

# **Bilateral Labour Migration Agreements in Two SADC Corridors**

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# Bilateral labour migration arrangements in two Southern African Development Community corridors



# FOREWORD

This publication presents the main research findings and recommendations, with respect to bilateral labour migration governance in two Southern African important migration corridors, notably Lesotho–South Africa and Zimbabwe–South Africa. This work has become possible, thanks to the project Towards Comprehensive Global Guidance on Developing and Implementing Bilateral Labour Migration Arrangements: Unpacking Key Obstacles to Implementation in the African Region, which was funded by the Government of Sweden and jointly implemented by IOM and the International Labour Organization ILO.

The materials presented in this publication were included into a preliminary [stocktaking study on the development and implementation of bilateral labour migration agreements \(BLMAs\) in African Union Member States](#), which also contains an assessment of labour migration corridors using the [tool for the assessment of the BLMAs](#). The latter has been developed as one of the products of the above-mentioned project too.

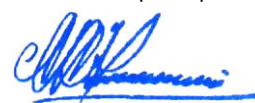
The BLMAs contribute to the protection of migrants' rights by establishing safe and legal channels for migration and facilitating remittance flows. Moreover, the positive effects of the BLMAs extend to the generation of economic growth and social development in origin and destination countries, by creating frameworks that allow policymakers to efficiently respond to labour market needs. The BLMAs may further ensure the institutionalization of tools for effective information-sharing, skills-matching and recognition among the parties.

This publication presents findings of the BLMAs used in the Southern African Development Community (SADC), where countries have relied predominantly on the less formal form of the BLMAs – the memorandum of understanding (MoU). The report discusses the shortcomings of the MoUs as they primarily focus on bilateral labour relations instead of migrant protection and do not create concrete obligations for the signatory countries. It further finds that ethical recruitment practices require more attention of the SADC countries to effectively protect migrants' rights and align country standards with the United Nations Global Compact for Migration, with particular reference to ensuring ethical recruitment.

To harness all the potential economic and developmental benefits of labour migration and to protect the rights of migrants aligned with the progressive regional (i.e. SADC Labour Migration Action Plan 2020–2030) and continental frameworks (e.g. the [African Union Commission Agenda 2063](#), the [African Continental Free Trade Area](#), the [Free Movement Protocol](#) and the [Migration Policy Framework for Africa](#)), further understanding of partners' capacity, data and policy coherence gaps is required for regional cooperation in Southern Africa. We hope this report will be a useful tool for public officials and other stakeholders to set the conditions for enhanced regional cooperation on and effective interaction in the area of labour migration.

IOM is grateful to the Government of Sweden for its generous financial contribution and support for the project. IOM also expresses its profound gratitude to the Government of Lesotho, the Government of South Africa and the Government of Zimbabwe for their active participation in the project, feedback and invaluable contribution towards this publication. Our sincere thanks and gratitude to the author of this report, Professor Marius Olivier, who is Honorary Professor at the Faculty of Law of the Nelson Mandela University in South Africa, Adjunct Professor at the School of Law of the University of Western Australia, Perth, and Director of the Institute for Social Law and Policy.

Finally, IOM extends its gratitude to the other experts and colleagues, namely Marina Manke, Vassiliy Yuzhanin, Jason Theede and Ida Dalgaard Steffensen, who made the publication of this report possible.



**Charles Allan Kwenin**  
Regional Director

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# BACKGROUND, SCOPE AND METHODOLOGY

This document contains a rapid assessment of experiences in developing and implementing bilateral labour migration agreements (BLMAs) along the Southern African Development Community (SADC)<sup>1</sup> migration corridors. It not only deals with the general context of bilateral labour arrangements in the SADC but also focuses on two specific SADC corridors – Lesotho–South Africa and Zimbabwe–South Africa. It delves into experiences, including good practices, challenges and bottlenecks, opportunities, as well as lessons learned in the development, implementation, and monitoring/evaluation of BLMAs and other arrangements affecting labour migration (including past and recently concluded BLMAs). Based on the identified practices and lessons learned, it draws conclusions and recommendations to inform the process of assessing, developing and implementing bilateral labour migration arrangements.

The document is informed by a methodology comprising the following components:

- An in-depth desk study (literature review) in relation to the assessment framework indicated below: The study involved a thorough analysis of the normative guidance for the SADC context, obtained from a wide range of international, continental (African Union), and subregional (SADC) instruments and their embedded standards, as well as other resource materials, including guiding frameworks operating at the international, continental and subregional levels; specific studies undertaken;<sup>2</sup> and other regulatory and operational arrangements impacting on the contents and implementation of bilateral labour migration arrangements. Apart from BLMAs and memorandums of understanding (MoUs), the latter arrangements comprise other bilateral arrangements (e.g. sectoral and bilateral labour arrangements other than bilateral labour agreements, bilateral social security agreements, bilateral trade agreements and bilateral investment treaties). They further comprise a range of multilateral arrangements, among others, continental and subregional free movement,<sup>3</sup> free trade/trade in services<sup>4</sup> and social security agreements.<sup>5</sup> These arrangements also operate in other global contexts.<sup>6</sup> In addition, although of less relevance to migrant workers in or from SADC countries and in particular the countries specifically covered in this corridor report,<sup>7</sup> higher-order regional regulatory frameworks include the all-important European Union provisions regarding the status and mobility of so-called third-country nationals, European Union migration policy and European Union Association Agreements.<sup>8</sup> Selected experiences at the national level were also consulted.

<sup>1</sup> The Southern African Development Community (SADC), first established as a development coordinating conference (SADCC) in 1980, was transformed into a development community in 1992: “It is an inter-governmental organisation whose goal is to promote sustainable and equitable economic growth and socio-economic development through efficient productive systems, deeper co-operation and integration, good governance and durable peace and security among fifteen Southern African Member States” (see [www.sadc.int/about-sadc/overview/sadc-facts-figures/](http://www.sadc.int/about-sadc/overview/sadc-facts-figures/) (accessed 16 March 2019)). The SADC now consists of sixteen Member States: Comoros joined the SADC in the course of 2018 (see [www.sadc.int/news-events/news/un-ion-comoros-becomes-16th-sadc-member-state/](http://www.sadc.int/news-events/news/un-ion-comoros-becomes-16th-sadc-member-state/) (accessed 16 March 2019)).

<sup>2</sup> Among others, see A. Segatti, *Regional Guidelines for the Development of Bilateral Labour Agreements in the Southern African Development Community* (Maputo, IOM, 2016), available at <https://publications.iom.int/books/regional-guidelines-development-bilateral-labour-agreements-southern-african-development>; and P.H. Bamu, *An Analysis of SADC Migration Instruments in Light of ILO and UN Principles on Labour Migration* (International Labour Organization (ILO), 2014).

<sup>3</sup> See in particular the recently adopted African Union Protocol on Free Movement of Persons, Right of Residence and Right of Establishment (2018) – among others, Article 19, which arranges for portability of social security benefits. Subregional-level instruments include the SADC Protocol on Facilitation of Movement of Persons (2005), the Economic Community of West African States (ECOWAS) Protocol relating to Free Movement of Persons, Residence and Establishment (1979) and antecedent instruments, the East African Community (EAC) Common Market Protocol (2009) and related annexes, and the Common Market for Eastern and Southern Africa (COMESA) Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence (2001).

<sup>4</sup> At the continental level, see the newly adopted African Union Continental Free Trade Area (AUCFTA) and the associated *Protocol on Trade in Services* (2018). This is replicated at the level of several African Union regional economic communities (RECs).

<sup>5</sup> See, among others, the (fifth draft) African Union Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Citizens to Social Protection and Social Security (2020), and at the subregional level (among others) the ECOWAS General Convention on Social Security (2013).

<sup>6</sup> For example, global and regional free trade and trade in services agreements, such as the General Agreement on Trade in Services, operating within the World Trade Organization context.

<sup>7</sup> But note that a sizeable number of Zimbabweans in particular have emigrated to the United Kingdom.

<sup>8</sup> For a more elaborate discussion of the European Union context, see M.P. Olivier, *Access to Social Security for Migrant Workers from Africa, including Portability Regimes*, final report, submitted to the ILO (Institute for Social Law and Policy, 2016), paras. 4.5.1–4.5.3 and para. 4.5.5.



- Consultative interviews with relevant stakeholders, either individually or in groups that institutionally or otherwise had a common link – relevant government ministries (in particular, ministries of labour, home affairs and foreign affairs), social partners and, in the case of Lesotho, also a recruitment agency, and an ex-migrant worker organization: These interviews were informed by a framework of guiding questions, made available to the interviewees prior to the interviews, which had to be adjusted on a case-by-case basis, depending on the interviewed institutions/individuals.
- An expert consultative workshop: In this workshop, which took place in Addis Ababa, Ethiopia, on 22 November 2018, initial research findings were discussed. Stakeholder representatives from Lesotho and Zimbabwe were present in this occasion. A consultative validation meeting with representatives from the Government of South Africa concerning this version of the report was held on 29 January 2019; written feedback from stakeholders in Lesotho and Zimbabwe has not been received.
- Feedback received from the donor (the Swedish Ministry of Justice), the International Labour Organization (ILO) and IOM.

In view of the reality of SADC countries, as is the case with many other African countries, which are increasingly concluding MoUs, whether binding or not, but often with minimalistic content, it was essential to develop and utilize an assessment framework with the necessary flexibility to be used for BLMA purposes, or any other bilateral arrangement affecting labour migration. The framework employed for this report, which is in the form of a list of issues and questions, incorporates the following main elements of both the labour agreement cycle and the migration cycle:

- Preparatory framework
- Recruitment, selection and placement
- Engagement, assistance and protection
- Return and reintegration
- Implementation

It needs to be emphasized that the said main elements are typically contained in many good practice bilateral labour migration arrangements around the world. On the one hand, the framework addresses key elements of the bilateral labour agreement cycle – firstly, the preparatory framework informing the negotiation and conclusion of bilateral agreements and, secondly, the implementation of these agreements. However, any type of BLMA would need to do more, as it should also address critically important components of the migration cycle – with reference to, firstly, recruitment, selection and placement; secondly, engagement with, assistance to and protection of migrant workers; and, thirdly, return and reintegration.

The structure of the report is as follows. This part on the background, scope and methodology is followed, firstly, by a brief overview of the SADC and its migration and labour migration context and responses and, secondly, an analysis of the corridor findings. The final part of the contribution concerns high-level conclusions and recommendations.

Finally, the limitations of the scope of the report should be made clear. While it considers both the general context of bilateral labour arrangements in the SADC and comments more broadly on bilateral arrangements concluded by the three countries concerned, its focus is on two specific SADC bilateral contexts/corridors, namely Lesotho–South Africa and Zimbabwe–South Africa. It therefore does not provide a representative picture of all the SADC corridors.



