



SOUTHERN AFRICAN MIGRATION PROGRAMME

**LABOUR MIGRATION TRENDS AND POLICIES IN SOUTHERN
AFRICA**

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1.0 Introduction

1.1 Since 1990, there have been major changes to longstanding patterns of intra-regional labour migration within the Southern African Development Community (SADC). At the same time, new channels of migration to and from the region have opened. Labour migration is now more voluminous, dynamic and complex than it has ever been. This presents policy-makers with considerable opportunities and challenges. In order to understand the exact nature of these challenges, it is important to have a good grasp of current labour migration characteristics and trends. Unfortunately, reliable, accurate and comprehensive data on labour migration is not available. The quality and currency of data varies considerably from country to country. A regional labour migration observatory would make the future writing of an overview of migration trends a much easier task.

1.2 The primary objectives of this overview of labour migration trends and policy implications is fourfold: (a) to review recent characteristics and trends in labour migration within and from the SADC region. Official statistics as well as recent survey data are drawn on to generate an overall picture of current characteristics and trends in the region; (b) to highlight some of the critical and urgent issues pertaining to labour migration in the region; (c) to discuss the main features of labour migration strategies and policies and legislative and regulatory frameworks in countries covered by the Southern African Development Community (SADC); and (d) to review the prospects for the freer circulation of migrant labour in the Southern African region.

1.3 This brief focuses primarily on the period since 1990 and restructuring of labour migration in the wake of the collapse of apartheid, new global migration forces, the end of the wars in Mozambique and Angola and the current economic and political situation in Zimbabwe. Although the brief provides an overview of the region as a whole, the report concentrates on the major labour migration channels in the region (from countries such as Lesotho, Swaziland, Malawi, Mozambique and

Zimbabwe to South Africa). The report also considers the nature and implications of new migrant movements to and from SADC.

2.0 Contemporary Migration

2.1 Migration Trends and Volumes

2.1.1 Southern Africa has a long history of migration, dating back to the mid-nineteenth century.¹ For much of the twentieth century, the region experienced two major forms of labour migration: (a) in-migration of white immigrants primarily from Europe; and (b) intra-regional migration of temporary migrant workers (primarily male) from one country in the region to another.

2.1.2 A survey of a sample of 30,000 migrants from five SADC countries conducted by the Southern African Migration Project (SAMP) in 2005 showed that 23% of migrants had grandparents who had gone to work in another country, and 57% had parents who had done so (Table 1). Lesotho's figures were the highest (44% of grandparents and 76% of parents) but all of the other country's migrants showed significant numbers of grandparents, and particularly parents, who had also migrated for work across borders.²

2.1.3 Since 1990, migration within SADC and from the rest of Africa to SADC has increased dramatically. One very rough approximation of numbers is contained in UN data for "migrant stock" (defined as the number of foreign-born people in a country at the time of the most recent census).³ According to the UN, the total African migrant stock of SADC was 3.4 million people in 2000. Of these, 2.4 million (72%) were from other SADC countries and 966,307 (28%) were from the rest of Africa (Table 2).

2.1.4 Over 80% of the non-SADC migrant stock was concentrated in only two states: Tanzania and the DRC, both with extensive borders with non-SADC countries.

Table 1: Household History of Migration by Country

Parents worked in another country												
	Botswana		Lesotho		Mozambique		Swaziland		Zimbabwe		Total	
	N	%	N	%	N	%	N	%	N	%	N	%
Yes	254	41.9	828	76.2	609	66.3	519	47.3	138	34.2	2348	57.1
No	257	42.4	171	15.7	255	27.8	503	45.8	242	60.0	1428	34.7
Don't know	95	15.7	87	8.0	54	5.9	76	6.9	23	5.7	335	8.1
Total	606	100	1086	100	918	100	1098	100	403	100	4111	100
Grandparents worked in another country												
Yes	63	11.0	249	24.4	396	43.9	115	10.5	61	18.5	884	22.6
No	294	51.5	215	21.1	239	26.5	701	63.8	246	74.8	1695	43.3
Don't know	214	37.5	555	54.5	267	29.6	282	25.7	22	6.7	1340	34.2
Total	571	100	1019	100	902	100	1098	100	329	100	3919	100

Source: SAMP MARS Data Base

Table 2: African Migrant Stock of SADC

	SADC		Rest of Africa		Total
	No.	%	No.	%	No.
Angola	29,641	90	3,121	10	37,762
Botswana	51,035	99	622	1	51,657
DRC	42,177	13	274,864	87	317,041
Lesotho	4,022	92	370	8	4,392
Malawi	247,524	98	5,138	2	252,662
Mauritius	489	58	347	42	836
Mozambique	230,260	89	28,670	11	258,930
Namibia	121,655	98	2,943	2	124,598
Seychelles	3,100	92	257	8	3,357
South Africa	687,678	94	41,820	6	729,498
Swaziland	32,368	87	5,042	13	37,410
Tanzania	295,121	36	533,133	64	828,234
Zambia	310,560	91	31,010	9	341,570
Zimbabwe	446,785	92	39,612	8	486,397
Total	2,502,415	72	966,929	28	3,469,344

Source:

http://www.migrationdrc.org/research/typesofmigration/global_migrant_origin_database.html

In the Tanzanian case, the non-SADC migrants are primarily refugees. In every other SADC country, the non-SADC born population is a small proportion of the total African migrant stock (Table 2). These figures will have changed in the last few years but they illustrate that with the exception of Tanzania and the DRC, the vast majority of cross-border migration has occurred within the SADC region.

2.1.5 Legal movements of people from country to country within the SADC region have grown massively since 1990. The volume of human traffic at virtually every border post throughout the region has increased in the last two decades and will probably continue to do so. Statistics from individual countries need to be compiled in a centralized data base to confirm this observation. However, South African data provides a good indication of the magnitude of change. The total number of legal entrants into South Africa increased from 1 million in 1990 to 5.1 million in 1996 and over 9 million in 2008 (Figure 1). The number from the rest of Africa rose from less than a million in 1990 to 3.8 million in 1996 and 7.4 million in 2008. In 2008, three quarters of all entrants were from the rest of Africa (up from 55% in 1996) (Table 3).

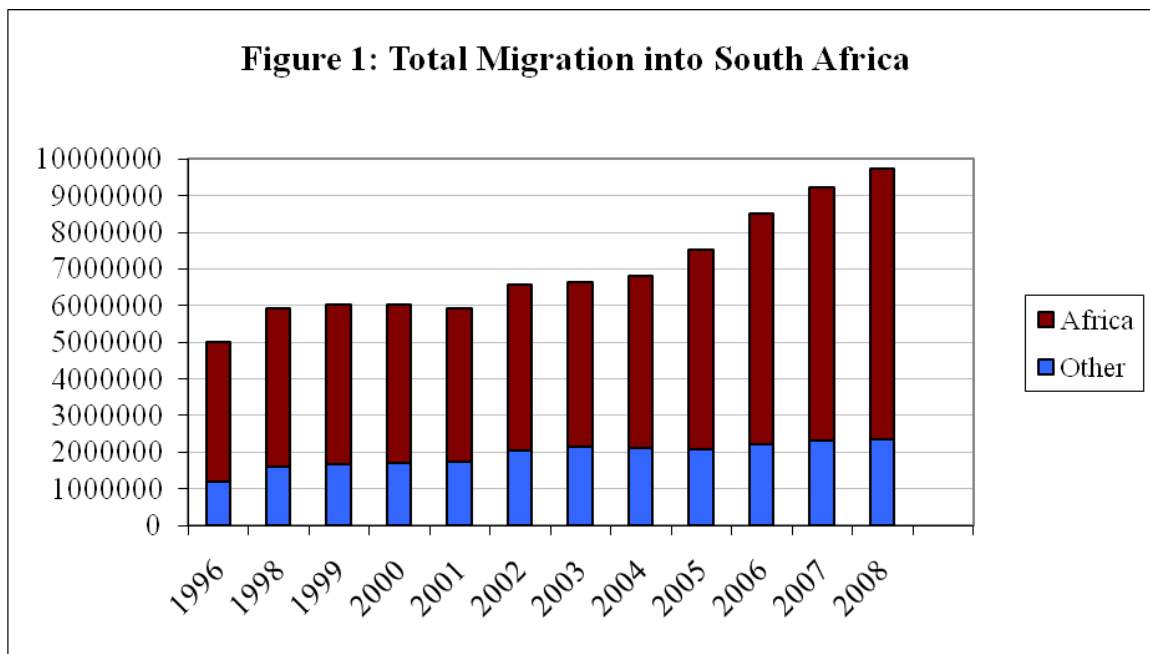


Table 3: Total Migration into South Africa 1996-2008

	1996	1998	2000	2002	2003	2004	2006	2008
Europe	798,398	981,680	1,048,923	1,273,822	1,343,379	1,312,309	1,412,653	1,443,587
N. America	144,592	203,065	210,349	222,345	228,244	251,536	309,697	351,158
C & S America	33,603	46,870	47,348	39,486	41,778	46,625	56,023	65,002
Australasia	63,793	70,333	71,161	87,136	90,391	93,304	109,754	117,882
Middle East	25,064	28,570	29,297	34,112	32,860	32,831	38,209	43,714
Asia	142,240	138,478	156,600	184,555	186,274	195,943	217,396	230,343
Indian Ocean	11,726	-	14,323	21,004	20,486	17,942	17,047	-
Africa	3,781,351	4,291,547	4,298,613	4,513,694	4,519,616	4,707,384	6,318,138	7,395,397
Unspecified	185,454	124,362	123,761	173,522	177,067	156,310	39,371	77,290
TOTAL	5,186,221	5,898,236	6,000,538	6,549,916	6,640,095	6,815,202	8,518,288	9,724,373

Source: Statistics South Africa, Tourism & Migration Reports, PS015

2.1.7 Since this data on legal entry includes all types of migration, it is important to try and determine how many are actually labour migrants (i.e. entering to work or to look for work). In 2008, for example, 9.1 million people said they were entering on “holiday” and 186,000 to conduct “business.” Only 137,000 (1.5%) said they were entering to work (up from 94,000 in 2005) (Table 4). This is certainly an under-estimate of the number of labour migrants for two reasons: (a) it does not include migrant mineworkers entering on contract (b) it does not include those who enter the country as “holidaymakers” with the intention of working.

Table 4: Reason for Entry by Region of Origin, 2008

	Holiday	Business	Work	Study	Transit	Border Passes	Other	Total
Africa	6,971,081	116,146	46,787	81,617	24,587	154,999	197	7,395,414
Europe	1,359,259	39,757	33,630	7,343	2,946	649	3	1,443,587
N America	331,795	8,464	6,738	3,036	854	271	0	351,158
Asia	181,179	13,976	28,686	2,901	1,719	1,858	24	230,343
Australasia	117,435	2,835	1,453	300	315	44	0	122,382
S America	60,631	1,481	2,014	411	451	14	0	65,002
Middle East	39,011	2,479	1,505	535	132	22	0	43,684
Unspecified	20,912	715	16,219	12,910	101	0	20	77,290
Totals	9,081,303	185,853	137,032	109,053	31,105	184,270	244	9,728,860

Source: Statistics South Africa, Tourism and Migration Reports, PO3051

2.1.8 Other research suggests that the proportion of labour migrants in the total cross-border population from within SADC is higher. A SAMP survey of migrants in five SADC countries in the late 1990s showed, for example, that 29% of all migrants were labour migrants (Table 5).⁴ The proportion varied by country from a low of 10% (Botswana) to a high of 67% (Mozambique). Only in Mozambique was labour migration the most important reason for entry. In Botswana, Lesotho and Zimbabwe, more people entered to visit family and friends than for any other reason. Business (including informal trading) was easily the most important activity for migrants from Botswana and Zimbabwe.

Table 5: Reasons for Entry to South Africa (%)					
Reason for Entry	Botswana	Lesotho	Mozambique	Namibia	Zimbabwe
<i>Employment related</i>					
Work	7	17	45	11	15
Look for work	3	8	22	2	14
<i>Business related</i>					
Business	6	2	2	8	7
Buy and sell goods	2	3	2	2	21
Shopping	24	19	4	1	21
<i>Other reasons</i>					
Visit family/friends	23	34	12	13	39
Medical	5	6	4	4	2
Holiday	14	2	5	19	3
Study	3	1	1	3	2
Other	12	8	2	12	3
<i>Source: SAMP Database</i>					

2.2 The Decline of Temporary Contract Migration

2.2.1 Contract labour migration is associated with the regional migrant labour system to the South African mining industry. The collapse of apartheid and the advent of democracy in South Africa led to many calls to abolish the migrant labour system, seen as one of the cornerstones of the apartheid system.⁵ Critics of the system, including the ANC and the NUM, pressured the mining companies to stabilize their labour force in family housing and to stop using migrant labour. However, the mining companies resisted all pressures to move away from hiring migrants and even abandoned plans to expand family housing, citing the cost crisis in the industry.⁶

2.2.2 The new ANC-led government tried to dismantle the migrant labour system and atone for the past by offering miners from neighbouring countries permanent residence. The plan was to encourage them to voluntarily “opt out” of migrant labour and settle in South Africa. However, only 50% of eligible miners accepted the offer (51,504 in total) and very few of those “opted out” of the system, continuing to migrate between the mines and their home countries.⁷

2.2.3 The cost crisis in gold mining in the 1990s produced significant change to the migrant labour system. The South African gold mining industry entered a long period of restructuring and downsizing as a result of declining ore reserves, rising costs and a stagnant gold price. Trade union gains for migrants in the mining industry in the 1980s were rolled back in the 1990s through sub-contracting. Once dominated by a handful of powerful, centralized mining groups, the mining companies began to out-source non-production and production functions to a growing number of sub-contracting companies. These companies tended to hire more vulnerable non-South African workers, particularly from Mozambique and Lesotho. Research shows that the rise of sub-contracting had a marked impact on

trade union strength in the mining industry and led to a decline in wages, job security, working conditions and safety.⁸

2.2.4 At the time of the 1987 Mineworkers' Strike, 477,000 migrant workers were employed on the mines. By 2001, the figure was down to only 207,000 (Table 5). Retrenchments on this scale exacerbated poverty in many rural mine source areas, shutting off remittances to many households and denying young school-leavers the chance to migrate to the mines.⁹ Hardest hit were internal source areas (mainly in the Eastern Cape) where the number of migrants fell from 200,000 in 1990 to 99,000 in 2001.¹⁰ The numbers also fell in Botswana (14,000 in 1990 to 3,000 in 2006), Lesotho (99,000 in 1990 to 45,000 in 2001) and Swaziland (18,000 in 1990 to 7,000 in 2005).

