

SOCIAL INSURANCE COVERAGE FOR SADC MIGRANT WORKERS IN SOUTH AFRICA: A REGIONAL AND INTERNATIONAL FRAMEWORK COMPLIANCE ANALYSIS*

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SUMMARY

South Africa is a migrant destination country, attracting migrant workers from SADC countries and other regions. SADC migrant workers are vulnerable to many social security risks and need deliberate social security protection through legislation and practice. The Constitution of the Republic of South Africa, 1996 enshrines the right to social security and extends it to "everyone". This article singles out social insurance as one of the pillars of social security and examines the legislation enabling this right. It also discusses supra-national instruments that promote access to this right and evaluates compliance with relevant legislation and implementation. It posits that South Africa needs to adopt relevant and key international instruments, and to comply with the current ones. This is aimed at achieving universal access to social insurance benefits for those who are entitled, thereby progressively realising this right as envisaged in the Constitution.

1 INTRODUCTION

Labour migration is an ever-growing global phenomenon. It is estimated that in 2020 there were more than 258 million people living in a foreign country, mostly in pursuit of work and better living standards.¹ This phenomenon is prevalent in Southern Africa with South Africa regarded as the traditional migrant-receiving country and a regional leader in the economy.² Migrant workers who choose South Africa as their destination become part of the

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¹ International Labour Organisation "Social Protection for Migrant Workers" (2021) <https://www.ilo.org/global/topics/labour-migration/policy-areas/social-protection/lang--en/index.htm> (accessed 2021-05-31).

² Crush (ed) "Migration, Remittances and Development in Lesotho" 2010 52 *African Books* 22–23. This work shows that a substantial number of South African mineworkers are from Lesotho. Van Eck and Snyman "Social Protection Afforded to Irregular Migrant Workers: Thoughts on International Norms, the Southern African Development Community, Botswana and South Africa" 2015 *Journal of African Law* 1–2.

most vulnerable groups in the labour and social security landscape insofar as asserting and exercising their rights is concerned. Their vulnerability is exacerbated by their lack of political representation and of adequate legislative protection. In most of the Southern African Development Community (SADC) countries, a person's nationality and immigration status play an important role in determining that person's access to social security.³ Almost all social assistance benefits are dependent on the citizenship and immigration status of the person. Access to social insurance benefits on the other hand is not necessarily dependent on these factors since social insurance schemes are mostly employment-based and contributory in nature. This means that South African migrant workers who are able to pay contributions to these schemes can have access to benefits with relative ease if they remain in the country after their employment terminates.⁴ This may not be the case should they leave the country. The International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families⁵ (ICRMW) defines a migrant worker as "a person, who is to be engaged, is engaged or has been engaged in a remunerated activity in a State in which he or she is not a national".⁶ Social insurance refers to public schemes created to achieve income maintenance or replacement by providing earning-related benefits,⁷ and this is the context in which the term is used in this work.

South Africa's public social insurance system is created through various specialised pieces of legislation and this article deals with the role each plays in social insurance coverage for migrant workers. Each social risk (such as unemployment and illness) is covered under its own specific piece of legislation. This article focuses only on social risks covered under compulsory public schemes; therefore, retirement and health care are only mentioned to provide a complete overview of social insurance as they are covered through voluntary private retirement funds and medical schemes respectively.

The purpose of this article is to lay out the legal framework for the provision of access to public social insurance for migrant workers from the SADC region in South Africa. It does this by examining legislation, regional and international instruments pertinent to the issue. Moreover, it evaluates South Africa's compliance with these regional and international standards and puts forward a few recommendations.

³ Mpedi and Smit (eds) *Access to Social Services for Non-Citizens and the Portability of Social Benefits Within the Southern African Development Community* (2011) 6.

⁴ This is subject to exceptions (Unemployment Insurance Fund is a case in point).

⁵ A/RES/45/158 (1990), Adopted: 18/12/1990; EIF: 01/07/2003.

⁶ Art 2 of ICRMW.

⁷ Smit and Mpedi "Social Protection for Developing Countries: Can Social Insurance Be More Relevant for Those Working in the Informal Economy" 2010 14 *Law Democracy & Development* 3.

2 THE RIGHT TO SOCIAL SECURITY

Social security is a recognised human right in South Africa, SADC and internationally.⁸ Section 27(1)(c) of the Constitution of the Republic of South Africa, 1996 (the Constitution) gives everyone the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Social security is an umbrella concept that encompasses, among other measures, social assistance and social insurance; this discussion focuses on the latter. On a number of occasions, the Constitutional Court has considered the rights enshrined in section 27 and has developed a body of jurisprudence that gives meaning and content to these rights.⁹ The right to social security therefore includes a right to social insurance as its first leg. Beneficiaries of social insurance have a subjective entitlement to the benefits based on their contribution.¹⁰ It is submitted that the use of the word "including" in section 27(1)(c) denotes the precedence of social insurance over social assistance. Social assistance is necessary only for those who are unable to support themselves.¹¹ Smit and Mpeli describe social insurance as public schemes designed to achieve income maintenance or income replacement by providing earnings-related benefits.¹² The court has said that the right to social security creates a positive duty on the State to put in place reasonable measures towards progressive realisation of access.¹³ The court has further held that this does not mean that everything should be realised at the same time and that a standard of reasonableness will be employed to assess the performance on the part of the State.¹⁴ This assessment takes into consideration the reasonableness of the government's programme given the social, economic and historical context of our society and the capacity of government institutions to implement that programme.¹⁵ Having established that we are dealing with a right enshrined in the Bill of Rights, the pieces of legislation giving particularity to this right are outlined below.¹⁶

⁸ Reynaud "The Right to Social Security: Current Challenges in International Perspective" in Riedel (ed) *Social Security as a Human Right* (2007) 1. See Mpeli and Smit *Access to Social Services for Non-Citizens* 33 showing that the Constitution of Zambia makes provision for the right to social security in section 7. An indirect protection of this right can be found in section 11 of the 1998 Tanzanian Constitution. See also the SADC Code on Social Security of 2007, Art 4(1).

