12 BCLR 1655 (CC). Equality is very important in all aspects, namely when employing migrants as well as reducing unemployment; permanent residents should not be viewed any differently from South African citizens.

46 S 7(2) of the 1996 Constitution.

47 S 7 of the 1996 *Constitution*.

3.2.2 Section 26, 29 and 39 of the Constitution

As mentioned before, section 27(1)(c) of the *Constitution*, interpreted in broad terms, guarantees the right of access to social security as was found by the Constitutional Court in the *Grootboom*⁴⁸ case. The case refers to the states' obligations under section 26 of the Constitution, which gives everyone the right of access to adequate housing, and section 28(1)(c) which affords children the right to shelter. It concerns questions about the enforceability of social and economic rights. It was found that all rights under the Bill of Rights are interrelated. However, the state is not obliged to go beyond available resources or to realise the rights immediately. Nevertheless these obligations must be met by the state. Section 39(2) of the *Constitution* states that when any legislation are interpreted and customary or common law is developed, one should ensure that a court, tribunal or forum does indeed promote the spirit purported and objects provided for in the Bill of Rights.⁴⁹ Reading the above-mentioned sections in concert reinforces the assumption that these fundamental rights of access to social security are enforceable.⁵⁰

It must, however, be remembered that there are two rights that are unavailable to non-citizens, namely the right to vote and the right to engage in freedom of trade, occupation and profession.⁵¹ Non-citizens are also excluded from obtaining employment-related social security coverage, such as benefits from the Unemployment Insurance Fund.⁵²

Social security is also relevant with specific reference to the rights as mentioned in section 10 of the *Constitution*, such as the right to inherent dignity and to have this right respected and protected,⁵³ while discrimination, directly and or indirectly, are prohibited on various grounds such as race, gender, sexual orientation and religion.⁵⁴ Migrant workers are not to be unfairly discriminated against as provided for in South African labour law and other relevant equity legislation. From this it is also obvious that immigrants' human rights should be promoted. Not all social benefits are relevant to the

48 2001 1 SA 46 (CC).

49 S 39(2) of the 1996 *Constitution*.

50 Olivier, Smit & Kalula *Social Security Law* 44.

51 Crush (ed) *Immigration, Xenophobia and Human Rights in South Africa* 17.

52 Fultz & Pieris "The Social Protection of Migrant Workers in South Africa" 10.

53 S 10 of the 1996 *Constitution*.

54 S 9 of the 1996 *Constitution*.

temporary migrant workers, as mentioned above. These workers are not necessarily entitled to being granted other rights, except remuneration.⁵⁵ This includes other rights such as health, safety and compensation for injuries and occupational diseases.⁵⁶

3.2.3 Social security as referred to in the Constitution

The right to social security is regarded as being a right of admission and the state can not be deemed to be the only means depended on for granting social security to migrant workers in all given circumstances.⁵⁷ It is therefore crucial that sufficient steps and procedures are implemented to ensure that the burden and strain on the state and the community with regard to the obligation on the destination country to provide social protection to the migrant worker is not aggravated. Legislation and policies must be instituted and implemented to ensure that people who need the government's assistance in obtaining social security are provided with the necessary means to obtain this assistance through programmes run by the government. This approach provides for various problems and will be addressed by means of case law.

3.2.1.1 Case law relevant to social security rights

The following case law may be referred to as pertaining to social security. In the case of *Baloro and Others v University of Bophuthatswana and Others*⁵⁸ a distinction was made between citizens and non-citizens and it was found to be unfair discrimination in terms of the equality clause of the 1993 Constitution.⁵⁹ Although it does not deal with social security rights but it sheds light on what action may amount to discrimination against non-citizens. In this instance one may refer to section 9 of the *Constitution*, the right to equality. Section 9 of the *Constitution* provides that there should be no unfair discrimination, whether it is direct or indirect discrimination. It is then obvious that the exclusion of non-citizens from obtaining social security and/or assistance may be

55 Strydom *et al Essential Social Security Law* 300.

56 *Compensation for Occupational Injuries and Diseases Act* 130 of 1993; s 27 of the 1996 *Constitution*.

57 Olivier, Smit & Kalula *Social Security Law* 29.

58 1995 4 SA 197 (BSC) par 201. Moratorium was placed on promotions of non-national academic staff with valid employment contracts while promoting South African citizens with same valid employment contracts. This was regarded as a gross violation of s 8(2) of the Interim Constitution Act 200 of 1993 (hereafter Act 200 of 1993).

59 Act 200 of 1993.

regarded as unconstitutional. In the *Baramoto*⁶⁰ case it was found that the *Constitution* applies to all, including citizens and non-citizens. With this in mind, one could also refer to the *Johnson v Minister of Home Affairs & Another*⁶¹ where the right of non-citizens to human dignity and their constitutional right were discussed as stated in section 10 of the *Constitution*. Johnson was kept in detention in terms of the *Aliens Control Act* and his detention had violated his right to freedom and security of the person as entrenched in terms of section 11(1) of Act 200 of 1993.⁶²

A significant Constitutional Court decision can be found in the *Khosa & Others v Minister of Social Development and Others*⁶³ case. The applicants in this case were Mozambican citizens who had permanent residency in South Africa. The Court was called upon to deal with the question whether or not social assistance given to citizens could be restricted. The Court found that the right to equality had been infringed; it was both discriminatory and unfair practice where permanent residents were excluded from obtaining social assistance. The *Constitution* is regarded as not being in compliance with the objective of achieving the realisation of the right to social security. Section 25 of the *Immigration Act* provides that permanent residents in South Africa are entitled to the child support grants, care dependency grants and old age grants.⁶⁴ A permanent resident does indeed have all the rights, privileges, duties and obligations bestowed on a citizen of the country, except for those rights as ascribed to citizenship in terms of the *Constitution*.⁶⁵ But, as yet, this obligation is not complied with by South Africa with specific regards to international and bilateral agreements. One can refer to *Larbi-Odam & Others v MEC for Education (North-West Province)* where it was stated that permanent residents should not be viewed as being any different from South African citizens.⁶⁶ It is obvious that this would then imply that employment-related social security coverage should be provided to these permanent residents as well as those

60 1998 5 BCLR 562 (W) 575.

61 1997 3 BCLR 355 (C) 361.

62 1997 2 SA 432 (C) 433.

