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## **Terms of Reference – Service Provider/Institutions**

### **Assessment of social protection laws, policies as well as the institutional, operative and administrative arrangements to facilitate the coverage and portability of social security benefits for migrant workers in SADC countries**

**(July 2022)**

#### **1. Background/Context:**

Compared to nationals working their entire lives in one country, migrant workers face huge challenges in exercising their rights to social security. They can be denied access or have limited effective access to social security coverage in their host country because of their status, nationality or the insufficient duration of their periods of employment and residence. Their access may further be restricted due to lack of knowledge about and awareness of their rights and obligations. At the same time, they can lose their entitlements to social security benefits in their country of origin because of their temporary absence.

There are additional factors that also contribute to limited access to social security to migrant workers in the region such as the weak administrative and regulatory arrangements for the portability of social security rights. Limited and underdeveloped social security systems (not covering all branches, limited benefits, limited coverage) in certain SADC Member States. Others include the high informality of employment; the non-ratification or non-enforcement of international social security standards; and the absence of bi- and multilateral social security coordination arrangements in the region. These factors affect access to social security systems and the portability of social security benefits for migrant workers. That's the case in most SADC countries, as non-citizens are excluded from most national social security systems as social security systems are established, regulated and administered at a national level.

The right to social security is a fundamental human right included in international and regional instruments such as the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; and the African Charter on Human and Peoples' Rights (1981). Article 27 of the 1990 UN "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families"<sup>1</sup> states the following:

1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral

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<sup>1</sup> The UN 1990 UN "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families" has been ratified by the following four SADC Member States: Lesotho, Madagascar, Mozambique and Seychelles.

and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.

2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.

**Social security** is defined by the ILO as the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner. The **9 key branches of social security** encompass the following:

1. Retirement benefits
2. Unemployment benefits
3. Survivors benefits
4. Occupational injury and disease benefits
5. Health insurance
6. Maternity benefits
7. Invalidity
8. Sickness benefits
9. Family benefits

**Social protection** is defined by the ILO as the set of public measures that a society provides for its members to protect them against economic and social distress that would be caused by the absence or a substantial reduction of income from work as a result of various contingencies (sickness, maternity, employment injury, unemployment, invalidity, old age, and death of the breadwinner); the provision of health care; and, the provision of benefits for families with children.

By definition, social protection is broader and more inclusive than social security since it incorporates non-statutory or private measures for providing social security, but still encompasses traditional social security measures such as social assistance and social insurance. For the purpose of the Social Protection Floors Recommendation, 2012 (No. 202), social protection floors are nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion.

Government, workers, and employers' representatives of ILO Member states have adopted a number of Conventions and Recommendations with explicit or implicit provisions related to the social security rights of migrant workers and their family members. Key ILO instruments providing guidance on the provision of social security benefits to migrant workers include the following:

- a) The ILO ***Social Security (Minimum Standards) Convention, 1952 (No. 102)*** is the flagship convention on social security and defines worldwide agreed minimum standards for all nine branches of social security. It serves as a benchmark and sets minimum standards of protection for: the coverage of the population, the level of

benefits to be provided by social security schemes for each risk and the conditions for entitlement to those benefits, as well as related statistical requirements to demonstrate compliance.

The Convention further establishes the principle of equality of treatment between national and non-national residents of countries of employment, which is applicable to all nine branches of social security (Art. 68). The Convention allows for two exceptions in the application of this principle, including the condition of reciprocity which States may impose when applying this article. The convention further defines a set of core principles irrespective of the type of social security systems. These include: the general responsibility of the State for the due provision of benefits and the proper administration of the institutions and services concerned in securing the provision of benefits; the participation of the persons protected in the management of social security schemes; the collective financing of social security schemes; the adjustment of pensions in payment; and the right of appeal in case of refusal of the benefit or complaint as to its quality or quantity. States that ratify Convention No.102 have to accept at least three of the nine branches of social security. With the exception of the **Democratic Republic of the Congo**, no other SADC country has ratified ILO Convention No.102 - Social Security (Minimum Standards) Convention, 1952.