⁹ *Soobramoney v Minister of Health, KwaZulu Natal* 1997 (12) BCLR 1696 (CC); *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); *Minister of Health v Treatment Action Campaign* 2002 (1) BCLR 1033 (CC).

¹⁰ Van Langendonck (ed) "The Meaning of the Right to Social Security" in *The Right to Social Security* (2007) 6.

¹¹ *Ibid.*

¹² Smit and Mpeli 2010 *Law Democracy & Development* 3. See also Tshoose *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life of Poor People in South Africa* (unpublished LLD thesis, University of South Africa) 2016 25–26 where it is set out that social insurance protects income earners and their families against a reduction or loss of income as a result of exposure to risk.

¹³ *Government of the Republic of South Africa v Grootboom* *supra* par 45.

¹⁴ *Soobramoney v Minister of Health, KwaZulu Natal* *supra* par 53.

¹⁵ *Ibid.*

¹⁶ See Liebenberg "The Judicial Enforcement of Social Security Rights in South Africa: Enhancing Accountability for the Basic Needs of the Poor" in Riedel (ed) *Social Security as*

3 SOCIAL INSURANCE LEGISLATIVE FRAMEWORK

3 1 Unemployment Insurance Act 63 of 2001 (UIA)

The UIA was enacted to establish the Unemployment Insurance Fund to which employees and employers must contribute¹⁷ and to secure income protection in cases of temporary unemployment.¹⁸ Participation in this scheme is compulsory unless specifically excluded in terms of section 3, which is briefly ventilated below. The Act makes provision for five contingencies – namely unemployment, illness, maternity or adoption, and dependant's benefit.¹⁹

All employees who are regarded as "contributors" in terms of section 1 of the Act are eligible for unemployment benefits. However, section 3(1)(d) provides that migrant workers who have to leave the Republic upon termination of their employment do not qualify as "contributors" as defined in section 1 of the Act. This means that migrant workers are not covered for the contingencies listed in section 12 of the Act.²⁰ However, migrants with permanent residence status are entitled to benefits under the Act.²¹ This is simply because these migrants are not required to leave the Republic even after the termination of their employment.

Prospective beneficiaries can access unemployment insurance benefits by visiting any Department of Labour's Labour Centre or its provincial offices.²² Section 17(2) of the Act provides that an application must be made within six months of the termination of the contract of employment. The Commissioner has the discretion to accept an application made after this period if a just cause is shown.²³ All necessary documentation must accompany the application when lodged.²⁴

It is submitted that the exclusion created by section 3(1)(d) of the UIA should be challenged in light of the provisions of section 27(1)(c) of the Constitution, which affords the right to have access to social security to everyone, and of section 9 of the Constitution, which guarantees everyone the right to equality before the law and the right to equal protection and

a Human Right: Drafting a General Comment on Article 9 ICESCR – Some Challenges (2006) 72.

¹⁷ Except if specifically excluded by s 3 of the UIA.

¹⁸ S 2 read with s 4 of the UIA.

¹⁹ See Industrial Health Resource Group "Compensation and Other Social Protection Benefits for Workers and Ex-Workers in the Mining Sector" (2014) <http://www.health-e.org.za/wp-content/uploads/2014/04/South-Africa-compensation-and-other-benefits-brochure.pdf> (accessed 2021-03-03) 6.

²⁰ The contingencies in terms of s 12(1)(a)–(e) are unemployment, illness, maternity, adoption and death.

²¹ Meyer "Migrant Workers and Occupational Health and Safety Protection in South Africa" 2009 21 *SA Merc LJ* 838.

²² Industrial Health Resource Group <http://www.health-e.org.za/wp-content/uploads/2014/04/South-Africa-compensation-and-other-benefits-brochure.pdf> 6.

²³ S 17(2) of the UIA.

²⁴ Department of Labour "How to Claim UIF Unemployment Benefits" (2008) <http://www.labour.gov.za/DOL/legislation/acts/how-tos/unemployment-insurance-fund-uif/how--to-claim-uif-unemployment-benefits> (accessed 2021-03-02).

benefit of the law.²⁵ It is submitted that section 3(1)(d) deprives migrant workers (at least those without permanent residence) of the protection and benefit of the law relating to unemployment insurance.

The Act differentiates between different categories of fixed-term contract worker on the ground of citizenship.²⁶ Olivier points out this glaring inconsistency in the Act where fixed-term contract employees who are South African citizens are covered by this scheme²⁷ while migrants employed on fixed-term contract are not.²⁸ This amounts to discrimination based on citizenship.²⁹

3 2 Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)

COIDA was enacted to provide for compensation for disablement caused by occupational injuries sustained or diseases contracted by employees in the course of their employment, or for death resulting from such injuries or diseases, and to provide for matters connected thereto.³⁰

At common law, every employee had a right to a safe working environment.³¹ This entailed that an employee who had sustained an injury or contracted a disease at work was able to lodge a delictual claim against their employer. COIDA was introduced to provide for a no-fault compensation claim against the Fund³² rather than the employer, as the common-law protection proved to be cumbersome for affected employees.³³ The civil claim that employees had against an employer is therefore replaced by an insurance claim in terms of COIDA.³⁴

Section 15(1) of the Act establishes the Compensation Fund to which every registered employer must contribute.³⁵ Contributions are calculated on industry-based risk assessments.³⁶

²⁵ Dupper, Olivier and Govindjee "Extending Coverage of the Unemployment Insurance System in South Africa" 2010 3 *Stell LR* 438.

²⁶ Dupper *et al* 2010 *Stell LR* 456.

²⁷ Olivier *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)* World Bank Social Protection Discussion Paper No. 0908 (2009) 49. See also s 16(1)(a)(i) of the UIA.

²⁸ S 3(1)(d) of the UIA.

²⁹ Dupper *et al* 2010 *Stell LR* 456.

³⁰ Preamble to COIDA.

³¹ Myburgh, Smit and Van der Nest "Social Security Aspects of Accident Compensation: COIDA and RAF as examples" 2000 4 *Law Democracy & Development* 44.

