

THE LAW SOCIETY OF ZIMBABAWE SUMMER SCHOOL
PRESENTATION ON THE OBJECTS OF THE SADC LAWYER'S ASSOC.
AND
LAWYER MOBILITY IN THE SADC REGION

Chairperson and Convenor of the Zimbabwe Law Society Summer School, President of the Law Society of Zimbabwe Mr. Sternford Moyo, President of the SADC Lawyer's Association Dr Carlos Alberto Cauio, distinguished guests, fellow lecturers, colleagues and participants.

On behalf of the President of the SADC Lawyers Association, Dr Cauio and the Council, may I express my sincere thanks and appreciation to you for inviting the SADC Lawyer's Association to participate in this Summer School and to make a contribution to its programme. I also bring warm greetings to each of you from the respective Law Societies of Botswana, Angola, Namibia, Swaziland, Mozambique, Zambia, Malawi, Lesotho, Tanzania and South Africa. Our presence here and indeed that of Dr Cauio and Sanjay from Botswana demonstrates our commitment to strengthening the bonds and relationship between our respective Law Societies and between practicing lawyers within the SADC region. It is indeed our privilege to participate in your Summer School and thank you for the kind and generous arrangements in bringing us to your country.

Chairperson, we must at the outset acknowledge that we gather at one of the most difficult and fraught moments in world history. As lawyers and social activists we cannot ignore the dismal scourge of war and the cowardly hand of terrorism that has brought with it so much death and destruction and which has dominated our every waking hour since the 11th September. These events no doubt have had and will continue to have a profound effect on the world and have already brought about complex realignments in international politics and concerns.

Chairperson as we speak the world is at war. Thousands of innocent lives have been tragically lost through the wanton acts of terror that has provoked a calculated campaign of revenge bringing with it the further loss of civilian lives.

As lawyers, committed as we are, to the building and the maintenance of the Rule of Law and the protection of liberty we are now faced with difficult challenges and choices as many clamour to subvert the cherished values we hold in response to the scourge of international terrorism.

The eminent jurist, his Lordship Justice Michael Kirby of the High Court of Australia recently addressed the 32nd Annual Convention of Australian Lawyers and implored in a desperate yet eloquent reminder to lawyers and judges:” ...*We have not cared enough for justice. We have been just too busy to repair the wrongs that we saw. Yet at critical moments in our nation’s history, lawyers have upheld the best values of our pluralist democracy. In the future, we must do so more wholeheartedly. To preserve liberty, we must preserve the Rule of Law. That is our justification as a profession. It is our continuing challenge after September 11.*”

Chairperson, lest we allow the events of 11th September to over-shadow and pre-occupy our concerns we must not lose sight of the awesome challenges and horrors that continue to plague our own continent. War, terror, dispossession, famine, poverty and the systematic abrogation in many countries of the Rule of Law is no stranger to Africa. Many a victim of the scourge of war and the deliberate denial of human rights and fundamental dignity remains yet to be addressed by our legal systems. The stench of human decay and war has long pervaded the skies above Africa and has misted the eyes of many a mother and child who have waited in vain for the return of those who have gone to war, often in causes not of their own making.

Chairperson, the ravages of poverty, hunger, aids, tuberculosis and malaria are compounded by the genocides and intolerance that we daily witness. These challenges, urgent and demanding deserve our collective attention and that of the rest of the world. It is therefore appropriate that as lawyers we address these issues of common concern, so that we can create and strengthen the appropriate institutions locally, regionally and within the continent to build a just peace and the Rule of Law. In these endeavors we seek the fullest and broadest participation of all the detachments of our lawyers. Our problems, of course, are neither unique nor peculiar or have isolated consequence in this region. Our borders are not impervious and are no longer barriers of seclusion. Each of the countries in the region with its own policies, difficulties, weaknesses, strengths, wealth, poverty, resources, laws, and challenges of governance impact directly or indirectly on one another. Likewise the challenges of the global economy impacts not only on us in the region but on the entire continent.

Chairperson, we must acknowledge the positive endeavors in the continent to bring about its renewal and to create new opportunities for development and prosperity. We are also aware of the demands made on the international community with regard to the debt of many African countries and the clarion call for support for development and economic stability. We must remember to the important debates that we recently witnessed in Durban at the World Conference Against Racism (WCAR) on the issues of reparation for slavery and the ravages of colonialism.