- b) The **Equality of Treatment (Social Security) Convention, 1962 (No.118)** sets the obligation of equal treatment between nationals and non-nationals. Yet, this is contingent upon reciprocity, which signifies that it does not concern all non-national workers employed on the territory of the State which has ratified the Convention, but only those who are nationals of a State which has also ratified the Convention. The Convention provides for several rights. According to C118, the principle must be granted “both as regards coverage and as regards the right to benefits, [and] in respect of every branch of social security for which it [the ratifying State] has accepted the obligations of the Convention”. Equality of treatment must not be limited by a condition of residence (exceptions are possible for certain non-contributory schemes, the duration of which must not exceed the limits set out in the Convention, but they cannot be imposed solely upon non-nationals). States that have ratified the Convention must “endeavour to participate in schemes for the maintenance of acquired rights and rights in the course of acquisition under their legislation of the nationals” of the States for which the Convention is also in force. The provisions of Convention No.118 are applicable to refugees and stateless persons, for whom equality of treatment must be secured without any condition of reciprocity. Only two countries of the SADC have ratified C118. They include the Democratic Republic of Congo (only with respect to invalidity, old-age, employment injury and family benefits) and Madagascar (only with respect to sickness, maternity, invalidity, and employment injury benefits).
- c) *Maintenance of Social Security Rights Convention, 1982 (No. 157)*. In the same vein, the **Maintenance of Social Security Rights Convention, 1982 (No.157)** provides rules for the adoption of national legislation implementing the principles of the maintenance of rights in the course of acquisition and of acquired rights for migrant workers, in respect of all branches of social security. **None of the SADC countries have**

**ratified C157.** The Convention is supplemented by the **Maintenance of Social Security Rights Recommendation, 1983 (No. 167)** which proposes to States model provisions for the conclusion of bilateral or multilateral social security instruments as well as a model agreement for the coordination of such instruments.

- d) The **Equality of Treatment (Accident Compensation) Convention (No. 19) (interim status)**<sup>2</sup> guarantees to nationals of any member State that has ratified the Convention, and who suffer personal injury due to work accidents, “the same treatment in respect of workmen's compensation” as that granted to the nationals of the employment country, without any condition of residence. **All countries of the SADC, except Mozambique, Namibia and Seychelles** have ratified C19.
- e) **ILO Social Protection Floors Recommendation, 2012 (No. 202)** is a key guiding instrument for the development of national floors of social protection and serves as a cornerstone in the promotion of the rights of migrant workers and their families. Despite not being binding, R202 provides useful guidance to build social protection floors within comprehensive social security systems for all in need and to ensure that migrants and their families have at least access to essential health care and basic income security throughout their life cycle. It calls on member States to extend social protection and progressively ensure higher levels of social security to as many people as possible. States “should provide basic social security guarantees to at least all residents and children as defined in national laws and regulations” and subject to their existing international obligations. In accordance, these guarantees should thus at least be provided to migrant workers with a residence status and children irrespective of their status or their parents or guardians’ status. The wording ‘all’ residents emphasizes that all types or categories of residents and residence status defined under national law should be included whether they are permanent or temporary.

Other relevant Conventions and Recommendations with social protection provisions relevant for migrant workers, include the two migrant specific Conventions No 97 and No. 143 and related recommendations. For more information see table 2.1, page 51-52 of the following ILO tool: “Extending Social Protection to Migrant Workers, Refugees, and their Families: Guide for Policymakers and Practitioners” [wcms\\_826684.pdf \(ilo.org\)](https://www.ilo.org/wcms/5/4/paging/truecms/826684.pdf)

Some of the matters covered by Conventions Nos. 118 and 157 are very complex. Conventions Nos. 118 and 157 therefore establish a system based on a number of basic principles, and primarily equality of treatment, the maintenance of acquired rights and the maintenance of rights in the course of acquisition. Other Conventions and Recommendations also embed some of these principles, in particular the principle of equality of treatment which is a fundamental element of international **human rights** law, and promoted by a large number of ILS with regards to social security specifically.

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<sup>2</sup> Although this Convention has interim status, can’t be ratified anymore and is currently open for denunciation, it remains in force for States that have ratified it and, with 121 States parties, it is one of the most ratified ILO Conventions.

**1. Equality of treatment:** By virtue of the principle of equality of treatment, non-national workers must benefit in the host country from the same conditions as nationals in terms of coverage and entitlement to social security benefits.

