

# PERSPECTIVES TOWARDS THE DEVELOPMENT OF THE SOCIAL PROTECTION DIMENSION OF THE SADC REGIONAL INTEGRATION AGENDA

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## Abstract

The social protection of Southern African Development Community (SADC) residents is one of the central objectives of the SADC integration agenda. Evidence of this can also be seen in the various instruments adopted and/or concluded by SADC member states which are geared towards the promotion of adequate social protection in the region. These instruments include the SADC Treaty, the Charter of Fundamental Social Rights, the Draft Protocol on Facilitation of Movement of Persons, the Code on Social Security, the Code on HIV/AIDS and Employment, the Declaration on Gender and Development, the Declaration on HIV and AIDS, and various other instruments dealing with issues such as occupational health and safety.

This paper explores the extent to which the social protection dimension of the regional integration agenda has been realised. It evaluates the extent to which the development of social protection in the region has been given prominence in the evolving regional integration initiatives. This is achieved by examining the regional social protection and related instruments, their impact on ensuring the establishment of a SADC-wide social protection regime, and steps adopted to realise SADC's social protection goals.

## I SADC regional integration agenda

The main objectives of regional integration initiatives are considered to be increased trade and stronger economic linkages between countries. However, regional integration is not limited to the achievement of these narrow objectives, but can also address political and social objectives. The possible social objectives that can be addressed include democratic participation, respect for basic rights, education, social security (protection) and poverty reduction.<sup>1</sup> The regional integration agenda of the Southern African Development Community (SADC) is an example of one that aims to achieve not only increased trade and stronger economic linkages between SADC countries, but also political and social objectives.

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<sup>1</sup> R Robert 'The social dimension of regional integration in ECOWAS' (December 2004) *International Labour Office Working Paper No. 49 1* (hereafter Robert 2004).

SADC was formed in 1992 through its transformation from a coordination conference to a development community.<sup>2</sup> The principal objectives of the Southern African Development Coordination Conference (SADCC) were –<sup>3</sup>

... to reduce economic dependence particularly, but not only, on South Africa; to forge links to create genuine and equitable regional integration; to mobilise resources for implementing national and interstate policies; and to take concerted action to secure international cooperation within the framework of the strategy of economic liberation.

At the SADCC Summit of Heads of State and Government in August 1992 in Windhoek, Namibia, the Declaration and Treaty of SADC (*SADC Treaty*) was signed. The Treaty transformed the SADCC from a coordination conference into a community – the Southern African Development Community. The Treaty also redefined the basis of cooperation among the member states from a loose association into a legally binding arrangement. The establishment of SADC was aimed at promoting deeper economic cooperation and integration to help address many of the factors that make it difficult to sustain economic growth and socio-economic development.<sup>4</sup>

However, SADC's development integration approach is one which recognises the political and economic diversities of its member states.<sup>5</sup> SADC also allows member states to define the scope and sectors of cooperation, identify appropriate strategies and mechanisms to overcome impediments to integration, and address regional imbalances between member states.<sup>6</sup> This approach is reflected in the principle of variable geometry, according to which a group of member states could move faster on certain activities and the experiences learnt are replicated in other member states.<sup>7</sup> This has an impact on the formulation of the community's objectives and in the mechanisms adopted to achieve them.

The institutional character of SADC's regional integration also has an impact on the community's objectives and implementation mechanisms. Although its aim is to achieve regional integration, SADC is currently an international organisation.<sup>8</sup> It is based on the sovereign equality of all member states.<sup>9</sup> This implies that programmes adopted by SADC are not automatically effective in the member states. In addition, member states cannot be compelled to implement the objectives set out in such regional programmes within their

<sup>2</sup> The Southern African Development Coordination Conference (SADCC) was formed on 1 April 1980 following the adoption of the Lusaka Declaration – Southern Africa: Towards Economic Liberation by Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, the United Republic of Tanzania, Zambia and Zimbabwe; see SADC *Regional Indicative Strategic Development Plan (RISDP)* (2003) 2 (hereafter RISDP 2003).

<sup>3</sup> Ibid.

<sup>4</sup> RISDP 2003 op cit at 3.

<sup>5</sup> Member states have diverse production structures, trade patterns, resource endowments, development priorities, institutional affiliations and resource allocation mechanisms.

<sup>6</sup> RISDP op cit note 2 at 3.

<sup>7</sup> RISDP 2003 op cit at 84.

<sup>8</sup> See Article 3 of the SADC Treaty.

<sup>9</sup> SADC Treaty Article 4.

territories. Thus, adoption of regional programmes and compliance with such programmes can only be done through agreement between member states.<sup>10</sup>

## II SADC objectives: towards the establishment of an integrated regional social protection regime

The establishment of an integrated regional social protection regime is central to SADC's regional integration agenda. This is indicated in SADC's vision, mission and common agenda (objectives). Its vision is one of a common future, *a future in a regional community* that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice, and peace and security *for the peoples of Southern Africa*.<sup>11</sup>

SADC's mission is to promote sustainable and equitable economic growth and *socio-economic development* through efficient productive systems, *deeper cooperation and integration*, good governance, and durable peace and security, so that the region emerges as a competitive and effective player in international relations and the world economy.<sup>12</sup>

The realisation of a social protection dimension of regional integration is also evident in SADC's common agenda/objectives. The SADC Treaty envisages that the ideal of regional integration can only be achieved through a multi-dimensional approach, i.e. the realisation of political,<sup>13</sup> economic<sup>14</sup> and social objectives. The social objectives are to alleviate poverty,<sup>15</sup> enhance the standard and quality of life of the peoples of southern Africa,<sup>16</sup> and to support the socially disadvantaged through regional integration.<sup>17</sup>

The mechanisms adopted in the Treaty to achieve SADC's objectives indicate that all three broad categories of objectives are to be realised. According to the Treaty, SADC will –<sup>18</sup>

- harmonise member states' political and socio-economic policies and plans
- encourage the people of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of SADC programmes and projects

<sup>10</sup> See, for example, the Treaty's Article 10(8) ('unless otherwise provided in this Treaty, the decisions of the Summit shall be by consensus and shall be binding'); Article 11 ('decisions of the Council shall be by consensus'); Article 13(6) ('decisions of the Standing Committee shall be by consensus') and Article 19 ('except as otherwise provided in this Treaty, decisions of the Institutions of SADC shall be taken by consensus').

<sup>11</sup> RISDP op cit note 2 at 4.

<sup>12</sup> Ibid.

<sup>13</sup> Some of the political objectives include to evolve common political values, systems and institutions (Article 5(1)(b)) of the SADC Treaty; and to promote and defend peace and security (Ibid Article 5(1)(c)).

<sup>14</sup> Economic objectives set out in the SADC Treaty are to achieve development and economic growth (Article 5(1)(a)); to promote self-sustaining development on the basis of collective self-reliance, and the interdependence of member states (Article 5(1)(d)); to promote and maximise productive employment and utilisation of resources of the Region (Article 5(1)(f)); and to achieve sustainable utilisation of natural resources and effective protection of the environment (Article 5(1)(g)).

<sup>15</sup> SADC Treaty Article 5(1)(a).

