

# Crossings

## Harmonisation of migration policies in SADC states

FEARS THAT LIBERALISATION OF IMMIGRATION LAWS WILL CAUSE A 'FLOOD' OF MIGRANTS ARE SPECULATIVE, WRITES VINCENT WILLIAMS, AND IGNORE THE POTENTIAL CONTRIBUTIONS SUCH PEOPLE COULD MAKE TO RECEIVING COUNTRIES.

As the Southern African Development Community (SADC) region is moving closer towards free trade – the free movement of capital and goods – and ultimately economic integration, the issue of migration and, more broadly, the free movement of people, has once again come into prominence. But the free movement of people continues to be balanced against the political and economic interests of individual member states. Policies, legislative instruments and institutions and mechanisms designed to manage cross-border migration are inevitably couched in protectionist language and this is unlikely to change unless:

- Economic parity between member states increases, or
- A regional migration regime involving all SADC member states that promotes the achievement of greater economic parity is conceptualised, designed and implemented.

All SADC member states have immigration laws and policies that are based on three fundamental principles:

- The sovereignty of the nation-state;
- The integrity of national boundaries; and,
- The right to determine who might enter its national territory and to impose any conditions and obligations upon such people.

As a result, migration laws and policies are largely “protectionist” and discourage the movement of people across borders. As noted by several commentators, this places immigration laws and policies at odds with the historical reality of cross-border migration and in fact encourages undocumented (illegal) movements. And, by driving migration underground, it becomes more difficult to achieve what migration laws and policies intend to achieve: the regulation and management of cross-border migration to ensure that it does not disproportionately disadvantage citizens and have a negative effect on either the source or destination countries.

In terms of current institutional arrangements in most SADC member states, cross-border migration inevitably creates a “dilemma of jurisdiction”. At its most basic it becomes a tug-of-war between the Ministry/Department of Home Affairs/Immigration and the Ministry/Department of Labour. In its extended form it also involves foreign affairs, social and welfare services and so on. The question is: who decides on the numbers of people who should be allowed into a country and the purpose and conditions under which they will be allowed; and, once they’ve been granted access, to what social and welfare services they are entitled? And how does the movement of citizens from one country to another affect the relationship between the governments of the host and source countries?

The absence of a regional protocol or agreement on cross-border migration has been ascribed to a “lack of political will”. However, this “lack of political will” is probably caused by a high degree of uncertainty about the potential effect of the free movement of people.

While economic disparities between SADC member states continue to exist, coupled with the perception that migrants are a burden to the economies of the receiving countries (as opposed to the



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### Editorial Why harmonise?

The possibility of harmonising the migration policies and laws of Southern African Development Community (SADC) member states has been under the spotlight for some time now. Key to this debate has been the recognition that firstly, migration is inevitable and that it will continue to affect all member states and secondly, that the only real way in which migration in the region can be adequately managed is if it is based on systems and procedures that have been collectively developed and co-operatively implemented.

Yet there continues to be a perception that there are too many differences between the current policies and legislation of member states and that harmonizing them, or even developing a more consistent approach to migration management across the region, will be a difficult if not impossible task.

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# Policy needs to be user-friendly

PATRICK CHAUKE, ANC MP AND CHAIRPERSON OF THE PARLIAMENTARY PORTFOLIO COMMITTEE ON HOME AFFAIRS, SPOKE TO KATE LEFKO-EVERETT ABOUT SOUTH AFRICA'S IMMIGRATION POLICY.

**Q: What were the problems with South Africa's immigration policy prior to 1994?**

A: I think that the major problem was the manner in which the Aliens Control Act was designed. South Africa was isolated for many years because of apartheid and its participation internationally was quite limited. The Aliens Control Act did not conform with human rights and international charters on the movement of people and that is why it was found unconstitutional. The Aliens Control Act was designed to isolate South Africa and we were not able to have a lot of investment in the country and the free flow of skills. But after 1994 we began the process of addressing our immigration regime, which was characterised by a number of problems. We have not arrived at the point yet where we have a clear policy and without a clear policy there is nothing that we can do because that policy becomes a foundation of the immigration legislation that we want at the end of the day.

**Q: When the Immigration Act of 2002 was adopted, how did it differ from the previous act?**

A: The 2002 immigration policy began to address some key concerns and to regulate the movement of people who come into the country, regulate the payments for people who want to come to stay in the country, to retire in the country, to start businesses in the country. The Aliens Control Act did not have much of those details. The current problem we face is that the Immigration Act does not address the same problems we are trying to address, because of the lack of policy that governs the immigration law. We have agreed that there is a need to overhaul the entire policy, so that process will have to start. It must be informed by input from other stakeholders, not only in South Africa, but in terms of the global trend of migration. We have to conform to the conventions we have signed and then bring them forward so that we are able to have a comprehensive immigration regime.

**Q: What are some of the significant problems with the Immigration Act of 2002?**

A: One of the problems is that people really struggle to get permits. For example, if you want to come and retire in South Africa, you are required to be in possession of a large sum of money, which means that the act segregates rich and poor. Only the rich will have that opportunity. But there are people who have worked in the mines for many years who don't have South African citizenship, but who want to retire here. They cannot retire here without having that money. That is why now we are beginning to make it quite easy for people who are willing to retire here, across the rich and the poor.