**2. Maintenance of acquired rights and the provision of benefits abroad:** The maintenance of acquired rights permits migrant workers to receive benefits which are due to them from a State, even when they cease to be resident on its territory. This principle, which is essential for the social protection of migrant workers, is intended to ensure them real equality of treatment and not just legal equality. In the case of long-term benefits (particularly invalidity, old age and survivors' benefit, and annuities paid as a result of an employment accident or an occupational disease), there is a direct obligation to maintain acquired rights, in the sense that it is not dependent on the conclusion of an agreement between the States concerned. With regard to short-term benefits, the obligation to maintain acquired rights is indirect. States have to endeavour to participate in schemes for the maintenance of these rights.

**3. Maintenance of rights in course of acquisition:** The maintenance of rights in the course of acquisition makes it possible to add together periods of coverage of migrant workers under the social security legislation of the various countries in which they have lived.

**4. Applicable legislation:** The States concerned have to determine by common agreement the applicable legislation, in accordance with certain principles set out in the Convention itself. The applicable legislation is normally that of the State in which the persons concerned carry out their occupational activity or, in the case of persons who are not active, in which they are resident.

**5. Administrative assistance and assistance to persons:** Convention No. 118 provides that States parties shall afford each other administrative assistance free of charge with a view to facilitating the application of the Convention and the implementation of their respective social security legislation.

Objective no. 22 of the **Global Compact for Safe, Orderly and Regular Migration**, encourages countries to "Establish mechanisms for the portability of social security entitlements and earned benefits". It includes provisions on social protection which build on the principles of non-discrimination and equality of treatment and provide a cogent framework for governments to pursue implementation at the national level. Objective 22 of the GCM calls amongst other for:

- The establishment of national social protection systems, including social protection floors for nationals and migrants, in line with the ILO Recommendation 202 on Social Protection Floors;
- The conclusion of bilateral, regional or multilateral social security agreements to ensure the portability of social security rights and benefits;
- The inclusion of social protection provisions in labour agreements.

## 2. The Southern African Development Community (SADC)

The Southern African Development Community (SADC) aims to further socio-economic, political, and security cooperation among its Member States and foster regional integration, in order to achieve peace, stability, and wealth. SADC has adopted the Charter of Fundamental Social Rights in SADC (2003), SADC Employment and Labour Policy Framework (2021), the non-binding Code on Social Security in SADC (2007) and the SADC Portability of Accrued Social Security Benefits with the Region (Draft Policy Framework) of 2016. These policy frameworks address the social aspects of regional integration.

In the SADC region the portability of social security benefits is limited. Social security systems remain less developed in SADC Member States, with coverage being extended to mostly formal sector workers. As a result, the situation of migrant workers remains precarious when it comes to social protection. This is especially the case with those in the informal economy and in irregular situations. In addition, while some countries have concluded bilateral labour and social security agreements (e.g. South Africa has concluded bilateral labour and social security agreements with Botswana, Lesotho, Malawi, Mozambique, Swaziland and Zimbabwe), other countries do not have such provisions in place.

In order to overcome some of the restrictions in accessing social security and portability of social security rights to migrant workers, including those in the informal economy, SADC Ministers of Employment and Labour and Social Partners adopted on March 6 2020 the **SADC Guidelines on the Portability of Social Security Benefits** (the Guidelines). The Guidelines are an integral part of the SADC Labour Migration Action Plan (LMAP) (2020-2025), also adopted by Member States in March 2020.

The Guidelines seek to assist Member States to create a favourable system of policies and regulations that enable workers in SADC to accumulate and access social security benefits across different countries in the region. They recognise the importance of workers' ability to move between borders, without loss of their accrued benefits or entitlements. Such guarantees are essential for SADC to achieve self-sustaining development based on collective self-reliance and the interdependence of Member States. Accordingly, the Guidelines include provisions on non-discrimination and preservation/totalisation of acquired rights.

Also noteworthy, are provisions on mutual administrative assistance, aimed at effective coordination and cooperation between SADC Member States on enhancing access and portability of social security in the SADC region. This includes, for example, the payment of accrued benefits abroad/export of benefits to overcome territorial restrictions on cross-border payments.

However, the Guidelines alone are not sufficient to providing access to social security and guarantee portability of social security rights to migrant workers. There should be accompanied by inclusive policy, legal and administrative arrangements to provide access to social security and facilitate portability of benefits to migrant workers, regardless of their citizenship and location.

