SADC Lawyers' Association 2012 conference and AGM

Report compiled by Kim Hawkey

Outgoing SADC Lawyers' Association President Thoba Poyo-Dlwati at the association's 2012 conference and AGM.

President of the Swaziland Law Society, Titus Mlangeni, welcomed delegates to the conference.

'Safeguarding judicial independence in an era of judicial reviews in the SADC region' was the topic of the 13th Southern African Development Community Lawyers' Association (SADC LA) conference and annual general meeting, which took place in Ezulwini, Swaziland in late August.

The conference, which was attended by law society and Bar leaders, lawyers, judges, government officials and civil society representatives, took place one week after the 32nd SADC Summit of Heads of State and Government extended the suspension of the SADC Tribunal and proposed that it become an interstate court with its jurisdiction limited to interpreting the SADC Treaty and protocols.

Speakers at the conference included chairperson of the United Nations Committee on Economic, Social and Cultural Rights, Justice Ariranga Pillay, who is the former President of the SADC Tribunal and former Chief Justice of Mauritius; the speaker of assembly in Swaziland, Prince Guduza, who delivered a speech on behalf of King Mswati III; the Swazi Minister of Justice and Constitutional Affairs, Mgwagwa Gamedze; and advocate Pansy Tlakula, the Special Rapporteur on Freedom of Expression in Africa at the African Commission on Human and Peoples' Rights and chairperson of the South African Independent Electoral Commission.

Topics ranged from decriminalising freedom of expression to women's rights and gender equality.

The association also used the event to reaffirm that 'an independent, efficient and effective judiciary is the bedrock of just, peaceful, democratic and functional societies'. However, it noted that judicial independence in the SADC region had 'suffered serious blows over the past few years' at both regional and national levels. It also noted that while there had been some improvement in the observance of human rights and the rule of law in some countries, in others there had been either regression or no notable improvement in this regard.

Welcome from Swaziland

In a welcome speech, President of the Law Society of Swaziland, Titus Mlangeni, spoke about the need for leadership in the SADC region to adapt to changing circumstances.

He said that it was necessary to register concerns about slow progress and added that Swaziland should not be moving backwards, but should be moving forwards. He called on the Judicial Service Commission in that country to appoint judges transparently. He said that in the past few months four judges had been appointed, yet none of these vacancies had been advertised. In a call intended for the country's Chief Justice, he said: 'This, Mr Chief Justice, denies professionals what they have achieved and may adversely affect their confidence.'

He also spoke about freedom of speech and, in this regard, said: 'It is a constitutional right in this country to articulate one's views and articulate one's plight. To be punished for this is very wrong.'

He added that in difficult times the legal profession is probably the most critical; however, it was necessary to have an enabling environment, which must be provided by the state. He said that the measure of accomplishment of a country economically was its judiciary. 'Foreign investors run from lawlessness – not just crime, but also the ignoring or violating of orders of the courts,' he said.

A word from the king

Prince Guduza delivered King Mswati III's speech, in which the king called on legal practitioners to uphold their professional ethics.

'First and foremost, you need to uphold your professional ethics. As lawyers, our people look up to you to provide them with professional legal advice. We believe your calling is to serve the people diligently and to be honest at all times. To many of our young people, lawyers are their role models. Therefore, as lawyers, you need to live a positive life. Leave a good legacy in your community. Be above reproach at all times,' he said.

He described it as 'heartbreaking' when some lawyers were 'found on the other side of the law or embroiled in unethical behaviour' and said it was important to create a strong regulatory framework to deal with such conduct.

'Our message to all lawyers is that you need to avoid this cancer because it compromises your noble profession,' he said.

Topics in the king's speech also covered, among others, the Swazi constitution and the people's parliament.

SADC LA President condemns decision on tribunal

In her opening remarks, outgoing President of SADC LA, South African attorney Thoba Poyo-Dlwati, condemned the SADC summit's decision regarding the tribunal, which she said would turn the tribunal into a 'sham institution'.

‘You all know our struggles over the past two years as a profession in our efforts to save the SADC Tribunal from the jaws of death. It is sad to report to you that, despite our commitment to working with regional governments through the ministers of justice and attorneys-general on this issue, our leaders seem to have a different thinking altogether as far as the SADC Tribunal is concerned,’ she said.

