ACCESS TO SOCIAL SERVICES FOR NON-CITIZENS AND THE PORTABILITY OF SOCIAL BENEFITS WITHIN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

South Africa Country Report

A REPORT TO THE WORLD BANK

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CHAPTER ONE: MATRIX

Non-citizens, who are lawfully employed in South Africa, usually qualify for employment-based social insurance benefits, such as unemployment insurance (see, however, the qualification referred to below), compensation for occupational injuries and diseases, and occupational-based retirement benefits. Apart from certain exceptions made for foreigners with permanent residence status, non-nationals are generally excluded from social security protection, in particular social assistance. In terms of the Social Assistance Act of 2004 one of the eligibility criteria for accessing almost all social assistance benefits (such as old age grants and disability benefits and in contrast to the previous act the foster child grant as well) is South African citizenship. This must, however, be understood to be qualified by the recent Khosa judgment of the Constitutional Court, which held that the citizenship-requirement does not apply to permanent residents. In terms of the unemployment insurance scheme, non-citizens are excluded from the operation of the Unemployment Insurance Act if they have to be repatriated upon termination of their services.

<table>
<thead>
<tr>
<th>Categories of persons covered.</th>
<th>social assistance</th>
<th>national and occupational old-age and disability pension</th>
<th>unemployment benefits</th>
<th>healthcare (including health insurance)</th>
<th>public housing</th>
<th>public schooling</th>
</tr>
</thead>
<tbody>
<tr>
<td>Citizens</td>
<td>Old Age Grant</td>
<td>Retirement benefits (via pension or provident funds)</td>
<td>The payment of illness, maternity, adoption and dependent’s benefits in the event of unemployment. It is contributory in nature.</td>
<td>They enjoy free primary health care. Are also able to access health care through private medical schemes.</td>
<td>There is provision for housing subsidies to accelerate access to housing. Housing subsidy is not a cash payout but is paid directly to financial institution.</td>
<td>Loans and bursaries are allocated to eligible students in public higher education through the NSFAS.</td>
</tr>
<tr>
<td>Permanent residents</td>
<td>Old Age, Child Support, Disability, Care Dependency, Foster Child, And War Veterans grants; Grant-in-Aid Social Relief</td>
<td>Retirement benefits (via pension or provident funds)</td>
<td>Through the Unemployment insurance fund, can access unemployment benefits in the event of unemployment. They need to be contributors and formally employed to access this benefit.</td>
<td>They enjoy free primary health care and also can access health care through private medical schemes.</td>
<td>Access housing subsidies. i.e. the Housing subsidy grant and the Human settlement redevelopment grant.</td>
<td>Can access loans and bursaries through the NSFSAS for public schooling in public higher education.</td>
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<tr>
<td>Temporary residents (including contract migrants)</td>
<td>Not covered.</td>
<td>The Road Accident fund, a non-employment based social insurance scheme is available to temporary residents. They can also access compensation for occupational injuries and diseases.</td>
<td>Temporary residents are excluded from Unemployment insurance.</td>
<td>Temporary residents are not covered in the public sector. Health care is available to them through the private sector through private schemes, which is contributory in nature.</td>
<td>Not covered.</td>
<td>Not covered.</td>
</tr>
<tr>
<td><strong>Refugees</strong></td>
<td>Can access all social grants in South Africa.</td>
<td>Refugees who contribute to the unemployment Insurance fund are able to access this benefit in the event of unemployment. They are allowed to move freely and work in the country.</td>
<td>Refugee Children enjoy access to free basic primary healthcare</td>
<td>Not covered.</td>
<td>Same as permanent residents.</td>
<td></td>
</tr>
<tr>
<td><strong>Asylum seekers</strong></td>
<td>Cannot access social grants in South Africa until refugee status has been conferred upon them.</td>
<td>Not covered.</td>
<td>Not covered.</td>
<td>Not covered.</td>
<td>Not covered.</td>
<td>Not covered in public sector. Can access schooling if they privately fund themselves.</td>
</tr>
</tbody>
</table>

**Permanent residents**

**Social Insurance**
Unemployment Insurance Benefits
- Illness benefits
- Maternity benefits

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1 Entitlement of permanent residents to social assistance benefits is indicated in the Constitutional Court decision of *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).
• Adoption benefits
• Unemployment benefits
• Dependants' benefits

Health insurance (occupational based)

* **Social Assistance**

* Temporary Residents\(^2\)

* **Social Insurance**
  Employment Injuries and Diseases
  Motor Vehicle Accidents (RAF)
  Health Insurance (occupational based)
  Retirement Benefits (if rules of fund allow this)

* Refugees\(^3\) and Asylum-Seekers\(^4\)
  Motor Vehicle Accidents

* Non-citizen children
  Motor Vehicle Accidents

* Illegal Immigrants\(^5\)

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\(^2\) Migrant workers on a work permit.

\(^3\) Refugees and asylum-seekers who are employed would in principle qualify to contribute to and benefit from employment-based social insurance.

\(^4\) The Jesuit Refugee Services, a private institution, offers a social assistance grant to seriously disabled, chronically and terminally ill refugees and asylum-seekers. The beneficiary must be without any possibility of ever becoming self-reliant or contributing to their daily living needs. The grant amount is in line with the government disability grant.

\(^5\) Illegal immigrants qualify for some core social security rights, such as emergency medical assistance. They could also qualify for motor vehicle accident insurance.
CHAPTER TWO: OVERVIEW OF SOCIAL SERVICES.

2.1 INTRODUCTION

The architecture of international human rights is built upon the premise that all persons, by virtue of their essential humanity, should be able to enjoy all human rights unless exceptional disjunctions, for example between citizens and non-citizens, serve a legitimate state objective and are proportional to the achievement of that objective.6

Given the vulnerable place non-citizens hold as a minority group in their host countries, they are extremely susceptible to human rights abuses as well as to exclusion from the socio-economic structure of the host state. This report attempts to highlight the social security policies in South Africa as they relate to non-citizens, examine whether any provision exists for the portability of benefits and to identify gaps, if any, in the social security net with regard to various categories of non-citizens.

2.2 OVERVIEW OF THE SOUTH AFRICAN SOCIAL SECURITY SYSTEM

South Africa has inherited a social security system which is remarkably comprehensive by a middle income developing country standard.7 The system is characterised by a strict distinction between social assistance and social insurance.8 Due to historical reasons, some of the traditional social security contingencies are not regulated on a public insurance fund basis, but covered in terms of essentially private mechanisms – in particular retirement and health,9 though health care is provided for the bulk of the population by limited public measures in terms of free primary health care, as well as hospital care for women with young children and the aged. For the rest, medical services

8 Ibid.
9 In these cases public provision is made to cover in particular those without sufficient means – such as by means of the state old-age grant and public health services. In the South African context the private measures must be seen as part of the social security system.
are covered by private schemes. Social insurance usually refers to earned benefits of workers and their families and is often linked to formal employment. Social assistance is financed through taxes, regulated by legislation and is the exclusive responsibility of the state. Social relief forms part of the social assistance branch of the South African social security system, and entails short-term measures undertaken by the State, and private institutions, to assist persons during individual or community crises that have caused the persons or communities to be unable to meet their most basic needs. Overarching legislation in South Africa deals with the various social security contingencies. In the area of social assistance, the Social Assistance Act is the most important instrument. Common law, particularly administrative law, plays an important role as far as social security discretion exercise and social delivery are concerned. Social insurance contingencies are regulated by individual pieces of legislation.

Outside social assistance retirement coverage is regulated mainly in terms of the Pension Funds Act. However, some occupational-based retirement schemes are provided for by other statutes and cover particular categories of workers. These include the Military Pensions Act; Special Pensions Act; and General Pensions Act.

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12 According to the Social Assistance Act 13 of 2004, this means a social grant including social relief of distress.
14 As defined in the Fund Raising Act 107 of 1978. See now also the definition of social assistance in s 1 of the Social Assistance Act 13 of 2004.
16 13 of 2004.
17 The Promotion of Administrative Justice Act 3 of 2000 gives expression to the constitutional requirement that national legislation be enacted, setting out the details of the broad framework of administrative law rights enshrined in the Bill of Rights.
19 24 of 1956
20 84 of 1976
21 69 of 1996
22 29 of 1979
Different sets of legislation deal with employment-related injuries and diseases in and outside the mining sector, and are administered by different institutional frameworks for occupational health and safety. The laws concerned with preventing or reducing accidents, injuries and ill health at workplaces are, generally, the Occupational Health and Safety Act (OHSA)\textsuperscript{23} and the Mines Health and Safety Act (MHSA)\textsuperscript{24} Compensation is regulated by the Compensation for Occupational Injuries and Diseases Act (COIDA)\textsuperscript{25} and Occupational Diseases in Mines and Works Act (ODMWA)\textsuperscript{26}. OHSA and COIDA are administered by the Department of Labour, while ODMWA is administered by the Department of Health. The MHSA is administered by the Department of Minerals and Energy.