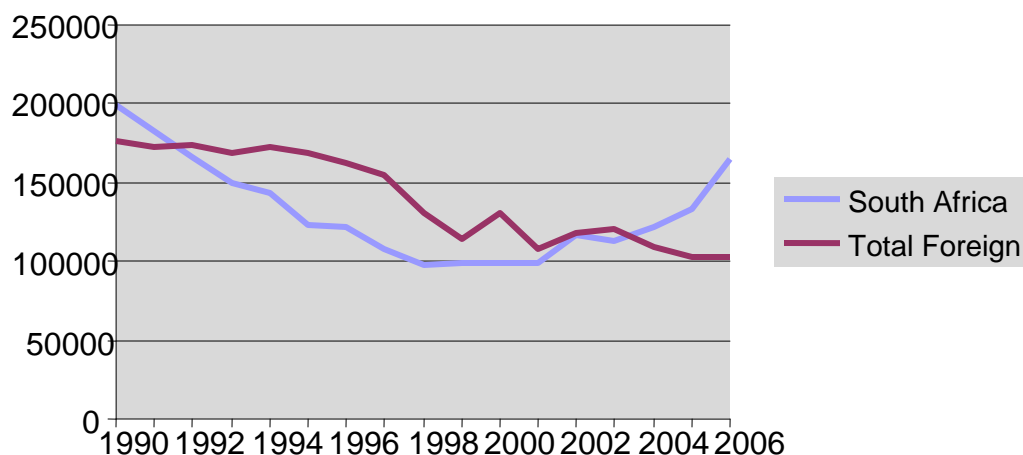
2.2.5 In contrast to the other source countries, Mozambique was virtually unscathed by the job losses of the 1990s.¹¹ There were more Mozambicans employed on the mines in 2000 (54,000) than there had been in 1990 (45,000). The proportion of Mozambicans in the workforce increased from 10% to 25% during the decade. The proportion of non-local miners rose from around 40% in the mid-1980s to nearly 60% in 1997. The reasons why South African companies retrenched everyone except Mozambicans have not been fully explained although some sources in the industry say it was because Mozambican workers needed the jobs more and were therefore less militant. Others have speculated it was because, at the time, rates of HIV and AIDS were lower in Mozambique.

Table 6: Migrant Labour on the South African Gold Mines, 1990-2006							
Year	South Africa	Botswana	Lesotho	Mozambique	Swaziland	% Foreign	Total
1990	199,810	14,609	99,707	44,590	17,757	47	376,473
1991	182,226	14,028	93,897	47,105	17,393	49	354,649
1992	166,261	12,781	93,519	50,651	16,273	51	339,485
1993	149,148	11,904	89,940	50,311	16,153	53	317,456
1994	142,839	11,099	89,237	56,197	15,892	55	315,264
1995	122,562	10,961	87,935	55,140	15,304	58	291,902
1996	122,104	10,477	81,357	55,741	14,371	58	284,050
1997	108,163	9,385	76,361	55,879	12,960	59	262,748
1998	97,620	7,752	60,450	51,913	10,336	57	228,071
1999	99,387	6,413	52,188	46,537	9,307	54	213,832
2000	99,575	6,494	58,224	57,034	9,360	57	230,687
2001	99,560	4,763	49,483	45,900	7,841	52	207,547
2002	116,554	4,227	54,157	51,355	8,698	50	234,991
2003	113,545	4,204	54,479	53,829	7,970	51	234,027
2004	121,369	3,924	48,962	48,918	7,598	47	230,771
2005	133,178	3,264	46,049	46,975	6,993	43	236,459
2006	164,989	2,992	46,082	46,707	7,124	38	267,894

Source: TEBA

2.2.6 Since 2000, a rising gold price has led to renewed expansion on the gold mines, with the workforce increasing from 207,000 in 2001 to 268,000 in 2006 (Table 5). Virtually all of the new (or re-employed) workers have come from inside South Africa. The numbers of non-local labour migrants from all outside source countries have continued to fall since 2000 (Figure 2). Even the numbers from Mozambique have started to decline. The proportion of foreign miners has recently fallen from a peak of 59% in 1997 to only 38% in 2006.

**Figure 2: Local and Foreign Migrant Labour,
1990-2006**



2.2.7 South African gold mines are thus currently looking to the domestic labour market for migrant workers. This could indicate a new “South Africans-first” policy. One of the stated objectives of the Fundamental Principles of the Mineral and Petroleum Resources Development Act (Act 28 of 2002), for example, is to “promote employment and advance the social and economic welfare of all South Africans” (Section 2(f)). However, the *Social and Labour Plan* of the Department of Minerals and Energy (1999) highlights the need to protect all migrant labour and their employment including foreign labour. This does not mean that *new* jobs in an expanding industry will go to non-local miners.

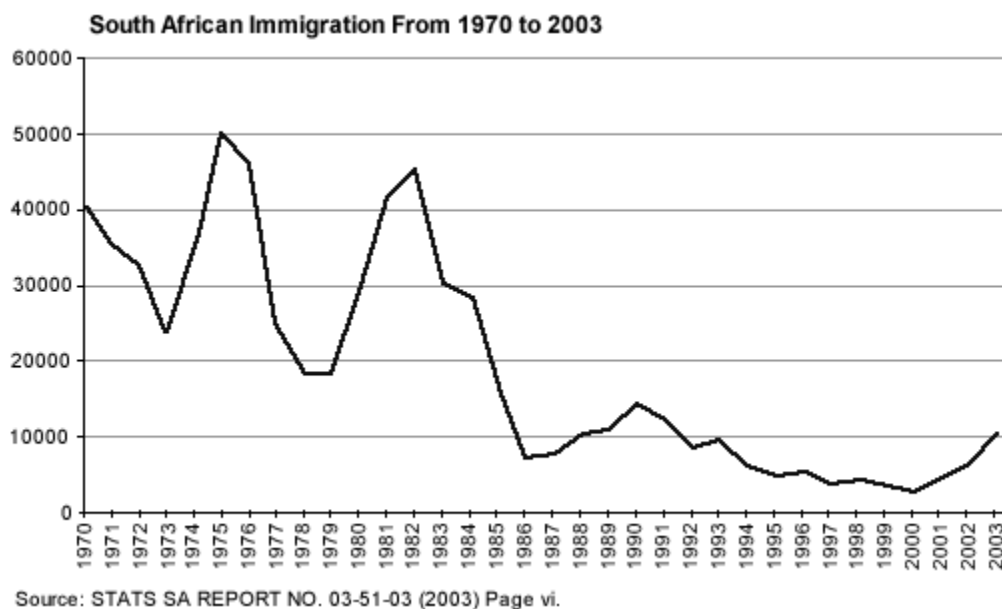
2.2.8 The other major sector to employ contract migrants is South African commercial farming, particularly in the border areas with Mozambique, Zimbabwe and Lesotho.¹² A study of commercial vegetable farming in the Free State Province in the late 1990s showed that farmers recruited (mainly female) workers from Lesotho under legal contract through Labour Offices in Lesotho.¹³ Similar arrangements were in place for the hiring of Mozambicans in Mpumalanga and Zimbabweans in Northern Province.

2.2.9 Since the implementation of the 2002 Immigration Act, commercial farmers have been issued with “corporate permits” to legally employ a pre-determined number of migrant workers from other countries. The functioning of the new corporate permit system in facilitating legal access by South African employers to non-South African semi-skilled and unskilled labour requires further examination.

2.3 The Fall and Rise of Legal Immigration

2.3.1 Immigration from Europe to Southern Africa declined with independence. In the case of South Africa, a declining trend began in the 1980s and continued after the collapse of apartheid (Figure 3). In 1974, there were 50,000 immigrants to South Africa; in 1999 there were less than 4,000. The primary reason for the decline in the 1980s was political turbulence which made South Africa an unattractive destination for emigrants from Europe. The primary reason for the continued decline after 1994 was post-apartheid immigration policy which actively discouraged legal immigration.¹⁴

Figure 3: Immigration to South Africa, 1970-2003



2.3.2 Immigration from the rest of Africa remained relatively constant in the 1990s (at less than 2,000 per year) (Table 7). After 2000, it began to rise again, topping 5,000 in 2004 (a trend that has since continued) (Figure 4). In other words, in the 1990s, although immigration was discouraged, immigrants from Africa were favoured over those from Europe. The proportion of immigrants from Africa rose from 11% in 1990 to nearly 50% in 2004.

2.2.3 With South Africa's post-2000 immigration policy focusing on skills-acquisition, the overall number of immigrants is increasing again (from 3,053 in 2000 to 10,714 in 2004). The growing number and proportion of African immigrants suggests the beginnings of a skills brain drain to South Africa which could accelerate in the future.

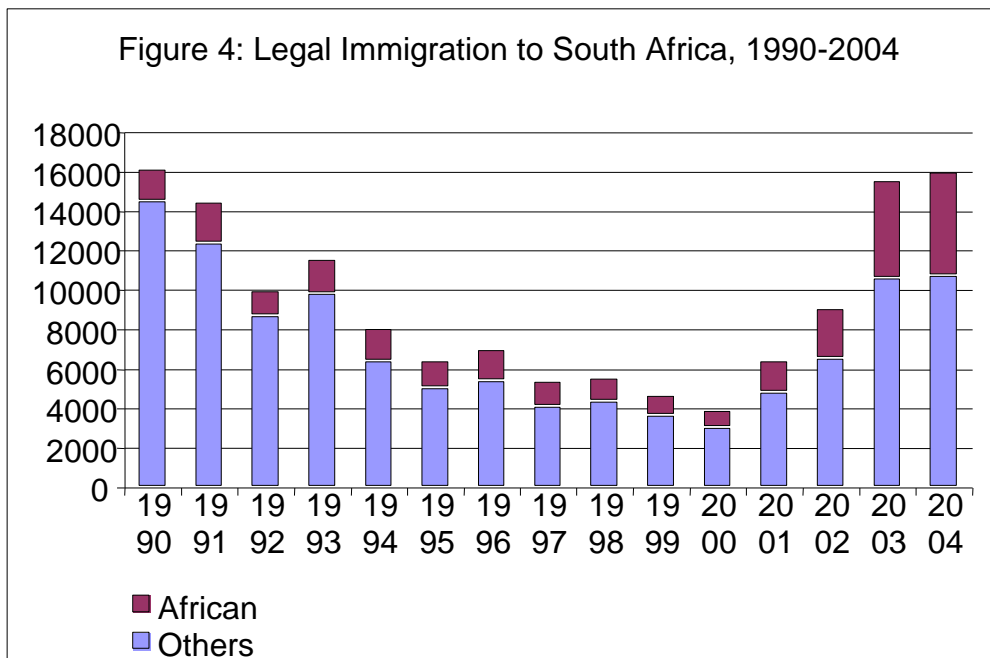


Table 7: Legal Immigration to South Africa, 1990-2005			
Year	Legal Immigrants	African Immigrants	%
1990	14,499	1,628	11.2
1991	12,379	2,065	16.7
1992	8,686	1,266	14.6
1993	9,824	1,701	17.3
1994	6,398	1,628	25.4
1995	5,064	1,343	26.5
1996	5,407	1,601	29.6
1997	4,102	1,281	31.2
1998	4,371	1,169	26.7
1999	3,669	980	26.7
2000	3,053	831	27.2
2001	4,832	1,584	32.8
2002	6,545	2,472	37.8
2003	10,578	4,961	46.9
2004	10,714	5,235	48.9
Total	110,121	29,745	27.0
<i>Source: DHA annual reports; Statistics South Africa Tourism & Migration reports, PS015</i>			

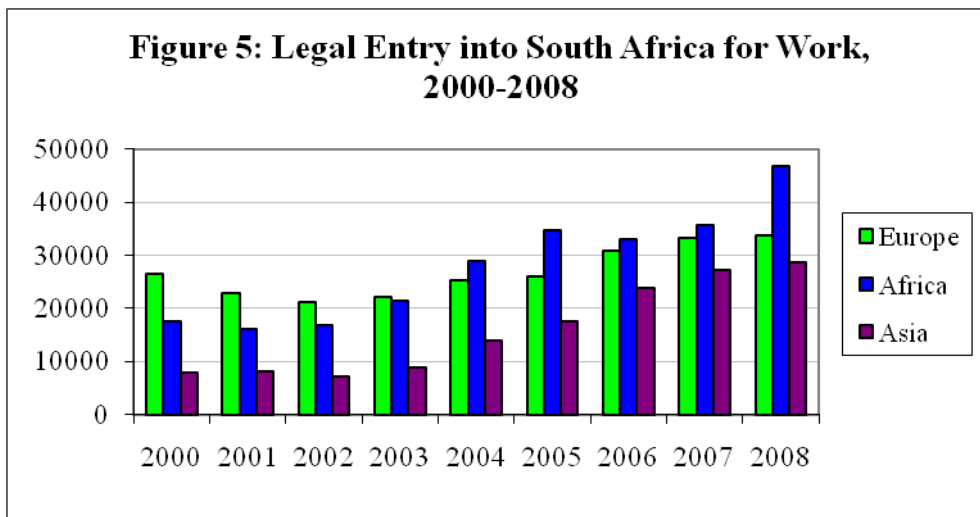
2.3.4 Under political pressure to address South Africa's chronic unemployment problem, the post-apartheid government initially began to reduce temporary work permit renewals (from 33,318 in 1992 to 9,191 in 2000) (Table 8). The issue of new permits (primarily to skilled migrants) spiked in 1996 and then went into decline (from 19,498 in 1996 to 6,643 in 2000). Figures from 2001 onwards are unavailable but there are indications that the numbers have begun to rise again with the recent change in South African immigration policy. For example, 17,205 new work permits were issued in 2006 compared to only 6,643 in 2000.

Table 8: Work Permits Issued by South Africa, 1990-2000, 2006			
Year	New Work Permits	Renewals	Total
1990	7,657	30,915	38,571
1991	4,117	32,763	36,880
1992	5,581	33,318	38,899
1993	5,741	30,810	36,551
1994	8,714	29,352	38,066
1995	11,053	32,838	43,891
1996	19,498	33,206	52,704
1997	11,361	17,129	28,490
1998	10,828	11,207	22,035
1999	13,163	10,136	23,299
2000	6,643	9,191	15,834
2006	17,205	n/a	n/a
Source: DHA Annual Reports			

2.3.5 The growing significance of Africa as a source region for skilled labour migrants can be seen in official entry-for-work statistics. This data shows that the number of people who entered South Africa for “work purposes” declined from 118,500 in 1996 to a low of 58,747 in 2002 (Table 9). In the case of Africa, the decline was from 53,342 to 16,924.

2.3.6 After the passage of the 2002 Immigration Act, the overall numbers and the number from Africa started to rise again from all areas (from 59,000 in 2002 to 137,000 in 2008 (Figure 5)). The numbers from the rest of Africa nearly tripled from 17,000 to 47,000 between 2002 and 2006. Also notable is a fourfold increase in legal migration from Asia (from 7,000 in 2002 to nearly 29,000 in 2008).