Chairperson, we simply cannot allow ourselves to be overwhelmed by these challenges.

The legal profession in our region must embrace the responsibility of building our respective economies, fighting poverty and strengthening our legal systems in both its civil and criminal jurisdictions. So to Chairperson are we charged with the mandate of vindicating on behalf of our clients and client communities their

constitutionally entrenched rights in accordance with the standards and principals of the Regional and International Human Rights instruments to which many of our states are parties to.

It is within this context, motivated and impelled by the need for greater regional co-operation amongst lawyers that in 1999 the leaders of the Mozambican and Swaziland Law Societies expanded on the vision to institutionalize a regional organization of lawyers in the Southern African Development Community. Dr Cauio and Mr. Earnshaw of the Swaziland Law Society took up the cudgels on behalf of those who over the years expressed the need for such an institution and brought together the leaders of the various Law Societies to forge unity in the structure of the SADC Lawyers Association. A preparatory meeting was held in Maputo at which representatives from the Law Societies of Swaziland, Namibia, Lesotho, Malawi and the Ordem dos Advogados De Mocambique. The preliminary draft of the constitution was prepared by the Law Society of Zimbabwe. Its inaugural meeting was held on the 6th and 7th of August 1999 in Maputo where the constitution was settled after many, many hours of negotiation and deliberation We were thereafter able to proudly declare the objectives of the Association as: -

- i) The maintenance and promotion of the Rule of Law throughout the SADC region, to promote human rights with an emphasis on the rights of people with disabilities, women and children.
- ii) To ensure that the people of the region are served by an Independent and efficient legal profession.
- iii) To promote the honour and integrity of the profession and to strive for uniformity in standards of professional ethics.

- iv) To encourage and improve the standards of legal education and the promotion of exchange of legal expertise and provide exchange programs for lawyers and students.
- v) To encourage the harmonization of the legal systems in the region.
- vi) To work with, support and complement the work of the African bar Association, the International bar Association, Commonwealth Lawyers Association and other international organizations with similar objectives.
- vii) To facilitate the resolution of conflict amongst countries, organizations and individuals within the Region by way of arbitration and alternative dispute resolution where appropriate.

Since inception meetings have been held in Angola, Namibia, Swaziland, Johannesburg and more recently in Botswana. On the occasion of each Council meeting appropriate Declarations in consultation with the host Law Society were adopted. At both the Angolan and Namibian Council meetings declarations were issued reaffirming the commitment of the Association to establishing and protecting the Rule of Law in the Region. In the Namibian Declaration, which was issued in October 2000, the Association expresses its concern about the fact that the SADC region had lost the opportunity of hosting the important international conference of the Commonwealth Lawyers Association as a result of the concerns of violence and the “disregard for the Rule of Law and human rights” in Zimbabwe. In consultation with the lawyers of the Law Society of Swaziland the Association expressed its support for the need for reform within the Swami legal system and publicly expressed support for the Swaziland Law Society. In Angola the Association recognized the urgent need for building judicial and legal structures and supported the efforts of the Angolan Bar Association in its endeavors to establish the Rule of Law in this war torn and devastated country.

These Chairpersons have been important statements of commitment by lawyers of the Region. As joint custodians and guardians of the law with the judiciary we have a solemn duty and responsibility to support our colleagues in their professional organizations within the region especially where there are attacks on the independence of the judiciary and the undermining of the legal system.

The commitment to seeking the harmonization of laws within the region remains a project of high priority within the Association. The Association is earmarked to hold a conference at its AGM on the theme of "*The Role of Law and Facilitating Regional Integration in Southern Africa*" (SADC). A thorough exposition of the complex debates on the harmonization of our legal systems will be addressed together with the issue of creating greater mobility for lawyers within the Region.