³² Nyenti, Du Plessis and Apon "Access to Social Services for Non-Citizen and the Portability of Social Benefits Within the Southern African Development Community: South Africa Country Report" (2007) http://siteresources.worldbank.org/INTLM/Resources/390041-1244141510600/Nyenti_Plessis_Apon-South_Africa-2007.pdf (accessed 2021-02-15) 20.

³³ Employees had to establish some form of fault.

³⁴ S 35(1) of the COIDA. See *Mankanyi v Anglogold Ashanti* 2011 32 *ILJ* 545 (CC) 57; *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) 14; *MEC for Education v Strauss* [2007] SCA 155 (RSA) 12.

³⁵ S 15(2)(b) of the Compensation for Occupational Injuries and Diseases Act.

³⁶ Nyenti *et al* http://siteresources.worldbank.org/INTLM/Resources/390041-1244141510600/Nyenti_Plessis_Apon-South_Africa-2007.pdf 19.

The Act defines an employee as a person who has entered into or works under a contract of service or of apprenticeship/learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done or is in cash or in kind.³⁷

It is clear from this definition that citizenship or immigration status is not a determinant factor for insurance coverage. It is also clear that even though the Act has numerous provisions on employees who are excluded from coverage, such exclusions have nothing to do with the employees' nationality or status in the Republic.³⁸ This means that migrant workers are also covered for occupational injuries and diseases under the Act.³⁹ Compensation payable is paid to a worker's dependants if he or she dies from the occupational injury or disease. The benefits offered are payable to employees who suffer temporary disablement, employees who suffer permanent disablement, and dependants of employees who die as a result of an occupational injury or disease.⁴⁰

The Act makes provision for a range of benefits payable under different circumstances. A worker who suffers permanent disablement as envisaged in section 49 will be entitled to a monthly pension that is payable until he or she dies.⁴¹ Section 52 makes provision for the payment of a lump sum instead of a monthly pension, upon application by the pensioner, subject to the pension not exceeding a certain prescribed amount. Medical expenses incurred by the worker as a result of an accident or disease are also covered for up to two years.⁴² Another form of rehabilitative benefit is created for a sick or injured worker who needs constant help from another person in order to perform the essential activities of life. This benefit is available in addition to any other benefit received in terms of the Act.⁴³

If a migrant worker to whom compensation is due, or the worker's dependants where he or she is deceased, is outside the Republic for a period of more than six months, he or she may be awarded a lump sum and his or her pension be deemed to have expired.⁴⁴ The administrative processes involved in claiming this compensation are more cumbersome for the migrant worker or his or her dependants once they leave the country.⁴⁵ In some instances, the applicants are even advised to approach SADC

³⁷ S 1 of COIDA.

³⁸ S 1(xix)(d) of COIDA. In terms of the definition of employee in the Act, the following are also included and therefore covered by the Act: Casual workers, seasonal workers, temporary workers, workers employed by labour brokers, and apprentices and learners.

³⁹ Nyenti *et al* http://siteresources.worldbank.org/INTLM/Resources/390041-1244141510600/Nyenti_Plessis_Apon-South_Africa-2007.pdf 20.

⁴⁰ Myburgh *et al* 2000 *Law Democracy & Development* 46.

⁴¹ S 49(4) of COIDA.

⁴² S 73(1) of COIDA. See also Myburgh *et al* 2000 *Law Democracy & Development* 51. In terms of s 73(2) of COIDA, the Director-General may, if he or she is of the view that continued medical treatment will reduce the disablement from which the employee is suffering, order that medical expenses be covered beyond this period or direct the employer or mutual association concerned to pay these expenses.

⁴³ S 28 of COIDA.

⁴⁴ S 60 of COIDA.

⁴⁵ Rothgiesser "Social Insecurity" (2008-09-25) *Mail and Guardian* <http://mg.co.za/article/2008-09-25-social-insecurity> (accessed 2021-01-15).

consulates for assistance in establishing contact with the Compensation Fund.⁴⁶ Section 94 of COIDA empowers the Minister to issue a notice that puts into effect an agreement (bilateral agreement) concluded with another state to make provision for reciprocity in issues relating to compensation for occupational injuries and diseases. This provision makes it possible for a former migrant worker to receive his or her benefits in his or her home country.⁴⁷ The potential benefits of this provision are obvious, but it is unfortunate that authorities have made little or no use of this provision.⁴⁸ Maximum use of this provision by the Minister coupled with relevant and updated bilateral agreements can ensure that migrant workers receive their benefits wherever they are in the region.

Injuries in the mining and construction sectors are covered by the Rand Mutual Assurance Company Limited (RMA) and the Federated Employers Mutual respectively,⁴⁹ and not by the Compensation Fund. The benefits offered by the RMA are more or less similar to those offered by the Compensation Fund. The RMA pays lump-sum compensation if permanent disability is 30 per cent or less than total impairment. If total impairment is higher than that, then a monthly pension is awarded. Medical expenses are paid up until either maximum medical improvement or two years. Where the miner is deceased, a fatal pension is awarded to the widow or widower and the funeral expenses are taken care of. Moreover, a family allowance is paid to pensioners who are assessed at 100 per cent permanent disability.⁵⁰

The RMA has offices in most of the mining regions of the country, as well as satellite offices in former high recruiting areas such as Maseru in Lesotho and Xai-Xai in Mozambique.⁵¹ These offices are there to process the claims of (and on behalf of) injured and deceased former migrant miners who have returned to their home countries. In principle therefore, former miners who have returned to their home countries should be able to claim their benefits at these offices. It is submitted that the RMA should duplicate its efforts in other recruiting areas to cover more potential beneficiaries.

These funds (the Compensation Fund and RMA) often face challenges when dealing with the administration of the benefits. Compensation from the Compensation Fund must be paid directly into bank accounts of beneficiaries.⁵² The obvious problem here is that some beneficiaries, especially those in remote rural areas of the SADC region, may not have access to the necessary infrastructure. In these cases, the Compensation Commissioner has to be creative and find alternatives such as the

⁴⁶ See also the Industrial Health Resource Group <http://www.health-e.org.za/wp-content/uploads/2014/04/South-Africa-compensation-and-other-benefits-brochure.pdf> 4.