Table 9: Legal Entry into South Africa for Work, 1996-2008							
	1996	1998	2000	2002	2004	2006	2008
Europe	27,126	31,359	26,392	21,080	25,239	30,771	33,630
North America	7,375	9,449	8,090	6,070	6,207	6,022	6,738
Central & S America	1,240	1,470	1,252	1,175	1,329	1,602	2,014
Australia	1,531	1,847	1,535	1,360	1,294	1,329	1,452
Middle East	1,081	1,185	818	942	1,185	1,485	1,505
Asia	8,257	8,279	7,951	7,140	13,952	23,820	28,686
Indian Ocean Islands	307		371	251	202	279	
Africa	53,342	23,707	17,562	16,924	28,944	42,325	46,787
Unspecified	18,190	3,871	4,997	3,796	4,912		16,219
TOTAL	118,449	81,442	68,979	58,747	83,264	114,237	137,032



2.3.6 The most important conclusion is that the anticipated “brain drain” of skills to post-apartheid South Africa from the rest of Africa did not happen in the 1990s because of South Africa’s restrictive immigration policy. However, the 2002 South African Immigration Act (as amended in 2004) and the Joint Initiative for Priority Skills Acquisition (JIPSA) suggest that this policy has now changed and that the

South African government is making the import of skills a priority. Work opportunities for skilled African labour migrants will undoubtedly increase although hiring in some sectors (e.g. health professionals) may continue to be limited by the government. Overall, we are witnessing the beginning of significant skills migration to South Africa from the rest of Africa.

2.3.7 The only other SADC country which experienced consistent growth in the import of skilled workers in the 1990s was Botswana.¹⁵ Economic growth and a stable economy attracted skilled workers from other SADC countries and from the rest of Africa, as well as Asia and Europe. In 2006, Botswana had an estimated 80,000 legal immigrants in the country and 17,000 skilled migrants spread across all sectors of the economy but working primarily in central government, wholesale and retail, education and manufacturing (Table 10).

	Citizens	Non-Citizens
Agriculture	5,334	295
Mining and Quarrying	10,928	536
Manufacturing	32,399	2,134
Utilities	2,841	15
Construction	20,866	1,966
Wholesale and Retail	40,164	2,812
Hotels and Restaurants	14,431	652
Transport/Communications	11,139	1,605
Financial	6,424	195
Real Estate	15,287	1,631
Education	6,276	2,528
Health and Social Work	1,754	472
Other Community	2,912	229
Central Government	85,601	14,472
Local Government	25,447	597
Total	281,803	16,996
Source: Central Statistical Office, Botswana		

2.3.8 After 2000, the number of work permits issued by Botswana began to decline (Table 11) as the government pursued an active 'localization' policy to reduce dependence on expatriates.¹⁶ The greatest decline has come in the number

of skilled migrants from South Africa, the United Kingdom and the rest of Europe, the rest of Africa (except Zimbabwe) and Asia. The number of work permits issued to Zimbabweans increased to the point where Zimbabwe is now the most important source country for skilled and legal labour migrants to Botswana.

	2001	2002	2003	2004	2005	2006
South Africa	2,365	1,946	1,380	1,308	1,225	824
Zimbabwe	1,964	1,694	1,177	1,956	3,425	3,165
Zambia	459	428	321	383	452	324
Malawi	174	152	109	126	123	100
Ghana	143	109	64	56	76	75
Other Africa	744	630	462	559	690	576
UK	798	664	466	401	320	210
Other Europe	506	414	309	276	243	143
India	1,183	992	720	863	903	781
China	681	513	335	605	786	793
Other Asia	611	509	363	457	509	502
Other	-	146	107	112	121	79
Not Known	174	17	13	25	21	14
Total	9,802	8,214	5,826	7,127	8,894	7,586

Source: Central Statistical Office, Botswana

2.4 The Growth of Irregular Migration

2.4.1 The number of labour migrants working illegally (without work permits and/or appropriate residency status) in any country is difficult to determine. These workers have no interest in making their presence or status known to officials, researchers or census-takers and some also carry false documentation. The media and the general public in SADC like to cite numbers of irregular migrants in the “millions.”¹⁷ However, there is no substantive basis for such claims. Nevertheless, irregular labour migration has undoubtedly increased significantly in the last decade and has become a major concern of governments in many SADC states. Botswana and South Africa are currently experiencing the greatest influx of irregular migrants but many others (including Malawi, Mozambique, Namibia, Swaziland, Tanzania and Zambia) also have valid concerns about rising irregular migration.¹⁸

2.4.2 The ILO has suggested that it is important for countries to disaggregate irregular migration. One study used the ILO typology in SADC to distinguish between (a) lawful and unlawful entry to a country; and (b) lawful and unlawful residence in a country (Table 12).¹⁹

Table 12: Typology of Irregular Migration				
	1. Entry Lawful, Stay Lawful	2. Entry Lawful, Stay Unlawful	3. Entry Unlawful, Stay Lawful	4. Entry Unlawful, Stay Unlawful
A. No of Migrants	<ul style="list-style-type: none"> • Work Permit Holders • Mine/Farming Contracts 	<ul style="list-style-type: none"> • Retrenched Workers who Remain • Working in Different Sector • Overstayers 	<ul style="list-style-type: none"> • Forced migrants (refugees) • Immigration amnesty beneficiaries 	<ul style="list-style-type: none"> • Border jumpers • False documents • Trafficked
B. No. working Illegally	<ul style="list-style-type: none"> • Contravening Work Permit Conditions • Holding valid visitors permit 	<ul style="list-style-type: none"> • Working in Different Sector • Expired work permits 	<ul style="list-style-type: none"> • Some forced migrants (refugees) 	<ul style="list-style-type: none"> • Border Jumpers • False Documents • Trafficked

2.4.3 The most significant increase in irregular labour migration in the last five years has been from Zimbabwe. The numbers of migrants who used to migrate from Malawi, Mozambique and Zambia to the commercial farms of Zimbabwe has declined considerably since the land transfer programme in Zimbabwe.²⁰ However, the number of Zimbabweans migrating to work or to look for work in Botswana and South Africa has increased dramatically. Opportunities for Zimbabweans to work legally in other countries are limited but that has not prevented many from migrating. Most of the migrants would classify as B2 or B4 migrants in the above typology, although increasing numbers of Zimbabweans are making refugee claims (19,000 in South Africa in 2006).

2.4.4 Most irregular migrants in SADC are from other countries within the SADC. South Africa, for example, has deported over 1.5 million migrants to neighbouring countries since 1994 (with Mozambique and Zimbabwe making up 90% of the total).

2.4.5 The growth in irregular labour migration within and to SADC has been accompanied by growing informalization of migrant labour employment. Before the 1990s, most labour migrants were employed in the formal sector of the country of destination. Since 1990, more labour migrants have begun to work in the unregulated informal sector (either as owner-operators or as employees of micro-enterprises and SMME's). The numbers of informal sector labour migrants are unknown but are increasing as the informal sector expands throughout the region.

2.5 The Feminization of Migration

2.5.1 Globally, commentators have remarked on the growing feminization of labour migration with the absolute numbers of female migrants increasing and more women migrating in their own right as independent labour migrants.²¹ In Southern Africa, males still predominate in cross-border migration. Of the 2001 SADC-born migrant stock of South Africa, for example, 430,432 (63%) were men and 257,246 (37%) were women. The proportions are similar for migrants from African countries. In a SAMP survey of five SADC countries, over 60% of men but only 16% of women had worked in another country, a dramatic difference.²²

2.5.2 There is a definite "feminization" trend to labour migration in Southern Africa including (a) an increase in the number and proportion of migrants who are female; and (b) a shift in the reasons for women's migration i.e. more and more women becoming independent migrants in their own right.²³ Women in Southern Africa are more mobile than ever before.²⁴ However, research shows that there are significant gender differences in the purpose of migration between men and women.

2.5.3 In the SAMP survey referred to above, migrants in Botswana, Namibia, Mozambique, Lesotho and Zimbabwe were asked the reason for their most reason visit to South Africa. The survey showed that 50% of male migrants (but only 10% of female migrants) had gone to work or look for work.²⁵ A much greater proportion of women than men migrated for other reasons: informal trading (10% versus 4%), shopping (23% versus 13%) and visiting family and friends (38% versus 17%) (Table 13). As Dodson concludes: “Men and women migrate for different reasons. Men go primarily in search of employment, whereas women’s migration is driven by a wide range of social and reproductive factors in addition to economic incentives. Even the economic motives for migration are gender-specific, with women going largely to trade and men to work, most in formal employment. Thus migration is closely tied to socio-economic roles and responsibilities allocated on the basis of gender.”²⁶

2.5.4 Gender differences in male and female migration show up in the timing of actual and anticipated migration periods, with males consistently staying away longer than women. Gender differences are also apparent in the frequency and duration of visits to other countries. Women make more frequent visits but of shorter duration than men. Female migrants tend to either be young, single women or older, married women whereas male migrants come from a wide range of age groups and all marital status categories.

2.5.5 The Southern African labour market is highly stratified by gender which provides very different incentives and opportunities for labour migration by males and females. For example, for many years the only legal way for a non-professional SADC citizen to work in South Africa was in the mining industry. Yet, 99 percent of mine employees are male. There is no equivalent employment sector for women in which there is comparable ease of entry.

Table 13: SADC Gender Differences in Reasons for Migration		
Purpose of Most Recent Visit:	Males	Females
<i>Employment related</i>		
Work	33	7
Look for work	17	3
<i>Other work related</i>		
Business	3	3
Buy and sell goods	4	10
<i>Other reasons</i>		
Shopping	13	23
Visit family/friends	17	38
Holiday	3	3
Medical	2	8
Other	8	5
Worked in SA at some point	63	16
<i>Source: SAMP database</i>		

2.5.6 The feminization of poverty in many countries has prompted female household heads and other members to seek work through migration. This process coincides with a growing preference among employers for female workers. Farmers in border areas prefer to employ female migrants from neighbouring countries in the fields and canning factories.²⁷ There is also evidence that child labour is increasing, particularly from Mozambique. In addition, studies show that when a miner is retrenched, he tends to relinquish his career as a migrant and stay home and women household members are forced to migrate for work in other low-wage sectors.²⁸

2.6 Forced Migration

2.6.1 Forced migrants are not normally classified as labour migrants. However, the distinction is sometimes blurry in practice. In some SADC countries, for example, successful refugee claimants are allowed to work, making them de facto

labour migrants. Labour migrants sometimes attempt to use refugee protection systems to access other countries. Many have their claims rejected, but not all.

2.6.2 Between 1994 and 2004 around 150,000 refugee applications were received by the Southern African Department of Home Affairs (Table 14). In the same decade only 26,900 were granted refugee status. Angola and the DRC accounted for a quarter of refugee claims lodged in South Africa between 1994 and 2004. Since the end of the war in Angola, the number of applications has declined while DRC remains a major source (the third most significant source in 2006 with 5,582 applications).

2.6.3 The major change since 2000 has been the dramatic increase in the number of applications lodged by migrants from Zimbabwe and Malawi. In 2006, Zimbabwe was the leading country of refugee claimants in South Africa (18,973 or 35% of all applications) followed by Malawi (6,377 or 12%) and the DRC (5,582 or 11%). The only other SADC country whose migrants are making a significant number of claims is Tanzania. The unanswered question is how many of these claimants are genuine refugees and how many are labour migrants using the asylum and refugee system.

Table 14: Refugee Applications in South Africa by Country of Origin, 1994-2004		
Country	Applications	
	Number	%
Africa		
DRC*	24 808	15.7
Angola*	12 192	7.7
Somalia	14 998	9.5
Nigeria	12 219	7.7
Kenya	10 553	6.7
Zimbabwe*	6 857	4.3
Ethiopia	6 537	4.1
Tanzania*	4 821	3.1
Senegal	4 724	3.0
Burundi	4 570	2.9
Congo-Brazzaville	3 823	2.4
Malawi*	2 765	1.8
Rwanda	2 167	1.4
Ghana	2 114	1.3
Cameroon	2 011	1.3
Ivory Coast	1 006	0.6
Asia		
Pakistan	12 576	8.0
India	10 472	6.6
Bangladesh	4 173	2.6
China	2 846	1.8
Bulgaria	1 616	1.0
Others	10 098	6.4
Total	157 946	100
Source: DHA * = SADC Countries		

2.7 International Student Migration

2.7.1 Although not strictly a form of labour migration, international student migration is included in this review for several reasons. First, international student migration within the SADC has increased considerably since 1994.²⁹ Secondly, many students work while they are studying in other countries. Thirdly, student migration often turns into temporary or permanent labour migration as graduates

seek employment in the countries in which they studied. Fourthly, recent surveys show that many SADC students do not intend to remain in their home countries after graduation but to seek work elsewhere in the region or outside it.³⁰

2.7.2 South Africa is the primary destination for students in the region, although students from other SADC countries are also to be found in most other SADC countries. The SADC Education Protocol has made it much easier for students from other SADC countries to attend institutions of higher learning in other countries (Table 15). The total number of international students registered at South African universities rose from 12,500 in 1994 to nearly 53,000 in 2005. The majority (68%) are from SADC countries.

Table 15: International Students at South African Public Universities, 2005		
Region	Number	%
Southern Africa	35,725	68
Rest of Africa	7,586	14
Rest of the World	7,913	15
No Info	1,479	3
Totals	52,703	100
Source: SA Department of Education		

2.7.3 More research is needed on what international student migrants do after graduation. However, research has been conducted on what students who are educated in their own countries intend to do once they have graduated. SAMP's Potential Skills Base Survey, conducted in 2002, interviewed 10,000 final-year students at universities and colleges in 6 SADC countries about their migration intentions on graduation.³¹ As Table 16 shows, 45% of students have given moving to another country upon graduation a "great deal" of consideration (with Zimbabwean students the highest at 71% and Namibia the lowest at 29%). As many as 36% said they would probably leave within 6 months of graduation and 53% within 5 years of graduation (with Zimbabwean students again reporting the

highest propensity to leave). The majority of SADC students felt that they would move to South Africa, although South African and Zimbabwean students displayed a strong inclination to leave the region altogether. In other words, migration potential amongst new graduates is extremely high within Southern Africa.

Table 16: Likelihood of Emigration After Graduation (%)							
	South Africa	Namibia	Botswana	Zimbabwe	Swaziland	Lesotho	Ave.
Likelihood of moving							
Six months after graduation	36.5	28.5	21.0	56.2	31.3	37.1	35.5
Two years after graduation	48.2	47.4	39.8	70.0	55.3	55.1	52.1
Five years after graduation	47.6	58.1	49.8	59.5	58.7	50.3	53.2

2.8 Skilled Labour Migration and the Brain Drain

2.8.1 Official emigration statistics do not capture the full dimensions of the brain drain from SADC countries. Statistics South Africa, for example, recorded a total of 92,612 people (including 20,038 with professional qualifications) emigrating between 1989 and 2003 to five main destination countries. However, destination-country statistics of immigrant arrivals from South Africa show 80,831 professionals and 368,829 total immigrants arriving from South Africa during the same time period.³² Official statistics therefore undercounted the loss by around three-quarters.