# OVERVIEW: SOUTHERN AFRICAN DEVELOPMENT COMMUNITY AND ITS LABOUR MIGRATION CONTEXT

## Southern African Development Community migration<sup>9</sup>

The SADC consists of 16 Member States<sup>10</sup> and is one of eight regional economic communities (RECs) in Africa, comprising 277 million residents. Its major migration drivers include poverty and high unemployment rates in several SADC countries. Migration in the SADC is further associated with the impact of HIV/AIDS (across the African region, the SADC has the highest HIV prevalence rate in Africa at 12.6%).<sup>11</sup> Other drivers of migration include economic development in the region, supported by significant increases in cross-border trade. The services sector has the largest contribution to the regional GDP (51%), as opposed to industry (32%) and agriculture (17%). Also, the total SADC trade almost quadrupled between 2000 and 2011; total intra-SADC imports have grown steadily over the past 10 years, more than tripling in total.<sup>12</sup>

A considerable part of the labour migration is of a mixed and irregular nature. As has been remarked:

### Overview of migration in the Southern African Development Community<sup>13</sup>

The Southern Africa region continues to experience a significant rise in mixed and irregular migration flows. These flows originate mostly from the Horn of Africa, particularly Ethiopia and Somalia, and consist of refugees, asylum seekers, economic migrants and victims of trafficking, including women and children. The large majority of these migrants attempt to reach their destinations through established smuggling and trafficking networks. At least 20,000 migrants travel through the Great Lakes and the Southern African Development Community (SADC) regions to try to reach South Africa each year. Human rights violations and the lack of protection of migrants – including from extortion, abandonment, and physical and, to a certain extent, sexual, violence – continue to be a harsh reality for these mobile populations. In addition, relatively large mobile populations move between Angola and the Democratic Republic of the Congo, as well as from Zimbabwe to South Africa, and often prompt the affected governments to take measures to promote the departure of irregular migrants. Insecurity, lack of economic livelihood, drought and crop failure are some of the push factors that motivate migrants seeking better opportunities to undertake risky migratory routes. Labour migration remains one of the dominant forms of population movement in the region. Some migrants experience xenophobia, including negative social attitudes, discrimination and, at times, violence.

<sup>9</sup> This paragraph and the next paragraph rely in part on M.P. Olivier, *Migration in Namibia: A Country Profile 2015* (Geneva, IOM, 2016), pp. 28–33, available at <https://publications.iom.int/books/migration-namibia-country-profile-2015>.

<sup>10</sup> The SADC Member States are Angola, Botswana, Comoros, the Democratic Republic of the Congo, Eswatini (formerly Swaziland), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, , South Africa, the United Republic of Tanzania, Zambia and Zimbabwe (see [www.sadc.int/member-states/](http://www.sadc.int/member-states/) (accessed 16 March 2019)).

<sup>11</sup> See [www.sadc.int/about-sadc/overview/sadc-facts-figures](http://www.sadc.int/about-sadc/overview/sadc-facts-figures) (accessed 18 January 2019).

<sup>12</sup> See [www.sadc.int/about-sadc/overview/sadc-facts-figures/](http://www.sadc.int/about-sadc/overview/sadc-facts-figures/) (accessed 10 December 2018).

<sup>13</sup> IOM, *Regional Strategy for Southern Africa 2014–2016* (Pretoria, 2014), p. 7. Available at [www.iom.int/sites/default/files/country/docs/AUP00579-RO-Pretoria-Regional-Strategy.pdf](http://www.iom.int/sites/default/files/country/docs/AUP00579-RO-Pretoria-Regional-Strategy.pdf).

There has also been an increase in trafficking in persons<sup>14</sup> and internal and external refugee movements,<sup>15</sup> while skills flight (brain drain) to and the growth of diaspora (particularly) in developed countries have been substantial.<sup>16</sup> In fact, the very nature of migration within the SADC is undergoing changes. It has, in particular, been reported that the change has been dramatic over the last 20 years as far as, for example, Lesotho is concerned: the focus and incidence of migration has shifted from mainly male mineworkers to higher-income migrants, and also large numbers of female migrants.<sup>17</sup>

The importance and role of migration in the SADC countries is also demonstrated by the extent and significance of remittances to the survival of recipient households, as they are fundamental in enabling families to meet their everyday needs.<sup>18</sup> For most households with outgoing migrants, migrant remittances comprise the main source of household income; also, the 2010 study undertaken in five SADC countries found that 85 per cent of households with outgoing migrants received cash remittances.<sup>19</sup> For example, in 2012 Lesotho was, in relative terms, the second leading recipient country in the world, after Tonga:<sup>20</sup> remittance income in Lesotho surpassed other sources of external financial inflows and constituted 28.6 per cent of GDP.<sup>21</sup> Remittances also play a significant role in the economic development of the SADC countries. As remarked in a 2012 study, and echoing the international experience in this regard:<sup>22</sup> “[F]or national economies, cross-border remittances are a source of foreign exchange and taxes, contribute to the balance of payments, and provide capital for enterprises and valuable household incomes.”<sup>23</sup> Therefore, the SADC governments and even international organizations have started to integrate remittances as a tool for development into their poverty reduction strategies.<sup>24</sup>

<sup>14</sup> There is increasingly evidence of a growing number of local smugglers and an expanding network of transnational criminal syndicates involved in a diverse range of human trafficking activities (J. Crush, V. Williams and S. Peberdy, *Migration in Southern Africa*, a paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (2005), pp. 21–23 and 25–26; P. Mudungwe, *Migration and Development in the Southern Africa Development Community Region: The Case for a Coherent Approach*, African Diaspora Policy Centre (ADPC) Research Brief No. 2016/02 (The Hague, ADPC, 2016), p. 50; see also generally United States Department of State *Trafficking in Persons Report 2018*).

<sup>15</sup> Internally displaced persons (IDPs) in the SADC – the result of, among others, political and military instability in some of the countries in the SADC region – accounted for 2.9 million of the approximately 13 million IDPs in Africa in 2005, more than half of the total number of IDPs worldwide and dwarfing the number of refugees (Brookings Institution, University of Bern Project on Internal Displacement, Regional Seminar on Internal Displacement in the Southern African Development Community (SADC) Region (Gaborone, Botswana, 24–26 August 2005), pp. 4–6; R. Black, *Migration and pro-poor policy in Africa*, Working Paper C6, Development Research Centre on Migration, Globalisation and Poverty, University of Sussex, p. 6. Yet the position is that a coordinated response to the challenge of internal and external refugee movements is lacking in the SADC: “Individual countries are left to shoulder the burden as best they can with support from international agencies. All are signatories to the major refugee conventions but few have advanced or adequate systems of refugee determination in place. Regional burden sharing is a key concept that SADC could easily turn into a reality.” (Crush, Williams and Peberdy, *Migration in Southern Africa*, pp. 13 and 14)

<sup>16</sup> While there is significant intraregional brain drain, especially from countries such as Zimbabwe, Mozambique and Angola to South Africa and Botswana in particular, this is counterbalanced by significant emigration of SADC professionals to countries outside the SADC. The health sector in the SADC is most severely impacted by the brain drain, with nearly 30 per cent of SADC-born physicians and 10 per cent of SADC-born nurses resident outside their countries of birth. Major destinations for SADC health-care professions include the United Kingdom, the United States, Portugal, Australia and Canada. See J. Crush and V. Williams, *Labour Migration Trends and Policies in Southern Africa*, Southern African Migration Programme (SAMP) Policy Brief No. 23 (March 2010), pp. 27–29, and the studies referred to in the publication, as well as Mudungwe, *Migration and Development in the Southern Africa Development Community Region*, pp. 46–47.

<sup>17</sup> L.J. Ntema, M. Lenka, L. Marais and A. De Gouvêa, *The Levels of Access to Public Services in the Free State by Non-South Africans/Non-Free State Residents* (Bloemfontein, Centre for Development Support, University of the Free State, 2011), p. 59.

<sup>18</sup> B. Dodson, H. Simelane, D. Tevera, T. Green, A. Chikanda and F. de Vletter, *Gender, Migration and Remittances in Southern Africa* (J. Crush (ed.)), South African Migration Project Migration Policy Series No. 49 (Cape Town, IDASA; and Kingston, Ontario, Southern African Research Centre, Queen's University, 2008), pp. 8 and 30.

<sup>19</sup> W. Pendleton, J. Crush, E. Campbell, T. Green, H. Simelane, D. Tevera and F. de Vletter, *Migration, Remittances and Development in Southern Africa* (J. Crush (ed.)), Southern African Migration Project Migration Policy Series No. 44 (Cape Town, IDASA; and Kingston, Ontario, Southern African Research Centre, Queen's University, 2006), p. 4. Remittances are sent on a regular basis and “easily outstrip agriculture in relative importance” as a household income source (*ibid.*, p. 5). In fact, the same study remarks that “across the region as a whole, annual median income from wage employment and cash remittances is the same . . . When cash and commodities are combined, however, the value of remittances exceeds all other forms of income . . .” (*ibid.*).

<sup>20</sup> L.J. Nalane, A. Chikanda and J. Crush, *The Remittances Framework in Lesotho: Assessment of Policies and Programmes Promoting the Multiplier Effect* (IOM and ACP Observatory on Migration, 2012), pp. xiii and xiv, 1 and 7. Available at <https://publications.iom.int/books/remittances-framework-lesotho-assessment-policies-and-programmes-promoting-multiplier-effect>.

<sup>21</sup> *Ibid.*

<sup>22</sup> C. Thouez, The impact of remittances on development, in: United Nations Population Fund (UNFPA), *International Migration and the Millennium Development Goals*, selected papers of the UNFPA Expert Group Meeting, Marrakech, 11–12 May 2005 (New York, 2005).

<sup>23</sup> Crush, Williams and Peberdy, *Migration in Southern Africa*, p. 18.

<sup>24</sup> C. Ramírez, M. Domínguez and J. Morais, *Crossing borders: Remittances, gender and development*, working paper (Santo Domingo, United Nations International Research and Training Institute for the Advancement of Women (Instraw), 2005), p. 52.

## Labour migration overview

Traditionally, there has been a strong focus on labour migration in the SADC, due to economic opportunities in receiving countries. Also, the cultural and linguistic similarities between migrants from Botswana, Eswatini (formerly Swaziland), Lesotho and Mozambique and the population of South Africa allow them to easily blend into communities in South Africa, thereby encouraging migration.<sup>25</sup> In fact, intra-SADC movement is the prevailing characteristic of migration from the SADC countries. Southern African cross-border migration tends to occur within the region or with neighbouring regions, while only a small percentage moves overseas, confirming the South–South nature of SADC migration.<sup>26</sup> As noted in an African Development Bank study, in Southern Africa slightly more than 65 per cent of international migrants relocate within the same region in search of better economic opportunities; 26.5 per cent migrate to East Africa and 6.5 per cent move to Central Africa.<sup>27</sup>

In South Africa, the major destination country within the SADC,<sup>28</sup> migrants from within the SADC constitute 94 per cent of the total stock of African migrants<sup>29</sup> and around 75 per cent of all (regular) migrants in the country.<sup>30</sup> In addition, a 2010 study of migration in Southern Africa revealed that 86 per cent of the total number of migrants from Lesotho, Botswana, Eswatini, southern Mozambique and Zimbabwe were working in South Africa, confirming a clear trend that most South–South migrants travel across contiguous borders.<sup>31</sup> In particular, as noted earlier, the main destination for migrants from Lesotho, a landlocked country with limited employment opportunities, is South Africa: 99.8 per cent of Lesotho migrant workers are said to work in South Africa.<sup>32</sup>

In fact, migration has been a long-standing feature of the labour market framework in Southern Africa, particularly as far as work on the mines and in agriculture is concerned.<sup>33</sup> Apart from informal cross-border trade-related migration,<sup>34</sup> historically work on the mines – again, particularly in South Africa – served as a magnet for both internal and external migrants. As a result, it could be argued that the economic development of several countries in the region was made possible only by the use of labour from other countries.<sup>35</sup> From a historical perspective, as is supported by data on modern-day migration movements within the SADC, it can be said that labour migration practices in Southern Africa are deeply entrenched and have become part of the movements of people for generations, primarily in search of better living and working conditions.<sup>36</sup>

<sup>25</sup> A. Shimeles, *Migration Patterns, Trends and Policy Issues in Africa*, Working Paper Series No. 119, African Development Bank Group (Tunis, African Development Bank, 2010), p. 11.

