THE REGULATION OF SOCIAL SECURITY PROTECTION AFFORDED TO MIGRANT WORKERS IN THE SADC AREA AND SOUTH AFRICA SPECIFICALLY

by

SARAH WAINWRIGHT

submitted in partial fulfilment of the requirements for the degree

MAGISTER LEGUM

in

LABOUR LAW

in the

FACULTY OF LAW

at the

UNIVERSITY OF JOHANNESBURG

SUPERVISOR: RADLEY HENRICO

JULY 2015

TABLE OF CONTENTS

THE REGULATION OF SOCIAL SECURITY PROTECTION AFFORDED TO MIGRANT WORKERS IN THE SADC AREA AND SOUTH AFRICA SPECIFICALLY

1. INTRODUCTION

"The position of non-citizens (in SADC) with regards to social security leaves much to be desired. Apart from certain exceptions made for foreigners with permanent residence and with refugee status, non-nationals are generally excluded from virtually all social assistance benefits. They are also excluded from certain branches of social insurance. The exclusion is not only of a legal nature; in practice non-citizens, even if they may have a legal entitlement, are often excluded from access to benefits and services. This is in particular true of non-citizens from neighbouring countries who have returned home after a period of work in South Africa. Due to a variety of reasons, including the fragmented nature of the South African social security system, inchoate service delivery by certain social security institutions, the overriding impact of immigration law and policy aimed at deportation, regulation and control, and lack of appropriate cross-border and inter-institutional arrangements, legally entitled beneficiaries and their dependants are often left without access and a remedy."[1]

Millard states in her article "Migration and the portability of social security benefits: The position of non-citizens in the South African Development Community"[2] (SADC) that migration has to be managed on two levels, namely politically "by harmonising the laws that deal with immigration," and on a "social protection level, by aligning the protection measures that exist at a national level in different SADC countries."[3]

Sub-Saharan Africa is influenced by a variety of international instruments created by the United Nations (UN), International Labour Organisation (ILO), the African Union (AU) and SADC amongst others, which provide human rights-based approaches towards social security and legal protection for migrant workers.[4]

---

[1] Olivier "Social Security Framework: Exclusion from social insurance and social assistance" 2012 *LAWSA* 89.
[2] 2008 *AHRLJ* 37.
[3] (n 2) 40.
[4] Such as the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the ILO conventions C97 and C143 amongst others.

Currie states that: "The recognition that human rights and the basic social conditions in which people live are fundamentally interconnected have encouraged the inclusion in modern constitutions of socio-economic or "second generation" rights. These are "positive" rights that impose obligations on government. Rather than simply protecting members of society from the heavy hand of state power, socio-economic rights oblige the state to do as much as it can to secure for all members of society a basic set of social goods - education, health care, food, water, shelter, access to land and housing."[5]

Yet despite this backdrop and overriding influence, regional and national political and economic factors play a role that is unique to the SADC region and affects migration in a manner that is un-catered for by international or national instruments. Olivier states in his report entitled the "Regional Overview of Social Protection for Non-Citizens in the South African Development Community (SADC)"[6] that: "the chief motive for the majority of migrants is without a doubt the pursuit of better living standards for themselves and for their families. Also, within SADC, the majority of migrants target countries with better economies. Therefore, the migration flow is towards Botswana, Namibia and South Africa because these countries have stronger economies and also experience skills shortages. These countries, therefore, offer migrants better prospects for improving their quality of life. South Africa in particular attracts by far the majority of intra-SADC migrants."

As developing countries, the burden now rests on the member states of SADC and South Africa (as an economic powerhouse) to implement and refine these national and international tools in order to create a wholly unique social security and legal protection platform for migrant workers. These international tools should provide sufficient regulation in light of the comprehensive rights detailed by these instruments but the unique political and economic factors influence social security and legal protection parameters to the extent that social security protection is under-regulated to the detriment of migrant workers.

This paper shall consider the different factors influencing social security protection in sub-Saharan Africa on an international, regional and national level. It shall consider the international tools which set a benchmark for sub-Saharan Africa, which benchmark is untenable. This paper shall consider why the international instruments have proved less useful than one would assume and which specific factors result in the under-regulation of migrant

[5] Currie and De Waal *The Bill of Rights Handbook* (2005) 567.
[6] SP Discussion Paper No. 0908 (Report commissioned by the World Bank 2009) 11.

workers in the SADC area and South Africa in particular. It will also consider the stance taken by the courts, particularly in light of the Constitutional dispensation in South Africa. Finally, it will suggest that an increase in the regulation of migrant workers and a simultaneous decrease in the immigration laws in sub-Saharan Africa might result in a greater degree of social security protection for migrant workers.

2. MIGRANT WORKERS

"... Migration has been a long-standing feature of the labour market framework in Southern Africa, in particular as far as work on the mines and in agriculture is concerned. Apart from the informal cross-border trade-related migration, work on the mines, in particular in South Africa, served as a magnet for both internal and external migrants."[7] Olivier continues to state that "systems of labour migration in Southern Africa are deeply entrenched and have become part and parcel of the generations- long movements of people, primarily in search for better living and working conditions."[8]

The ILO defines the concept of 'migrant worker' as follows:

"For the purpose of this Convention the term **migrant for employment** means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment."[9]

Article 11 of the more recent Convention of Migrant Workers[10] has the virtually identical definition, namely:

"For the purpose of this Part of this Convention, the term **migrant worker** means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker."

This Convention has a slightly broader category of exclusions, which (like the former) include frontier workers, short-term entry of members of the liberal professions and artistes, and

[7] (n 6).
[8] (n 6) 12.
[9] Article 11 C97 of 1949. Own emphasis.
[10] C143 of 1975.

seamen.[11] It also contains the broader categories of persons being those coming specifically for purposes of training or education, or employees of organisation or undertakings who have been admitted temporarily.[12]

The United Nations Convention regarding migrant workers, titled "The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families" defines a 'migrant worker' as: "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national." [13]

While the definitions of "migrant worker" as defined by the ILO and the United Nations are factually accurate, they do not fully encapsulate the nature of the widespread migrant labour force that travels in the SADC region for a variety of political and economic reasons. It is the nature of this labour force that is of paramount importance to the consideration of social protection and legal protection and the regulation thereof in the SADC region.

In this respect, Fenwick *et al* says "South Africa...remains the region's most dominant, sophisticated and diversified economy and continues to attract the highest numbers of both formal and informal labour migrants. Since 1990, the number of labour migrants moving to South Africa from neighbouring countries has increased dramatically. This has been attributed to a number of factors, including increasing unemployment in the sending countries and reduced government investment in social services. Today, key reasons for migration include large differentials between SADC member states in terms of wages, standards of living and unemployment rates and political upheavals."

He continues to state that: "Migration in the region challenges the capacity of national labour law frameworks to protect undocumented migrant workers, who form the majority of the migrant workforce. The latter are workers that enter and work in the country illegally, or enter legally (on a basis other than a work permit) and stay in the host country and work without permission to do so. They usually do not have the education or skills that would justify the issue of a work permit. They prefer to work in jobs where they do not attract the attention of the public authorities and therefore they have fewer choices open to them. They are therefore vulnerable to exploitation and abuse and are willing to accept work where conditions are poor,

[11] Convention No. 97.
[12] Convention No. 143.
[13] Article 2(1) UN Convention.

the wages are low and there is little or no job security. Because of their precarious position, they do not have recourse to the protection afforded by labour laws."[14]

It is at the level of the definitions that one begins to see that the international frameworks, while aspirational, are not necessarily appropriate for sub-Saharan Africa and its unique labour dynamic. While the definitions highlighted above are not inaccurate and are applicable to migrant workers in the SADC region, they are simply under-inclusive. The activity may be remunerated and the worker may be a foreign national but in sub-Saharan Africa these are only two of the defining characteristics of a migrant worker. This is the first illustration that one has that the international tools may not necessarily be suitable for sub-Saharan Africa.

The South African definition of "migrant worker" is not as readily available in the legislative tools as some of the international definitions. Statistics South Africa defines a migrant worker for the purposes of the South African census as follows: "A *migrant worker* is a person who is absent from home (or country) for more than one month of a year for the purpose of finding work or working. This could be a mine worker, a factory worker or even a gardener or domestic worker. A person away from home (country of origin) but going home every weekend was, nevertheless, regarded as a migrant worker if the total period spent away from home was a month or more in a year. A person who is normally away from home for more than a month in a year, but was at home on *census night*, was regarded as a migrant worker."[15] It is clear that the South African specific definition of "migrant worker" is equally as deficient. Like its international counterparts, it too offers no clues as to the realities of migrant worker living.

Migrant labourers are a particularly vulnerable element of the economy, particularly in light of the nature of the migrant work. The majority of migrant labourers are unskilled or semi-skilled workers who move to South Africa specifically because of the decline in employment opportunities in their sending countries. The nature of the work is such that they are often excluded from labour law protection and social security protection. This may be because they are in their host country illegally or it may be because the nature of their work is informal and the traditional labour laws do not take cognisance of their informal working relationships. This paper shall highlight those mechanisms that are in place which take cognisance of the migrant

[14] Fenwick, Kalula and Landau *Labour Law: A Southern African Perspective* (ILO: International Institute for Labour Studies 2007) 14.
[15] http://www.statssa.gov.za/census01/census96/html/metadata/Docs/Dfntns.html (20-02-2015).

worker as well as the tools developed by international organisations and African organisations such as SADC to protect and enhance the rights afforded to migrant workers.

3. INTERNATIONAL STANDARDS

Although many international instruments exist which establish a variety of standards against which South Africa and SADC communities can compare themselves, the conventions, codes, protocols and recommendations made on an international level rarely consider the highly unique developing country framework in which migrant workers operate in the developing sub-Saharan Africa. By their very nature, the tools and instruments developed by the international community are internationally-focused as opposed to Africa-focused. They must, by necessity, be generic enough to be applicable across the board and on an international level. They must be applicable to other countries as well. Africa as a continent, and SADC specifically, are developing communities and international tools which do not account for this developing community environment will fall short on a level of practical implementation. Perhaps as a direct result of this, there are poor levels of ratification in sub-Saharan Africa.

In light of South Africa being an exceptionally prominent "accepting" or "receiving" country one cannot assess the migrant worker context in South Africa in isolation. South Africa operates within the greater frame work of SADC, which in turn can be viewed against the backdrop of international organisations such as the United Nations and the ILO. Olivier states that the "increased movement of people, including migrants, across national borders has become a hallmark of the modern era. World-wise, there are 175 million people who are currently not residing in their countries of origin. Of these, 90 million are migrant workers."[16]

While there are several conventions and international instruments in place dealing with migrant workers specifically,[17] these conventions and the contextual matrix in which they must be referenced must be seen against the backdrop of the overarching human rights espoused by international organisations and South Africa and its Constitution in particular. Migrant workers are protected not only by the international instruments pertaining to migrant workers, but also

[16] (n 6).

[17] Such as the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the African Union Convention on Cross Border Co-operation, the International Labour Organisations two conventions being the 1949 Convention (C97) and the 1975 Convention (C143) and the SADC Charter of Fundamental Social Rights, The SADC Code on Social Security and the Protocol on the Facilitation of Movement of Persons.

by the broader instruments dealing with fundamental human rights.[18] It could also be argued that these international instruments are persuasive in that they form a system of social pressure. It could be argued that a reputationally sound organisation such as the ILO need not overtly pressurize a country to comply with international standards as the watching international community will do so. Similarly, countries which have ratified an instrument and then fall below the necessary parameters would be socially driven to rectify the situation. While many of these instruments have not been ratified by South Africa they have nonetheless formed a part of the South African legal framework and are therefore applicable to migrant workers in South Africa.

