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The Portability of Pension Fund Benefits and Rights in the Course of Acquisition: A Brief Critique of the SADC Legal Frameworks¹

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¹ Background paper to upcoming publication *'The Regulation of Withdrawal and Death Benefits from Pension Funds as a Social Protection Mechanism for Migrant Professionals in the SADC'*

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Background Paper

1. National and regional pension fund reforms in the SADC

Pension funds are important non-bank financial institutions that provide meaningful social protection to citizens and contribute to economic development in the Southern African Development Community (SADC) region. This is achieved through, among other things, periodic payment of benefits, investments of assets held by them into infrastructure development projects and other areas of economic activity as well as in the development of capital markets.²

Several countries in the SADC region have, in relatively recent years, enacted new pension laws and regulations or instituted major reforms to existing pension laws. The main driver behind these regulatory initiatives is the realisation of the role that pension funds play in the attainment of social protection and developmental objectives at the domestic level. Regulating them to ensure these broad social and economic aims and to mitigate the risks of failure was therefore par for the course for the legislatures of countries such as Lesotho,³ South Africa,⁴ Eswatini,⁵ Botswana,⁶ Malawi,⁷ Namibia,⁸ and Zimbabwe.⁹

When the SADC reformed its Treaty¹⁰ in 2001 to reflect the agreed regional integration agenda, the Member States also adopted the SADC Common Agenda¹¹ to promote and achieve said regional integration. The SADC Common Agenda, *inter alia*, promotes:

² See, for example, when explaining the reasons for adopting the Pension Funds Act 5 of 2019, the Finance Minister of Lesotho noted that one of the justifications for this new legislation was to facilitate “developing the domestic capital market by requiring that a portion of the pension fund contributions be invested in Lesotho, as there is currently no legislative requirement that pension money’s be invested in the country to avoid repatriation of funds into the economies of other countries.” See, Government Notice No 26 of 2019; Non-Bank Financial Regulatory Authority, Annual Report (2019) 47 (noting that the retirement funds sector is one of the biggest sectors in the nonbank financial institutions industry in terms of asset size and continues to contribute significantly to the economy of Botswana and the ratio of total assets of retirement funds to GDP is 42% and while as assets held by retirement funds as at December 31, 2018 amounted to P79 billion); Financial Services Regulatory Authority, Annual Report (2018) 106-109 (noting that the assets held by retirement funds in Eswatini amounted to E28 billion as at 31 December 2018).

³ See, Public Officers Defined Contribution Pension Fund Act 8 of 2008; and Pension Funds Act 5 of 2019.

⁴ See, the Pension Funds Amendment Act 22 of 1996, amending the Pension Funds Act 24 of 1956; and Financial Sector Regulation Act 9 of 2017.

⁵ See, Swaziland National Provident Fund Order, 1974; the Retirement Funds Act 5, 2005; the Financial Services Regulatory Authority Act, 2010.

⁶ See, Retirement Funds Act 2014 and the Non-Bank Financial Institutions Regulatory Authority Act of 2016.

⁷ See, Pension Act, 2010 (No. 6 of 2011)

⁸ Which like Eswatini adopted the South African Pension Funds Act as its primary legislation to regulate private pension funds.

⁹ See, Pension and Provident Funds Act of 1976; Social Security Act of 1989.

¹⁰ 32 ILM 116, entered into force 30 September 1992.

¹¹ “The SADC Common Agenda refers to a set of key principles and values that guide the Regional Integration agenda. The SADC Common Agenda is spelled out in Article 5 of the Treaty (as amended, 2009), as well as in the Review of Operations of SADC Institutions and consists of the policies and

- Sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication.
- Self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States.
- The maximisation of productive employment and utilization of resources of the region.

Since the 2001 reforms of the SADC Treaty, there is no doubt that greater integration among member's states both in terms of human and financial capital, immigration but also in the harmonization of various laws and policies in several areas, has been achieved.¹²

In furtherance of these and other related aims, in 2003, the regional body adopted the Charter of Fundamental Social Rights in SADC (the Charter). Article 2 of the Charter sets out its objectives. For our purposes, the most vital objective is to "promote the establishment and harmonisation of social security schemes," and to this effect it obligates "[g]overnments to create an enabling environment in order that" the objects of the Charter are realised.¹³

Furthermore, pursuant to its objectives in Article 5 of the SADC Treaty and the Charter, the SADC adopted the Code on Social Security 2008, whose purposes are:

3.1 To provide Member States with strategic direction and guidelines in the development and improvement of social security schemes, in order to enhance the welfare of the people of the SADC region.