**Q: Soon after it was adopted the Immigration Act of 2002 was amended. What were the reasons for this and what are the key amendments that were made?**

A: Most of the key amendments were around the whole process of issuing permits. Immigration depends on the permits, because you can control the permits that you give out. The first amendment we had was to allow people in the neighbouring countries, for example we have people who are living in an area called Mbuzini in Mpumalanga. Part of Mbuzini is in South Africa and part of it is in Mozambique. Those people are divided, because they don't have access to go from one area to the other because of colonialism and



Patrick Chauke, who chairs the Parliamentary Portfolio Committee on Home Affairs.

apartheid. Another problematic area was the regulations, which were not in line with the act itself and were taking their own directions. And there is the issue of the fees that people must pay. They were very high for people who are just doing cross-border migration on a daily basis, so we have to amend those things and make them reasonable.

**Q: In terms of the other amendments what kind of impact did they have on the other countries in the region?**

A: Currently we are not able to give accurate information on that point. Within the SADC there's no uniformity on migration policies, so their impact is not going to be easily understood until, at SADC level, we have one uniform immigration policy. It's quite a difficult situation that the SADC has to engage in. That is why we have country-to-country bilaterals, rather than having a SADC arrangement on immigration. Mozambique and South Africa currently are discussing the free flow of movement. The impact of the law will be the judged in terms of impact at the regional level, in Africa as a continent and globally.

**Q: What do you think the objectives or outcomes behind immigration policy are as contained in the most recent version of the act?**

A: What we want to do is create an environment whereby, firstly, South Africans are free to move from one point to another, in and out of the country. Secondly, we want to attract investment and make it possible for people who want to come and invest not to find it difficult through immigration laws. If the laws are stiff, people aren't going to come and apply because they will know that they'll have to wait for six months before they get their permit to invest in South Africa. The current laws are beginning to make it quite easy for people who come, like movie-makers for example, or people who are in the film industry. Our immigration policy is a user-friendly policy. But we don't have a clear policy, which we have to deal with.

**Q: And what about dealing with problems like xenophobia? What are the objectives of the policy?**

A: The issue of xenophobia is not going to be an issue that must

be legislated. Naturally you find it, you find it everywhere – it's a global problem – whereby, if you are not a resident or a citizen of a particular country, you are treated differently from citizens. We have to educate our people. The state must make it possible for each and every official, for example from home affairs, to have to treat any person as a client. Because, to perpetuate xenophobia, if the state does not deal with that, ordinary citizens will take it from the state. The challenge is that all of us must go out and educate the masses. That's the only way that we'll deal with the problem of xenophobia. The issue of illegal marriages is one problem we currently face in the Department of Home Affairs. People who access our country then come with other means of getting papers, getting status, citizenship or asylum. People illegally marry South Africans to qualify. So that's why our laws must be user-friendly and we must educate our people on how they must receive people. If you follow the UN Conventions on Refugees and Asylum-Seekers, if our people can understand those things, the whole trend of xenophobic attitudes will diminish because they'll understand our obligation as a country. As a country we have certain responsibilities as a host. If South Africa has refugees, how do you integrate them into society? That's one responsibility of the state: you need to provide them with houses. You need to provide them with social grants, all of the social needs like education. It's the responsibility of the state to make sure people are well received and well accommodated. In South Africa we don't have refugee camps, which means we have to try to integrate refugees within the communities. It's the responsibility of the country, but we must share it with the United Nations. We have to have a system that would accommodate all of these people as they are integrated into society.

**Q: If you could redraft South Africa's immigration policy and law, what are the key principles that you would take into account and on which you would base the immigration policy and law?**

A: That's the most difficult question because through our understanding, reading and training, the responsibility plays on us to come with this immigration policy. Firstly it must be a user-friendly policy. Secondly it must be in line with international laws and standards on migration. What we must do is have a policy which all of us contribute to making. We will be having a workshop on some of these issues and will have to look into the entire immigration regime. But the fundamental principle will be that it must be a user-friendly policy, with a lot of security mechanisms in place.

**Q: What about public participation in this process?**

A: Public participation is very key in any policy. The position of the portfolio committee is that with any bill that we pass there must be input from ordinary people. The problem is that when you talk about ordinary people you talk about people who are somewhere in the villages, who have interest in migration but who don't have means to come to Cape Town. How do you reach out to those people? The problem that Parliament will have to address is the manner in which we structure our committee work and the public hearings.

**Q: Are there any other comments you want to make for the readers?**

A: We are part of the global community and we recognise and respect all the international laws and standards on the issue of migration. We are going to work very hard to make sure that the laws are fully implemented and that the proper policies are in place, so that that will definitely help us to participate in the global village.



# Uniform migration data collection for SADC a must

MIGRATION POLICIES VARY FROM COUNTRY TO COUNTRY IN THE SADC REGION. MEMBER STATES NEED TO DEVELOP AND IMPLEMENT A MIGRATION DATA COLLECTION AND PROCESSING SYSTEM THAT NOT ONLY ASSISTS WITH THE IN-COUNTRY MANAGEMENT OF MIGRATION, BUT THAT ALSO FACILITATES AND ENHANCES A COLLABORATIVE APPROACH AT A REGIONAL LEVEL. TIFFANY TSANG REPORTS.

In trying to understand the dimensions, scope and effect of migration in the SADC region, government officials and researchers often make the point that there is not sufficient data and information available and that, even where information and data is available, the extent to which it is accurate and reliable is not always certain. Thus, immigration policies and laws are often based on speculation and perception, rather than substantive data and information.

In discussing the prospects for the harmonisation of migration policies, laws and practices in the region, government officials meeting at the Migration Dialogue for Southern Africa (Midsa) Forum in Swaziland in November 2000 noted that one of the critical pillars of such harmonisation would be to ensure that SADC member states are able to compare and contrast migration flows in and out of their respective countries and specifically between their countries. However, to do this it would have to be assumed that there are substantial similarities between the immigration data collection and processing systems used by member states.