63 2004 6 BCLR 569 (CC); *Mahlaule & Another v Minister of Social Development & Others* (CCT) 12/03 and 13/3. The effect of this judgment is to ensure that the State does indeed fulfil its obligation by compelling it to ensure that everyone receives social assistance, irrespective of whether or not they are indeed citizens of South Africa.

64 S 25 of the *Immigration Act* 13 of 2002.

65 *Strydom et al Essential Social Security Law* 302.

66 S 9 of the 1996 *Constitution*.

pertaining to the *Compensation for Occupational Injuries and Diseases Act*⁶⁷ (hereafter COIDA), the Unemployment Insurance Fund (hereafter UIF) and even pension funds.⁶⁸ It should, however, be noted that it is not that easy to determine exactly who is entitled to obtain social security and related social security rights. All have to undergo the means test to determine the extent to which these non-citizens should be included for purposes of this right.⁶⁹

3.3 *International and comparative law*

The *Constitution* makes it clear why international human rights law should be taken into account when social security rights are interpreted.⁷⁰ International treaties are deemed to be one of the main aspects that should be referred to in the South African context as South Africa is party to the obligations mentioned. Provisions impacting on fundamental rights are found in section 39(1)(b) and section 233 of the *Constitution*.⁷¹ Section 39(1)(c) of the *Constitution* provides that a court, tribunal or forum may, but is not obliged to consider foreign law.⁷² Whereas section 39(1)(b) of the *Constitution* provides that a court, tribunal or forum must consider international law when interpreting the Bill of Rights. South Africa will still be held liable even when not bound by any treaty obligations as these treaties should be considered when the fundamental right to access to social security are interpreted. It is important to understand that various relevant international instruments exist, some not legally binding, but still having to be considered as relevant. These instruments are regarded as significant benchmarks in evaluating whether or not South Africa is in compliance with the relevant international standards.⁷³

In *S v Makwanyane*,⁷⁴ public international law was found to include both binding⁷⁵ and non-binding law.⁷⁶ Guidance is provided to the interpretation of provisions as

67 *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

68 Olivier, Smit & Kalula *Social Security Law* 98.

69 1997 12 BCLR 1655 (CC).

70 S 39(1)(b) of the 1996 *Constitution*.

71 S 233 of the 1996 *Constitution*.

72 S 39(1)(c) of the 1996 *Constitution*.

73 Olivier *et al Introduction to Social Security* 163-165, 179.

74 1995 3 SA 391 (CC).

75 SA has signed but not yet ratified the primary international documents regulating social rights, namely the United Nations Covenant on Economic, Social and Cultural Rights.

mentioned in the Bill of Rights, referring to the decisions of courts and tribunals. In the *Grootboom*⁷⁷ case it was found by the Constitutional Court that the fact that the courts are bound to consider international law does not make them necessarily obligated and/or bound to follow it.⁷⁸ Conversely, section 233 of the *Constitution* should also be considered as it provides 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.⁷⁹

From this extract it is apparent that a common law presumption exists, requiring legislation to be interpreted with specific reference to international law.⁸⁰ The various case laws that exist have a direct or indirect influence on the social security provided for in terms of the South African legislation, with specific reference to social security and social assistance. Therefore a distinction should be made between legal and illegal migrant workers.⁸¹ According to the *White Paper on International Migration*⁸² it is admitted that no constitutional basis exists, *in toto*, through which the application of the Bill of Rights⁸³ exclude persons currently in South Africa, on grounds relating to status. It is apparent that social security legislation still excludes most categories of employees; migrant workers especially are excluded from having access to social security rights as previously mentioned, such as exclusion from COIDA, UIF and pension funds.

The exclusion of non-citizens is therefore very real and results in the non-compliance with the constitutional obligations pertaining to social protection and equality rights in the employment sector.

76 1996 1 SA 984 (CC).

77 *S v Makwanyane* 2001 1 SA 46 (CC).

78 Olivier, Smit & Kalula *Social Security Law* 59.

79 S 233 of the 1996 *Constitution*.

80 2001 1 SA 46 (CC) 45.

81 Definition and/or distinction of legal and illegal migrant workers not relevant to the discussion of this dissertation.

82 White Paper on International Migration 31 March 1999.

83 Chapter 2 of the 1996 *Constitution*.

4 The *Immigration Act 13 of 2002*

The *Immigration Act 13 of 2002* (hereafter *Immigration Act*) provided for the regulation of admission of persons to, their residence in, and their departure from the Republic and came into effect on 7 April 2003.⁸⁴ Prior to 1994, the immigration policy or system implemented in South Africa was described as being unconstitutional because of the non-compliance with human rights and international charters on the movement of people of the freedom of movement of people.⁸⁵ The Preamble of the *Immigration Act* provides for the following objectives and aims to regulate the movement of both those who enters and leave South Africa by improving security and border management. All permits, especially temporary and permanent residence permits, are issued and should be issued as speedily as possible, ensuring that South Africa's economy has access to foreign skills. Human rights based enforcement should be ensured, the prevention of xenophobia, the complete regulation of movement of people coming into and leaving South Africa as well as persons entering South Africa in order to retire, start businesses or to live here.⁸⁶ The recognition of the fundamental rights of migrant workers is mentioned in section 2(1)(a) of the *Immigration Act* stating that "to promote a human rights based culture in both government and civil society in respect of immigration control".⁸⁷

Two types of permanent residence permits are provided for in the *Immigration Act*. Firstly, one should refer to section 20 of the *Immigration Act*⁸⁸ where, for example, the rights of a foreigner who wants to retire in South Africa are mentioned. This section also refers to persons who want to retire in South Africa and it determines that the permit authorised could exceed the three-month period usually permitted. This would only occur if such persons could provide the necessary proof that they are indeed able to provide for themselves financially.

84 Lefko-Everett & Williams *Crossings* March 2005 2.

85 Lefko-Everett & Williams *Crossings* March 2005 2.

86 Preamble to the *Immigration Act 13 of 2002*.

87 S 2(1)(a) of the *Immigration Act 13 of 2002*.

88 S 20 of the *Immigration Act 13 of 2002*.

The second type of permanent residence permit provided for is one where foreigners could, in terms of sections 25, 26 and 27 of the *Immigration Act*, apply for a permanent resident's permit,⁸⁹ the direct residence permit⁹⁰ and those grounds that exist for obtaining residency.⁹¹ In this regard one should distinguish between direct residence, as mentioned in section 26, and residence provided for on alternative grounds. Section 25 of the *Immigration Act*, provides that a permit for permanent residency may be granted when an employee was in possession of a work permit for a period of five years; has been the spouse of a citizen of South Africa or has been a permanent resident for five years; if he/she is a child of the citizen or is a permanent resident under the age of 21; and when he/she is a child of a citizen.