\textbf{2.3 CONSTITUTIONAL IMPERATIVE}

Section 27(1)(c) of the South African Constitution\textsuperscript{27} guarantees everyone the right to have access to social security and, if they are unable to support themselves and their dependents, appropriate social assistance. The state has a duty to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.\textsuperscript{28}

The constitutional right to social security and social assistance speaks of the “right to access” as opposed to an unequivocal “right to”. A comprehensive and integrated approach is required in the realization of these rights due to the fact that the rights are interrelated, interdependent and indivisible. The “right to access” requires that realising a particular socio-economic right, such as the right to access to housing, would require that other elements which do at times form the basis of other socio-economic rights, such as

\begin{itemize}
\item \textsuperscript{23} Act 85 of 1993.
\item \textsuperscript{24} Act 29 of 1996.
\item \textsuperscript{25} Act 130 of 1993.
\item \textsuperscript{26} Act 78 of 1973
\item \textsuperscript{27} Act 108 of 1996. This right is also recognised in a range of international human rights instruments, including the International Covenant on Economic, Social and Cultural Rights of 1966 (Articles 9, 10 and 11) and the United Nations Convention on the Rights of the Child of 1989 (Article 27).
\item \textsuperscript{28} Section 27 (2) of the Constitution, 1996.
\end{itemize}
access to land, must be in place as well. Together these rights are mutually supportive and have a significant impact on the dignity of people and their quality of life. This approach also implies that the state is not the only party responsible for the provision of this socio-economic right, but the responsibility must also be borne by individuals. The state has a duty to unlock the system so that all people, at all economic levels of society, are able to access social security. The implication being that those who have the financial means to afford social security will be placed in a position that allows them to adequately access it, whereas for those who cannot support themselves and their dependants, the state can then take responsibility through the provision of social assistance as was enunciated in the Grootboom case.

Reasonable measures must be put in place to progressively realise this right. In addition to reasonable legislative measures, the state must also put in place well-directed policies and programmes, implemented by the executive, to realise this right. In order to be reasonable the measures adopted to realise the right must not leave out of account the degree and extent of the denial of the right they endeavour to realise, and must be understood in the context of the Bill of rights as a whole.

The right of access to social security and social assistance must be progressively realised by the state. This means that the right of access is not absolute, but rather limited by the available resources. Thus an unqualified obligation to meet this right is not capable of being fulfilled by the state. In Soobramoney, the court enunciated thus:

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29 The Government of the Republic of South Africa and Others v Grootboom and Others 2000 11 BCLR 1169 (CC).
30 E.g. in the event of unemployment, benefits are paid out to the contributors. The state has a duty to provide adequate legislation for monitoring such a fund. This facilitates access to social security for those who can afford it.
31 See Government of the Republic of South Africa v Grootboom and others 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) par 35.
32 Government of the Republic of South Africa v Grootboom par 42.
33 Ibid, par 44. In the court’s judgment, the concept of reasonableness was aptly summed up that those whose needs are the most urgent and whose ability to enjoy the right is most in peril, must not be ignored by the measures aimed at achieving the realisation of the right; and if measures, thought statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.
34 Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) par 11.
“What is apparent from these provisions is that the obligations imposed by the state by ss 26 and 27 in regard to access to .......... and social security is dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by the reason of the lack of resources.”

In addition to the internal limitation contained in section 27 of the Constitution, section 36, which contains the general limitation clause, is also relevant. A right in the Bill of Rights can only be limited to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Amongst relevant factors considered are the nature of the right; the importance of the purpose of the limitation; its nature and extent and whether there are less restrictive means to achieve this purpose.

The way in which the section 27 internal limitation and the section 36 general limitation interact with regard to the right is that if a legislative measure taken by the state fails to pass the requisite of reasonableness for the purposes of section 27, then section 36 can only have relevance if what is “reasonable” for the purposes of that section, is different to what is “reasonable” for the purposes of section 27.35

It is imperative to note the context within which the right to social security, in terms of the Constitution is understood. The right should not be viewed in isolation, but is intrinsically linked and interrelated to the other rights in the Bill of Rights. In Grootboom36 it was stated thus:

“All the rights in our bill of rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2.”

International law provides a framework within which the Bill of Rights can be evaluated and understood as was confirmed in S v Makwanyane.37 Both international and foreign law are important sources for the development of a legal framework of social security for

35 Khosa v the Minister of Social Development; Mahlaule v the Minister of Social Development 2004 (6) BCLR 569 (CC) par 83.
36 See n 3 above par 23.
37 1995 (3) SA 391 (CC) at par 35. See also section 39(1)(b) of the Constitution.
non-citizens. This flows, firstly, from the provisions of the Constitution which require the consideration of international law in the interpretation of the right to have access to social security and appropriate social assistance\(^{38}\) and the adoption of an international law-friendly approach when interpreting legislation pertaining to social security.\(^{39}\)

Secondly, South Africa has ratified a number of international treaties which are relevant to the social security position of different categories of non-citizens – in particular treaties relating to the position of children and refugees. Thirdly, the Constitution supports the consideration of the legal systems of other countries when grappling with the interpretation of a right such as the right to have access to social security and appropriate social assistance.\(^{40}\) In this regard, international convenants that South Africa has acceded to or ratified will play an integral part, as well as the persuasive authority of international law it has yet to ratify.

Article 2(3) of the ICESCR\(^ {41}\) stipulates thus:

> “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present covenant to non-nationals”

The International Covenant on Economic, Social and Cultural Rights of 1966 provides for the right to social security for everyone.\(^ {42}\) It stipulates that state parties must undertake this duty individually and through international assistance and co-operation and to realise this right progressively to the maximum extent of the available resources.\(^ {43}\) However, article 2(3) of the Covenant contains a specific exception to the general rule of equality for developing countries. Since this provision constitutes an exception to the general rule of equality, it should be narrowly construed, may be relied upon only by

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\(^ {38}\) Section 39(1)(b).

\(^ {39}\) Section 233: ”… when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

\(^ {40}\) Section 39(1)(c) of the Constitution, 1996.

\(^ {41}\) International Covenant on Economic, Social and Cultural Rights, which South Africa has signed, but has not yet ratified.

\(^ {42}\) Art 9.

\(^ {43}\) This duty is reflected in section 27(2) of the South African Constitution with regard to the provision of socio-economic rights.
developing countries, and only with respect to economic rights. States may not draw distinctions between citizens and non-citizens as to social and cultural rights.44

CHAPTER THREE: ACCESS TO FORMS OF SOCIAL SECURITY

Apart from certain exceptions made for foreigners with permanent residence status, non-nationals are generally excluded from social security protection, in particular social assistance.45 In terms of the Social Assistance Act46 one of the eligibility criteria for accessing almost all social assistance benefits is South African citizenship. This applies to certain branches of social insurance as well, such as the unemployment insurance scheme, since non-citizens are excluded from the operation of the Unemployment Insurance Act if they have to be repatriated upon termination of their services.47

3.1 SOCIAL ASSISTANCE

The Social Assistance Act48 provides for; *inter alia*, the administration of social assistance and the payment of social grants. It provides for the payment of a child support grant; care dependency grant; foster child grant; disability grant; older person’s grant; war veteran’s grant and a grant-in-aid.49 The Act provides social assistance to South African citizens,50 non South African citizens who, prior to 1 March 1996 were recipients of a benefit similar to a grant in terms of any law repealed by section 20 of the Social Assistance Act and to a member of a group or category of persons determined by the minister.51 In order to qualify for social assistance, a person must fall, therefore, into any

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46 13 of 2004: see section 5(c).
47 Section 3(1)(d) of the Unemployment Insurance Act 63 of 2001.
48 13 of 2004
49 Section 4.
50 South African citizen, in terms of the Act, means a person who has acquired citizenship in terms of chapter 2 of the South African Citizenship Act, No 88 of 1995
51 With the concurrence of the Minister of Finance, by notice in the gazette. See section 1.
of the aforementioned categories. A determining factor in a person’s eligibility for social assistance is his or her financial position as grants are only awarded if the applicant’s - or in the case of the foster care grant the foster child’s - financial resources are below a certain level. With regard to the foster care grant, in determining whether an applicant qualifies for a grant, and if so, to what amount he/she would be entitled, the income and assets of the applicant and spouse or the concerned foster child are assessed.

In terms of section 5(c) of the Social Assistance Act, social grants are restricted to South African citizens. However, the majority of the Constitutional Court in the Khosa case held that permanent residents are entitled to social assistance grants, namely those grants which were the subject of the enquiry in the case, namely the old age grant, the child support grant, and the care dependency grant. To access these grants beneficiaries must comply with a means test. Non-citizens who have temporary resident status are not entitled to the same level of protection as citizens.

Two further important qualifications are contained in the Social Assistance Act. In the first place, section 2(1) extends coverage to non-citizens in the event of a bilateral agreement providing for this. However, this provision, read with the power of the Minister to determine groups or categories of persons to be covered, is restricted, as it only covers bilateral agreements, and does not take into account possible obligations on South Africa to extend protection in terms of international instruments, such as the UN Convention on the Rights of the Child and the various refugee conventions ratified by South Africa. In the second place, the payment of social assistance benefits will, as a

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52 Section 5(c).
53 Accessed at http://www.sassa.gov.za/services/grant_means_test.asp (10th April 2007). with regard to the child support grant, in order to pass the means test, the following requisites must be fulfilled in order to qualify: a person must live in a rural area and earn less than R1 100 per month or R13 200 per year; must live in an urban area in an informal house or a shack and earn less than R1 100 per month or R13 200 per year; or live in an urban area in a house or flat and earn less than R800 a month or R9 600 a year.
54 Khosa v The Minister of Social Development and Others; Mahlaule v The Minister of Social Development 2004 (6) BCLR 569 (CC).
55 See now generally the Khosa case, which drew a clear distinction between permanent residents, on the one hand, and temporary residents who have less tenuous links with South Africa, on the other hand.
56 See the definition of South African citizen, contained in s 1.
rule, be suspended in the event that a beneficiary is absent from the country for more than 90 days.\textsuperscript{57}

\textit{Older Persons Grant} \textsuperscript{58}

A person is eligible for an old age grant if he, in the case of a male, has attained the age of 65 years and in the case of a female, has attained the age of 60 years.\textsuperscript{59}

In order to qualify for the grant, the applicant must be a South African Citizen/ permanent resident; must be resident in South Africa at the time of application; if a male, must be 65 years or older; if a female, must be 60 years or older; and spouse must comply with the means test; must not be maintained or cared for in a state institution; must not be in receipt of another social grant and must submit a 13 digit bar coded identity document.