2.8.2 The sector most impacted by the brain drain is health. A recent study by the Centre for Global Development shows that in 2000, nearly 30% (17,000 out of 57,000) of SADC-born physicians were resident outside their country of birth (Table 17).³³ The greatest number of locally-born physicians residing abroad were from

South Africa (7,363 or one in five), followed by Angola (2,102), Zimbabwe (1,602), Tanzania (1,356) and Mozambique (1,334). The numbers of Zimbabwean-born physicians outside the country has undoubtedly increased considerably since 2000.

2.8.3 The major destinations for SADC physicians include the United Kingdom (5,930), Portugal (3,347), the USA (2,799), Canada (2,100) and Australia (1,365). In a significant number of cases there are more locally born physicians residing outside their country than in it. They include Mozambique (75%), Angola (70%), Malawi (59%), Zambia (57%), Tanzania (52%) and Zimbabwe (51%).

Table 17: Number of SADC-Born Physicians Residing Abroad												
Destination Country												
Origin Country:	H O M E	A B O D	U K	U S A	F R A N C E	C A N A D A	A U S T R A L I A	P O R T U G A L	S P A I N	B E L G I U M	S W I T Z E R L A N D	% A B R O A D
Angola	881	2,102	16	0	5	25	0	2,006	14	5	31	70%
Botswana	530	68	28	10	0	0	3	0	0	1	26	11%
DRC	5,647	552	37	90	139	35	0	42	4	107	98	9%
Lesotho	114	57	8	0	0	0	0	0	0	0	49	33%
Malawi	200	293	191	40	0	0	10	2	1	1	48	59%
Mauritius	960	822	294	35	307	110	36	1	0	20	19	46%
Mozambique	435	1,334	16	20	0	10	3	1,218	4	2	61	75%
Namibia	466	382	37	15	0	30	9	0	0	0	291	45%
Seychelles	120	50	29	0	4	10	3	0	0	0	4	29%
South Africa	27,551	7,363	3,509	1,950	16	1,545	1,111	61	5	0	0	21%
Swaziland	133	53	4	4	0	0	0	1	0	0	44	28%
Tanzania	1,264	1,356	743	270	4	240	54	1	1	3	40	52%
Zambia	670	883	465	130	0	40	39	3	0	3	203	57%
Zimbabwe	1,530	1,602	553	235	0	55	97	12	1	6	643	51%
TOTAL	40,501	16,917	5,930	2,799	475	2,100	1,365	3,347	30	148	1,557	29%

Source: Clemens "Medical Leave."

2.8.4 Approximately 10% of SADC-born nurses were outside their country of birth in 2000 (Table 18). The greatest number of nurses abroad were from South Africa (4,844), followed by Mauritius (4,531), Zimbabwe (3,723), the DRC (2,288) and Angola (1,841). On a proportional basis, the countries most affected are Mauritius (63% of nurses abroad), the Seychelles (29%), Zimbabwe (24%), Mozambique (19%) and Malawi (17%). In Zimbabwe, for example, Chikanda recently concluded that “most of the country’s public health systems are grossly understaffed and the skeletal staff remaining is reeling under heavy workloads.”³⁴

Table 18: Number of SADC-Born Nurses Residing Abroad												
Destination Country												
Origin Country:	H O M E	A B R O A D	U K	U S A	F R A N C E	C A N A D A	A U S T R A L I A	P O R T U G A L	S P A I N	B E L G I U M	S W I T Z E R L A N D	% A B R O A D
Angola	13,135	1,841	22	135	12	10	4	1,639	8	11	0	12%
Botswana	3,556	80	47	28	0	0	0	0	0	0	5	2%
DRC	16,969	2,288	44	207	206	50	0	9	4	1,761	7	12%
Lesotho	1,266	36	5	6	0	0	0	0	0	0	25	3%
Malawi	1,871	377	171	171	0	10	14	0	0	0	11	17%
Mauritius	2,629	4,531	4,042	107	86	75	195	1	0	22	3	63%
Mozambique	3,664	853	12	64	0	10	0	748	2	6	11	19%
Namibia	2,654	152	18	6	0	0	4	1	0	6	118	5%
Seychelles	422	175	80	28	8	30	29	0	0	0	0	29%
South Africa	90,986	4,844	2,884	877	20	275	955	58	3	33	0	5%
Swaziland	3,345	96	21	36	0	10	4	0	0	0	25	3%
Tanzania	26,023	953	446	228	0	240	32	2	1	0	4	4%
Zambia	10,987	1,110	664	299	0	25	68	2	0	0	52	9%
Zimbabwe	11,640	3,723	2,834	440	0	35	219	14	3	0	178	24%
TOTAL	189,147	21,059	11,290	2,632	332	770	1,524	2,474	21	1,839	439	10%

Source: Clemens, “Medical Leave.”

2.8.5 South Africa stands to benefit greatly from the exodus of health professionals from other African countries. In 2000, South Africa had 1,557 physicians and 439 nurses from other SADC countries. To date, the African brain drain to South Africa has been slowed by South Africa's post-1994 immigration policy which, until recently, did not favour the importation of skills.³⁵ Although that has now changed, the South African government maintains that it will not do what it criticizes developed countries for doing i.e. poaching health professionals from African countries.

2.9 Employment Sectors of Labour Migrants

2.9.1 In 2004, SAMP conducted a five-nation survey of migration, poverty and remittances (Migration and Remittances survey or MARS).³⁶ MARS interviewed a nationally-representative sample of migrant-sending households in Botswana, Lesotho, Mozambique, Swaziland and Zimbabwe. The survey collected information on over 30,000 individual migrants, including occupational data. A complete occupational breakdown of the sample is provided by country in Table 19.

Main Occupation	Botswana		Lesotho		Mozambique		Swaziland		Zimbabwe		Total	
	N	%	N	%	N	%	N	%	N	%	N	%
Farmer	7	1.1	3	.3	1	.1	5	.4	6	.7	22	.5
Agricultural worker (paid)	1	.2	21	2.0	22	2.2	6	.5	10	1.2	60	1.3
Agricultural worker (unpaid)	0	.0	0	.0	0	.0	0	.0	1	.1	1	.0
Service worker	7	1.1	12	1.1	12	1.2	28	2.5	85	9.9	144	3.1
Domestic worker	11	1.7	97	9.0	9	.9	18	1.6	16	1.9	151	3.2
Managerial office worker	2	.3	2	.2	0	.0	9	.8	30	3.5	43	.9
Office worker	7	1.1	3	.3	4	.4	19	1.7	39	4.6	72	1.5
Foreman	4	.6	1	.1	5	.5	8	.7	4	.5	22	.5
Mine worker	552	87.2	736	68.4	301	30.5	705	62.3	26	3.0	2320	49.5

Skilled manual worker	5	.8	67	6.2	79	8.0	69	6.1	42	4.9	262	5.6
Unskilled manual worker	3	.5	16	1.5	94	9.5	88	7.8	18	2.1	219	4.7
Informal sector producer	1	.2	30	2.8	8	.8	5	.4	41	4.8	85	1.8
Trader/ hawker/ vendor	0	.0	21	2.0	59	6.0	8	.7	126	14.7	214	4.6
Security personnel	0	.0	2	.2	5	.5	22	1.9	1	.1	30	.6
Police/ Military	1	.2	0	.0	1	.1	2	.2	3	.4	7	.1
Businessman/ woman (self-employed)	4	.6	13	1.2	39	4.0	12	1.1	36	4.2	104	2.2
Employer/ Manager	0	.0	0	.0	0	.0	4	.4	11	1.3	15	.3
Professional worker	10	1.6	31	2.9	17	1.7	40	3.5	126	14.7	224	4.8
Teacher	0	.0	1	.1	1	.1	9	.8	60	7.0	71	1.5
Health worker	4	.6	3	.3	3	.3	6	.5	91	10.6	107	2.3
Pensioner	1	.2	1	.1	0	.0	0	.0	0	.0	2	.0
Scholar/ Student	0	.0	0	.0	0	.0	1	.1	11	1.3	12	.3
House work (unpaid)	0	.0	0	.0	1	.1	0	.0	0	.0	1	.0
Unemployed/ Job seeker	1	.2	0	.0	0	.0	0	.0	0	.0	1	.0
Other	5	.8	0	.0	167	16.9	49	4.3	25	2.9	246	5.3
Shepherd	0	.0	5	.5	0	.0	0	.0	0	.0	5	.1
Don't know	7	1.1	11	1.0	159	16.1	19	1.7	49	5.7	245	5.2
Total	633	100.0	1076	100.0	987	100.0	1132	100.0	857	100.0	4685	100.0

2.9.2 The occupational data shows the following:

- Mining remains the largest employer of labour migrants from these countries (49.5%) followed by skilled manual workers (5.6%), professionals (4.8%) and unskilled manual labourers (4.7%).
- The informalization of migrant labour is evident in that 6.4% of migrants worked in the informal sector and another 2.2% said they were self-employed business people.

- The proportion of commercial farmworkers is relatively low (1.8%).
- Other sectors in which over 1% of the migrants are employed include domestic work (3.2%), the service sector (3.1%), the health sector (2.3%), teaching (1.5%) and clerical work (1.5%).
- Botswana, Lesotho Swaziland and Mozambique (at over 50%) in each case are clearly dominated by mine migration (to South Africa). In the Zimbabwean case, mining (at 3%) was relatively insignificant.
- Very few labour migrants appear to leave Botswana for work other than in mining and these numbers are declining.
- In the case of Lesotho, while 68% of migrants are miners, retrenchments have diversified the sources of employment (as well as encouraging more women to migrate). As many as 9% are domestic workers and 6% are skilled manual workers.
- Mozambican labour migrants are employed in a large array of unskilled and semi-skilled professions. After mining (at 30.5%) comes unskilled manual work (9%), skilled manual work (8%) and trading and hawking (6%).
- Zimbabwean labour migrants are employed in an even greater variety of occupations. The single most significant category is informal work and self-employment (at 23.7%), followed by professionals (14.7%), health workers (10.6%), service workers (9.9%), teachers (7.0%), skilled manual workers (4.9%) and office workers (4.6%).

2.9.3 Two things set the Zimbabwean migrant profile apart from that of the other countries: (a) only 30% of the migrants work in South Africa compared with over 90% for all the other countries and (b) Zimbabwean migration is dominated by skilled and professional people whereas the migrants from the other countries are mainly semi-skilled or manual workers. Zimbabwean migration within SADC is dominated by people working in the informal sector and service sector.

3.0 Major Issues Pertaining to Labour Migration in Southern Africa

3.1 Data Deficiencies

3.1.1 Our understanding of the dynamics and trends of labour migration within, to and from the Southern African region have improved but there are still many gaps. Official statistics (which reveal migration patterns and trends) need to be triangulated with household surveys (which provide a greater understanding of migration causes and dynamics) and private sector data (which provides employment information).

3.1.2 Official migration statistics are of relatively good quality in some SADC countries (e.g. Botswana and South Africa) but not in others. However, even in the South African case, there are serious undercounting problems in relation to the brain drain. Not only are there large data gaps but where the data does exist, it is not often accessible on a regional scale.

3.1.3 A recent report for the Migration Dialogue for Southern Africa (MIDSA) investigated the migration data systems for all SADC states and recommended harmonization of migration data collection.³⁷ Information was collected from 11 SADC states on four key issues: (a) Collection and storage of data; (b) Processing and analysis of data; (c) Accessibility of data/availability of statistics; and (d) Categories of data.

3.1.3 The study found that there is significant overlap between the systems currently in place in the various SADC member states and there is also substantial interest in developing some form of shared or at least compatible system. The key to data harmonisation is to ensure that all member states collect the same information about persons travelling through their ports of entry by designing and implementing SADC-wide arrivals and departure cards that are used by all member

states. This means that all states will collect the exact same information about travellers passing through their ports of entry, which then makes it easier to compare data between countries.

3.1.5 Most countries already have designated storage facilities for entry and exit cards that are collected. However, there are inconsistencies in terms of whether the designated storage facility is just an empty room in an office building, or whether it is part of a formal archival system. There are also inconsistencies in terms of the length of time these cards are stored before being destroyed.

3.1.6 Most countries do not have the resources to migrate from a manual system to an electronic system and, to complicate matters further, those countries that have invested in electronic systems are not using the same system. An important first step would be for member states to initiate a consultation to discuss the possibilities and modalities of implementing a uniform electronic data collection and storage system.

3.1.7 The ability of member states to process and analyse migration-related data is very uneven. Most member states do this kind of processing at a very basic level by producing internal reports that reflect total number of travellers in particular categories over a set period of time. Other member states are able to produce very substantial statistical information which is then analysed and used for purposes of planning and/or reporting.

3.1.8 For many countries, data collection is largely a matter of routine and the extent to which they process and analyse the data collected for policy making is limited. A starting point is to collectively clarify the purpose and objectives of data processing and analysis and then to think about appropriate systems to put in place to achieve these.

3.1.9 There are no uniform systems in place in the region that guide or determine the extent to which migration-related data is publicly available.. The majority of member states do not produce comprehensive publicly-available data of the level of detail required to understand labour migration patterns and trends.

3.1.10 The MIDSA report argues that harmonisation is much more feasible to achieve than is commonly believed. However, the argument must be considered that harmonisation should not be pursued simply because it is possible to do so. Instead, SADC states need to reflect on the purpose of harmonization and critically think about the systems to put in place to achieve this objective.

3.1.11 As regards complementary research on labour migration, SAMP has undertaken the most systematic sectoral research program over the last decade on many aspects of labour migration.³⁸ SAMP has specialized in producing policy-relevant research and disseminating it at the national scale. However, not all SADC countries have been involved in SAMP and the network needs expanding throughout the region. Research also needs to be more closely attuned to the information needs of governments, labour and business, particularly when it comes to the issue of good labour migration management.

3.2 The Rights of Migrant Workers

3.2.1 Labour migrants in Southern Africa have never enjoyed the same basic rights as local workers. Indeed, many still work in exploitative conditions that do not meet minimum national labour standards or the international conventions to which countries are party. Capacity for enforcement is weak in many countries and unions have traditionally had problems organizing migrant workers. This is certainly not a problem confined to Southern Africa.

3.2.2 A survey by SAMP showed that most citizens in several SADC countries do not believe that labour migrants should enjoy the same rights and legal protections as domestic workers.³⁹ However, they do believe that migrants should enjoy more rights than refugees. At the same time, many are probably unaware of the actually working conditions of migrants, even though they do receive periodic press coverage.

