LIBER AMICORUM

ESSAYS IN HONOUR OF
PROFESSOR EDWELL KASEKE
AND DR MATHIAS NYENTI

Marius Paul Olivier
Letlhokwa George Mpedi
& Evance Kalula

EDITORS

CHAPTER 16

Portability of Accrued Social Security Benefits within the SADC Region Policy Framework: Opportunities, Pitfalls and Challenges

Letlhokwa George Mpedi

Abstract

The chapter critically reviews the Portability of Accrued Social Security Benefits within the Southern African Development Community Region Policy Framework of 2016 (hereinafter the Policy Framework). This is done with a emphasis on the administrative measures, contained in Part III of the Policy Framework – essential for the meaningful portability of social security benefits in the region. These measures include the maintenance of relations, the establishment of administrative measures, communication on measures taken to implement the Policy Framework and institutional arrangements. The chapter identifies and critically discusses the opportunities, pitfalls and challenges currently facing the region in its quest to realise the objectives of the Policy Framework. Such objectives include the provision of mechanisms to enable workers moving within and outside the Southern African Development Community (hereinafter the SADC) region to keep the social security rights which they have acquired under the legislation of the one Member State, ensuring that workers in the region enjoy equal rights under the social security legislation of the Member States, provision of a regional platform for the progressive coordination and integration of social security systems in the SADC, and the improvement of the standard of living and conditions of employment of persons in the region. The chapter, while acknowledging that the Policy Framework is soft law, argues that its importance as a precursor to a binding instrument should not be underestimated. However, the chapter argues that, for the Policy Framework to live up to its promise, its provisions, particularly those dealing with administrative measures need to be implemented as a matter of urgency. The chapter argues that there are measures that need to be put in place to ensure, *inter alia*, that the administrative coordination of the portability of social security benefits is enhanced. For instance, existing manual processes, development of protocols for the exchange of data and reliable data storage are upgraded (to safeguard data integrity, data protection, privacy and confidentiality) and appropriate and effective financial services sector which is geared at the expansion of access to accrued social security benefits for

migrant workers in SADC must be developed. This discussion is followed by concluding observations.

Keywords: Coordination of social security systems, portability of benefits, social protection, social security

16.1

Introduction

The last time I saw and spoke to Dr Mathias Ashu Tako Nyenti was when my wife and I paid him and his family a visit on Saturday 16 December 2017 at his home. We found him watching the African National Congress' (ANC) elective conference¹ which was broadcast live on television. He was in high spirits and, despite my great efforts to avoid talking about work, enthusiastically enquired about the latest developments at the Faculty and what our research agenda will be in 2018. Little did we know that that would be our last interaction this side of the grave.

Doctor, as I warm-heartedly called him, and I were very close. This was the case, particularly when it came to our area of expertise, namely labour and social security law. We toiled in this field of science for over a decade and, in the process, published book chapters,² articles³ and books.⁴ In addition, we compiled research reports for various stakeholders including government departments and international institutions and organisations.⁵ This, in all probability, placed us amongst the few

1 54th African National Congress Elective Conference, Nasrec, 16 December 2017. Available online: <https://bit.ly/2GEEdNm> [accessed on 19 July 2019].

2 See, for example, Mpedi *et al.* 2011. "Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community: A Synthesis." In: L.G. Mpedi & N. Smit (eds.). *Access to Social Services for Non-Citizens and the Portability of Social Security Benefits within the Southern African Development Community*. Bloemfontein: Sun Media, p. 1; Mpedi, L.G. & Nyenti, M. 2017a. "Social insurance in South Africa: Are there lessons to be learnt from the German experience?" In: C. Hugo & M.J. Möllers (eds.). *Transitional Impacts on Law: Perspectives from South Africa and Germany*. Baden-Baden: Nomos, p. 449.

3 See, for example, Nyenti, M. & Mpedi, L.G. 2012. "The impact of SADC social protection instruments on the setting up of a minimum social protection floor in southern African countries." *Potchefstroom Electronic Law Journal*, 15:244; Mpedi, L.G. & Nyenti, M. 2012. "Perspective towards the development of the social protection dimension of the SADC regional integration agenda." *SADC Law Journal*, 2:164.