At the request of the delegates, SAMP agreed to undertake a research project to develop an understanding of the current systems of migration data collection, processing, analysis and accessibility in SADC member states. This project became known as the Migration Data Harmonisation Project (MDHP) and was initiated in February 2003.

In keeping with the request made at the Midsa Forum, the short-term objective of the MDHP was to provide a general assessment of the "state of migration data" in each country in which the research was conducted, as well as in the region generally. This would allow for both regional and country-specific recommendations on how to improve data collection and processing systems. On the assumption that member states would endeavour to achieve a greater degree of consistency in terms of their data collection and processing systems as a result of this project, the longer-term objective of the MDHP was to provide a basis for more substantial and accurate analyses of the scope and effect of cross-border migration in the SADC region.

The key findings of the MDHP suggest that all SADC member states have an interest in, and are involved in, the collection of data about legal cross-border movements, though the extent to which this happens varies from one country to another. With some exceptions, data collection and processing systems are manual and in some of the countries where computer systems have been introduced computerisation is limited to the larger ports of entry.

In addition, all countries have some basic form of data processing, either at immigration headquarters or at the ports of entry where the actual data is collected. This basic processing is usually a tally of the number of travellers on a daily, monthly or annual basis, broken down by country of origin and/or purpose of travel.

In some of the countries, data collected at the ports of entry is



The key findings of the Migration Data Harmonisation Project suggest that all SADC states need to be involved in the collection of data about legal cross-border movements. Photo: african pictures.net

forwarded to either a central statistics office or a statistical unit within the immigration department. It is these statistical units that are responsible for producing reports that are made available outside of the immigration department of countries where such reports are available, usually at a nominal cost. However, with the exception of the Seychelles and Mauritius, there is a significant delay between when the data is collected and when it actually becomes available. This has to do largely with underdeveloped communications infrastructure and/or lack of capacity to process and analyse the data collected.

In all the countries in which the research was conducted there was substantial acknowledgement and agreement that a proper understanding of migration patterns and trends will put member states in a better position to develop policies that are more responsive to migration realities, rather than policies being based on

perceptions and assumptions. However, while member states might see the value of, and have the desire to engage in, a more systematic approach to data collection, processing and analysis, most countries do not have the resources, skills or expertise to put such a system in place in the short term.

The overall challenge to all member states, therefore, is how to develop and implement a migration data collection and processing system that not only assists with the in-country management of migration, but that also facilitates and enhances a collaborative approach at a regional level. As matters stand, the harmonisation of data collection and processing systems would be relatively easy to achieve if the resources and expertise were available to develop and implement a model that draws on the various systems currently in use and to set up a uniform system across the region, while making some allowances for in-country peculiarities.



## A regional issue: working towards

ONCE THE DIFFERENCES AND SIMILARITIES IN IMMIGRATION POLICIES OF THE VARIOUS SADC COUNTRIES ARE ACKNOWLEDGED, IT WILL BE EASIER TO SIMPLIFY AND STANDARDISE NATIONAL POLICIES TO DEVELOP AN INTEGRATED REGIONAL POLICY, WRITE JONATHAN KLAAREN AND BONAVENTURE RUTINWA.

**M**igration between the countries of the Southern African Development Community (SADC) is an issue at the regional, rather than national, level and in recognising this states have committed to increased cooperation and policy integration. Given that SADC countries share many of the same migration challenges and that much of the existing national legislation requires updating, a great deal could be gained by simplifying and standardising national policies to develop an integrated regional policy: a process referred to as “harmonisation”.

Previous efforts have been made within the SADC to move towards regional policy harmonisation through, in particular, the “Draft Protocol on the Free Movement of Persons in SADC”, first tabled in 1996. However, the protocol drew heavily from the precedent set by the European Schengen Treaty and the argument was made that it failed to reflect the unique political and economic realities of southern Africa. After much debate a modified version, the “Draft Protocol on the Facilitation of Movement of Persons in SADC”, was rejected by a number of SADC states.

The harmonisation of migration policies and legislation continues to be the subject of discussion between SADC member states, primarily through the Migration Dialogue for Southern Africa (Midsa). At the Midsa Forum held in Swaziland in November 2000 SAMP was asked to undertake a study of citizenship, migration, immigration and refugee legislation across SADC member states. The study’s purpose was to assess the similarities and differences that exist between current policies and legislation and to put forward recommendations regarding the prospects for, and possibilities of, harmonisation. The results were published in 2004 as *Midsa Report 1: Towards the Harmonisation of Immigration and Refugee Law in SADC*.

The report highlights several key differences in immigration legislation between SADC countries, but it also confirms that many laws and policies are not only founded on shared principles, but aim to address common migration challenges.

### Citizenship

The first area of legislation examined was that of citizenship, which governs legal “membership” of a country. Citizenship laws affect migration policy by differentiating between nationals of a country and those who are “non-citizens” and, by virtue of this distinction, provide the basis for the prescription of rights and entitlements within a particular country.

Within the SADC countries there are five main ways of acquiring citizenship: through birth in a country, descent from parents of that country, naturalisation, marriage or registration. Citizenship through naturalisation is a point of difference among SADC countries and only South Africa, Botswana and the Seychelles do not require naturalisation applicants to renounce citizenship to any other country. Dual citizenship is explicitly prohibited in five countries and accepted in seven others and emerges as a particularly prickly question when countries in southern Africa are increasingly distinguishing between the rights of citizens and non-citizens.

### Population registration and identification

Population registration and identification systems help countries to distinguish by means of documentary evidence between citizens and non-citizens and, by extension, to protect the exclusive rights of citizens by requiring those who apply for particular services to verify their identity as citizens.