3.2.3 A recent study of conditions on Free State farms, for example, concluded: “Almost without exception, the farmworkers interviewed testified that they endure exploitative employment conditions, including wages below the Minimum Living Standard, unhygienic and crowded living conditions, and abusive treatment from farmers and supervisors. The mutual mistrust exhibited by Basotho farm labourers and Free State farmers undermines productive labour relations; furthermore, the farmers’ determination to deny their labour force basic rights and freedom of movement often results in abusive treatment.”⁴⁰ It would be incorrect to infer that all employers treat their workers in this manner but other studies have also shown the poor working conditions and lack of protection enjoyed by migrants in other sectors where organization has been difficult or slow – domestic service, commercial agriculture and construction.

3.2.4 Both the AU and the UN have called on all countries to ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. This important Convention, which lays down a basic framework of rights and protections for migrant workers, has now been ratified by 37 countries. None of these are developed countries and only two (Lesotho and Seychelles) are in the SADC.

3.2.5 A study by SAMP and UNESCO is examining the obstacles and challenges to ratification in SADC. The first study in this project focused on South Africa.⁴¹ The South Africa report examines the reasons why some countries are reluctant to ratify and then looks specifically at the position of SA stakeholders, based on extensive interviews with key informants in government, the private sector and the labour unions. The report found that the applicable labour and related policies, laws and regulations of post-apartheid South Africa are not actually inconsistent with the provisions of the Convention. If anything, there is a close correlation between what the Convention tries to achieve and what South African law provides for.

3.2.6 All key informants agreed that South Africa's labour legislation applies equally to migrant workers and to nationals, and that no distinction or denial of rights can be instituted on the basis of nationality or citizenship. Most also thought a distinction should be made between documented and undocumented migrants. But some, particularly the the National Union of Mineworkers (NUM) and the Congress of South African Trade Unions (COSATU), were adamant that once a person had been employed, they should be entitled to the full protection of South Africa's labour legislation, irrespective of their legal status. As one noted - 'a worker, is a worker, is a worker.' In this respect, it is not just South Africa's labour law that is applicable, but also the Constitution, which outlaws discrimination on the basis of nationality or origin.

3.2.7 One of the biggest obstacles to ratification of the Convention is its limited visibility. That could well prove true of other SADC countries as well. The Convention has never been formally tabled or discussed and familiarity with it is limited to a few individuals in government who may have had the opportunity to participate in international forums where the Convention had been discussed. COSATU suggested that as a first step towards ratification, a broad-based awareness programme or campaign could be conducted to explain the origin, purpose and contents of the Convention.

3.2.8 Another way to promote ratification would be to position the Convention in the context of the Southern African (SADC) sub-regional agenda. Considering the Convention's emphasis on the entire process of migration and its provisions on collaboration, it would be extremely difficult for a country in Southern Africa to effectively implement the Convention on its own. Ratification on a regional scale would serve as a mechanism through which Southern African countries could hold each other accountable to the obligations of the Convention. Existing agreements such as the SADC Protocol on the Facilitation of Movement of Persons and the Social Charter on the Fundamental Rights of Workers could serve as a foundation for this cooperation and enforcement.

3.3 Managing Irregular Labour Migration

3.3.1 Irregular migration is seen by many governments as a significant and growing problem in SADC. Not all labour migrants are in irregular status but increasing numbers are. This is leading to significant problems of migration management in many SADC destination countries. General problems caused by uncontrolled irregular labour migration include:

- Undermining of respect for national sovereignty, the integrity of borders, legal channels of border crossing and the right of states to determine who will enter their territory and not.
- Lack of respect for the rule of law.
- Trafficking and human smuggling across borders leads to significant abuse and exploitation of desperate migrants.
- Widespread corruption at borders and amongst enforcement agents. Migrants do “deals” with corrupt officials and police to obtain false documentation or pay bribes in order to avoid arrest and deportation.⁴²
- Exploitation by employers of vulnerable migrants who are afraid of reporting violations of their rights to the authorities.
- Undermining labour legislation as irregular migrants are used to undercut local workers and collective agreements
- The high cost of enforcement including arrest, detention and (largely ineffectual) deportation.
- Growing hostility and resentment towards migrants leading to violence against migrants, including those (such as refugees) who are legally in a country

3.3.2 A number of key questions arise in the debate about how to reduce irregular migration and its negative impacts:

- Should irregular labour migrants enjoy all the rights and privileges of other workers or does their questionable legal status disqualify them from such access?
- How effective are current systems of enforcement? Does the deportation of labour migrants (particularly to neighbouring SADC countries) actually have the desired effect or is it counter-productive?
- Why does enforcement generally focus on migrants and not their employers? Would employer sanctions be a better option? Or, as some maintain, would it be better to concentrate on reducing the incentive to employ irregular migrants by enforcing labour law and standards?
- How can states deal with ground-level corruption amongst their own officials and police? How can states deal more effectively with trafficking and smuggling?
- How can states discourage the abuse of refugee protection systems by irregular migrants and avoid clogging up refugee determination processes?
- Should states offer “amnesties” and/or legalization for irregular migrants? South Africa offered three such amnesties in the 1990s which had a positive impact.

3.3.3 This set of discussion points questions are largely reactive strategies to existing irregular migration. Several proactive policy options have also been suggested. Three in particular need to be discussed:

- Improved Legal Access to Labour Markets. SAMP research shows that the vast majority of migrants would use legal channels of access and employment if these were available to them.⁴³ However, few states in SADC, with their own problems of domestic unemployment, make it easy for labour migrants from other countries to come and work legally. Even the new South African Immigration Act, with its emphasis on recruiting high-level skills from abroad, does not make it easy for an employer with the means to hire an individual non-South African should they wish to do so. Only the gold mining industry (and

some commercial farmers) have ever enjoyed that privilege. The argument is that if policies were in place that made legal migration for employment easier, then irregular migration, and all its negative consequences, would be less of a problem.

- Temporary work programmes. The ILO has provided a guide to global “best practice” in the design and implementation of programmes of temporary work for employment.⁴⁴ SADC states might consider the design and implementation of such schemes.⁴⁵
- Greater freedom of movement between states. Since over 90% of irregular migrants within SADC come from within the region, allowing greater legal freedom of movement to seek work within the Community might immediately reduce the “problem” of irregular migration to manageable proportions by removing the vast majority of irregular migrants. Enforcement resources could then be focused on the smaller number of migrants from outside SADC. This possibility is part of the debate over the Facilitation of Movement Protocol (see below).

3.3.4 Xenophobic rhetoric and actions targeted at labour migrants from other countries are a significant problem within the SADC, as documented in several recent studies.⁴⁶ Intolerance is greatest in those countries that are the major destination countries for migrants (Botswana, Namibia and South Africa).⁴⁷ While much of this discourse is rooted in local fears about job competition and competition for scarce resources, xenophobia manifests itself in a whole set of myths about other Africans and in criminal actions against migrants (e.g. the recent looting and burning of Somali-owned stores and the driving out of Zimbabweans from some South African communities). Political ownership of the problem and public and media education are a clear necessity since the media is generally fanning the flames of xenophobia.⁴⁸

3.4 Remediating the Brain Drain

3.4.1 One of the major challenges facing all of the states of SADC is the renewed brain drain of scarce skills from the region. Solimano has developed a classification of six different brands of talent according to occupational characteristics.⁴⁹

- Technical talent in terms of people who are experts in information technology, telecommunications, engineering or computer science. This particular group of 'knowledge people' represent a human capital resource base for current production-related activities.
- Scientists and academics who constitute an important knowledge source for countries.
- Entrepreneurs and managers, an important group seen as often overlooked in discussions of talent mobility. Migrant entrepreneurs and managers are significant agents for wealth creation.
- Qualified professionals, such as economists, engineers, health or environmental specialists, who are recruited to assist multilateral and regional development banks, international organizations and development agencies at global, regional and national scales, constituting an 'international public sector.'
- Talented cultural workers, including musicians, artists and designers, who represent an important resource for the development of creative and cultural industries.
- Health professionals whose international circulation represents a specific form of talent outflow that is of considerable concern to developing countries.

3.4.2 The countries of the SADC are impacted by a brain drain in each of these six categories. However, the issue of health professional migration is one which is clearly of most concern to most SADC countries at the present time. Some attempts have been made in the health sector to minimize the brain drain of health workers and its effects by addressing push and pull factors. On the push side, SADC governments have adopted a number of financial and non-financial incentives to try

to get professionals to stay. These include improved training and career opportunities; social needs support; improved working conditions; better management of human resources; greater health and ART access for the public; and salary top-ups and allowances. Table 20 shows that all SADC countries are trying some of these measures. Table 21 provides a more detailed inventory of non-financial and financial policies and strategies by country. The problem is that many push factors are non-sector specific e.g. personal and family safety and educational opportunities for children.

Table 20: Remedies for the Health Brain Drain						
	Training And career path Measures	Social needs support	Working conditions	HR and personnel management Systems	Health and ART Access	Financial: Salary top-ups and allowances
Angola			X	X		X
Botswana	X		X	X	X	X
DRC	X			X		X
Lesotho	X	X	X	X		X
Malawi	X	X	X	X	X	X
Mauritius	X		X	X		X
Mozambique	X	X	X	X	X	X
Namibia	X			X		X
South Africa	X		X	X	X	X
Swaziland	X	X	X	X	X	X
Tanzania	X	X		X		X
Zambia	X	X	X	X	X	X
Zimbabwe	X	X	X	X		X

Source: Y. Dambisya, "A Review of Non-Financial Incentives for Health Worker Retention in East and Southern Africa" Equinet Discussion Paper No. 44, Harare, 2007.

Table 21: Financial and Non-Financial Incentives for Health Professionals		
Country	Non-financial incentives	Financial incentives
Angola	Functional Health Information System; expansion and upgrading of facilities.	Under-the table payments; overtime pay; exposure; evening and night subsidies.
Botswana	Performance-based incentives; HRH planning with HMIS; upgrading of facilities; higher training opportunities; HIV/AIDS workplace programme.	Reasonable salary; overtime pay (higher rates for nurses than doctors).

DRC	Not available. <i>Planned:</i> Continuing professional development; monitoring and evaluation; supervision; improved communication.	Dual employment; under-the table payments; timely pay; performance-based bonuses; increased overtime pay.
Lesotho	Accelerated grade policy; continuing education; higher promotion prospects for rural HCW; bonding. <i>Proposed:</i> Improvement in facilities and equipment; IT support; staff housing; staff security; transport; support centres; sabbatical leave; formal job regarding; improved career management; better posting policy; streamlined HRM policies and procedures; HRIS.	Accelerated increment for rural workers; overtime and night duty allowances; mountain allowance; housing subsidy; top-up pay for CHAL hospital workers.
Malawi	HIV/AIDS policies in the workplace; training opportunities; improved workplace conditions; staff rotation; better HRM and supplies through SWAP. CHAM: Transport for visits and shopping; free housing; free medical care (private rooms); bonding for training.	Salary top-ups; professional allowance; retirement packages (earlier for CHAM; more generous for government); housing allowance; car allowance; subsidised utilities; access to loans; dual practice; CHAM- assistance with school fees; medical expenses; housing.
Mauritius	Improved workplace; CPD; HRIS; decentralisation of operational management.	Reasonable salary; disturbance allowance for Rodrigues and outer islands; higher pay from savings.
Mozambique	50% bonus when calculating length of service for rural staff; use of service cars; free housing; free food; HRM system; HGO initiatives; paid and free ART; improved communication. <i>Proposed:</i> bicycles; motorcycles; tea/coffee; greater staff rotation; TV and internet access; solar panels where there is no electricity; performance appraisal.	Dual employment; under -the table payments; medical assistance fund; salary top-ups; housing and fuel subsidies; per diems; extra-hours contracts.
Namibia	Job security; career paths and training opportunities; performance appraisal.	Reasonable salary; end-of -service benefits; housing; car ownership schemes; medical aid.
South Africa	Improved working conditions; infrastructure; performance appraisal system; career	Salary increase; scarce skills and rural allowance; limited dual practice (RWOPS);

	<p>progression and CPD; community service; bonding; certificate of need; recreational facilities; better HR planning and management; medical care (GEMS).</p> <p><i>Private Sector:</i> Allows short postings abroad.</p>	<p>sponsorship for education; affordable medical insurance. Proposed: New remuneration structure for HCW.</p>
Swaziland	<p>Proposed by government: Better accommodation; childcare facilities; provision of ART; AIDS care.</p> <p><i>Private Sector:</i> Lower workload; many training opportunities; supervision; good facilities.</p>	<p>60% pay rise for HCW; car and housing allowances.</p>
Tanzania	<p>Open performance appraisal; HRM; HRIS; housing; performance-based contract; Mkapa fellowships offers skills enhancement and alumni association membership.</p>	<p>Differential salary structure for HCW compared to other civil servants; dual practice; SASE; Mkapa Fellowships offer a stipend and end-of-service bonus.</p> <p><i>Proposed:</i> Rural incentives; extend SASE to other HCW.</p>
Zambia	<p>HIV/AIDS treatment for HCW; better infrastructure; training opportunities; performance-based contract; staff transport; accommodation; electrification; support for nurse tutor training; trophy and plaque awards (pilot study).</p>	<p>Rural doctors: good salary; housing subsidy; hardship allowance; children's fees; end-of-contract bonus; access to loans. Salary top-ups- medical school staff; bonus for best performing and best improved health centre in one district (pilot study).</p> <p><i>Planned:</i> Extend Incentives rural incentives to other HCW.</p>
Zimbabwe	<p>Bonding; training opportunities; performance management system; recruit more HCW to reduce workload; improvements in housing and working environment.</p>	<p>Salary reviews for all health professionals; Call allowances- better rates in rural than urban areas; dual practice; part-time work in non-health sector.</p>
<p>Source: Dambisya, "Review of Non-Financial Incentives"</p>		

3.4.4 However, the pull factors are extremely strong and health workers remain very dissatisfied with existing conditions. Multi-lateral codes such as the 2003 *Commonwealth Code of Practice on the International Recruitment of Health Workers* signed by all Commonwealth countries do not appear to be having any significant impact.

3.4.5 In terms of health professionals there has been an important and welcome policy shift away from the early reactive *ad hoc* policy responses to the development of more comprehensive strategic responses which seek to manage the mobility of health professionals. The elements of this strategy include:

- Improving the existing lack of knowledge and data to monitor flows of health professionals into and out of SADC demands immediate attention. Improved monitoring systems need to be established to track the flows of SADC health professionals overseas and of foreign health professionals entering the region as well as intra-regional flows.
- Bilateral agreements with individual countries involving codes of practice for recruitment and treatment of health workers, exchange programs for training and development and the provision of health professionals from specific countries. South Africa now has such an agreement with the UK for example. These agreements would allow SADC countries to fill some of the gaps in the health service with doctors from countries which have an excess. However, most bilateral agreements to date only appear to apply to doctors and not other areas of health work which have been affected by emigration (e.g., nursing).
- A SADC-wide policy on the movement of health professionals within the region to discourage movement from the poorest and neediest countries to those which are relatively well-endowed.
- Skills import through return migration programmes and immigration policies that would facilitate import of foreign medical skills on a temporary basis from developed countries and from Asia.