4 See, for example, Mpedi, L.G. & Nyenti, M.A.T. 2017. *Towards an Instrument for the Portability of Social Security Benefits in the Southern African Development Community*. Stellenbosch: African Sun Media; Mpedi, L.G. & Nyenti, M.A.T. 2016. *Employment Injury Protection in Eastern and Southern African Countries*. Stellenbosch: African Sun Media; Mpedi, L.G. & Nyenti, M.A.T. 2015. *Key International, Regional and National Instruments Regulating Social Security in the SADC: A General Perspective*. Stellenbosch: African Sun Media.

5 See, for example, Mpedi, L.G. & Nyenti, M. 2014. *Portability of Social Security Benefits in Mining Sector: Challenges Experienced by Former Mineworkers in Accessing Social Security Benefits in Selected Southern African Countries*. Midrand: Southern Africa Trust Midrand.

leading social security/protection experts in South Africa, the Southern African Development Community (hereinafter the SADC)⁶ and Anglophone Africa.

It was during our abovementioned visit that Doctor and I had an intense discussion on regional integration in Southern Africa, in which we lamented the enduring absence of a binding instrument on the portability⁷ of social security benefits in the SADC region. It should be pointed out that we have co-authored a monograph, which reflected on the need for such an instrument.⁸ SADC adopted the Portability of Accrued Social Security Benefits within the Southern African Development Community Region Policy Framework (hereinafter the Policy Framework) in 2016. This is soft law. Therefore, it is a non-binding instrument.⁹ Consequently, the chapter seeks to review the Policy Framework to highlight some administrative and related challenges that require attention. The main goal of such an exercise is to set the scene for the adoption of a binding instrument that Doctor and I, and undoubtedly many SADC's former and current migrant workers, would argue that the region desperately needs.

16.2

Portability of accrued social security benefits within the SADC: The policy framework

16.2.1 Objectives

The Policy Framework has four key objectives.¹⁰ First, it aims to provide mechanisms to enable workers moving within and outside the SADC region to keep their social security rights, which they have acquired under the legislation of the one Member State.¹¹ Second, it seeks to ensure equality of treatment of workers in the SADC region under social security legislation.¹² Furthermore, it strives to provide a regional framework for the progressive coordination and integration of

6 The Southern African Development Community (hereinafter the SADC) is a regional economic community in southern Africa. It comprises sixteen Member States, namely: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, United Republic of Tanzania, Zambia and Zimbabwe.

7 'Portability', according to section 1(2) of the Policy Framework refers to the "transfer of accrued social security benefits of an individual beneficiary."

8 See Mpedi & Nyenti, 2017a.

9 See, for an interesting exposition on non-binding norms, Shelton, D. (ed.). 2000. *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*. Oxford: Oxford University Press.

10 Section 4(1) of the Portability of Portability of Accrued Social Security Benefits within the Region (Policy Framework).

11 Section 4(1)(a) of the Policy Framework.

12 Section 4(1)(b) of the Policy Framework.

LIBER AMICORUM

social security systems in SADC.¹³ Lastly, it endeavours to contribute towards the improvement of the standard of living and conditions of employment of persons in SADC.¹⁴ In light of the preceding objectives of the Policy Framework, it is hardly surprising that its overall objective is “to facilitate the development of policies and programmes aimed at the progressive enhancement of the adequacy, efficiency and regional coordination of SADC Members States’ social security systems”.¹⁵

16.2.2 Administrative measures

16.2.2.1 *Maintenance of relations*

The Policy Framework requires competent institutions, i.e., institutions in charge of policy formulation, administration and regulatory oversight of social security systems,¹⁶ to maintain relations and cooperate with their regional peers.¹⁷ The maintenance of relations and cooperation amongst competent institutions is crucial if the SADC Member States are to enhance the administrative coordination of social security benefits in the region. In their quest to enable competent institutions to maintain relations and cooperate on social security matters, Member States should establish an autonomous regional agency as required by the SADC Protocol on Employment and Labour of 2014. Such an agency is anticipated to deal with cross-cutting issues on social protection which include the streamlining and facilitation of portability of social security benefits across borders; stipulating minimum standards; as well as regulating institutional mechanisms that guarantee applicable entitlements, rights and obligations across borders.¹⁸

