



## 17th SADC Lawyers' Association Annual Conference Newsletter Cape Town • South Africa

Issue no:2

Friday 19 August 2016

[View in browser](#)

Opening Session: Gilberto Caldeira Correia

**Not a subscriber?**  
[Register now for a  
FREE TRIAL](#)



### General: Confronting human rights abuses

Leaders of the SADC countries have to be challenged on whether they are serious about human rights, the rule of law and even the proper development of the countries in the region. Speaking at the inaugural session of the SADC Lawyers' Association conference in Cape Town the association president, **Gilberto Caldeira Correia**, said while the name – the Southern African Development Community – suggested SADC intended to promote development, it was very difficult to believe that SADC leadership was still trying to reach this objective.

Speaking through an interpreter, he said this objective was put in doubt 'when we see the political leaders (in SADC) electing someone to head the organisation who champions the violation of human rights'. It was **'nonsensical' to say that SADC promoted a democratic community 'and then we see the election of Robert Mugabe** as head of the SADC'. It was 'equally paradoxical' that the SADC heads of state should choose someone like Swaziland's King Mswati to lead the community.

(King Mswati, the sole remaining absolute monarch in Africa, takes over SADC leadership this week, amid protests that he should be precluded from the post given his human rights record.)

Correia, a former president of the Mozambique Bar Association, said it was very worrying to see some parties that yesterday fought to reach independence today violating the rule of law so they could maintain power at all costs. He mentioned the situation in Mozambique where death squads operated in broad daylight against members of opposition parties and there was 'no intention' of doing anything about it.

In Lesotho 'we all know that the law of the bullet is governing', with attempts on the lives of journalists and lawyers. 'Our colleagues are threatened because they are carrying out their democratic role of defending clients.'

He also mentioned human rights violations in Angola and Zimbabwe, and, speaking of South Africa, **expressed concern at the 'financial debacle of Nkandla' and the Marikana massacre.**

It was increasingly common to see 'action against those promoting human rights' he said, and it was 'not accidental' that SADC voted to suspend and 'amputate' its own tribunal, initially set up to hear complaints involving human rights abuses.

Against this background, the SADC Lawyers Association was an important body because of its commitment to political development and its determination that its members would comply with their professional duties. These duties were not without dangers however: whenever there were tyrannical events lawyers were among those oppressed and targeted, he said.

This conference newsletter is sponsored by:



**LEGALBRIEF**  
A Matter of Justice



**LEGALBRIEF**  
AFRICA



### [New titles from Juta Law](#)

**Civil Society and International Criminal Justice in Africa: Challenges and Opportunities**

Recent decades have witnessed an increased role for civil society in international law making and the development of international institutions. The design, legal framework and establishment of the International Criminal Court is a key example of this trend. Yet, once international institutions are established, there are few opportunities and mechanisms for civil society to participate directly within the formal proceedings of such institutions, with participation largely limited to states.  
[- More Information](#)

## Opening Address

### We must deal with corruption – Chief Justice Mogoeng

In a wide-ranging series of challenges to the SADC Lawyers' Association, South Africa's Chief Justice Mogoeng Mogoeng has urged that members of the association help root out corruption, protect the environment, assume responsibility to prepare lawyers for elevation to the judiciary – and remember that while 'it is nice to make money – life is not only about making money'.

Giving the keynote address at this year's conference in Cape Town yesterday, Justice Mogoeng said the situation in the region was complicated by an 'uncontrollable desire' by some people to take advantage of others through manipulating the system 'so you can get there and maintain that undeserved position of wealth, control and privilege'.

[See full article](#)

## Construction Law: Claims for delay on international construction projects

### General: Challenges of meeting construction deadlines addressed

The first plenary session of the 17th SADC Lawyers Association annual conference addressed the implications of delays in construction projects around the continent.

SADCLA executive committee member Max Boqwana set the tone for the proceedings by noting that former war zones like Angola and the DRC have become fertile ground for massive infrastructural projects. Advocate Johan Beyers of the Cape Town Bar Association said infrastructural projects are notorious for over-running on time and costs with major implications.

However, he was quick to point out that it is a global problem. After all, up to 70% of construction projects in Saudi Arabia experience time over-runs while it is even higher in Qatar (80%). In India, the figure soars to 83%. And a 2001 UK report found that 70% of government-funded projects 'were delivered late'.