In terms of section 26 of the *Immigration Act*, a permanent residence permit issued on 'other grounds' refers to instances where a foreigner has a good and sound character and has received an offer for employment or has the necessary skills and qualifications and the prospect of establishing a business in South Africa to the value of R2,5 million. These are just some of the qualifications that have to be met to obtain permanent residency.

Some exceptions exist in terms of which persons may extend their stay in South Africa. An example is that a three-month permit will be renewed only once and will be made available to non-prohibited persons with either a return ticket or a valid visa. This type of permit will be made available to students, businessmen, traders, recipients of medical treatment and so forth.

Section 29 of the *Immigration Act* provides for persons who can't enter South Africa under any condition or those who may enter but may not be granted permanent residency. These prohibited persons are those with infectious diseases and those with a record of previous criminal offences.

89 S 25 of the *Immigration Act* 13 of 2002.

90 S 26 of the *Immigration Act* 13 of 2002.

91 S 27 of the *Immigration Act* 13 of 2002.

The *Immigration Act* is said to be very stringent in order to prevent people from obtaining permits easily.⁹² The impact of this would show directly in the economic growth of the country, as well as in people's skills development. In paragraph (d) of the *Immigration Amendment Act 19 of 2004*⁹³ (hereafter the *Immigration Amendment Act*) the following is mentioned to promote admittance of foreign employees, namely that economic growth is possible if one employs much needed foreign labour; investments by foreigners are facilitated, attracting scarce skills or qualified persons; skilled human resources are increased and tourism is enhanced. These could be regarded as the main objectives that could not be reached because of the lack of integration and the lack of implementation of the required mechanisms. With specific reference to contributions such as providing possible scarce skills, skilled human resources as made by foreign workers, it must be stressed that they should not have an adverse impact on existing labour standards nor affect South African workers' rights and expectations.

Immigration legislation should promote economic growth and attract labour skills to South Africa. A human rights culture of enforcement should be promoted in the execution of the prescribed objectives as mentioned in the Preamble of the *Immigration Act* as well as the objectives as set out in the SADC Treaty (as discussed in chapter 6 of the dissertation). The promotion of economic growth is emphasised throughout. The *Immigration Act* provides for the countries' economic growth being provided through the employment of needed foreign labour.⁹⁴

As previously mentioned the aim of the *Immigration Act* is to comply with all the international obligations. The South African economy would indeed thrive as a result of the migrant worker's contributions, provided these migrant workers do not negatively affect the labour market, the given labour standards and the rights as well as the expectations of South African citizens. However, the policy connection between migrant workers and the training of South African citizens must be taken into account.

The *Immigration Act* may be seen as a positive tool belonging to both social and economic policy without impacting on the rights and economic status of South African

92 Lefko-Everett & Williams *Crossings* March 2005 2.

93 *Immigration Amendment Act 19 of 2004* par (d).

94 Preamble to the *Immigration Act 13 of 2002*.

citizens. Skills are regarded as the main criterion used to determine who should be selected for immigration, based on three fundamental principles: procedures should be instituted to streamline the process consentaneous with migration of skilled persons; penalties for illegal migration should be established; and the system of men entering South Africa without their families and on fixed contracts should continue.⁹⁵

4.1 Immigration Amendment Act 19 of 2004

The *Immigration Amendment Act* provides for various amendments as made to the *Immigration Act* and came into effect in July 2005. The Preamble of the *Immigration Amendment Act* sets out the aims and objectives to ensure that South Africa complies with international obligations; that xenophobia be countered and prevented; that control be retained over foreigners in order to satisfy the security requirements; that a human rights based culture of enforcement be promoted as well as simplification of the procedures to ensure that permits applied for are issued as speedily as possible.⁹⁶

Several ways exists for foreigners to legally migrate to South Africa for the purpose of employment. Various permits are provided for, such as a general work permit,⁹⁷ a corporate work permit,⁹⁸ a quota work permit, an intra-company transfer permit and exceptional skills or qualifications permits.

Permanent residence permits are issued to people whom have had valid working permits for five years or longer or have received an offer of permanent employment. The spouse of a citizen or resident also obtain permanent residency after five years.⁹⁹

Direct residency refers to those persons who have been the holders of a work permit, in terms of the act, for five years and has proven that he or she has received an offer for permanent employment and who wants to invest in South Africa by establishing businesses. If a person wishes to retire in South Africa, financial guarantees should be provided and direct residency may then be granted.¹⁰⁰

95 Crush *South Africa: New Nation, New Migration Policy?* 17.

96 Preamble to the *Immigration Amendment Act* 19 of 2004.

97 S 21 of the *Immigration Amendment Act* 19 of 2004.

98 S 21 of the *Immigration Amendment Act* 19 of 2004.

99 S 27(b) of the *Immigration Amendment Act* 19 of 2004.

100 S 27 of the *Immigration Amendment Act* 19 of 2004.

The establishment of an Immigration Advisory Board is also provided for in the *Immigration Amendment Act*. The *Immigration Amendment Act* provides that the Board will advise the Minister with regard to immigration policies and regulations.¹⁰¹ There is however no guidelines or policy formulated in this regard.

The objectives of the *Immigration Amendment Act* are a significant improvement on the *Immigration Act* with reference to promotion of the rights based approach, promotion of economic growth and countering xenophobia. The new version of the law has indeed been better thought through and is more concise. The primary emphasis of the *Immigration Act* before amendment is said to have been to prevent illegal immigration to South Africa.¹⁰² It is however noted that the *Immigration Amendment Act* does not specifically provide the intended route to be taken pertaining to facilitation of legal immigration and also the promotion of economic growth.

101 S 6 of the *Immigration Amendment Act* 19 of 2004.

102 Williams "Immigration Act 19 of 2004: A summary and review" Jan 2007 *Crossings* 6.

5 International Labour Organisation Standards

The International Labour Organisation (hereafter ILO) was founded in 1919 the objectives being the regulation of all international concerns. The main aims of the ILO are the promotion of employment rights, encouragement of employment opportunities, and enhancement of social protection.¹⁰³ The Constitution of the ILO¹⁰⁴ (hereafter the ILO Constitution) clearly states that this intergovernmental organisation is committed to protecting and promoting human rights. It is quite clear that the primary goal of the ILO today is to "promote opportunities for women and men to obtain decent and productive work and in conditions of freedom, equity, security and human dignity".¹⁰⁵ Standard-setting are regarded as one of the various ways to promote and protect human rights,¹⁰⁶ these issues include the freedom of association,¹⁰⁷ night work,¹⁰⁸ migrant workers as well as child labour.