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> SADC Treaty Article 5(2)(a) – (j).

- create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions
- develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally, among member states
- promote the development of human resources
- promote the development, transfer and mastery of technology
- improve economic management and performance through regional cooperation
- promote the coordination and harmonisation of the international relations of member states
- secure international understanding, cooperation and support, and mobilise the inflow of public and private resources into the region, and
- develop such other activities as member states may decide in furtherance of the objectives of the Treaty.

The SADC Treaty compels member states to cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit.<sup>19</sup> Member states are also required, through appropriate SADC institutions, to coordinate, rationalise and harmonise their overall macroeconomic and sectoral policies and strategies, programmes and projects in the areas of cooperation.<sup>20</sup> Amongst these areas of cooperation in which member states are compelled to cooperate is social welfare (protection).<sup>21</sup> This indicates that member states are required to cooperate in coordinating, rationalising and harmonising their social protection policies and strategies, programmes and projects (through appropriate SADC institutions) to ensure that all who inhabit the region are socially integrated. Member states also agree to conclude such protocols as may be necessary in each area of cooperation, which are to spell out the objectives and scope of, and institutional mechanisms for, cooperation and integration.<sup>22</sup>

### III Realisation of SADC social protection objectives

It is argued that implementing the areas of cooperation – in this case, the area of social welfare – is conducted at three levels: the provision of a legal framework, the assignment of an institutional framework, and the design and implementation of a programmatic framework.<sup>23</sup> It is further stated that the legal framework, which is the constitutive basis of cooperation, may be sourced from the SADC Treaty or from instruments implementing the Treaty, such as protocols. The Treaty and its instruments identify and demarcate particular areas of cooperation imperative for the achievement of the aims and objectives of the regional integration initiative. They also establish

<sup>19</sup> SADC Treaty Article 21(1).

<sup>20</sup> SADC Treaty Article 21(2).

<sup>21</sup> SADC Treaty Article 21(3)(f).

<sup>22</sup> SADC Treaty Article 22.

<sup>23</sup> See Kaime T 'SADC and human security: Fitting human rights into the trade matrix' 2004 *African Security Review* 13(1) 113.

institutional structures necessary for the implementation of the defined areas of cooperation. At the design and implementation level, the areas of cooperation are implemented through programmes and projects designed and planned by the SADC Secretariat.<sup>24</sup>

In an evaluation of the extent to which SADC's social protection agenda has been realised, one needs to investigate the legal, institutional design, and implementation frameworks, if any, that have been established. This involves looking at the available social protection instruments, the institutions created to implement these instruments, and their design and implementation plans.

(a) Legal framework for the social protection dimension of the SADC regional integration agenda

In order to realise the social protection objectives set out in the SADC Treaty, member states have either concluded or adopted various instruments. Amongst these are instruments which, although they do not specifically focus on social protection, are nevertheless geared towards the promotion of adequate social protection in the region. These include the Charter of Fundamental Social Rights in SADC; the Code on Social Security; the Draft Protocol on the Facilitation of Movement of Persons in SADC; the Code on HIV/AIDS and Employment; and Protocols to the SADC Treaty.<sup>25</sup>

The Social Charter, the Code on HIV/AIDS and Employment, and the Protocols are legally binding instruments that SADC member states are required to implement. However, as discussed below, the implementation and enforcement of these instruments is problematic. In addition, the Draft Protocol on the Facilitation of Movement of Persons is yet to be adopted, which means it is not yet operative. The Code on Social Security is non-binding, however, and merely provides guidelines on the implementation of social security in the region.<sup>26</sup>

(i) *Charter of Fundamental Social Rights*

The Charter of Fundamental Social Rights was adopted in August 2003. The Charter underpins the need for social protection, particularly with respect to workers and vulnerable groups. The Charter makes comprehensive provision for the establishment of harmonised programmes of social security throughout the region. Minimum requirements and the harmonisation of these requirements are also foreseen in, among other things, the area of paid maternal leave, and occupational health and safety.<sup>27</sup>

<sup>24</sup> Ibid.

<sup>25</sup> In terms of Article 1 of the SADC Treaty, a *Protocol* is an instrument of implementation of the Treaty, having the same legal force as the Treaty.

<sup>26</sup> The Code aims to provide member states with strategic direction and guidelines in the development and improvement of social security schemes, in order to enhance the welfare of the peoples of the SADC region; to provide SADC and its member states with a set of general principles and minimum standards of social protection, as well as a framework for monitoring at national and regional levels; and to provide SADC and its member states with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region (Article 3, Code on Social Security in SADC).

<sup>27</sup> Article 11(a) of the Social Charter.



The Charter recalls the objectives of the SADC Treaty, namely to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of southern Africa, and support the social disadvantaged through SADC regional integration. The Charter also contains provisions relating to the social protection of both the employed and the unemployed, regulating, in terms of social protection, the position of workers more comprehensively than those who do not work. Article 10 of the Charter stipulates as follows:

SADC Member States shall create an enabling environment such that every worker in the SADC Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be able to receive sufficient resources and social assistance.

In addition, equal treatment for men and women as well as equal opportunities for both genders are required in, amongst other things, the area of social protection.<sup>28</sup> Member states are also required to develop reasonable measures to enable men and women to reconcile their occupational and family obligations.<sup>29</sup> Protection of children and young people is emphasised,<sup>30</sup> while member states undertake to create an enabling environment in accordance with arrangements applying to each country to protect the elderly. This protection relates not only to workers in respect of whom retirement provision exists, but also to every other person who has reached retirement age but is not entitled to a pension and has no other means of subsistence. In relation to workers, the Charter stipulates that every worker of the SADC region is entitled, at the time of retirement, to be able to enjoy resources affording him/her a decent standard of living, including equity in post-employment security schemes.<sup>31</sup> Persons who reach retirement age but have no access to social insurance due their inability to participate in the labour market are entitled to adequate social assistance to cater specifically for his/her basic needs, including medical care.<sup>32</sup>

Persons with disabilities are also given priority. Member states are required to ensure that persons with disabilities, irrespective of the origin or nature of their disablement, are entitled to comprehensive additional concrete measures aimed at improving their social and professional integration.<sup>33</sup>

National tripartite institutions and existing SADC regional structures have been tasked with the implementation of the SADC Charter.<sup>34</sup> Article 16(2) stipulates that these institutions and structures are to promote social legislation and equitable growth within the region and prevent non-implementation of the Charter. All member states are required to submit regular progress reports to the annual tripartite sectoral meeting, and the most representative organisation of employers and workers are to be consulted in the preparation of such reports.

<sup>28</sup> The Charter refers to the SADC Treaty and recalls the objectives contained in its Article 5.

<sup>29</sup> Article 6(c) of the Social Charter.

<sup>30</sup> Social Charter Article 7.

<sup>31</sup> Social Charter Article 8(a).

<sup>32</sup> Social Charter Article 8(b).

<sup>33</sup> Social Charter Article 9. Measures to be adopted depend on the capacity of the beneficiaries, and relate to vocational training, accessibility and mobility, means of transport, housing, and appropriate organisation of work and workplaces.

<sup>34</sup> Social Charter Article 16(1).