The value of the grant is R 870 per month.

\textit{Child Support Grant}

The child support grant is a grant payable to a primary care giver of a child. A primary care giver is a person older than 16 years who, whether related to the child or not, takes primary responsibility for meeting the daily needs of that child.\textsuperscript{60}

The objective of the child support grant is to assist children affected by poverty ranging from 0-14 years.\textsuperscript{61} The age limit for the eligibility of this grant was 0-7 years; however

\textsuperscript{57} Section 16 of the Social Assistance Act 13 of 2004.
\textsuperscript{58} Section 10 of Social Assistance Act 13 of 2004.
\textsuperscript{59} There is controversy surrounding the age distinction between the sexes with women qualifying for their grants five years before men and is \textit{prima facie} discriminatory. Accessed at \url{http://www.sahrc.org.za/old_website/chapter_2.PDF}, (7th July 2007.) A group of males are challenging the constitutionality of the gender disparity in qualifying for the old age grant, claiming it amounts to a violation of their rights to equality and to social security.
\textsuperscript{60} Section 1.
the Government extended this age limit to 0-14 years. The value of the Child support grant is R 200 per month.

The main determining factor of eligibility is parental household income. In order to qualify for the grant, the following conditions must be fulfilled: the child and primary care giver must be a South African citizen/permanent resident; the applicant must be the primary care giver of the child/children concerned; the children/child must be under the age of 14 years; the applicant and spouse must meet the requirements of the means test; the care giver must be in possession of the 13 digit bar coded ID document and 13 digit birth certificate (of the child). With the child support grant, one cannot apply for more than six non biological children.

**Disability Grant**

A person is eligible for a disability grant if he or she is above 18 years and is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession, the means needed to enable him or her to provide for his or her maintenance. The ambit of the definition of disability is such that it no longer encompasses the traditional sense of disability in terms of physical or mental impairment, but rather widens the scope by encompassing such impairment, whether physical or mental, that curtails an individual’s ability to work. The value of the disability grant is R 870 per month.

A person who is in prison does not qualify for the grant; nor those living in a state institution (such as a state old age home) or living in a psychiatric hospital or receiving care from a state treatment centre or if receiving state care for a drug habit. Also if one is

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62 Children aged 15 to 18 are left out of this social grant. This is a stark exclusion as Section 28(3) of the Constitution defines a child as a person under the age of 18 years; however the child support grant only covers those aged below 14 years.
63 Section 9 of Act 13 of 2004.
64 In this case, for instance, a person with HIV/AIDS who is in the stages of AIDS so as not to be able to work would qualify for a disability grant.
refusing to undergo medical treatment, or gives false or misleading information when he/she makes the application for the grant.65

In order to qualify for the grant, the applicant must be a South African citizen / permanent resident; must be resident in South Africa at the time of application; must be between 18 to 59 years of age if a female and 18 to 64 years of age if a male; must submit a medical/assessment report confirming disability; and spouse must meet the requirements of the means test; must not be maintained or cared for in a State Institution; must not be in receipt of another social grant and must submit a 13 digit bar coded identity document.66

**Care Dependency Grant**67

Care Dependency Grant is a grant payable to the parents, foster parents, guardians or custodians in respect of a child between the ages of 1 and 18 years in their care, who due to severe mental and/or physical disability, need full time care.68 However exempt from a care dependency grant is a parent, primary care giver or foster parent who cares for a child that is, on a 24 hour basis for a period exceeding six months, cared for in a state funded institution.

The rationale behind this is to eliminate ‘double dipping’ in that, the state bears the cost both in the institution as well as pays a social grant to the parent. The value of the care dependency grant is R 870 per month.

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67 Section 7 of Act 13 of 2004.
68 There is no restriction on the number of care-dependent children per application. Once the child reaches the age of 18 years, he or she no longer qualifies for this grant and is eligible for the disability grant. In order to qualify for the grant, the following must be fulfilled: children must be South African citizens/permanent residents except for foster parents; the applicant and child must be resident in South Africa; age of child must be from 1 to 18 years; must submit a medical / assessment report confirming disability; applicant, spouse and child must meet the requirements of the means test; the care-dependant child/children must not be permanently cared for in a State Institution; 13 digit bar coded ID document (applicant) and a 13 digit birth certificate (child).
At the age of 6 the child shall be evaluated as to his/her educability and trainability for attendance at a school for specialised education or if such a facility is not available by an assignee of an education authority e.g. the child must be assessed to see if the child can be taught basic life skills.\footnote{A person cannot have both a child support grant and a care-dependent grant for the same child. A parent or foster parent shall not be considered for a care dependency grant when the care dependent child is admitted to and cared for permanently in a psychiatric hospital or a care and treatment centre. Accessed at \url{http://www.sassa.gov.za/services/grant_types/disability_grant.asp}. (On 10th April 2007).}

**Foster Child Grant**\footnote{Section 8 of the Social Assistance Act 1 of 2004.}

A foster parent is eligible for a foster child grant as long as the child is in need of care. When the child is placed with foster parents at cost of the state, then the state supports the foster parent by giving foster care grants, which is R 620 per child per month.\footnote{There are incidents where children are placed under the supervision of the social worker at no cost to the state because some foster parents voluntarily take the responsibility of providing alternative care for children in need of care. There are also incidents where children are placed under foster parents with no cost to the state because the assets and income of the children are sufficient enough to support them.} A foster parent can apply for a foster care grant once the court has placed the child with him/her. The asset and income of the foster child is a determining factor for eligibility in this case.\footnote{For a foster parent to be eligible to benefit from the foster care grant, the foster child should not exceed his/her assets with a value of R 252,000 and his/her yearly income. Also the following pre-requisites must be fulfilled: the applicant / child must be resident in South Africa at the time of application; 13 digit bar-coded ID document (applicant); court order indicating foster care status; must have valid RSA / non RSA 13 digit ID number in respect of each child and the foster child must pass the means test.} The means test depends on the income of the foster child, not on the income of the parents. The income of the foster parents is not counted.

Foster grants are usually paid out until the child turns 18. It stops when the child leaves school or is earning an income above the stipulated means test. If it happens that the child who is turning 18 is still in secondary/high school (but not a tertiary facility), the grant can be paid out until the end of the year in which the child turns 21.

If the child is disabled, then the care dependency grant is available as well as a foster child grant.
War Veterans’ Grant\textsuperscript{73}

A person is eligible for a war veterans grant if he or she has attained the age of 60 years and owing to physical or mental disability, is unable to provide for his or her maintenance.

The person also must have performed any naval, military or air force service during the Great War of 1914 -1918; while a member of the Union Defence Forces, signed in Korea; performed any naval, military or air force service during the war which commenced 6 September 1939.

The applicant must be a South African citizen / permanent resident; must be resident in South Africa at the time of application; must be 60 years and over or must be disabled; must have fought in the Second World War or the Korean War or served in the war that commenced on 06 September 1939; and spouse must meet the requirements of the means test; must not be maintained or cared for in a State Institution; and must not be in receipt of another social grant.

Grant in Aid \textsuperscript{74}

A person is eligible for a grant-in-aid if the following circumstances are fulfilled:

- must require full-time attendance by another person owing to his/her physical or mental disabilities;
- must not be cared for in an institution that receives subsidy by the state for the care or housing of such beneficiary;
- must be a social grant recipient

A grant in aid is an additional grant awarded to persons who are in receipt of an (old age/disability/war veteran’s grant), and who are unable to care for themselves. One

\textsuperscript{73} Section 11 of Act 13 of 2004.
\textsuperscript{74} Section 12.
cannot receive the grant-in-aid on its own; it must be in addition to one of these main
grants. The grant-in-aid cannot operate on its own, but it is in addition to the other main
grants. The value of the grant-in-Aid is R 200 per month.

Social Relief of Distress

Social relief of distress programmes are aimed at the alleviation of both chronic and
transient poverty. Social relief is regulated by legislation and financed through taxation.
Social relief is provided for individuals in the event of an individual crisis or for whole
communities where they face a crisis. This grant is usually offered for three months but
this period may in exceptional circumstances be extended to six months. Beneficiaries
must be a citizen of South Africa and living in South Africa at the time of applying for
the grant.

Outside the legal framework of social assistance provision in South Africa, the Jesuit
Refugee Services, a private institution, offers a social grant to seriously disabled,
chronically and terminally ill refugees and asylum seekers. The beneficiary must be
without any possibility of ever becoming self-reliant or contributing to their daily living
needs. The grant amount has been fixed in line with the government disability grant.
Food parcels, school fees and medical referrals form part of the assistance provided for
refugees or asylum seekers by the Jesuit Refugee Services.