⁴⁷ These provisions empower the Minister of Labour to put into effect bilateral agreements that may make provision for the transfer of compensation benefits to other countries.

⁴⁸ Olivier *Regional Overview of Social Protection for Non-Citizens in SADC* 49.

⁴⁹ Myburgh et al 2000 *Law Democracy & Development* 52. These mutual associations are licensed in terms of s 30 of COIDA.

⁵⁰ *Ibid.*

⁵¹ Rand Mutual Assurance Company *Annual Report* (2012) 269.

⁵² Olivier "Enhancing Access to South African Social Security Benefits by SADC Citizens: The Need to Improve Bilateral Arrangements Within a Multilateral Framework (Part I)" 2011 1 *SADC Law Journal* 133.

arrangement made for Basotho migrants where payments are made through the Office of the High Court.⁵³

The RMA outsources the payment of benefits to service providers such as The Employment Bureau of Africa (TEBA). TEBA charges a fee to trace, verify and pay out benefits to the rightful beneficiaries.⁵⁴ In cases where beneficiaries cannot be traced or their status verified, payments are suspended until this process is successful.⁵⁵ Needless to say, the lengthier the process, the more likely it is adversely to affect the lives of the potential beneficiaries, thereby infringing upon their fundamental rights. Alternative arrangements have been made in Lesotho for those who do not have bank accounts, and payments are made through the Workmen's Compensation Trust Fund, which in turn remits the benefits down to the rightful beneficiaries. In Mozambique, benefits are entrusted with the labour ministry, which filters them down to the correct recipient.⁵⁶ As already stated, these efforts need to be duplicated throughout all affected areas as there are still many beneficiaries who are yet to receive their benefits. In 2013, the unclaimed benefits were estimated at around R5.7 billion.⁵⁷ This is a lot of money to be left idling in unclaimed benefit funds with no proper and consistent claiming processes. This money could assist the State to realise its socio-economic responsibilities towards the poor.

3 3 Occupational Diseases in Mines and Works Act 78 of 1973⁵⁸ (ODIMWA)

ODIMWA is a specialised piece of legislation that regulates medical examinations and compensation for lung diseases contracted at work in the mining sector and other works defined in the Act. This piece of legislation proves to be crucial for migrant workers since statistics show that most contract migrant workers in South Africa are employed in the mining sector.⁵⁹

The Act makes provision for both current and former mineworkers. It provides for continuous evaluation of compensable lung diseases for active employees and lifelong surveillance and monitoring of former employees.⁶⁰ The health ministry is tasked with the administration of this Act whereas administration of COIDA lies with the labour ministry. This creates unnecessary fragmentation but will not be explored further in this contribution. The Medical Bureau for Occupational Diseases (MBOD) conducts medical examinations and certification of occupational

⁵³ *Ibid.* Olivier explains how payments are made in Lesotho in fn 73 of his article.

⁵⁴ RMA Annual Report 46.

⁵⁵ *Ibid.*

⁵⁶ Olivier 2011 *SADC Law Journal* 133. See fn 74 of Olivier's article.

⁵⁷ Mpedi and Nyenti *Portability of Social Security Benefits in Mining Sector: Challenges Experienced by Former Mineworkers in Accessing Social Security Benefits in Selected Southern African Countries* A scoping study for Southern Africa Trust (2013) 24.

⁵⁸ As amended in 1993 and in 2002.

⁵⁹ Myburgh et al 2000 *4 Law Democracy & Development* 48.

⁶⁰ Robert *The Hidden Epidemic Amongst Former Miners: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Work Act in the Eastern Cape, South Africa* (2009) 16.

compensable diseases and benefits due are paid by the Compensation Commissioner for Occupational Diseases (CCOD).⁶¹

The Act makes provision for the payment of lump-sum cash payments and medical benefits to eligible individuals.⁶² Mineworkers must undergo a medical benefits examination once every two years for the rest of their lives to detect the presence of any occupational lung disease. Former mineworkers are also required to undergo a medical benefits examination within 12 months of leaving their employment (the mine). They are, thus, entitled to these benefits even after leaving their employment.⁶³ If a compensable occupational lung disease is detected, the director of MBOD must be notified so that the process of accessing compensation can be put in motion. The costs of these medical examinations for in-service workers are borne by the employer, and those of former miners are borne by the Department of Health.⁶⁴

Medical practitioners, more especially pathologists, are obliged to communicate their findings of compensable diseases to the director of MBOD. The medical practitioner must have knowledge or have reason to believe that a particular patient or the deceased was working in a mine or works as defined in the Act.⁶⁵ Owing to the territoriality principle,⁶⁶ this provision applies to South African medical practitioners and pathologists only. A migrant who dies from an occupational disease abroad will not necessarily be medically examined in the way the Act requires, and if examined, the relevant practitioner does not have to report to South African authorities. The dependants of the deceased are therefore deprived of their right to social insurance benefits.⁶⁷

3 4 Road Accident Fund Act 56 of 1996 (RAF Act)

The RAF Act establishes the Road Accident Fund in section 2. The Fund was established to process claims and pay compensation for loss or damage wrongfully caused by the negligent driving of a motor vehicle.⁶⁸ The Act shifts the liability of the wrongful driver or owner to the RAF.⁶⁹

This non-occupational social insurance scheme is funded by a fuel levy collected by the South African Revenue Service (SARS).⁷⁰ The Fund pays compensation for bodily injuries or deaths from all motor vehicle accidents occurring within the Republic. An employee who sustains an injury or dies

⁶¹ *Ibid.*

⁶² Robert *The Hidden Epidemic Amongst Former Miners* 22 and 29.

⁶³ S 32(1) of ODIMWA.

⁶⁴ Robert *The Hidden Epidemic Amongst Former Miners* 23.

⁶⁵ Ss 33 and 34 of ODIMWA.