4.0 Policies and Frameworks

The ILO has argued that “Current migration patterns, which mostly reflect individual or family initiatives, are in marked contrast to the 1950s and 1960s, when a significant proportion of migration took place under the aegis of bilateral agreements between governments. Today, most labour migration policies are

unilateral, with destination countries announcing programmes to admit migrants without seeking to conclude an accord with sending nations” (ILO 2004: 4) In terms of migration management, the ILO maintains that there was a shift in the later half of the twentieth century from bilateralism to unilateralism in migration management. At the same time, managing migration is seen as “inherently a multilateral issue.” The majority of cross-border movements still occur within regional blocs. As a result, there is considerable value to “regional accords and processes for managing migration.”

This section of the paper examines the main features of labour migration strategies and policies and legislative and regulatory frameworks in countries covered by the Southern African Development Community (SADC). Southern Africa represents an interesting case study in the competing pressures for unilateralism, bilateralism and multi-lateralism in the search for workable labour migration policies and strategies and legislative and regulatory frameworks.

4.1 Unilateralism and Southern African Migration Legislation⁵⁰

4.1.1 All SADC countries have their own national immigration/migration legislation and regulations. This legislation is the pre-eminent determinant of terms and conditions of access of labour migrants (either as temporary migrants or permanent residents) to national labour markets. The majority of the SADC countries’ laws on immigration use an integrated system to grant permission for temporary employment, where the regulation of a person’s right to enter and reside in the country is combined with the regulation of the right to work. Sometimes, persons who are granted a temporary residence permit for a purpose other than employment may also be granted permission to work. Certainly, many persons who are granted a temporary resident permit for a purpose other than employment do work without authorization.

4.1.2 At least five SADC countries have separate legislation granting employment permits: Botswana, the DRC, Lesotho, Mauritius, and Mozambique. In Botswana, the Employment of Non-Citizens Act 11 of 1981 governs employment permits. In the DRC, separate laws govern general immigration and specific work permits. In Lesotho, the Department of Labour administers work permits in terms of its legislation. In Mauritius, the Non-Citizens Employment Restriction Act governs employment permits. In Mozambique, Law 25/99 and 26/99 govern work visas.

4.1.3 Even where there is no separate legislation, there may be involvement by a separate institution in decisions regarding employment permits. In Botswana, the Ministry of Home Affairs and Labour is a combined ministry. Nonetheless, a separate internal section of this Ministry deals with the administration of employment permits. In Swaziland, employment permits are decided upon with the help of the Ministry of Enterprise and Employment. Likewise, the Department of Labour is formally and specifically involved in several aspects of the issuance of work permits in terms of the Immigration Act (South Africa).

4.1.4 Few multilateral international instruments appear to be incorporated or used to any great extent in the migration legislation of the countries of SADC.⁵¹ This is in contrast to the refugee law regimes, where international instruments are depended upon heavily. Table 22 describes the substantive policies used in the granting of temporary employment permits in the SADC countries. This table uses five factors that are commonly part of domestic labour market policy to regulate the employment of foreign workers: (i) the effect on domestic employment; (ii) the condition of pre-entry engagement for employment; (iii) the limitation of a permit to a specific employer; (iv) the condition that the worker be paid a prevailing wage; and (v) the condition that the employer undertake specific training arrangements. In addition, some countries have the authority to limit the geographic area of the employment permit (e.g. Lesotho, Malawi).

Table 22: Temporary Employment Conditions in SADC	
	Employment Permit Factors
Botswana	Effect on domestic employment; Employer training arrangements;
Lesotho	Effect on social and economic interests of residents in area where alien is to sojourn; Specific employment sectors approved by Minister
Malawi	Limitation to geographical area; limitation to specific occupation; limitation to specific employer; Policy on Employment Permit Guide (for time posts): factors are qualifications as compared with advert, experience, relative importance of post in organization, availability of local expertise, period of stay of expatriate if renewed, local advert process, and remuneration package.
Mauritius	Specific employer limitation; External application; Limit of three years for skilled workers;
Mozambique	Laws 25/99 and Laws 26/99
Namibia	Sufficient qualifications; Insufficient number of domestic workers; Application to Immigrant Selection Board
South Africa	Quota work permit (s 19(1)): category as prescribed, quota available; General work permit (s 19(2)): diligent search for domestic workers, prevailing wage, notification on change of position; Intra-company transfer work permit (s 19(5)): financial guarantees of deportation costs, certified need for foreigner, specific employer limitation Corporate work permit.
Swaziland	Specific employer limitation with exceptions for sectors including trade, business, and professions; Specification of steps to engage domestic workers; Requirement for effective training programmes
Tanzania	Specific employer limitation (s 20): USD 500 Specific sectors including trade, business, and professions (s 19): USD 1500 (large capital investors), USD 500 (small cap), or USD 50 (peasants)
Zambia	Professional qualification or financial resources; Insufficient number of domestic workers; Benefit to inhabitants generally
Zimbabwe	Specific employer and employment limitation
Source: Klaaren and Rutinwa "Harmonization."	

4.1.5 Most SADC countries explicitly take into account the effect of expatriate employment on domestic workers (Botswana, Lesotho, Malawi, Namibia, South Africa, Swaziland, and Zambia). This may be done either directly through the consideration of domestic employment as a factor in the decision to grant the work

permit or indirectly through a requirement of diligent search for (South Africa) or advertisement for (Malawi) local workers. A number of countries specify that training arrangements for local workers are either positive factors or requirements (Botswana, Swaziland). Other countries may consider this factor in their general discretion. A requirement that a prevailing wage be paid is a factor only in South Africa. A few countries of the SADC region have a specific employer limitation as part of their employment permit (Malawi, Swaziland, Zimbabwe). Others require notification for a change in employment (South Africa).

4.1.6 As the major destination country for migrant workers in SADC, the new South African immigration legislation is of some interest as an example of renewed unilateralism. The new Immigration Act of 2002 (Act 13) was amended in 2004 by the Immigration Amendment Act (IAA) (Act 19). The Act conceives of most labour migrants, including skilled migrants, as temporary residents or “sojourners.” A number of different permit categories have been designed to facilitate the entry of “sojourners.” These include (a) four different categories of work permit (quota, general, exceptional skills and intra-company transfer), (b) corporate permits; (c) business permits; (d) study and exchange permits, which allow limited work activity under highly restrictive conditions; and (e) treaty permits. Other entry permits include (f) visitor’s permits; (g) cross-border passes; and (h) relatives’ permits. These explicitly prohibit work, although (f) and (g) do allow the conduct of business, including trade.

4.1.7 In the case of quota work permits, categories and quotas are to be “determined by the Minister at least annually ... after consultations with the Ministers of Labour and Trade and Industry” (Section 19(1)). The quotas (as presented on 24 February 2003) related to experience and training rather than sectors of the economy. They were extremely broad in scope. The highest quota, of 90,000 permits, is provided to two categories: (a) where employers “justifiably” require a post-graduate degree and at least 5 years of professional experience; and (b) where employers “justifiably” require at least 5 years of experience showing

skills acquired through training. A second quota of 75,000 permits is provided (a) where employers require a graduate degree and 5 years of professional experience; and (b) where employers require at least 5 years of experience showing entrepreneurship, craftsmanship or management skills. In between is a sliding scale of qualifications, skills and experience level. There are ten categories in all, most allocated a quota of 70,000 permits, giving a total of 740,000 quota permits per annum. None of the categories allow residence rights for families of permit-holders.

4.1.8 Since 2003, there has been a dramatic revision of the Quota permit system and reduction in the number of Quota permits available. The Quota Schedule published by the Department of Home Affairs in 2007 allows for a total of only 30,200 permits which are tied to specified sectors and professions. Each quota category requires the person to be “registered with the relevant professional body where applicable” and to have “at least 5 years relevant experience.” The three largest sectors cited are: “Building and engineering technicians” (5,250); “Biomedical engineers and technicians” (5,000) and “Agricultural and science technicians” (5,000).

4.1.9 General work permits (Section 19(2)) may be issued to migrants who do not fall within the ambit of the quota permit system. Here the onus falls on the employer to demonstrate that they have first diligently searched for a qualified South African candidate and to give an undertaking that the terms and conditions of employment are not “inferior to those prevailing in the relevant market segment for citizens, taking into account applicable collective bargaining agreements and other applicable standards.” The general work permit appears to be a catch-all for individuals who do not fall under the other categories. Holders of general work permits are expected to provide proof within six months of issue that they are still employed and of the conditions of their employment.

4.1.10 Exceptional skills work permits (Section 19 (4)) are issued to individuals of extraordinary (but as yet undefined) skills and qualifications. This is the only

category of work permit to include residence rights for the permit-holders immediate family. There is no indication as yet whether family members will be permitted to work. In any event, this category is unlikely to attract a large number of applicants.

4.1.11 Intra-company transfer permits (Section 19 (5)) initially permitted a company to bring a foreign employee into the South African branch plant for a period of up to two years, but this is in the process of being amended in a recent Immigration Amendment Bill, which will extend this period to four years. No rights of family residence are provided for.

4.1.12 Corporate permits “may be issued to a corporate applicant who may conduct work for such corporate applicant.” This is effectively a “block” or “group” permit allocated to an employer rather than individual employees. In granting such a permit, Home Affairs must first consult with Labour and Trade and Industry to determine the number of foreign employees who can be hired under the permit. Management of the permit, including allocation of individual permits, becomes the responsibility of the corporation.

4.1.13 Visitors’ permits and cross-border passes (for people from neighbouring countries with a common border who do not hold passports) are issued for short term stays of up to three months. Purpose of visit does not have to be specified but work is specifically precluded. Business activity is permitted, however, which means that cross-border trading can be carried out legally under these permits.

4.1.14 In summary, three points need to be made about South Africa’s new framework for admission of migrant workers:

- (a) the new amended Act, which proposes to use migration as a tool of economic growth, represents a significant break from the control-oriented mindset of the past;

(b) the Act facilitates temporary entry or varying periods of time but does not encourage permanent immigration;

(c) the Act does not encourage family members to accompany labour migrants to South Africa.

4.1.15 The new framework also, in effect, asserts the right of South Africa to craft its own immigration policy in the national interest. The primacy of unilateralism as a principle of migration management has therefore been established and entrenched by the Immigration Act. In that sense, South Africa could be seen as simply another example to confirm the ILO's observation about the growing importance of unilateralism in national immigration policy.

4.1.16 Since so much SADC migration is intra-regional, it is important to also be aware of exit procedures and regulations. There generally relatively light regulation of departures from SADC countries of both citizens and non-citizens. In general, the kind of action that is required is merely the production of a valid passport or travel document, filling in a report of departure, and affecting the departure through a mandated port of entry. In a couple of countries, the departure of persons appears to be largely unregulated (Lesotho and Tanzania). In Zimbabwe, however, the departure of persons is highly regulated with five separate sections of the migration legislation devoted to the process of examining and permitting departures. Like many other SADC countries, Zimbabwe follows the norm in regulating departure within the ambit of its principal immigration legislation. However, Malawi, Mauritius, Namibia and Swaziland use legislation additional to the principal immigration legislation to regulate departure.

4.1.17 The principal exception to the norm is Malawi where the African Emigration and Immigration Workers Act 1 of 1954 aims, in part, to control the emigration of workers (essentially to South Africa). The Act requires adult males to have identity certificates authorizing them to leave Malawi (s 4); women may accompany or have their own certificate. To the extent that the Act is implemented with women having

a migration status dependent upon that of specific men, it presents the opportunity for restricting the freedom of movement of women. This Act worked with and facilitated the operation of the bilateral labour agreement between Malawi and South Africa.

4.1.18 There is a fair amount of variation in the permanent residence policies of the SADC region. One country, Swaziland, does not even have this category of immigration status at all. Where the category exists, it is possible to distinguish two models. First, there is a model that treats permanent residence as an extension of temporary status. In a number of countries, the category of permanent resident is barely distinguished, if at all, from temporary resident: Mauritius, Tanzania, and Zambia. In two countries (Botswana and Namibia), the decisions about permanent resident permits are made by an independent and specialized entity: the Immigrants Selection Board. However, in Namibia, the Immigrants Selection Board also makes decisions on temporary employment, straddling the line between temporary and permanent residence. In the second model, there is a sharp distinction between temporary and permanent residence. South Africa and Botswana have this model, where permanent residents are treated nearly as well as citizens. Lesotho also makes such a sharp distinction.

4.1.19 In both of these models, the acquisition of permanent residence status can either be an automatic or a discretionary decision. If it is automatic, the acquisition of permanent residence is usually dependent either on a number of years of lawful status or on family status. In the automatic granting of permanent residence based on years of lawful status, the number of years varies. In Botswana and Mozambique, 10 years of lawful status yields permanent residence. In South Africa, the figure is five (of work permit status) with an offer of permanent employment. Zimbabwe also has a five year period for conversion, as a general rule. Family reunification is an explicit policy in South Africa and Zimbabwe. An explicit family reunification policy is likely to be favourable to women and to reconcile legal with social realities.

The discretionary decision is the model present in Lesotho, South Africa (alongside the automatic model), Malawi, Namibia, Tanzania, and Zambia.

4.2 Bilateralism and Labour Migration in Southern Africa

4.2.1 Bilateralism in labour migration involves formal or informal agreements between two states: generally an origin and destination state for the same cohort of migrants. Historically, temporary labour migration to South Africa was governed by bilateral policies. More recently, two other forms of bilateralism have emerged: one as a response to irregular migration, the other to facilitate high level skills exchange or import.

4.2.2 Labour migration to South Africa from neighbouring states (Botswana, Lesotho, Swaziland, Malawi and Mozambique) was historically governed by detailed bilateral labour agreements. The bilateral agreements were last renewed in the 1960s (with Mozambique) and the 1970s. The treaties, which have never been modified or rescinded, specify a series of conditions and obligations on the following issues:

- Recruitment – including the right of the private sector to recruit, length of contract, time between contracts, quotas, payment of recruiting fees, the need for written contracts, and provision of facilities for recruiting and processing contracts;
- Contracts – including identification of employer and employee, home address, place of employment, contract length, minimum wage, in-kind contributions, transport to and from work;
- Remittances and Deferred Pay – provision for compulsory deduction of a proportion of wages and transfer to home country;
- Taxation – exempting contract workers from being taxed in South Africa;
- Documentation – including the need for valid contracts, passports, vaccination certificates, employment record books;
- Unemployment Insurance;

- Length of Agreements;
- Labour Offices – to be established in South Africa and be responsible, inter alia, for “protecting the interests of workers,” registration of undocumented workers, transfer of money, providing information on conditions of employment, and consulting on the repatriation of destitute and sick workers.