### 3. The Southern Africa Migration Management (SAMM) project

In this context, the Southern Africa Migration Management (SAMM) project is supporting the SADC Secretariat on the piloting of the “**SADC Guidelines on Portability of Social Security Benefits**”. A first E-learning course took place between 21 June to 16 July 2021 in collaboration with the International Training Centre of the ILO (ITC/ILO). The course was attended by 36 participants from Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Seychelles, South Africa, United Republic of Tanzania and Zimbabwe.

Following the E-Learning-Course on “Piloting of the SADC Guidelines on Portability of Social Security Benefits”, the Southern Africa Migration Management project has been supporting all participating countries in the development of Action Plans for the implementation of the Guidelines. The Action Plans will guide the implementation of the SADC Guidelines in each of the SADC participating countries, in particular in the 5 countries (**Eswatini, Lesotho, Malawi, South Africa and Zimbabwe**), who volunteered to pilot the implementation of the Guidelines. Work will also include 6 other countries (**Botswana, Comoros, the Democratic Republic of Congo (DRC), Madagascar, Mauritius and Seychelles**) and **Namibia** that have shown interest in doing work in this area.

Among the activities identified in the countries’ actions plans, the review of the current SADC policy, legislative and administrative frameworks with a view to extend social security coverage to migrant workers and nationals is considered a priority.

**Work under this consultancy is linked to SAMM’s Workplan as follows:**

**Result/output 1.3: Regional frameworks for cross-border portability of accrued social security benefits is developed and implemented to enhance social protection for migrant workers**

Activity 1.3.1.5 Development of guidance materials on portability of benefits in Southern Africa.

### 4. Objective, Output and description of tasks

The objective of this consultancy is to produce a report comprised of twelve short (5 to 15 pages each) country-level assessments/reviews to inform policy makers and practitioners on the policy, legal, as well as the institutional, operative and administrative arrangements governing migrant workers’ social protection/social security coverage, access to, and portability of social security benefits in the SADC region. The national assessments will be covering the five countries piloting the SADC Guidelines (**Eswatini, Lesotho, Malawi, South Africa and Zimbabwe**), six other volunteer countries (**Botswana, Comoros, the Democratic Republic of Congo (DRC), Madagascar, Mauritius and Seychelles**) and **Namibia**.

National assessments should be based on interviews and a survey including questions/information on migrant workers’ access to social security and their actual coverage of the nine social security branches and specifying if it is possible for migrants in an irregular

situation and in the informal economy to register in the national security system and access coverage.

The national assessments should reflect on recent developments regarding the facilitation of access to social security to migrant workers and include information on existing bilateral/multilateral agreements to foster the portability of social security entitlements. They should also mention if the portability of social security benefits has been ensured during past decades. If not, what are the reasons behind.

The assessment should further assess the following criteria's regarding **practical obstacles** migrants face in accessing social protection:

- Lack of information in adequate language
- Lack of trust in national institutions due to institutions not ensuring portability of benefits
- Limited contribution capacity
- Informality/irregularity/sector specific exclusion, etc.
- Lack of representation and organisation in trade unions leading to no consultation on the protection of their rights including access to social security
- Discrimination including based on gender, nationality, ethnicity etc.
- Geographical barriers etc.

More specifically, consultant(s) will be required to undertake the following tasks to complete the assignment:

- (1) Review the existing legislative, policy, institutional, operative and administrative framework governing national social security systems in general and the social protection provisions specific to migrant workers with regards to International Labour Standards, namely but not limited to ILO Conventions No. 102 on Social Security (Minimum Standards), No.118 on Equality of Treatment (Social Security), No. 157 on Maintenance of social security right and Recommendation No.202 on Social Protection Floors.
- (2) Collect and analyse available information and data on national social security schemes by branch; existing restrictions to effective social security coverage of migrant workers based on nationality, migration status and/or residence, concentration in the informal economy (e.g. domestic workers, agricultural workers, etc); restrictions to payment of benefits abroad; minimum qualifying periods, including by assessing gender differences;
- (3) Assess legal challenges and opportunities to access and/or extend social protection to migrant workers including unilateral, bilateral and multilateral labour and social security agreements and measures that countries can consider taking.
- (4) Identify legal, institutional, operational and administrative challenges of co-ordination of social security systems taking into account Convention No. 102 and



Recommendation No. 202 as well as other relevant ILO Conventions and Recommendations, and in conjunction with regional policy frameworks, including the Charter of Fundamental Social Rights in SADC (2003), the SADC Protocol on Employment and Labour (2014), Code on Social Security in SADC (2007) (the Code) and the SADC Portability of Accrued Social Security Benefits with the Region (Draft Policy Framework) of 2016;

- (5) Formulate recommendations on required steps for supporting the extension of social protection/social security to migrant workers at the national level (e.g. through unilateral measures) and in relation to the establishment of bilateral or multilateral social security agreements in the SADC region.