However, these instruments remain poorly ratified and unimplemented, although efforts are being made to promote them. Very few ILO standards can be applied to all workers without considering the nationality of such migrant workers. ILO standards may be defined as minimum standards that establish a minimum level below which these labour standards are not permitted to fall.¹⁰⁹ The objective in this regard is to give every individual country the opportunity to improve on these standards should they wish to do so.

Conventions are generally adopted by the International Labour Conference after which all member states are allowed to ratify the specific conventions. The convention which has been ratified would then become a treaty in international law if a certain number of member states have ratified the convention. One should however remember that these conventions, even if they aren't ratified still remain an international labour standard.

103 Cholewinski *Migrant workers and international human rights law* 79-81.

104 Constitution of the ILO.

105 Report by the Director General for the International Labour Conference 87th Session, 1999 (http://www.ilo.org/public/english/employment/skills/hrdr/publ/017_2.htm).

106 Leavy VA *Lessons from the experience of the International Labour Organisation* in Alston P (ed), *The United Nations and Human Rights: A Critical Appraisal* 580, 582.

107 Freedom of Association and Protection of the Right to Organise Convention 87 of 1948.

108 Night Work (Women) Convention (Revised) 89 of 1948.

109 Feys 1999 20 *ILJ* 1463.

Recommendations however are not binding as they needn't be ratified.¹¹⁰ If a convention is enforced through ratification a legal obligation will rest on the country that has ratified it. If a convention has not been ratified by a certain country this specific convention will have the same legal force as that imposed by a recommendation.

The ratification of standards provided by the ILO is crucial to the protection of migrant workers in the international context. Two legally binding instruments specifically relating to the protection of migrant workers is Convention 97 and Migrant workers (Supplementary Provisions) Convention 143 of 1975 (hereafter Convention 143).¹¹¹ However these instruments remain poorly ratified and unimplemented as prescribed, although efforts are being made to promote them. Very few ILO standards can be applied to all workers without considering the nationality of such migrant workers. ILO standards may be defined as minimum standards that establish a minimum level below which these labour standards are not permitted to fall. The objective in this regard is to give every individual country the opportunity to improve on these standards should they wish to do.

5.1 Fundamental Conventions of the ILO

Most of the member states of the ILO signed and ratified the eight core conventions, even if they haven't ratified these conventions an obligation still rests on the member state to respect, promote and realise these rights. These core conventions includes freedom of association, the right to organise and collective bargaining,¹¹² the elimination of all forms of forced and compulsory labour,¹¹³ the abolition of child labour.¹¹⁴ The ILO Conventions include the Equal Remuneration Convention,¹¹⁵ the Minimum Age Convention,¹¹⁶ the Worst Forms of Child Labour Convention,¹¹⁷ and the elimination of discrimination in respect of employment and occupation.¹¹⁸ In ratifying these core

110 Feys 1999 20 *ILJ* 1469.

111 Cholewinski *International Migration Law* 285.

112 Freedom of Association and Protection of the Right to Organise Convention 87 of 1948; Right to Organise and Collective Bargaining Convention 98 of 1949.

113 Forced Labour Convention 29 of 1930.

114 Abolition of Forced Labour Convention 105 of 1957.

115 Discrimination (Employment and Occupation) Convention 111 of 1958.

116 Equal Remuneration Convention 110 of 1951.

117 Worst Forms of Child Labour 182 of 1999.

118 Worst Forms of Child Labour 182 of 1999.

conventions, the signatories will be obligated to act according to international standards and would therefore fall under the supervisory system. An advantage that exists under the ILO standards approach is, for example, the flexibility to decide on standards that would be appropriate for regional integration.¹¹⁹ Although the application of standards may be regarded as being more flexible, these ILO standards are universal standards. Given the universality of the standards one should refer to the human rights while taking into account the diversity of countries with reference to the economy, skills, culture and political fields.¹²⁰

These are the core ILO Conventions and, in ratifying these conventions, the signatories will be obligated to act according to the international standards and would therefore fall under the supervisory system.¹²¹ Mechanisms of supervision and enforcement are therefore established if individual member states ratify a regional multilateral treaty and thus bind themselves to uphold these standards at a regional level.

An advantage that exists under the ILO standards approach is, for example, the flexibility to decide on standards that would be appropriate for regional integration. Although the application of standards may be regarded as being more flexible, these ILO standards are universal standards.¹²²

The eight fundamental conventions of the ILO are all regarded as significant in reference to the ILO Declaration on the Fundamental Principles and Rights at Work.¹²³ Even those member states that have not ratified the conventions are bound by the obligations seeing that the same legal force will apply as that imposed on a recommendation.

According to section 19(5)(d) of the ILO Constitution the Parliament of the country which has ratified any given convention will be obligated to take any such action as may be necessary to make effective the provisions of such convention.¹²⁴ Effect to this specific

119 Olivier *Social Protection in SADC* 48.

120 Cholewinski *Migrant workers and international human rights law* 81.

121 Valticos *The role of the ILO*.

122 Woolfrey 1991 12 *ILJ* 703; Fenwick, Kalula & Landau *Labour Law* 11.

123 ILO Declaration on Fundamental Principles and Rights at Work.

124 ILO Declaration on Fundamental Principles and Rights at Work par 2.

convention should then be given in both municipal law and practice according to section 19(6) of the ILO Constitution.¹²⁵

As provided in section 19(5)(b) and (e) of the ILO Constitution however the ratification of a convention and thereafter the implementation in municipal law constitute sufficient compliance.¹²⁶ The enactment in legislation should also be done in order to enforce the provisions as stated in the convention.¹²⁷

5.2 Migrant specific conventions

Two very important migrant specific conventions that had been adopted by the ILO are Convention 97 and Convention 143. Convention 97 provides that all migrant workers who are currently in a specific country, for example South Africa should not be treated less favourable than a citizen of that country should be treated. The equal treatment of the migrant worker will also refer to working conditions, social security and even trade union membership. South Africa however has not yet ratified this convention.¹²⁸