*(ii) Code on Social Security*

The Code on Social Security provides guidelines on the implementation of social security.<sup>35</sup> It requires that everyone in SADC who has insufficient means of subsistence to support themselves and their dependants should be entitled to social assistance, in accordance with the level of socio-economic development of the member state concerned.<sup>36</sup> Member states are also encouraged to establish social insurance schemes and should progressively expand the coverage and impact of these schemes.<sup>37</sup> Furthermore, the Code seeks to ensure access to social security for citizens of one SADC member state who live in another member state. To this end, the Code states as follows:<sup>38</sup>

Member states should ensure that all lawfully employed immigrants are protected through the promotion of the following core principles. These principles should be contained in both the national laws of member states and in bi- or multilateral arrangements between member states:

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

Therefore, the Code on Social Security encourages member states to ensure that all lawfully employed immigrants<sup>39</sup> are protected through the promotion of certain core principles.<sup>40</sup> In terms of two of these principles, migrant workers should, first, be able to participate in the social security schemes of the host country<sup>41</sup> and, secondly, enjoy equal treatment alongside citizens within the social security system of the host country.<sup>42</sup> Member states are further encouraged to introduce, by way of national legislation and bi- or multilateral arrangements, cross-border coordination principles such as the maintenance of acquired rights, the aggregation of insurance periods, and the exportability of benefits.<sup>43</sup>

The Code further suggests that illegal residents and undocumented migrants should be provided with basic minimum protection and should enjoy coverage

<sup>35</sup> See note 26 supra for the aims of the Code.

<sup>36</sup> Article 5(1) of the Code on Social Security.

<sup>37</sup> Code on Social Security Article 6(1).

<sup>38</sup> Code on Social Security Article 17(2).

<sup>39</sup> As well as self-employed migrant workers; see Ibid Article 17(2)(f).

<sup>40</sup> Code on Social Security Article 17.

<sup>41</sup> Code on Social Security Article 17(2)(a).

<sup>42</sup> Code on Social Security Article 17(2)(b).

<sup>43</sup> Code on Social Security Article 17(2)(d) and (e). This is also made clear as far as pension arrangements in the region are concerned. According to Article 10.5, 'Member States should aim at achieving equality of access, as well as the maintenance and aggregation of social security contributions and benefits and the aggregation of insurance periods on a cross-country basis among Member States, through national laws and bilateral and other arrangements'.

according to the laws of the host country.<sup>44</sup> As regards refugees it stipulates that social protection extended to them should be in accordance with the provisions of international and regional instruments.<sup>45</sup>

(iii) *Draft Protocol on the Facilitation of Movement of Persons*

Proposals for a Protocol on the Freedom of Movement of Persons first emerged from a SADC workshop in 1993 and a meeting of the SADC Council of Ministers in 1994. The adoption of the current Draft Protocol followed many years of negotiations and the development of drafts Protocols in 1995<sup>46</sup> and in 1997.<sup>47</sup>

<sup>44</sup> Code on Social Security Article 17(3).

<sup>45</sup> Code on Social Security Article 17(4).

<sup>46</sup> The Draft Protocol on the Facilitation of Movement of Persons was first drafted in 1995 as the Draft Protocol on Freedom of Movement of Persons. The 1995 Draft Protocol was based on the clear vision of a region with a shared history (including free movement of persons before colonial conquest) and a future where capital, goods and people could move freely across national borders; see S Perbedy & J Crush 'Histories, realities and negotiating free movement in southern Africa' in A Picoud & P Guchteneire (eds) *Migration Without Borders: Essays on the Free Movement of People* (2007) 187 (hereafter Perbedy & Crush 2007). The 1995 Draft Protocol aimed for the gradual abolition of barriers to movement across the national borders of SADC member states. Article 3 of the Draft Protocol cited its ultimate objective as being the progressive elimination of all controls on SADC citizens, bringing about the free movement of people within a projected ten years. This free movement was seen as a corollary of the drive towards the interdependence and integration that are among the core tenets of the SADC Treaty.

The 1995 Draft Protocol proposed a three-phase process towards the free movement of persons. In the first phase (within 12 months of its adoption), there was to be visa-free entry from one member state to another for visits of up to six months, provided that the traveller had valid travel documents and entered through an official border post. In the second phase (within three years), any SADC citizen would have the right to reside in another member state in order to take up employment, and to enter freely for the purpose of seeking employment. In the third and final phase (within five years), states would abolish all restrictions on the freedom of establishment/permanent residence of citizens of other member states in its territory. When SADC Ministers of Home Affairs met in 1996 to discuss the Draft Protocol, Botswana, Namibia and South Africa opposed it.

Some of the weaknesses of the 1995 Draft Protocol included the fact that it failed to take the socio-economic reality of the region into account (Solomon H 'Towards the free movement of people in southern Africa?' (March 1997) *ISS Papers* No. 18). The Protocol was premised on the assumption that the free movement of people would ultimately lead to the interdependence and integration of our national economies for the harmonious, balanced and equitable development of the Region (Preamble to 1995 Draft Protocol). However, while the aims of the Draft Protocol were capable of realisation in a region where national economies are of similar relative size and capacity, the SADC region is currently typified by a range of diverse economies. Therefore, a regional brain-drain would probably result from intraregional free movement, with both skilled and unskilled labour flocking to countries with relatively developed economies such as Botswana, Mauritius, Namibia and South Africa. Thus, far from resulting in a more equitable regional development, integration could simply have resulted in widening disparities between the core and the periphery within the region. In addition, the final phase of the Draft Protocol, which sought to eliminate all internal borders within the region, would not only have required extensive planning and cooperation (not catered for in the Protocol) with regard to strengthening the region's external borders, but would also have required some form of centralised database through which the movements of people in the region could be tracked. In view of such opposition, the SADC Secretariat revised the 1995 Draft Protocol and introduced the Draft Protocol on the Facilitation of Movement of Persons in 1997.

<sup>47</sup> The 1997 Draft Protocol on the Facilitation of Movement of Persons recognised that the full popular participation in the process of building the region into a community was only possible where all SADC citizens enjoyed freedom of movement of persons, namely visa-free entry, residence and establishment in the territories of member states (Preamble; Article 3 of the 1997 Draft Protocol). It suggested a phased approach, whereby these objectives were to be incrementally and progressively attained. Two important general principles relating to residence and establishment in other member states were contained in the 1997 Draft Protocol: the equal enjoyment in principle of freedoms and privileges enjoyed by citizens of the particular member state; and the maintenance of rights of residence or establishment acquired in another member state (Chapter IX; Articles 22 – 23 of the 1997 Draft Protocol).



The Draft Protocol on the Facilitation of Movement of Persons was adopted in 2006, but is still to be implemented.<sup>48</sup> In all, the Draft Protocol adopts a flexible approach, with undefined time frames, and is subject to national laws.<sup>49</sup> It encourages member states to conclude bilateral agreements to facilitate the movement of persons among them.<sup>50</sup> Applications for residence permits will also be processed much more expeditiously after the Draft Protocol comes into force.<sup>51</sup> The Draft Protocol provides for those who are seeking permission to perform a legal economic activity or business or those who wish to practise a profession, for instance as a lawyer or doctor, in a fellow member state.