<sup>26</sup> Mudungwe, *Migration and Development in the Southern Africa Development Community Region*, p. 45.

<sup>27</sup> Shimeles, *Migration Patterns, Trends and Policy Issues in Africa*, p. 9.

<sup>28</sup> Political migration has largely been the result of instability in countries such as the Democratic Republic of the Congo and, earlier, Angola and Mozambique. Economic migration within the SADC has resulted in the flow of migrants to countries with better economies and skills shortages, namely Botswana, Namibia and especially South Africa. See M.P. Olivier, *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)*, World Bank Social Protection Discussion Paper No. 0908 (World Bank, 2009), p. 10, available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0908.pdf> (accessed 10 December 2019), and the studies referred to in the report.

<sup>29</sup> See Crush and Williams, *Labour Migration Trends and Policies in Southern Africa*, p. 5.

<sup>30</sup> *Ibid.*, p. 7.

<sup>31</sup> Pendleton et al., *Migration, Remittances and Development in Southern Africa*, pp. 2 and 3; R. Sabates-Wheeler and J. Koettl, Social protection for migrants: The challenges of delivery in the context of changing migration flows, *International Social Security Review*, 63(3–4):116 (July 2010).

<sup>32</sup> J. Crush, J. Dodson, J. Gay, T. Green and C. Leduka, *Migration, Remittances and 'Development' in Lesotho* (J. Crush (ed.)) (South African Migration Programme; Cape Town, IDASA; and Kingston, Ontario, Southern African Research Centre, Queen's University, 2010), p. 26.

<sup>33</sup> Cf. C. Fenwick and E. Kalula, Law and labour market regulation in East Asia and Southern Africa: Comparative perspectives, *International Journal of Comparative Labour Law and Industrial Relations*, 21(2):193–226 (2005).

<sup>34</sup> See generally Crush, Williams and Peberdy, *Migration in Southern Africa*, pp. 5 and 6; P. Delius, The history of migrant labor in South Africa (1800–2014), *Oxford Research Encyclopaedia of African History* (May 2017), available at <http://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-93>. This, in particular, has been true of the extensive labour migration from (southern) Mozambique to South Africa (see N. Gaspar, The reduction of Mozambican workers in South African mines, 1975–1992: A case study of the consequences for Gaza Province – District of Chibuto (2008), pp. 16–20, available at <http://hdl.handle.net/10539/4839>).

<sup>35</sup> Crush, Williams and Peberdy, *Migration in Southern Africa*, pp. 5 and 6.

<sup>36</sup> *Ibid.*

While many cross-border migrants in Southern Africa are circular migrants,<sup>37</sup> migration patterns within the SADC have largely been characterized by their permanent or ongoing nature: once immigration linkages are established, they are very difficult to break and migration flows are almost impossible to reverse.<sup>38</sup> This is particularly true in the mining and agriculture industries in Southern Africa. Migration is essentially regarded as a long-term engagement rather than as a passing phase in the working lives of migrants, despite the fact that they maintain strong links with the home country.<sup>39</sup> This also flows from the fact that, according to the 2010 study referred to previously, migrants from the countries concerned<sup>40</sup> are predominantly older,<sup>41</sup> married<sup>42</sup> and, in most cases, heads of households.<sup>43</sup> In addition, the study indicates that many households have a migration “tradition” which is passed on from one generation to the next in that parents and even grandparents work outside the home country.<sup>44</sup> Furthermore, it is generally accepted that SADC-related migration is characterized by several dimensions, including contract labour migration,<sup>45</sup> declining levels of regular migration to and within the region and an increase in clandestine and undocumented (irregular)<sup>46</sup> as well as informal migration,<sup>47</sup> and increased feminization of cross-border migration.<sup>48</sup>

<sup>37</sup> Circular or seasonal migrants – who, in the case of the SADC, include seasonal agricultural workers in border areas, construction workers, informal cross-border traders – move for short periods from their country of usual residence to one or more countries for purposes of employment, or to conduct an economic activity (Mudungwe, *Migration and Development in the Southern Africa Development Community Region*, p. 49.)

<sup>38</sup> M. Reitzes, *Regionalizing International Migration: Lessons for SADC* (J. Crush and V. Williams (eds.)), Southern African Migration Programme (SAMP) Policy Brief No. 11 (2003), p. 18.

<sup>39</sup> Pendleton et al., *Migration, Remittances and Development in Southern Africa*, p. 4.

<sup>40</sup> Migrants were from Botswana, Eswatini, Lesotho, Mozambique and Zimbabwe (Pendleton et al., *Migration, Remittances and Development in Southern Africa*, p. 1).

<sup>41</sup> Only 7 per cent of the migrants covered in the survey were under the age of 25; in contrast, 41 per cent were over 40 (Pendleton et al., *Migration, Remittances and Development in Southern Africa*, p. 2; see also Crush, Williams and Peberdy, *Migration in Southern Africa*, pp. 21–23).

<sup>42</sup> As many as 62 per cent of the migrants covered in the survey were married (Pendleton et al., *Migration, Remittances and Development in Southern Africa*, p. 2).

<sup>43</sup> Just over half of the migrants were actually heads of household rather than ordinary members of household, although the pattern differed from country to country (Pendleton et al., *Migration, Remittances and Development in Southern Africa*, pp. 2 and 3).

<sup>44</sup> About 50 per cent of the migrants covered in the survey indicated that their parents had been cross-border migrants (Pendleton et al., *Migration, Remittances and Development in Southern Africa*, p. 3).

<sup>45</sup> See Crush, Williams and Peberdy, *Migration in Southern Africa*, p. 7; and Mudungwe, *Migration and Development in the Southern Africa Development Community Region*, p. 48.

<sup>46</sup> Irregular migration appears to be widespread and on the increase in Southern Africa, although the exact number of irregular migrants is a subject of constant debate and conflicting opinion. It was reported that South Africa deported over 1.5 million irregular migrants to neighbouring countries between 1994 and 2010 (Mudungwe, *Migration and Development in the Southern Africa Development Community Region*, pp. 49 and 50; see also Crush and Williams, *Labour Migration Trends and Policies in Southern Africa*).

<sup>47</sup> Mudungwe, *Migration and Development in the Southern Africa Development Community Region*, p. 50. This applies in particular to informal cross-border traders: for example, it has been suggested that 30–50 per cent of border crossings into South Africa, except from Namibia and Botswana, are by small-scale traders (M.P. Olivier, *Reflections on the Feasibility of a Multilateral SADC Social Security Agreement Involving South Africa and Lesotho, Mozambique, Swaziland and Zimbabwe*, report submitted to the ILO (2010), paras. 32–35).

<sup>48</sup> Crush, Williams and Peberdy, *Migration in Southern Africa*, p. 14; SAMP and IOM, *HIV/AIDS, Population Mobility and Migration in Southern Africa: Defining a Research and Policy Agenda* (Geneva, 2005), p. 17; Mudungwe, *Migration and Development in the Southern Africa Development Community Region*, p. 48. Yet, it has been remarked that across all the African RECs, the SADC has the largest gap (i.e. 23%) between male and female (migrant) employment (P. Mehra, *Labour migration within Africa: A snapshot of statistical data trends*, paper presented at the international symposium “Fostering Labour Mobility within and from Africa”, Nairobi, 9–12 July 2018), p. 14, and the studies cited in the publication).

## Bilateral and other responses to Southern African Development Community labour migration

Limited use has been made of BLMAs in the SADC. Involving South Africa as the country of destination, five bilateral labour agreements were concluded under the previous political regime, primarily to provide labour for South African mines: these agreements were finalized with Botswana,<sup>49</sup> Eswatini,<sup>50</sup> Lesotho,<sup>51</sup> Malawi<sup>52</sup> and Mozambique.<sup>53</sup> One was concluded in the 1960s (Malawi) and three in the 1970s (Botswana, Eswatini and Lesotho). The remaining agreement, with Mozambique, was concluded in 1964, but had been preceded by a range of earlier agreements with the Portuguese colonial government regulating the provision of temporary labour from Mozambique, initially dating back to the nineteenth century.<sup>54</sup> The agreements specify conditions and obligations on issues such as recruitment, contracts, remittances and deferred pay, taxation, required documentation, unemployment insurance and appointment of labour officials to be stationed in South Africa.

In the course of the consultations informing this report, it became clear that given the time periods during which these agreements were concluded, there is seemingly no institutional knowledge of: (i) the history of the agreements (other than that they were supposed to arrange for migrant labour to be made available to, in particular, South African mines); and (ii) challenges experienced with the conclusion and inception of these agreements. Also, in the case of South Africa in particular, the democratization of the country in the early 1990s brought about a clear break with the past, which in part has led to a reconsideration by South Africa of the value and appropriateness of the agreements. Nevertheless, for reasons discussed below, the future existence of these bilateral labour agreements is uncertain. In the course of consultations held for this report, the Government of South Africa (i.e. the National Department of Labour and Employment) has indicated that it has no intention to conclude new bilateral labour agreements and that it prefers MoUs as the primary vehicle to establish and maintain bilateral labour migration relations. The reasons for this stance on the part of the Department are varied – according to the Department these agreements have become obsolete; the Department prefers the relative flexibility of a framework arrangement regulating labour relations in the broader sense of the word contained in an MoU; it prefers a less exacting instrument than one that imposes onerous obligations; and labour migration as such, according to the Department, should be managed via the normal immigration and work visa route. This tendency is also reflected in the recent practice in Mauritius, another SADC migrant-receiving country. In the course of negotiations (2018) with Lesotho on the exchange of labour between the two countries, Mauritius indicated its willingness to conclude an MoU (supported by an accompanying Declaration of Intent), but not a bilateral labour

<sup>49</sup> Agreement between the Government of the Republic of South Africa and the Government of the Republic of Botswana relating to the Establishment of an Office for a Botswana Government Labour Representative in the Republic of South Africa, Botswana Citizens in the Republic of South Africa and the Movement of Such Persons across the International Border – Treaty Series 3/1973. The agreement entered into force on 24 December 1973.

<sup>50</sup> Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland relating to the Establishment of an Office for a Swaziland Government Labour Representative in the Republic of South Africa, Certain Swaziland Citizens in the Republic of South Africa, the Movement of Such Persons across the Common Border and the Movement of Certain South African Citizens across the Common Border, and Addendum Thereto – SA Treaty Series 3/1986. The agreement entered into force on 22 August 1975.

<sup>51</sup> Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho relating to the Establishment of an Office for a Lesotho Government Labour Representative in the Republic of South Africa, Lesotho Citizens in the Republic of South Africa and the Movement of Such Persons across the International Border – SA Treaty Series 1/1973. The agreement entered into force on 24 August 1973.

<sup>52</sup> Agreement between the Governments of the Republic of South Africa and Malawi relating to the Employment and Documentation of Malawi Nationals in South Africa – SA Treaty Series 10/1967. The agreement entered into force on 1 August 1967.

<sup>53</sup> Agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal Regulating the Employment of Portuguese Workers from the Province of Mozambique on Certain Mines in the Republic of South Africa – SA Treaty Series 11/1964. The agreement was concluded between the Government of the Republic of South Africa and the then colonial government, the Government of the Republic of Portugal, and entered into force on 1 January 1965.