These instruments, be they international or regional, form both a direct and an indirect source of law for South African courts. They are either directly implemented by virtue of having been signed and accepted and ratified by South Africa, or they are subject to consideration by courts by virtue of the constitutional provisions which obligate the courts to consider international law.[19] On a national level, the Constitution of the Republic of South Africa[20] and the Bill of Rights affords comprehensive protection both directly and indirectly to everyone.

In addition to the above, Servais highlights that "as the number of international, bilateral, multilateral, regional and universal instruments grows, conflicts are bound to arise, especially with international labour standards. More often, however, tension has been observed between the policies implemented by international institutions (at one time, for example, between ILO and the international financial organisation) than real contradictions between their standards."[21]

He continues by stating that "when two provisions appear to conflict each other a check must be made of whether they are truly incompatible. Only in rare cases has a State ratified contradictory standards by which it is bound. It may also happen that international supervisory bodies interpret differently relatively similar rules. The problem has been given no definitive answer because there is no hierarchical order to international instruments. The emergence of a law of international organisations alongside the classical law of treaties has made the question more complex."[22]

[18] For example, the United Nations Universal Declaration of Human Rights of 1948 and the African Charter of Human and People's Rights of 1981, amongst others.
[19] s 39 and ss 231 - 233 specifically.
[20] of 1996.
[21] Servais *International Labour Law* (2012) 110.
[22] (n 21).

As one continues to operate in a shrinking global economy, the relevance and applicability of these international instruments becomes of paramount importance. These instruments will be considered in the light of their impact on sub-Saharan Africa and South Africa.

3.1 United Nations

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families adopted by the General Assembly in December 1990 is the United Nations international instrument governing migrant workers and certain broad principles pertaining thereto. This instrument has not been ratified by South Africa but it nonetheless sets out certain principles that South Africa is bound to consider in light of its constitutional obligations enshrined in the interpretation clause [23] and Chapter 14 which deals with International Law.[24]

This instrument is particularly controversial because it seeks to protect both legal and illegal or "irregular" migrants insofar as social security is concerned. Dekker states as follows: "This Convention has been severely criticised, especially by the major "receiving States" that have not ratified the Convention to date. In fact, it took thirteen years for the Convention to come into force. The main reason why states have not ratified it is fear that irregular migration will increase if migrants are given human rights protection."[25]

The Preamble of the Convention takes into account the United Nations core tenets, including those pertaining to human rights as well as the principles and standards of the ILO and its two Conventions pertaining to migrant workers. It expresses a desire to support the progress made on a regional or bilateral basis as well as the importance of these bilateral and multilateral agreements.[26] These bilateral and multilateral agreements referred to in the preamble create an essential process of attempting to streamline protection afforded to migrant workers. Millard makes reference to the aligning of protection measures at a national level in different SADC countries. [27] This "alignment" is achieved with tools such as bilateral and multilateral agreements. These agreements between two or more countries allow for the contracting

[23] s 39.
[24] s 231 – s 233 specifically.
[25] Dekker "The social protection of non-citizen migrants in South Africa" 2010 *SA Merc LJ* 388 392.
[26] Preamble.
[27] (n 2) 27.

countries to determine the best possible methods in which they can offer social security protection to their own citizens as well as migrant workers entering their borders. They will deal with issues such as reciprocity and portability of benefits across borders and ideally "align protection measures" to ensure maximum protection for migrant workers.

This Convention recognises that any problems that beset migration are even more serious in the cases of illegal migration and supports action to prevent clandestine and irregular movement across borders while simultaneously upholding the instruments supporting human rights.[28]

Ultimately, it seeks "international protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive convention which could be applied universally."[29]

As a brief overview, it contains the following relevant provisions:

Part 1 deals with the Scope and Definitions of the Convention. Of relevance is the Applicability in Article 1 which stipulates that all migrants and members of their families are protected by this Convention without distinction or exclusion based on discriminatory grounds such as race, gender and religion amongst others. It also stipulates that the protection provided by the Convention applies throughout the migration process, including the preparations to migrate up until and including the return to a home area. The definitions are contained in Article 2 which categorise certain types of sub-category of migrant worker and the Exclusions are dealt with in Article 3. These highlight those people to whom the Convention does not apply, such as investors, refugees, state employees and sea farers amongst others. It is interesting to note that the exclusions are predominantly, although not entirely, related to members of society who are not vulnerable, with the notable exception of refugees. It is tacitly acknowledged that migrant workers are ordinarily a vulnerable element of society.

Part 2 deals with Non-discrimination with Respect of Rights and Part 3 with Human Rights, detailing the familiar rights to freedom of movement, life, freedom from torture and slavery amongst others.

Of specific relevance is Article 17 which clarifies that in cases when a migrant worker or member of his family is deprived of his or her liberty he should be treated with humanity and

[28] Preamble.
[29] Preamble.

respect of the inherent dignity of the person. Related to this is Article 18 which accords a migrant worker the right to be treated on an equal footing with nationals or the State before a court or tribunal. When one considers the efforts made to facilitate cross-border migration which will be canvassed below, the importance of liberty and human dignity become paramount. Many migrant labourers are subjected to brutal immigration policies either because of their irregular status or simply because there has not been sufficient harmonisation of immigration laws.

Of importance to the field of labour relations and employment rights and benefits, Articles 25 and 26 deal with conditions of work including remuneration and minimum standards, as well as the human rights aspects pertaining to a minimum age of employment and restriction on work. Article 26 deals with rights of workers to take part in trade union activities and it seeks to uphold the right to freedom of association. In short, migrant workers are entitled to the same rights and protections and shall enjoy treatment "not less favourable" than that of nationals.

Article 27 and 28 deal with social security which a migrant worker is entitled to enjoy to the same degree as a national provided that they fulfil the requirements provided for by the national legislation and the applicable bilateral and multilateral treaties. Article 27(2) even goes so far as to state that in circumstances where the migrant worker would not qualify for social security as the applicable legislation does not provide for it, the state concerned shall examine the possibility of reimbursing the interested parties the amount of contributions made by them with respect to that benefit.

The use of the word "shall" is particularly interesting as this is a pre-emptive term that suggests that a state shall not be afforded the discretion to ignore the prospect of reimbursement. While there is no firm direction that the state shall reimburse, it is enjoined to at the very least consider this reimbursement.

Of particular interest is that in this Convention Articles 1 to 35 make no specific distinction between irregular and regular or documented migrants. This is the first instrument and Article 36 is the first Article within this instrument to make such a distinction and provides for additional rights to be enjoyed by the documented migrant.

While it could be assumed that all humans by virtue of their status as a human beings should be entitled to be treated with the dignity that flows from their innate being, and should be

afforded the basic human rights of liberty,[30] equality,[31] privacy[32] and property[33] this instrument goes so far as to stipulate that regular or legal migrant workers and their families are entitled to social security benefits[34] as well as social assistance such as medical[35] and education[36] facilities. These additional protections also include rights such as the freedom to choose a residence,[37] the right to participate in affairs of their state of origin[38] and the migrant worker may enjoy political rights in the state of employment if that state grants the worker those rights.[39]

The second United Nations instrument of relevance to the status of migrant workers is one which is discussed by Currie who states that: "The most important international instrument relating to socio-economic rights is the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR)...The basic obligation imposed by the Covenant on a member state is 'to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the right by all appropriate means, including particularly the adoption of legislative measures."[40] The applicable steps are those of international assistance and co-operation, especially economic and technical.[41] The focus on international co-operation and cross-border co-ordination is a common theme that runs through the international instruments. This Covenant continues to state that "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals."[42] This catch-all Article allows developing countries specifically, inclusive of the SADC region, to elect which economic rights shall be recognised. Article 2(3) specifies non-nationals in this respect and it specifies that only economic rights are open to election. Social and cultural rights are expressly excluded. Ultimately, developing countries such as South Africa can opt out of recognising certain economic rights for non-nationals, but they cannot go

[30] Article 16.
[31] Article 18.
[32] Article 14.
[33] Article 15.
[34] Article 43 and Article 45.
[35] Article 43(1)(e).
[36] Article 43(1)(a).
[37] Article 39.
[38] Article 41.
[39] Article 41.
[40] Currie and De Waal (n 5) 575.
[41] Article 2(1).
[42] Article 2(3).

so far as to opt out of the associated social and cultural rights. As is discussed below, the social security rights are very firmly entrenched in South Africa.

Currie continues by highlighting that: "The primary responsibility for the enforcement of the Covenant lies with the UN Committee on Economic, Social and Cultural Rights. The Committee was established in 1987 to monitor the compliance of state parties with their obligations under the Covenant. Member states have to submit periodic reports to the Committee on the measures taken and progress made with respect to their obligations. Given that the socio-economic rights in the South African Constitution were modelled on those in the Covenant, the Committee's interpretations on the Covenant and its comments on state reports are a valuable source of guidance for South Africa courts."[43]

The *Certification* judgment is relevant in this respect because two primary objections were raised insofar as the constitutional protection of socio-economic rights was concerned.[44] Firstly it was argued that the rights were not universally accepted fundamental rights, which argument was rejected. The rejection was on the basis that universally accepted fundamental rights can be supplemented with other rights which are not universally accepted,[45] such as these socio-economic rights. Secondly, it was argued that to give the courts the power to encroach upon the "proper terrain"[46] of the legislature and the executive by dictating to government on budgetary matters would be inconsistent with the separation of powers. This argument was also rejected because a court "may require the provision of legal aid, or the extension of State benefits to a class of people who formerly were not beneficiaries of such benefits".[47] The court continued to state that the inclusion of socio-economic rights within a bill of rights cannot and does not confer upon the courts a task that different to what they are ordinarily seized to deal with and therefore it cannot be a breach of the separation of powers.

It is interesting to note that consideration of international law was pervasive before the advent of the Constitutional dispensation. Both the covenant and the established migrant labourer population were in existence at the time of drafting the interim and final Constitutions. These are therefore instruments that are doubly entrenched; firstly because the Covenant forms a direct part of the Constitution in that the socio-economic rights were modelled on it, but also

[43] Currie and De Waal (n 5) 575.
[44] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC).
[45] (n 44) 76.
[46] (n 44) 77.
[47] (n 44) 77.

because the Constitution endorses and promotes interpretation and development of our law in light of international influences.[48] Ultimately, these instruments have an extremely broad set of rights set out for migrant labourers which, either directly or indirectly, have influenced South African law.

3.2 African Union

The African Union is a union of 54 African states with the vision of "an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena."[49] The African Union exists to create greater unity and solidarity between the African peoples in Africa,[50] so the below Convention is of particular relevance to this international organisation.

The African Union Convention of Cross- Border Corporation otherwise known as the Niamey Convention says little about migrant workers but recognises much about border issues and the necessity to facilitate a borderless economic structure within Africa. The preamble recognises exactly this - that a considered legal framework for cross-border cooperation would accelerate integration into Africa and improve the likelihood of creating zones for trade and cooperation.[51] It similarly recognises that cooperation must take place at a local, sub-regional and regional level for it to be successfully implemented.[52]

While the focus is on effective immigration policies[53] and the facilitation of cross-border cooperation, the obvious impact will be on the migrant workers who will be crossing these borders. It stands to reason that the corollary will be the conventions and protocols and codes (and other international tools and instruments) that should be read in conjunction with this Convention in order to ensure that the freedom of movement provided for in international tools is coupled with the social security, social protection and legal protection that would create a sustainable environment for a migrant worker. The cross-border legal harmonisation that is advocated in this Convention would similarly have to be developed in keeping with the

[48] ss 232 and s233 of the Constitution.
[49] www.au.int/en/about (13-02-2015).
[50] AU objectives www.au.int/en/about (13-02-2015).
[51] Preamble.
[52] Article 2(1).
[53] Article 2: Objectives.

individual constitutional dispensations.[54] A Convention regulating cross-border cooperation cannot exist in isolation from the people who will be crossing those borders, and as such, the international, regional and national tools applicable to the areas of movement have to be considered to ensure that the objectives of the African Union are met, in that the people of Africa are able to create a greater unity and solidarity, while simultaneously not breaching any international human rights.