⁶⁶ In terms of this principle, laws enacted in one country only apply in that country and cannot be enforced extra-territorially.

⁶⁷ See the Industrial Health Resource Group <http://www.health-e.org.za/wp-content/uploads/2014/04/South-Africa-compensation-and-other-benefits-brochure.pdf> 7.

⁶⁸ Road Accident Fund “About the Road Accident Fund” (undated) www.raf.co.za (accessed 2021-01-15).

⁶⁹ S 21(1)(a) of the RAF Act.

⁷⁰ Road Accident Fund “Fuel Levy” (undated) www.raf.co.za/About-us/Pages/Fuel-levy.aspx (accessed 2021-01-15).

while driving or being ferried on an employer's vehicle will be compensated.⁷¹ The Act places no restrictions on the citizenship or immigration status of the applicant.⁷² Therefore migrant workers and their dependants are protected in terms of this Act.⁷³ The Act is, however, silent on the procedure to be followed where dependants of a deceased are outside South Africa. In view of jurisdictional limitations, it would seem that such potential beneficiaries would have to come to South Africa if they want to lodge a claim.

4 CONSTITUTIONAL SIGNIFICANCE OF REGIONAL AND INTERNATIONAL INSTRUMENTS ON SOUTH AFRICA'S SOCIAL INSURANCE PROVISION

Regional and international bodies such as SADC, the International Labour Organisation (ILO) and the United Nations (UN) have developed a body of standards in the form of treaties, conventions and protocols on social security. These standards serve as a benchmark against which the social security laws of members of these organisations must be measured.⁷⁴ Section 39(1)(b) of the Constitution provides for the consideration of international instruments in the interpretation of the Bill of Rights, which encompasses social security rights.⁷⁵ Section 233 of the Constitution provides for the adoption of an interpretation that is more in line with international law when interpreting social security legislation.⁷⁶ These provisions show that international law plays a vital role in the way in which South African courts interpret legislation and the rights enshrined in the Bill of Rights.⁷⁷ Furthermore, South Africa's willingness to comply with relevant regional and international instruments is demonstrated by ratification of some of these instruments. The legislature and courts are enjoined to consider international standards when passing and interpreting legislation pertinent to social security.⁷⁸ It is important to mention that these instruments

⁷¹ Tshoose "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 (14) PELJ 245.

⁷² Mpedi and Smit *Access to Social Services for Non-Citizens* 18.

⁷³ Nyenti *et al* http://siteresources.worldbank.org/INTLM/Resources/390041-1244141510600/Nyenti_Plessis_Apon-South_Africa-2007.pdf 20.

⁷⁴ Tshoose *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life of Poor People in South Africa* 237–238.

⁷⁵ S 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. Social security rights are entrenched in s 27 of the Bill of Rights. See Olivier and Kalula "Regional Social Security" in Olivier, Smith, Kalula and Mhone (eds) *Introduction to Social Security* (2004) 163.

⁷⁶ S 233 of the Constitution 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". See Olivier *et al* *Introduction to Social Security* 179.

⁷⁷ The Bill of Rights is contained in chapter 2 of the Constitution of the Republic of South Africa. See *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) par 55.

⁷⁸ The case of *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 35, serves as authority for considering both binding and non-binding international law. This principle was quoted with approval by Yacoob J in *Government of the Republic of South Africa v Grootboom* *supra* par 26.

are far from perfect. Some shortcomings relating to migrant worker coverage are identified, and suggestions aimed at improving the situation are put forward. The extent to which these instruments promote coverage for migrant workers is discussed below.

5 REGIONAL INSTRUMENTS

5.1 Southern African Development Community Treaty of 1992 (SADC Treaty)

The SADC Treaty is the founding document of the SADC region, which is made up of 15 member states.⁷⁹ One of the objectives of SADC is to support, through regional integration, those who are socially disadvantaged.⁸⁰ Article 21 deals with areas of cooperation and provides that member states should work together in harmony in order to achieve an integrated region based on balance, equity and mutual benefit.⁸¹ The provision goes on to list the specific areas of cooperation; and social security is conspicuously absent from this list.⁸² Article 6(2) also provides an exhaustive list of grounds of prohibited discrimination; again, discrimination based on citizenship is absent from this list.⁸³ It is submitted that these provisions were missed opportunities; the Treaty should have included social security as one of the areas of cooperation and citizenship as a ground upon which not to discriminate. Another opportunity to realise social security rights for non-citizens presents itself in the form of the Protocols concluded in terms of article 22 of the Treaty. The Protocols envisaged by the provision are meant to provide details of how the objectives of the Treaty should be achieved. It is rather disappointing to note that, of the 27 Protocols concluded, none deals with the social security of people in SADC.⁸⁴ The SADC Treaty and its Protocols are binding instruments;⁸⁵ the inclusion of social security rights for regional migrants would thus have served as a strong incentive for states to align their domestic social security systems with the tenets of the Treaty.

5.2 SADC Charter of Fundamental Social Security Rights of 2003 (SADC Charter)

The SADC Charter is a legally binding instrument that enjoins member states to create an environment in which every worker in the region will have

⁷⁹ SADC member states are South Africa, Mozambique, Zimbabwe, Swaziland, Lesotho, Botswana, Namibia, Tanzania, Zambia, Malawi, Angola, Democratic Republic of Congo, Mauritius, Madagascar and Seychelles. See Art 3 of the SADC Treaty.

⁸⁰ Art 5(1)(a) of the SADC Treaty.

⁸¹ Art 21 of the SADC Treaty.

⁸² Nyenti and Mpedi "The Impact of the SADC Social Protection Instruments on the Setting Up of a Minimum Social Protection Floor in Southern African Countries" 2012 15 *PELJ* 252.

⁸³ *Ibid.* See also art 21 of the SADC Treaty.

⁸⁴ Southern African Development Community "SADC Protocols" (undated) <http://www.sadc.int/about-sadc/overview/sa-protocols/> (accessed 2021-07-03).

