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TRIBUTE TO AKHO NTANJANA



Why should young and promising eagles suddenly perish and be taken away from us forever? I am gutted and unable to understand why.

Akho Ntanjana was on a meteoric rise – he was excelling in his career and slowly transforming into a trailblazer in his own unique way. He was a quiet, focused, forward looking young man and destined to reach great heights.

Akho worked tirelessly on the accreditation of this journal by the Department of Higher Education and Training – a long and arduous process. The receipt of the accreditation letter made him smile – he was relieved and fulfilled when he achieved his objective. He reminded us all that the real work was about to begin to maintain the accreditation.

Akho will be sorely missed by his SAJEI colleagues, the SAJEI Editorial Board members, the authors, the JUTA team and, more specifically, by his mother, wife, and siblings. May his soul rest in peace and rise in glory.

DR GOMOLEMO MOSHOEU

Production editor

Well done, Akho!

You have run your race; now, it is for us to take the baton
and continue on your well-defined route.

Thank you for being our guiding light.

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Enhancing Judicial Excellence

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The Development of SADC Community Law in Member States

by MR Phooko, LT Chigowe and H 'Nyane

First edition, Juta, 2024

To cite the book's purpose, it 'deals with the topical subject of the development and application of SADC community law in SADC member states.' The book comprises four parts, twelve chapters, written by different authors. Part I consists of one chapter – the introduction. Part II is titled 'SADC Community Law and Its Implications for Member States'. It consists of three chapters. Part III is titled 'Performance of SADC on Its Objectives: Regional Integration, Democracy, Peace and Development'. It consists of seven chapters. Part IV is the Conclusion.

Chapter 1 by Moses Retselisitsoe Phooko is titled 'Introduction to SADC and SADC community law'. It introduces the rest of the chapters. Chapter 2 by Mkhululi Nyathi is titled 'How accommodative is South Africa of SADC legal norms? Making sense of the Fick and Law Society judgments'. The chapter correctly highlights that South African courts respect and will enforce SADC Tribunal decisions and treaty obligations. This is crucial, as other states such as Zimbabwe have a different, dismissive attitude towards the decisions of the SADC Tribunal, which is why Fick ended up in South African courts. Chapter 3 by Hoolo 'Nyane is titled 'The transformation of SADC community law from a treaty-based legal regime to a single constitutional order'. It argues that the SADC should transform from a treaty-based system to a European Union-style constitutional order. Although the realisation of this ideal is remote in the SADC context, the chapter nonetheless gives the reader something to ponder. The argument toward supranational institutions is not new, but similarly it is known that African leaders do not want such supranational institutions in regional integration, at both regional economic community (REC) and African Union (AU) levels.

Chapter 4 by Moses Retselisitsoe Phooko is titled 'An Assessment of Zimbabwe's reception of SADC community law into its domestic sphere'. The chapter highlights that the courts of Zimbabwe give precedence to their constitution rather than SADC community law such as the SADC Treaty and the SADC Tribunal. This position is the opposite of that of South African courts, as shown in Fick and Law Society above. The chapter engages the reader to adopt a position as to how SADC states should relate to SADC community law. Clearly, it is untenable if SADC member states can ignore SADC community law in favour of their domestic laws.

Chapter 5 by Carol Chi Yang is titled 'Regional integration and the right to development obligation of SADC member states', it assesses whether and to what extent regional integration could be conceived to contribute towards the realisation of the right to development in the SADC. It notes that the

SADC Treaty omits to recognise the right to development. Therefore, it argues that the SADC Treaty should have adopted the right to development enshrined in Article 22 of the African (Banjul) Charter on Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) so as to make it prominent, which would entail a 'conscious obligation for its realisation'. Failure to do so may mean that SADC member states may '... not measure up with the obligations on the right to development they have committed to...'. This argument draws the reader into the mechanics of the actualisation of the right to development at AU level, where the African Charter is located. It raises two questions. Should every REC do what the author suggests? If so, what are the implications? Secondly, why should emphasis on the right to development be placed on RECs instead of a top-down approach where the realisation is driven from the AU level? The chapter draws the reader to adopt a position in this regard.