**Beyers addressed the various challenges impacting on construction project in Africa, including civil unrest, adverse weather conditions, power shortages and adverse geological conditions.** 'If your contract doesn't take these into account, the projects can be jeopardised,' Beyers said, adding that delay claims are usually complex and may significantly impact on the capital costs.

These sentiments were echoed by Dr Tony Farrow, MD of Navigant's Global Construction Practice. The quantity surveyor, who has extensive experience in leading large expert witness cases involving the analysis of delays and disruptions, said he has never experienced a major construction project that has been completed on time. 'In the construction industry, uncertainty is a certainty,' he said. Both speakers addressed concerns that construction law is generally excluded as part of the LLB curriculum in African universities even though the future of the continent is wholly dependent on the roll-out of massive infrastructure developments.

## Environmental challenges: Wildlife poaching

### Conservation: No consensus on how to protect Africa's 'white gold'

Kenyan President Uhuru Kenyatta in April sparked a global controversy when he set fire to a massive stockpile of ivory in an effort to show his country's commitment to saving Africa's elephants.

## HIV & Social Security Law: The SADC Region

*HIV & Social Security Law* comprises a collection of conference papers from representatives of the ILO, the SADC Tribunal and academics from different universities in the SADC region. They assess the extent to which national governments have enacted measures to deal with HIV-related issues in the domains of labour law, health law, social protection and social security law. The legal situation in the EU is included as an example.

[- More Information](#)

## Kenyan-South African Dialogue on Devolution

In a radical break with its past, democratic South Africa established a system of devolution that was confirmed in the 1996 Constitution. In reaction to a system of highly centralised government that had seen the abuse of power, spatial inequality and underdevelopment, Kenya has also opted for devolution. This system was embodied in the 2010 Constitution and implemented with the establishment of 47 counties after the general elections in March 2013. Devolution lies at the heart of Kenya's new constitutional dispensation and provides a means of addressing past injustices.

[- More Information](#)

## The SADC Law Journal

The *SADC Law Journal* is an annual peer-reviewed journal which provides a forum for legal themes of relevance to the SADC legal fraternity.

[- More Information](#)

## Comparative Law in Africa: Methodologies and Concepts (Comparative Law in Africa series) (2015)

The Centre for Comparative Laws in Africa held its inaugural methodology workshop from 22 to 24 October 2012. Over 40 scholars from various universities in South Africa, Africa, Europe and the United States of America participated in plenary and panel discussions around comparative law in cultural, interdisciplinary and subject context, Western legal traditions and mixed jurisdictions in African comparative legal studies, traditional and informal law in Africa, religious law in Africa and its comparative implications and the role of African

More than 100 tons of ivory burned for days in the Nairobi National Park. Professor Tumai Murombo, Director and Professor of Environmental Law (Nelson Mandela Institute, University of the Witwatersrand) said the massive response to the ceremony – both positive and negative – highlights the fact that there is no consensus in dealing with the 'white gold' issue.

He said national interests often supercede regional challenges with the result that countries usually work independently of each other while attempting to resolve the same problems. **The laws, he said, are often out-dated and inadequate to deal with the challenges while both CITES and the SADC protocols have ignored the cultural reasons for the scourge of ivory poaching.**

He cited the case of the Great Limpopo Transfrontier Park which joins some of the most established wildlife areas in southern Africa into a huge conservation area of 37 572km<sup>2</sup> and is intended to safeguard threatened animals. 'But the South African authorities still cannot chase poachers into Mozambique and, for that matter, the Mozambican authorities cannot chase them into Zimbabwe'.

Tom Ogola, a former legal officer for Kenya Wildlife Services, said Africa faces a complex multidimensional challenge with far-reaching ecological and economic ramifications. 'There is no silver bullet that will put an end to the poaching pandemic,' he said.

Rudi Aucamp, Senior Associate with Aucamps Attorneys in Johannesburg, said there is light at the end of the tunnel in that prosecutors are now securing lengthy prison sentences for convicted poachers. He said the 2014 case in which rhino poacher Mandla Chauke was sentenced to 77 years in prison (he was also convicted for the murder of his accomplice who was killed in a shoot-out with rangers) served notice that the courts are cracking down. On the downside, Aucamp noted that poaching over the past eight years has become increasingly violent – for both the poachers and the authorities.