It was worrying, she added, that the summit gave leaders the mandate to revise the legal documents of the tribunal over the past two years, ‘only to completely disregard their recommendations in favour of the decision of the SADC Council of Ministers’, which was not involved in the review process of the tribunal.

‘Why waste the region’s resources and taxpayers’ money over a process that the SADC Heads of State and Government have no intention of respecting and following? There is no political will, period,’ she said.

Ms Poyo-Dlwati also denounced the proposal to convert the tribunal to one that hears interstate matters only, which was against international practice, where there was a move to involve citizens and ensure their rights were protected. A tribunal of the nature proposed was ‘unheard of in this day and age’, she said, and it would, in effect, create a white elephant:

‘From what we know of our leaders in SADC, it is unlikely that they will take each other to the tribunal, rendering the institution only a court in name and building as no cases will be heard at that court.’

This, she said, was a clear indication that leaders in the SADC region were ‘concerned more with protecting their turf than with the rights of the citizens’.

‘We are finding it increasingly difficult to keep the confidence that we should otherwise have in our leaders,’ she said.

‘As lawyers … we therefore reject the proposed tribunal and wish to state categorically that we will not be part of that sham institution. … We … do not see the proposed SADC Tribunal as a legitimate and effective institution.’

‘This is the clearest case in the region of the undermining of the rule of law and independence of the judiciary, especially if we consider that the suspension of the tribunal in the first place was motivated by Zimbabwe’s refusal to abide by the judgments of the tribunal and respect the independence of the judiciary. … We need, as lawyers, to ask the following questions: What are our leaders hiding? What are they afraid of? Why are they so averse to the idea of citizens taking their grievances to the tribunal?’

Ms Poyo-Dlwati also highlighted some of the positive developments in the region since the association’s 2011 conference and AGM, as well as some remaining

challenges and other 'worrying developments' in the SADC region. She referred to the matter involving Swazi judge Thomas Masuku, which was discussed at SADC LA's 2011 conference and AGM. Judge Masuku was removed from the Bench for allegedly insulting the country's King Mswati III. Ms Poyo-Dlwati asked the King's representatives attending the event to convey her message that SADC LA was not satisfied that due process was followed in the suspension and dismissal of Judge Masuku.

Ms Poyo-Dlwati also called on law societies in the region to ensure that they have adequate measures in place to deal with errant lawyers 'for the sake of maintaining the reputation of the profession and public confidence'. She also called on lawyers to provide *pro bono* and free legal services to the poor and marginalised.

'To my fellow lawyers, … more often than not, we have been responsible for denying justice to the weak and vulnerable in our societies. … We have become obsessed with making money and not ensuring that justice is delivered to all,' she said.

Swazi speaker of assembly, Prince Guduza, delivered a speech on behalf of Swazi King Mswati III.

Ousted Swazi Judge Thomas Masuku at the SADC Lawyers' Association AGM and conference in August 2012.

Resolutions on the SADC Tribunal

• SADC LA will not support the tribunal in the form proposed by the 32nd SADC summit, in which form the tribunal will be an interstate court and its jurisdiction limited to the interpretation of the SADC Treaty and protocols.
• Lawyers however remain committed to working with the SADC summit and regional governments to ensure that the SADC Tribunal is revived in an acceptable form, retains its mandate and is effective and independent.

On independence of the judiciary

• The lawyers noted that judiciaries in the SADC region are being undermined in different ways, including financially, by the unjustifiable suspension and removal of judges and through the limited confines in which judges are expected to exercise their mandate.
• It was noted further that while in most instances threats to independence of the judiciary might come from outside, in certain instances it can come from within the judiciary itself.
• Governments must therefore ensure that the judiciaries in the region are adequately resourced, are independent and are able to carry out their mandate without fear or favour.

On constitution-making in SADC

• The lawyers noted that Zimbabwe, Zambia and Tanzania are currently involved in constitution-making processes, while debates on same are ongoing in Botswana.
• Countries that are involved in constitution-making processes were urged to ensure that the resultant constitutions entrench the principles of human rights, democracy, the rule of law, independence of the judiciary and other norms that encourage the establishment of free and democratic societies and eliminate dictatorships.