Convention 143 consists of two parts. When a state ratifies this convention it has the option of accepting either one of the parts or the whole of the convention. The definitions of the parts are that Part I deals with migration in the case of abusive circumstances while Part II deals with equality of opportunity and treatment. In terms of this convention all migrants should be treated as equals with specific reference to opportunities given in terms of employment, alternative employment, social security and cultural rights.¹²⁹ The objectives as set out in this convention are hard to comply with as it is difficult enough for member countries to provide social services for their own citizens, more so for migrant workers.¹³⁰

Member countries who ratify the convention undertake to treat migrant workers no less favourably than their own nationals, providing that the migrant workers are regarded as regular workers. This would include full social security benefits, such as equal

125 S 19(5)(d) of the ILO Constitution.

126 S 19(6) of the ILO Constitution.

127 Ss 19(5)(b) and (e) of the ILO Constitution.

128 Erasmus & Jordaan 1993/1994 19 SAYIL 65-92.

129 Cholewinski *International Migration Law* 285; Strydom *et al Essential Social Security Law* 300.

130 Strydom *et al Essential Social Security Law* 290; Cholewinski *International Migration Law* 285.

treatment to all, for example with regard to old age, unemployment and family responsibilities. The reason why South Africa has not yet ratified this convention is that it is very expensive to implement.¹³¹

5.3 Social security conventions applicable to migrants

When referring to social security, one should also mention the Social Security (Minimum Standards) Convention 102 of 1952 (hereafter Convention 102) that provides for the equality of treatment of national and non-national residents. Some of the nine branches referred to in this convention promote the basic standards that should be followed namely medical care, health advantages, maternity benefits and family benefits. Traditionally the ILO took two steps in order to achieve social security: the first was the recruitment, selection and placing or employment of migrant workers as mentioned in Convention 97; and the second, the social security and protection given to migrant workers and members of their families.¹³²

The Equality of Treatment (Accident Compensation) Convention 19 of 1925 (hereafter Convention 19), compels the country that had ratified the convention to grant equal treatment to all as regards accident compensation, whether they be nationals of the country or migrants. South Africa does indeed comply with this convention, with reference to section 60 of COIDA. If a migrant worker is found to be entitled to compensation, whether the accident happened in South Africa or another state, South Africa has the discretion to decide whether to allow the person to claim compensation in terms of the COIDA or the law of the other state.¹³³ It is therefore imperative to ensure that the principle of equality is upheld in terms of the requirements in the Constitution where it is provided that the fundamental right to equality should be enhanced and promoted. Some of the migrant workers entering South Africa are indeed willing to make the necessary contribution to the insurance schemes. It is thus difficult to justify the exclusion of migrant workers should they wish to register and contribute. The Equality of Treatment (Social Security) Convention 118 of 1962 provides that when a state wants to ratify this convention, some of the elements of social security should

131 Strydom *et al Essential Social Security Law* 290.

132 Olivier, Smit & Kalula *Social Security Law* 546.

133 Olivier, Smit & Kalula *Social Security Law* 331.

already be in place, such as disability benefits and old-age benefits. It is, however, important to note that this convention only comes into effect when another country also ratifies the convention. Both countries will then be obliged to provide equality of treatment for the other country's nationals. The Maintenance of Social Security Rights Convention 157 of 1982, states that the country's laws, where the migrant worker is employed, will apply.¹³⁴

Relatively few countries have ratified these conventions. The writer is of the opinion that the reason for this is that the flow of migrant workers is continuous and uni-directional; it therefore seems unnecessary to be bound by these conventions.

5.4 South Africa's obligations

All the conventions as mentioned above provide for the equal treatment of citizens as well as non-citizens of South Africa. The equal treatment would also ensure that all rights applicable to the non-citizens be instituted and regulated throughout.

134 Strydom *et al Essential Social Security Law* 293-294.

6 Treaty of the Southern African Development Community

A very important development is the Southern African Development Co-ordination Conference in 1980. This was succeeded by the Southern African Development Communities (hereafter SADC) in 1992. Some of the objectives of the Treaty of the Southern African Development Community (hereafter SADC Treaty) are to achieve development and economic growth, alleviate poverty, enhance the standard and quality of living of peoples in Southern Africa and to support the socially disadvantaged through regional integration. Two objectives that may be emphasised are the promotion of democratic values and the combating of HIV/AIDS.¹³⁵

It is also mentioned in the treaty that the policies that are to be developed should be aimed at eliminating all obstacles to ensure the free movement of capital and labour, services and goods and the movement of people among member states in the SADC region.¹³⁶ Appropriate institutions of the SADC provide for the co-ordination, rationalisation and harmonisation of the macro-economic and the sectoral policies and strategies, programmes and projects.¹³⁷ The member states of the SADC agreed to adhere to the following set of principles, namely

- a) sovereign equality of all Member States;
- b) solidarity, peace and security;
- c) human rights, democracy, and the rule of law;
- d) equity, balance and mutual benefit; and
- e) peaceful settlement of disputes.¹³⁸

Some areas of co-operation agreed upon pertaining to the provisions in the treaty:

- food security;
- land and agriculture;
- infrastructure and services;
- social and human development; and

135 S 5 of the SADC Treaty.

136 S 5(2)(d) of the SADC Treaty.

137 S 21 of the SADC Treaty.

138 S 4 of the SADC Treaty.

- special programs¹³⁹

In order to address issues such as the following which are prevalent in the SADC region:

- the low economic growth rate;
- unemployment and underemployment;
- social exclusion and marginalisation; and
- the social protection measures currently used.¹⁴⁰

The SADC member states all have divergent socio-political, historical and economic areas; therefore a co-ordinated social security structure should be followed in order to give effect to the principles provided for in section 4 of the SADC Treaty.¹⁴¹ The member states should act in accordance with the following principles which include human rights, democracy and the rule of the law, equity, balance and mutual benefit.

6.1 Regional Instruments

The low economic growth rate, unemployment and underemployment and the inadequacy of current labour and social protection standards and regulations are all aspects that should be taken into account with regard to SADC's regional integration agenda. Regional instruments, such as the Draft Regional Code on Social Security in the SADC as well as a Draft Protocol on the Freedom of Movement of Persons in the SADC which have been concluded in May 1998, have been instituted in order to ensure the adequate protection of social rights of people in the region.¹⁴² The SADC has also drafted various treaties and protocols that supplement or vary national labour law. Treaties entered into with Mozambique, Lesotho and Swaziland effect the migrant entering South Africa from that specific country. The Charter of Fundamental Social Rights in the SADC (hereafter the Charter) and the Code on HIV/AIDS and Employment are important instruments that deal with workers' rights.