⁸⁵ Art 1 of the SADC Treaty.

adequate social protection and enjoy social security benefits.⁸⁶ Article 10(2) makes provision for social security coverage of the unemployed and those previously employed but unable to re-enter the job market. This would include those who have acquired occupational diseases or those who suffered workplace injuries and were put on retirement. These workers must be compensated by domestic social security schemes of the host country.⁸⁷ It is notable that the SADC Charter does not distinguish between citizens and non-citizens in its provisions. This means that the provisions apply to all inhabitants of member states irrespective of where they happen to be.⁸⁸ Article 16 requires member states to submit progress reports on the implementation of the provisions of the Charter and that those who fail to comply with the standards risk be indicted to the SADC Tribunal. However, the Tribunal has been suspended since 2010.⁸⁹ The provisions of the Charter are well envisioned, and its commitments bring a glimmer of hope but as long as there is no proper implementation and enforcement mechanism, these good aspirations remain mere pipe dreams and do not translate into the lives of the people of the region.⁹⁰

5 3 SADC Code on Social Security of 2007 (SADC Code)

The SADC Code is a non-binding regional instrument adopted to provide member states with strategic direction and guidelines in the development and improvement of their domestic social security schemes.⁹¹ The Code seeks to provide an instrument of coordination and harmonisation of social security schemes in the region.⁹² Article 6 enjoins member states to adopt social security schemes and progressively to expand their coverage and impact. The entire working class should have some form of social security coverage.⁹³

Article 17(2)(a) provides that member states should enable migrant workers to participate in the social security schemes of the host state and that member states should not differentiate between citizens and non-citizens in their social security coverage.⁹⁴ Furthermore, member states should facilitate payment of the social benefits due to migrants in the host state and the exportability of those benefits to the home country where the

⁸⁶ Nyenti and Mpedi 2012 *PELJ* 249. See also art 10 of the SADC Charter.

⁸⁷ Art 10 read with art 8(a) of the SADC Charter. See *South Africa's Occupational Retirement System: A Comparative Social Security Perspective* (unpublished LLD thesis, University of South Africa) 2015 32.

⁸⁸ Olivier and Dupper "Political and Regulatory Dimensions of Access, Portability and Exclusion: Social Security for Migrants, with an Emphasis on Migrants in Southern Africa" (2012) *International Institute for Social Law and Policy* 12 <http://ilera2012.wharton.upenn.edu/RefereedPapers/DupperOckert.pdf> (accessed 2021-06-15).

⁸⁹ Art 16 of the SADC Charter. See also Manamela *South Africa's Occupational Retirement System* 33.

⁹⁰ See Manamela *South Africa's Occupational Retirement System* 33.

⁹¹ Nyenti and Mpedi 2012 *PELJ* 255.

⁹² Art 3 of the SADC Code.

⁹³ Art 6.4 of the SADC Code.

⁹⁴ Art 17(2)(b) of the SADC Code.

migrant worker has returned home or to dependants there.⁹⁵ The Code further extends its protection to irregular migrants by encouraging member states to provide them with at least basic minimum protection.⁹⁶ It can be said that this Code offers the most detailed and extensive social insurance coverage of migrants in the region as it especially mentions contingencies such as maternity/paternity, unemployment and occupational injuries and diseases as risks against which migrant workers should be protected.⁹⁷ Nonetheless, as commendable as it may be, this Code remains a non-binding instrument; as a result, member states do not have to adhere to its precepts. One way in which South Africa could live up to the aspirations of this instrument is to widen the scope of coverage of the unemployment insurance and by considering the conclusion of a bilateral agreement with neighbouring countries to facilitate exportability of benefits. The discussion that follows looks at international instruments crafted by bodies such as the UN and the ILO that are instrumental in protecting the social security rights of migrant workers.

6 INTERNATIONAL INSTRUMENTS

6 1 International Covenant on Economic, Social and Cultural Rights of 1996 (ICESCR)

The ICESCR has been ratified by 13 SADC member states.⁹⁸ South Africa signed the Covenant in October 1994 but only ratified it in 2015.⁹⁹ The Covenant makes provision for the right of everyone to social security including social insurance.¹⁰⁰ General Comment No.19 adopted in 2008 provides details on this provision.¹⁰¹ It provides *inter alia* that migrant workers' entitlement to a benefit should not be affected by a change in workplace. Migrant workers who have contributed to a social security scheme of a country should benefit from it or at least have their contributions refunded if or when they leave the country.¹⁰² The General Comment further explains that the right to social security encompasses the right to access and maintain benefits without discrimination.¹⁰³ The General Comment refers here to access to benefits such as unemployment benefits, occupational injury and disease benefits, and old-age benefits.¹⁰⁴ The General Comment

⁹⁵ Art 17(2)(c) of the SADC Code.

⁹⁶ Art 17(3) of the SADC Code.

⁹⁷ Art 8, 11 and 12 of the SADC Code.

⁹⁸ SADC member states that have ratified the Covenant are: Angola, Democratic Republic of Congo, Lesotho, Malawi, Madagascar, Mauritius, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe <https://treaties.un.org/doc/Treaties/2007/11/27/IV-.en.pdf> (accessed 2021-01-15).

⁹⁹ Tshooose Social Assistance: Legal Reforms to Improve Coverage and Quality of Life of Poor People in South Africa 244.

¹⁰⁰ Art 9 of the ICESCR.

¹⁰¹ UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 19: *The Right to Social Security (Art 9 of the Covenant)* (4 February 2008) E/C.12/GC/19 <http://www.refworld.org/docid/47b17b5b39c.html> (accessed 2021-01-25).

¹⁰² UN CESCR General Comment No. 19 11 par 36.

¹⁰³ UN CESCR General Comment No. 19 2 par 2.