Most population registers contain information about identity number, name, address, sex, date and place of birth, occupation, marital status and name of spouse. Similarly, most SADC countries issue “identity documents” as a primary means of identification for citizens. While the contents of identity documents might vary slightly between countries, most include: an identity number, name, date and place of birth, citizenship status, a photograph and fingerprints and sometimes eye colour, height and region of origin.

However, while population registrations and identification help countries to regulate migration, not all SADC countries have enacted legislation accordingly and in some registration is still voluntary. Systems of administration and documentation also differ between SADC countries.

### Registration of births and deaths

Much information recorded at birth, such as date, place and parentage, is critical to an individual’s citizenship in a particular country and to acquiring identification. These in turn affect movement-related rights, such as the right to enter, remain in and leave a country. While registration of births is therefore important to an immigration regime, legislation on maintaining registries differs between SADC countries.

Death registries also help governments to better enforce registration and identification laws and to ensure that identity documents of deceased people are not misused. As with the registration of births, laws on the registration of deaths are fairly modern in most SADC countries, but these countries also differ in their ability to collect, store and retrieve information in birth and death registers, often due to lack of resources and inadequate institutional arrangements.

### Immigration and migration

There have been a number of recent changes in SADC immigration laws. Mozambique, Namibia, South Africa, Tanzania and Zimbabwe have made significant changes to their immigration law within the past ten years. South Africa is re-drafting immigration legislation once again and Lesotho is fundamentally revising its statute.

In most SADC countries new immigration legislation does not draw substantially from international instruments, for example, on the treatment of migrant workers or on trade and services. Instead SADC states rely on a range of bilateral and operational agreements between countries. However, there are a number of SADC protocols that affect migration in the region, including those on education and training and immunities and privileges.

Visitors to most SADC countries must have a visa, although this alone is not a sufficient condition for entry to the country. Migrants might be prevented from entering a country or “excluded” for reasons including insufficient funds, disease, a past criminal conviction, security concerns or a prior violation of a migration law. Six countries exclude migrants engaged in prostitution and Malawi and Zimbabwe exclude homosexuals. However, in most countries a person who is excluded must be notified and might be able to appeal.

Migrants legally entering SADC countries are usually given a temporary residence permit unless they have qualified for an employment, investor or permanent residence permit. SADC countries differ a great deal in terms of the specificity of temporary residence permits and South Africa, as the most specific, offers 15 different types. All SADC countries offer visitor’s permits and might offer permits for study or education. Most also have permits for the entry of relatives and South Africa and Zimbabwe have permits for medical treatment.

Employment permits for non-citizens differ from temporary residence permits and in five countries these are issued outside of migration legislation. SADC governments generally consider the effect of foreign workers on domestic employment before granting an employment permit and require that the applicant has a job offer before entering the country, works only for a specific employer and is paid a prevailing wage. Labour migration, for example, to South African mines is legislated separately under bilateral agreements between countries.





# a common ground

Most SADC countries comply with international standards on expulsion and deportation, although some meet only the minimum standards requiring notification or a warrant for a person expelled from the country. In most countries a migrant might be detained pending expulsion, but can opt to pay a bond instead.

The police, and sometimes the defence forces or prisons services, are primarily responsible for enforcing immigration law. There is little variation in punishable offenses specified in immigration law across the SADC countries, which include illegal entry or re-entry, misuse of documents and falsification of information.

Human smuggling and trafficking is not explicitly criminalised, but some offenses, such as aiding and abetting the unlawful entry of people into a country, come close to the crimes of smuggling and trafficking.

## Migration control

Most SADC countries have ratified key international instruments relating to refugees. Accordingly, legislation enshrines the principles of asylum, non-refoulement, which protects refugees from being returned to places where their lives or freedoms could be threatened, and protection for refugees, which guarantees minimum standards of treatment in terms of freedom of movement, employment and equality. In ratifying these instruments SADC states also have committed to assist refugees through repatriation to their home country, resettlement or local integration. In most SADC countries a migrant who wants to be "recognised" as a refugee must tell authorities that he or she is seeking asylum upon entering the country. At the same time in most countries migrants seeking asylum are not penalised for illegal entry.

While laws on refugees are founded on the same principles

across SADC countries, some legislation aims more at controlling refugees than protecting them. While some states allow free movement, others require that refugees live in settlements that they may not leave without permission. Most countries prohibit refugees from working unless they obtain a work permit and few allow for citizenship through naturalisation.

The Midsa report provides useful insight into the possibilities for the harmonisation of immigration policies and legislation between SADC member states. The first of these is that, despite claims to the contrary that are sometimes made, all member states face the same problems and challenges in terms of migration management, though these might differ in degree and extent. Related to this is the fact that the policies and laws of all countries are designed to respond to these problems and challenges.

Secondly, and fundamental to the debate about the prospects for harmonisation, is the fact that there is a significant degree of overlap between the policies and laws of the various countries; much more so than was previously anticipated. This does not apply only to immigration policies and laws, but also to policies and laws regarding citizenship, births and deaths and the registration and identification of citizens, all of which have an impact on migration management. Thirdly, the report makes important recommendations aimed at refocusing specific policies or bits of legislation so that they are better able to provide a basis to address the challenges and problems faced by member states.

Finally, while the report itself is silent on the more general prospects for harmonisation, it is apparent that aligning the various policy and legislative instruments is perhaps not such a difficult and complicated task. Now that the differences and similarities have been identified, it is much easier to see what member states have in common in terms of their policies and laws and, therefore, to start a process of harmonisation or, at the very least, work towards greater consistency between the policies and laws of the countries that make up the SADC.