On gender equality and women's rights in SADC

• The meeting noted that the commitment of SADC governments on gender issues is still wanting. For instance, no country in the SADC has achieved the 50/50 gender parity called for in the SADC Protocol on Gender and Development.
• It was noted further that gender disparity is evident in SADC LA, where the make-up of the presidencies of the law societies and Bar associations currently shows that there is one woman President out of 15.
• To address these challenges, the meeting urged SADC leaders to implement the SADC Protocol on Gender and Development and SADC LA, law societies and Bar associations to encourage the participation of women lawyers in the affairs of these institutions.
• Further, it was agreed that women lawyers in the region will work towards the establishment of a regional women lawyers' network to support each other professionally.

On independence and effectiveness of the legal profession

• It was noted that SADC LA is alive to the fact that – as an institution representing the legal profession in the SADC region – it has a duty to issue statements, comment on and take action on socio-political issues and developments in the region without fear or favour. To effectively achieve this mandate, the profession must therefore not be timid or passive and must be informed and independent.
• Lawyers must ensure that they retain their integrity in order to maintain public confidence. Law societies must therefore ensure that they have effective mechanisms in place to deal with errant lawyers in the public interest and to maintain the profession's reputation.
• Continuing professional development must not only target lawyers, but must also target staff members that work in law firms and law-based organisations.

On SADC citizens

• SADC citizens must recognise that it is not the responsibility of one citizen to build a nation but it is the responsibility of all citizens. An active citizenry plays an integral role in the development and prosperity of any country.

On illicit financial flows, poverty and implications for human rights

• The lawyers agreed that there is a need to recognise that poverty is a violation of human rights and that tax evasion, corruption and other illicit activities fuel poverty.
• Lawyers gave their commitment to get involved in various ways in the fight against illicit financial flows, including through their role as tax advisers to corporates and other institutions; by embracing economic, social and cultural rights as justiciable; and by advocating for the amendment of laws that have over the years made it possible for big multinational and other corporations to carry out abusive tax evasion without consequences.
• Governments were urged to be accountable and transparent, and to provide good financial governance and access to information on how available resources are spent.
• Further, governments were urged to ensure that they have functional and effective institutions to address and deal with issues of corruption, tax evasion, money laundering and other illicit activities as capacity in this area remains very low in SADC.
• Lawyers agreed that there is a need to examine the operations of extractive industries in SADC to understand how they contribute to poverty through corruption, tax evasion, money laundering and other illicit activities.
• Politicians and other leaders were urged to lead by example through paying their taxes all the time and on time.
• Lawyers highlighted the need to work with other professions in addressing the challenges of illicit financial flows, tax evasion and corruption.

On freedom of expression and access to information

• Lawyers noted that all the countries in the SADC region still have criminal defamation laws on their statutes in one form or another, while all countries except South Africa and Namibia still have insult laws.
• The lawyers noted that in most cases it is the political leaders and other influential people who determine what constitutes insult, leading to the persecution and prosecution of the media, journalists and other citizens.
• It was further noted that there is a close link between entrenched rule, dictatorship, the fight for self-preservation and repression of freedom of expression and access to information.
• There is, therefore, a need to repeal and amend laws that criminalise freedom of expression, using international principles as a basis for advocacy.
• There is a need to encourage debate and research on the relevance of laws that criminalise freedom of expression in this day and age.
• Lawyers will engage in strategic litigation, including taking cases to the African Court on Human and Peoples' Rights to protect freedom of expression and access to information.

On protecting prisoner rights and managing prison conditions in SADC

• The meeting noted that the rights of awaiting trial detainees could not be separated from the right to a fair trial.

• It was further noted that international norms and standards do not provide effective guidance to the purpose and practice of pre-trial detention and vagueness in some of the instruments often provides loopholes that lead to deliberate non-compliance by state parties.
• Therefore, for the same reasons that justify proliferation of international human rights instruments at international, continental and regional level, there is a need to consider having instruments on the protection of prisoner rights that address these rights at the SADC level to reflect our realities and aspirations as a region.