139 S 21 of the SADC Treaty.

140 Regional Social Security: Are Innovative Developments in Southern Africa Relevant to the European context? September 2001 5.

141 S 4 of the SADC Treaty; Olivier, Smit & Kalula *Social Security Law* 664.

142 Olivier *Social Protection in SADC* 51; Mengelkoch *The right to work in SADC countries* 32.

SADC announced the Draft Protocol on the Free Movement of Persons in 1995, but it was replaced by the Draft Protocol on the Facilitation of Movement of Persons in the Southern African Development Community.¹⁴³ The main objectives as contemplated in the Protocol are to establish the right to enter member countries freely and without a visa, the right to reside in other member states and also the right to work in another member state. As a result, SADC members' nationals will have the right to accept any employment offers and obtain residence in such a member state where they are employed. They will, however, be subject to the labour laws of that specific member state.

6.1.1 Charter of Fundamental Social Rights

The objectives of the SADC Treaty, read together with the Charter can only be attained through the creation and development of social security protection measures and structures in the region.¹⁴⁴ The Charter reiterates the objectives of the SADC Treaty as well as the provisions pertaining to the social security and regulation of migrants in the workforce as well as those not currently employed.¹⁴⁵ In this regard, one could refer to the importance of achieving economic growth and development, alleviating poverty and providing support for those who are socially disadvantaged. Other conditions that should also be met are the working conditions of the migrant workers and the harmonisation of residential conditions. From this it is apparent that the Charter commits SADC member states to the principle of free movement of workers throughout the SADC region. This Charter was adopted by the SADC region in August 2003 and refers to co-ordinated efforts made by the member states in the region.

The Charter furthermore promotes the establishment and harmonisation of social security schemes; thereby providing for the social protection of workers and the unemployed.

Section 10 of the Charter stipulates that all workers in the SADC region have the right to adequate social protection and adequate social security benefits. They should also

143 S 10 of the Charter of Fundamental Social Rights.

144 S 7 of the Charter of Fundamental Social Rights.

145 Olivier & Smit *LAWSA* Vol 13 Part 2 par 128.

receive sufficient resources and social assistance if it were impossible for them to enter or re-enter the labour market.¹⁴⁶ Various other aspects that are emphasised in the Charter include the equal treatment of men and women and the protection of children and young people.¹⁴⁷ After retiring, as stipulated in the Charter, every worker must be able to enjoy a decent standard of living and obtain social assistance.¹⁴⁸

Section 11(a) of the Charter provides for minimum requirements and the harmonisation of requirements for paid maternity leave and occupational health and safety protection, as well as the improvement and harmonisation of work and living conditions.¹⁴⁹ Another very important requirement in the Charter is that member states should ratify and implement the ILO core conventions. The onus is on the national tripartite institutions and the current existing regional structures to implement the SADC Charter.

6.1.2 *Bilateral treaties*

The *Aliens Control Act* previously governed the immigration and temporary residence of migrants in South Africa. Specific exemptions were made in the South African immigration legislation with regard to clauses in the Act. Bilateral treaties were known to exist among neighbouring states and with South Africa with specific reference to mine and farm workers who entered South Africa from countries such as Mozambique,¹⁵⁰ Lesotho,¹⁵¹ and Swaziland.¹⁵² These bilateral treaties were supposed to ensure that contract migration to South Africa occurred in an orderly fashion. It should, however, be emphasised that attempts were made to modernise or abolish these treaties as they tended to be unconstitutional.

The agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal was signed in Lisbon on 13 October 1964. This treaty established that recruitment of workers could only be instituted for the mines in South Africa as affiliated to the Recruiting Organisation or Organisations as referred to

146 Ss 8(a) and (b) of the Charter of Fundamental Social Rights.

147 Ss 8(a) and (b) of the Charter of Fundamental Social Rights.

148 Fenwick, Kalula & Landau *Labour Law* 13.

149 S 11(a) of the Charter of Fundamental Social Security.

150 Treaty No 11/1964 Date of entry into force on the 1st of January 1965.

151 Treaty No 1/1973 Date of entry into force on the 24th of August 1973.

152 Treaty No 3/1986 Date of entry into force on the 22nd of August 1975.

in Section III of the treaty. Recruitment of these workers was coupled with specific conditions such as their accommodation, transport and meals. The employees to whom this treaty applied would also receive protection relating to their employment and the rights emanating from their contract of employment.¹⁵³ Article X of the treaty refers to the content of the employment contract and that the following had to be included: the identification of the employer, identification of the worker, duration of the contract and so forth. The Department of Labour in Mozambique also required that provision should be made for medical care and, in case of death that the necessary arrangements should be made by the employer who should also pay for all funeral expenses.

The agreement between the Government of the Republic of South Africa and the Government of the Republic of Lesotho was reached on 24 August 1973. This treaty stated that citizens from Lesotho who wanted to be employed in South Africa would be subject to the availability of South African labour. It was essential that such workers entering South Africa complied with South African requirements pertaining to entry, identification and documentation. Article VIII of the Treaty emphasised that all persons entering or leaving either the Republic of South Africa or the Kingdom of Lesotho had to comply with the laws and regulations governing the admission to, residence in and departure from the two respective countries.¹⁵⁴

The treaty between South Africa and the Government of Swaziland was very similar to the treaty between South Africa and Mozambique. Every person leaving the Kingdom of Swaziland for the purpose of taking up employment in terms of this Agreement had to comply with the laws and regulations governing the admission to, residence in and departure from the Republic of South Africa.¹⁵⁵

It is important to note the significance of the co-ordination of the social security system within South Africa with specific reference to increasing migration and integration requirements that have to be met.¹⁵⁶ South Africa is bound by these bilateral treaties between itself and neighbouring countries. This may have a negative effect on the

153 Treaty No 1/1973 Date of entry in force on 24 August 1973.

154 Article VIII of Treaty No 3/1986 Date of entry in force on 22 August 1975.

155 Olivier & Smit *LAWSA* Volume 13 Part 2 par 129.

156 Olivier, Smit & Kalula *Social Security Law* 575.

SADC countries' citizens as regards temporary and permanent employment in other SADC countries.¹⁵⁷