Article 7 recognises that state parties should harmonise their domestic law with this Convention but specifically uses the word "encouraged" as a reflection that not all countries will be able to achieve this immediately or even effectively. It continues at Article 8 to set out the mechanisms for implementation on a national level with reporting structures, establishment of cooperation mechanisms and other tools.

There is a strong emphasis on encouragement to implement the policies and prescripts of the Convention and that member states should consider the Convention in line with domestic policies. A Continental Border Consultative Committee shall be established to this end,[55] but there can be no question that the political and economic strengths of various member parties will play a profound role in the viability of immediate ratification and implementation. Indeed, the simple truth as to whether a member state is a receiving or sending state will play a profound role. It stands to reason that a receiving state will have a greater reticence and less motivation to ratify an instrument which obliges the member state to uphold standards which it cannot reasonably reach. Similarly, the receiving state bears a greater burden insofar as legal protection and social protection is concerned and without the necessary incentive to ratify this or other international instruments, will be loathe committing to the social welfare of non-citizens based in its country.

This Convention was adopted on 27 June 2014 so it remains to be seen whether it will play a role in the development of cross-border facilitation. The tools established to ensure compliance will illustrate relatively quickly the potential success of the instrument.

Albeit this Convention is a newly adopted one, certainly as far back as 2004 the Ouagadougou Extraordinary Summit highlighted key areas of interest which overlap with the issues surrounding cross-border facilitation. Two such key issues are labour migration and regional economic integration. The Special Session Concept Note states that the Ouagadougou +10

[54] Article 4.
[55] Article 10.

policy debate will focus on 6 key priority areas and goals, one of which will be labour migration.[56]

Part of this initiative encompasses a proposed meeting of the Regional Economic Communities which states that "a meeting with the social sector desk responsible for labour, employment, migration and social protection at the RECs will be organised in collaboration with the AUC Department of Economic Affairs. This meeting provides opportunity to review policy and programmes devised by the RECs in the areas of labour, employment, migration and social protection. Some RECs have accumulated broad experience in these areas in terms of regional integration and should contribute to the formulation of the new policy instruments following the Ouaga + 10 process. Among the relevant issues, labour migration will feature as a prominent area of policy intervention at all levels."[57]

The same Commission of the African Union held an Extraordinary Summit on Employment, Poverty Eradication and Inclusive Development in Africa.[58] The objectives highlighted were to "end the challenge of persistent high levels of underemployment, unemployment and vulnerability in the course of the next decade through effective, measurable and well researched implementation of the following Key Priority Areas",[59] one of which refers to labour migration and regional economic integration. A further objective was to enhance the capacity of the RECs to monitor and evaluate productive employment and labour migration within the framework of regional and inter-regional cooperation.[60] Ultimately, the developing continent recognises that economic development, growth and strength lies in the creation of cross-border facilitation measures.

3.3 International Labour Organisation

Baruah and Cholewinski state that: "While the ILO instruments concerning migrant workers do not cover all migrant - related operations (for example, they do not deal with the elaboration and establishment of a national labour migration policy), the principles enshrined in these

[56] AU *Special Session of the Labour and Social Affairs Commission of the African Union* (Windhoek, Namibia, 21 - 25 April 2014) par 19.
[57] (n 56).
[58] Labour and Social Affairs.
[59] AU *Draft Declaration on Employment, Poverty Eradication and Inclusive Development* (2014 - "Ouagadougou +10 Declaration") par 2.
[60] (n 59).

instruments provide an important framework for guidance on what should constitute the basic components of a comprehensive labour migration policy, the protection of migrant workers and measures to facilitate as well as to control migration movements. More specifically, they call for measures aimed at regulating the conditions in which migration for employment occurs and at combating irregular migration and labour trafficking, and measures to detect the illegal employment of migrants with the aim of preventing and eliminating abuses. They also contain provisions on cooperation between states and with employers' and workers' organisations in this regard."[61]

Despite the international prominence of the ILO and the fact that its conventions are considered to be the cornerstone of fair and progressive labour relations it is of importance to remember as stated by Van Niekerk *et al* that "(ILO) Conventions are not automatically binding, not even on those member states that voted in favour of the adoption of the convention. The rationale underlying this provision can be traced back to the formation of the ILO and resistance to the concept of an 'international labour parliament' that would have the power to bind sovereign member states to standards adopted by a requisite majority. The ILO's constitution therefore provides for the voluntary assumption of obligation, so that a convention becomes binding on a member state only once that state has ratified the convention. Article 19, Paragraph 5(d) of the ILO constitution provides that a member state ratifying a convention is obliged to 'take such action as may be necessary to make effective the provisions' of the ILO's supervisory bodies, including the complaints procedures established by the ILO's constitution."[62]

"ILO social security standards can be classified according to their objective with regard to non-citizen workers. One group of labour standards aims to create equality of treatment between citizens and non-citizen workers. Other instruments seek to ensure that a worker's change of residence does not prejudice his or her acquired rights or rights in the course of acquisition. These instruments contain standards and principles aimed at protecting and streamlining the social security (insurance) rights of non-citizens when they move across borders, and also apply to refugees and stateless persons residing in any of the ratifying states without condition of reciprocity."[63]

---

[61] *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* OSCE (Organisation for Security and Co-Operation in Europe) IOM (International Organisation for Migration) & ILO (International Labour Office) (2006) 28.
[62] Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@Work* (2012) 21.
[63] Olivier "Social Security Framework: Non-citizens: International Labour Organisation Instruments" 2012 *LAWSA* 138.

However, the international framework pertaining to migrant labour is largely contextualised by two ILO conventions pertaining to Migrant Workers, being the Migration for Employment Convention (Revised) 1949 (No. 97) and the more recent Migrant Workers Convention 1975 (No. 143). Neither has been ratified by South Africa, but nonetheless, it is the framework against which the international community reflects upon standards for migrant workers. (It is particularly interesting to note that International Labour Organisation conventions that have not been ratified in South Africa are referenced in the Codes and Protocols of SADC[64] and re-emphasised as a base point upon which a country can consider existing standards.)

While ratification is important insofar as an overt and express commitment to uphold certain standards, the lack thereof is not a reflection that it is irrelevant to South Africa. The constitutional entrenchment of international law allows for its indirect incorporation.

3.3.1 The 1949 Convention (C97)

The 1949 Convention, which has not been ratified by South Africa but has been ratified by several SADC countries[65] places an obligation on members who have ratified the convention to make available information on their national policies, laws, and regulations pertaining to emigration and immigration as well as any general agreements or special arrangements made for migrant workers.[66]

Again, if SADC countries have ratified this convention, any bilateral or multilateral treaty entered into between South Africa and one of these ratifying countries, the Convention will find its way into the framework of South African policy regardless as to ratification.

As far as provisions of the Convention are concerned, Article 4 provides that members undertake to facilitate the departure, journey and reception of migrant workers in terms of this convention.[67] Article 6 is also of importance. Essentially it states that each member shall provide, without discrimination, to *lawful immigrants* treatment no less favourable than its own

[64] SADC Code on Social Security, SADC Protocol on the Facilitation of Movement of Persons, SADC Protocol on Employment and Labour.
[65] Madagascar, Malawi, Mauritius, Tanzania and Seychelles. http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242 (29-10-2014).
[66] Article 1 No. 97.
[67] Article 4 No. 97.

nationals.[68] It does not stipulate what shall happen to those migrants who are based in a member state on an irregular basis.

It stipulates that remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young person's shall be applied equally to nationals and migrants alike. Freedom of association rights are also entrenched, as is accommodation, employment taxes and legal proceedings. Article 6 also stipulates that social security rights shall be equal (subject to the limitations that appropriate arrangements for the maintenance of the acquired rights and rights in the course of acquisition, as well as national laws or regulations which may prescribe certain special arrangements concerning benefits payable) out of public funds that do not fulfil the contribution conditions.[69]

Article 10 expressly enjoins member territories to enter into bilateral agreements "in cases where the number of migrants going from the territory of one Member to that of another is sufficiently large." These agreements would serve to clarify the position of the two contracting countries regarding social security entitlements. As an example, it would provide mechanisms to recognise and control an influx of migrant workers so that social security claims are not duplicated by both countries. It would ensure that claims could be made in either country or benefits would be portable across borders. Essentially, bilateral agreements serve to streamline a process.

Annex I - Recruitment, Placing and Conditions of Labour Migrants for Employment Recruited otherwise than under Government Sponsored Arrangements for Group Transfer also sets out guidelines (with a similar provision to Article 10) contained in Article 7 of the Annex I. This too encourages the conclusion of bilateral and multilateral agreements as does Article 12 for Annex II (dealing with the Government Sponsored Parties).

Multilateral agreements are more complicated because they may conflict with existing bilateral agreements. While the ILO recommends the creation of these agreements, the process of coordinating the conflicting political, social and economic agendas of several, often vastly differing countries is overwhelming. This, coupled with the fact that many countries may have existing bilateral agreements that govern relationships between them results in a process that may very well take years. The value of the agreements must be considered in light of the

[68] Own emphasis.
[69] Article 6(b)(ii) No. 97.

logistical maze that warrants creating them. In turn, this time consuming process leaves several years of migrant workers unprotected.

3.3.2 The 1975 Convention (C143)

The second Convention, or the Migrant Workers Convention of 1975 (C143) highlights in the preamble the Constitution of the ILO, which assigns the task of protecting the interests of workers when employed in countries other than their own, as well as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which espouses the right of every one to leave any country and to enter ones' own country.

Part I deals with Migrant Workers in Abusive Conditions and stipulates that all human rights must be upheld. Article 2 enjoins members of the Convention to determine whether there are any illegally employed migrant workers in its territory and whether their travel conditions either into or out of the country are problematic and in contravention of any bilateral or multilateral treaties to which the member country may be committed.

Article 3 and 4 enjoins the member to conclude such bilateral and multilateral treaties in order to prevent any abuses which may be occurring with reference to the illegal migrants and to participate on an international level to prevent any abuses.

Article 8 stipulates that a migrant who has resided legally in an area shall not be deprived of such legal standing in the event that he loses his employment and shall, in effect, enjoy the equality of security of employment.

Part II[70] and Part III[71] both encourage a member state to conclude bilateral and multilateral agreements between themselves in Article 13 and 15 respectively.

Of particular importance and as discussed below is that South Africa has not ratified either of these two conventions although the courts shall (and do) take cognisance of them. Again, the issues of bilateral and multilateral agreements is raised, which by their very nature depend on reciprocity between countries. This is interesting because the ILO instruments do not depend on reciprocity. While they highlight and endorse the principles, the ILO instruments do not

[70] Equality of Opportunity and Treatment.
[71] Final Provisions.

affect the sovereign right of each member state to allow or refuse a foreigner entry to its territory.[72]

These conventions are enhanced when read against the ILO 2012 Text of the Recommendation Concerning National Floors of Social Protection. This is a non-binding instrument setting out that each member should develop a floor of social security. Part III sets out the National Strategies for the Extension of Social Security which stipulates that "social security extension measures should apply to persons both in the formal and informal economy and support the growth of formal employment and the reduction of informality, and should be consistent with, and conducive to, the implementation of the social, economic and environmental plans of Members.[73] It continues to state that the extension strategies should ensure support for disadvantaged groups and people with special needs. It can be argued that migrant workers, particularly irregular or undocumented migrant workers would constitute a segment of the disadvantaged group. As the name would suggest, this document constitutes a broad set of recommendations regarding social protection which a nation could elect to implement or reject.