In addition to the aforementioned cross-cutting issues, the agency could assist competent institutions in their day-to-day handling of pertinent matters essential for the cross-border payment of social security benefits, such as the proof of life certificates, tracing of beneficiaries and information and communication to beneficiaries. These matters are currently dealt with on an ad hoc basis by social security institutions at Member State level. The crux of the matter is that relevant social security institutions have a propensity of operating in silos in the SADC region. There are exceptions. For example, Malawi and Zambia do conduct, from time to time, reciprocal visits between the two countries as envisaged by the Malawi/Zambia Social Security Agreement of 2003. This good practice ought to be adopted by the envisaged agency. However, for the practice to be considered for adoption, Member States should prioritise the establishment of the agency. Such a step is long overdue.

¹³ Section 4(1)(c) of the Policy Framework.

¹⁴ Section 4(1)(d) of the Policy Framework.

¹⁵ Section 2 of Policy Framework.

¹⁶ Section 1(2) of the Policy Framework.

¹⁷ Section 8 of the Policy Framework.

¹⁸ Article 19(j) of the SADC Protocol on Employment and Labour of 2014.

16.2.2.2 Communication

Competent institutions are obliged to exchange information on their efforts to implement the provisions of the Policy Framework or relevant changes in the national legislation.¹⁹ However, it does not prescribe or state how such information should be exchanged. Paper communication is still key in the many SADC Member States while electronic communication is lagging behind some of the advanced regions of the world, such as the European Union (EU). In addition, the Policy Framework does not offer guidance on how competent institutions should implement multilingual communication between themselves. This is essential, particularly because English, French and Portuguese are the working languages of the SADC.²⁰ These are not the only (official) languages in the Member States.²¹ Therefore, multilingualism can pose a serious challenge to the competent institutions in their quest to communicate as anticipated by the Policy Framework.

16.2.2.3 Administrative processes

The Policy Framework obliges competent authorities to institute the necessary administrative measures for the application of the provisions of the Framework.²² It does not specify or give examples of such measures. This makes sense because the SADC Member States are at different levels of development. Thus, the administrative measures will differ from one Member State to another. In addition, some Member States will move at a faster pace to institute administrative measures than the others. This is in line with the principle of variable geometry.²³ Notwithstanding the principle of variable geometry,²⁴ the SADC Member States will need to reconsider and upgrade the current manual processes. Most importantly, they understandably need to develop procedures for the exchange of information and reliable information storage that will ensure data integrity, data protection, privacy

¹⁹ Section 10 of the Policy Framework.

²⁰ Article 37 of the SADC Treaty of 1992.

²¹ South Africa, for example, has thirteen official languages, namely: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu (section 6(1) of the Constitution of the Republic of South Africa, 1996).

²² Section 9 of the Policy Framework.

²³ Article 2(2)(b) of the Code on Social Security in the SADC explains the principle of variable geometry as the situation "where a group of Member States could move faster on certain activities and the experiences learnt are replicated in other Member States."

²⁴ See, for an illuminating critique of the principle of variable geometry, United Nations Economic Commission for Africa. 1993. *On the general scheme for coordination and harmonizing integration activities in Africa: A critique of the principle of variable geometry*. Seventh Joint ECA/UNDP/Africa IGO/United Nations Specialised Agencies Meeting, Addis Ababa, Ethiopia, 23-24 April 1993.

LIBER AMICORUM

and confidentiality.²⁵ The aforementioned measures are crucial for the reason that data sharing in SADC member countries is still at the embryonic stage.²⁶ Failure to improve information-sharing mechanisms in the region will hamper efforts by relevant social security institutions to assist (intended) beneficiaries to claim their accrued benefits.²⁷

In addition, the SADC Member States will need to ensure that appropriate and effective financial services are in place to ensure that the benefits are paid without any let or hindrance between the Member States. This exercise should focus greatly on the lowering of the overall costs of exporting social security benefits within the region. The point is that there are a variety of models for the cross-border payment of social security benefits in the SADC. These models are business to business, business to client (individual payment), government institution to government institution and client to business. Each model has its advantages and disadvantages. For instance, the client to business approach, which takes place in an instance where benefits are paid as a lump sum upon the termination of employment in a host country, can be costly as the service of paying benefits across borders is not free. The models work through commercial channels or institutions which levies an administrative fee or commission. Another point to note is that the cost of remitting money varies from one service provider to another and from one SADC country to another. The situation is compounded by the volatility of the currency, particularly as regards the SADC countries that are not part of the Common Monetary Area (hereinafter the CMA).²⁸