¹⁰⁴ *Ibid*

reiterates the provision of article 9 of the International Covenant on Economic, Social and Cultural Rights that makes special reference to social insurance as part of the right to social security.¹⁰⁵ The ratification of the Covenant by South Africa is a positive and welcome development because it serves as motivation to the country to discharge its responsibilities regarding protection of socio-economic rights and to catch up with other countries that ratified the Covenant earlier.¹⁰⁶ Moreover, South Africa will be motivated by the reporting mechanism of the UN Committee on Economic, Social and Cultural Rights, which requires member states to submit progress reports within two years of ratification and further reports from time to time.¹⁰⁷ However, South Africa is reluctant to ratify the Optional Protocol to the Covenant on Economic, Social and Cultural Rights (OP-ICESCR), which gives individuals a complaint mechanism in terms of which they can lodge complaints regarding violations of their socio-economic rights by member states.¹⁰⁸ This means that individuals cannot yet use this Optional Protocol against South Africa.

6 2 International Convention on the Protection of All Migrant Workers and Members of Their Families of 1990 (ICRMW)

The ICRMW is the most comprehensive in providing for the social protection of migrant workers. In the Preamble, it recognises the important role played by migrant workers in the economies of poor countries and appreciates that there are millions of people affected by this phenomenon globally. The Preamble further concedes that migrant workers and members of their families have not been adequately afforded social protection throughout the whole world and therefore require international intervention. Article 27 provides that migrant workers and members of their families should be treated as nationals with regard to social security matters. Where domestic legislation excludes migrant workers and members of their families, the host state should devise a means of refunding them any contribution they may have made to a particular scheme.¹⁰⁹ Thus, the Convention advocates for non-discrimination and equality of treatment between nationals and migrant workers in the provision of social security.¹¹⁰ The Convention appreciates that domestic legislation may exclude migrant workers in certain cases but

¹⁰⁵ UN CESCR General Comment No. 19 1 par 1.

¹⁰⁶ Tshoose Social Assistance: Legal Reforms to Improve Coverage and Quality of Life of Poor People in South Africa 244.

¹⁰⁷ Tshoose Social Assistance: Legal Reforms to Improve Coverage and Quality of Life of Poor People in South Africa 245–246.

¹⁰⁸ See the International Network for Economic, Social & Cultural Rights (ESCR-Net) “The Government of South Africa Ratifies the ICESCR” (2015) <https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr> (accessed 2021-07-04). See also Manamela South Africa’s Occupational Retirement System 38.

¹⁰⁹ Art 27(2) of the ICRMW.

¹¹⁰ Olivier and Dupper <http://ilera2012.wharton.upenn.edu/RefereedPapers/DupperOckert.pdf> 10.

that those exclusions should be fair.¹¹¹ If migrants have contributed towards a scheme, then they should get back their contributions.¹¹²

7 INTERNATIONAL LABOUR ORGANISATION (ILO) CONVENTIONS

The ILO was established in 1919 and has a membership of 185 countries.¹¹³ The objectives of the ILO include, *inter alia*, enhancing coverage and effectiveness of social protection for all.¹¹⁴ All SADC member states are members of the ILO and therefore the ILO conventions should have an impact on the provision of social protection to migrant workers in the region. Furthermore, the need to protect migrant workers from social risks has been at the heart of the ILO since its inception.¹¹⁵ To achieve these objectives, the ILO has adopted a number of conventions that have a bearing on the provision of social insurance by member states. The Migration for Employment Convention (Revised)¹¹⁶ provides that signatory states should afford migrant workers the same treatment as their citizens in matters of social security, and specifically mentions social insurance contingencies such as occupational injuries and diseases, maternity and unemployment.¹¹⁷ Five SADC member states have ratified this convention to date.¹¹⁸ The Migrant Workers (Supplementary Provisions) Convention¹¹⁹ also calls for equal treatment between migrant workers and citizens in the provision of social security.¹²⁰ Article 10 provides that signatory states must adopt national policy aimed at ensuring equality of opportunity and treatment in respect of, among other matters, social security of regular migrant workers and members of their families.¹²¹ Other conventions such as the Social Security (Minimum Standards) Convention,¹²² the Maintenance of Social Security Rights Convention,¹²³ and the Unemployment Convention¹²⁴ enjoin

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Dupper "Migrant Workers and the Right to Social Security: An International Perspective" 2007 2 *Stell LR* 225.

¹¹⁴ See the ILO website <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (accessed 2021-02-15).

¹¹⁵ Preamble to the Constitution of the ILO <http://www.ilo.org/public/english/bureau/legal/download/constitution.pdf> (accessed 2021-02-15). The Preamble notes the need for the protection of the interests of workers when employed in countries other than their own.

¹¹⁶ ILO *Migration for Employment Convention (Revised)* C97 (1949). Adopted: 01/07/1949; EIF: 22/01/1952.

¹¹⁷ Art 6(1)(b) of the Migration for Employment Convention.

¹¹⁸ The following countries have ratified this Convention: Malawi, Mauritius, Madagascar, Tanzania and Zambia http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242 (accessed 2021-03-03).

¹¹⁹ ILO *Migrant Workers (Supplementary Provisions) Convention* C143 (1975). Adopted: 24/06/1975; EIF: 09/12/1978.

¹²⁰ See the Preamble to the Migrant Workers (Supplementary Provisions) Convention.

¹²¹ Art 10 of the Migrant Workers (Supplementary Provisions) Convention.

¹²² ILO *Social Security (Minimum Standards) Convention* C102 (1952). Adopted: 28/06/1952; EIF: 27/04/1955.

¹²³ ILO *Maintenance of Social Security Rights Convention* C157 (1982). Adopted: 21/06/1982; EIF: 11/09/1986.

¹²⁴ ILO *Unemployment Convention* C002 (1919). Adopted: 28/11/1919; EIF: 14/07/1921.

signatory states, for instance, to establish and maintain a system of unemployment insurance that covers migrant workers.¹²⁵ Furthermore, these instruments also call for bilateral and multilateral agreements to regulate how migrant workers should receive their benefits upon returning to their home countries.¹²⁶

8 EVALUATION OF COMPLIANCE WITH INTERNATIONAL AND REGIONAL NORMS

This section juxtaposes aspects covered by South African social insurance legislation with the picture presented by international and regional instruments. It is clear from the discussion above that our social insurance legislation has shortcomings and in certain cases deprives migrant workers of social security rights. This continues despite the constitutional guarantee of equality of treatment and equal benefit of the law.¹²⁷ Some of the glaring dichotomies are pointed out below.