In 1995 the SADC Employment and Labour Sector (ELS) was established to facilitate co-operation and integration among the SADC member states with regard to labour and employment matters. This important instrument is charged with the task of fulfilling the SADC mission in the field of human resources management and, in particular, to promote employment and labour issues with a view to improving labour productivity.¹⁵⁸

6.1.3 Social security to citizens of SADC member states as migrants in the SADC

It would appear that the exclusion of the protection of migrant workers in the area of social protection may be regarded as one of the main reasons of social exclusion in Southern Africa.¹⁵⁹ It is apparent that the migration of people in the SADC member states is increasing, even though it is not possible to determine exactly how many people migrate into this country every day. Both the social security and social assistance systems in the SADC member states are nationally based. The exclusion of non-citizens from social security is deemed to be an obstacle in the development of social security mechanisms in the SADC region. This exclusion of non-citizens raises very serious questions in the fields of international, public and constitutional law.¹⁶⁰

6.2 Harmonisation of social security standards

The need for the harmonisation of social security systems in the SADC region is based on the realisation that social security in the member states is disparate owing to historical factors. There are also other factors, such as regional and international influences to take into account when trying to determine the exact effect on the labour market. SADC at regional level provides that economic integration occurs in this regard.

157 Olivier & Smit *LAWSA* Volume 13 Part 2 par 129.

158 Olivier, Smit & Kalula *Social Security Law* 575.

159 Woolfrey 1994 15 *ILJ* 944.

160 Fenwick & Kalula 2005 *International Journal of Comparative Labour Law and Industrial Relations* 14, 19.

The aim of the SADC region is to establish a common labour market. But will the harmonisation of the different countries' labour rights be desirable? In Southern Africa harmonisation is regarded as being based on the ILO core conventions mentioned above and the 1998 Declaration of Fundamental Principles and Rights at Work. Understandably, various arguments exist in favour of the harmonisation of labour rights in the various countries. Some of the disadvantages are that the process of integration and development is neglected in harmonising the various systems, as well as the fact that "social dumping" will be encountered if the countries reduce their level of social protection to minimise competition from any low-cost competitors.¹⁶¹ Progress has been slow in integrating and harmonising the various labour law systems.¹⁶²

6.2.1 *Aspects to consider for labour law harmonisation in South Africa*

The most important aspects that should be taken into consideration when discussing the labour law harmonisation in Southern Africa are fundamental labour rights, free movement of workers and certain basic conditions of employment, among others. There are various challenges facing the labour law system in South Africa which should also be taken into account when considering labour law harmonisation in South Africa.

Fundamental labour rights are those rights referred to in the ILO Conventions. All the core conventions have been ratified by South Africa, making them binding. As mentioned above, one should take care to act in accordance with the minimum standards set out in these conventions. On the other hand, the free movement of workers could be both an important aspect to consider as well as one of the challenges. South Africa is regarded as one of the countries attracting the most migrants as they deem South Africa to be a very sophisticated country with a diversified economy.¹⁶³ But again, the actual reasons why these people migrate to South Africa should be considered. Unemployment and governments' decrease in the investment in social security are two of the main reasons for migration. Differentials in the SADC member

161 Fenwick, Kalula & Landau *Labour Law* 22.

162 Fenwick, Kalula & Landau *Labour Law* 23.

163 Fenwick, Kalula & Landau *Labour Law* 18.

states, such as wages, standards of living and unemployment rates, as well as political upheavals are deemed to be key reasons for migration.¹⁶⁴

Labour migration is regarded as the link between these SADC countries. Migration to South Africa from other countries and inter-country migration are regarded as being the primary trend. The reason for this being that most of these SADC countries do indeed have one thing in common, colonisation and the need to exploit commodities.¹⁶⁵

When referring to the impact of HIV and AIDS, one should keep in mind that South Africa has the highest number of people living with this disease. The impact of HIV and AIDS on the labour market occurs in different ways, such as changing the composition of the labour force and the levels of skills and experience of the workforce in the region. Enterprise productivity is also affected. This pandemic reduces the state's capacity for further development.¹⁶⁶

Major reform initiatives have been instituted in South Africa. This has been done to overhaul our social protection systems with regard to marginalisation and the need to have a holistic overview in addressing poverty. All the SADC member states are aware of the significance and urgency of co-ordinating the social security system.¹⁶⁷

Various challenges exist in the region with specific reference to the reform of the labour market, promoting employment and the alleviation of poverty. Further challenges that may exist with reference to strategies of labour, government and business in Southern Africa are regional integration, globalisation and even migration.¹⁶⁸ One should, however, remember that certain factors also affect the capacity to deal effectively with these challenges. The following are regarded as some of the factors:

... different levels of development and industrialisation in member states; differences in the form and measure of influence that individual governments exert over the employment and labour sector, as well as the influence governments have over the economic market forces in individual

164 Olivier *et al* *Introduction to Social Security* 191-192.

165 Olivier *et al* *Introduction to Social Security* 191-192; *LAWSA* Vol 13(2) par 125.

166 Torres *Labour Markets in Southern Africa* 14.

167 Olivier *et al* *Introduction to Social Security* 202.

168 Committee of Inquiry into a Comprehensive System of Social Security for South Africa Draft Consolidated Report Pretoria 2002 Transforming the Present – Protecting the Future <http://www.welfare.gov.za/documents/2002/may/pdf> 151.

countries; internal strife in a number of SADC countries, such as the Democratic Republic of the Congo...¹⁶⁹

The importance of integrating these systems may be condensed in the following extract:

...Secondly, to develop a common framework and charter on social protection and to ensure a consistent approach is implemented. Thirdly, it will be necessary for South Africa as a SADC member state to engage actively in promoting the social protection dimension of SADC integration and interdependence. Fourthly, active involvement in developing acceptable baseline standards in the area of social protection for the region is required. These standards should be implemented with reference to the particular socio-economic status of each of the member countries, as suggested above. Finally, it will be necessary for South Africa to adopt measures aimed at coordinating its social security system with those of the other SADC member states. This can be done either bilaterally and / or (preferably) multilaterally.¹⁷⁰

6.3 Implementation of free movement of labour in SADC

One should refer to regional groupings of developing countries and their experiences when considering exactly how to implement free movement of labour in SADC. In this regard one should also refer to the economic and development disparities among the member states pertaining to low education standards, poverty and others. Economically, various arguments exist for and against the free movement of labour. It may be regarded as a political, yet human rights issue, pertaining to the increase of people's freedom.