4.2.3 In practice, the agreements were used almost exclusively by the South African mining industry. The treaties are badly outdated and the Malawi-South Africa agreement is defunct. In the period after 1994, the Chamber of Mines lobbied hard for the continuation of the treaties.⁵² They even proposed that the treaties be extended to other sectors. Despite being badly outdated, some provisions (such as the right of countries to have a Labour Office in South Africa to look after the interests of migrants) continue as before.

4.2.4 In practice, the bilateral agreements are being replaced by the new corporate permits of the 2002 Immigration Act. This would signal the end of bilateralism and the triumph of unilateralism in South African migration policy. Yet one of the briefest sections of the Immigration Act, and one of the most significant in terms of labour migration, is the treaty permit. These permits “may be issued to a foreigner conducting activities in the Republic in terms of an international agreement to which the Republic is a party” (Section 14(1)). The treaty permit was included in the Act as a direct concession to the mining industry and to ensure, in legal terms, that the Act did not breach any existing labour agreements.

4.2.5 In policy terms, the future of the treaties themselves is therefore not resolved by the Immigration Act. If the bilateral agreements are persisted with, then they need revision and updating. Indeed, they are so archaic that this would be an important opportunity to bring them into line with international best practice on temporary migration schemes.⁵³ The ILO has reviewed such schemes globally and

made recommendations which have been applied to the South African context but not implemented.⁵⁴ If they are allowed to lapse, then all of the other provisions of the treaties, including deferred pay and the ability of supplier states to protect their own workers through treaty agreements, should also fall away.

4.2.6 The tension is really between a unilateral, state-centred approach (in which government has the final word on every migrant who enters) or a bilateral, privatized approach (in which government continues to allow the private sector to determine who shall enter). This issue will require some kind of resolution before a decision is made on whether to revise the bilaterals or bring all migrants under the corporate permit sections of the new Immigration Act. As part of this review, the relevance of protection mechanisms in bilateral treaties must also be addressed. In a post-apartheid era of new labour laws, it might be considered redundant to continue with such mechanisms. Also, the South African government will need to decide whether it wishes to pursue a bilateral approach (involving negotiation with supplier countries) or simply abandon bilateralism in favour of unilateralism for all categories of migrants.

4.2.7 Bilateral discussions between South Africa and Lesotho, Mozambique and Zimbabwe have proceeded on a range of issues, including migration, since 1994. In the case of Mozambique, attention has focused on the treatment of Mozambican migrants in South Africa by the South African police and employers and the implications of the Immigration Act of 2002. In the case of South Africa, attention has focused more on developing joint strategies to curb irregular migration, trafficking and cross-border crime. One of the concrete outcomes of the bilateral discussions between South Africa and Mozambique has been the signing of an agreement that allows for visa-free entry for the purpose of tourism and for a period not exceeding 90 days. As befits a debate between a migrant-sending and migrant-receiving country, the priorities and concerns of both differ considerably. However,

bilateral dialogue is preferable to unilateral action, so that further development of this mechanism is likely.

4.2.8 Further, there are regular bilateral committee meetings at the operational level. The minutes of these meetings may constitute *de facto* and *de jure* international agreements regarding the operation of migration regimes. For instance, Mozambique participates in at least three such arrangements: the Sub-Committee on Migration and Labour between Mozambique and South Africa; the Sub-Committee on Defence, Security and Migration between the Kingdom of Swaziland and the Republic of Mozambique; and the Sub-Committee on Migration, Security and Labour between Mozambique and Zimbabwe. These sub-committees discuss issues such as the modalities and mechanisms for deportation, notification procedures to consulates, complaints against police and migration officials during the deportation process, legalisation of workers, and means for social integration of those repatriated. In another example, there are local operational agreements at the Ficksburg and the Maputsoe border posts between South Africa and Lesotho.

4.2.9 Various agreements have also been signed by Zimbabwe and South Africa. These include an MOU in 2002 to manage the employment and protection of Zimbabwean farm workers. The latest agreement in 2006 includes the International Organisation for Migration (IOM) and refers to the establishment of a reception and support centre to be managed by the IOM. The centre is to provide support to repatriated migrants, security screening and serve as a recruitment centre for farmworkers.⁵⁵

4.2.10 These bilateral agreements move away from reliance on outdated treaties, and may be easier to implement as they are focused on particular sectors. Focused bilateral agreements may allow for progress to be made on matters of mutual interest to both parties, and are often faster to implement than trying to negotiate multilateral agreements. However, the increasing number of MOUs being signed by

different Departments with neighbouring states has the potential to create a fragmented approach to the management of labour migration.

4.2.11 One response to skills shortages and the brain drain has been for SADC governments to enter into bilateral agreements with other countries outside the region for the supply of skilled workers. South Africa, for example, has favoured a strategy of importing Cuban doctors on temporary assignments to work in rural hospitals. The scheme is regulated by a bilateral agreement between the two governments. The agreement has worked quite well although South Africa has had to deal with the challenge of Cuban doctors absconding and seeking to remain in the country at the end of the agreed timeframe/contract. Currently, it seems the main thrust of this agreement is to allow South African medical students to be trained in Cuba. A new bilateral agreement, signed in 2007, with the Tunisian government will allow for up to 1,000 doctors to be recruited from Tunisia to work in South Africa on short-term contracts. These bilateral agreements are highly targeted and limited to members of a single profession from specific countries. Their scope is limited and negotiated by the Department of Health. And, it could be argued that they represent the back-door introduction of a “guest-worker” response to skills shortages.

4.2.12 The Department of Health has signed an agreement with the UK pertaining to the recruitment and employment of South African health professionals, including the adoption of an exchange programme that allows for health professionals from one country to work in the other for a defined period for the purpose of sharing and transferring skills. Although Britain has said it will not directly recruit South African health professionals to the NHS, this does not prevent it employing South Africans recruited through private agencies or who make individual applications for employment. These agreements also allow for the twinning of hospitals.

4.3 Multilateralism and Labour Migration⁵⁶

4.3.1 In August 2003, SADC Heads of State adopted the Charter of Fundamental Social Rights in SADC, which in Article 2, sets out the following: “The objective of this Charter shall be to facilitate, through close and active consultations among social partners and in a spirit conducive to harmonious labour relations, the accomplishment of the following objectives:

- (a) ensure the retention of the tripartite structure of the three social partners, namely, governments, organisations of employers and organisations of workers;
- (b) promote the formulation and harmonisation of legal, economic and social policies and programmes, which contribute to the creation of productive employment opportunities and generation of incomes, in Member States;
- (c) promote labour policies, practices and measures, which facilitate labour mobility, remove distortions in labour markets and enhance industrial harmony and increase productivity, in Member States;
- (d) provide a framework for regional co-operation in the collection and dissemination of labour market information;
- (e) promote the establishment and harmonisation of social security schemes;
- (f) harmonise regulations relating to health and safety standards at work places across the Region; and
- (g) promote the development of institutional capacities as well as vocational and technical skills in the Region.”

4.3.2 The Charter specifies that “it shall be the responsibility of Governments to create an enabling environment in order that objectives referred to in paragraph 1 of this Article are realised.” The Charter entered into force at the same time it was adopted given that it was signed by all 14 SADC member states. The Charter itself makes no specific reference to migrant workers. However, there are several

references in the Charter to ‘every worker in the region’ and it can, therefore, be assumed that its provisions are equally applicable to migrant workers.

4.3.3 A number of SADC Protocols contain provisions that are relevant to migration within the region. For instance, Article 3(a) of the SADC Protocol on Education and Training states as an agreed objective of Member States “to work towards the relaxation and eventual elimination of immigration formalities in order to facilitate freer movement of students and staff within the Region for the specific purposes of study, teaching, research and any other pursuits relating to education and training.” In addition, the Protocol on Immunities and Privileges allows SADC to issue a SADC Laissez-Passer to its officials. Holders of the SADC Laissez-Passer have visa-free entry to the territory of all member states including persons holding a SADC Identity Card and travelling on the business of SADC. Other relevant protocols such as one on social security are at a draft stage.

4.3.4 Three separate drafts of protocols on the movement of people were developed in the 1990s.⁵⁷ The first was the Draft SADC Protocol on the Free Movement of People which proposed a phased adoption of free movement between all member countries. The model was heavily based on Schengen approach and aimed for the phased abolition of all barriers to movement across national borders of SADC countries within five years. This Protocol was rejected by SADC states in 1997. South Africa responded with a Draft Protocol on the Facilitation of Movement of People which proposed minimal levels of harmonization on issues such as visa-free entry for short-term visitors. This Protocol was rejected by the SADC Secretariat which drafted its own SADC Draft Protocol based on the original Draft Protocol on the Free Movement of People.

4.3.5 This Draft Protocol was shelved by the SADC Council of Ministers in 2001. In 2002, the prospects for the freer (legal) circulation of labour within the SADC were therefore gloomy with the Protocol sitting firmly on the shelf. In the last five years,

however, renewed debate about the Protocol was prompted by the ground-level reality of growing intra-regional mobility, the need for a coordinated multi-lateral approach to the development and security challenges of migration and the prompting of the African Union. Discussion on the Protocol was revived in 2003 when questions related to the movement of persons repeatedly surfaced during the deliberations of the SADC Organ on Politics, Defence and Security Co-operation.

5.0 The Prospects for Freer Circulation of Labour Within SADC

5.1 The Protocol on Facilitation of Movement⁵⁸

5.1.1 In July 2005, the Ministerial Committee of the SADC Organ considered and approved the Draft Protocol on the Facilitation of Movement of Persons. The draft Protocol was subsequently tabled at the SADC Summit in August 2005 where it was approved and signed by six member states. It has now been signed by nine member states: Botswana, DRC, Lesotho, Mozambique, Namibia, South Africa, Swaziland, Tanzania and Zimbabwe).

5.1.2 In terms of its current status, therefore, the Facilitation of Movement Protocol has been formally adopted at the Summit of the Heads of States and been signed by nine member states which now allows for the drafting of an implementation plan. However, for the Protocol to come into effect, at least nine member states must have both signed and ratified it.

5.1.3 The ultimate objective of the protocol is “is to develop policies aimed at the progressive elimination of obstacles to the movement of persons of the Region generally into and within the territories of State Parties” by facilitating:

- entry, for a lawful purpose and without a visa, into the territory of another State Party for a maximum period of ninety (90) days per year for bona fide visits and in accordance with the laws of the State Party concerned;

- permanent and temporary residence in the territory of another State Party; and
- establishment of oneself and working in the territory of another State Party.

5.1.4 The Protocol also makes it clear in regard to this provision and those relating to permanent and temporary residence as well as establishment and working, that entry for these reasons will be governed by the national legislation of the SADC member state which they are entering. Table 23 sets out the main provisions of the Protocol.

Table 23: Main Provisions of the SADC Protocol on the Facilitation of Movement of Persons		
Policy and Legislative Obligations (Policy)	*State Parties shall promote legislative, judicial, administrative, and other measures necessary for cooperation in the achievement of the protocol's objectives	*Future policy and legislation must seek to reflect the objectives of the protocol
	*State Parties agree to take steps to achieve the following: 1. harmonization of their laws such that citizens of State Parties are able to enter another State Party for a maximum period of 90 days per year 2. abolition of visa requirements, provided that where visas are regarded as necessary they will be issued gratis at port of entry	*Requires state parties to relinquish some internal control over the immigration of citizens of other member states into their national territory
	*Applications for residence permits and permit renewals shall be issued in accordance with the national laws of the State Party concerned	*Does not dictate the content of national laws regarding residence *Are laws regarding Residence Permits subject to the harmonization provisions of the protocol?
	*State Parties shall, in terms of its national laws, grant permission for the establishment to citizens of other State Parties	*Does not dictate the content of national establishment laws *Are national laws regarding establishment subject to harmonization?

*No citizen of a State Party who has been granted residence or establishment in the territory of another State Party may be expelled from the host state except where:

1. reasons of national security, public order or public health so dictate
2. an essential condition of the validity of such person's residence or establishment permit has ceased to exist or cannot be complied with any longer
3. a citizen of another State Party acts in conflict with the purposes for which such permit was issued or fails to comply with any conditions subject to which it was issued
4. the person refuses to comply with a lawful order of a public health authority, assuming that the consequences of such refusal have been explained

*The diplomatic or consular authorities of the State Party of which the affected party is a citizen shall be informed of the decision to expel the affected person and such person shall be afforded an opportunity to consult with said diplomatic or consular authorities

*Any person who has acquired residence or establishment in the territory of a State Party shall not be subject to collective or group indiscriminate expulsion

*Each case of expulsion shall be considered on its own merits

*Each State Party shall ensure that its laws, regulations, or administrative mechanisms for the expulsion of citizens of other State Parties, except where Article 22 applies, incorporate the following principles:

1. giving of adequate notice
2. affording to the affected person the opportunity to have recourse in the appropriate domestic courts or tribunals of the host state
3. suspension of any order of expulsion upon notice of appeal
4. giving of reasonable time to affected parties to settle their personal affairs

5. expulsion of any individual may not affect the residence or establishment permits of any independent member of that person's family

6. the expenses involved in repatriation

*The requirements governing expulsion necessitate an oversight body in each member state to guarantee that the limitations to expulsion of citizens of other member states are respected and that the appropriate rights are guaranteed to the affected parties in the case of expulsion

Practical and Logistical Requirements (Logistics)	*State Parties shall promote legislative, judicial, administrative, and other measures necessary for co-operation in the achievement of the protocol's objectives	*Necessitates establishment of an oversight body in each member state specifically charged with monitoring SADC-related issues
	*State Parties shall establish and maintain a population register from which the status of its citizens and permanent residents can be determined accurately	*Requires the creation of a nationally accessible database containing information on all citizens and permanent residents
	*State parties must take steps to achieve: 1. regional standardization of immigration forms 2. establishment of a separate SADC desk at each major port of entry between State Parties 3. bilateral agreements to establish a sufficient number of border crossing points with identical opening hours on each side of the border and at least one such post which remains opens 24 hours every day 4. bilateral agreements to provide uniform border passes to citizens of State Parties who reside in border areas 5. co-operation with SADC secretariat to provide senior immigration, customs, and security officials as necessary to facilitate the movement of person within	*Establishment of SADC desk requires allocation of funding to staff desks, however this provision may facilitate the movement of persons by reducing customs activity among citizens of member states * Creating a "sufficient" number of border crossing sites with identical opening hours on both sides and at least one post that is open 24 hours requires legislative coordination to establish new sites and funding to build the facilities and provide staff *Issuance of uniform border passes requires a centralized database of all citizens of member states who are entitled to such a pass *Requires funding for expanded immigration, customs, and security staff
	*State Parties agree to make travel documents readily available to their citizens and to increase and improve travel facilities especially between their mutual borders *State Parties undertake to introduce machine readable passports as soon as possible and technologically sensitive passports and other related facilities as circumstances allow	*Requires funding for: 1. Physical improvements and renovations to travel facilities (e.g. airports, train/bus depots) 2. Upgrades in elements of infrastructure to facilitate travel (e.g. roads, railroads, etc.) 3. Coordinated technological system to allow for machine readable and technologically sensitive passports
State Parties agree to increase co-operation and mutual assistance in: 1. improving mechanisms for co-operation in safeguarding security by exchanging information among relevant authorities on security, crime, and intelligence 2. training competent authorities and educating communities on the protocol 3. providing sufficient and adequately	*Requires funding to provide for training of officials and community education initiatives regarding protocol * "...sufficient and adequately equipped ports of entry..." involves additional funding to update technology at ports of entry, as well as employ a sufficient staff of customs officers to move persons through efficiently *Exchange of security and intelligence information among member states requires a centralized computer database accessible to all member states to facilitate sharing of information between countries	