Despite the call for equality of treatment between citizens and migrant workers in matters relating to occupational injuries and diseases by the SADC Charter, legislation such as COIDA and ODIMWA continue to burden migrant workers and former migrant workers with bureaucratic processes that either hinder or delay access to benefits. Former migrants who have acquired occupational lung diseases from the mines find themselves having to come back to South Africa for examination and certification.¹²⁸

COIDA, ODIMWA and the RAF Act do make provision for a cross-border mechanism in terms of which bilateral agreements can be concluded to ensure that migrant workers who have left the Republic gain access to their accrued social insurance benefits.¹²⁹ This is a positive gesture by the legislature. However, in practice, accessing benefits remains a pipe dream because nothing has been done to implement it. The reality is that the bilateral agreements envisaged by these provisions have not been concluded and therefore the violation of SADC migrant workers' human rights continues unabated.¹³⁰

The South African unemployment insurance system¹³¹ falls short when gauged against the provisions of the SADC Code, which specifically calls for consistent treatment of citizens and migrant workers, including irregular migrants, in their access to maternity,¹³² unemployment¹³³ and occupational

¹²⁵ Art 3 of the Unemployment Convention.

¹²⁶ Art 9(1) of the Maintenance of Social Security Rights Convention.

¹²⁷ S 9 of the Constitution.

¹²⁸ See Robert *The Hidden Epidemic Amongst Former Miners*.

¹²⁹ S 94 of COIDA; s 105 of ODIMWA; s 9 of the RAF Act.

¹³⁰ Olivier, Dupper and Govindjee "Redesigning the South African Unemployment Insurance Fund: Selected Key Policy and Legal Perspectives" 2011 2 *Stell LR* 403.

¹³¹ S 3(1)(d) of the UIA excludes migrant workers who have to leave the Republic when their contract of employment terminates from access to unemployment insurance, and they are excluded from the definition of "contributor" in s 1 of the Act.

¹³² Art 8 of the SADC Code.

¹³³ Art 11 of the SADC Code.

injuries and diseases benefits.¹³⁴ Similar ideas of access and maintenance of unemployment benefits without discrimination are expressed by the Unemployment Convention, the ICESCR and the UN CESCR General Comment 19 – namely that migrant workers should be allowed to contribute to unemployment insurance and that their benefits should not be affected by a change of workplace or country of residence.¹³⁵

Dupper suggests that one way that policy makers can extend access to unemployment insurance for migrants is to zoom into section 16 of the Social Assistance Act¹³⁶ read with Regulation 31 of the Act.¹³⁷ These provisions state that a social assistance beneficiary who will be out of the country for a period not exceeding 90 days (three months) can arrange with the Minister of Social Development to receive his or her grant outside the country. The author's argument that this approach can also work concerning social insurance benefits where beneficiaries have left the Republic finds my support.¹³⁸ Migrant workers should be allowed to contribute to the UIF just like citizens who are employed on a fixed-term basis; this means that the definition of "contributor" should be extended to reflect this.¹³⁹ This would make the UIA more compatible with section 9 of the Constitution, which guarantees the right to equality.

Olivier points out that one of the factors causing migrant workers' poor access to social insurance benefits in South Africa is inadequate administrative and institutional capacity throughout the region.¹⁴⁰ Migrant workers are unable to contact South African authorities in their home countries and when they resort to their own governments for assistance, they are met with reluctance.¹⁴¹ The poor ratification rate by South Africa of some of the key instruments also compounds the lack of compliance and makes the country's commitment to internally accepted norms suspect.¹⁴² Olivier suggests that even though ratification of instruments does not guarantee compliance, failure to do so may be viewed as an attempt to evade international monitoring.¹⁴³

9 CONCLUSION

The South African social insurance system makes provision for most social security contingencies espoused by international instruments. However, the

¹³⁴ Art 12 of the SADC Code.

¹³⁵ UN CESCR General Comment No. 19 11–12 par 36–37. See also Olivier et al 2011 2 *Stell LR* 402 where it is argued that South Africa is not complying with the Unemployment Convention.

¹³⁶ 13 of 2004.

¹³⁷ Dupper et al 2010 *Stell LR* 457.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ Olivier and Kalula in Olivier et al *Introduction to Social Security* 188.

¹⁴¹ Mpedi and Nyenti *Portability of Social Security Benefits in Mining Sector* 42–43.

¹⁴² Dekker "The Social Protection of Non-Citizen Migrants in South Africa" 2010 22 *SA Merc LJ* 392. See also Olivier "Enhancing Access to South African Social Security Benefits by SADC Citizens: The Need to Improve Bilateral Arrangements Within a Multilateral Framework (Part II)" 2012 2 *SADC Law Journal* 149.

¹⁴³ Olivier *Regional Overview of Social Protection for Non-Citizens in SADC* 94.

legislative framework meant to give meaning to social security rights remains wanting in different respects. Migrant workers are still excluded, in some cases solely on the grounds of citizenship, a ground of discrimination that is prohibited by SADC, UN and ILO instruments. The bilateral agreements envisaged in COIDA, ODIMWA and the RAF Act should be concluded in order to facilitate the movement of benefits to their rightful beneficiaries. The definition of a “contributor” in the UIA should be expanded to enable migrant workers to contribute and to draw benefits from the UIF. Furthermore, relevant international instruments such as the Migration for Employment Convention and the Social Security (Minimum Standards) Convention should be ratified.

While waiting for legislative reforms and improvement in the ratification rate, officials directly or indirectly involved in the dispensation of social insurance benefits should find creative ways of ensuring that benefits reach the hands of the rightful beneficiaries, be it in the Republic or in the region. The RMA’s offices in Maseru and Xai-Xai and the Compensation Commissioner’s office in Lesotho have set examples of what can be done in this respect.¹⁴⁴

¹⁴⁴ RMA Annual Report 269. See also Olivier 2011 *SADC Law Journal* 133.