The Preamble of the Draft Protocol states that it is dictated by various provisions of the Treaty, including –

- the duty to promote the interdependence and integration of SADC's national economies for the harmonious, balanced and equitable development of the region
- the necessity to adopt a flexible approach in order to accommodate disparities in the levels of economic development among member states
- the need to redress imbalances in large-scale population movement within SADC, and
- the need to support, assist and promote the efforts of the African Union (AU), which encourages the free movement of persons in SADC as a stepping stone towards the free movement of persons in an eventual African Economic Community.

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The aim of the revision was to deal with the concerns of member states, but keep the original objectives and principles of the Free Movement Protocol. The 1997 Draft Protocol sought to facilitate the movement of member states' citizens within the region by gradually eliminating the obstacles impeding such movement; to expand the network of bilateral agreements among member states in this regard, as a step towards a multilateral regional agreement; to cooperate in preventing the illegal movement of citizens of member states and the illegal movement of nationals of third states within and into the region; to cooperate in improving control over SADC's external borders; and to promote common policies with regard to immigration matters where necessary and feasible (Article 2 of the 1997 Draft Protocol).

The 1997 Draft Protocol also reduced the visa-free entry period from six months to three (although visitors can apply for an extension, subject to the laws of the member state); eliminated the commitment to introduce a SADC passport; and only committed member states to give permanent residence to non-nationals already resident in their territory. Furthermore, it only committed member states to a progressive reduction in migration control between each other, as opposed to the free movement of persons. Article 4 of the 1997 Draft Protocol stated that the progressive implementation of its objectives would be guided specifically by economic and other developments in the region and the particular circumstances of each member state, the degree to which control over external borders can effectively be established, and the requirement for migrant labour within the region. In addition, the Draft Protocol recognised that disparities in the levels of development in the region led to imbalances and large-scale population movements within SADC, which, if not addressed, would be to the disadvantage of certain member states.

The 1997 Draft Protocol was tabled at the Council of Ministers meeting in Maputo in January 1998. The Council deferred discussion of the Draft Protocol to afford member states time to review it. The Draft Protocol was again discussed at the Council of Ministers meeting in September 1998. Botswana, Namibia and South Africa again expressed their concerns. Member states were, therefore, asked to consult internally and with the Chairman of the Council; see Perbedy & Crush (2007) op cit note 46 at 189.

<sup>48</sup> See M Olivier 'Regional overview of social protection for non-citizens in the Southern African Development Community (SADC)' (May 2009) *World Bank SP Discussion Paper No. 0908* 81 (hereafter Olivier 2009).

<sup>49</sup> Article 10, 2006 Draft Protocol on the Facilitation of Movement of Persons.

<sup>50</sup> Draft Protocol on the Facilitation of Movement of Persons Articles 13 and 14.

<sup>51</sup> Draft Protocol on the Facilitation of Movement of Persons Article 17.

In terms of Article 2 of the Draft Protocol, its overall objective is to develop policies aimed at the progressive elimination of obstacles to the movement of persons in general, as regards moving into or within states parties' territories. This overall objective will be achieved by facilitating —<sup>52</sup>

- entry, for a lawful purpose and without a visa, into the territory of another state party for a maximum period of 90 days a year for a bona fide visit, and in accordance with the laws of the state party concerned
- permanent and temporary residence in the territory of another state party, and
- establishment of oneself and working in the territory of another state party.

Three kinds of movement are envisaged by the Protocol: visa-free travel, permanent and temporary residence, and establishment. A person may be admitted into the territory of another state if the visit is for a maximum period of 90 days, although the person may apply for an extension of this period, subject to the laws of the state party concerned. The visitor is also required to possess a valid travel document; needs to have sufficient means of support for the duration of the visit; is not allowed to be a prohibited person under the laws of the intended host state; and enters the territory of the other state through an official port of entry.<sup>53</sup>

The Draft Protocol permits states parties to apply in writing for an exemption from implementing the requirements of visa-free travel in terms of Article 14. Where an exemption is granted, it allows the applicant state party to impose on a citizen of another state party the requirement of an entry visa. However, the imposition of an entry visa is on condition that any such citizen who requires a visa will be able to apply for such a visa at the entry border post; no fee will be chargeable for such visa; and each exemption will be valid for a period not longer than twelve months – although the Summit may grant a member state an extension of this exemption for any further period determined by the Summit.<sup>54</sup>

The Draft Protocol does not specify what a visitor may or may not do during the visit, such as whether the person is permitted to take up short-term employment, engage in trade or business of any sort, or attend an educational institution. However, provisions relating to the other kinds of movement specify the types of activities that can be undertaken. In addition to the requirement to have sufficient means for the duration of the visit, the absence of any such specification implies that visa-free travel is for tourism purposes only. Activities such as the taking up of short-term employment, engaging in trade or business, or attending an educational institution are not envisaged.

<sup>52</sup> Draft Protocol on the Facilitation of Movement of Persons Article 3.

<sup>53</sup> Draft Protocol on the Facilitation of Movement of Persons Article 14(2).

<sup>54</sup> Draft Protocol on the Facilitation of Movement of Persons Article 15.

The Draft Protocol defines *residence* as permission or authority to live in the territory of a state party in accordance with that state's respective legislative and administrative provisions.<sup>55</sup> Residence is to be obtained through an application for a residence permit, which the applicant is required to make to the appropriate authorities of the relevant state party in accordance with that state's laws. States parties are encouraged to facilitate the processing of residence applications, and to avoid unnecessary delays.<sup>56</sup>

The term *establishment* as contained in the Draft Protocol denotes permission or authority granted by a state party in terms of its national laws to a citizen of another state party, to exercise an economic activity and profession either as an employee or a self-employed person; or to establish and manage a profession, trade, business or calling.<sup>57</sup> The Draft Protocol does not specify the difference(s) between *residence* and *establishment*. However, the provision that a residence permit may be renewed (in terms of Article 17(5)) seems to imply a more temporary situation, while *establishment* indicates the possibility of a person applying for and being granted permanent residence or citizenship in another member state.

Article 20 states that a citizen of a state party who acquires residence or establishment in the territory of another state party is entitled to enjoy those rights and privileges as determined by the laws of a host state and also has to fulfil his/her obligations accordingly. In addition, the Draft Protocol does not infringe on any citizen of a state party enjoying the right of residence or establishment acquired in another state party before the Draft Protocol's entry into force.<sup>58</sup>

The Draft Protocol prohibits the removal of persons from the territory of a member state, except where —<sup>59</sup>

- this is dictated by the host state for reasons of national security, public order or public health
- an important essential condition of the issue or validity of such person's residence or establishment permit has ceased to exist, or cannot be fulfilled or complied with any longer
- a citizen of another state party acts in conflict with the purposes for which his/her permit was issued, or contravenes or fails to comply with any conditions of its issue, or
- the person refuses to comply with a lawful order issued by an appropriate public health authority for the protection of public health in circumstances where the consequences of such refusal have been explained.

<sup>55</sup> Draft Protocol on the Facilitation of Movement of Persons Article 16.