	<p>*State Parties must afford to an expelled person the opportunity to have recourse in the appropriate domestic courts or tribunals of the host state</p> <p>* The expenses involved in repatriation of an expelled party to their home state shall be shared, as per bilateral agreements, by the receiving State Party and the State Party ordering expulsion</p>	<p>*Requires funding for:</p> <ol style="list-style-type: none"> 1. the establishment of an appropriate judicial mechanism through which an expelled person may pursue the appeal process 2. costs incurred in repatriating expelled individuals
	<p>*In order to assist in the enforcement of this protocol, State Parties shall put in place such immigration, police, or other security co-operation arrangements as deemed necessary</p>	<p>*Requires funding for additional immigration and security services</p>
International and Domestic Co-operation (Co-operation)	<p>*State Parties shall promote legislative, judicial, administrative, and other measures necessary for co-operation in the achievement of the protocol's objectives</p>	<p>*Requires domestic co-operation to promote the objectives of the protocol in all aspects of government</p>
	<p>*Implementation framework will be agreed upon by State Parties 6 months from the date of signature of the protocol by at least 9 member states</p>	<p>*Requires co-operation amongst signatories to develop an implementation plan, including an appropriate time frame</p>
	<p>*State Parties shall ensure that all relevant national laws, statutory rules and regulations are in harmony with and promotive of the objectives of this protocol</p> <p>*State Parties undertake to co-operate and assist the other state parties to facilitate the movement of persons in the Community as a vehicle for achieving economic integration</p>	<p>*Requires significant international legislative co-operation and communication regarding immigration policies and the movement of persons</p>
	<p>* State parties shall take steps to achieve:</p> <ol style="list-style-type: none"> 1. bilateral agreements to establish a sufficient number of border crossing points with identical opening hours on each side of the border and at least one such post which remains opens 24 hours every day 2. bilateral agreements to provide uniform border passes to citizens of State Parties who reside in border areas 3. co-operation with SADC secretariat to provide senior immigration, customs, and security officials as necessary to 	<p>*Requires co-operation between member state governing bodies, between each member state and the SADC secretariat, and amongst domestic legislative entities in order to:</p> <ol style="list-style-type: none"> 1. reach agreements regarding border crossing sites and border passes 2. provide the proper immigration, customs, and security staff

	<p>*State Parties agree to increase co-operation and mutual assistance in the following fields:</p> <ol style="list-style-type: none"> 1. formulating policies and awareness programmes on the implementation of this protocol 2. improving mechanisms for co-operation in safeguarding security by exchanging information among relevant authorities on security, crime, and intelligence 3. training competent authorities and educating communities on the protocol 4. providing sufficient and adequately equipped ports of entry 	<p>*Requires international co-operation in achieving logistical requirements regarding the regulation of movement of persons</p>
	<p>*The expenses involved in repatriation of an expelled member state citizen to their home state shall be shared, as per bilateral agreements, by the receiving State Party and the State Party ordering expulsion</p>	<p>*Requires international co-operation to share costs incurred in repatriation</p>
	<p>*State Parties agree to co-operate in harmonizing travel between member states whether by air, land or water</p>	<p>*Requires international co-operation to coordinate travel between SADC states</p>

5.1.5 In terms of the timeframe for implementation, the Protocol specifies that an Implementation Framework will be agreed upon within six months from the date on which at least nine member states have signed.

5.1.6 The protocol thus defines three types of "movement" by people. In terms, first, of **Visa-free entry**, a citizen of a State Party may enter the territory of another State Party without the requirement of a visa. However, the person must enter through an official border post, possess valid travel documents and produce evidence of sufficient means of support for the duration of the visit. Furthermore, it is specified that this is limited to 90 days per year, though the visitor may apply for an extension of this period.

5.1.7 With regard to what the person may do during these three months, the protocol is completely silent. There is no specification as to whether the person may take up short-term employment, engage in trade or business of any sort, or attend

an educational institution. Given the absence of such provisions related to visa-free entry, it can be assumed that such visits are intended to be for reasons not provided for by the other categories of movement as discussed below. The protocol also provides for an exemption in terms of which any member state may apply in writing and for *good reason* to re-impose visa requirements, provided that such visas will be issued at a port of entry at no cost.

5.1.8 The second type of movement envisaged by the protocol is referred to as **Residence** and is defined as “permission or authority, to live in the territory of a State Party in accordance with the legislative and administrative provisions of that State Party.” The protocol also encourages member states that have signed the protocol to facilitate the issuing of residence permits so as not to cause undue delays.

5.1.9 The third category of movement, known as **Establishment** is defined as "permission or authority granted by a State Party in terms of its national laws, to a citizen of another State Party, for:

- exercise of economic activity and profession either as an employee or a self-employed person;
- establishing and managing a profession, trade, business or calling.

It is not entirely clear from a reading of the text of the Protocol, what the difference is between 'residence' and 'establishment', though the notion of establishment has within it, the possibility that persons who have relocated permanently will have the option of applying for and being granted citizenship in the country of destination.

5.1.10 Articles 20 – 25 of the protocol focuses on the rights of individuals not to be removed from the territory of a member state unless there are legitimate and valid reasons for doing so. However, a very clear set of principles and procedural guidelines are specified in the event of such removal. Furthermore, the protocol clearly states that no-one may be subjected to collective or group removals- in other

words, no state has the right to remove an entire family or all the citizens of a particular country unless each case has been considered and determined on its own merits.

5.1.11 Article 28 is a re-affirmation of the obligations of members states towards asylum-seekers and refugees, but stipulates that the management of refugees shall be regulated by a specific MOU between State Parties.

5.1.12 Article 29 specifies that the institutions responsible for the implementation of the protocol shall be the Committee of Ministers responsible for Public Security and any other committee established by the Ministerial Committee of the Organ.

5.1.13 While most of the provisions of the Protocol are relatively clear, it is how it will be implemented. The Protocol specifies in Article 4 that an Implementation Framework will be agreed to within 6 months from the date of ratification by at least 9 member states. The problem is that member states may be reluctant to ratify the Protocol unless they know how it will be implemented and it makes sense to at least prepare a draft Implementation Framework that member states can consider during the process of ratification.

5.1.14 Ratification of the Protocol requires two steps (though they can happen simultaneously). Firstly, the Head of State has to sign the text of the Protocol signifying the intent of the member state to consider ratification. Secondly, the Protocol has to be submitted to, and adopted by the Parliament of the member state concerned and subsequently deposited with the SADC Secretariat. This process necessarily involves that prior to ratification, member states consider very carefully, what the implications of the Protocol are. At the SADC Summit at which the Protocol was adopted, six out of fourteen member states appended their signatures. If this show of commitment and priority (or lack thereof) is anything to go by, it will take some time before nine member states ratify the Protocol.

5.1.15 The adoption of the Protocol has been described as a major step towards the free movement of persons in SADC. Indeed, it is quite significant that after nearly ten years, a sufficient number of Heads Of State were able to reach consensus and make a decision to adopt the Protocol. However, in terms of content, much of the Protocol merely affirms what is already happening in the region based on either the domestic legislation of SADC member states and/or bilateral and multilateral agreements that have been signed between member states. In this sense, the Protocol does not represent any 'radical departure' from the status quo, but largely elevates to a regional level, what is already a reality in the region. This is not to undermine the importance of having such a Protocol, but to underscore the fact that in policy and legislative terms, we are unlikely to see anything substantially different in the short to medium term. Perhaps the biggest and most visible impact that the Protocol will have once it comes into effect would be in terms of the logistical mechanisms it puts in place.

5.1.16 While the Protocol makes provision for a range of policy, legislative and logistical adjustments on the part of State Parties, the extent to which (a) State Parties are obliged to comply and (b) the Protocol can be enforced, remains unclear. While it is not always clearly stated, it is implicit in the phrasing of particularly the provisions related to residence and establishment, that these provisions are subject to the domestic/national legislation of State Parties. In other words, even if a member state has ratified the Protocol, it does not mean that its national policies and legislation will be amended to comply with the provisions of the Protocol. It is certainly the intention and State Parties are 'encouraged' to amend their national legislation, but there are no mechanisms to ensure that state parties will indeed amend their legislation to give effect to the provisions of the Protocol. In essence, any and all the provisions of the Protocol are ultimately subject to domestic legislation.

5.1.17 The Protocol calls for various logistical mechanisms to be put in place; ranging from increased border infrastructure and personnel, to the introduction of

machine-readable passports and other appropriate technology. The resource and capacity implications of these provisions in the Protocol are substantial. While some SADC member states already have some of these mechanisms in place, and while it is possible for some other member states to put these mechanisms in place, it is also very obvious that a significant number of member states simply do not have either the resources or the capacity to comply with these requirements. The potential outcome of this problem is two-fold. Firstly, member states may be unwilling to sign and ratify the Protocol because they are aware that they will be unable to implement it as required. Secondly, even if member states do sign and ratify the Protocol, it is apparent that many will not be able to comply with its provisions.

5.2 The Lesotho-South Africa Agreement

5.2.1 The Facilitation of Movement Protocol has also been seen as facilitating discussions between South Africa and Lesotho over cross-border interaction between the two countries. A Joint Bilateral Commission for Co-operation (JBCC) between the two countries was signed in 2001. The JBCC is used as a vehicle to drive forward areas of co-operation between the two countries and by mid-2007, 20 subsidiary cooperation agreements had been signed.

5.2.2. In 2000, the Departments of Home Affairs in both countries asked SAMP to conduct research on cross-border movement between the two countries and to make recommendations on how to facilitate movement between the two countries. This resulted in an extensive report which questioned whether the considerable resources being consumed to manage border operations between the two countries were being effectively utilized and recommended the downgrading of the current border regime.⁵⁹

5.2.3 In 2002, an Agreement on the Facilitation of Cross Border Movement of Citizens between South Africa and Lesotho was drafted. The Agreement was independently approved by the Cabinets of both countries in 2005-6 and signed in

June 2007. The implications of the Agreement for labour migration from Lesotho need to be assessed. One of the primary outcomes will be increased access by Basotho to the South African labour market. It remains to be seen whether the “special relationship” is simply to be confined to these two countries or will be extended to other countries although the SADC Secretariat has noted that the Agreement is consistent with the SADC Protocol on the Facilitation of Movement of Persons.

5.3 The African Union and Free Labour Movement

5.3.1 Freer movement of people across the continent is cited as a key long-term objective of the AU, particularly as it pertains to the relationship between migration and development. Since 2000, the issue of migration and development has become increasingly important to the AU. In this respect, the AU developed a *Draft Strategic Framework on Migration* in the early 2000s. By 2006, this had been formulated as *The Migration Policy Framework for Africa*. This document formed the basis for the *African Common Position on Migration and Development* (EX.C.L. 277(IX)) which was endorsed at a meeting of the executive council of the AU in Khartoum in January 2006. The AU summit held in Banjul in June 2006 endorsed the Common Position (AU/Dec.125(VII)). This meeting also called for a Ministerial meeting with the EU to discuss these issues. This meeting was held in Sirte in December 2006. It produced the *Africa-EU Joint Declaration on Migration and Development*.

5.3.2 Each of these AU documents, including the Africa-EU Joint Declaration, provide for wide-ranging sets of principles in relation to migration management, but these are presented as guidelines in the development of national and sub-regional policies and legislation, rather than de facto continental policies. Importantly, the AU documents need to be understood in the context of the AU founding document as well as the Treaty Establishing SADC, both of which make reference to the creation of an African Economic Community and the eventual free movement of persons.

5.3.3 When establishing the need for a comprehensive continental set of migration policies the Migration Policy Framework states:

Well managed migration has the potential to yield significant benefits to origin and destination states...However, mismanaged or unmanaged migration can have serious consequences for States' and migrants' well-being, including potential destabilizing effects on national and regional security, and jeopardizing inter-State relations. Mismanaged migration can also lead to tensions between host communities and migrant, and give rise to xenophobia, discrimination and other social pathologies.⁶⁰

The Framework thus sees migration as having both a potentially positive and negative effect on migration. The Framework identifies nine thematic migration areas and makes recommendations for ways policies can be established to enhance the developmental possibilities of migration.

5.3.4 When considering labour migration, the Framework argues that it is necessary to establish “regular, transparent and comprehensive labour migration policies, legislation and structures” at national and regional levels to ensure benefits for countries of origin and destination. It argues that labour migration policies should “incorporate appropriate labor standards” to the benefit of migrants, their families and “society generally.” It recommends bilateral and multi-lateral cooperation to develop systematized and regular movements of labour. The Framework also argues strongly that the rights of migrant workers should not be different than those of citizens for the benefit of both, and national development policies, and recommends that States “incorporate provisions from ILO Conventions No. 97 and No. 143” and the International Convention on the Rights of Migrant Workers into national legislation. The Framework also calls for regional cooperation at bilateral and multilateral levels to harmonise labour migration

policies. In this arena it also sees managed labour migration as an integral part of regional and sub-regional economic integration and economic development.

NOTES

¹ Jonathan Crush, "Migrations Past: An Historical Overview of Cross-Border Movement in Southern Africa" In David McDonald, ed., *On Borders: Perspectives on International Migration in Southern Africa* (New York and Cape Town: St Martine's Press and SAMP, 2000), pp. 12-24.

² Wade Pendleton et al, *Migration, Remittances and Development in Southern Africa*, SAMP Migration Policy Series No. 44, Cape Town, 2006, p. 18.

³ The UN data for migrant stock does not break migrants down by type nor by how long they have been in the country of destination. It also may include refugees.

⁴ McDonald, *On Borders*.

⁵ Jonathan Crush and Wilmot James, eds., *Crossing Boundaries: Mine Migrancy in A Democratic South Africa* (Cape Town and Ottawa: Idasa and IDRC, 1995).

⁶ Jonathan Crush and Clarence Tshitereke, "Contesting Migrancy: The Foreign Labour Debate in Post-1994 South Africa" *Africa Today* 48(3) (2001): 49-72.

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