• *Midsa Report 1 is available from SAMP, tel +27(21) 476 5600, email nomzi@idasact.org.za, www.queensu.ca/publications.*

## Editorial

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In this issue of *Crossings* we review and report on various aspects of the migration harmonisation debate. We ask whether the possibility of policy and legislative harmonisation is as remote as is sometimes suggested.

Our tentative conclusion is that existing policies and laws are in fact not that contradictory; in all countries they are geared towards addressing similar problems and challenges. While there are technical and in some countries more substantive differences, these can quite easily be modified to fit within a more consistent set of policies and laws across the region.

For this reason, we believe that the difficulty in harmonising immigration laws and policies has little to do with the policies and laws themselves, but is rather to do with uncertainty about the impact free or freer movement of people would have on individual member states.

Therefore there is a need to more accurately assess what the potential impact of migration harmonisation would be, not just on those countries that are labeled "receiving" countries but also on those countries regarded as "sending" countries. Key to this assessment must be the recognition that migration in the region is not a one-way process but has potential benefits for the countries migrants come from and the countries that they go to.

The fundamental questions are whether and how member states can move beyond the perception that a more liberal migration regime in the region will have a more negative than positive impact. It is only when there are clearer answers to the questions about impact – and assuming that the impact will be more positive than negative – that significant progress towards migration harmonisation can be achieved.

In terms of the SADC objectives to promote regional cooperation and integration and enhance socioeconomic development, migration is a key instrument that cannot and should not be ignored.

*Vincent Williams and Jonathan Crush*

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fact that they could make a substantial contribution), it is unlikely that any significant progress will be made in the development of some kind of regional protocol or agreement about the free movement of people.

In this context it is essential to dispel the perception that if increased cross-border migration between states is allowed, this will result in the "opening of the floodgates" and the swamping of member states with more developed economies. Equally important is that any proposals regarding the free(r) movement of people must substantially incorporate the management and regulatory aspects of such movement.

There is already increased co-operation between member states and several signed protocols and agreements that affect cross-border operations, including a protocol on tourism. The development of protocols and agreements about cross-border migration must build on these existing initiatives.

It is apparent that not all member states will agree simultaneously to protocols pertaining to migration to their countries. Therefore, as mentioned above, the strategic approach would be to pursue bilateral and multilateral options that, if expanded exponentially, will incorporate most of the SADC member states eventually. For this reason it is critically important that a focal point for migration be developed at a regional level. Such a focal point must focus on increased bilateral and multilateral arrangements that pertain to the management and regulation of cross-border migra-

tion flows, while at the same time promote the concept and desirability of a regional protocol or agreement.

The movement of people across borders is a reality that will continue and cannot be wished away. No matter how much time, effort and resources governments put into stopping or drastically controlling such movements, it is unlikely that any government will succeed in stopping the movement of people, though they might create the illusion of doing so.

But what are the actual prospects for the harmonisation of immigration policies and laws between SADC member states?

As suggested, the major stumbling block to harmonisation is the perception that the liberalisation of immigration laws will result in one-way flows that will affect adversely those countries with the most developed economies in the region. This is, however, largely speculative and there is no real evidence to verify that this is indeed what will happen. Nevertheless, the possibility that this might happen is what is preventing any real progress in the steps being taken to achieve harmonisation.

More generally, there is the fear that harmonisation will mean that member states lose their ability to make decisions about who might enter their countries, for what purpose and under what conditions and that, therefore, the movement of people will become uncontrollable. In this sense the word harmonisation has become synonymous with loss of control and more generally is perceived to be a threat to statehood and sovereignty.

The results of research undertaken by SAMP suggest that there already is a significant degree of overlap and consistency between the immigration policies and laws of SADC member states and that to achieve harmonisation is not very difficult. In other words, with some amendments in specific countries, it would be relatively easy for all member states to have more or less the same migration policies and laws and it probably would not make a substantial difference to the movement of people across borders. What this indicates is that the debate about harmonisation is not about the actual immigration policies and laws of member states, but rather about the rights and entitlements of migrants once they have crossed the border into another country.

By definition immigration policies and laws do not define the rights and entitlements of migrants beyond the requirement for, and conditions of, entry. Once a person has entered another country as a migrant, temporarily or permanently, his/her rights and entitlements are prescribed by a range of other policies and laws, be these education, health, social and welfare services, housing and so on. Until there is an acknowledgement that the immigration harmonisation debate is not about immigration per se, but about the social and welfare rights of migrants, and unless steps are taken to address what is fundamentally a more complex and controversial set of issues, it is unlikely that any significant progress will be made towards the harmonisation of immigration policies, laws and practices.



## Setting up in a new city is a daunting task

# Women prepared to risk it all

IN AN EFFORT TO DEVELOP A BETTER UNDERSTANDING OF THE EXPERIENCES OF FEMALE MIGRANTS AND TO ASSESS THE IMPLICATIONS OF THESE FOR MIGRATION POLICIES AND MANAGEMENT SYSTEMS, SAMP IS CONDUCTING IN-DEPTH INTERVIEWS WITH ABOUT 100 FEMALE MIGRANTS AS PART OF A PROJECT CALLED "FEMALE MIGRANT VOICES". ANYA RUSSIAN SUMMARISES THE FINDINGS OF ONE OF HER INTERVIEWS.

**E**lizabeth (not her real name) is a young Kenyan woman who had plans to train as a nurse until she realised that she would not be able to afford the costs of the training. In the absence of any other opportunities at home, she decided her best option was to leave Kenya and to travel to South Africa. When asked about if she had made prior arrangements for her travel to and stay in South Africa, she responded: "No, I didn't have any idea. I didn't even know where I was going. I said I want to go; I don't want to stay anymore in my country. I just decided to come to South Africa."