New SADC LA executive committee

• President: Kondwa Sakala-Chibiya from Zambia
• Vice-president: Gilberto Correia from Mozambique
• Treasurer: Max Boqwana from South Africa
• First additional member: Maureen Kondowe from Malawi
• Second additional member: Patrick Mulowayi from the Democratic Republic of Congo

Safeguarding judicial independence in SADC

Former President of the SADC Tribunal, Judge Ariranga Pillay from Mauritius.

Chairperson of the Kenyan Commission on Administrative Justice, Otiende Amollo.

To tie in with the theme of the conference, in its first session, chairperson of the United Nations Committee on Economic, Social and Cultural Rights, Justice Ariranga Pillay, who is the former President of the SADC Tribunal and former Chief Justice of Mauritius, spoke on the suspension of the SADC Tribunal; while chairperson of the Kenyan Commission on Administrative Justice, Otiende Amollo, discussed processes and procedures for an efficient justice system; and Botswana High Court Justice Oagile Dingake provided a perspective on judicial independence in the SADC region. The session was chaired by vice-president of the SADC LA, Beatrice Mtetwa.

Judicial review in SADC: Strengthening judicial independence and access to justice

Judge Pillay spoke about the history of the SADC Tribunal as the judicial arm of the region and highlighted the importance of judicial review as a means of protecting individual rights and ensuring that governments are held accountable. He referred to several cases that had been heard by the tribunal to illustrate illegal government action and to highlight the importance of the role of the tribunal and of collective accountability in the form of checks and balances.

Judge Pillay referred to art 4(c) of the SADC Treaty, which contains principles that have been held to be both justiciable and enforceable. It reads:

‘SADC and its member states shall act in accordance with the following principles:

…
(c) human rights, democracy and the rule of law …'.

He also referred to art 6(1), which contains general undertakings that create legal obligations on states and ministers of justice, among others. It reads:

'Member states undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this treaty.'

Judge Pillay said that one of the ways that the independence of the judiciary can be seriously compromised by the executive is that the latter can dissolve a court of law and not renew the contracts of its judges, as happened in the case of the SADC Tribunal in 2010 when the tribunal was effectively dissolved and the terms of its judges were not renewed. He said that this was despite the fact that the judges, including himself, had a reasonable expectation that their contracts would be renewed.

'Instead we were sent packing overnight with no explanation or hearing. ... It is ironic that persons before the court had the right of redress, yet its judges did not. We asked for arbitration or mediation, but they have refused. So far, we have received no word about this,' he said.

He added that this reminded him of the words of the jurist Alexander Hamilton that the judiciary is the 'weakest and least dangerous department of government'.

In conclusion, Judge Pillay made the following comments and recommendations:

• SADC organs are bound by the principles of human rights, democracy and the rule of law, which are justiciable and enforceable.
• The Council of Ministers and the SADC summit did not act in accordance with the principles of human rights, democracy and the rule of law when it took the decisions in May 2011 and the recent decision regarding the tribunal in August 2012.
• The judicial review powers of the tribunal should remain intact. Judge Pillay said that 80% of cases that came before the tribunal involved individuals. 'What will happen now to those people who are denied the right of access to the courts in their countries? They will be left without any redress,' he said
• There is an inherent tension between the political powers of the state and the judiciary.
• There is an indication that the complaint procedure in relation to the tribunal should be simplified to increase access to justice.
• In the interests of justice, the 'unanimity rule' in terms of art 10(9) of the SADC Treaty, which provides that 'decisions of summit shall be taken by consensus', should not allow a state to be judge and party to a matter. A member state with a direct interest in a matter should not take part in the process, Justice Pillay said, adding that some countries have explained that because of the consensus rule their hands were tied. However, Judge Pillay said that this was not true.

In response to a question from a delegate as to whether the decision in respect of the tribunal was the result of 'a problem with the way its judges were functioning or whether it was an act of lawlessness', Judge Pillay said: 'I can assure you that there is nothing against the judges; we would know if there had been. We do not know the exact reason why this was recommended. … Some countries do not accept that decisions of their highest courts are being quashed by the tribunal. But this is the essence of a regional tribunal. They did not act in accordance with the rule of law and human rights and they were bound to observe those principles, which are justiciable and enforceable,' he said.

Strengthening the efficiency of the justice delivery system through judicial reforms: The case of Kenya

Commissioner Amollo spoke about how the Kenyan judiciary had regained public confidence after experiencing a period of serious institutional challenges that hampered its ability to perform effectively.