In recognizing the ever-changing economic and social relationships in the Region, the Association is committed to creating mechanisms and legal instruments that will facilitate the mobility of lawyers within the various legal jurisdictions of the Region. We have identified the need for developing a substantive Code of Practice and Ethics for lawyers who seek to work across borders in the Region. Chairperson it was your President Stern ford Mayo who in the early days of the Association's existence exhorted it to cast its attention to prioritizing these matters. Charged by the Council Mr. Moyo prepared the first draft of a proposed Code of Ethics.

Chairperson it is true that the devil always lies within the details of such processes. What is far more important though is that we should ensure the broadest participation of all lawyers and their respective Societies in the region in the process of drafting the Code. There is the urgent need for us to agree on the core values and principles within the profession that would regulate cross-border practices. Mr. Moya's draft Code of Ethics fashioned largely on that of the Bars and Law Societies of the European Union capsule the fundamental principles and core values as: -

- i) The maintenance and the strengthening of the independence of the legal profession and in particular that of the legal practitioner.
- ii) Enforcing and enhancing the integrity and honesty of the legal practitioner.
- iii) Protecting the confidentiality of the relationship between legal practitioner and her/his client/s.
- iv) To ensure that the legal practitioner is able to at all times act in the best interest of her/his client/s.
- v) To strenuously avoid situations in which a conflict of interest might arise between legal practitioners and that of their client/s.
- vi) To ensure full disclosure of potential conflicts of interest by the legal practitioner to client/s.
- vii) To ensure that clients are able to receive prompt, efficient, diligent and conscientious service by their legal practitioners.
- viii) To ensure that the legal practitioner obtaining a financial interest in the matters in which does not compromise the client/s interest he/she acts for the client/s.
- ix) To avoid a breach of confidence between legal practitioner and client/s.
- x) To ensure a full and proper accountability of fees charged to client/s.

- xi) To ensure that proper financial mechanisms and accounts are held by the legal practitioner to ensure the safety of trust money of their client/s.
- xii) To ensure that the legal practitioner obtains proper insurance against claims of professional negligence.
- xiii) Ensuring mutual respect for our different legal systems and their existing Codes of Conduct.
- xiii) To ensure that the legal practitioner maintains her/his fidelity as an officer of the court of whatever jurisdiction he/she practices in.
- xiv) To enhance the spirit of co-operation and collegiality between legal practitioners who practice across borders.
- xv) There are Chairperson a number of matters besides those listed above which our respective Associations may differ on and which require further debate and discussion such as: -
 - a) The permissibility of advertising of legal services;
 - b) The institution of multi-disciplinary practices;
 - c) Access to rights of audience in various courts of law and tribunals by foreign lawyers.

These are just a few of the issues that we should identify for thorough interrogation and resolution.

Chairperson we must however also be mindful of the difficulties that confront us in dealing with these issues. We need to recognize the historic differences within our legal systems and traditions: some in the region are predominantly of common law extraction while others are of the civil law whereas others claim a fusion of both. We need to recognize the uneven state of economic and social development within the region. My simplistic understanding of economic forces

reveal the huge disparities between states in our region by simply looking at the daily economic indicators and the dollar and sterling exchange rate with that of our own currencies.

We need also to be mindful of the ravages of the legacies of our colonial heritage and the entrenched disparities in wealth and power within certain race groups in the region. We need to be mindful of the difficulties around the issues of land reform and property rights, the exploitation of mineral resources and environmental concerns in many parts of this region and the different responses thereto. There are differences in our land tenure arrangements, our procedural and substantive laws such as banking law, mortgage, income tax, securities, prescription, the protection of property rights and interests both physical and intellectual. The origins and sources of our laws of contract, delict and others may also be different. So to are their differences in our Court structures, and in their Rules and Procedures. There are cultural and language differences and precepts of customary legal institutions may also differ. There is different agricultural and trade incentives together with attractions of investment and regulatory measures that either restrict or enable the flow of finance together with different tax regimes.

These differences and variances within our Region, Chairperson should not deter nor stifle our desire to seek greater co-operation at creating a legal environment for the practice of law across borders within the Region. If anything these variances are the very challenges that forces us to find common ground and synergy between our legal systems. Harmonization nor mobility of practice cannot and would no simplyt be achieved by the waving of magical wands or by our mere desperate desires. We are required to actively engage the process of creating the environment of co-operation, which is often regarded as being snail paced and frustrating by the front-runners in economic development and their clientele. However we must ensure that the process that we institute is both inclusive and thorough and that we take with us as many as possible of the role

players and institutions in the region and so ensure the integrity of the outcome. We must build firm foundations on agreed principles and the core values on which our co-operation will thrive and grow.