<sup>56</sup> Draft Protocol on the Facilitation of Movement of Persons Article 17.

<sup>57</sup> Draft Protocol on the Facilitation of Movement of Persons Article 18 read with the definition of *establishment* in Article 1.

<sup>58</sup> Draft Protocol on the Facilitation of Movement of Persons Article 21.

<sup>59</sup> Draft Protocol on the Facilitation of Movement of Persons Article 22.

From a labour and social protection perspective, the restrictive provisions of the Draft Protocol hinders SADC's integration agenda. Its impact can be ascertained by comparison with the effects of the European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of European Union (EU) citizens and their family members to move and reside freely within the territory of the EU and European Economic Area (EEA) member states. However, this must be viewed in the context of SADC's institutional character of regional integration, which is one of an international organisation of sovereign states. The EU, conversely, is a supra-national community.<sup>60</sup>

*(iv) Code of Conduct on HIV and AIDS and Employment*

Adopted by the SADC Summit in September 1997, the Code of Conduct on HIV and AIDS and Employment is evidence of SADC member states' recognition of the impact of HIV and AIDS in the early 1990s. The Code of Conduct is the common standard by which the SADC region deals with the rights and duties of HIV and AIDS and employment.<sup>61</sup>

The Code was motivated by the regional nature and implications of HIV and AIDS, and the desire to harmonise national standards in dealing with persons living with HIV. Taking into account the interdependence of SADC countries and their people, member states developed a common guideline on how persons living with HIV and AIDS should be treated in the course of employment. The Code incorporates member states' national codes, and reflects principles developed by the International Labour Organisation (ILO).<sup>62</sup>

The Code aims to ensure non-discrimination between those living with HIV and those who are not, as well as other comparable health/medical conditions. The Code aims to ensure that SADC member states develop tripartite national codes on HIV and AIDS and employment, which are reflected in law. It presents guiding principles for, and components of, the national codes.<sup>63</sup>

The Code covers all employees and prospective employees, all workplaces, and all contracts of employment in SADC. It addresses certain specific policy components, including job access, workplace testing, occupational benefits, and workers' compensation.

<sup>60</sup> A supra-national community is one where member states cede some of their sovereignty to a community body in relation to decision-making and implementation. In the case of the EU, the European Parliament approves EU legislation together with the Council (which is made up of the governments of the 27 EU countries). The EU Commission drafts and implements EU legislation; see [http://europa.eu/about-eu/basic-information/decision-making/procedures/index\\_en.htm](http://europa.eu/about-eu/basic-information/decision-making/procedures/index_en.htm), accessed on 30 August 2012.

<sup>61</sup> Foreword, Code of Conduct on HIV/AIDS and Employment.

<sup>62</sup> Ibid.

<sup>63</sup> Code of Conduct on HIV/AIDS in Employment at 3.

The Code enjoins SADC member states to ensure that their interactions are consistent with the principles and policy components of the Code; and that they share and disseminate information to enable an effective and planned response to the pandemic. SADC member states are also encouraged to cooperate in making national data available for monitoring and planning an effective response to the regional health, human resource, economic and social impact of HIV and AIDS.<sup>64</sup>

#### (v) *SADC Protocols*

In addition to these instruments, various Protocols have been concluded which provide for regional cooperation in a number of priority areas.<sup>65</sup> Article 22(1) of the SADC Treaty provides for member states to conclude a series of protocols to address the objectives in Article 5 of the Treaty. These protocols are negotiated by member states and, after approval by the Summit, become an integral part of the Treaty. Human resource development and social welfare are some of the areas identified in Article 21(3) of the SADC Treaty that have direct implications for social security within southern Africa. However, no Protocol specifically dealing with social protection has been adopted.

As a result, the Protocols that have been adopted do not directly regulate the issue of social protection. Therefore, they merely have a bearing on the SADC social protection agenda. These include the Protocol on Gender and Development; the Protocol on Education and Training; the Protocol on Energy; the Protocol on Health; and the Protocol on Mining.

#### Protocol on Gender and Development

The Protocol's aim to provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender-responsive legislation, policies, programmes and projects will redress current discriminatory provisions and practices affecting women's access to social security, especially social insurance. By harmonising the implementation of the various instruments to which SADC member states have subscribed at regional, continental and international level in respect of gender equality and equity, the Protocol seeks to ensure a uniform regional approach to the enforcement of the rights of women. Other social-security-related objectives include addressing

<sup>64</sup> Code of Conduct on HIV/AIDS in Employment at 5.

<sup>65</sup> These include the Protocol against Corruption; the Protocol on Combating Illicit Drugs; the Protocol on Control of Firearms, Ammunition and Other Related Materials; the Protocol on Culture, Information and Sport; the Protocol on Gender and Development; the Protocol on Energy; the Protocol on Extradition; the Protocol on the Facilitation of Movement of Persons; the Protocol on Fisheries; the Protocol on Forestry; the Protocol on Health; the Protocol on Immunities and Privileges; the Protocol on Legal Affairs; the Protocol on Mining; the Protocol on Mutual Legal Assistance in Criminal Matters; the Protocol on Politics, Defence and Security Cooperation; the Protocol on Shared Watercourse Systems; the Revised Protocol on Shared Watercourses; the Protocol on Tourism; the Protocol on Trade; the Protocol on Transport, Communications and Meteorology; the Protocol on Tribunal and Rules of Procedure Thereof; and the Protocol on Wildlife Conservation and Law Enforcement.



emerging gender issues and concerns; setting realistic, measurable targets, time frames and indicators for achieving gender equality and equity; and attaining sustainable development and strengthening community-building. The Protocol requires states parties to harmonise social security and other national legislation, policies, strategies and programmes with relevant regional and international instruments related to the empowerment of women and girls for the purpose of ensuring gender equality and equity. Furthermore, states parties are obliged to enact and enforce legislative measures prohibiting the dismissal or denial of recruitment on the grounds of pregnancy or maternity leave; provide protection and benefits for women and men during maternity and paternity leave; and ensure that women and men receive equal employment benefits, irrespective of their marital status.

#### Protocol on Education and Training

The Protocol on Education and Training states that the member states recognise that the development of human capital to its fullest potential is the *sine qua non* for tackling socio-economic problems facing the region. The Protocol is aimed at establishing a system of cooperation in education and training policy, because it provides for cross-border cooperation on policy level.

#### *Protocol on Energy*

The Protocol on Energy recognises the need for a coordinated approach to energy strategy formulation and planning for the SADC region. It further determines to ensure, through collective action, the well-being of the peoples of the SADC region through the provision and use of energy for all SADC inhabitants, particularly ensuring that low-income residents have access to energy. Article 2 contains the general principles of the Protocol and states, among other things, that, for the purposes of the Protocol, member states are to use energy to support economic growth and development, alleviate poverty, and improve the standard of quality of life throughout the region.