3.4 Southern African Development Community

"Immigration laws and policy in SADC countries generally focus on the effects, rather than the underlying causes, of migration. The policy and legal framework in this regard emphasises the tightening of controls, the monitoring of borders and, particularly in South Africa, the establishment of detention centres and increased deportation of irregular migrants. In essence, immigration laws and practice in SADC are not geared towards honouring a human rights approach and towards encouraging and supporting migration, but towards restricting access, controlling movement and regulating presence in the host country. In addition, primacy is given to immigration laws and policy at the expense of social security laws and labour laws."[74] SADC has a variety of instruments that govern the movement of migrants and the framework within which they are assessed. SADC is in the invidious position in that of the fifteen member states[75]

[72] (n 61) 27.
[73] 14A/12.
[74] Olivier "Social Security Framework: SADC migrants and social security: Policy and legal reforms" 2012 *LAWSA* 158.
[75] Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. http://www.sadc.int/ (29-10-2014).

there are distinctly different political and economic factors to consider which in turn affect the ability of individual states to conclude bilateral and multilateral agreements.

The three main SADC instruments dealing with social and legal protection for Migrant Workers are the Charter of Fundamental Social Rights, the Code on Social Security and the Protocol on the Facilitation of Movement of Persons. There is an additional Protocol which was signed on 18 August 2014. Its impact remains to be seen. This is the Protocol on Employment and Labour. Each of these instruments will be considered in turn.

3.4.1 The Charter

Dealing first with the objectives of the Charter (which are mentioned in Article 2), the Charter promotes the formulation and harmonisation of legal, economic, and social policies and programmes, promotes labour practices which facilitate mobility, provides a framework for regional co-operation and promotes the establishment of social security measures and health and safety measures amongst other issues.

Article 4 entrenches the freedom of association and collective bargaining and stipulates that dispute machinery must be autonomous, accessible, efficient and subject to tripartite consultation. It deals comprehensively with the rights associated with the freedom of association and collective bargaining, including the right to strike.

Article 5 deals with the Conventions of the ILO and expressly provides that member states shall establish a priority list of ILO Conventions and that they must take "appropriate action" to ratify and implement these instruments. It goes further to state that not only must the member states focus on ratification within their own borders but also establish regional mechanisms to assist with this process for other member states. This amounts to a "best practice" policy which is recommended by several international instruments as a means to achieve a higher ratification standard faster. Essentially, those countries that have ratified a Convention or other international tool will provide the feedback to facilitate the easy adaption and quicker adoption for other countries.

Social protection is dealt with in Article 10 and of importance in the labour regulation framework, Article 11 deals with the Improvement of Working and Living Conditions; specifically the harmonisation of minimum requirements in labour legislation to set a floor of

minimum standards in the region. This Article makes explicit reference to workers in the region (as opposed to within a member state) clearly acknowledging that migrant workers as workers in the "region" are equally as entitled to harmonised working conditions as are citizens within each specific member state. Ultimately, it proposes that legal protection pertaining to working and living conditions should be harmonised throughout the region for the benefit of all workers and not just citizens.

Health, safety and environmental factors are dealt with at Article 12 which again mentions the ILO Conventions as an aspirational standard. It is clear throughout the Charter that a profound importance is attached to the standards set out in the ILO Conventions.

It stands to reason then that regional mechanisms refers again to bilateral and multilateral agreements to facilitate the best practice models. Utilizing the agreements would facilitate refining of the regional measures. Regional methods would also include reporting structures. These have a two-fold benefit. Firstly, a reporting structure holds regions accountable and forces a critical and analytical view of the status of migrant workers in a region and their access to social security benefits. Accountability to other regions ensures awareness of the situation which should lead to progress and development. Secondly, reporting structures provide for social pressure. If all countries in SADC were to comply with an established reporting structure, the failure of one would result in a social pressure to conform to standard.

3.4.2 The Code

In Article 2 of The Code on Social Security in SADC sets out the principles underlying the Code more specifically in that the Code "is mindful of and attempts to give expression to salient principles underlying the development of social security systems."

Article 3 sets out that the Code intends to give direction to the development of schemes to guide member states and Article 4, expanding on this, highlights that each member state should consider the ILO Convention on Minimum Standards of Social Security to be a satisfactory level.[76] Again, the adherence to international standards is codified. Article 4 continues to state that every member state should progressively raise its system of social security to a higher level

[76] C102 of 1952.

keeping in mind the realities and level of development of the member state. Throughout the Code, social security aspects are considered such as health, education and old age.

Article 17, however, deals specifically with Migrants, Foreign Workers and Refugees, recognising that they are a specific category of vulnerable workers. This Article emphasises that member states should work towards the free movement of persons and that immigration controls should be progressively reduced. This must be seen in conjunction with the Protocol on the Facilitation of Movement of Persons which is discussed below and which deals with the degree to which member states are enjoined to remove barriers preventing the freedom of movement between national borders.

Article 17 continues to provide that lawfully employed immigrants, as distinguished from irregular immigrants, should be protected through the promotion of the following core principles which should be contained in national laws of member states as well as bilateral and multilateral arrangements, namely:

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

While not expressly provided for in the above basic rights, illegal and undocumented migrants are protected inasmuch as the Article provides that they should be provided with basic minimum protection.

The Code also contains parameters for monitoring and establishment of protection schemes within a national and regional framework and endorses a policy which accounts for compliance with the international and regional instruments as well. This Code essentially sets out more

detailed parameters and objectives. One can see the evolution from UN instruments which are, by necessity, extremely broad in their fundamental principles. SADC as an area is sufficiently homogenous for the Code to allow for greater specificity and precise objectives.

3.4.3 The Protocols

The Protocol on the Facilitation of Movement of Persons recognises that freedom of movement of persons is a worthy ideal, but "conscious of the necessity to adopt a flexible approach in order to accommodate disparities in the levels of economic development among Member States" deals with the objective of member states to develop policies aimed at the progressive elimination of obstacles to the movement of persons in the region generally and into and within the territories of state parties.[77]

This instrument, while dealing specifically with freedom of movement, to the exclusion of any social or economic aspect, cannot be seen in isolation because of the various articles mentioned in the Protocol that deal with the mutual efforts of the member states. Article 7 deals with the "Harmonisation of National Laws" and that SADC will, from time to time, produce model laws for consideration by member states.[78]

Article 11 deals with co-operation and mutual assistance of the member states and that the members should formulate policies and mechanisms for enhancing co-operation. Article 13 stipulates that current immigration practices require harmonisation and that a viable method in which to do so is by way of bilateral agreements.

Article 31[79] deals with the necessary steps that member states shall take to ensure the co-operation and harmonisation of the activities of the SADC and the regional economic communities. This protocol recognises that migrant labourers are an economic set that warrants acknowledgement, protection and specialised legislative provision.

The second and more recent protocol of relevance is the Protocol on Employment and Labour. This protocol was signed by South Africa on 18 August 2014. The specific objectives of the Protocol are to set minimum standards on employment and labour, social security, health and other workplace related matters. Article 5 highlights that a basic human rights approach is

[77] Article 2, Overall Objective.
[78] Article 7.
[79] Relationship with Other African Regional Economic Communities.

required and specifically states that there should be a domestication process of international obligations.

Article 11 makes reference to the rights of every worker to have adequate social protection. This instrument takes cognisance of the fact that an instrument that only protects citizens would be of limited value. The language used throughout the Protocol refers to "everyone" or to the rights of "workers". It is only the Article[80] pertaining to Health Care where specific reference is made to the rights of "residents' to receive adequate health care.

Article 19 is entitled Labour Migration and Migrant Workers and this sets out the comprehensive obligations of a SADC member state. The protocol references the obligations to improve migration, facilitate the return of emigrants in their country of origin, to ensure that fundamental rights are accorded to non-citizens and to harmonise national migration laws and policies.

Cumulatively and individually these instruments provide a valuable theoretical base point upon which the social security rights of documented and undocumented migrants are protected. Each of these tools further clarifies and enhances the position of SADC with regard to the labour force. However, the inherent problems facing the SADC labour force are not accounted for. While the very nature of harmonising a system across such a large geographical area and such a diverse country-framework necessitates broad, over-arching strokes, the frailties of the system also require intricate and problem specific solutions.

Nonetheless, the SADC instruments reflect significantly more specificity than the other international tools discussed thus far. As the area becomes more homogenous and the problems facing migration in these areas become region-specific, the associated instruments are able to focus the objectives slightly more than, for example, an ILO Convention.

4. SOUTH AFRICAN LEGISLATION AND JURISPRUDENCE

South Africa has a unique role to play because it is such a prominent receiving country in Africa in general. The legislative and jurisprudential tools available in South Africa are pivotal to the welfare of documented and undocumented migrants. The ethos espoused by the international tools discussed above will reflect in the legislation and the constitutional jurisprudence in South

[80] Article 13.

Africa, most specifically the immigration laws and South African constitutional law. The South African courts have had limited opportunity to develop a comprehensive jurisprudence surrounding migrant workers. The vulnerability and often undocumented status of migrant workers is probably a bar to accessing the necessary courts or tribunals. Nonetheless, the common theme running through these cases is a greater recognition of the rights of a vulnerable category of persons.

4.1 The Constitution of the Republic of South Africa.

Olivier states: "International precedent makes it clear that courts with constitutional power potentially wield enormous power in the shaping of social security law and labour law."[81] He continues by quoting Kahn-Freund[82] who stated that: "It is very easy for judges to read their own notions of policy into the bill of rights. To enact a bill of rights may involve a shifting of the function of law reform from Parliament, the Government and the Law Commission to the Bench and the Bar. Some may consider this as a risk, others as an opportunity. But it should be faced with open eyes. The potential significance of such development should not be underestimated."[83] This is an interesting view in relation to that which was stated in the *Certification*[84] judgment above, in that the inclusion of socio-economic rights within a bill of rights does not confer upon the courts a different task than that with which they are ordinarily seized. Regardless as to whether one holds the view of Kahn-Freund or that as espoused in the *Certification* judgment (or even whether one perceives these as statements that amount to the same thing), it is apparent that a constitutional dispensation can have a powerful sway over a socio-economic structure in a country.

Olivier states that "the rich constitutional rights-infused jurisprudence in South Africa has also been instrumental in enhancing the labour law and social security position of non-citizens. This is evident from, for example, court judgments which extended the social assistance grant system to permanent residents; directed government to protect unaccompanied foreign children through the child welfare protection system in South Africa, and recognised the continued

[81] "*Critical issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Marginalised* 1999 *ILJ* 2199.
[82] *The Impact of Constitutions on Labour Law* 1976 *Cambridge Law Journal* 240.
[83] (n 82) par 270.
[84] (n 44).

existence of an employment contract despite the fact that a work permit of a foreigner may have expired." [85]

Thus far this paper has considered several international instruments which provide a framework for social security provisions in sub-Saharan Africa. On a national level, the Constitution (which encompasses the fundamental human rights including the rights to fair labour practices, freedom of association, freedom of movement, freedom of trade and the social security rights of education, healthcare and housing), also contains two important considerations for the interpretation of the international instruments referred to above.

Section 232 reads as follows:

> "Customary International Law
>
> Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

Section 233 reads as follows:

> "Application of International Law
>
> 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."

Essentially, the relevance of the international instruments is constitutionally entrenched in that these constitutional provisions prescribe that these instruments must be taken into account. Similarly, the fundamental rights enshrined in Chapter 2 are also interpreted in light of these international instruments. This, coupled with the interpretation clause contained in the Constitution,[86] makes it clear that our courts are bound to consider the impact of these international instruments, whether or not they have been ratified.

The South African Constitution provides that a court must take cognisance of international and foreign law. Most specifically, the Constitution states that one must consider international law and one may consider foreign law. It is these constitutional clauses that ensure that standards on an international level can and should make their way into South African jurisprudence when

[85] (n 6) 36.
[86] s 39(1).

the judiciary applies the applicable international law. This in turn ensures that the international standards, codes, conventions and protocols relevant to migrant workers become constitutionally entrenched.