She managed to arrange a plane ticket from Nairobi to Johannesburg and, on arrival in Johannesburg, she somehow found a taxi driver who took her to a place where there were many other foreigners. She asked if anyone knew any Kenyans and was directed to someone who housed her for a few days and helped to arrange a bus ticket from Johannesburg to Cape Town. Throughout the process her biggest problem was to obtain travel documents to leave Kenya, rather than to get into South Africa. While not stating it explicitly, she suggested that she needed money to bribe officials to obtain travel documents in Kenya, but she said that in South Africa she didn't need any money and that she had no problems with immigration or other officials.

Getting established in a new city was somewhat daunting. "It was not easy for me," she said, "because when I come here to Cape Town, I didn't know anyone. Most of the people they don't want to tell you where to start or what to do. It wasn't easy for me because I think I looked for a whole month without doing anything." She said when she applied for positions, mainly in hotels, she was always put at the bottom of the list because South Africans were given preference.

By chance she met a Kenyan woman who had a stall at a craft market. The woman was about to have a baby and needed to employ someone to run her stall temporarily. Elizabeth ran the stall on her own for about three months and when her friend returned she gave some crafts to Elizabeth, which she used to set up a stall of her own.

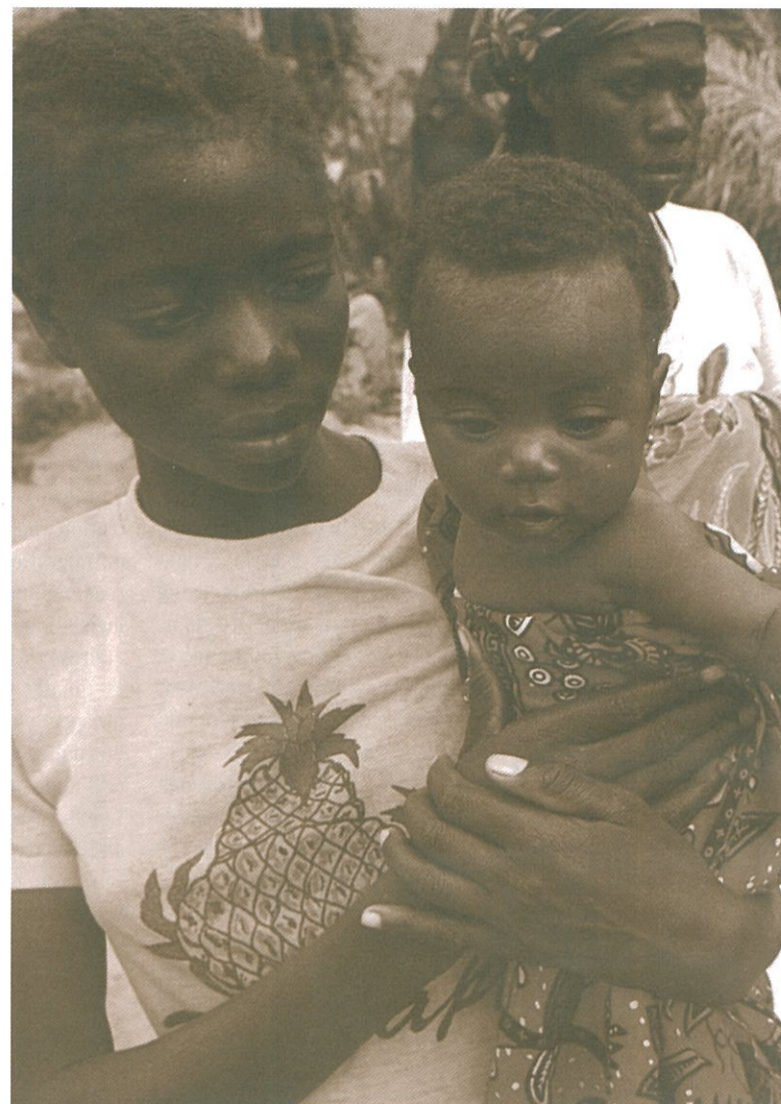
She now says proudly that not only does she make enough money to be self-sufficient, but that she is also sending money back home to her family in Kenya. "Everything has changed. Before I couldn't do anything and had to ask for money from my parents, but now I can do everything." Impressed by her success, some of Elizabeth's family members said they wanted to join her in South Africa. "After two years I invited my brother," she said. "I did everything for him and now he is doing business on his own."

She is quick to acknowledge that her success story is not necessarily the norm and said women generally tend to face more obstacles. She referred to the experiences of other women who had tried to emigrate and who had found it much more difficult. "It is difficult if you have a baby. It's very difficult. They don't allow women to get out of the country very much if you are married." Her opinion was that women should be allowed to emigrate on their own if they chose. The alternative, she said, is that women often end up on the street prostituting themselves or "being escapist so you will forget".

In telling her story Elizabeth appears to deliberately emphasise the positive aspects of her experience, with only oblique references to potential or actual difficulties. This is not surprising given the successful outcome of her endeavours. However, implicit in Elizabeth's story is the ever-present possibility that things might not have worked out as well as they did. At any point along her journey she might have fallen prey to criminals or unscrupulous characters, who would not have hesitated to exploit her vulnerability as a woman travelling alone. She depended almost entirely on people she met along the way.

Perhaps her greatest vulnerability during her journey was that she could have become a victim of trafficking, coerced or deceived into a situation of ongoing exploitation, usually as a sex worker. With the increase in the phenomenon of human trafficking in southern Africa and the rest of the continent, this scenario is not as far-fetched as it might appear. Elizabeth was lucky that this did not happen to her.

