



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

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Minister in the Presidency for planning speaks...

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### Legislation: Minister raises questions over SADC Treaty

**South Africa's Minister in the Presidency for planning, Jeff Radebe**, has questioned whether the SADC Treaty as it stands is an appropriate instrument to promote trade, investment and the harmonisation of laws in the region.

Speaking at a gala dinner marking the end of the SADC Lawyers' Association conference held in Cape Town last week, Radebe said the overarching conference theme, **'Promoting the harmonisation of trade and investment laws and legal practice standards for regional development and effective integration in SADC'**, was well chosen.

There were already a 'spaghetti bowl' of bilateral and multilateral trading agreements between certain SADC members, and between some members and countries in other parts of the world. However the need to 'better harmonise the trade, investment and legal practice dispensation' across the SADC region was urgent and the figure of 12% intra-Africa trade was 'simply an intolerable statistic'.

He said there was a need to reflect on whether the harmonisation of trade, investment and legal practice sought in the region was in fact achievable under the current **SADC Treaty framework**. 'To be brutally frank, the question must be whether the current SADC Treaty is "fit for purpose" and allows for the creation of an adequate mechanism to harmonise our efforts at regional integration.'

Radebe went further, saying he wanted to be 'bold' by offering some suggestions of 'concrete recommendations' worth considering to achieve the conference goals. The first was an amendment to the SADC Treaty that would facilitate harmonisation of laws. He also said it was necessary to provide for the **'procedures and mechanisms to adopt harmonised community laws directly applicable in the SADC region'**.

He then threw out the idea of a **'regional legislative body'** that could enact laws directly applicable in the region. But it was the fourth suggestion that drew the most reaction. Radebe began his next sentence with the words, 'the SADC Tribunal', and the audience immediately began to clap and cheer. However, the Minister did not say anything on the subject of the mandate of a revived Tribunal following its suspension in 2010 under controversial circumstances. He merely said **'the SADC Tribunal could be adequately capacitated to ensure effective application and implementation of the harmonised law'**.

(The issue of the suspension of the Tribunal and the need for it to be revived in a way that would still deal with human rights in the region was a hot subject at the conference, being mentioned to warm applause by both the SADCLA's outgoing president, Gilberto Caldeira Correia, and by South Africa's Chief Justice Mogoeng Mogoeng. At the start of the conference they urged

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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.

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association members to keep lobbying to achieve their aims for the Tribunal as a mechanism to deal with individual human rights, among other issues.)

Radebe said it was significant that in the current depressed global environment African countries continued to record significant economic growth. The continent registered an average GDP growth of about 3.6% in 2015, 'against 2% recorded by the developed countries during the same period', which Radebe said was 'remarkable, even if it is still short of the high growth rate necessary to ensure sustainable development'.

Departing from his prepared text, Radebe said he wanted to share 'a true story' with guests. It concerned former Botswana President, Festus Mogae, who at a meeting in Addis Ababa last year, explained that he had had to struggle to get a visa to get into the Ethiopian capital for the gathering. Before moving on to 'loftier things', said Radebe, **'Mogae asked why he should need a visa' to visit other African capitals.** If regional trade and investment were to be successfully promoted, said the Minister, it was important that restrictions, such as this, were properly dealt with.

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### Economic protection and the role of African multilateral institutions

#### Economy: Delegates look to Brexit 'disaster' for lessons

The fragility of the European Union came into sharp focus during Friday's plenary session of the 17th SADC Lawyers' Association annual conference in Cape Town.

The session addressed the role of economic protection and African multilateral institutions. Barrister Elton Jangale of PFI Partnerships Law Consultants in Malawi described Brexit as 'a disaster', noting that the continent that sparked both World Wars and the Cold War has now created 'another European war'.

The challenge for Africa, he argued, is to ensure that its various communities have the necessary framework and structures in place to ensure that they work as glue for its member states. 'Regional economic communities such as SADC and the East African Community (EAC) should be building blocks for the African economic community,' he said. Delegates also addressed the impact of economic partnership agreements and regional integration processes in the region.

#### 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.

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#### 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.

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#### 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.

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#### 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

Daniel Njiwa, the country representative for Zambia, said it is critical to take cognisance of all the positives and negatives around the continent when formulating regional blocs like SADC. The positives, he said, include the fact that **Africa's middle class has tripled over the past 30 years, that 10 of the world's fastest-growing economies are located in Africa and that enrolment at tertiary institutions has soared by 21% since 2000.** He noted that the negatives include the fact that ICT penetration still lags, millions of Africans still live below the poverty line (\$1.25 a day) and HIV/Aids remains rife. 'The reality is that while African economies are growing steadily, inequality is increasing throughout the continent,' he said.

comparative legal studies in the development of law in Africa.  
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Advocate Mojanku Gumbi, a consultant at Gumbi Dechambenoit & Associates, said one of the profound problems facing Africans is the different interpretation of the various continental platforms such as Napad and SADC. 'The systems are in place, but suddenly we have a situation where Zimbabwe doesn't want South African imports. For people to start taking us seriously, we have to start taking ourselves seriously,' she said. Gumbi added that the 'disintegration' of the EU has provided lessons for African states on how to form their own platforms to promote integration.

## Free movement of persons and combatting human trafficking

### Human Rights: Striking a balance

The difficulty of balancing the free movement of persons – an issue mandated by international law as well as the domestic laws of many countries – while curbing human trafficking was addressed at a plenary session on human trafficking.

The distinction between trafficking and smuggling was also addressed. Smuggling refers to the illegal movement of individuals into countries where they are not nationals or permanent residents. The individuals are assisted for a fee by criminal syndicates. Smuggling ends with the arrival of the migrants in the country of destination whereas trafficking sees the continued exploitation of the victims to generate funds for the traffickers.