Chapter 6 by Lloyd Tonderai Chigowe is titled 'The role of SADC in safeguarding democratic governance: Lessons from ECOWAS'. The chapter assesses democratic governance in the SADC, by this is meant the holding of '...regular, transparent, free and fair elections, effective participation of citizens in democratic governance, rejection of unconstitutional change of government...'. It considers how the Economic Community of West African States (ECOWAS) dealt with the removal of former president Yahya Jammeh of Gambia in 2016, and draws lessons that the SADC can learn from. The reader is invited to review the lessons learnt and adopt a position.

Chapter 7 by Adele Mcilo, Leon Poshai, and Percyslage Chigora is titled 'The impact of Covid-19 on social security frameworks: Lessons from Zimbabwe and South Africa'. It highlights the stark differences between South Africa and Zimbabwe in providing security for its most vulnerable citizens. It points out that Zimbabwe failed dismally to provide adequate social security during the Covid-19 pandemic. The authors note that on the other hand, South Africa had better social security measures relative to Zimbabwe.

Chapter 8 by Jan L Neels is titled 'The Southern African Development Community and the African principles on the law applicable to international commercial contracts'. The chapter deals with applicable law in commercial contracts where the parties omitted to choose one. It proposes the adoption of 'African principles on the law applicable to international commercial contracts'. The premise of these principles seems to be that in the absence of a choice of law by the parties, the applicable law should be the law of the country of habitual residence of the seller, service provider, franchisee, distributor etc, depending on the nature of the contract. The proposed principles engage the reader as there are other worthy options in this regard,

such as the use of the *lex loci solutionis* (place of performance) model. Indeed, the author admits that the choice between the two models is a difficult one.

Chapter 9 by Nelson Kekana is titled 'A call for cooperation and harmonisation of tax regimes within SADC'. The chapter provides examples of different tax regimes in the SADC member states. It highlights the challenges posed by such divergent regimes, and argues for a need to harmonise them in line with the SADC Protocol on Finance and Investment. No doubt a harmonised tax regime in the SADC would be convenient and predictable for persons and companies working or doing business across SADC member state borders. But the reality is that this call is controversial in that tax is the main source of revenue for states. Therefore, getting them to change their regimes has major economic political connotations for SADC member states. This controversy makes the chapter a worthy read.

Chapter 10 by Swikani Ncube is titled 'The SADC Standby Force in Cabo Delgado: Some critical questions in understanding the subregion's collection security framework'. The chapter assesses the SADC's collective security framework. It concludes that the SADC's recent deployment in Mozambique demonstrates that the SADC is capable of using force to protect common security interests. However, the author questions if the SADC can act in similar way if the offender was a head of state. It's an interesting question worthy of consideration.

Chapter 11 by Anzanilufuno Munyai is titled 'A systematic strategy for economic integration in SADC: Path towards sustainable development'. The author argues that attainment of sustainable development in the SADC requires three strategies, namely: the exercise of the right to permanent sovereignty over natural resources; the nationalisation of industries; and the SADC regional free trade agreement. The author argues that trade in good requires states, rather than the private sector, to own natural resources. He argues that private ownership of natural resources is neo-colonialism. Furthermore, the author argues that the free movement of people must be implemented if sustainable development is to be achieved. These are thought-provoking suggestions, especially as they involve nationalisation or expropriation. Expropriation is a contentious subject, especially in South Africa where the debate is active, and there are a string of arguments for and against expropriation.

Chapter 12 by Lloyd Tonderai Chigowe is the conclusion and summarises the book's findings.

The book is noteworthy because it is a consolidation of contributions of the SADC community law on various pressing, unsettled and controversial issues. This makes it an interesting contribution to the scholarship on SADC community law. Each chapter engages the reader in its own way. The authors manage to pinpoint the salient issues under discussion, and find their own way to present well-structured arguments. The authors do not profess to have all

the answers to the issues they pose, but they do a good job of articulating their views. No doubt readers will have their own views on the issues presented, but as scholarly works that is what the chapters should invoke the reader to do. Therefore, each chapter succeeds in setting the tone for the discourse it covers. There are no significant shortcomings. If anything, there is a need for more books of this nature on the SADC community law.

The authors are congratulated for their interesting and informative contributions.

DR TINYIKO NGOBENI

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