#### Protocol on Health

The Protocol on Health provides for a system of cooperation to address health issues and establish institutional mechanisms to implement the Protocol. The Protocol directly addresses the issue of health as a prerequisite for sustainable human development and increased productivity in SADC member states. The Preamble recognises that close cooperation in the area of health is essential for the effective control of communicable and non-communicable diseases as well as for addressing common health concerns in the region, and aspires to offer a full range of cost-effective and quality integrated health services through regional cooperation. Article 2 states that the Protocol has to be implemented in accordance with the following principles:

- Striving for the formulation of regional health policies and strategies consistent with the principles contained in Article 4 of the Treaty
- Promoting, coordinating and supporting individual and collective efforts of states parties to attain an acceptable standard of health for all their people
- Commitment to the primary-health-care approach
- Promoting health care for all through better access to health services, and
- Ensuring equitable and broad participation for mutual benefit in regional cooperation in health.
- Protocol on Mining

The Protocol on Mining declares that SADC member states are determined to ensure, through cooperation and collaboration, that the region's abundant mineral resources are developed in order to improve the living standards for all SADC inhabitants. Article 2(1) contains one of the general principles of the Protocol, stating that, for the purposes of the Protocol, member states recognise that a thriving mining sector can contribute to economic development, alleviation of poverty and the improvement of the standard and quality of life throughout the region. Article 2(8) further determines that member states will ensure the economic empowerment of the historically disadvantaged in the mining industry. Article 2(9) provides for the development and observation of internationally accepted standards of health, mining, and environmental protection, while Article 9 provides for improved practices and standards of occupational health and safety. However, no provision is made for compensation as a social security mechanism where these practices and standards have not been properly applied.

#### (ii) Institutional framework for social protection integration

In line with its new objectives, SADC also created new institutions for their realisation.<sup>66</sup> The objective of the restructuring was to increase the efficiency and effectiveness of SADC policies and programmes, and to implement a more coherent and better-coordinated strategy to eliminate poverty in the region.<sup>67</sup> The principal SADC organs and institutions as provided in Article 9 of the SADC Treaty are the Summit of Heads of State or Government;<sup>68</sup> the Council

<sup>66</sup> SADC was restructured in terms of the 'Report on the restructuring of SADC institutions' adopted during an Extraordinary Summit on 9 March 2001 in Windhoek, Namibia.

<sup>67</sup> RISDP op cit note 2 at 3.

<sup>68</sup> The Summit comprises all SADC Heads of State or Government. It is SADC's ultimate policymaking institution. The Summit is responsible for SADC's overall policy direction and the control of its functions. It usually meets once a year around August/September in the member state holding the SADC Deputy Chairpersonship at the time. Extraordinary Summit meetings are also held if and when the need arises. The Summit elects SADC office-bearers, namely the SADC Chairperson and Deputy Chairperson; and the Chairperson and Deputy Chairperson of the SADC Organ on Politics, Defence and Security Cooperation. The functions of the Summit are enumerated under Article 10 of the SADC Treaty.

of Ministers;<sup>69</sup> Commissions;<sup>70</sup> the Standing Committee of Officials;<sup>71</sup> the Secretariat;<sup>72</sup> and the (former) Tribunal.<sup>73</sup>

SADC also adopted a more centralised approach through which the existing 21 Coordinating Units were grouped into four clusters called *Directorates*, namely –

- Trade, Industry, Finance and Investment
- Infrastructure and Services
- Food, Agriculture, and Natural Resources, and
- Social and Human Development and Special Programmes.

The Directorate of Social and Human Development and Special Programmes comprises culture and information; health and pharmaceuticals; HIV and AIDS; education, skill development and capacity-building; employment, productivity, labour and social security; and special programmes.<sup>74</sup> The objectives of this Directorate include –<sup>75</sup>

- developing, promoting and harmonising policies and programmes to ensure sustainable human development
- developing, promoting and harmonising policies and gender development strategies and programmes
- developing, promoting and harmonising human resources development, educational, skills development and training policies, strategies and programmes
- developing, promoting and harmonising policies geared towards social welfare for vulnerable groups

<sup>69</sup> The Council of Ministers consists of ministers from each member state, usually those responsible for foreign affairs, economic planning and finance. The functions of the Council are provided for under Article 11 of the Treaty, and include overseeing the functioning and development of SADC and ensuring that policies are properly implemented. The Council usually meets twice a year: in February, and just before Summit in August or September.

<sup>70</sup> Established under Article 12 of the SADC Treaty, Commissions are constituted to guide and coordinate cooperation and integration policies and programmes in designated sectoral areas.

<sup>71</sup> The functions of this Committee are enumerated under Article 13 of the Treaty. The Standing Committee of Senior Officials consists of one Permanent/Principal Secretary or an official of equivalent rank from each member state, preferably from a ministry responsible for economic planning or finance. As a technical advisory committee to the Council of Ministers, this Committee serves as the clearing house for the Council agenda. The Chairperson and Vice-Chairperson of the Standing Committee are appointed from the member states holding the SADC Chairpersonship and Deputy Chairpersonship of Council.

<sup>72</sup> Article 14 of the Treaty lays out the functions of the Secretariat. The Secretariat is the principal executive institution of SADC responsible for, amongst other things, the strategic planning and management of SADC programmes; the implementation of decisions taken by SADC policy organs and institutions such as Summit, Council and the Troikas; and the coordination and harmonisation of member states' policies and strategies.

<sup>73</sup> The SADC Tribunal was established by the Protocol on Tribunal and Rules of Procedure Thereof that was signed in Windhoek, Namibia, during the 2000 Ordinary Summit. The Tribunal was entrusted with the responsibility to ensure adherence to, and proper interpretation of, the provisions of the SADC Treaty and its subsidiary instruments, and to adjudicate on disputes referred to it. However, the Tribunal was dissolved on 20 May 2011 and expressly barred from hearing any new or pending cases. A new Tribunal is envisaged, with a different jurisdiction and a new membership, once SADC Ministers of Justice/Attorneys-General have amended the relevant SADC legal instruments, e.g. the SADC Treaty and the Protocol on Tribunal (Protocol), and have submitted a final report to Summit in August 2012.

<sup>74</sup> See <http://www.sadc.int/shdsp>, accessed on 3 November 2011.

<sup>75</sup> Ibid.

- developing, promoting and harmonising health care policies and standards; coordination of the development of policies to effectively combat the HIV/AIDS pandemic and all other communicable diseases
- promoting employment creation and efficient human resources utilisation
- developing, promoting and harmonising employment policies and labour standards
- promoting economic empowerment and forward and backward linkages between rural and urban economies, and
- ensuring the efficient and effective management of the SADC Regional Disaster Management Centre.