<sup>54</sup> See Gaspar, The reduction of Mozambican workers in South African mines, 1975–1992, pp. 16–20; R. Plender, *International Migration Law* (Martinus Nijhoff, 1988), p. 339. See also M. Harris, Labour emigration among the Moçambique Thonga: Cultural and political factors, *Journal of the International African Institute*, 29(1):50–66 (January 1959) – at p. 50: “The emigration of Moçambique labourers to the South African mines has been governed by a series of international agreements beginning in 1897 between Moçambique and the Transvaal Republic, followed by the Modus Vivendi of 1901, the Transvaal-Moçambique Convention of 1909, and the Portuguese–South African Convention of 1928, revised in 1934, 1936, and 1940.”



agreement, as the appropriate instrument.<sup>55</sup> According to Lesotho government stakeholders consulted, Mauritius also preferred the flexibility of a less onerous MoU instrument. According to the draft MoU,<sup>56</sup> which concerns cooperation on a reciprocal basis as regards the recruitment and development of specified categories of professionals and low-skilled workers, the MoU gives effect to the respective national labour migration policies, the SADC regional framework, also in relation to labour migration, as well as regional and international instruments ratified by both countries. Limited provision is made concerning the position and protection of affected migrant workers, save for some reference to integration in host communities, and bilateral meetings to reflect on the welfare of migrant workers from both countries.

Increasingly, in the SADC, use is made of MoUs or other cooperation arrangements. Several of these arrangements have been concluded by South Africa, but other SADC countries have followed suit. South Africa has concluded such arrangements with Lesotho (first in 2006, and again in 2013),<sup>57</sup> Mozambique<sup>58</sup> and Zimbabwe (replacing preceding MoUs of 2004 and 2009).<sup>59</sup> Similarly, Zimbabwe has concluded MoUs with Malawi<sup>60</sup> and Mozambique;<sup>61</sup> renegotiating a lapsed bilateral (labour) MoU with Namibia and considering the conclusion of MoUs with Botswana and Zambia are some of the priorities of the Government of Zimbabwe.<sup>62</sup> As discussed above, Lesotho has concluded a draft MoU with Mauritius.

The focus of these arrangements is on cooperation in the fields of employment and labour. Indicated areas of cooperation of relevance to labour migration usually include but are not limited to social security issues, often specified to also cover compensation in respect of occupational injuries and diseases and pension portability; occupational safety and health; and public employment services. In the case of the Zimbabwe–South Africa MoU, labour migration management is also specifically indicated. Particularly noteworthy is the fact that, unlike the bilateral labour agreements mentioned above, after a stipulated period of time, most of the MoUs are said to renew automatically, subject to termination by either party on (usually) six months' written notice.

A number of countries in the SADC have also concluded other types of bilateral arrangements. For example, South Africa has concluded bilateral arrangements to provide for the regulation of movement across country borders. These arrangements, for example with Lesotho in 2007,<sup>63</sup> have subsequently been subsumed in special permit regimes established by South Africa with Lesotho (2015 and 2019)<sup>64</sup> and

<sup>55</sup> See Lesotho, Ministry of Labour and Employment, *Study Tour of the Government of the Kingdom of Lesotho to the Republic of Mauritius and Negotiation of Bilateral Labour Agreement* (February 2018).

<sup>56</sup> (Draft) Memorandum of Understanding between Lesotho and Mauritius on Cooperation in the Field of Labour (2018).

<sup>57</sup> Memorandum of Understanding between Lesotho and South Africa on Cooperation in the Field of Labour (signed in Maseru on 30 October 2006 and 3 December 2013, respectively).

<sup>58</sup> Cooperation Agreement between Mozambique and South Africa in the Fields of Migratory Labour, Job Creation, Training, Studies and Research, Employment Statistics, Social Dialogue and Social Security (signed in 2003). The objective of this agreement is to define the basis for institutional relations under which cooperation ties are developed.

<sup>59</sup> Memorandum of Understanding between Zimbabwe and South Africa on Cooperation in the Fields of Employment and Labour (2017).

<sup>60</sup> Memorandum of Understanding between Zimbabwe and Malawi on Cooperation in the Fields of Employment and Labour. Several such MOUs have been concluded. According to Zimbabwean government representatives, the latest version has lapsed and has not yet been reactivated.

<sup>61</sup> Memorandum of Understanding between Zimbabwe and Mozambique on Cooperation in the Fields of Employment and Labour (2015).

<sup>62</sup> Information was obtained during consultation with Zimbabwean government representatives.

<sup>63</sup> Agreement between South Africa and Lesotho on the Facilitation of Cross-border Movement of Citizens of the Two Countries (June 2007). The primary objective of the agreement is to facilitate the movement of citizens of South Africa and Lesotho (other than through designated airports) who intend to visit the two countries. This is also to authorize the escalating costs related to improving service delivery regarding issuing immigration clearances to the citizens of South Africa and Lesotho who routinely cross the borders between the two countries. The agreement allows the citizens of the two countries to freely move between them without reporting to the migration officers for examination, as long as they have valid passports (Article 3).

<sup>64</sup> As has been noted: "The Department of Home Affairs announced the Lesotho Special Permit (LSP) in 2015 intended to regularise the stay of undocumented Lesotho nationals residing and/or working in South Africa. The DHA issued 94,941 LSPs in 2015/16. On 18 November 2019, the DHA announced the opening of applications for the new Lesotho Exemption Permit (LEP) about six weeks before the 31 December 2019 expiry of the Lesotho Special Permits. In addition to the accelerated time line, applications for the LEP is open to valid LSP permit holders only (Department of Home Affairs 2019). LEPs are valid for a period of four years." (K.N. Bule and L.B. Landau, *A Drop in the Ocean: Labour Market Effects of South Africa's Special Dispensations for Southern African Migrants*, report submitted to the ILO (2020), p. 21).

Zimbabwe (2009, 2015 and 2017),<sup>65</sup> as well as with Angola (2017).<sup>66</sup> Between 2009 and 2019, approximately 336,000 people received special dispensation permits.<sup>67</sup> The primary focus of these permit types that have been issued to considerable numbers of irregular Lesotho and Zimbabwean citizens in South Africa was to regularize their stay in the country. The Lesotho permit regime, known as the Lesotho Special Permit, was replaced by the Lesotho Exemption Permit (LEP) in 2019, while the Zimbabwean permit type, referred to as the Zimbabwe Exemption Permit (ZEP), will expire by 2021.<sup>68</sup> A related measure is the introduction in 1996 of the Border Resident Card, on the basis of a bilateral agreement to this effect between Namibia and Angola, to allow border residents to have access to a 60-kilometre zone in the neighbouring country without a passport.<sup>69</sup> However, these agreements cannot be seen strictly as a labour agreement.

A Mauritius–Seychelles MoU of 2017 concerns the recruitment of Mauritian teachers and other professionals to meet the needs of the Seychelles labour market.<sup>70</sup> In fact, sectoral (labour exchange) arrangements have generally been concluded by individual ministries in several SADC countries in order to procure much-needed skilled professionals.<sup>71</sup>

Finally, other measures of relevance to labour migration but not included in BLMAs have also been contemplated by the SADC countries. These include visa arrangements and, in particular, special visa categories/regimes. For example, the *White Paper on International Migration for South Africa*<sup>72</sup> (2017) envisages treatment of migrant workers on the basis of specialized visa categories, such as the SADC special work visa, the SADC trader's visa, and the SADC small and medium enterprise (SME) visa.

## National-level institutional arrangements

Before reflecting on an assessment of existing arrangements, it is necessary to briefly indicate the institutional arrangements operative in the three countries that form the subject of this corridor study, as regards labour migration. In South Africa, the National Department of Employment and Labour is the chief custodian of labour migration and has taken the initiative to develop, among others, the draft National Labour Migration Policy. The overarching responsibility for migration policy more generally lies with the Department of Home Affairs (DHA). The DHA is the custodian of the *White Paper on International Migration for South Africa* and of the special permit regimes applicable to Lesotho and Zimbabwe. The chief responsibility for cross-border relations, also with regard to the joint bilateral cross-border commission framework (which accommodates labour migration matters, too), is with the Department of International Relations and Cooperation (DIRCO). Social partners are also involved, in particular via the National Economic Development and Labour Council (Nedlac). Nedlac is the vehicle by which government, labour,

<sup>65</sup> Again, as noted: "Announced in 2009, the Dispensation of Zimbabwe Project (DZP) provided eligible Zimbabweans who were working, studying or running businesses without the proper permission or documentation an opportunity to legalise their stay in the Republic for a period of four years. All told, 242,731 individuals applied for and received the permit. Since then, various special dispensations have been implemented. The broad objectives of special dispensations include regularising the stay of Zimbabweans and Basotho residing in South Africa legally, curbing deportations, and reducing the pressure and backlog on the asylum and refugee system. In 2014, the DHA afforded holders of the DZP an opportunity to renew their permits for a further three years. With the imminent expiry of the permit, the DHA issued yet another call for renewal in 2017, this time issuing the Zimbabwe Exemption Permit (ZEP). The Minister of Home Affairs at the time, Hlengiwe Mkhize, asserted that, 'this dispensation will assist greatly in advancing the objectives of the National Development Plan, Vision 2030 particularly in respect of the focus on the economy, attracting critical skills into the country and ensuring transfer of skills to our citizens for better employment prospects'. Of 180,188 Zimbabweans who applied for the ZEP permit in 2017, the DHA issued approximately 178,172 permits (Department of Home Affairs 2018)." (Bule and Landau, *A Drop in the Ocean*, pp. 20–21 (authorities omitted))

<sup>66</sup> In accordance with the Angolan Special Permits regime, 1,757 permits were issued to Angolans in South Africa (Bule and Landau, *A Drop in the Ocean*, p. 20).

<sup>67</sup> Bule and Landau, *A Drop in the Ocean*: p. 21.

<sup>68</sup> A related initiative is aimed at the authorization of the position of Zimbabwean agricultural workers on farms in Limpopo, South Africa. In terms of the 2004 Memorandum of Understanding on Employment and Labour between the two governments, the Government of Zimbabwe agreed to issue them emergency travel documents (Government of Zimbabwe National Labour Migration Policy (draft) (2016), p. 5; see also Human Rights Watch, *Unprotected Migrants: Zimbabweans in South Africa's Limpopo Province*, Volume 18, No. 6(A) (New York, 2006), available at [www.hrw.org/report/2006/08/08/unprotected-migrants/zimbabweans-south-africas-limpopo-province](http://www.hrw.org/report/2006/08/08/unprotected-migrants/zimbabweans-south-africas-limpopo-province)).

<sup>69</sup> Olivier, *Migration in Namibia*, p. 44.

<sup>70</sup> Similar MOUs with other countries are apparently being considered by Seychelles (see Seychelles News Agency, *Zambians, Mauritians boosting teacher ranks in Seychelles' state schools* (Seychelles News Agency, 5 February 2018), available at [www.seychellesnewsagency.com/articles/8625/Zambians%2C+Mauritians+boosting+teacher+ranks+in+Seychelles+state+schools](http://www.seychellesnewsagency.com/articles/8625/Zambians%2C+Mauritians+boosting+teacher+ranks+in+Seychelles+state+schools)).

<sup>71</sup> This is the author's observation based on years-long engagement with labour migration practices of SADC countries.

<sup>72</sup> South Africa, Department of Home Affairs, *White Paper on International Migration for South Africa* (Pretoria, 2017).



business and community organizations seek to cooperate, through problem-solving and negotiation, on economic, labour and development issues and related challenges facing the country. The labour market policy constitutes one area of Nedlac's work. Private recruitment agencies are voluntarily organized in the Confederation of Associations in the Private Employment Sector (CAPES).