This position reflects in the judgment of *National Union of Metal Workers of South Africa and others v Bader Bop (Pty) Ltd and another*[87] where O' Regan J states that the "The first purpose of the Act is thus to give effect to constitutional rights. Secondly, the Act also makes clear that it is intended to give legislative effect to international treaty obligations arising from the ratification of International Labour Organisation (ILO) Conventions. South Africa's international obligations are thus of great importance to the interpretation of the Act."[88]

The same case continues to re-iterate the stance taken in the case of *South African National Defence Union v Minister of Defence*[89] where it was expressly stated that an important source of international law will be the conventions and recommendations of the ILO.[90]

Despite many of the ILO conventions that have not yet been ratified by South Africa, the two conventions on migrant workers, C97 and C143 being a case in point, our courts are duty bound to take cognisance of international standards and implement these where possible. The *Discovery*[91] case detailed below also highlights the obligation on the courts to consider these international instruments.

In *S v Makwanyane*[92] the court stated: "International agreements and customary international law provide a framework within which ...[the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions..."[93]

Insofar as migrant workers in South Africa are concerned, the fact that certain instruments have not been ratified becomes less important because it is constitutionally entrenched that these instruments have been and will continue to be enveloped into South African jurisprudence by

[87] 2003 3 SA 513 (CC).
[88] (n 87) 26.
[89] 1999 4 SA 469 (CC) 25.
[90] (n 87) 28.
[91] *Discovery Health Limited v CCMA* 2008 7 BLLR 633 (LC) 42.
[92] 1995 3 SA 391 (CC).
[93] (n 92) 35.

sections 232 and 233 of the Constitution. Moreover, these organisations may "provide guidance"[94] as to the correct interpretation. The protection afforded to migrant workers is therefore doubly entrenched; firstly by the Bill of Rights and then by unratified (but nonetheless incorporated) customary international law in South Africa.

The case of *Sanderson*, however, sets out a warning. "In this context I wish to repeat a warning I have expressed in the past. Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies. Both the interim and the final Constitutions, moreover, indicate that comparative research is either mandatory or advisable... Nevertheless the use of foreign precedent requires circumspection and acknowledgement that transplants require careful management."[95]

In the case of *De Lille and another v Speaker of the National Assembly*[96] Hlophe J similarly states that "In my judgment, it is important that our Courts should borrow wisely from other jurisdictions. Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well-established in other jurisdictions. Nevertheless we should be careful and borrow wisely because our own Constitution is the product of South African history and must be interpreted accordingly."[97]

As a caution Epstein AJ states the following in the matter of *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*[98] "The relevance of a foray into foreign jurisdictions is ameliorated by the following extract from T Koopmans, 'Understanding Political Systems: A Comment on Methods of Comparative Research: 'There is little reliable knowledge of the world's political systems because most observers share the views, assumptions, and prejudices of the actors: United States political scientists write about the American system, English and Scottish lawyers about the government of the United Kingdom, and Frenchmen about France. When these learned authors write about a system which is foreign to them, they normally fail to understand it because they fail to discover the different assumptions underlying that foreign system'."[99]

[94] (n 92) 35.
[95] *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) 26.
[96] 1998 3 SA 430 (C).
[97] (n 96) 21.
[98] 2003 3 SA 389 (W).
[99] (n 98) 32.

This extract is perhaps the most pessimistic when it comes to the value of comparative research. It essentially suggests that any environment in which one does not have a first-hand experience is rendered unreliable when compared against one which is familiar. There is merit in this argument. As an example, many South African cases refer to the concept of 'ubuntu' which concept is extremely difficult to explain to someone who does not have an inherent understanding of the South African context. If foreign jurisdictions were to attempt to apply this concept of "ubuntu" to international jurisprudence there is an extremely high possibility that the essence of the concept would be lost in the application of the concept. The same danger is applicable to South African courts attempting to extract principles that are unique to a foreign jurisdiction.

These warnings do not detract from the necessity to do comparative research. They simply propose caution, particular when dealing with jurisdictions and societies that differ from our own. A North American jurisprudential dilemma regarding migrant workers is unlikely to be a replica of a scenario in SADC in light of the differing social, political and economic cultures.

4.2 Immigration Law of South Africa

Olivier states in his report "Reflections on the feasibility of a multilateral SADC Social Security Agreement involving South Africa and Lesotho, Mozambique, Swaziland and Zimbabwe"[100] that "Immigration law has an impact on the social security and other rights of non-citizens. Immigration law is used as a tool to regulate and control access and entitlement to social security in South Africa, and often supersedes the personal scope of coverage of social security schemes relating to non-citizens. As a result, immigration and social security legislation invariably contains provisions which either expressly exclude or adversely affect social security rights of non-citizens. Legally and factually speaking therefore, the position of non-citizens in terms of South African immigration is superimposed on their social security status."[101]

[100] p 11. See also Olivier "Social Security Framework: Constitutionality of exclusions" 2012 *LAWSA* 90.
[101] (n 100) 12.

Essentially, the immigration status of a migrant worker would then be determined by the provisions of the Immigration Act and by the provisions of any bilateral agreements between the (relevant countries).[102]

The Immigration Act, which regulates non-citizens' entry into and residence in South Africa distinguishes between various categories of non-citizens according to their immigration status and/or purpose of entry. In terms of section 9(4)(b) of the Act, a non-citizen may only enter and remain in the country if he or she is in possession of a permanent residence permit or one of 14 different kinds of temporary residence permit.[103]

The preamble of the Immigration Act[104] recognises that economic growth is promoted through the employment of needed foreign labour and foreign investment, also makes express mention that a human rights based culture of enforcement must be promoted, that international obligations of the Republic are complied with and civil society is educated on the rights of foreigners and refugees.

This serves to illustrate that at the outset, and enshrined in the preamble is the recognition that foreign labour in South Africa is a reality and such reality exists within the framework of the SADC region. Its relevance however is determined only by the degree to which South African immigration laws are harmonised with other nations in sub-Saharan Africa. While South Africa can recognise a human rights based culture within its own borders, the very nature of migration is that two nations are involved and a harmonisation of laws and the establishment of bilateral or multilateral agreements are essential. The countries cannot operate in a vacuum.

While the legislation contains nothing remarkable and is purely a tool for implementation purposes it is silent on the issue of neighbouring countries or the heavy influx of workers that South Africa experiences as a receiving country. It is also silent on the ratio of irregular workers relative to regular and documented workers entering the country. A viable and effective immigration system that is harmonised with neighbouring countries will have as an objective the increase in the number of regulated workers and a decrease in the number of irregular workers.

[102] (n 100) 12.
[103] (n 100) 12.
[104] Act 13 of 2002 as amended by Act 19 of 2004.

4.3 Case Law

This section will highlight some of the cases that have been decided in our courts in a chronological order, illustrating the progress or stagnation of social protection for migrant workers specifically, but also other workers who are vulnerable for similar reasons.

- The *Larbi - Odam* Case

The *Larbi - Odam*[105] case came before the Constitutional Court in 1997 and dealt with eight appellants who were foreign teachers employed in the North-West Province. The eight appellants came from various parts of Africa and had been resident in South Africa for varying amounts of time. Some were married to South African citizens, some were permanent residents, some had children in South Africa.

Regulation 2(2) of the Bophuthatswana National Education Act[106] provided that a person could not be appointed or promoted in a permanent post unless he or she was a citizen of Bophuthatswana. The appellants sought an order that this was discrimination on the basis of citizenship (or in this case, the lack thereof).

Mokgoro J applied the *Harksen v Lane* [107] test for discrimination to these facts and found that the unspecified ground of citizenship did constitute a ground for discrimination. He continues

[105] *Larbi-Odam v MEC for Education (North - West Province)* 1998 JOL 1826 (CC).
[106] 2 of 1979.
[107] 1998 1 SA (CC) at par 53 the test for discrimination is set out thus:
"At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
    i. Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of the persons as human beings or to affect them adversely in a comparably serious manner.
    ii. If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and other in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

to highlight the increased vulnerability that a non-citizen will face in a country and quotes Wilson J in the Canadian Supreme Court in *Andrews v Law Society of British Columbia*[108] that:

"Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending".[109]

Ultimately, Mokgoro J found that unless employment positions require citizenship for a specific reason such as the political sensitivity of the post there should be no distinction between the employment opportunities for permanent residents and citizens. A distinction was made between temporary residents and permanent residents and the court stipulated that should the temporary residents wish to enjoy the same security of tenure that the permanent residents enjoyed, they could exercise their rights and apply for permanent residency in the normal course.

Ultimately, the court endorsed a stance that a citizen and non-citizen shall be entitled to equal rights and privileges and the regulation pertaining to the Education Act prohibiting the permanent employment of the applicants was declared to be invalid.

Again, the constitutional endorsement of equality and the recognition of the rights of non-citizens was upheld which goes a significant distance towards recognising the rights of non-citizen workers. While the case can be distinguished because the very nature of a migrant labourers working life is mobility, it nonetheless entrenches the right to a certain degree of job security and equal treatment.

With job security and equal treatment comes an increase in access to and ease with which employees can claim social security protection. Job security reduces the prospects of movement, which in turn reduces the risks associated with portability of benefits. Job security promotes a legal status for a migrant worker, which in turn enhances a states' ability to accommodate and make provision for a worker. A judgment that appears to have no social security element at all, ultimately filters down to increased protection for migrant workers.

(c.) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).

[108] (1989) 56 DLR (4th) 1 at 32.

[109] (n 105) 19.

- The *Khosa* Case

The matter of *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*[110] dealt with two separate but related matters (which were argued simultaneously and decided simultaneously) pertaining to permanent residency and social protection. The *Khosa* matter was a claim brought by the applicants challenging the constitutionality of legislation that reserved social grants for aged South African citizens, and the related *Mahlaule* matter raised similar constitutional queries pertaining to the entitlement of permanent residents claiming child support grants and care dependency grants.

In both cases the applicants were Mozambique nationals who acquired permanent residence by virtue of exemptions granted to them. In both cases, the applicants would qualify for the social assistance but for the fact that they are not South African citizens.

In these matters the applicants relied on the distinction between "*citizens*" and "*everyone*" in section 25 and section 27 of the Constitution respectively; essentially saying that the use of the word "*everyone*" would include permanent residents and therefore entitle them to social assistance in respect of the old age grants and the child care grants.

In these cases, the state argued that the legislative provisions set out were made with a view to combat poverty and in order to give effect to international obligations. It also argued that the state has an obligation towards its own citizens first which is based on the social contract assumption that non-citizens are not entitled to the full benefits available to citizens.

The court then referred to the Immigration Act[111] which provides that:[112]

"The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship."[113]

The state also argued that the financial implications of providing social security for non-citizens would be dire, but ultimately the court found that by excluding permanent residents from the

[110] 2004 6 SA 505 (CC).
[111] 13 of 2002.
[112] (n 110) 57.
[113] s 25(1).

scheme for social security, the legislation limits their rights in a manner that affects their dignity and equality in an absolute sense.

The finding by the Constitutional Court that social security rights are constitutionally entrenched for some sectors of the non-citizen population goes a considerable length towards improving the conditions for migrant workers. A further factor in their vulnerability is the access that a largely unskilled group of workers would have to the legal system. A precedent of this nature goes a considerable distance towards setting the tone for a greater degree of social protection in South Africa.

- The *Discovery* Case

The *Discovery*[114] case considered the aspects surrounding the validity of an employment contract in circumstances where an employee had no legal right to remain in the country. The employee was an Argentinean and a permanent resident in South Africa who represented that he was legally permitted to work for the respondent.