The final report should comprise conclusions recommendations on the policy, legal, institutional, operative and administrative reforms and measures needed to improve social protection coverage and reduce obstacles to ensure social security portability of benefits for migrant workers taking into account the SADC region's ambition to implement the SADC guidelines on portability of social security benefits.

## **5. Methodology**

The review will be primarily based on desktop research and literature review and strongly complemented with key informant interviews, expert reviews and inputs from Social Security Expert meetings. The expert(s) will review all the relevant legislation (principal and subsidiary), all the relevant social security and social protection policies in the country.

The expert(s) will also prepare a short survey and conduct interviews with focal persons at the Ministries responsible for social security/social protection, social security institutions and/or regulatory bodies, main stakeholders including social partners and migrants (migrant networks) at country level to assess the institutional, operative and administrative situation. The expert(s) will find out to what extent legal provisions are translated into real (effective) coverage and assess gender differences between migrant workers in terms of social security access and portability of benefits.

## **6. Tasks to be performed**

1. Produce an Inception Report and a Survey;
2. Produce a first draft composed of an introductory chapter and the first six national assessments;
3. Produce a second draft composed of the six additional national assessments;
4. Produce a final draft including conclusions and recommendations.

## **7. Qualifications**

Education: Advanced university degree (Master's Degree or equivalent) in law, public policy, social protection, social sciences or related discipline.

Experience: A minimum of 10 years of experience at the national and/or international level in legal and policy development, policy analysis, research, technical assistance to governments and international organizations, in social protection or related areas. Advanced knowledge of

social protection especially social protection/social security law, and migration policy debates in the SADC and experience in conducting similar analysis and studies, is desired.

Language: Fluent in written and spoken English and French

Communication: The consultant(s) must possess proven abilities to synthesize complex legal and policy information and prepare reports in a clear and concise manner.

## 8. Reporting

The service provider shall report to and perform the assigned tasks under the overall guidance and supervision of the Southern Africa Migration Management (SAMM) Chief Technical Advisor, Ms. Gloria Moreno-Fontes. The DWT Senior Social Security Specialist, Mr. Andrew Allieu, Aly Cisse, Senior Labour Migration Specialist (Independent) and Stefan Urban, Senior Social Protection Specialist (Independent) will also provide technical guidance before and during the drafting process.

## 9. Terms of Contract for Consultant

The service provider will be responsible for all expected outputs mentioned in the terms of reference.

## 10. Timeline and payment breakdown

The consultant will work for a total of an estimated non-consecutive **120 working days**

**Starting date:** 15 August 2022

**End date:** 15 December 2022

Total agreed consultant(s)' fees represent an estimated **30,000.- US dollars** based on an estimated daily fee of **250\$/day** for an estimated **120** working days.

**Payments** will be disbursed as follows:

- ✓ **15% of the total** upon the completion of an inception report and a survey no later than **15 September 2022** to the satisfaction of the ILO.
- ✓ **25% of the total** upon the completion of the first draft comprising information from 6 countries no later than **31 October 2022** to the satisfaction of the ILO.
- ✓ **25% of the total** upon the completion of the second draft comprising information from 6 additional countries no later than **30 November 2022** to the satisfaction of the ILO.
- ✓ **35% of the total** upon the completion of the final product no later than **15 December 2022** to the satisfaction of the ILO.

## 11. Travel

Travel (if any) and related costs will be covered by ILO in line with ILO policies and rules and only if the COVID-19 situation permits it.

## 12. Application

Interested service providers or institutions are invited to submit their applications by midnight South African Standard Time (GMT +2) on 24<sup>th</sup> July 2022 to the International Labour Organization's SAMM Project ([samm-project@ilo.org](mailto:samm-project@ilo.org))\_ Applicants should include the following documentation:

- CV/resumé of key personnel;
- Short proposal including mention of 3 papers of similar legal research/reports or attach 3 writing samples (preferably of published legal or human rights' analysis); 3 references; and, a half a page financial proposal indicating the consultant's daily professional fees in USD and (if necessary) a breakdown of costs.
- Cover letter.