Regional upliftment is most significant in establishing the social framework pertaining to the distribution of jobs, a comprehensive social security system and so forth. Labour and immigration laws should also be harmonised, a very relevant example being the SADC Charter. It is thus crucial that a comparative study of labour law should be conducted as member countries have different labour and immigration laws.

Section 2 refers to the rights that should be bestowed on citizens in the Southern African Development Communities. This would include the right to free entry into a member state for a short period without a visa, the right to reside in a member state and

169 Mengelkoch *The right to work in SADC countries* 32.

170 Mengelkoch *The right to work in SADC countries* 33.

also the right to be employed in the territory of the member state. This would be generalised by implementation, integration and the elimination of obstacles and the expansion of bilateral agreements among member states.

6.4 *Duties of South Africa as a SADC country*

The obligations bestowed upon South Africa could be said to be facilitated through the implementation of the Immigration Amendment Act and that co-ordination for social security could also be obtained through further bilateral and multilateral treaties. It would be necessary for South Africa to adopt measures in order to compare the co-ordination of social security with those of other SADC countries. A common approach should also be followed in order to implement a framework and/or charter on social protection. The member states of the SADC should also ensure that the socio-economic status of the member countries is implemented through standard setting.

It is apparent that protocols are created in order to give effect to the different aims and objectives of the SADC treaty. It should however also be noted that the level of economic integration and co-operation provided for in existing protocols and taking into account exceptions on these, the standard setting in the area of social security is not fully developed.

Possible coordination methods could include making provision for social security standards which are accepted internationally and also focusing on the human rights approaches. Values that should be included should focus on the protection of people's rights, group solidarity as well as the adoption of international minimum standards.

7 Conclusion

It is obvious that South Africa has undergone major changes since the first democratic elections in 1994. The *Constitution* came into being in 1994 its objective being to establish a non-racial, human rights-based community. The means and mechanisms for lawful entry to work in South Africa by migrants in the Southern African region are restricted and have become much more stringent since 1994. Various immigration legislation such as the *Immigration Amendment Act* sets out the aims and objectives to ensure that South Africa complies with international obligations, that xenophobia be countered and prevented, that control be retained over foreigners in order to satisfy the security requirements, a human rights based culture of enforcement be promoted as well as simplification of the procedures to ensure that permits applied for are issued as speedily as possible.¹⁷¹

As discussed in Chapter 2 the historical background of South Africa do indeed play a major role, specifically so, the 1913 *Immigration Regulations Act* and the 1937 *Aliens Act* which are regarded as being the foundational legislation for South Africa, focusing on the control and exclusion of migrant workers and discrimination with reference to different races.

The rights of “everyone” are entrenched in the Bill of Rights with specific reference to equality before the law, human dignity, personal freedom and security, privacy and social security. Specific rights however are expressly limited in the Bill of Rights to South African citizens only; these include the right to vote, to form a political party, to obtain a passport and to enter into the country. The right to social security is entrenched in section 27(1)(c) of the *Constitution*. From this section it is obvious that basic needs should be met, such as the right to have access to food, water and healthcare services, as well as the right to social security for individuals and all their dependants if they are unable to support themselves.

From the discussion in this paper, it may be assumed that social protection is a really important factor with regard to regional migration as it has a major impact on the lives of

171 Preamble to the *Immigration Amendment Act* 19 of 2004.

both South African citizens and non-citizens, particularly in respect of the benefits they receive, or do not receive. Other important factors that may be referred to are the economic effects on a country; concomitant with its enhancing the productivity and mobility of the migrant workers, as well as a government's financing the protection of the equality of both migrant workers and South African citizens.¹⁷²

The objectives of the *Immigration Amendment Act* are a significant improvement on the *Immigration Act* with reference to promotion of the rights based approach, promotion of economic growth and countering xenophobia. The new version of the law has indeed been better thought through and is a lot more concise. The primary emphasis of the previous *Immigration Act* is said to have been to prevent illegal immigration to South Africa.¹⁷³ Elaboration on the positive objectives is of great importance. It is however noted that this *Immigration Amendment Act* do not specifically provide the intended route to be taken pertaining to facilitation of legal immigration and also the promotion of economic growth.

It is acknowledged that regional and bilateral agreements are necessary to give effect and detail to principles established at international level. It is obvious that South Africa does indeed have extensive social protection in the Southern African region. As South Africa is a host country for migrants, it may be concluded that the economic benefit to our country is not that great, except for regional stability, good relations among the Southern African states and access to African skills. SADC countries' labour regulations differ with regard to coverage, content and degree of implementation. The focus should therefore be on the establishment of a policy that ensures that all relevant international law and issues, as well as the necessary implementation, are taken into account when referring to migration. It is evident that the objective of the Draft Protocol on the Facilitation on Movement of Persons is to promote interdependence while integrating SADC countries' economies, this with reference to free movement in the region, while ensuring the facilitation of residence and the establishment of any regional national in the country within a specific period.

172 www.ilo.org/public/english/region/afpro/pretoria/papers/1997/popap3/intro.htm.

173 Williams *Crossings* Jan 2007 6.

It is further clear that neither South Africa, nor SADC can unilaterally expand social security coverage to both citizens and non-citizens. The financial and economic impact would be too great; and thus, additional migration will be one of the consequences that would have to be dealt with.

Being part of the global community, South Africans should recognise and respect all international laws and standards on the issue of migration. However, increasingly more governments are recognising the need to establish and improve laws, policies, practices and administrative structures for ensuring effective migration. Throughout the integration and implementation of an immigration policy, the focus should be on the human rights of such migrant workers and that states are clearly compelled to guarantee the human rights of all those within their territory.

Despite numerous changes, it is clear that some remaining obstacles will have to be overcome, such as the equal treatment of all workers pertaining to certain rights under COIDA, UIF and obtaining a pension fund, the free movement of persons within SADC countries, whether they are South African citizens or non-South Africans, whether they are legal or illegal workers. Moreover, labour standards should be complied with; if not, penalties should be imposed on the employer rather than on the migrant worker employed illegally.¹⁷⁴ Although South Africa wants to be regarded as a progressive country and is constitutionally bound to adhere to the provisions as stipulated in the Bill of Rights one should regard the cost implications as well as whether or not the political determination exist to effect these changes necessary.

174 Tqolo & Bethlehem 1995 Vol 19 2 *SA Labour Bulletin* 86.

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