16.2.2.4 Facilitation of institutional arrangements

The institutional arrangements on the implementation of the Policy Framework are to be facilitated by the SADC institutions established under article 9 of the SADC Treaty.²⁹ Institutions established by article 9(1) of the SADC Treaty are as follows: the Summit of Heads of State or Government; the Organ on Politics, Defence and Security Co-operation; the Council of Ministers; the Sectoral and Cluster Ministerial

²⁵ See, for further reading on privacy and data protection from a social protection point of view, Carmona, M.S. 2018. *Is Biometric Technology in Social Protection Programmes Illegal or Arbitrary? An Analysis of Privacy and Data Protection*. Geneva: International Labour Office.

²⁶ International Organizations for Migration. 2016. *Regional Guidelines for the Development of Bilateral Labour Agreement in the Southern African Development Community*. Maputo: International Organization for Migration, p. 29.

²⁷ *Ibid.* 'Accrued social security benefit' is defined section 1(2) of the Portability of Accrued Social Security Benefits within the Southern African Development Community Region Policy Framework of 2016 (hereinafter the Policy Framework) as "benefits due to the beneficiary by virtue of legislation and/or contractual obligations which are defined and recognised as social security benefit within Member States."

²⁸ The Common Monetary Area consists of Eswatini, Lesotho, Namibia and South Africa.

²⁹ Section 11 of the Policy Framework.

Committees; the Standing Committee of Officials; the Secretariat; the Tribunal and SADC National Committees. In addition, article 9(2) of the SADC Treaty makes provision for the establishment of other institutions as and when necessary.

16.3

Towards a legally binding instrument

Despite some of the challenges outlined in 16.2 above, the role and importance of the Policy Framework as a foundation for a legally binding instrument cannot and should not be trivialised. The need for a legally binding instrument has been emphasised at a SADC Employment and Labour Sector workshop on the portability of social security benefits.³⁰ Apart from calling for a binding instrument, the workshop concluded that the instrument should, apart from making provision for the portability of social security benefits, coordinate social security in the SADC region. The coordination of social security systems is emphasised for the main reason that: “Coordination of social security systems maintains and respects the separate definitions and rules of each national social security system and draws on common rules through which social security systems can work together to achieve mutually agreed objectives.”³¹ The reference to the coordination of the social security systems points to the fact that the envisaged legally binding instrument will need to make provision for the following pertinent social security coordination principles: equality of treatment, aggregation of insurance periods, maintenance of the acquired rights and benefits, applicable law and transferability or (ex)portability of benefits.³²

In its quest to craft a binding instrument, SADC should endeavour to embrace the principles contained in section 3 of the Policy Framework, such as the need for “the progressive extension of social security coverage commencing with the vulnerable employment sectors such as mining, agriculture, domestic and informal sectors”. These principles are important as they give due recognition to the social and economic realities in the region. In addition, SADC should, to the extent relevant, draw inspiration from other Regional Economic Communities. For instance, there are useful lessons that could be drawn from the Economic Community of West African States (ECOWAS). The Supplementary Act A/SA.5/07/13 Relating to the General Convention on Social Security of Member States of ECOWAS provides for

³⁰ See, for example, SADC. 2019. *Conclusions and recommendations*. Employment and Labour Sector workshop on the portability of social security benefits, Johannesburg, South Africa, 29-31 May 2019.

³¹ *Ibid.*

³² See, for a discussion of the social security coordination principles, Mpedi & Nyenti (2017a), pp. 6-7; Dupper, O. 2014. *Coordination of Social Security Schemes: The Case of SADC*. Berlin: Freie Universität Berlin.

LIBER AMICORUM

annexures with a list of competent authorities, competent institutions and benefits as well as institutions designated by competent authorities as responsible for issuing a certificate of temporary employment abroad. These annexures are practical and essential for giving effect to measures aimed at the coordination of national social security systems and the portability of social security benefits. Furthermore, SADC should draw from the principles embodied in the various pertinent International Labour Organization (hereinafter the ILO) instruments. These instruments include the Social Security (Minimum Standards) Convention 102 of 1952 and the Maintenance of Social Security Rights Convention 157 of 1982. Regrettably, the ratification record of the SADC Member States of the relevant social security instruments is appalling. Therefore, Member States should be emboldened to work towards the ratification of the applicable up-to-date ILO social security instruments as a matter of urgency.