In Lesotho, the Ministry of Labour and Employment (MOLE) bears primary responsibility for labour migration matters, in particular via its Migration Liaison Office. The MOLE is the custodian of the Lesotho National Labour Migration Policy. The Ministry of Home Affairs (MOHA) has the overarching responsibility for migration policy in the country. Under its auspices the (draft) Migration and Development Policy was developed. The Ministry of Foreign Affairs and International Relations fulfils the counterpart role of DIRCO in South Africa as regards the bilateral joint cross-border commission framework. Together with other stakeholders, and supported by IOM, these government ministries form part of the National Consultative Committee on Migration. Other stakeholders include, but are not restricted to, social partners, migrant workers associations (including ex-mineworkers associations), The Employment Bureau of Africa (TEBA) (mainly involved in recruitment of and liaison with mineworkers and ex-mineworkers), the Basotho Immigrants Protection Organization (BIPO) and a recruitment company (labour export agency).

In Zimbabwe, the custodian for labour migration is the Ministry of Public Service, Labour and Social Welfare, and its various subdivisions. The Ministry is responsible for the development of the (draft) National Labour Migration Policy. Migration policy generally lies with the Ministry of Home Affairs. This Ministry, through its Permanent Secretary, also takes the lead as regards the Inter-Ministerial Committee for Migration. The Ministry of Foreign Affairs and International Trade fulfils the counterpart role of DIRCO in South Africa as regards the bilateral joint cross-border commission framework. The Ministry's Diaspora Directorate led the development of the draft Diaspora Policy and is the liaison with the Zimbabwean diaspora.

# ASSESSMENT OF BILATERAL LABOUR MIGRATION AGREEMENTS, OTHER RESPONSES AND RELATED REGULATORY CONSIDERATIONS

## Bilateral labour agreements

During interviews held for purposes of this report, the appropriateness of the current bilateral labour agreements regime involving South Africa as the receiving country has been questioned by both South African and Lesotho stakeholders (no such agreement has been concluded with Zimbabwe). It has been indicated that:

- These agreements were concluded in a previous political dispensation, primarily with a view to providing “cheap labour” to South African mines and partly also South African farms, with little regard to the protection needed by the migrant workers;
- The relevance of the agreements has diminished over the years due to the rapidly declining number of foreign mineworkers employed in South African mines, the restructuring of mining operations leading to large-scale retrenchments, and the fact that many mining companies use recruitment avenues outside the agreement framework to procure the services of (migrant) mineworkers and ex-mineworkers;
- According to the South African National Department of Employment and Labour, the considerable unemployment rate in South Africa renders it inappropriate to provide for a special regime, allowing access for foreign workers to a part of the South African labour market;
- The agreements do not cover other critical labour market sectors, such as domestic, construction and textile workers;
- In particular, in the case of the agreement with Mozambique, South Africa effectively forfeits the tax payable by Mozambican mineworkers, as the agreement provides for tax to be paid in Mozambique.

There are also other considerations emanating from the extensive literature written on this subject<sup>73</sup> and largely shared by the interviewees during consultations. One of these considerations relates to the deferred pay arrangement contained in these agreements. In terms thereof, after an initial period of employment, as much as 60 per cent of a mineworker’s salary is compulsorily deferred and can only be received once the worker returns to the country of origin. Concerns raised during the consultations include that mineworkers are not properly informed about the payment options available to them in the country of origin. Objections against the deferred pay arrangement itself have been raised in the literature on this subject, and include the remark in an authoritative report prepared for the ILO that “[s]uch mandatory deductions are not consistent with international labour standards”;<sup>74</sup> and the fact that the United Nations International Convention on the Protection of All Migrant Workers and Member of Their Families, ratified by, among others, Lesotho and Mozambique, but not by South Africa, stresses that migrant workers have the right to (freely) transfer their earnings and savings to their State of origin or any other State.<sup>75</sup> It is further echoed by the provision in the SADC Labour Migration Policy Framework that migrant workers have the right to transfer earnings and savings on return to their country of origin.<sup>76</sup> In fact, the organized

<sup>73</sup> See generally M.P. Olivier, *Developing a Framework for a Redesigned Bilateral Labour Migration Regime between South Africa and Mozambique, with Particular Emphasis on Mozambican Mineworkers*, report submitted to IOM and Lawyers for Human Rights (Institute for Social Law and Policy, 2016), pp. 16–18, and authorities cited in the report.

<sup>74</sup> P. Wickramasekara, *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review*, report prepared for the Labour Migration Branch, ILO (Geneva, ILO, 2015), p. 31.

<sup>75</sup> Article 47(1) and (2) of the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>76</sup> SADC Labour Migration Policy Framework, paras. 5.1.5 (iii)(c), (e) and (j); para. 5.1.5 (iv)(e).

labour movement in South Africa, which also represents employed mineworkers from the origin SADC countries, has consistently argued for the deferred pay arrangements to be abolished,<sup>77</sup> given the obligatory and inflexible nature of the deferred payment system and the fact that it is "... felt to be discriminatory in the sense that South African nationals are not subject to the same kind of regulations."<sup>78</sup>

An analysis of the agreements reveals that they were entered into to regulate the flow of migrant labour from these countries to South Africa.<sup>79</sup> However, with the possible exception of the 1964 labour agreement, which regulates the employment of Mozambican mineworkers in certain South African mines,<sup>80</sup> it is clear that the obligations outlined in the agreements<sup>81</sup> are primarily imposed upon the relevant employers and not the Government of South Africa. The agreements invariably refer to the fact that the South African authorities "shall endeavour to ensure ..." compliance by employers. Furthermore, there are several other reasons why these agreements, to the extent that they may still be operational, must be seen as limited in scope and effect:

- For the most part, the agreements are focused on imposing unilateral conditions from the perspective of the country of destination and paying little attention to the protection of the migrant workers.
- Return and repatriation regulation is dealt with not with a view to the reintegration of those affected in the countries of origin but as a measure of removal of unwanted migrant workers. For example, in terms of the agreement between Eswatini and South Africa, government labour offices and representatives established under the agreement have the function to "assist the Government of the Republic of South Africa with the repatriation<sup>82</sup> of sick, injured or destitute Swaziland citizens who are or were employed in the Republic of South Africa and of other such citizens whose presence in the Republic of South Africa is or has become unlawful".

Furthermore, social security and related arrangements, in particular portability issues, have received limited attention in the agreements. As a rule, but subject to some limited exception (i.e. the provisions on workers' compensation in the case of Mozambique), they do not cover public social security transfers but only employer- and occupational-based payments. Also, no provision is made for retirement or related disability benefits in the agreements, including death benefits in favour of the dependants or survivors of migrant workers in South Africa and ex-migrant workers. Insufficient provision is made in the agreements concerning compensation procedures, required documentation, and informing mineworkers and ex-mineworkers of their social security entitlements. As has been noted, "... compensation authorities in South Africa have failed to disseminate culturally sensitive information about the autopsy process widely

<sup>77</sup> The National Union of Mineworkers (NUM) in South Africa has recommended that the deferred pay system be abolished as it does not serve the interests of workers. However, the Chamber of Mines and the supplying States think otherwise (see B. Maharaj, Immigration to post-apartheid South Africa, Global Migration Perspectives No. 1 (Geneva, Global Commission on International Migration, 2004), p. 18).

<sup>78</sup> T. Sparreboom and P. Sparreboom-Burger, Migrant worker remittances in Lesotho: A review of the Deferred Pay Scheme, Poverty-oriented Banking, Working Paper No. 16 (Geneva, ILO, 1996), p. 4.

<sup>79</sup> The agreements typically provide that employment may only occur in accordance with the provisions of the agreement, that a citizen of the sending country entering South Africa for purposes of employment must also have in possession a written employment contract attested in the home country, and that the period of employment may not exceed 24 months. With some exceptions, recruitment is limited to agencies that have been authorized to do so. Entering into or remaining in South Africa in contravention of the agreements is made subject to repatriation.

<sup>80</sup> The agreement with Mozambique, among others, provides for:

- (a) The payment of workers compensation benefits partly in South Africa and partly in Mozambique (Article XXII);
- (b) The transfer of assets in the estate of a deceased worker, including: "When the heirs or beneficiaries of the deceased workers cannot be traced, such moneys shall be invested by the Province of Mozambique in works or services of a social character, in areas where the majority of workers are recruited. All other unclaimed moneys due to the Portuguese workers which could not be paid to them shall be dealt with in a similar manner." (Article XXIII);
- (c) Application of the Occupational Diseases in Mines and Works Act 78 of 1973 (South Africa) to Mozambique migrant workers who have returned to Mozambique, as far as mining-related lung diseases are concerned (Article XXV).

<sup>81</sup> Specifically: (a) deferred pay to be paid to the foreign national in the sending country upon return to that country; (b) allowances payable to family members; and (c) monies to be paid into a welfare fund which may be set up by the government of the sending country for the purpose of supporting such citizens during periods of their disablement upon return to the sending country.

<sup>82</sup> Article 5 requires prior consultation.

enough.”<sup>83</sup> Furthermore, the agreements also fail to provide appropriately for the tracking and tracing of beneficiaries to whom compensation or other payments are due, be it the mineworkers themselves or their dependants. Large sums of unclaimed money have consequently accumulated over the years – a matter of serious concern to both the Government of South Africa and the governments of countries of origin. Finally, health and safety guarantees and protection are largely absent from the agreements.<sup>84</sup>

The shortcomings of the bilateral agreements indicated in this section and earlier in this report have prompted the National Department of Employment and Labour of South Africa to argue for the “nullification” of the agreements and for providing for the limited protective elements present in the agreements to be captured in new MoUs. The Department is of the view that broader-based MoUs with flexible provisions, on the basis of which concrete measures could be taken as the need arises, present a more acceptable solution than bilateral labour agreements. It is further of the view that labour migration as such should be left to be dealt with in terms of the South African immigration and visa regime, rather than through bilateral arrangements.

### Memorandums of understanding

Bearing in mind the above discussion, it is clear that since the democratization of South Africa in 1994, and barring the possibility of limited sectoral bilateral agreements arranging for categories of workforce to be provided to sectors of the South African labour market,<sup>85</sup> no bilateral labour agreement has been concluded by South Africa. As indicated earlier in this report, this pattern is also discernible from the practice of other SADC countries including Lesotho, Malawi, Mauritius, Mozambique, Namibia and Seychelles. This is the case even though:

- Representatives of the Government of Zimbabwe expressed their wish to let the (labour cooperation) MoUs they have concluded graduate into bilateral labour agreements; and
- In exploring the possibility of entering into a bilateral labour arrangement with Mauritius, the Government of Lesotho was intent on concluding a bilateral labour agreement and to that effect had prepared draft guidelines and a model agreement; however, as indicated, the outcome of the bilateral negotiations was an MoU, preceded by a declaration of intent to this effect.

Yet, even though for the moment MoUs appear to be the preferred channel of regulating bilateral labour relations in the SADC, several concerns have been raised by most of the stakeholders met for purposes of this report. The concerns expressed by the stakeholders relate to the fact that these MoUs have a restricted scope from a labour migration perspective, as their overarching focus is on bilateral labour relations. Also, clearly stipulated obligations imposed on the parties are largely absent, as little is said in terms of concrete undertakings. Furthermore, there is limited reflection on measures aimed at protecting the rights and interests of migrant workers in these MoUs. Finally, stakeholders indicated several problems, which are experienced with implementing the MoUs, reflected in the following sections.

<sup>83</sup> R. Boyko, S. Darby, R.C. Goldberg and Z. Millin/Yale Global Health Justice Partnership, *Fulfilling Broken Promises: Reforming the Century-old Compensation System for Occupational Lung Disease in the South African Mining Sector* (2014), p. 23. Available at [www.polity.org.za/article/fulfilling-broken-promises-reforming-the-century-old-compensation-system-for-occupational-lung-disease-in-the-south-african-mining-sector-2014-01-15](http://www.polity.org.za/article/fulfilling-broken-promises-reforming-the-century-old-compensation-system-for-occupational-lung-disease-in-the-south-african-mining-sector-2014-01-15).