3.2 SOCIAL INSURANCE

75 The Fund Raising Act 107 of 1978 defines social relief as the “alleviation of need of persons by means of
the temporary rendering of material assistance to them.” See now s 1 of the Social Assistance Act 13 of
2004 (definition of "social assistance" and of "social relief of distress"), as well as s 13 which provides for
the granting of social relief of distress.
76 Mpedi LG, Kuppan GY, Olivier MP “Welfare and Legal Aid” in Olivier M et al Social Security: A Legal
Analysis 205.
77 Social assistance according to s 1 of the Social Assistance Act 13 of 2004 now includes social relief of
distress. A person is only entitled to social relief, if he or she complies with the eligibility criteria in terms
of s 5 of the Act, and the additional requirements which may be prescribed in terms of s 13 of the Act.
78 For example, refugees who are confined to a wheelchair should be prioritised under other programmes,
such as skills training.
**Unemployment Insurance**

The Unemployment Insurance Act (UIA)\(^{79}\) covers workers and their dependants against temporary unemployment arising from termination of service, illness, maternity, and adoption.

Though citizenship for purposes of contributions and benefits is generally not a requirement, as far as non-citizen fixed-term contract workers are concerned, the Unemployment Insurance Act (UIA) excludes persons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership, if there is a legal or a contractual requirement or any other agreement or undertaking that such persons must leave the Republic, or that such person be repatriated upon termination of the contract.\(^{80}\) The UIA itself appears to be inconsistent as far as different categories of fixed-term contract workers are concerned. Fixed-term contract workers who lose their employment as a result of the termination of their contract remain entitled to receiving UIF benefits.\(^{81}\) However, non-citizen fixed-term contract workers, who have to return home upon completion of the contractual period, are specifically excluded.

**Employment injuries and diseases**

In terms of the Compensation for Occupational Injuries and Diseases Act (COIDA),\(^{82}\) compensation for employment injuries and diseases is paid to employees and their dependants out of the Compensation Fund, to which employers contribute on the basis of industry-based risk assessments.\(^{83}\) In the mining context, protection against employment-related injuries and diseases is provided for in separate legislation.\(^{84}\) On the level of

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\(^{79}\) Act 63 of 2001.

\(^{80}\) Section 3(1)(d) UIA; s 4(1)(d) Unemployment Insurance Contributions Act of 2002.

\(^{81}\) See UIA Section 16(1)(a)(i).

\(^{82}\) Act 130 of 1993.

\(^{83}\) Established in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

\(^{84}\) Occupational Diseases in Mines and Works Act (ODMWA) 78 of 1977. There are several major differences between ODMWA benefits and compensation payable under COIDA. The net result of these differences is that ODMWA benefits are generally inferior to those under COIDA, although it offers free benefit examinations, which are not available under COIDA.
preventative safety measures, the most significant are the *Occupational Health and Safety Act (OHSA)*\(^{85}\) and the *Health and Safety in Mines Act*.\(^{86}\)

The Compensation for Occupational Injuries and Diseases Act (COIDA)\(^{87}\) provides a system of no-fault compensation for employees who are injured in accidents that arise out of and in the cause of their employment or who contract occupational diseases. In the mining industry this function is fulfilled by the Occupational Diseases in Mines and Works Act (ODMWA),\(^{88}\) as far as occupational diseases are concerned.

Generally non-citizens would qualify for coverage under the various laws dealing with employment injuries and diseases. Finally, in terms of section 60 of the COIDA, an employee or dependant of an employee who is resident outside the Republic or is absent from the Republic for a period(s) of more than six months, and to whom a pension is payable, can be awarded a lump sum, thereby losing any entitlement to the pension.

**Motor Vehicle Accidents**

A non-employment based social insurance scheme is the Road Accident Fund established under the Road Accident Fund Act (RAF).\(^{89}\) The Fund, which is primarily funded from a compulsory fuel levy, pays out compensation to a third party for any loss or damage suffered as a result of any bodily injuries or death, caused by the negligent driving of motor vehicles.

In terms of section 17 of the Road Accident Fund Act, the Fund shall be obliged to compensate any person and no limitation exists in respect of citizenship exists.

\(^{85}\) Act 85 of 1993.  
\(^{86}\) Act 29 of 1996.  
\(^{87}\) Act 130 of 1993.  
\(^{88}\) Act 78 of 1973.  
\(^{89}\) Act 56 of 1996.
Disability pension (public, occupational and private)

South Africa does not have a national or public disability pension scheme. Disability is covered either in terms of illness benefits under the unemployment insurance scheme or the compensation for occupational injuries and diseases scheme. Non-citizen employees of employers with occupational-based disability insurance schemes will be covered under the company’s programme. In principle, those who can afford private insurance cover based on incapacity or disability can obtain the same.

Old age pension (public, occupational and private)

South Africa also does not have a national or public old age insurance scheme. In the absence of a national or public retirement fund regime, occupational-based and private retirement funds are the preferred vehicle for ensuring financial support in old age by workers. Retirement funds have in common, the fact that they are all contributory, with contributions forthcoming from both employers and employees. The insurance industry also provides cover for those who can afford it. Non-citizens can therefore access social security on this basis.

Health Care (public, occupational and private)

Health care for the bulk of the population is provided by the limited public measures in this area: free primary health care, as well as free hospital care for women with young children and the aged. For the rest, medical services are covered for a selected part of the population by private schemes, which are regulated by the Medical Schemes Act. In terms of the Medical Schemes Act medical schemes may, as a rule, no longer refuse membership or differentiate between members of a scheme on the basis of age and medical history. Certain core medical services have to be covered by these schemes.

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90 Act 131 of 1998. In terms of the Medical Schemes Act medical schemes may, as a rule, no longer refuse membership or differentiate between members of a scheme on the basis of age and medical history. Certain core medical services have to be covered by these schemes.
South Africa does not currently have a statutory national health insurance system.⁹¹ Health care services are provided both by the public health system and the private system. The public health system, which is funded by the government, is mainly used by those who are unable to afford the private system. Due to lack of resources, a majority of the urban and the rural poor (including the informally employed) rely heavily on the public system.⁹² Primary health care is offered free by the state; however beneficiaries and members of any medical aid schemes are excluded from these free services. The groups that have to pay for public sector hospital services are adults, children older than six who do not have disabilities and, also anyone covered by medical aid.⁹³

The private health care system is accessible to a restricted number of people in South Africa due to financial implications. Individuals can either insure against the risk of ill health through private insurance or through becoming members of medical schemes.⁹⁴ Membership of medical schemes is not dependent on a condition of any citizenship as long as one has the means to contribute towards the scheme. Non-citizens with the necessary means therefore have equal access to health insurance as citizens.

**Sickness benefits (public, occupational and private)**

Sickness benefits are provided in terms of the Unemployment Insurance Act. This implies that non-citizens who have acquired permanent residence status are eligible for social protection on the same basis as South Africans.

As stated above, the UIA excludes non-citizen fixed-term contract workers who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership, if there is a legal or a contractual requirement or any other agreement or undertaking that such persons must leave the Republic, or that such person be repatriated

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⁹¹ The National Health Act No 61 of 2003 provides a framework for a single health system for South Africa and highlights the rights and responsibilities attendant upon health providers and health users accordingly.
upon termination of the contract. Employers often, however, make private arrangements for limited private benefits for contract workers.

**Public Schooling**

The Bill of Rights of the South African Constitution states that everyone has the right to a basic education, including adult basic education and further education, which the State, through reasonable measures, must progressively make available and accessible. It is important to note that the right to basic education is not qualified by the phrases “within available resources” or “progressive realisation of the right” as is found in many of the other socio-economic rights provisions of the Constitution. This means that the right to basic education is an immediate right, unlike the right to further education, which is subject to available resources as well as progressive realisation. This would seem to imply that resource constraints would not be applicable in determining the content of the right to basic education. However, it may become relevant in a determination at the limitations phase.

The National Education Policy Act empowers the Minister of Education to determine national norms and standards for education planning, provision, governance, monitoring and evaluation. The higher education sector in South Africa is predominantly public; whereas the private education sector is relatively small. Government and its appointed agencies, such as the National Student Financial Aid Scheme (NSFAS) and the Tertiary Fund for South Africa (TEFSA) finance higher education. The private sector also provides financing in higher education, but this is to a limited scale. However, the principle of shared costs applies with regard to financing higher education meaning that the government and/or students share the costs of higher education. The criterion for

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95 Section 29 of the Constitution.
97 27 of 1996.
98 Ishengoma M Johnson *Financing higher education in post-apartheid South Africa: Trends, developments and challenges ahead*. Accessed at http://ahero.uwc.ac.za/index.php?module. However in colleges and other higher education institutions that produce “pure public goods” such as nursing, teacher training and police training colleges, the government is responsible for all financing.
accessing the NSFAS loan is, *inter alia*, that one must be a South African citizen or permanent resident and must be in financial need.

The NSFAS is responsible for allocating loans and bursaries to eligible students in public higher education. A student may receive between R2 000 and R30 000, depending on need that is determined through a national means test.\textsuperscript{99} It therefore follows that academically deserving students whose parents cannot afford to pay their fees can be able to access loans and bursaries at higher education level.

Apart from permanent residents and refugees, all other non-citizens are expected to pay fees at public schools.