3.2 To provide SADC and Member States with a set of general principles and minimum standards of social protection, as well as a framework for monitoring at national and regional levels.

3.3 To provide SADC and Member States with an effective instrument for the coordination, convergence, and harmonisation of social security systems in the region.

In the context of this background paper, Articles 6 and 9 of the Code are the most important. Article 6 requires member states to establish social insurance schemes.¹⁴ It also enjoins them to adopt applicable legislation and other measures to ensure that these schemes are responsibly managed in terms of their governance and administration. In addition, Article 9 provides that:

9.1 Member States should ensure that social insurance schemes provide protection against the contingency of death.

9.2 The benefits payable in the event of death of a breadwinner should include a death grant, to assist with funeral costs and – subject to qualifying conditions –

strategies of the organisation." See, <https://www.sadc.int/about-sadc/overview/sadc-common-agenda/> (accessed 18/09/2021)

¹² Mhango M *Pension Law and Death Benefits: Law and Policy Harmonization in the Southern African Development Community* (forthcoming 2021) (arguing that there is harmony among the laws that regulate the payment of benefits payable upon the death of a pension fund member).

¹³ Article 2(1)(e). See also, Articles 6(b), 8 and 10 of the Charter.

¹⁴ Social insurance is defined in Article 1.3 as "1.3 Social insurance: This is a form of social security designed to protect income earners and their families against a reduction or loss of income as a result of exposure to risks. These risks impair one's capacity to earn income. Social insurance is contributory with contributions being paid by employers, employees, self-employed persons, or other contributors, depending on the nature of the specific scheme. Social insurance is aimed at achieving a reasonable level of income maintenance." And Article 1.5 provides that "Conceptually and for the purposes of this Code, social security includes social insurance, social assistance and social allowances."

survivors' benefits, which should be in the form of periodical payments, aimed at the upkeep of survivors.

9.3 Member States should ensure that legal dependants and, where justified, factual dependants, qualify as survivors.

At the African Union level, policy instruments governing migration issues in general consist of African Common Position on Migration and Development (ACPMD) 2006 and the Migration Policy Framework for Africa (MPFA) 2006 which was revised in 2018 (2018 – 2030) together with a Plan of Action (2018 – 2027). Agenda 2063 is yet another influential policy document which promotes the free movement of persons and proper migration governance across the African continent.

This background paper focuses on briefly critiquing the framework for portability of pension benefits and rights in the course of acquisition in the event of migration or remigration of high skilled professionals within the SADC region.

2. What is portability and what are the criteria for fully portable pension rights in a regional economic community?

Holzmann and Jacques have written extensively on the issue of the portability of pension benefits across borders and define portability in this context as, "...a migrant's ability to preserve, maintain, and transfer both acquired social security rights and rights in the process of being acquired from one private, occupational, or public social security scheme to another, independent of nationality and country of residence."¹⁵

Holzmann and Jacques further define social security rights as all rights stemming from contributory payments or residency criteria in a country.¹⁶ Pursuing the portability of acquired pension benefits as a social security policy objective is influenced by, *inter alia*, two key considerations according to Holzmann.¹⁷ The social policy perspective posits that acquired benefits are a critical element of an individual's life cycle planning and risk management strategy and thus, lack of provision that facilitates portability hinders individuals' and families' abilities to plan for the future and may create substantial welfare losses.¹⁸ From a human rights perspective, individuals have the right to social protection according to national legislation and international conventions, and acquired rights should carry over when they leave a country or profession.¹⁹ Holzmann further notes that private sector pension arrangements often profit from tax privileges during the accumulation phase which results in significant exit tax when the migrant leaves the country.²⁰ If a labour migrant therefore moves across an economic regional community such as the SADC and works in several countries, each time they exit, the move will incur significant value loss due to tax regimes which are not designed to facilitate portability of acquired benefits across borders.