16.4

Conclusion

It has been over three years since the Policy Framework was adopted. As it can be deciphered from this chapter, the Policy Framework is undoubtedly an important step towards the much needed legally binding instrument. The administrative measures provided in the Policy Framework are vitally important for the full implementation of a future binding instrument. Notwithstanding a few points of criticism that have been levelled against the Policy Framework, Member States need to double efforts in their mission to embrace the Policy Framework to ensure the smooth implementation of a binding instrument when it sees the light of day. Furthermore, in their quest to develop the envisaged instrument, Member States should learn from the experience of regions such as the ECOWAS. In addition, the resultant binding instrument should express and exude the principles contained in the ILO social security standards. Sadly, Doctor will not be there to rejoice the long-overdue victory. Hopefully, that will be in our lifetime.

16.5 Bibliography

- Carmona, M.S. 2018. *Is Biometric Technology in Social Protection Programmes Illegal or Arbitrary? An Analysis of Privacy and Data Protection*. Geneva: International Labour Office.
- Dupper, O. 2014. *Coordination of Social Security Schemes: The Case of SADC*. Berlin: Freie Universität Berlin.
- International Organizations for Migration. 2016. *Regional Guidelines for the Development of Bilateral Labour Agreement in the Southern African Development Community*. Maputo: International Organization for Migration.
- Mpedi, L.G. & Nyenti, M.A.T. 2012. "Perspective towards the development of the social protection dimension of the SADC regional integration agenda." *SADC Law Journal*, 2:164.
- Mpedi, L.G. & Nyenti, M.A.T. 2014. *Portability of Social Security Benefits in Mining Sector: Challenges Experienced by Former Mineworkers in Accessing Social Security Benefits in Selected Southern African Countries*. Midrand: Southern Africa Trust.
- Mpedi, L.G. & Nyenti, M.A.T. 2015. *Key International, Regional and National Instruments Regulating Social Security in the SADC: A General Perspective*. Stellenbosch: African Sun Media.
- Mpedi, L.G. & Nyenti, M.A.T. 2016. *Employment Injury Protection in Eastern and Southern African Countries*. Stellenbosch: African Sun Media.
- Mpedi, L.G. & Nyenti, M.A.T. 2017a. "Social insurance in South Africa: Are there lessons to be learnt from the German experience?" In: C. Hugo & M.J. Möllers (eds.). *Transitional Impacts on Law: Perspectives from South Africa and Germany*. Baden-Baden: Nomos, p. 449. <https://doi.org/10.5771/9783845287775-449>
- Mpedi, L.G. & Nyenti, M.A.T. 2017b. *Towards an Instrument for the Portability of Social Security Benefits in the Southern African Development Community*. Stellenbosch: African Sun Media.
- Mpedi, L.G., Smit, N & Nyenti, M.A.T. 2011. "Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community: A Synthesis." In: L.G. Mpedi & N. Smit (eds.). *Access to Social Services for Non-Citizens and the Portability of Social Security Benefits within the Southern African Development Community*. Bloemfontein: Sun Media, p. 1.
- Nyenti, M.A.T. & Mpedi, L.G. 2012. "The impact of SADC social protection instruments on the setting up of a minimum social protection floor in southern African countries." *Potchefstroom Electronic Law Journal*, 15:244. <https://doi.org/10.4314/pej.v15i1.8>
- Southern African Development Community (SADC). 2019. *Conclusions and recommendations*. Employment and Labour Sector workshop on the portability of social security benefits, Johannesburg, South Africa, 29-31 May 2019.
- Shelton, D. (ed.). 2000. *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*. Oxford: Oxford University Press Oxford.

LIBER AMICORUM

United Nations Economic Commission for Africa. 1993. *On the general scheme for coordination and harmonizing integration activities in Africa: A critique of the principle of variable geometry*. Seventh Joint ECA/UNDP/Africa IGO/United Nations Specialised Agencies Meeting, Addis Ababa, Ethiopia, 23-24 April 1993.