*Public Housing*

The Constitution provides that everyone has the right to have access to adequate housing and the state has a duty to, within its available resources, to progressively realise this right.\textsuperscript{100} In the *Grootboom* case,\textsuperscript{101} the Constitutional Court endorsed the idea that adequate housing entails “more than bricks and mortar” and for a person to have access to adequate housing, there must be land, services and a dwelling. It held that the Constitution requires the state to devise and implement, within its available resources, a comprehensive and coordinated program progressively to realise the right of access to

\textsuperscript{99} Accessed at \url{http://www.info.gov.za/aboutsa/education.htm}. The National Department of Education is responsible for formulating policy, setting norms and standards, and monitoring and evaluating all levels of education. It also funds higher education institutions through subsidies and by providing financial support to students through the National Student Financial Aid Scheme (NSFAS). School fees are set at annual public meetings where parents vote on the amount to be paid. Although the Schools Act (No 84 of 1996) says that public schools can charge school fees, parents who cannot afford to pay, or who can only afford a lesser amount, are granted an exemption or reduction in fees. The Act states that parents who can show that they are in financial need can apply for an exemption from school fees. Parents can apply for a **full exemption** if the total annual income of both parents is equal to or less than 10 times the annual school fees. Parents can apply for a **partial exemption** if the total annual income of both parents is equal to or less than 30 times the annual school fees.

\textsuperscript{100} In that context, “adequate housing” is measured by certain core factors: legal security of tenure; the availability of services; materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy.

\textsuperscript{101} *Grootboom* Para 31.
adequate housing.\textsuperscript{102} The programme devised must include reasonable measures to provide relief for those people who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations.

The National Housing Act\textsuperscript{103} and National Housing Code were designed to accelerate the progressive realisation of the right to housing. The National Department of Housing administers two grants: the Housing Subsidy Grant and the Human Settlement Redevelopment Grant.\textsuperscript{104} The housing subsidy scheme is government’s primary housing delivery programme and beneficiaries are expected to make a minimum contribution in order to qualify for the subsidy.\textsuperscript{105} The housing subsidy is not a cash payout but is paid directly to a financial institution or to a conveyancing attorney.\textsuperscript{106}

In order to qualify for the housing subsidy, one must be a resident (either citizen or permanent resident); must be competent to contract (that is above 21 years/married); there must be a monthly household income; must not yet be a beneficiary of government funding and must be a first time property owner.\textsuperscript{107} All other categories of non-citizens do not have access to public housing.

\textsuperscript{102} Section 26(2) of the constitution, 1996.
\textsuperscript{103} Act 107 of 1997.
\textsuperscript{104} This promotes urban regeneration by funding projects and activities that cannot be funded through other government programmes. Examples include the provision of informal trading facilities, detailed planning initiatives through which integrated development is facilitated and urban regeneration initiatives, such as upgrading public open spaces.
\textsuperscript{105} Financial and Fiscal Commission Assessment of the Institutional and Funding framework for housing delivery in South Africa Accessed at http://wwwffc.co.za/docs/submissions/dor/2006/part1b.pdf. Individual housing subsidies are available to low-income households who wish to buy a residential property for the first time. The subsidies can be used to buy an existing house, including the property on which the house stands. Successful applicants will receive this subsidy only once. The housing subsidy is dependent on the gross (before deductions) monthly household income.
\textsuperscript{106} Cape Gateway Individual Housing Subsidies Accessed at http://www.capegateway.gov.za/eng/directories/services/11524/10647. People who are disabled or health-stricken are entitled to a full housing subsidy (Individual, Project-Linked or Relocation Assistance) without having to pay a contribution, even if their household budget is more than R1 500 but less than R3 500. In other words, they get a dispensation to not have to pay a contribution. The disabled and health-stricken are also entitled to a variance amount over and above the subsidy amount to cover the cost of special structures, for example, a wheelchair ramp for the walking disabled.
Aside from accessing housing through housing subsidies, anyone is entitled to buy a house as long as they have the means. In this regard, temporary residents with the means can be able to buy houses.

CHAPTER FOUR: ACCESS TO SOCIAL SECURITY BY DIFFERENT CATEGORIES OF RESIDENTS

In the judgment of the Constitutional Court in Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others\(^\text{108}\) the Court held that non-citizens are included in the constitutional entitlement of "everyone" to access to social security and appropriate social assistance.\(^\text{109}\) Their exclusion from the social security system must therefore pass the constitutional test of reasonableness.\(^\text{110}\) As indicated above, but subject to the qualifications mentioned, the consideration of international law and of foreign law may be of assistance in this regard.

4.1 Permanent Residents

Non-citizens who have acquired permanent residence status are eligible for social protection on the same basis as South Africans. For example, non-citizens with permanent resident status are entitled to workers compensation in the event of an accident or disease.\(^\text{111}\) They can also access funding for tertiary education and health care on the same footing as citizens.

Foreigners with permanent residence status are entitled to the same socio-economic rights as citizens. A permanent resident is defined as the holder of a section 25 permit as defined in the Act. A permanent resident has all the rights, privileges, duties and obligations of a citizen with the exception of those that the Constitution explicitly ascribes to a citizen.\(^\text{112}\)

\(^{108}\) 2004 (6) BCLR 569 (CC).

\(^{109}\) Para 590D supra.

\(^{110}\) See above.

\(^{111}\) See Compensation for Occupational Injuries and Diseases Act 130 of 1993.

\(^{112}\) Section 25 of Act 31 of 2002.
Initially, the position was that the eligibility criterion for assessing social assistance benefits was South African citizenship. This position was placed under constitutional challenge in the landmark case of *Khosa*. The court adopted a purposive approach to the interpretation of the bill of rights. It made a distinction between permanent residents on the one hand and temporary residents with regard to the right to access social assistance and found the former to have a stronger link with the country as opposed to the latter. The court found the provisions excluding permanent residents from social assistance to be unconstitutional. The current position is that permanent residents are entitled to access social assistance in terms of the Social Assistance Act.

In *Larbi Odam* the court decided on the constitutionality of regulations disqualifying non-citizens from permanent employment as teachers in state schools. The Court found discrimination on the basis of citizenship to be unconstitutional. The Court further held that denying permanent residents job security when they are allowed to live and work in South Africa indefinitely (and to apply in due course for citizenship) was unfair discrimination. Currently permanent residents can compete with South African citizens in the job market.

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113 See footnote 124. It found that the Constitution expressly provides that the Bill of Rights enshrines the rights of “all people in our country” and in the absence of any indication that section 27(1) is restricted to citizens as in other provisions in the Bill of Rights, the word “everyone” cannot be construed as referring only to citizens.

114 It found that permanent residents had a strong link with the country as opposed to temporary residents. Permanent residents reside legally in the country and may have done so for a considerable lengthy period of time; like citizens, they have made South Africa their home; permanent residents are compelled to return to the country at least once every three years; they have a right to work in South Africa and even owe a duty of allegiance to the state. The court found that, save for political rights; they were for most purposes in the same position as citizens.

115 *Larbi-Odam v MEC for Education (North West Province)* 1997 (12) BCLR 1655 (CC). In this case, the Constitutional Court applied the equality protections of the interim Constitution to non-South African citizens and struck down a Department of Education regulation prohibiting foreign citizens from being permanently employed as teachers in state schools. The regulation had provided that, subject to certain exceptions, only South African citizens could be appointed to permanent teaching posts in state schools.

116 The Court noted three reasons for this: that foreign citizens are a minority in South Africa and all countries, with little political power; that citizenship is a personal attribute which is difficult to change; and that there were specific threats and intimidation that these foreign teachers faced. All of these reasons made the foreign citizens a vulnerable group that should be protected in terms of the equality clause. While some jobs might be constitutionally limited because of particular political sensitivity (e.g. a Judge of the Constitutional Court), in general, employment opportunities should be available to permanent residents and South African citizens on an equal basis.
However, in *Union of Refugee Women and Others v Private Security Industry Regulatory Authority and Others*, the applicants challenged certain sections of the Private Security Industry Regulation Act. The Act requires security service providers to register with the Private Security Industry Regulatory Authority (the Authority). Section 23(1)(a) of the Security Act lists citizenship or permanent residence as a requirement for registration. Despite the provisions of section 23(1)(a), section 23(6) confers upon the Authority the discretion to register any applicant as a security service provider, on good cause shown and on grounds which are not in conflict with the purpose of the Security Act and the objects of the Authority. The applicants challenged section 23(1)(a) on the basis that it constitutes a violation of the right to equality, and discriminates against them on the basis that they are not citizens or permanent residents. Alternatively, they challenged the validity of the decisions of the Authority.

The Court acknowledged that refugees are a vulnerable group in our society and stressed that foreign nationals, including refugees, are not inherently less trustworthy than South Africans. However, it held that citizens and permanent residents will be more easily able to prove their trustworthiness in terms of the Security Act. The Court stressed that although section 27(f) of the Refugees Act grants refugees the right to seek employment, section 23(1)(a) of the Security Act limits the refugees’ right to choose employment only to the extent that they may not work in the private security industry. It in no way prevents them from seeking employment in other industries. They may also enter this single excluded industry if they successfully invoke the provisions of section 23(6) of the Security Act or if they acquire permanent resident status. In addition, the Court stated that while refugees are fully entitled to work in South Africa, section 22 of the Constitution limits the right to choose a vocation to citizens only. The right to equality was held not to be violated by section 23(1)(a). In essence, the regulatory scheme was found to be narrowly tailored to the purpose of screening entrants to the private security industry.