Modiri Mathews, the chief director of Immigration Services at South Africa's Home Affairs Department, said the post-apartheid vision has been to reverse racially biased and exploitative laws in order to integrate South Africa into SADC, the rest of the continent and the world. 'Despite post-1994 legislative changes, a new Green Paper has been introduced that argues that our current immigration policy is based on a strict compliance model rather than managing migration strategically to achieve national goals,' he said. He **expressed concern that the SADC Free Movement Protocol has only been signed and ratified by four member states.**

Ottilia Maunganidze, a senior researcher at the Institute for Security Studies, addressed the migration challenges in Europe and Southern Africa, noting that there are different forces at play. In Europe, she said the surge in migration has been prompted by refugees fleeing conflict zones while some migrants moving to or within SADC states have left trouble spots, it is more of an 'economic migration'. 'If people want to cross into another region, they will. If they can cross the Mediterranean in a dingy, they can climb over any (border) wall,' she added. Hermann Knott of the Luther Rechtsanwalts-gesellschaft in Germany also addressed the refugee crisis in Europe, saying it is crucial to address the root causes and strengthen external border management as well as increase police co-operation and improve prevention and information campaigns.

## The appointment of judicial officers

### General: The case for involving civil society

There was room to improve the way judges are appointed in Lesotho and the involvement of civil society could benefit the process, according to a panellist at the breakaway session on how judicial officers were chosen and appointed.

Commenting on several recent decisions in her country, Lineo Tsikoane, national programme officer of the Coalition of African Lesbians and founding director of the Seinoli legal centre in Lesotho, said the judgments – on gender equality and similar issues – had been disappointing. While those responsible for bringing the cases had thought the outcome could have set precedents 'that could be used for years to come', the cases had been decided on a narrow basis or had 'stuck to technicalities'. Tsikoane said **there was a strong view that the judges involved 'were not informed', and as a result the law had not been developed as it could have been.**

Civil society organisations were at the forefront of change in her country, she said. The people had moved away from a time of just one political party and there were now many parties. 'We are best suited to decide where we want to go,' she said. Leaving civil society completely out of the judicial appointment process was 'not right'.

And if a decision were to be made to include civil society organisations, it had to be on the basis that they would not be a 'back stop' but would be involved from an early stage. 'We can be used to voice the views of the community,' she said, and it would be 'relevant and contemporary' to take these views into account.

However Tsikoane **warned against trying to use civil society organisations as 'just rubber stamps'**, adding that if these organisations were to get involved, they would need to be 'sure about the mandate issues' that would arise.

#### **General: South Africa continues search for best practice**

It was not surprising that judicial appointments in South Africa were still hotly debated, said a member of that country's judicial selection committee, CP Fourie.

Fourie, who represents the legal profession on South Africa's Judicial Service Commission, was speaking to delegates attending a conference session on how the selection process contributed to an 'independent, impartial and accountable' bench. **The creation of a 'strong and independent and accountable judiciary' should be 'foremost in our minds'**, he said and so there was no wonder that it was such a contentious issue.

In South Africa the JSC would typically sit with 25 members to interview and select a candidate: four judges, four representatives of the legal profession, one legal academic and 16 representing political interests of whom three would come from minority parties.

According to the latest available statistics there were now 236 permanent judges in South Africa of whom 103 were 'African' (69 men and 34 women); 24 'coloured' (14 men and 10 women); 25 'Indian' (13 men and 12 women) and 84 'white' (60 men and 24 women). 'It is clear that we have come a very long way since 1994,' he said, 'but I acknowledge that a lot of work still remains to be done.'

Fourie said **the JSC system was much better than that in place before 1994 when appointments were made via unchecked executive power.** However the search needed to continue for best practices to incorporate into the system.

He posed a number of questions about the South African system, and suggested that delegates from other countries might benefit from considering these questions too. To start with, should there be any members of the selection panel with political interests, and if so was 16 too many? What about the overall size of the JSC: was it unwieldy?

Questions should also be asked about whether those who nominated candidates really applied their minds in doing so, particularly since so many among those initially nominated did not survive the shortlisting process. It was frowned on to nominate oneself, and so the question had to be asked whether those who nominated candidates were effectively a front, rubber stamping an application by someone who wanted to be nominated. There was, Fourie said, an obligation on someone who nominated a candidate to be satisfied that the person 'really was a good candidate'.

Are we really trying all means to get the best candidates, he asked. This was a particularly difficult question as the JSC did not itself nominate candidates, and could only work with names presented to them by others. There was also the problem of insufficient time for in-depth interviews, and it was also being asked whether more should be done to test the skills of a candidate. When a 'wrong' appointment was made, it was a very long-term mistake, he said.

#### **Research: Transparency is top of mind**

Wide-ranging research about possible best practice for judicial appointments in SADC countries has found that the question of transparency was an overarching theme.

Christopher Oxtoby, senior researcher at the Democratic Governance and Rights Unit of the University of Cape Town, told delegates attending a session on judicial appointment systems that **his unit had conducted field research in eight African countries in addition to its long and extensive research in South Africa**: Botswana, Kenya, Malawi, Namibia, Seychelles, Tanzania, Uganda and Zimbabwe. Other jurisdictions would also be canvassed as capacity became available.

Four categories of person were interviewed in each of these countries – a member of the body that selected judges, a member of the legal profession, a recently-appointed judge who could comment on what it was like to go through the selection process and a member of a civil society organisation engaged with the process.

From these interviews data was obtained that would be useful in developing best practice guidelines. These in turn would be presented to the Southern African Chief Justices' forum at its gathering next year. Oxtoby asked for feedback on the issues he raised in his presentation, as well as any other comment that would be useful in drafting these guidelines for the chief justices.

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