The court was seized with two questions. The first being whether the contract between the parties was valid. If it was found to be valid, the enquiry was over. However, if it was not valid, did that necessarily render the relationship between the parties as something other than "employer" and "employee"?

The court noted that the Immigration Act[115] prohibits the employment of foreigners without the necessary permits. However, the court considered whether this provision intended that all contracts concluded in violation of this section as a nullity. Essentially, the question was: if the applicant entered into a contract "tainted with illegality" would the situation be that such contract could not be valid and therefore the applicant was not an employee and could not claim redress as an employee under the Labour Relations Act[116] (the LRA)?

The court considered both section 38 and section 49 of the Immigration Act and concluded that neither expressly provides that contracts entered into in breach of these sections are void. The legislation is clear that the act of employing a person who is a foreign national without the valid

[114] (n 91).
[115] 13 of 2002.
[116] 66 of 1995.

work permit is prohibited, and not necessarily that the person who accepts and later does work for another is prohibited.

Despite the finding by the court that the employment contract was valid, the court considered the question as to whether the definition of employee is dependent on a valid underlying contract of employment (which debate is obviously pertinent to potential labour disputes arising between foreign nationals and their employers).

In this respect, the court considered the constitutional framework and relevant international standards. Van Niekerk AJ stated, with reference to the UN Conventions pertaining to Migrant Workers, that:

"Although the Convention has not been ratified by a significant number of countries (South Africa has not ratified it) it remains a significant statement of international norms in relation to the rights of migrant workers. The court is therefore required to consider its terms when interpreting domestic legislation."[117]

The court then continued to consider the ILO Conventions, which have also not been ratified by South Africa. The court found that the protection of the fundamental rights of migrants, even those who are employed illegally, is a primary purpose of the International Convention and the ILO Convention 143 and that the LRA should be interpreted taking this into consideration.

As a result, whether South Africa had any intention of ratifying these instruments or not, they now form part of South African law by virtue of their inclusion in South African jurisprudence.

This case is of great significance from two perspectives. Firstly, Van Niekerk AJ considers the unratified ILO conventions and this active endorsement of ILO principles is in line with the constitutional mandate that the courts must consider international law. Secondly, the interpretation of the facts against this constitutional mandate and the international provisions resulted in a profoundly important protection being afforded to a particularly vulnerable group of worker - the illegal migrant. Ordinarily an applicant of this nature - unskilled and uneducated - would be entirely without recourse. In this case, however, an educated migrant worker with irregular status was able to challenge his position and set a precedent that would favour many contracts of employment in South Africa. If the courts are prepared to recognise that the

[117] (n 91) 46.

relationship that underscores an employment relationship between irregular migrant and employer is worthy of protection, then the average migrant worker becomes slightly less vulnerable.

Woolman makes reference to the "Grootboom effect" with reference to the Grootboom judgment[118] pertaining to the right to housing. He says "The Grootboom effect would place other government agencies responsible for delivering basic necessities or transforming social institutions on notice that they are best served by finding stakeholder representatives who can provide the necessary feedback on new and better forms of service delivery."[119]

These judgments cumulatively serve to entrench the social security protection to which migrant labourers are entitled but are not necessarily within their means to achieve and place institutions "on notice" that a minimum level of protection is required.

- The *Kylie* Case

The *Kylie*[120] case is pertinent to the issue of migrant workers in South Africa for several reasons. Firstly, it entrenches the constitutional right to dignity, particularly because Kylie was considered to be a vulnerable member of society. While migrant workers may be operating legally or illegally in South Africa, they are considered to be a vulnerable segment of society. Generally, migrant workers are uneducated, isolated, open to exploitation, and subjected to many societal injustices (as was Kylie). Norton states in her article[121] that "the number of illegal migrants working around the world is significant. The constituency is a vulnerable one, subject to exploitation and abuse. Despite the numbers and the treatment of such workers, it is a striking fact that there are very few reported case of workers challenging their situation. The reason is obvious - workers do not want to expose themselves to the authorities for fear of deportation."[122]

Baruah and Cholewinski mention some of the vulnerabilities faced by migrant workers. They observe that: "It is important to keep in mind a number of basic or fundamental rights, which

[118] *The Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).
[119] Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 431.
[120] *Kylie v CCMA* 2010 4 SA 383 (LAC).
[121] "*Workers in the shadows: an international comparison on the law of dismissal of illegal migrant workers* (2010) *ILJ* 1521.
[122] (n 121) 1550.

are frequently violated in respect of migrant workers. These rights are found in the general international human rights instruments and are also protected by most national constitutions. Clearly, these rights include freedom from slavery, forced labour, degrading or inhuman treatment or punishment. There is little doubt that the working and living conditions of some migrant workers in certain parts of the world are very similar to the situations depicted in these rights violations...Women migrants, because of the gender specific jobs or sectors in which they predominate, are particularly vulnerable to such abuses."[123]

In the case of Kylie, in which a sex workers' right to dignity is upheld by the court, the court states "where a sex worker forms part of a vulnerable class by the nature of the work that she performs and the position that she holds, and she is subject to the potential exploitation, abuse and assaults on her dignity, there is, on the basis of the finding in this judgment, no principled reason by which she should not be entitled to some constitutional protection designed to protect her dignity, and which protection by extension has now been operationalised in the LRA."[124]

The same protection, on the basis of the same argument, can therefore be extended to migrant workers. The constitutionally entrenched right to dignity affords migrant workers a similar protection.

The case is also relevant to the protection of irregular migrant workers. Kylie was an illegal sex worker who was afforded the right to dignity and to fair labour practices despite the nature of her work being illegal. The judgment states that it "cannot and does not sanction sex work."[125] The legality of the work does not deprive the litigant of the constitutionally entrenched rights of human dignity and fair labour practices (amongst other rights).

This case means that migrant workers, regardless as to their status in South Africa and regardless as to the nature of the work that they are performing, should always have the right to human dignity. While the context may be different, this case is a reflection of the stance that South Africa courts are now adopting regarding vulnerable members of our society. On the face of it, an illegal and undocumented trade seems unlikely to result in a favourable outcome in court, yet the court distinguished between the legality of the situation (as it did in the *Discovery*[126] case) and the right to fundamental protection.

[123] (n 61) 26.
[124] (n 121) 44.
[125] (n 121) 54.
[126] (n 91).

The *Kylie* case is a reflection of changing attitudes towards the vulnerable segments of migrant worker population. This is a trend that is evident on an international scale as well. Norton points out in her article that:[127] "Interestingly the descriptors of workers have changed from 'illegal' and 'illicit' in the 1975 Convention to 'irregular' and 'undocumented' in the 1990 Convention."[128] Even the language surrounding migrant workers has evolved from the restrictive and one-dimensional "illegal" to the more tolerant and socially-sensitive "irregular". *Kylie* and the *Discovery* case illustrate that this social shift has permeated to the courts as well and illustrates that the illegality of the activity or status of a person should not impact on their fundamental human rights.

5. BILATERAL AND MULTILATERAL AGREEMENTS

There can be no question that bilateral and multilateral agreements go a significant distance towards ensuring a more equitable environment for migrant workers. Agreements between two (bilateral) or more (multilateral) countries serve to formalise relationships between these countries. These are reciprocal contracts that will govern a relationship and can deal with many issues. In this case, the international instruments such as the ILO tools, UN tools and SADC tools each encourage the conclusion of these agreements in order to regulate working conditions. The purpose of these agreements in this case specifically would be to regulate social security protection for migrant workers travelling between regions.

Baruah and Cholewinski state that: "the best way to ensure migrant workers' social security protection is through the conclusion of multilateral or bilateral social security agreements. Multilateral agreements, in comparison to bilateral agreements, have the advantage of generating common standards and regulations and so avoiding discrimination among migrants from various countries of origin who otherwise might be granted differing rights and entitlements through different bilateral agreements. In addition, a multilateral approach also eases the bureaucratic procedures by setting common standards for administrative rules implementing the agreement."[129]

[127] (n 121) 1550.
[128] (n 121) 1550.
[129] (n 61) 156.

Social security in particular and social protection generally is often restricted by the principle of territoriality, which means that only nationals living in a certain country, entitled to protection and then remaining in that country would benefit from protection. Article 17 of the SADC Code of Social Security recognises that the portability and exportability of benefits is an important consideration for member states insofar as harmonisation of the system is concerned. The above cases reflect a trend towards recognising that non-citizens are entitled to protection. Portability or the ability for the protection to follow the individual across borders is an important concept for both the worker and the host country. As Dekker states: "An important benefit for the country as regards documented migrants relates to the fact that the portability of benefits could increase the return rate of migrants to their home countries. This, in turn, will ensure that the social assistance system is not necessarily burdened."[130]

Dekker continues to give the example that an individual entitled to claim worker's compensation who is also allowed to return to his home country is more likely to return than to remain in the host country unnecessarily.[131] However, the reverse is true if social protection benefits cannot be transferred across a border. In the event that a migrant worker remains in the country to access worker's compensation, the time may well come that he accesses an old age grant, or child care grant or ultimately becomes a burden on the social protection scheme of the host country in a far broader manner than originally anticipated. The *Khosa* and *Mahlaule*[132] case being a case in point, as permanent residents would now be entitled to claim these protections.

South Africa, with its prominent role as a receiving country in the SADC region is particularly affected by bilateral and multilateral agreements or the lack thereof. South Africa has concluded some bilateral agreements[133] but with limited success.[134] Dekker goes further to state that "it is evident that the effectiveness of bilateral protection in Southern Africa is compromised where a country with a well-developed social security system, such as South Africa, concludes a bilateral agreement with a country with a relatively underdeveloped or strained social security system."[135] In circumstances like this South Africa would run the risk

[130] (n 25) 395.
[131] (n 25) 395.
[132] (n 110).
[133] (n 25) 393.
[134] The limited success may be attributed to levels of corruption and inefficiency rather than the efficacy of the agreement itself. Its content may be in line with all recommended conventions and protocols but the implementation flawed.
[135] (n 25) 394.

that while it lived up to its contractual obligations; the other contracting region would not or simply could not do so. A country with a more refined system and a greater degree of consistency with the provision of benefits to non-citizen migrants may not enjoy the reciprocity that has been contractually agreed to if the other contracting party is unable to deliver in accordance with the agreed obligations. Circumstances such as this would render the agreements precarious.

As set out by Van Ginneken[136] "Regional efforts may help to bring about change in the approach to social protection across borders; however, their impact may be limited for the same reasons that deter the implementation of comprehensive social security systems. The Southern African Development Community (SADC) for example, has agreed on a Social Code, which touches upon migrants rights; it encourages members to protect their immigrants, given them equal access to the social security system and to offer at least basic protection to undocumented migrants. Furthermore, member states are encouraged to introduce, by way of national legislation and bilateral or multilateral arrangements, cross-border coordination principles, such as maintenance of acquired rights, aggregation of insurance periods and exportability of benefits. However, the Social Code is not a legally binding agreement."[137]

While the Social Code may place a certain pressure on regions to consider implementation of its principles, the practicality of doing so may be difficult. Undocumented workers are an example. How can one ensure the portability of benefits for an undocumented worker who exists in his home country as a citizen yet not in his country of work as his status is undocumented or irregular? Reciprocal countries may not be able to afford the same degree of reciprocity to migrant workers. Zimbabwe and South Africa would be an example. The differing economic strengths of these two countries would suggest that an agreement on social security benefits may be difficult to reach. Xenophobia in sub-Saharan Africa is such that there may be regional pressure to conclude multilateral agreements regarding coordination principles but on a national level, individual countries may be resistant to foreign intrusions.