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117 *2007 (4) BCLR 339* (CC).
rather than constituting a blanket ban on the registration of refugees as private security service providers.

Non-citizens with permanent residence are entitled to social insurance. In the event that permanent residents are involved in an accident or contract an occupational disease in the workplace, they are entitled to workers compensation.119 Permanent residents, being contributors to the Unemployment Insurance Act (UIA),120 are entitled to benefits in the event of retrenchment, illness, adoption of young children or pregnancy. In terms of the Unemployment Insurance Act (UIA), they will be entitled to benefits, if they are retrenched, become ill or pregnant, or adopt young children. Their dependants will also be entitled to benefits in the event of their death.

4.2 Temporary residents

The Immigration Act defines a foreigner as a person who is neither a citizen nor a resident, but is not an illegal foreigner.121 A foreigner may be admitted to enter and sojourn in the country only if in possession of a temporary residence permit. There are various categories under which a person may get a temporary resident permit and these are, *inter alia*: work, holiday, study, asylum, medical treatment, relative permit, business, treaty.122

With regard to health care, temporary residents are not covered in the public sector. The means of social security available to them is in the private sector through private schemes as regulated by the Medical Schemes Act,123 which is contributory. It is a pre-requisite, before enrollment to study in South Africa, for a foreign student to be a member of a medical aid scheme. This is to avoid a situation whereby they place a strain on the resources available to citizens/permanent residents.

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119 Section 22 (1) of Compensation for occupational injuries and Diseases Act 130 of 1993.
120 See section 3(1) (d) 63 of 2001.
121 Section 1(1) of Immigration Act 13 of 2002.
123 131 of 1998.
Temporary residents who are migrant workers are excluded from unemployment insurance and thus, as a result of termination of services, illness, maternity or adoption, they will receive no coverage. The Unemployment Insurance Act excludes temporary residents who enter the country for purposes of carrying out a fixed contract of service if that person is obliged to leave the country on termination of the contract.

The Road Accident Fund, on the other hand, is a non-employment based social insurance scheme which is funded through compulsory fuel levy. It pays out compensation for bodily injuries or deaths arising from the negligent driving of motor vehicles. The fund is obliged to compensate any person and there is no limitation in terms of citizenship or permanent residence. Therefore temporary residents can access this form of social insurance. Temporary residents also qualify for compensation for occupational injuries and diseases in the event that an injury occurs at the workplace. The Compensation of Occupational Injuries and Diseases Act provides that if an employee or a dependent of an employee to whom a pension is payable in terms of the Act is resident outside the Republic or is absent from the Republic for a period or periods totaling more than six months, the Director-General may award a lump sum as determined by him in lieu of such person, and upon payment of such lump sum the right to the pension shall expire.\footnote{Section 60(1) of Compensation for Occupational Injuries and Diseases Act 130 of 1993.}

As indicated, in the absence of specific state provision of social security to temporary residents, employers usually privately take the initiative to provide some form of social security benefits for their temporary resident employees. One such initiative is the Employment Bureau of Africa (TEBA) which recruits miners for the mining industry and provides housing, medical care, life insurance and matching contributions for a provident fund as contractual benefits. It is a form of social protection for temporary migrants working in South Africa.

With regard to education, temporary residents cannot access free primary education. At tertiary level, they do not qualify for the NSFSAS loan given by government either. In
addition, temporary residents who are not in possession of a study permit (even though they may be in possession of a work permit or another permit) are prevented from studying. This is due to a recent interpretation of section 10 of the Immigration Act. Section 10 of the Act, 125 states that “a foreigner may enter and sojourn in the Republic only if he or she is in possession of one of the above temporary residence permits”. It is unclear whether it was the intention of the legislature, in section 10(4) of the Act, that the issuing of a particular permit to a foreigner excluded any other permit being issued to the same person. If this were to be the case, it implies a turn around from an earlier position where, as an example, a permit was issued allowing a foreigner to work and study at the same time.

At the tertiary level, universities have different fee structures for different categories of students. These are differentiated according residential status, nationality or region/continent of origin. Refugees and permanent residents pay the same fees as citizens. Students from the SADC region may pay either the same amount of fees as citizens, or an amount slightly lower than students from other regions. In some cases, SADC and African students pay the same amount, which is lower than students from other continents, but higher than fees for citizens. 126

Temporary residents in South Africa, also, cannot access social assistance as this is restricted to citizens and permanent residents.

4.4 Refugees 127

Special arrangements exist with regard to certain categories of non-citizens. Refugees in principle enjoy full legal protection which includes the rights set out in Chapter 2 of the

125 Ss 1 –5.  
126 See, for example, the fees structure of the University of Johannesburg at http://www.uj.ac.za/documents/2007/Tuition_Fees/Student_Fees_2007_Oktober_2006.doc.  
Constitution. Persons who have obtained refugee status therefore qualify for constitutionally entrenched socio-economic rights in terms of section 27 of the Constitution, amongst which the right to access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. However, the Social Assistance Act does not extend protection to refugees. An apparent conflict therefore exists between the two Acts. The position of refugees being able to access social assistance is still not yet decided.

The Immigration Department may issue a permanent residence permit to a foreigner of good and sound character who is a refugee as defined by the Refugees Act. A refugee, in terms of the Act, is a person who has been granted asylum. In order to qualify for refugee status, a person must fulfill the following conditions:

(a) A refugee is a person who as a result of a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her formal habitual residence is unable or owing to such fear, unwilling to return to it; or

b) is a person who owing to external aggression, occupation or foreign domination or events seriously disturbing or disrupting public order either in part or the whole of his or her country of origin, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere;

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128 S 27(b) of the Refugees Act 130 of 1998.
129 S 3(a) of the Refugees Act 130 of 1998 defines people who qualify for refugee status as those persons who have fled their own country fearing persecution by reason of their race, religion, nationality, political opinion or their membership of a particular social group. Section (3)(b) mentions certain other categories of persons, namely people who have fled their own country owing to external aggression, occupation, foreign domination or events seriously disturbing public order. According to section 3(c) dependants of those who have been granted refugee status also qualify for refugee status.
130 Act 13 of 2004.
132 Section 27 of Immigration Act 2002.
133 Section 1(v), (xv) of Act No 130 of 1998.
c) A dependent of a person contemplated in a) and b).\footnote{134}

The policy in South Africa, with regard to refugees, is that they are not held in a camp, but rather, it allows for mobilisation and local integration of refugees with the implication that they are allowed to settle anywhere in the country.

The Refugees Act guarantees refugees the right to enjoy full legal protection which includes the rights set out in the Bill of Rights of the Constitution. The Constitutional Court, in \textit{Union of Refugee Women}\footnote{135} aptly summed up the position of refugees in South Africa. It held that refugees who have been granted asylum are a special category of foreign nationals who have the right to remain in South Africa indefinitely. It likened their position to that of permanent residents with regard to the access of rights and privileges in South Africa, although not in all aspects.\footnote{136}

Although subject to some exceptions, refugees are guaranteed the right to seek employment;\footnote{137} and are also entitled to the same basic health services and basic primary education which South African citizens and permanent residents receive.\footnote{138} Dependants of refugees who accompanied their beneficiary to South Africa can apply for asylum or the main beneficiary can apply on their behalf.\footnote{139}

In \textit{Watchenuka and Another v The Minister of Home Affairs and two Others},\footnote{140} the applicants challenged Regulation 7(1)(a) of the Regulations to the Refugees Act which prohibits asylum seekers from undertaking employment or studying was challenged. The court found that the right to dignity was intricately linked to the right to work. The court found that the general prohibition of employment and study for the first180 days after a permit had been issued was in conflict with the Bill of Rights. It also stated that the

\footnotesize{
\footnotetext{134} Section 3.} 
\footnotetext{135} \textit{Union of Refugee Women and fourteen others v Private Security Industry Regulatory Authority} case No 35986/2003.\footnote{136} 
\footnotetext{136} Par 99.\footnote{137} 
\footnotetext{137} See \textit{Union of Refugee Women supra}.\footnote{138} 
\footnotetext{138} Section 27.\footnote{139} 
\footnotetext{139} Section 33.\footnote{140} 
\footnotetext{140} 2003 (1) SA 619 (C).}
freedom to engage in productive work, even where that is not required to survive, was indeed an important component of human dignity. It stated that where employment was the only reasonable means for a person’s support, then other considerations arose. What then would be in issue was not merely a restriction upon a person’s capacity for self fulfillment, but a restriction upon his or her ability to live without positive humiliation and degradation.\footnote{Pare 32. \textit{Ibid}}

The High Court held the prohibition on work and study contained in regulation 7 of Refugee Regulations (Forms and Procedure) 2000 to be \textit{ultra vires} and inconsistent with the Constitution and invalid. On appeal,\footnote{Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA 326 (SCA).} the Supreme Court of Appeal found the general prohibition of asylum seekers from employment and study to be unlawful.\footnote{Paras 33-36.} The Court held that the State must take account of the circumstances of the applicant, whether on a case by case basis or by formulating guidelines to be applied when issuing permits in particular cases.