Within the Directorate is the Employment and Labour Sector (ELS). The ELS is responsible for human resources management and, in particular, promoting employment and labour issues with a view to improving labour productivity and social development in SADC. The specific objectives of the ELS include –

- promoting the formulation and harmonisation of social policies and programmes in SADC member states which contribute to the generation of productive employment opportunities and increased income
- promoting labour policies and practices and measures in member states which facilitate labour mobility, remove distortions in labour markets, enhance industrial harmony, and increase productivity
- providing a framework for regional cooperation in the area of employment and labour with the full participation and involvement of all social partners
- promoting the establishment and harmonisation of social security schemes
- harmonising regulations relating to safety and health standards at workplaces across the region
- promoting equity and the protection of vulnerable groups, and
- promoting the development of institutional capacities as well as vocational and technical skills in the region.<sup>76</sup>

(c) Programmes and projects to implement the social protection agenda

No concrete mechanisms have been established as yet to implement the SADC social protection agenda. The SADC Treaty states that sanctions may be imposed against any member state that persistently fails, without good reason, to fulfil the obligations it has assumed under the Treaty; or against a member state that implements policies which undermine the principles and objectives

<sup>76</sup> A Chitambo 'SADC policy dimensions of social protection' Unpublished paper presented at the SADC Social Security Consultative Workshop entitled 'Towards the Development of Social Protection in the SADC Region', held at the Helderfontein Conference Centre, Johannesburg, South Africa, 17 – 19 October 2001.

of SADC. Sanctions are to be determined by the Summit on a case-by-case basis.<sup>77</sup>

The Social Charter also fails to establish implementation mechanisms. It allocates the responsibility of implementation to national tripartite institutions and regional structures. In addition, appropriate monitoring and enforcement mechanisms are lacking, as member states are also required to submit regular progress reports to the Secretariat.

SADC social protection instruments and the SADC Secretariat adopt a flexible approach, as consideration is given to the principle of variable geometry.<sup>78</sup>

#### **IV Challenges in the realisation of SADC'S social protection agenda**

SADC faces various challenges in realising a social protection dimension in its regional integration agenda. These relate to the lack of free movement of persons within the region, the absence of a multilateral social protection agreement, and failure to establish an appropriate enforcement mechanism.

##### **(a) Lack of free movement of persons within the region**

Despite its ideal of a regional community, SADC has not been able to ensure the free movement of persons within the region. This stems from the failure of the SADC Treaty to regulate freedom of movement conclusively. Article 5(2) (d) therein merely requires SADC to –

... develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States.

##### **(b) Absence of a multilateral social protection agreement**

In the SADC context, a multilateral social protection coordination instrument which will assist in realising the social protection agenda is absent. Such instruments have been used in other regional blocs to ensure citizens receive social protection, especially those living in the territory of another member state.

In an integrated regional community where persons are able to reside and work anywhere within the community, citizens from one member state who reside and work in another member state face exclusions from social protection. This is because social protection falls within the competence of the individual member states.<sup>79</sup> In the case of SADC, citizens from one member state who reside and work in another member state are excluded from social protection mostly as a result of the territorial and nationality basis of

<sup>77</sup> Article 33, SADC Treaty.

<sup>78</sup> See RISDP op cit note 2 at 84.

<sup>79</sup> Robert (2004) op cit note 1 at 20.



many social security systems.<sup>80</sup> This is also because the SADC Treaty itself offers no protection against discrimination based on nationality or citizenship. Article 6(2) only provides that SADC and its member states are not permitted to discriminate against any person on the grounds of gender, religion, political views, race, ethnic origin, culture or disability.<sup>81</sup> This lacuna requires that appropriate legal guarantees need to be adopted by member states to protect persons who reside and work outside of their home nation.

Legal guarantees on the protection of intra-community migrant workers have been adopted in the form of international bilateral or multilateral agreements on the coordination of social protection schemes. However, these agreements are mostly restricted mostly to social insurance schemes. It has been remarked that –<sup>82</sup>

[t]he international community has a long[-]standing tradition in protecting the social security of migrants through a network of instruments for the co-ordination of social security schemes. These instruments provide for the equal treatment of national and foreign subjects, for the exportability of certain types of benefits, and for the aggregation of insurance periods fulfilled under different national social insurance schemes. Furthermore, they establish a choice for the competent legislation which is applicable in transnational situations.

Bi- or multilateral social security agreements extend social protection to migrants. Examples of multilateral social security agreements concluded in other regions include the General Convention on Social Security of the Economic Community of West African States (ECOWAS) (1993); the Caribbean Community (CARICOM) Agreement on Social Security (1996), which regulates social security between CARICOM member states; and the European Community Regulation No. 883/2004 of 29 April 2004,<sup>83</sup> which contains a comprehensive regulation on the application of social security schemes to employed persons and their families moving within the European Community.

Such agreements regulate issues such as the choice of law, non-discrimination, aggregation of insurance periods, maintenance of acquired rights, and exportability of benefits. There is currently no multilateral social protection agreement in the SADC region. However, some SADC member states have concluded bilateral agreements, which are limited in scope and effect. The agreements are insufficient in guaranteeing the social protection of persons from the signatory countries as they are not reciprocal in nature.

Therefore, appropriate bi- or multilateral social security agreements are required in the SADC region to realise the social protection dimension of SADC regional integration – at least for intra-SADC migrant workers. This is even more vital in light of the absence of a binding and enforceable SADC

<sup>80</sup> See LG Mpedi, N Smit & M Nyenti 'Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community: A synthesis' in LG Mpedi & N Smit (eds) *Access to Social Services for Non-citizens and the Portability of Social Benefits within the Southern African Development Community* (2011) 14.

<sup>81</sup> See Olivier (2009) op cit note 48 at 81.

<sup>82</sup> G Vonk *De Coördinatie van Bestaansminimumuitkeringen in de Europese Gemeenschap* (1991) 483 – 4, as cited in MP Olivier, N Smit & ER Kalula *Social Security: A Legal Analysis* (2003) 669.

<sup>83</sup> Amending European Community Regulation 1408/71.

Protocol on social protection, and of a guarantee against discrimination on the basis of nationality or citizenship in the SADC Treaty.

(c) Failure to establish an appropriate enforcement mechanism

SADC has failed to establish appropriate mechanisms for the implementation and enforcement of regional obligations. The SADC Tribunal, which could be used to enforce binding SADC obligations on member states (such as the extension of social protection), has been dissolved.<sup>84</sup> The SADC Tribunal was set up by the Protocol on Tribunal and Rules of Procedure Thereof. The primary function of the Tribunal was to ensure the adherence to law in the interpretation and application of the Treaty. Its general jurisdiction was to adjudicate and give advisory opinions upon all matters referred to it under the Treaty and Protocols, all subsidiary instruments adopted within the SADC framework, acts of SADC institutions, and all matters specifically provided for in any other agreements that member states may conclude amongst themselves or within SADC and which confer jurisdiction on the Tribunal.<sup>85</sup>

The Tribunal had the power to hear a matter brought by member states against one another and between natural or legal persons and member states<sup>86</sup> The Tribunal could, however, not hear a matter brought by a natural or legal person against a member state unless that person had exhausted all available remedies or was unable to proceed under the domestic jurisdiction.<sup>87</sup> Where a dispute was referred to the Tribunal by any party, the consent of other parties to the dispute was not required.