¹⁵ Holzmann, R. and Jacques, W. "Status and progress in cross-border portability of social security benefits" (2019) 3 <http://pubdocs.worldbank.org/en/414741559591502612/status-and-progress-jan-13-2019.pdf> (accessed 20/10/2020)

¹⁶ As above. Holzmann and Jacques further emphasize that benefits that are not typically portable are those that are not based on contributions, such as benefit top-ups for low-income individuals or minimum income guarantees.

¹⁷ Holzmann, R. "The portability of social benefits across borders" (2018) IZA World of Labour, 3

¹⁸ As above

¹⁹ As above

²⁰ As above, 10

Noting the precarious position of migrant workers in the SADC region, Dupper highlights the application of three key legal principles, or requirements, as effectively militating against the portability of social security benefits.²¹

Firstly, the territoriality principle means that individual states are responsible only for social security provisioning in their own territories and therefore if a national of that country migrates to another country, they are automatically excluded from migrating with their social security benefits.²² Secondly, and tied to the territoriality principle, are nationality requirements for eligibility to access social protections and thirdly, residence requirements²³ also operate to exclude migrants whether in the host country or country of origin and transit country and every other permutation in between.

The portability of pension benefits would therefore have to logically go against this traditional grain and require the reform of national, bilateral, and multilateral social security legal architectures in the SADC region to facilitate seamless migration for professionals and other demographics. We must also emphasize that Dupper adopts the same definition of portability as Holzmann.²⁴ Therefore, to ensure portability of pension benefits, facilitative policy frameworks must include mechanisms such as totalisation i.e., the adding up of workers' contributions, employment, or residence of a migrant worker in different jurisdictions.²⁵

3. Is the transfer of pension fund benefits across SADC allowed without impossible burdens?

Before we highlight the prevailing scenario at the SADC level, we wish to observe that the current migration frameworks at the African Union²⁶ level fall short on providing concrete guidance on protecting professional migrants' acquired social security rights as portability is generally framed as an aspirational goal. The African Union is yet to provide detailed normative frameworks on labour migration and the portability of pension benefits across borders which are binding on Member States and applicable within Regional Economic Communities (RECS). Current programs and policies display a preoccupation with more immediate migration issues revolving around civil wars, refugees, human trafficking, seasonal migration in agriculture, migrant miners, access to the relevant social security safety nets in host countries and the like.

²¹ Dupper, O. "Coordination of social security: the case of SADC" (2014) (KFG Working Paper Series, 60). Freie Universität Berlin, FB Politik- und Sozialwissenschaften, Otto-Suhr-Institut für Politikwissenschaft Kolleg-Forschergruppe "The Transformative Power of Europe" 9 <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-391526>

²² As above, 5

²³ As above, 8

²⁴ As above, 9

²⁵ Anwarul, H and Kumar, R.D. (2019) "Totalisation/portability of social security benefits: imperatives for global action" Working Paper, No. 379, Indian Council for Research on International Economic Relations (ICRIER), New Delhi.

²⁶ To the extent they are relevant to the issue of portability of acquired pension rights, see, African Common Position on Migration and Development (ACPM) 2006 and the Migration Policy Framework for Africa (MPFA) 2006 and revised in 2018 (2018 – 2030) together with a Plan of Action ((2018 – 2027). Agenda 2063 is yet another influential policy document which promotes the free movement of persons and proper migration governance across the African continent.

Dodson and Crush observe that the regulation of the labour migration question at the regional level has been largely underwhelming due to the lack of, “a genuinely regional, rights-based migration governance regime.”²⁷ As a result of this piecemeal, uncoordinated approach, there are several instruments at the SADC level which display a lack of normative coherence, sufficient attention to detail on particular questions including the portability of pension benefits and over-reliance on programmes and plans of action which are not grounded in a rights-based regime.

For example, the SADC Protocol on the Facilitation of Movement of Persons 2005 is a symbolic instrument another aspirational instrument which does little to establish supranational citizenship with attendant rights and protections for migrants.²⁸ The Code on Social Security 2008 carries significant normative value for the professional migrants and the portability of their pension benefits in the process of acquisition however, the impact is minimal as the Code is not binding on Member States. Article 3 of the Code on Social Security 2008 provides that one of the purposes of the Code is to provide, “SADC and Member States with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region.” Article 17 of the SADC Code on Social Security 2008 promotes principles that seek to protect the rights of migrant workers within the region in relation to the portability of their social security benefits and those in the process of being acquired. These principles are characterised as “core principles” which, according to Article 17(2), should be contained in both the national laws of member states and in bilateral or multilateral arrangements between member states. Five key principles found therein are relevant to the fortunes of the demographic under consideration in this study, i.e., migrant professionals:

- Migrant workers should be able to participate in the social security schemes of the host country.
- Migrant workers should enjoy equal treatment alongside citizens within the social security system of the host country.
- There should be an aggregation of insurance periods and the maintenance of acquired rights and benefits between similar schemes in different Member States.
- Member States should ensure the facilitation of portability of benefits, including the payment of benefits in the host country.
- Member States should identify the applicable law for purposes of the implementation of the above principles.

However, other, more obliging, SADC instruments regarding portability of pension benefits do, to some extent, exist.

In his 2014 publication using European Union social security portability legal and policy frameworks as a point of comparison with SADC, Dupper observes that, at the time, there was no multilateral instrument that regulated the coordination and portability of pension benefits in the region.²⁹ However, Dupper emphasises that there existed a legal foundational basis, albeit tenuous, in the existing regional instruments to establish the portability objective.

For example, Article 2(e) of the Charter lists the establishment and harmonisation of social security schemes as one of its objectives. Article 10 further imposes an obligation on

²⁷ Dodson, B and Crush, J. (2015) “Migration governance and migrant rights in the Southern African Development Community (SADC): attempts at harmonization in a disharmonious region” 16

²⁸ As above, 8.

²⁹ As above, n 21.

member states to create an enabling environment so that every worker in the region shall have a right to adequate social protection and further provides that persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance. Dupper observes that these provisions do not apply the nationality principle.³⁰

Beyond this, these respective SADC frameworks display various shortcomings, from a multilateral regulation perspective, which militates against the portability of pension benefits and rights in the course of acquisition for professional migrants in the region. Existing bilateral arrangements display the following shortcomings: (1) the scope of such agreements is too narrow (2) they are severely lacking from a coordination and portability perspective (3) they are not reciprocal and only regulate the position of immigrants in host countries (4) they do not exhibit the features typical of coordination regimes i.e., the maintenance of acquired rights and aggregation of insurance periods are often missing.³¹

Articles 3, 4, 11 and 19 of the SADC Protocol on Employment and Labour 2014 have particular relevance to the issues surrounding the portability of pension benefits in the region. Article 3(f) provides for the objective of the creation of a legal and policy framework for labour migration within the SADC through harmonized labour and social security legislation in the context of ILO Conventions³² on migrant workers and African Union policy documents. However, none of the SADC Member States, except the Democratic Republic of the Congo (DRC), have ratified any of the relevant ILO Conventions setting down international labour standards for the issues concerning migrant labour in general. This, in and of itself, is a barrier because the legal foundation upon which SADC instruments are assessed for normative validity, compliance and implementation rest on very shaky ground. Article 4(1)(b) further calls for the harmonization of policies and legislation among member states on labour and social security. Article 11 is the flagship social security provision in the Protocol however it is silent on the issue of portability mechanisms save to provide for social protection in a generic way within domestic territories.

Article 19(f) provides as follows:

“In accordance with African Union and ILO instruments on migration, State Parties shall endeavour to adopt measures to facilitate the *coordination* and portability of social security benefits, especially through the adoption of appropriate *bilateral and multilateral agreements* providing for *equality of treatment* of non-citizens, *aggregation of insurance periods, maintenance of acquired rights and benefits, exportability of benefits and institutional cooperation*.”³³

Article 19(f) is therefore a key provision entrenching pension benefits portability mechanisms along six core metrics which can be used to further evaluate the adequacy of provisioning for portability whether at a bilateral or multilateral level. Article 19(j) further establishes a regional institutional mechanism to specifically monitor and address implementation deficiencies regarding, *inter alia*, streamlining and facilitation of portability of pension benefits across borders. Dodson and Crush point out that the Protocol was adopted in the context of a Draft SADC Labour Migration Policy of 2013 and that, combined with the SADC Action Plan on Labour Migration 2013–15 and the 2014 SADC Labour Migration

³⁰ As above.

³¹ As above, n 27, 13 – 16

³² Equality of Treatment (Social Security) Convention, 1962 (No. 118) and Social Security (Minimum Standards) Convention, 1952 (No. 102)

³³ Our emphasis.