It therefore follows that except in limited circumstances, refugees have the right to seek employment in all other sectors. With regard to access to health care, they are entitled to free primary health care on the same basis as citizens and permanent residents and to subsidised non-primary health care in government institutions, assuming they have the means; they can access the contributory private health system through medical aid. Amongst the categories of persons that are currently eligible for accessing free ARV treatment in the public sector are registered refugees.\footnote{The rights of vulnerable groups to health care. This they enjoy together with South African citizens and permanent residents.}

Article 22 of the Convention Relating to the Status of Refugees\footnote{United Nations Convention Relating to the Status of Refugees 1951.} provides that Contracting States shall afford refugees the same protection as is accorded to nationals with respect to elementary education. With regard to education other than at the

\footnotesize{\textsuperscript{141} Pare 32. \textit{Ibid}}\textsuperscript{142} \textit{Minister of Home Affairs and Others v Watchenuka and Another} 2004 (4) SA 326 (SCA).\textsuperscript{143} Paras 33-36.\textsuperscript{144} The rights of vulnerable groups to health care. This they enjoy together with South African citizens and permanent residents.\textsuperscript{145} United Nations Convention Relating to the Status of Refugees 1951.
elementary level, Contracting States are to afford refugees treatment as favorable as possible.

Even though legally refugees enjoy all rights as South Africans, barring the right to vote, in practice, state personnel and institutions exercise pervasive discrimination against immigrants and refugees. As an example, despite the fact that the Refugees Act of 1998 explicitly gives refugees and their children the right to primary education, there is a de facto requirement that migrants pay school fees.  

4.5 Asylum seekers

The Refugees Act defines an asylum seeker as a person seeking refugee status. The asylum seeker permit that is granted in term of section 22 of the Act allows temporary sojourn in South Africa and there is no limit on the number of renewals permitted by the Refugee Reception Officer. The asylum seeker permit is granted pending outcome of the main application for refugee status.

Under the Refugees Act, asylum seekers are not allowed to work, study, or be self-employed until they are granted refugee status (although individuals can apply for special consideration to be allowed to work after six months). A glaring gap is the lack of state support, and minimal other support for asylum seekers and this aggravates their means of survival in South Africa.

\[147\] Since the democratic elections of 1994 in South Africa and until 2001, the Department of Home Affairs has received a total of 64,341 asylum seekers and refugee applications in the country out of which only 17,198 had been approved. Timngum Desire, Assisting Urban Refugee Children in South Africa: Humanitarian challenges to state and non-state actors. Accessed at [http://www.isanet.org/noarchivesdesire.html](http://www.isanet.org/noarchivesdesire.html)
\[149\] Supra. These conditions appear to be an attempt to dissuade people from seeking asylum in South Africa.
It is worth noting a glaring gap in the Refugees Act. It makes a distinction between an asylum seeker and a refugee, however it fails to adequately address the rights the former have, while they are in transition before granted refugee status. Nor is there any contingency plan for asylum seekers who are in this transition. Also, in light of the fact that an asylum seeker permit is, in practice, constantly renewed before refugee status is actually granted, many people are caught between this gap and the issue of their right of access to social security rights in question. Also in light of the fact that the Act specifically lays down rights for refugees, but asylum seekers fall between the cracks before their rights are realised.

With regard to the right to education, the court in the Watchenuka case further stated that the freedom to study is inherent in human dignity for without which a person is deprived of the potential for human fulfillment. The court referred to section 29(1) of the Constitution which guarantees everyone the right to basic education, including adult education, and to further education. The court accepted that this right was not absolute, however it stated that where a child was lawfully in the country seeking asylum, there was no justification for limiting the right so as to deprive him/her of the opportunity for human fulfillment at a critical period.\textsuperscript{150} It therefore follows that asylum seekers can work and study in South Africa.

In practice however, they cannot access work opportunities easily. Most jobs require work permits and the general populace are not particularly sensitised as to the ability of an asylum worker to work in the absence of a work permit or an ID book. Most asylum seekers are forced to access jobs that require little, if no documentation. These are mostly manual jobs such as car guard attendants, security guards, domestic workers and farm labourers. This opens them up to abuse and discrimination.

In order for them to access free primary education, refugee status must be conferred upon them. They, therefore, do not have access to free primary education nor assisted government loans at tertiary level. However, the fact that they are allowed to move freely

\textsuperscript{150} Para 36.
within the country and work implies that they are expected to be self sufficient to pay for their education and survival. However, their lack of proper documentation, i.e. work permit or ID book, effectively excludes them from the proper paying jobs and so their situation is not improved. It of course follows, that they cannot access social assistance either.

4.6 Undocumented migrants

The Immigration Act of 2002 defines an illegal foreigner as a foreigner who is in South Africa and in contravention of the Act. An undocumented immigrant would therefore be considered as an illegal foreigner under the South African immigration law.

The most notable legal gap in the immigration and labour laws affecting foreign migrants arises due to the protection of undocumented migrants. In the event that an employer hires undocumented migrants, there is no means to ensure minimum wages are paid or any compensation for work-related injuries.151

General Recommendation No 30 issued by the Committee on the Elimination of all Forms of Racial Discrimination, states that once an employment relationship has been initiated and until it is terminated, all individuals, whether they have work permits or not, are entitled to the enjoyment of labour and employment rights, including freedom of assembly and association. Since South Africa is a state party to the International Covenant on the Elimination of all forms of Racial Discrimination (ICERD), it has an obligation to ensure that, at minimum, employers must pay the prescribed minimum wages and incur responsibility for work-related injuries of even undocumented workers, including those whom the government seeks to deport.152

151 See the cases in footnote 145 below.
Section 32 of the Immigration Act explicitly states that undocumented migrants will be deported. In accordance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, undocumented migrants who are apprehended and held in custody must have "an effective opportunity" to have their case reviewed "promptly" by a judicial or other authority. Continued detention should be on the basis of specified conditions, and should be subject to periodic review and to a maximum time limit. The current practices, allowing for the judicially unsupervised detention of undocumented migrants for an initial period of thirty days, are inconsistent with international human rights standards and the provisions of the South African constitution.

In the Khosa judgment, the court expressly stated that undocumented migrants were exempt from access to social security. The court made a distinction between permanent and temporary residents. It stated that whilst with the latter, their link with the country was a tenuous one, with regard to the former; they resided legally in the country and may have done so for a considerable length of time.

However the reality of undocumented migrants in South Africa cannot be ignored and they must enjoy some protection under the law. In Lawyers for Human Rights v The Minister of Home Affairs, the Court rejected the argument that persons illegally resident in the country had no rights and were protected only by international law. It

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153 Whereas the deportation is justifiable, it is the means that this deportation is effected that must be able to stand constitutional scrutiny. In South Africa, the deportation system has been widely criticised by human rights groups, including the South African Human Rights Commission with the gist of the critique attacking the methods of arrest and removal as being no different from those deployed to control black South Africans during the apartheid era. Evidence to back up this claim has emerged during the current trial of several South African policemen for setting attack dogs on defenseless Mozambican migrants. Similarly, a holding centre known as Lindela, through which many migrants pass prior to deportation, has also been the focus of major human rights investigations and complaints.


155 Supra.

156 Permanent residents are compelled to return to the country at least once every three years, they have their homes and families in the country, have the right to work in South Africa and even owe a duty of allegiance to the state. The court found that for these reasons temporary migrants were excluded from access to social assistance in South Africa.

157 2004 (4) SA 125 (CC).
stressed that illegal foreigners at ports of entry are protected by the rights in the Constitution.

However, illegal immigrants or migrant workers would not qualify for compensation under COIDA or ODMWA. The reason is that a person who is not in possession of a work permit as required by section 19 of the Immigration Act\(^\text{158}\) is not an employee for labour law and, one could add, social security law purposes (such as for purposes of bringing a case before the labour law adjudicating institutions)\(^\text{159}\) as no valid contract of employment exists and such a person cannot be understood to be “an employee”\(^\text{160}\)

With regard to access to housing, undocumented migrants cannot access housing subsidies nor can they buy a house, in the unlikely event of them having the funds to purchase it. The very reason of them having no documentation to reside legally in the country precludes them from accessing most of the social security system in South Africa. The reality of the situation is that most undocumented migrants are impoverished and reside in informal dwellings and shacks. In a recent Supreme Court case of *Tswelopele Non-profit Organisation v City of Tshwane Metropolitan Municipality*\(^\text{161}\) whereby sixteen undocumented migrants were amongst one hundred people forcibly evicted from their homes and their structures erected on the land on which they were squatting burnt down, the court found that this action had infringed on the occupier’s property rights. Although the court was silent as to the right of undocumented migrants with regard to housing, it reiterated that the action trampled on their feelings and affronted their social standing. It stressed that the Constitution entrenches the inherent right to dignity to ‘everyone’ which must be respected and protected and it stressed that the occupiers were bearers of constitutional rights.

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\(^{158}\) 13 of 2002.

\(^{159}\) Moses *v* Safika Holdings (Pty) Ltd 2001 22 ILJ 1261 (CCMA); Vundla *v* Millies Fashions 2003 24 ILJ 462 (CCMA); Lende *v* Goldberg 1983 2 SA 284 (C); see, however, Mackenzie *v* Paparazzi Pizzeria Restaurant obo Pretorius 1998 BALR 1165 (CCMA).

\(^{160}\) Smit N “Employment Injuries and Diseases” in Olivier M *et al* *Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) 472.

It follows that, whereas undocumented migrants, by their lack of documentation are excluded from the bulk of social protection in South Africa, the Constitution guarantees the right to inherent dignity and as such, they have a right to be treated with dignity in the host country.