The Tribunal had exclusive jurisdiction over all disputes between the member states and the community, as well as over all disputes between natural or legal persons and SADC. Such disputes could be referred to the Tribunal by the member state concerned or by the competent SADC institution or organ, or by the natural or legal person in question.<sup>88</sup>

The Tribunal had jurisdiction to give preliminary rulings in proceedings of any kind and between any parties, before the courts or tribunals of member states.<sup>89</sup> However, although the SADC Tribunal did not have jurisdiction, it could rule on a question of interpretation, application or validity of the provisions in issue if the question had been referred to it by a court or tribunals of a member state for a preliminary ruling in accordance with the provisions of the Protocol on Tribunal and the Rules of Procedure Thereof.<sup>90</sup>

<sup>84</sup> The SADC Tribunal was dissolved on 20 May 2011 and expressly barred from hearing any new or pending cases. A new Tribunal is envisaged, with a different jurisdiction and a new membership, once SADC Ministers of Justice/Attorneys General have amended the relevant SADC legal instruments e.g. the SADC Treaty and the Protocol on Tribunal and submitted a progress report to Summit in August 2011 and the final report to Summit in August 2012. The Summit of 17 – 18 August 2012 in Maputo, Mozambique, resolved that the Tribunal would now only deal with disputes between member states and not cases brought by individuals.

<sup>85</sup> Article 14, Protocol on Tribunal and Rules of Procedure Thereof.

<sup>86</sup> Protocol on Tribunal Article 15(1).

<sup>87</sup> Protocol on Tribunal Article 15(2).

<sup>88</sup> Protocol on Tribunal Articles 17 and 18.

<sup>89</sup> Protocol on Tribunal Article 16(1).

<sup>90</sup> Protocol on Tribunal Article 16(2).

The Tribunal was to apply the Treaty, the Protocol on Tribunal and other Protocols that form part of the Treaty; all subsidiary instruments adopted by the Summit, the Council, or by any other SADC institution or organ pursuant to the Treaty or Protocols; and to develop its own community jurisprudence having regard to applicable treaties, general principles and rules of public international law as well as any rules and principles of the law applying in member states.<sup>91</sup>

However, the enforcement of a Tribunal decision was governed by the law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the member state in which the judgment was to be enforced.<sup>92</sup> SADC member states and institutions were required to take all measures necessary to ensure the Tribunal's decisions were executed.<sup>93</sup> Tribunal decisions were to be binding on the parties to the dispute in respect of the case in question, and enforceable within the territories of the states concerned.<sup>94</sup> Any failure by a member state to comply with a Tribunal decision could be referred to the Tribunal by any party concerned.<sup>95</sup> If the Tribunal established the existence of such failure, it could report its findings to the Summit so that the Summit could take appropriate action.<sup>96</sup>

The provisions of the Protocol on Tribunal and Rules of Procedure Thereof indicate that the SADC Tribunal could have been instrumental in promoting the rights of citizens within SADC – including social protection rights. Citizens could have been able to compel their governments and SADC itself to realise the rights provided in binding (social protection) regional instruments, such as the Charter of Fundamental Social Rights and the Protocols to the SADC Treaty. However, the Tribunal itself lacked an appropriate enforcement mechanism, as it had to report its findings to the Summit so that the Summit could take appropriate action. As discussed above, Article 10(8) of the SADC Treaty states that –

... unless otherwise provided in this Treaty, the decisions of the Summit shall be by consensus and shall be binding.

As seen in the case of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*,<sup>97</sup> the effectiveness of the Tribunal to enforce decisions was limited.

## V Conclusions

The legal framework for social protection in SADC seeks to realise a regional social protection agenda of SADC integration. The Charter of Fundamental Social Rights, as a legally binding instrument required to be implemented by

<sup>91</sup> Protocol on Tribunal Article 21(a) and (b).

<sup>92</sup> Protocol on Tribunal Article 32(1).

<sup>93</sup> Protocol on Tribunal Article 32(2).

<sup>94</sup> Protocol on Tribunal Article 32(3).

<sup>95</sup> Protocol on Tribunal Article 32(4).

<sup>96</sup> Protocol on Tribunal Article 32(5).

<sup>97</sup> *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADC (T) 2 (28 November 2008).

SADC member states, is relevant in respect of realising the social protection dimension of SADC integration – especially for migrating SADC citizens – as it underpins the need to provide social security for workers and the vulnerable. In this regard, the Charter requires the provision of social security to both workers and the unemployed. The requirement of equal treatment indicates that both men and women will have access to social security. It also requires the protection of young people, the elderly – both retired workers with a pension and the destitute – and the disabled. This implies that the establishment of comprehensive systems of social security in SADC member states is envisaged.

The Charter also performs a standard-setting role by requiring the adoption of minimum standards throughout the region. In addition, the Charter, as is the case with the SADC Treaty, provides comprehensively for the establishment of harmonised programmes of social protection in SADC. This, in effect, facilitates access to social security for everyone in the region, including citizens of one SADC country who migrate to another member state. However, the Charter adopts a flexible approach, akin to other international and/or multilateral instruments, by leaving the scope of implementation to the respective member states. This is done by stipulating the principles that should apply at regional and country levels. In addition, SADC's inability to enforce the implementation by member states of Charter provisions implies that the Charter remains ineffective in furthering the regional social protection agenda of SADC integration.

The Code on Social Security endeavours to realise a regional social protection framework. It encourages the provision of social assistance for persons with insufficient means, the establishment and progressive expansion of social insurance schemes, and access to a basic minimum level of social security for everyone – irrespective of their nationality or immigration status. The Code is non-binding, merely providing guidelines for the development of social security. Member states are, thus, not compelled to implement its guidelines.

SADC Protocols also have a bearing on the social protection dimension of regional integration. However, proper enforcement of their implementation in member states is similarly lacking. In addition, a specific social protection protocol is absent, while the Draft Protocol on the Facilitation of Movement of Persons fails to guarantee freedom of movement – and is yet to be adopted. The said Draft Protocol is in fact restrictive, since it hinders the labour and social protection perspectives of the SADC integration agenda. In the absence of a multilateral social protection agreement, SADC citizens who migrate to another member state would have little or no social protection coverage.

Although SADC has also put in place institutions for the realisation of its objectives, there is no dedicated institution set up to implement the social protection agenda. The effect is that the promotion of social protection at regional level is ancillary to the available institutions' activities. The ineffectiveness of the SADC Tribunal and its eventual dissolution also implies that institutional mechanisms for the enforcement of social protection in SADC instruments rights are unavailable.

Furthermore, concrete mechanisms have not been established to implement the SADC social protection agenda. A member state can be sanctioned by Summit for failing to fulfil its obligations assumed under the Treaty, and for implementing policies which undermine the principles and objectives of SADC, but there is no standardised sanctions mechanism: sanctions are determined on a case-by-case basis, and the decisions of the Summit are by consensus. Moreover, appropriate monitoring and enforcement mechanisms are lacking, as member states are only required to submit regular progress reports to the Secretariat. The SADC Tribunal, which could have been used to compel the realisation of the social protection and other rights provided in binding regional instruments, similarly lacked an appropriate enforcement mechanism. Its dissolution underlines SADC's inability to enforce the provisions of its legal instruments in its member states.

SADC social protection instruments and the SADC Secretariat adopt a flexible approach, with consideration given to the principle of variable geometry. A multilateral social protection coordination instrument which could be used to realise the social protection agenda – at least for migrating SADC citizens – is absent as well.

All of the above shortcomings indicate that, unlike the economic and trade – and, possibly, political – dimensions of the SADC integration agenda, the social protection agenda has not yet been given firm commitment by SADC and its member states.