<sup>84</sup> For further details, see Olivier, *Developing a Framework for a Redesigned Bilateral Labour Migration Regime between South Africa and Mozambique*, pp. 20–22.

<sup>85</sup> These agreements, if they do exist, are not publicly available and appear to be inaccessible.

## Special permit regimes

Special permit regimes have been introduced by South Africa to deal with considerable numbers of irregular Lesotho and Zimbabwean citizens in South Africa in particular, in an attempt to regularize their stay in the country. These regimes were the subject of a bilateral understanding with each of the two affected countries.<sup>86</sup> Significant numbers of Zimbabwean<sup>87</sup> and Lesotho<sup>88</sup> citizens have benefited from the permit regimes. Naturally, since the purpose of the two respective regimes is the regularization of the position of irregular migrants from these countries, the regimes do not, as such, extend any other form of rights protection to these migrants. Nevertheless, the logical implication of regularized stay in South Africa is that such migrants are meant to be covered by, among others, the labour law and social security framework in South Africa applicable to any short-term migrants.

The success of these regimes does, however, hinge on the citizens of these two countries coming forward to apply for such a permit, and the existence of and access to a reliable citizens database in the respective countries. According to some of the stakeholders met, at least in the case of Lesotho, several challenges are experienced in this regard, prompted mainly by the fact that a considerable number of citizens of Lesotho have already acquired South African identity documents.

It is the view of the South African Department of Home Affairs (DHA) that the permit regime should be subsumed in an appropriate regional labour migration policy response to be developed by South Africa.

## Regulatory considerations

The extensive literature on the subject suggests that immigration laws and policies in the SADC countries generally focus on the effects of migration and not on its underlying causes. The policy and legal framework in this regard emphasizes the tightening of controls, the monitoring of borders and, particularly in receiving countries, the establishment of detention centres and the increased deportation of irregular migrants.<sup>89</sup> A study of a few years ago remarked that “[n]o country, with the possible exception of Botswana, has migrant or immigrant-friendly legislation on the books”.<sup>90</sup>

In addition, legal and policy coordination, also in the corridor countries explored in the context of this study, appears to be largely absent: primacy is generally given to immigration laws and policy, at the expense of social security and labour laws in particular.<sup>91</sup> As indicated by several stakeholders during consultations for purposes of this report, migrant workers who have lost their work become irregular migrants and are barely left with sufficient time to enforce labour law entitlements and finalize access to social security entitlements they may have.

Ethical recruitment, in particular appropriate regulation of ethical recruitment, is an area that has attracted attention in recent years but requires further unfolding – this is discussed in more detail in the next chapter. However, it is in the social security domain in particular that legal and policy challenges occur. As noted in an ILO study,<sup>92</sup> there are clear indications of nationality discrimination in both social security and related laws and practices of some of the SADC countries. Also, significant scope exists for the cross-border payment of benefits and provision of social security services by host country social security institutions. Limited provision is made for the exportability of social security benefits, unless the few existing bilateral treaties

<sup>86</sup> For example, the Lesotho Special Permit Regime was confirmed in the Statement of Intent from Bilateral Negotiations signed by the Ministers of Home Affairs of Lesotho and South Africa, dated 22 September 2015.

<sup>87</sup> According to the *White Paper on International Migration for South Africa*, 300,000 citizens of Zimbabwe have benefited.

<sup>88</sup> According to the feedback given by the Government of Lesotho, the permit schemes have benefited 120,000 of its citizens.

<sup>89</sup> Maharaj, *Immigration to post-apartheid South Africa*, p. 23; M.A.B. Siddique, *South African migration policy: A critical review* (University of Western Australia, Business School, 2004), p. 32.

<sup>90</sup> Crush, Williams and Peberdy, *Migration in Southern Africa*, pp. 10 and 24.

<sup>91</sup> Olivier, *Regional Overview of Social Protection*, pp. 55–56; S. Mitchell, *Migration and the Remittance Euphoria: Development or Dependency?* (New Economic Foundation, 2006), p. 22.

<sup>92</sup> M.P. Olivier, *South African social security benefits for migrant workers from Lesotho, Mozambique, Swaziland and Zimbabwe, and their survivors: Deficiencies, challenges and suggested approaches*, report submitted to the ILO (November 2010), para. 13 et seq.

contain different arrangements.<sup>93</sup> Also, as noted in the same ILO study, service delivery problems and deficiencies are experienced by migrant workers and their survivors as a result of the policy, institutional and operational fragmentation in the host country social security system and the lack of cooperation among social security institutions in the host country and with counterpart institutions in neighbouring countries. Some steps have been taken or are considered to address deficient service delivery; however, these appear to be insufficient and too limited to have a substantial effect on the nature, extent and impact of the current fragmented, inconsistent and uncoordinated approach.<sup>94</sup>

Yet, it is also evident that the SADC governments have realized the need for proper policy formulation and implementation. As regards the three countries selected for this corridor study, mention could be made of the following developments:

- South Africa: A recently (2017) overarching migration policy framework – *White Paper on International Migration for South Africa* – guides the development of clear and consistent policies. One of these policies in the making is the draft National Labour Migration Policy.
- Lesotho: The National Labour Migration Policy was adopted in 2018, while a draft labour policy, which contains pertinent provisions in relation to labour migration, is currently being considered.
- Zimbabwe: A draft National Labour Migration Policy awaits finalization, in addition to the adoption of the National Diaspora Policy in 2016 (with its Action Plan for the period 2017–2022) and the Labour Export Policy.<sup>95</sup>

A perusal of the above documents reveals that, cumulatively, several key issues are addressed by each of the three countries concerned:

- Importance of the international and regional normative frameworks;
- Embedding migration policy and in particular labour migration policy in national legal and policy frameworks;
- Overarching principles, vision and objectives for labour migration;
- Governance, coordination and data management issues;
- Labour immigrants and emigration for employment;
- Bilateral arrangements;
- Diaspora liaison and integration;
- Mainstreaming (labour) migration into national development;
- Treatment and protection of migrant workers to, within and from the countries concerned.

<sup>93</sup> Article 15.2 of Mozambique's Law on Social Protection (Law No. 4 of 2007) stipulates that, subject to contrary provisions contained in international conventions, benefits acquired under compulsory social security are not portable. Also, no provision for portability of benefits is made in the case of the current Lesotho legal framework.

<sup>94</sup> Olivier, *Reflections on the Feasibility of a Multilateral SADC Social Security Agreement*, paras. 72, 194, 197 and 542.

<sup>95</sup> Reference to these two policies are made in Zimbabwe's draft National Labour Migration Policy.







# FINDINGS FROM A BILATERAL LABOUR AGREEMENT CYCLE AND MIGRATION CYCLE PERSPECTIVE

## Preparatory framework

The history and nature of migratory flows seemingly play some, albeit limited, role in informing bilateral and other responses in the selected SADC countries. Important examples of where they do play a role include historically the need for migrant mineworkers informing the conclusion of the bilateral agreements referred to earlier in this document,<sup>96</sup> the comprehensive scale of irregular migration prompting the special permit regimes applicable to Lesotho and Zimbabwe citizens, and the new SADC visa types envisaged in the *White Paper on International Migration for South Africa*.

At a micro level, issuance of work permits in South Africa to individual foreign workers outside the framework of the bilateral labour agreements is dependent on proof that a suitable South African could not be found to fill the position.<sup>97</sup> Generally, however, from a macro perspective, limited consideration is given to labour market needs and available workers in South Africa, or whether workers specifically needed in South Africa are indeed available in any of the two countries of origin. This is the position despite the fact that the Government of South Africa has drawn several scarce skills lists. These include the Department of Higher Education and Training (DHET) Occupations in High Demand List 2015, the DHA Quota List gazetted in 2007 and the DHA Critical Skills List published in 2014.

South Africa does have a system of skills/qualifications assessment in place. However, the SADC regional framework in this regard, which is meant to inform and support cross-border skills flows, has not yet been finalized. Under the SADC Protocol on Education and Training of 1997, the region is implementing the SADC Qualifications Framework (SADCQF) to enable easier movement of learners and workers across the SADC region and internationally. The SADCQF is a mechanism for comparability and recognition of full qualifications, transfer of credit, creation of regional standards and facilitation of quality assurance at the regional level. The SADC Qualifications Framework Implementation Model was adopted in 2017, and eight Member States are piloting the alignment of their national qualifications frameworks with the SADCQF.<sup>98</sup>

Also, most of the stakeholders consulted for purposes of this study indicated that the legislative and administrative requirements for the regular migration of workers are often not known, nor are they consistently shared on a cross-border basis. An important exception was the work done by the Beitbridge Reception Centre (at the main South Africa–Zimbabwe border) to inform interested Zimbabwean migrant workers, including in particular domestic workers, of the South African requirements and the protections available under South African law and policy. The Beitbridge arrangement is not yet fully operational.

## Recruitment, selection and placement

The bilateral agreements concluded by South Africa specifically provide for the recruitment of migrant workers. From a domestic perspective, in South Africa, the Employment Services Act (Act No. 4 of 2014) (to be supported by the recently published draft Employment Services Regulations) informs the employment of foreign nationals in a manner that is consistent with the objects of the Act and the Immigration Act (Act No. 13 of 2002). Act No. 4 of 2014 also provides for the registration and regulation of private employment agencies, as well as the establishment and functions of public employment services. According to Act No. 4, foreign nationals employed in South Africa enjoy the protection of the right to

<sup>96</sup> Apparently, as transmitted during the consultative interviews, still today there is a practice of allowing a son of a deceased foreign mineworker to replace the worker, to ensure continued family support.

<sup>97</sup> South Africa's Employment Services Act of 2014 also requires that once a foreign national is employed, the employer needs to prepare a skills transfer plan for that person in that specific position.

<sup>98</sup> Information was extracted from the decisions taken at the SADC Employment and Labour Sector (ELS) meeting in March 2019.

ethical and fair labour practices enshrined in the South African Constitution. It further provides that private employment agencies may only charge fees to any work seeker to the extent that the Minister of Labour may, by notice in the government gazette, approve such fees.

Otherwise, however, no legislative and institutional arrangements pertaining to ethical recruitment exist in the South African system in respect of both immigrant workers and in particular emigrant workers. Also, in other SADC countries, including Lesotho and Zimbabwe, such arrangements seemingly are still developed weakly, despite advances made, including the already mentioned Labour Export Policy to be developed in Zimbabwe and certain provisions in the Lesotho Labour Code (to be revised). Therefore, standardized arrangements concerning costs, rights and obligations are generally lacking, as is the case with formalized government-organized pre-departure information and training.

It is evident that this is an area that requires considerable further investment in the SADC countries, including the selected corridor countries. Fair and ethical recruitment principles emanating from the ILO, IOM and the World Employment Confederation (WEC)<sup>99</sup> are particularly instructive and helpful. At the SADC level, per the decisions taken at the occasion of the Employment and Labour Sector (ELS) meeting of March 2019, and aligned with the United Nations Global Compact for Migration, ministers of labour and social partners were invited to approve the prioritization of fair and ethical recruitment programming in the follow-up to the SADC Labour Migration Action Plan (2016–2019). The ELS decision noted that, in accordance with the Global Compact for Migration objectives to which the SADC Member States agreed, there had to be a “review of existing recruitment mechanisms to guarantee that they are fair and ethical, and to protect all migrant workers against all forms of exploitation and abuse in order to guarantee decent work and maximize the socioeconomic contributions of migrants in both their countries of origin and destination”.<sup>100</sup>

Also, much can be learned from regulatory frameworks related to recruitment and overseas employment existing in other developing countries, and also in Africa. One of the most comprehensive and recent frameworks is Ethiopia’s Proclamation 923/2016, providing for overseas employment.