## Developments in Commercial Arbitration

### **Arbitration: Paving the way for arbitration**

Not a single arbitrator from Africa was listed in the current guide to the most sought-after international arbitrators, Sara Mhamilawa, legal counsel at the Network Information Centre, Tanzania, told SADCLA conference delegates yesterday.

In her presentation during a session on developments in commercial arbitration, Mhamilawa said while training in commercial arbitration was widely taught as a subject in SADC countries, no one offered it as a degree programme. On the other hand, there were plenty of courses and seminars on the subject in various parts of Africa.

For lawyers who wanted to get involved in commercial arbitration work, 'getting the deal' required gaining a reputation, having expertise in the primary subject or the substantive law relating to the dispute at hand, and knowing the relevant language. For many disputes within SADC countries this increasingly meant knowing Chinese as well as English.

She said for arbitration to take off in SADC countries there needed to be more marketing, particularly online information and that lawyers needed to help educate clients so that they would understand the implications and benefits of alternative ways of resolving commercial disputes, and in particular what arbitration could offer.

One of the positives of arbitration in commercial disputes lay in the fact of its 'finality', she said, yet a local court in Tanzania had allowed an appeal on a

matter that had been concluded by way of arbitration. This was an example of why it was important to advocate for the SADC to ensure a conducive legal framework for arbitration within the region.

#### **Arbitration: Why investors prefer arbitration**

The most common reasons given by investors for preferring arbitration over litigation included concerns that, unlike an arbitrator, the courts might be corrupt and would not be impartial.

Speaking to delegates at the SADCLA conference yesterday, Tadala Chinkwezule, legal services manager for the AHL group in Malawi, said that in addition investors might be concerned about political unrest or instability and the length of time involved in bringing litigation to completion, as opposed to the relative speed of arbitration.

If the SADC region could offer proper commercial arbitration to foreign investors it would help attract direct investment from outside the region because investors would feel confident that their complex disputes would be effectively and efficiently dealt with.

They would also be attracted by the idea of expeditious dispensation of justice and being able to choose an arbitrator with the required skills and knowledge. The confidentiality of the process would appeal as would the less formal and rigid process of arbitration compared with conventional litigation. It would benefit them because it was generally less expensive.

Chinkwezule argued that arbitration was a vital consideration for foreign investors in the region and its benefits were generally seen to outweigh those of litigation. She urged all members of the association not just to promote the use of commercial arbitration but to stress to clients that the arbitration should take place in Africa rather than in other parts of the world.

#### **Arbitration: Start small and dream big – Herholdt**

For lawyers who break into the world of international arbitration the rewards may be significant: exciting work on cases that, though they may take some years to finalise, bring significant benefits. It was also a chance to practice law beyond the limitation of domestic courts with the possibility of doors opening to other international opportunities. This was the message of Grant Herholdt, an attorney with ENSafrica, to delegates attending a breakaway session on commercial arbitration in Africa.

Herholdt, director of the company's dispute resolution department, directed some of his presentation to young lawyers who were keen to get involved in high-level arbitration. He said the practice work of most local lawyers was limited to domestic court proceedings and domestic arbitration. Only a handful of lawyers had experience in international arbitration and even that handful only rarely encountered international arbitration work.

In South Africa arbitration had been hampered because it was still governed by outdated legislation dating back to 1965. At the moment a new International Arbitration Bill had been presented to Parliament but it would take some time before it became law. While South Africa had fallen behind, however, other African jurisdictions had taken significant strides towards establishing a presence in international arbitration. Even those countries, however, still lagged behind the established international centres of Paris, London and Singapore among others.

And, while in South Africa legal attention post-apartheid had been focused on domestic constitutional and other developments, major legal firms from the US, London and Paris had aggressively expanded their work into other jurisdictions including South Africa. This allowed them to draft arbitration clauses that favoured their home turf, and their clients' disputes were typically heard in foreign centres rather than in South Africa.

His advice was that lawyers wanting to get in on such work should 'start small and dream big'. He told his audience that in the view of clients, service was often just as important as results, and he urged anyone wanting to break into this field to 'skill up' and participate in international arbitration workshops and seminars and consider signing up for relevant tertiary qualifications.



© Juta and Company (PTY) LTD 2016

[Terms and Conditions](#) | [Contact Us](#)