Her willingness to "risk it all" and to travel to South Africa without any arrangements in place, speaks to the situation of many women who find themselves without any real opportunities in their home countries. Some are more circumspect and plan their journey and destination with more care, but others, like



SAMP's analysis finds that migration policies and laws often unintentionally discriminate against female migrants because they do not take their experiences, concerns and needs into account.

Photo: africanpictures.net

Elizabeth, often believe that anything would be better than the situation in which they find themselves at home.

Currently very few, if any, countries in the SADC region have adequate laws and mechanisms to protect vulnerable migrant women who are at risk of becoming victims of trafficking. This means that the perpetrators of human trafficking usually get away with it unless they can be charged with kidnapping or assault. While the argument might be made that a woman's decision to emigrate, which could lead to such vulnerability, falls outside the scope of what governments and policy-makers can do, there is an obligation on governments to recognise this vulnerability and to ensure that steps are taken in terms of policies and laws to provide protection or recourse to migrants, particularly women and children, who are at risk.

On the other hand Elizabeth's story also speaks to the determination and resourcefulness of migrant women to improve not only their own lives, but also the lives of their families back home. Contrary to popular perception that migrants are a burden on the host society and that they compete with citizens for jobs and other opportunities, it is apparent that Elizabeth is making a positive contribution to South Africa through her entrepreneurial activities, even if her contribution is relatively small. Again, policy-makers need to give attention to facilitating and making it possible for migrant women like Elizabeth to make an even bigger contribution.



## Seeking co-operation on free movement of citizens

THE REVISED FACILITATION OF MOVEMENT OF PERSONS IN THE SADC PROTOCOL TONES DOWN PROVISIONS OF AN EARLIER DRAFT, BUT SOME MEMBER STATES STILL BAULK AT PROPOSED LIBERALISATION OF MIGRATION POLICY, REPORTS **VINCENT WILLIAMS**.

Within the Southern African Development Community (SADC) it has been accepted that regional cross-border migration is a key issue in the context of regional economic development and integration, but that it cannot be adequately managed and regulated on the basis of the domestic legislation of individual member states. Therefore, countries in the region need to co-operate to develop appropriate policies, legislation and mechanisms to govern a regional migration regime.

In 1993 a SADC workshop on the free movement of people was held in Harare and following the SADC Council of Ministers meeting in Swaziland in 1994 a team of consultants was appointed to prepare a SADC protocol on free movement. In 1995 the consultants submitted the *Draft Protocol on the Free Movement of Persons in the Southern African Development Community (SADC)*. This protocol, which proposed a phased-in approach to eventual free movement of people between SADC states, was considered by many member states to be too radical and somewhat premature.

Negative reaction to the protocol came particularly from South Africa, Namibia and Botswana, arguably the three countries with the strongest economies in the region. The Free Movement Protocol was replaced by the *Draft Protocol on the Facilitation of Movement of Persons in the Southern African Development Community (SADC)*, but despite several attempts, no significant progress has been made towards the adoption of this protocol.

There is significant overlap between the contents and scope of the two protocols as well as the mechanisms proposed for their implementation, with both proposing a phased-in approach. It is not so much in the provisions of the two protocols that the differences lie, but rather in the spirit and intent.

The essential difference between the two protocols is that the Facilitation Protocol proposes that the movement within the region of citizens of SADC member states should be determined by the domestic legislation of each state, but that states need to co-operate to harmonise their legislation and regulations to make such movement easier. The Free Movement Protocol, on the other hand, proposes that free movement within the SADC region should be the right of every citizen of a member state and that eventually such movement should not be hampered in any manner. The Free Movement protocol also proposes that the regulations that govern the movement of citizens of SADC member states within the region should be determined collectively at a regional level and should supercede domestic legislation and regulations.

Both protocols contain three additional sets of interesting provisions. Firstly, there are brief references to regional co-operation on refugee protection. The second concerns guidelines for the removal of people from the territory of a member state. Essentially, if these provisions are accepted, no member state shall be allowed to remove any citizen of another member state from its territory without due process and only according to strict procedures and regard for their rights. Specifically, the protocols prohibit the removal of groups of people based purely on their country of origin or family relations and argue that the merits of each case must be assessed.

The third set of provisions specifies that people who have been granted residence or establishment rights in a member state should enjoy the same rights as the citizens of that country. In the Facilitation Protocol this is qualified by the addition of the words "to the extent that it is possible". In the Free Movement Protocol it is stated "...save for such political rights as may be agreed by the Summit," but it then sets out various explicit rights that will be granted to citizens of members states who get establishment rights in another member state.

The issue of free movement in the SADC is controversial and complex. At the heart of it appears to be the fear of those member states with the most developed economies that a relaxation of migration controls would result in the one-way flow of large numbers of people in search of jobs and other opportunities. This is combined with the fear that reduced border controls would also increase opportunities for cross-border criminal syndicates. At a political level it also raises a fundamental question about the sovereignty of each member state and, therefore, whether migration should be governed by

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a regional protocol or subject to the domestic legislation of each member state.

It is unlikely that the issues related to the free movement of people in the SADC will be resolved in the short term. However, there have been several initiatives that augur well for the future. These include bilateral and multilateral co-operation agreements between specific countries regarding the joint management of borders and the movement of people.

Of particular significance has been the establishment of the Migration Dialogue for Southern Africa (Midsa), a regular inter-governmental forum for representatives of all SADC member states to exchange views and ideas on the management of cross-border migration in the region. The Midsa process is jointly administered by SAMP and the International Organisation for Migration (IOM).

• See table on the next page.