Chairperson as we look beyond the Mediterranean and explore the lessons and experiences of those countries that over many many years of deliberation and debate forged the European community (which often appeared to be so fraught and at times deadlocked) there is important lessons for us. There is much that we can learn from elsewhere in the wider legal community. Dedicated research, study and constant interaction not only within the sub-region but also across the globe will properly inform the product of our endeavors. We seek not to re-invent the wheel but to ensure that we put the best tyres on it!

So to must we engage our regional bodies such as the SADC for their support and cooperation?

Chairperson, in all of this we recognizes the fundamental need of building and strengthening our legal system and an independent judiciary. Our structures delivering and administrating justice on a daily basis must be resourced with the best of our legal minds and must be adequately capacitated by the state. Justice in our regions must be both efficient and effective and more importantly credible. Our courts and all its structures must function. We must ensure that our judges and our magistrates are properly trained and motivated to carry out their daily tasks. Our civil courts must not be in want of efficiency and speed. Our constitutional and common law and body of judicial precedent must be enhanced and be in competition with the best in the world. Alternative dispute resolution as a growing part of our legal system must never become a substitute for our formal courts but must be complimentary thereto. Our clients must never resort to forum shopping merely because they are not able to find efficient and effective justice in our legal systems. We must however create credible options to all litigants within our legal systems.

More importantly Chairperson we must each contribute to building a vibrant and a strong legal jurisprudence in our region.

In building on the common ground that we find in our commitment to the values and rights under the African Charter of Human & Peoples Rights we have already created the platform for building co-operation in the other areas of law.

Chairperson, lest we be overwhelmed by the influx of foreign legal firms from the North and to the West of us who have set up shop in our towns and cities and compete with us for state and commercial work we must urgently take up the challenges of creating an appropriate legal environment and infrastructure for fair and even competition. We must invest in capacitating our firms with the appropriate information technology and with ready access to international laws and statutes. We must institute together with our universities appropriate training and continuing legal education programmes on comparative regional and international law. We must recognize that in order to compete within the regional markets and internationally we must appropriately equip and capacitate our members through training and assistance in meeting the exciting challenges of cross border legal practice.

Chairperson, we are embarking on a long and what will often be a very difficult journey in creating the legal environment for co-operation and cross border practice. We must charge our President and his Council to forthwith and without delay place high on the agenda of the Association the of settling of the principles for the proposed Code of Conduct and to institute a process within the Region of consultation on these matters. Chairperson, the Association has recently received a generous grant for its operations from the Swedish government. This will enable us to establish our headquarters in Botswana where a permanent secretariat is to be appointed. This infrastructure will no doubt enable us with greater urgency to attend to these matters.

All of the challenges that have been raised are premised on the unconditional support of each of the Law Societies in the Region and more importantly on the

commitment of every legal practitioner to embrace the difficult road ahead. It is in our practices and in the interest of our clients that we must move speedily on these matters.

Concluding Comments:

Chairperson, mindful of the difficulties and the complex challenges facing all of us in this Region, we are confident that both individually and collectively as the legal profession we will not shirk from the responsibilities of building an environment of co-operation and mutual respect and tolerance within our various countries and in particular in that of our legal systems. The reality of the technological (and digital) age of development not only within this Region but continentally and globally requires of us to create such an enabling environment. Building and defending the Rule of Law was never going to be an easy process. How often have we seen liberty and justice sacrificed at the alters of political and economic expediency. Nonetheless and despite these difficulties we are confident that we will put into place the appropriate processes and mechanisms to facilitate the much-needed social and economic development in the region and the pre-eminence of the Rule of Law. Nothing less will ensure the continued survival of the profession.

These are indeed exciting yet difficult times...fraught with the ongoing challenges of war, terror, poverty and intolerance.

How exciting are these challenges Chairperson that we so enthusiastically must embrace.

I thank you.

VINCENT SALDANHA

Secretary: SADC Lawyers Association