Furthermore, there is a need to arrange for self-regulation of private employment agencies, in particular via the establishment of umbrella bodies exercising professional control (among others via the issuance of codes of conduct); the Kenya Association of Private Employment Agencies (KAPEA) and the Association of Skilled Migrant Agencies of Kenya (ASMAK) in particular can be mentioned as examples. Private regulation provides for professional standards set by the industry itself and for supervision by the industry. If effective, these can strengthen and complement public regulation. Also, scope exists for involving public employment services in recruitment as well. For the moment, in the case of South Africa, the public employment service arranged for in the Employment Services Act of 2014 is primarily aimed at providing State assistance to unemployed South African jobseekers. In South Africa, private recruitment agencies are voluntarily organized in the Confederation of Associations in the Private Employment Sector (CAPES). Members are required to adhere to the CAPES Code of Conduct and the CAPES Charter, which set out key principles regarding recruitment of workers.<sup>101</sup>

<sup>99</sup> The World Employment Confederation (WEC) was previously known as the International Confederation of Private Employment Services (CIETT).

<sup>100</sup> Information was obtained from the decisions taken at the SADC ELS meeting in March 2019.

<sup>101</sup> See [www.capes.org.za/](http://www.capes.org.za/).

Finally, there is a clear need to build capacity at the levels of government and the private sector to operationalize suitable arrangements. The need for capacity-building goes beyond the areas of recruitment, selection and placement, and includes among others:

- The requisite set of skills to negotiate BLMAs and a clear understanding of the subject area;<sup>102</sup>
- The ability to conclude BLMAs that make sufficient provision for the protection of migrant workers' labour, social security and other rights;
- The capacity to implement and review existing arrangements, and to improve systems and processes to support the implementation of bilateral arrangements, for example in relation to border management, reliable data sources and cross-border data exchange;
- Strengthening enforcement capacity, also with regard to penalizing employers who contravene labour and migration legislation;
- Investing in the capacity of government and other role players to effectively integrate return migrants after the expiration of their contracts.

## Engagement, assistance and protection

An analysis of the BLMAs referred to in this report and of feedback received from migration stakeholders in the selected corridor countries finds that:

- Integration into the country of destination (e.g. South Africa), and decent living and working conditions, as well as access to basic services (health, housing, etc.), have not been provided for; neither has provision been made for family protection and reunification, and the unique position/needs of women, in particular in relation to family responsibilities, including maternity contexts;
- A model employment contract is not included in any of existing legal and policy instruments; apparently, however, the main recruiting agency for South African mines makes use of a contract template for the recruitment of mineworkers;
- Assistance with advice, support, physical and mental protection, and complaints, grievance and dispute resolution has also not been provided for;
- As indicated above, social welfare/security provisions are contained in some arrangements, but, if so, only to a limited extent;
- Limited provision is made for (voluntary) transmission of earnings – in fact, as discussed, compulsory deferred pay arrangements are a hallmark of the bilateral labour agreements concluded by South Africa;
- Except for the Zimbabwean National Diaspora Policy (supported by several concrete steps taken by the Government of Zimbabwe), formal provision has not yet been made in policy and legal instruments aimed at engaging the diaspora.

Yet, countries of origin have taken several steps to assist their migrant workers abroad. In Lesotho, the Ministry of Labour and Employment, through its Migration Liaison Office, invariably assists migrant workers in South Africa in addressing their concerns. In the case of Zimbabwe, the Diaspora Directorate of the Ministry of Foreign Affairs and International Trade regularly engages with the diaspora. Trade unions in

<sup>102</sup> See, in this regard, among others, Segatti, *Regional Guidelines*, pp. 22–25; F. Fonseca, “Negotiation”, presentation made at an ILO Labour Migration Academy workshop, Johannesburg (December 2016); and O. Akinboade, *A Framework for Negotiating Bilateral Migration Agreements for Lesotho* (2013) (on file with the author). From a broader negotiation principle perspective, see ILO, *Joint Union/Management Negotiation Skills – Training for Social Partners on Negotiation Skills* (Turin, International Training Centre of the ILO (ITC/ILO), 2012); and ILO, *Joint Union/Management Negotiation Skills Training Course – Trainer's Guide* (Turin, ITC/ILO, 2012). For purposes of devising new bilateral labour arrangements, it is important to take note of different negotiation approaches, ranging from position-based negotiation to (the more preferable) interest-/needs-based negotiation – the latter approach involves an understanding of the mutual gains bargaining flow, the problem-solving process and critical elements of what are regarded as (required) behaviours of effective negotiators (see Fonseca, “Negotiation”, for further details).

South Africa have been approached, for example by the trade union movement in Zimbabwe, to assist with monitoring enforcement of the rights of migrant workers and with resolving disputes with employers. At times, the advice and support of international agencies, in particular the ILO and IOM, have also been secured. Other measures are being considered, including the appointment of labour attachés.

Finally, central banks in the countries concerned have commenced with measures to ease the flow of remittances, including the reduction of remittance costs. From a subregional perspective, the SADC region is implementing the SADC Financial Inclusion Strategy (2016–2021), adopted in 2016, which, among other objectives, seeks to facilitate easier and cheaper remittance flows in the region.

## Return and reintegration

While newly adopted policies (e.g. the draft Zimbabwean National Labour Migration Policy) envisage steps to support the return and reintegration of migrant workers, little provision in this regard is made in the BLMAs operating in the SADC region. Apparently, some ad hoc support is given to ex-mineworkers returning to Lesotho and Zimbabwe. Generally, however, skills training and job-seeking services have yet to be developed. Regarding portability of social security benefits, with limited exceptions, bilateral labour migration arrangements are not yet providing for this, although certain unilateral legislative measures do exist in this regard in South Africa and Zimbabwe, respectively. Mention should be made, however, of the drive towards dedicated arrangements in this regard within the context of the SADC Policy Framework on Portability of Accrued Social Security Benefits (2016).

## Implementation

The various bilateral labour migration agreements and arrangements covered in this report invariably provide for the establishment of cross-border institutional bodies to implement, monitor and review the BLMAs, such as the Joint Bilateral Coordinating Commission (JBCC) established for purposes of implementing the MoUs between Lesotho and South Africa and an apex-level binational commission to monitor the implementation of the MoUs between Zimbabwe and South Africa. At times, action or implementation plans are developed, also to deal with concrete measures that require attention and with monitoring specifically provided for in the BLMAs. However, concern has been expressed that these bodies, in particular the JBCC, do not meet regularly, and that the jointly developed annual plans are not always implemented.

Several other challenges are experienced with implementing the BLMAs and in relation to giving concrete effect to operational measures bilaterally agreed on by the countries concerned. Most critical is the absence of adequate information systems and supporting documentation. Neither Lesotho nor Zimbabwe has an operational labour market information system (LMIS) – data is reportedly still captured manually, although steps have been introduced to digitalize labour migration-relevant information. Also, household and population surveys generate insufficient labour migration data due to insufficient coverage and capturing of labour migration thematic issues.

In-country collaborative structures exist both at the government and multi-stakeholder levels. However, there is a perception among government stakeholders in the countries concerned that intergovernmental cooperation in relation to labour migration issues has not been properly developed. Also, trade unions in particular, in both Lesotho and Zimbabwe, allege that they have not been (sufficiently) involved in the consideration, conclusion and implementation of BLMAs.

Of critical importance for the successful implementation of any BLMA regarding the employment of migrant workers is an existing skills recognition system. While the countries covered in this corridor study have their own skills and qualification recognition systems in place, cross-border cooperation arrangements are in their infancy. The SADC framework in this regard is only currently being established and rolled out on a pilot basis in some SADC countries.

Finally, stakeholders in Lesotho seem to agree that capacity – both in human and technical terms – is needed to support the task of negotiating, concluding and implementing BLMAs.

# OVERALL CONCLUSION AND RECOMMENDATIONS

## Dealing with inadequate provisions and weak protection appearing from current bilateral labour migration agreements

The analysis of BLMAs and other arrangements affecting labour migration contained in this report makes it clear that several key elements of the bilateral labour agreement cycle and the migration cycle approach have been provided for inadequately. This also applies in particular to the weak and at times non-existing social protection of the rights of migrant workers. Both the South African and Lesotho government stakeholders are of the view that the traditional, extensive framework of international guidelines for concluding bilateral labour agreements is unnecessarily comprehensive from a SADC perspective, and that a more streamlined and focused approach is desirable. Also, they are of the view that it should be left to the countries concerned to decide how to give effect to agreed guidelines in the formulation and implementation of BLMAs. Of the stakeholders consulted for purposes of this report, there seems to be a general consensus that the assessment framework (see Annex) provides a pliable and flexible frame of departure for this purpose.

### Alternative(s) to current bilateral labour agreements?

For the reasons indicated in this report, serious doubt has been expressed by the consulted stakeholders regarding the appropriateness of the existing bilateral labour agreements concluded with South Africa and their effectiveness. Reference was made in this report of the view of the National Department of Employment and Labour of South Africa to have the current agreements “nullified”. In this regard, it is worthy to mention that the recent judgement of the South African Constitutional Court that the signing by the ex-President of South Africa of an SADC protocol that would suspend the then-established SADC Tribunal was constitutionally invalid could have a possible impact. Crucial for this report and the view that the existing bilateral labour agreements can be unilaterally “nullified” is the fact that the court has made it clear that the executive authority does not have the power to unilaterally remove rights of South African citizens and citizens of other SADC countries enshrined in the SADC Treaty and the founding Protocol of the SADC Tribunal, and embedded in the South African Constitution.<sup>103</sup> By parity of reasoning, it is suggested that the protections embedded in the current BLMAs, limited as they are, cannot be removed merely by executive act. It may be possible to terminate the bilateral labour agreements on the strength of the termination provisions contained in the very agreements (implying, in the case of Mozambique, a termination period of three years), provided at least that existing/accrued rights of migrant workers are not affected. Alternatively, the renegotiation of the agreements may be called for.

### The need for an overarching conceptual and policy framework, bearing in mind the imperatives of regional integration

It would appear that an underlying principled and overarching policy approach to dealing with labour migration has not yet been sufficiently developed, at least not in South Africa, although the development currently of a draft national labour migration policy is meant to address this very shortcoming. Therefore, it appears necessary to develop and implement BLMAs and arrangements impacting on labour migration in the SADC within a broader and holistic conceptual and policy perspective. Furthermore, it is necessary to consider how South Africa and the other affected SADC countries view the unfolding of the labour market structure and requirements from a regional rather than purely individual country perspective. This should be done, mindful of the fact that all SADC Member States have repeatedly committed to furthering regional integration. As far as South Africa is concerned, it is worthy to mention that the *White Paper on International Integration for South Africa* considers integration within the SADC paramount to South Africa's international migration policy and proposes a set of measures to facilitate further the safe, orderly and regular migration of the SADC nationals to South Africa (Chapter 11 of the *White Paper*).

<sup>103</sup> See *Law Society of South Africa and others v. President of the Republic of South Africa and others*, 2019 (3) BCLR 329 (CC).

## The importance of adjusting to the normative and guiding regional framework

Due attention should be paid to adjusting the objectives, scope and content of BLMAs in the SADC to continental and subregional policies and regulatory approaches pertaining to labour migration. As far as continental approaches are concerned, mention should be made of:

- African Union Declaration on Poverty Eradication, Education and Inclusive Development (2015);
- Joint Labour Migration Programme (JLMP) (2015);
- Revised Migration Policy Framework for Africa and Plan of Action (2018–2030);
- Free movement and free trade arrangements (which are enumerated in the following paragraphs);
- New Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security (2020);
- New Social Agenda 2063 (2020).