Policy Framework there is now a discernible shift in policy to focus on labour migration from an increasingly rights-based approach.³⁴

The Protocol is binding on SADC Member States however, the only barrier is the ratification³⁵ rate which currently operates to delay implementation, monitoring and enforcement. Article 32 which governs the entry into force of the Protocol provides for the deposit of instruments of ratification by two-thirds of the Member States. This threshold has not been achieved as of the date of this writing; in fact, an African Union report published in 2019 indicated that there were no ratifications of the Protocol.³⁶

As things currently stand, the portability of pension benefits for migrant workers in the SADC region is still at an aspirational phase if the SADC Migration Action Plans of 2013 and 2016 are anything to go by. It is only in the second SADC Migration Action Plan (2016-2019) that the issue of portability of social security benefits began to be addressed. Outcome 6 of the Action Plan is stated to be, “Strengthening of migrant workers’ access to pension and social protection across SADC region.” The key outputs would be the development of SADC policy and legislation to provide for portability and pension contribution and it is only in 2020 that the Action Plan envisaged that Member States would have adopted a raft of such measures. It is not clear what the status of this programme of action currently is.

In the absence of an agreement, at the SADC level, that ensures full and unimpeded portability of pension rights benefits, it is difficult to envisage how skilled professional migrants navigate their migratory movements in a manner that promotes social protection and preserves the sweat of their brows at a later stage in their lives.

To seek to address the above issues in a far more robust manner than before, the SADC Labour Ministers and Social Partners adopted the SADC Cross-Border Portability of Accrued Social Security Benefits Policy Framework 2016 (hereinafter the SADC Portability Framework 2016). Even though this instrument is still a draft, the ILO views the adoption of the SADC Portability Framework 2016 as a progressive move in the quest to attain the progressive coordination and integration of social protection systems in the SADC region.³⁷

The inclusion of provisions which seek to ensure the maintenance of acquired benefits and rights in the course of acquisition is stated to be one of the key highlights of the SADC Portability Framework 2016.³⁸ Section 4(1)(a) outlines the specific objectives which include, inter alia, ‘the provision of mechanisms to enable workers moving within and outside the SADC region to keep the social security rights which they have acquired under the legislation of the one Member State.’ Section 5 clarifies the scope of application of the instrument as including all general social security schemes plus schemes consisting of legislative obligations including retirement benefits, occupational injury and disease benefits, unemployment insurance, health insurance and survivors’ benefits. The instrument however leaves critical details such as qualifying criteria and other modalities to individual Member States³⁹ whilst

³⁴ As above, n 27, 10

³⁵ The ratification of the Protocol and its entry into force are governed by Articles 30 and 31 respectively.

³⁶ African Union (2019) ‘Guidelines for implementing actors on the AU free movement protocol’ 17

³⁷ ILO “Extending access to social protection and portability of benefits to migrant workers and their families in selected RECs in Africa” https://www.ilo.org/africa/technical-cooperation/WCMS_646607/lang--en/index.htm (accessed 9/09/2020)

³⁸ As above.

³⁹ Section 4(2)

also indicating that the regional body shall play a role in terms of coordination and implementation.⁴⁰

This instrument theoretically establishes a focused basis for the portability of social security benefits across the region and bilateral and multilateral coordination mechanisms. However, detailed provisioning is still only reflected in article 17(2) of the SADC Code on Social Security 2008 which is not binding.

4. Conclusions and recommendations

The African Union and SADC have a plethora of policies, programmes and normative instruments that address migration from a broad perspective. A few of the normative instruments address the issue of portability of pension benefits and acquired social security rights tangentially hence the need for a consolidated instrument addressing this issue. The SADC Cross-Border Portability of Accrued Social Security Benefits Policy Framework 2016 holds potential in terms of the consolidation of regional principles, values, rights addressing withdrawal and death benefits in the context of migration and remigration, coordination mechanisms and taxation mechanisms, amongst other things.

It would be critical for SADC to integrate key provisions from all relevant regional instruments to facilitate the portability of pension benefits and benefits in the process of acquisition and adopt a binding instrument. Otherwise navigating such a huge plethora of instruments with varying legal statuses is proving to be a minefield and would appear to delay or even stifle precise and implementable regional standard-setting.

⁴⁰ Sections 8 – 11