# Protocols

PROPOSED ELEMENTS	FREE MOVEMENT PROTOCOL	FACILITATION OF MOVEMENT PROTOCOL
<p><b>PHASE 1:</b>            Visa-free entry — citizen of a SADC member state may enter the territory of another member state without a visa</p>	<ul style="list-style-type: none"> <li>Limited to a period not exceeding six months, but may be renewed</li> <li>Entry is sought through an official border post</li> <li>Visitor must possess a valid travel document</li> <li>Visitor has or can obtain sufficient means of self-support for the duration of the visit, but shall be presumed to have such support</li> <li>Visitor is not an inadmissible immigrant under the laws of the host country</li> <li>Member states may apply for an exemption of this provision, but visas shall be issued free of charge at the port of entry</li> <li>Exemptions will be valid for a period not exceeding 12 months</li> </ul>	<ul style="list-style-type: none"> <li>Limited to a period not exceeding three months, but may be renewed</li> <li>Entry is sought through an official border post</li> <li>Visitor must possess a valid travel document</li> <li>Visitor must produce evidence of sufficient support for the duration of the visit</li> <li>Visitor is not a prohibited person under the laws of the host country</li> <li>Member states may enter into bilateral agreements with other member states regarding the reciprocal handling of travellers arriving without travel documents</li> <li>Member states may apply for an exemption of this provision but visas shall be issued free of charge at the port of entry</li> <li>Exemptions will be valid for a period not exceeding 12 months, but a state may apply for an extension thereof</li> </ul>
<p><b>PHASE 2:</b>            Residence — authorisation granted to a citizen of a SADC member state to temporarily reside in the territory of another state</p>	<ul style="list-style-type: none"> <li>Issued for a maximum period of three years, but can be renewed</li> <li>Applicant has the right to               <ol style="list-style-type: none"> <li>apply for and accept offers of employment</li> <li>enter freely the territory of a member state for the purpose of seeking employment</li> <li>take up employment subject to the labour laws of the host state</li> <li>reside in the territory of a member state as a student or trainee</li> </ol> </li> <li>Right of residence shall be granted by all member states to citizens of other member states within a period of three years from the entry into force of the protocol</li> <li>Laws and regulations shall be harmonised and a uniform SADC residence permit shall be established within two years of the entry into force of the protocol</li> </ul>	<ul style="list-style-type: none"> <li>Issued for a maximum period of three years, but can be renewed</li> <li>Shall be granted for the purposes of               <ol style="list-style-type: none"> <li>recreation, business or medical treatment</li> <li>taking up employment</li> <li>education or other training</li> <li>other authorised pursuits</li> </ol> </li> <li>Member states shall review and where necessary relax the criteria for granting residence and shall ensure that their laws and regulations governing the granting of residence permits are harmonised within a period of three years from the entry into force of the protocol</li> </ul>
<p><b>PHASE 3:</b>            Establishment — citizens of SADC member states may establish themselves (take up permanent residence) in the territory of another member state</p>	<ul style="list-style-type: none"> <li>Establishment shall include the right               <ol style="list-style-type: none"> <li>of access to economic activities as a self-employed person</li> <li>to establish and manage a profession, trade or business</li> <li>to practice one's profession, business or calling and to provide services related thereto</li> <li>to participate in all such human activities as citizens of the host state (subject to a later clause — see below)</li> </ol> </li> <li>The right of establishment shall be granted to citizens of other member states and the progressive abolishment of all restrictions shall take place within a period of five years from the entry into force of the protocol</li> </ul>	<ul style="list-style-type: none"> <li>Establishment shall mean permission or authority for               <ol style="list-style-type: none"> <li>access to economic activities as self-employed people</li> <li>establishing and managing a profession, trade or business</li> <li>practising one's profession, trade, business or calling and providing services related thereto</li> <li>participating in all human activities as citizens of the host state (subject to a later clause — see below)</li> </ol> </li> <li>Member states shall within a period of five years from the entry into force of the protocol eliminate all obstacles to the granting of the freedom of establishment</li> </ul>
<p><b>PHASE 4:</b>            Controls only at external borders (between SADC member states and non-member states, also referred to as third states)</p>	<ul style="list-style-type: none"> <li>Within a period of 10 years shall take steps to abolish controls on the movement of citizens of SADC member states within the SADC</li> <li>Citizens of member states shall not be subject to the carrying out of any checks or controls</li> <li>Abolition of checks on citizens shall not affect any rights or obligations of citizens of third states</li> <li>Member states shall be free to exercise police and other powers and to require persons to hold, carry and produce permits and documents</li> <li>May be suspended for a period not exceeding one month</li> <li>Shall enter into force on a date to be determined by the Summit</li> </ul>	<ul style="list-style-type: none"> <li>Within a period of 10 years shall take steps to minimise controls on the movement of citizens of SADC member states within the SADC</li> <li>Citizens of member states shall not be subject to checks or controls as a matter of routine</li> <li>Abolition of checks on citizens shall not affect any rights or obligations of citizens of third states</li> <li>Member states shall be free to exercise police and other powers and to require people to hold, carry and produce permits and documents</li> <li>May be suspended for a period not exceeding three months</li> <li>Shall enter into force on a date to be determined by the Summit</li> </ul>
<p><b>INSTITUTIONAL STRUCTURE:</b></p>	<ul style="list-style-type: none"> <li>Regional Standing Committee composed of the Minister responsible for Immigration and the Minister responsible for Police in each member state</li> <li>Regional Cross Border Security Committee</li> <li>Regional Committee on Refugees</li> </ul>	<ul style="list-style-type: none"> <li>Committee of ministers composed of the Minister responsible for Immigration in each member state(s)</li> <li>Regional Committees on Refugees</li> </ul>

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