Although South Africa has entered into a variety of agreements with countries in the SADC area, not all these agreements cover social security protection schemes and many simply deal with employer-related concerns. Olivier states that "Unlike labour laws, which in a growing

[136] Van Ginneken *Making social security accessible to migrants* (World Social Security Forum) International Social Security Forum 4 (2010).
[137] (n 136) 4.

range of developing countries have extended their reach at least to some extent beyond the confines of the traditional employment relationship, social security insurance laws are usually still predicated on the existence of an employer-employee relationship. Social insurance cover therefore tends to be narrow, leaving the most vulnerable, in particular those in rural areas, without any form of social protection."[138]

Millard[139] contends that South Africa has long been the economic stronghold of the SADC region and that as a consequence thereof, one would assume that bilateral or multilateral agreements would exist in order to provide for the portability of benefits.

Lesotho appears to be a special case in that its geographical position is such that employment opportunities within Lesotho are slim and workers are forced to seek work elsewhere, with the logical conclusion being South Africa. As a result, old age and disability pensions for migrant workers from Lesotho are catered for. Workers compensation is also provided for.[140]

Zimbabwe, another key sending country to South Africa, has no agreements with other SADC countries regarding the portability of benefits[141] which is of utmost concern in light of the large numbers of migrant workers who cross the borders both legally and illegally to work in South Africa.

As is apparent from the above, it is clear that the international instruments governing migrant workers encourage and endorse the conclusion of bilateral and multilateral agreements, the intention of which would be to ensure social protection with the clear and unequivocal agreements as to how to handle issues such as portability and reciprocity.

The latest SADC Protocol[142] (which has been signed by South Africa[143]) places a significant emphasis on a human rights approach as well as the domestication of international obligations, the impact of which, in light of the above instruments, remains to be seen.

[138] Olivier, Dupper and Govindjee *The Role of Standards in Labour and Social Security Law: International, Regional & National Perspectives* (2013) 19.
[139] (n 2) 37.
[140] (n 2) 42.
[141] (n 2) 51 - 52.
[142] Employment and Labour.
[143] 18 August 2014

6. EVALUATION

There can be no question that the international community and the regional and national communities recognise that migrant workers and cross-border movement of labour is a factual reality that must be accounted for in Africa in general and the SADC region specifically.

Olivier remarks that "a suitable range of interrelated measures is required to ensure the adequate provision of social security protections for migrants within Southern Africa. These measures involve host and home country unilateral interventions, bilateral treaties and multilateral agreements. The current legal and operational framework indicates that these measures are insufficiently developed and incoherently applied. They need to be informed by a normative framework, emanating from international and regional standards and reflected in comparative best practice, and should be supported by a set of guiding principles, with particular emphasis on the human rights domain, lawful residence and employment, and special protection for particularly vulnerable groups of migrants. Based on a human rights approach, a minimum level of protection needs to be available, even for migrants in an irregular situation. Given the current state of affairs and the goal of adequate social security protection for migrants within Southern Africa, an incremental approach appears to be called for, and needs to be associated with a number of core reforms at both the domestic and regional levels."[144]

On an international and continental level, a variety of instruments and tools (such as those canvassed above) exist to set minimum standards or aspirational levels to which member states can consider in light of developing their own domestic laws.

However, each member state has its own political and economic dynamic that will dictate the pace at which it can implement these policies, if at all; which in turn affects the surrounding nations with the creation of bilateral and multilateral agreements. In light of these diverse political and economic realities, one has to wonder whether the international instruments are even viable.

Similarly, if one country is able to establish the level of social protection advanced in some of the international tools there is a high possibility that this would be a significant pull factor for migrant workers. If every migrant worker were to be incentivised to travel to a specific country because of the particularly advanced social protection and social insurance mechanisms that

[144] Olivier *Social Security and Migrant Workers: Selected Studies of Cross-Border Social Security Mechanisms* (2014) 81.

exist in that country it would inevitably flood the system to breaking point. The adoption of mechanisms and schemes must be viewed in the context of the international framework if a sustainable system is to be found. The creation of bilateral and multilateral agreements that are premised on a thorough assessment of the economic and political factors influencing these agreements is essential to long term viability.

Olivier states that "Mere ratification of international law instruments provides no guarantee of compliance and adherence. Due to capacity and other constraints, ratification is often not matched by proper implementation at the country level in developing countries. Nevertheless, ratification is important, as it serves as an expression on the part of the country concerned of its willingness to implement international law minimum standards and provides an opportunity for external monitoring."[145]

The Study on Social Protection in sub-Saharan Africa[146] stipulates that there are several reasons for the lack of coverage in the informal economy.

The first is that there is a misguided idea that social security has found its way into national policy and legal systems. While certain systems have been established, they tend to favour the formal work-sector which does not account for the majority of migrant workers and certainly not those who are irregular. In amplification, the formal work sector has established social protection mechanisms in terms of social security and long-term insurance schemes such as programmes like the South African Unemployment Insurance Fund (UIF). However, it is unlikely that a migrant worker would ever benefit from such a scheme because these schemes are predicated on a formal employment relationship and long-term contributions. Olivier states that: "employers stand to benefit from employing non-citizen migrant workers as they are not covered by unemployment insurance and are thus not subject to compulsory contributions. This is also to the detriment of South African workers as they are undercut by the migrant workers. Wages are forced downwards by cheap migrant labour. Inclusion of non-citizen migrant workers into unemployment insurance would remedy this situation."[147] Migrant workers, particularly those who are undocumented, are often vulnerable to unscrupulous employers

[145] "International labour and social security standards: a developing country critique" 2013 *The International Journal of Comparative Labour law and Industrial Relations* 21- 38.
[146] Olivier, Adrianarison and McLaughlin *Study on Social Protection in Sub Saharan Africa* (2013) 6
[147] "Social security core elements: migrant workers" 2012 *LAWSA* 87.

coupled with being isolated and removed from access to courts and appropriate tribunals and resources to access their fundamental rights.

The second, related issue is that the traditional categories around which social security schemes are developed[148] and which form the basis for international and regional social security schemes (as is evident from the above protocols and codes and conventions) rarely reflect the realities of the countries. Olivier states that "The ILO conventions emphasise nine classical social risks, such as retirement, disability, maternity and (the need for) healthcare, as well as the adoption of public measures to address these risks. These definitions concentrate on protecting the individual from insecurity that may affect him or her and do not sufficiently address the context of those in the developing world, where poverty is endemic, where people are exposed to a range of risks not traditionally covered by the social security concept (such as droughts, calamities, natural disasters, HIV/AIDS), and where the focus often is on satisfying immediate needs rather than meeting long-term risks".[149] An ILO Convention has limited applicability in a Sub-Saharan African country with a unique political and economic dynamic. A child-headed family, as is increasingly common with high HIV/AIDS mortality rates, would have no incentive or motivation to be interested in a long-term insurance plan when the problems of the immediate are significantly more pressing.

The third, and similarly related issue advocated by Olivier *et al*,[150] is that the risk categories highlighted in the ILO Convention are all individual focused and do not account for the "collective risks" of war, crop failure and natural disasters. A collapsing economy in Zimbabwe, unique political scenarios in certain countries, rampant corruption, warfare and drought, HIV/AIDS or tuberculosis are all factors that are not accounted for in the international instruments and yet each of these factors will have a significant impact on migration in sub-Saharan Africa.

These individual focused rights also assume that targeted members have reached a standard of living which would benefit only from a social security platform. It does not account for the fact that many individuals in need of social security have not yet reached a basic standard of living which encompasses all human rights. The risks faced by people in a developing country and generally in a state of poverty suggest that basic upliftment is required as well as social security.

[148] Such as retirement, sickness, unemployment, employment injuries and maternity.
[149] (n 138) 26.
[150] (n 146) 6.

Social security provisions and recommendations and provisos cannot be developed by international organisations that assume that a certain base level has been reached when that base level is completely untenable in a developing country.[151]

A further consideration set out in the papers is that the reach of international standards is limited. Aside from the low ratification record, (and the low levels of compliance and monitoring for those that have ratified), these instruments, as stated above, are not created for the developing world migrant worker.[152]

The ILO Recommendation on National Floors of Social Protection[153] may go some degree of setting base standards but firstly, it is a recommendation and secondly it speaks generically of the measures required to extend appropriate protection. Greater specificity and tangible standards would be required.

A further problem that may exist with social security schemes is that there is little consideration of the informal economy. While insurance schemes may be endorsed in the formal sector, little incentive exists to encourage an informal worker to adopt a social insurance scheme. In addition, the schemes may not be open to an informal worker or irregular or undocumented migrants. They may not be affordable or they may not be attractive.

Olivier states that: "...of serious concern is the fact that social security, through its limited coverage of those in the informal economy, contributes to social differentiation and social exclusion. Social security is therefore often seen as serving the interests of the working elite, and not reaching out to those most in need of coverage. Yet it is clear that the general picture in the developing world reveals an increase in the informal economy and in unemployment, while the formal sector/ economy is generally shrinking. Concentrating attention on reforming that part of the social security system which covers only a small part of the labour force, at the expense of the informal economy and those who are unemployed, is inherently unequal, as it directs the attention of government and other stakeholders away from a huge segment of the population with little or no social security coverage."[154]

It is also relevant that a middle-income, formally-employed sector of the economy is less in need of intervention from the government and other stakeholders. To focus too much attention

[151] (n 146) 7.
[152] (n 146) 7.
[153] 202 of 2012.
[154] (n 138) 20.

on this sector is a misdirection of resources on a sector of the economy that has less need. Not only does this misdirection perpetuate inequality but it is also inefficient and potentially wasteful.

It is clear that an international framework with aspirational standards forms an excellent basis upon which to draw advice, but the particular nuances of a developing country cannot be under-estimated or ignored. The SADC region and South Africa require social and legal protection that recognises the unique problems facing sub- Saharan Africa.

There is no question that bilateral and multilateral agreements go a significant distance in terms of increasing the social protection afforded to migrant workers in the SADC region. However, this is largely true only of those migrant workers who are documented; the irregular workers cannot benefit from policies that are unable to identify and account for them.

The key issue that migrant workers in the SADC region face (and in South Africa in particular in light of South Africa being a dominant receiving country) is that the benefits to which a worker might ordinarily be entitled in their home country are not necessarily portable to or from the country in which they work. This is expressly accounted for in the SADC Code in Article 17.

The systems that are currently in place do not support the transfer or portability of benefits from one geographical location to another, and in many cases an individual is simply excluded by virtue of their irregular status or simply on the basis of their non-national status. One of the reasons for this is the "inherited institutional design and the resultant governance and management problems. In many African countries there are clear indications of excessive state intervention or interference."[155] Essentially, the necessary systems at an institutional level are either absent or lacking.

The SADC Code on Social Security, at the outset, in Article 2 also sets out the three SADC specific principles being:

a) Solidarity and redistribution;
b) Variable geometry (the principle, according to the Regional Indicative Strategic development Plan, where a group of member states could move faster on certain activities and the experiences learnt are replicated in other Member states); and

[155] (n 138) 18.

c) Multi-actor responsibility (that is to say, social security provisioning is a function shared by governments, public social security institutions and private role players, keeping in mind that governments bear the overall responsibility).

Immigration laws and policy in SADC countries generally focus on the effects rather than the underlying causes of migration.

Olivier contends for a three pronged approach to ensure adequate provision of social security protection for migrants within Southern Africa.[156]

The three prongs are: "unilateral measures adopted by both SADC home and host countries, dedicated bilateral treaties, in particular between SADC member countries and one or more multilateral arrangements encompassing the SADC region as a whole and/or some countries within that region." Again, the focus on harmonisation through bilateral and multilateral agreements is of importance. Without a degree of harmonisation on a regional level, the efficacy of social security and legal protection in the sub-Saharan Africa region will fall short.