The subregional frameworks operating at the SADC level include the following:

- Charter of Fundamental Social Rights in SADC (2003);
- Code on Social Security in the SADC (2007) (in particular, Article 17);
- SADC Labour Migration Policy Framework (2014);
- SADC Regional Indicative Strategic Development Plan (2020–2030) (Pillar 3 on Social and Human Capital Development);
- SADC Labour Migration Action Plan (2020–2025);
- SADC Employment and Labour Policy Framework (2020–2030).

Of particular importance are the relevant free movement regimes that effectively convey the regional integration agenda of both the African Union and the SADC, expressed above. Following are some of these regimes:

- Continental and subregional free movement regimes linked to regional integration considerations, such as:
  - The new African Union Protocol on Free Movement of Persons, Right of Residence and Right of Establishment (2018);
  - Several African Union regional integration initiatives, such as the Treaty Establishing the African Economic Community (1991), also known as the Abuja Treaty; see also Agenda 2063 (2015 edition);
  - Similar arrangements at the level of at least four African RECs, namely the Economic Community of West African States (ECOWAS) and the East African Community (EAC), and in principle also the Common Market for Eastern and Southern Africa (COMESA) and the SADC;
  - Of importance is also the European Union migration policy and regulatory framework and their impact on third-country nationals; see also the Association Agreements.
- Continental and subregional free trade and associated trade in services arrangements, which include:
  - The African Union Continental Free Trade Area (AUCFTA) and its associated Protocol on Trade in Services (2018);
  - Similar arrangements at the level of several RECs (e.g. COMESA, the EAC, ECOWAS and the SADC), and also at an inter-REC level (e.g. the Tripartite, involving COMESA, the EAC and the SADC);



These regimes have critical implications for the mobility of workers and professionals, among others, and their labour and social protection.

- Continental and subregional social security arrangements/interventions:
  - Developing continental frameworks (e.g. Article 19 of the Protocol on Free Movement of Persons, Right of Residence and Right of Establishment (2018) and the JLMP (2015));
  - ECOWAS General Convention on Social Security (2013);
  - Arrangements being developed based on the EAC Common Market Protocol (2009);
  - SADC Policy Framework on Portability of Accrued Social Security Benefits (2016).

## The value of comparative African experiences

As presented in this document, there are valuable lessons to be learned from the labour migration experiences of other African countries. In addition to the experiences already indicated in this report, the following can be mentioned:

- Diaspora arrangements (e.g. Rwanda, Ethiopia, Kenya, Uganda);
- Protection of migrant domestic workers (e.g. Ethiopia, Kenya);
- Pre-departure training (e.g. Ethiopia, Ghana, Kenya, Uganda);
- Unilateral protective measures, also in the area of welfare (e.g. Lesotho, Uganda);
- LMIS and management information system (MIS);
- Mutual recognition arrangements relating to (a) qualifications and (b) professional bodies (e.g. Kenya and other EAC countries);
- Free movement regimes impacting on labour migration, especially EAC and ECOWAS countries.

## Addressing (weak) implementation and lack of capacity

There is a need to address the weak implementation of BLMAs in the SADC region. Areas that come to mind include deliberate attempts to improve and streamline in-country and cross-border coordination and alignment of institutional structures, operations and programmes. In addition, in some countries, there is a need to strengthen human and technical capacity. Some of these matters were reflected on earlier in this report.

## More comprehensive regulatory frameworks needed

In several respects, regulatory frameworks may be in need of strengthening and expansion. Areas affected include:

- Improved regulation of public and in particular private employment agencies;
- Unilateral arrangements that can be introduced by countries of origin to support the protection of their migrant workers abroad including, among others, extending where necessary social security protection extraterritorially;
- Harmonizing and aligning immigration law, labour law and social security legal frameworks.

## The need for broader corridor studies to be undertaken

The specific arrangements made and conclusions drawn in relation to the selected corridors leave a clear impression of unique approaches, among others, characterized by a movement away from reliance on general government-to-government bilateral labour agreements to other types of BLMAs and other arrangements with limited content. There is an evident need to explore the practice, legal and policy



framework in other SADC corridors, and for that matter in other parts/regions of Africa not covered in this report, to determine a set of principles and guidelines that could possibly be applicable throughout the continent.

### Further involvement of multilateral agencies

Multilateral agencies already play an important role in assisting governments and other labour migration stakeholders in the three countries covered in this report. Among others, they support or have supported the development of national labour migration policies, helping to steer collaborative labour migration structures, in particular in Lesotho, and assisting with building capacity in this area. Specific areas of needed further/future intervention, as appears from this corridor study, include the building of human and technical capacity in relation to the range of issues highlighted in this report regarding negotiation skills, the conclusion of BLMAs, implementation modalities, data management systems, revision of existing BLMAs and other arrangements affecting labour migration, enforcement capacity, and the integration of return migrant workers, among others. Depending on the need in this regard, multilateral agencies can also assist the countries and stakeholders concerned with exposing them to good practice experiences in particular areas of interest/importance, such as organizing and regulating recruitment, diaspora mapping and engagement, and skills transfer plans/programmes. Multilateral agencies such as IOM and the ILO have considerable experiences in their areas of specialty, which could be put to further use by the countries concerned, for example in the areas of better alignment with international and regional standards and guidelines, border management, regularization programmes and return of migrant workers.

# ANNEX TO THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY CORRIDOR ASSESSMENT: ASSESSMENT FRAMEWORK

**Explanatory note:** This framework and its embedded questions should be able to assist labour migration stakeholders, in particular relevant government ministries, to have a benchmark against which labour migration could be successfully managed. The framework could be applied regardless of the mode of the BLMA or other arrangements affecting labour migration selected (e.g. a bilateral labour agreement, an MoU). It might even be of value if governments need to decide which arrangement modality is the most suitable for the specific context. It is also capable of being applied/adjusted when governments consider the introduction of unilateral measures. The framework will help government and other stakeholders to consider and address key elements of both the labour agreement/arrangement cycle, on the one hand, and the migration cycle relevant to migrant workers and their dependents, on the other. This is done by posing questions that governments and other stakeholders should ask and address, in relation to, the preparatory framework; recruitment, selection and placement; engagement, assistance and protection of migrant workers and their family members; return and reintegration; and implementation (of the arrangement).

## A. Preparatory framework

1. Has consideration been given to the nature, scope and focus of migration flows between the countries, with reference to matters such as who would typically migrate, the duration of migration, whether the migration is of a regular/irregular nature and unilateral or bilateral, whether workers migrate and if so for what purpose, the education and skills levels of persons who so migrate, as well as the gendered context of migration?
2. Is there a legal, policy and/or operational framework in place informing the management of bilateral labour migration and the sending and receiving of migrant workers?
3. Is there a proven need for migrants to work in the country of destination, with reference to:
  - (a) Employment/Labour market needs of the country of destination, in particular occupational categories, labour market sectors and/or geographical areas? Has a labour market and skills assessment been undertaken?
  - (b) Availability of suitable and sufficient workers in the country of origin who could fulfil the identified employment needs of the country of destination?
4. Are the legislative and administrative provisions and requirements regarding entry, employment, residence and return, and documentation known in the country of destination and have they been:
  - (a) shared between the parties?
  - (b) made available to interested and selected candidates?
5. Are there any legal or practical obstacles for women (or certain other groups of the population) to migrate for employment in certain occupations or sectors, or generally?
6. Is there a system of skills and qualifications recognition existing in the country of destination and/or origin that can inform the movement of migrant workers to the country of destination in terms of the BLMA?
7. Have a gender-responsive stakeholder analysis and needs assessment been undertaken to identify interested and needed stakeholders and their needs and views?

## B. Recruitment, selection and placement

1. Does a legal and an operational institutional framework for fair and ethical recruitment, selection and placement of candidates exist?
2. Is there clarity regarding recruitment, placement and travel costs, cooperation between, and the rights and obligations of the various parties involved?
3. Has the direct involvement of the government or other indicated intermediaries of the country of origin and/or destination in the recruitment, selection and placing of candidates been determined?
4. Is the country of origin or country of destination, or both, able to monitor and supervise the operations of recruitment agencies operating within the framework of the bilateral arrangement?
5. Are measures in place to ensure that the selected candidates have complied with health, qualifications, security, insurance, language, documentary and other requirements imposed by the country of destination and, if relevant, the country of origin, and that assistance that may be required is available?
6. Is sufficient provision made for appropriate pre-departure sensitization and equipment, as well as on-arrival induction of selected candidates? Are the specific and differentiated needs and concerns of women and men taken into account?
7. Do the countries of origin and destination have laws, mechanisms and procedures in place, in particular in relation to documentation, to enable workers to enter, reside and work, and access services, in the country of destination?

## C. Engagement, assistance and protection

1. Has an employment contract containing clear terms and conditions that comply with both the labour, social security and other laws of the country of destination and international labour and social security standards been agreed upon and, where relevant, vetted/approved by one or more government and/or other indicated institutions in the country of destination and/or country of origin?
2. Has provision been made for decent living and work conditions, including occupational safety and health arrangements and access to basic services, such as needed health care?
3. Do arrangements exist to appropriately provide for the needs of families of workers, in particular minor children, and with particular reference to family reunification, access to employment for family members, and access to school and health services for children?
4. Do arrangements exist to sufficiently protect women workers and provide for their needs, with reference, among others, to maternity protection and work arrangements?
5. Are measures in place to ensure the integration of the worker into society and the workplace in the country of destination?
6. Do measures and institutions, known to the worker, and established by (a) the country of destination and (b) the country of origin exist to assist the worker with advice, support, physical and mental protection and complaints, grievance and dispute resolution?
7. Have measures been adopted to guarantee the protection of the worker's human, labour and social security rights, and in particular equal treatment and protection against abuse?
8. Is support given to the worker to freely use and inexpensively transmit earnings?

#### D. Return and reintegration

1. Is assistance given to the workers to plan their return and reintegration?
2. Has a supportive regime been developed to ensure portability of social security and other benefits?
3. Have measures been adopted to ease labour market integration, including recognition of skills and experience required, skills training opportunities and job-placing services upon return?

#### E. Implementation

1. Have institutional partners with the necessary mandate in both countries been identified that should negotiate, conclude and implement the arrangement, on the basis of consultation and cooperation:
  - (a) within the country of destination and origin respectively?
  - (b) between the two countries?
2. Are the necessary operating systems and processes, backed by needed data exchange measures in place to implement the arrangement?
3. Is it agreed how often cross-border institutions shall meet to monitor and review implementation of the arrangement?
4. Does a mutually agreed framework exist to deal with disputes arising from the implementation and/or interpretation of the arrangement?
5. Have the commencement date and duration of the arrangement been confirmed?
6. Are the social partners and other stakeholders involved in the implementation of the arrangement?

#### F. General matters to be considered

1. Do the parties intend the arrangement to be binding?
2. Do the parties intend the arrangement to be a labour migration agreement, a memorandum of understanding or a different kind of arrangement?
3. Has the impact of other relevant regulatory and operational arrangements applicable to one or both of the parties been considered, in particular:
  - (a) Other bilateral arrangements (e.g. sectoral and other bilateral labour arrangements, bilateral social security agreements, bilateral trade agreements, bilateral investment treaties)?
  - (b) Multilateral arrangements (e.g. international, continental and regional free trade; trade in services; free movement; human rights; labour and social security; and regional integration instruments; higher-order regional regulatory frameworks)?







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