4.3 Non-citizen children

Some of the statutory exclusions found in the South African social security system are contrary to the treaty obligations to which South Africa is bound. This applies in particular to the position of non-citizen children. As far as non-citizen children are concerned, the position is that their exclusion from certain child grants flies in the face of the non-discrimination clause of the International Convention on the Rights of the Child. Given the particular vulnerable position of children, in particular impoverished children, and the constitutional focus on the protection of children, also for purposes of social security, it is doubtful whether the exclusion of children to forms of social assistance will pass constitutional muster. Of significance in this regard is the following finding made by the Constitutional Court in the Khosa case, with reference to the provision in the relevant legislation which allowed children to be excluded from the social assistance grant system if the applicant does not meet the citizenship test:

"The respondents did not seek to support these provisions, which discriminate against children on the grounds of their parents' nationality. It was therefore conceded that citizenship is an irrelevant consideration in assessing the needs of the children concerned. Moreover, the denial of support in such circumstances to children in need trenches upon their rights under section 28(1)(c) of the Constitution."

The Convention on the Rights of the Child provides important guidance for designing and implementing reception policies under the “best interest ‘principle. It stipulates that states must guarantee special protection and care to child asylum seekers with respect to their special needs; avoid detention of asylum seekers under eighteen years of age and

162 See art 2(1) of the Convention on the Rights of the Child of 1989, which has been signed and ratified by South Africa.
163 See Section 28 of the Constitution, 1996.
164 Cf the Khosa case 600B-C.
165 Ibid.
psychological assistance, including by enabling contact with non-governmental organisations offering such assistance.\textsuperscript{166}

With regard to undocumented migrant children, they are entitled to access social security. In the event of their being unaccompanied, the state has a duty to find alternative care for them. They enjoy similar social security rights as South African and permanent resident children in this regard. In \textit{Centre for Child Law}\textsuperscript{167} the judgment reaffirmed that unaccompanied foreign children should be dealt with under the provisions of the Child Care Act and not through immigration and deportation means; that they should have legal representatives assigned to them by the state and found a positive duty on government departments to liaise with one another to formulate and implement practical arrangements regarding unaccompanied foreign children in South Africa.

\textbf{CHAPTER FIVE: PORTABILITY OF BENEFITS}

Barring a limited number of exceptions, South Africa is not yet linked to the network of bilateral and multilateral conventions on the coordination of social security. This may operate to the disadvantage of both non-citizens in South Africa and of South Africans who take up temporary or permanent employment or residence in other countries.\textsuperscript{168} In terms of comparative approaches, the territorial principle operative in social security is – in these conventions – replaced by a personal entitlement to benefits, which follows the beneficiary. The general principles which constitute the content of bi- and multilateral arrangements in this regard, usually relate to:\textsuperscript{169}

\begin{itemize}
  \item the choice of law principle, identifying the legal system which is applicable (as a rule, the applicable law is that of the place of employment, the \textit{lex loci laboris});
\end{itemize}

\begin{thebibliography}{99}
\bibitem{166} Concluding observations of the Committee of the Rights of the Child, CRC/C/IS/Add.203, Para 23.
\bibitem{167} \textit{Centre for Child Law and another (Lawyers for Human Rights) v Minister of Home Affairs & Others} 2005 (6) SA 50 (T).
\bibitem{168} Eg, in terms of s 60 of the COIDA, an employee or dependant of an employee who is resident outside the Republic or is absent from the Republic for a period(s) of more than six months, and to whom a pension is payable, can be awarded a lump sum, thereby losing any entitlement to the pension.
\bibitem{169} Barnard C \textit{EC Employment Law} (Oxford: OUP 2002) 302, commenting on the position in the EU.
\end{thebibliography}
• equal treatment (in the sense that all discrimination based on nationality is prohibited);

• aggregation of insurance periods (in that all periods taken into account by the various national laws are aggregated for the purposes of acquiring and maintaining an entitlement to benefits, and of calculating such benefits); and

• maintenance of acquired benefits and the payment of benefits to residents, irrespective of the country to the agreement where they reside (“exportability” principle).

Various ILO Conventions require co-ordination on the part of State parties in order to guarantee migrant workers comprehensive and continuous protection on the basis of effective equality and reciprocity.170

Also, South African benefits may be remitted through government to government agreements or through the mines’ major recruitment agency. In South Africa, the mining industry has two kinds of remittance in effect. The compulsory deferred pay, whereby in the case of Mozambique and Lesotho, home country legislation compels migrants to remit 60% and 30% respectively of their earnings to their home countries.171 Voluntary remittance is also involved, whereby TEBA and the banks have instituted efficient systems for voluntary deferment of wages. TEBA’s voluntary system has been known to remit more funds to the home countries than the compulsory deferred pay system.172

As mentioned above, South Africa is not yet linked to multilateral and bilateral agreements on the co-ordination of social security. The absence of proper bi- or multilateral arrangements in this regard between South Africa and other states may cause South Africa to be in breach of its international obligations and opens migrant workers,

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170 Cf e.g. the Maintenance of Social Security Rights Convention (No 157 of 1982) and the supplementing Recommendation (No 167 of 1983).

171 Jonathan Crush, Contract Migration to South Africa: Past, present and future. Accessed at http://www.queensu.ca/samp/transform/crush.htm. On the South African side, this compulsory deference policy has been critiqued by the Chamber of Mines as violating the basic rights of a person to earn and spend their money as they wish.

172 Ibid.
both documented and undocumented to vulnerabilities of exploitation and abuse in the host country.\textsuperscript{173}

**CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS**

Any approach to combating discrimination against non-citizens should take into account the varying state interests at stake with due regard to categories of rights (e.g. political rights, right to education, social security, other economic rights etc) as to various kinds of non-citizens with their distinct relationships to the country in which they are residing (e.g. permanent residents, migrant workers, temporary residents, tourists, undocumented workers etc). This must be done in proportion to the legitimacy of state interest or rationally for distinctions between citizens and non-citizens or among non-citizens.\textsuperscript{174}

Whereas South Africa has a more liberal approach to refugee rights as opposed to other countries, there is still a lot of disjuncture between the rights guaranteed by international human rights to non-citizens( in this context, including all categories of non-citizens excluding permanent residents) and those currently fulfilled by the state towards non-citizens. For example the exclusion of migrant workers from contributing to the Unemployment Insurance Fund creates unsuitable circumstances for them in the event of subsequent unemployment, which is in direct contrast to the constitutional guarantee of access to social security for everyone.\textsuperscript{175}

With regard to the position of refugees in South Africa, there is need for synergy between the Refugees Act and the Constitution. The Refugees Act guarantees full legal protection which includes the socio-economic rights enshrined in chapter 2 of the Constitution.\textsuperscript{176}

\textsuperscript{173} See art 3 of ILO Convention 2 of 1919, to which South Africa is a party (South Africa ratified the Convention 20 February 1924). It stipulates: "The Members of the International Labour Organisation which ratify this Convention and which have established systems of insurance against unemployment shall, upon terms being agreed between the Members concerned, make arrangements whereby workers belonging to one Member and working in the territory of another shall be admitted to the same rates of benefit of such insurance as those which obtain for the workers belonging to the latter."


\textsuperscript{175} Section 27 (3) of the Constitution.

\textsuperscript{176} Section 27 (b) of the Constitution.
However the Social Assistance Act does not extend social assistance protection to refugees. In the short term, the personal scope of application of the social assistance grants should be extended to officially recognised refugees. This will require that the provisions of the Social Assistance Act 13 of 2004 and its Regulations be accordingly amended.177

International human rights law defines the context of adequate reception standards for asylum seekers and amongst the standards set are that asylum seekers should not be left in a destitute condition while awaiting examination of their asylum claims and time limits for regulation to lodge asylum claims should not be so short as to deprive persons of the protection they are entitled to under international law.178 The position of asylum seekers in South Africa, as highlighted, is a precarious one, in that national legislation inadequately addresses their rights and legal and social protection while they are in transition. The outcome of asylum applications in South Africa is notoriously long with applications taking many years to be determined.179 It is recommended that South Africa takes into account minimum conditions which reflect the human dignity of the persons involved. A possible suggestion in this regard is to make the social relief of distress programme available to asylum-seekers who are awaiting the outcome of their refugee status application.180

In the long term, it is recommended that legislative and administrative initiatives be undertaken to systematically introduce the means of subsistence test in immigration law for purposes of residence status.181 The withdrawal of the temporary permit182 in the event and on the basis that the means of subsistence test is no longer met should also be introduced. This will make it possible to extend the scope of protection of social assistance grants to all lawful residents who have not become a burden to the State,

177 Treasury Document 72.
180 Treasury document, 72.
181 Treasury document 72. It is in particular recommended that obtaining a temporary and a permanent residence permit be made subject to a clearly defined means of subsistence test.
182 But not the permanent residence permit, in view of the approach adopted by the Constitutional Court in the Khosa judgment.
without any major consequences for the South African budget. It should be borne in mind, however, that this system can only operate effectively when there is an infrastructure for the exchange of data between the immigration and social assistance administrations and an effective system of deportation.\textsuperscript{183} The state has an integral role to play in this regard.

Finally, it is recommended that appropriate cross-border co-ordination arrangements be developed (at least for purposes of cross-border coverage and protection of social insurance entitlement), to be adopted by way of national legislation and bi- and/or multilateral agreements.\textsuperscript{184} This will go along way in guaranteeing social security protection for migrant workers in South Africa and also extend social security protection to migrant South African workers in other countries.

\textsuperscript{183} Treasury document 72.
\textsuperscript{184} Supra, 74.
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