Insofar as a home country or country of origin perspective is concerned, Olivier proposes that the comparative best practice model or variable geometry is followed, whereby SADC and South Africa, as an example, utilize the experiences of other countries to inform the policy decisions they intend to make. This is outlined in the Code above, in that individual regions learn from those that have already implemented certain strategies. Tanzania, in particular, has spearheaded certain policies and programmes faster than its neighbours and stands as a model on which aspects of these programmes work. The cooperation endorsed by the international tools allows a nation to develop a more nuanced plan on the basis of the "trial and error" approach of a predecessor.

As is apparent from the analysis of the variety of regional and international tools discussed above, most advocate a policy of integration and communication within the communities with a view to establishing viable working frameworks. The viability of a "best practice" policy is dependent on comparing similar environments. The insights drawn from a neighbouring country are of significantly more value than those drawn from a first world developed country with a limited migrant workforce.

[156] (n 144) 81 - 115.

Klaaren makes reference to an International Bill of Rights for Migrants which would include social and political rights as well as social benefits. He states as follows: "some could see such an instrument as ill-advised - either by diverting attention away from compliance or by competing with the International Convention on the Rights of Migrant Workers. But it could be a powerful mobilizing tool, contributing to and capitalising upon the processes of building a human rights culture. This is not entirely theoretical. A relatively little known provision of the South African Constitution allows for the adoption of such bills of rights. Section 234 is entitled "Charters of Rights" and reads as follows: 'In order to deepen the culture of democracy established by the provisions of the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.' As set out, the basic idea of this section is to allow for the deepening of democracy through the formulation and adoption of non-binding but rights- based charters. One example could be a charter of victims' rights. While not precisely the international route suggested for such an international Bill of Rights for Migrants, perhaps s234 of the Constitution provides a route and identifies a power that should be exercised on behalf of SADC based migrants in South Africa."[157]

While theoretically viable, a charter of rights would probably be a time-consuming and expensive exercise to create and it would simply provide the legislative framework for migrants to litigate (which litigation is often impossible because of their reduced access to the courts). If those resources were channelled into a programme, a contractual undertaking or a project with an immediate and tangible reprieve for migrant workers, it would have a greater effect and a more immediate benefit for a vulnerable community. A contractual undertaking between neighbouring countries to offer an immediate social protection to a migrant worker would be of far greater tangible benefit to a community than a charter of rights that is impossible to achieve, implement or monitor.

7. CONCLUSION

Migrant workers in SADC region are particularly vulnerable on a variety of levels. Not only do the international frameworks fail to provide mechanisms for adequate social security but migrant workers in sub-Saharan Africa face unique challenges relating to their basic human rights as well. Collective issues such as HIV/AIDS, war, famine, poverty, illness,

[157] *Human Rights Protection of Foreign Nationals* 2009 *ILJ* 82 90.

unemployment and underemployment have a profound impact on the realisation of regulated social and legal protection for migrant workers.

It is apparent that an initiative is required to develop a social security and legal protection framework which extends to everyone, legal and irregular migrant workers included, which takes into account the niche issues facing this sector of the labour market as the current system is under-inclusive.

As demonstrated and endorsed by the international instruments, an approach will have to be developed on a regional basis, implementing best practice policies and taking an active learning approach to the framework. Flexibility will be of paramount importance in light of the unchartered territory that a framework such as this would cover.

An approach premised on bilateral and multilateral agreements between the regional players that focus on the reduction of legal formalities surrounding immigration should serve to de-regulate the movement of migrant workers between countries. This reduction of formalities will facilitate the ease of movement for migrant labourers and would likely result in a greater number of regular migrants. Without the necessity to travel illegally, migrant workers would be easier to regulate once inside national borders.

While the international instruments provide a valuable framework, the introduction of factors that are relevant to the developing country dynamic would result in instruments that have greater applicability in the sub-Saharan Africa region. Sensitivity to the cultural, political, social and economic realities would give these instruments a relevance that they currently lack. Essentially, the process demands that these tools be refined, developed and codified to create new structures.

Coupled with the flexible and culturally sensitive approach to developing the international tools to be regionally applicable would have to be a strict approach to reporting structures and the sharing of information between states and regional areas. Without the feedback from neighbouring areas with similar goals, it will be impossible for a broad protection base to be implemented and regulated.

An effective model would allow for a decrease in formalisation and an increase in harmonisation of immigration laws. Migrant workers who can travel easily and freely between countries would have no necessity to do so on an irregular basis.

Olivier states: "Until recently, attempts to widen the scope of social security coverage to include those who work informally and/or outside the confines of the traditional employer-employee relationship, have largely been unsatisfactory. Little attempt has been made to accommodate the specific context of informal and self-employed workers within the traditional social insurance framework by way of, for example, specialised arrangement. And yet, there are increasingly indications that tailor-made solutions are being developed and tested in a range of developing countries and environments. These experiences are to be found in particular in middle income countries, although some attempts are also made to implement certain initiatives in low-income SSA countries. One of these solutions, to be found in both low- and middle-income developing countries, also in other parts of the developing world, relates to the extension of coverage beyond the sphere of the formal employment relationship."[158]

While an approach in a middle-income developing country is valuable and offers insight for a "best practice" model, it is the lower-income communities that have the greatest number of vulnerable workers. However, there may be practical considerations to implementing these plans in a middle-income area. The "best practice" policy may be better served if it is assessed on a smaller scale without the same degree of vulnerability from the target audience. It may be the case that a social security system requires the middle-income economic group as the financial backbone to a system before it can be made available to all sectors of the economy. An initial model with less demands on the system may allow policy-makers an opportunity to assess flaws and rectify them before a wide-scale implementation.

Regardless of the economic area, any adaption of the international and regional models has value. It allows for the culturally sensitive modification and development of international instruments in order that they are regionally applicable to sub-Saharan Africa. This modification could account for issues such as portability of benefits and social security schemes relevant to the immediate needs of a broad population base, particularly those who are not in the traditionally protected employer-employee relationships.

Perhaps the refinement of the existing framework to sub-Saharan ideals would result in an increase in the ratification levels on an international stage again.

[158] (n 146) 8.

8. BIBLIOGRAPHY

Articles, Handbooks, Reports

1. Baruah, N Cholewinski, R *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* OSCE (Organisation for Security and Co-Operation in Europe), IOM (International Organisation for Migration) & ILO (International Labour Office) 2006.
2. Beatty D "Constitutional Labour Rights: pros and cons" 1993 *ILJ* 1-16.
3. Dekker AH "The social protection of non-citizen migrants in South Africa" 2010 *SA Merc LJ* 388.
4. Fenwick, C Kalula E and Landau I *Labour Law: A Southern African perspective* (ILO : International Institute for Labour Studies, 2007).
5. Kahn-Freund O *The Impact of Constitutions on Labour Law* (1976) Cambridge Law Journal 240.
6. Klaaren J *Human Rights Protection of Foreign Nationals* (2009) 30 ILJ 82.
7. Millard D *Migration and the portability of social security benefits: The position of non-citizens in the South African Development Community* 2008 *AHRLJ* 37.
8. Norton, D *Workers in the Shadows: An International Comparison on the Law of Dismissal of Illegal Migrant Workers* (2010) 31 ILJ 1521.
9. Olivier M, Adrianarison F & McLaughlin M *Study on Social Protection in Sun-Saharan Africa* (Final Report EC, 2013).
10. Olivier M *Critical Issues in South African Social Security : The Need for Creating a Social Security Paradigm for the Excluded and the Marginalised* (1999) 20 ILJ 2199.
11. Oliver M *Reflections on the feasibility of a multilateral SADC Social Security Agreement involving South Africa & Lesotho, Mozambique, Swaziland & Zimbabwe* (ISSLP) International Institute for Social Law and Policy 2010.
12. Olivier M *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)* (Report commissioned by the World Bank, 2009) see also http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0908.pdf)
13. Olivier M *Social Security Developments in the SADC Region and future prospects for coordination* in *Social Security and Migrant Workers: Selected Studies of cross border social security mechanisms* 2014 Kluwer p81 - 115.
14. Olivier M *Work at the margins of social security: Expanding the boundaries of social protection in the developing world* 2014 Liber Amicorum Jos Bergman.
15. Van Ginneken, W *Making social security accessible to migrants* (World Security Forum, International Social Security Association, 2010).

Case Law

1. *De Lille and another v Speaker of the National Assembly* 1998 (3) SA 430 (C)
2. *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and others* 2003 (3) SA 389 (W)
3. *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC).
4. *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).
5. *Harksen v Lane NO* 1998 (1) SA 300 (CC).
6. *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).
7. *Kylie v CCMA & Others* 2010 (4) SA 383 (LAC).
8. *Larbi- Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC).
9. *National Union of Metal Workers of South Africa and others v Bader Bop (Pty) Ltd and another* 2003 (3) SA 513 (CC).
10. *Sanderson v Attorney- General, Eastern Cape* 1998 (2) SA 38 (CC).
11. *S v Makwanyane* 1995 (3) SA 391 (CC).
12. *South African National Defence Union v Minister of Defence and another* 1999 (4) SA 469 (CC).

International Instruments

1. African Charter of Human and Peoples Rights of 1981.
2. African Union *Convention on Cross-Border Cooperation (Niamey Convention).*
3. AU *Draft Declaration on Employment, Poverty Eradication and Inclusive Development* (2014 - "Ouagadougou +10 Declaration").
4. AU *Special Session of the Labour and Social Affairs Commission of the African Union* (Windhoek, Namibia, 21 - 25 April 2014).
5. ILO *Migration for Employment Convention (Revised) 1949* (No. 97).
6. ILO *Migrant Workers (Supplementary Provisions) Convention 1975* (No. 143).
7. ILO Recommendation 202 of 2012 on National Floors of Social Protection.
8. UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* Resolution 45/158 (1990).
9. UN *International Covenant on Economic, Social and Cultural Rights* Resolution 2200A (XXI) (1966).
10. UN ECOSOC (Economic and Social Council), Committee on Economic, Social and Cultural Rights *General Comment No. 19* (The Right to Social Security) E/C.12/GC/19, 4 February 2008.
11. UN Universal Declaration of Human Rights of 1948.
12. SADC Charter of Fundamental Social Rights in SADC (2003).
13. SADC Code on Social Security (2007).
14. SADC Protocol on the Facilitation of Movement of Persons (2005).
15. SADC Protocol on Employment and Labour (2014).

Legislation

1. Constitution of the Republic of South Africa of 1996.
2. Immigration Act 13 of 2002.

Textbooks

1. Currie I and De Waal J *The Bill of Rights Handbook* 2005 Juta & Co Lansdowne.
2. Olivier M, "Social Security Framework: Exclusion from social insurance and social assistance" 13(2) *LAWSA* LexisNexis (2012) § 89.
3. Olivier M, "Social Security Framework: Non-citizens: International Labour Organisation instruments" 13(2) *LAWSA* LexisNexis (2012) § 138.
4. Olivier M, "Social Security Framework: Constitutionality of exclusions" 13(2) *LAWSA* LexisNexis (2012) § 90.
5. Olivier M, "Social Security Framework: SADC migrants and social security: Policy and legal reforms" 13(2) *LAWSA* LexisNexis (2012) § 158.
6. Olivier M, "Social Security Core Elements: Migrant workers" 13(3) *LAWSA* LexisNexis (2012) § 87.
7. Olivier M, Dupper O and Govindjee A *The Role of Standards in Labour and Social Security Law: International, Regional & National Perspectives* 2013 Juta & Co Cape Town.
8. Servais J-M *International Labour Law* (Third Revised Edition, 2012) Wolters Kluwer.
9. Van Niekerk A, Christianson MA, McGregor M, N Smit and van Eck BPS *Law@work* 2012 Lexis Nexis Johannesburg.
10. Woolman S *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic L*aw 2013 Juta & Co Cape Town.

Websites

1. http://www.statssa.gov.za/census01/census96/html/metadata/Docs/Dfntns.html (20-02-2015).
2. http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242 (29-10-2014).
3. http://www.sadc.int/ (29-10-2014).