Commissioner Amollo said that following the post-election violence that took place in the country in 2007, there was a general acceptance that a new constitution and judicial reform were necessary.

This led to the establishment of a committee of experts (COE) to identify and resolve outstanding issues before preparing a draft constitution and to ensure that the new constitution would reclaim confidence in the judiciary, which had by this point gained much distrust from the country's citizenry.

Commissioner Amollo said that submissions to the commission on the judiciary were 'virtually unanimous on one point: The judiciary had to be reformed'. In terms of the submissions, there were two broad proposals on how this should be done, namely –

• the entire judiciary should be reappointed (with all judicial officers, or at least all judges, being treated as having lost their jobs but being permitted to reapply); and
• judicial officers remaining in office, but being required to take a new oath and undergo a vetting process.

Commissioner Amollo said that the 'gentler' approach, namely the second one, was adopted and a process of vetting began and is still under way.

In terms of the vetting process, he said that all judges were afforded the opportunity to resign (with appropriate benefits) and those who did not do so would be vetted by an independent commission to ensure 'that any complaints against sitting judges were properly considered'.

This entailed judges continuing in office while a phased vetting process was under way, which was acknowledged as being less disruptive than filling all judicial positions anew, Commissioner Amollo said. He added that some 'interesting results' had been produced by the vetting process and to date a number of judges had been removed from office as a result. These included:

• Four judges in the Court of Appeal for reasons such as failing to summon the ex-President to testify in a judicial commission of inquiry on the loss of state funds; acting corruptly in a land transaction; delivering pro-government judgments; and for being insensitive to litigants.
• Three superior court judges for reasons including delays of up to four years to deliver judgments; a misuse of judicial power to issue blanket orders to insurance companies to the detriment of claimants; and a lack of court management skills.

Commissioner Amollo highlighted some of the benefits of a reformed judiciary, including the manner of appointment of judges through, for example, public interviews and the re-establishment of the Judicial Service Commission (JSC). The effect, he said, was 'immense public confidence in the judiciary', which had 'almost totally been reclaimed'.

He added that there had subsequently been 'bold decisions that could not be imagined previously'. These included a decision by the High Court to declare the initial appointment of the Chief Justice unconstitutional after the President failed to follow the correct procedure. 'The President thereafter withdrew the nominations and remitted to the JSC the task of competitively selecting a Chief Justice. This enhanced public confidence in the judiciary to high levels,' Commissioner Amollo said. In another matter, the President's appointment of county commissioners was also declared unconstitutional by the High Court for breaching gender and consultation requirements. Another example cited by Commissioner Amollo was the issuing by the High Court of an arrest warrant against the Sudanese President for war crimes under the International Criminal Court system.

One final example, which Mr Amollo said had raised 'the integrity bar of public conduct within judicial service' to a new level was the manner in which the 'saga' surrounding Deputy Chief Justice Nancy Baraza was being dealt with.

During a shopping trip, Judge Baraza allegedly bypassed a security guard conducting security checks, who insisted on conducting a body search on the judge.

'An altercation erupted resulting in the [judge] confronting and threatening to shoot the guard with a gun. She further pinched her nose,' Commissioner Amollo said.

This resulted in a media report of the incident, which was met with a public outcry. As a result, the JSC called for an emergency session in which it ordered an investigation into the matter. A tribunal was subsequently established to undertake this. The tribunal found that the Deputy Chief Justice was unfit to hold office on account of gross misconduct and an appeal is currently lying with the Supreme Court, Commissioner Amollo said, adding that such a matter 'would not have seen the light of day' in the past.

In conclusion, Commissioner Amollo highlighted some lessons that could be taken from the Kenyan experience, including:

• Judicial reform will always be resisted – by the judiciary and those with other interests.
• To have an effective judiciary, there must be independence in terms of its members. However, functional independence and institutional independence were also necessary.
• While it is very difficult to cause judicial transformation, if successful it will galvanise transformation in all other sectors.
• Care must be taken to ensure that transformation of the judiciary does not amount to judicial lynching.

Judicial independence in the southern African region: The case of Botswana

Botswana High Court Justice Oagile Dingake.

Justice Dingake said that there were three reasons why the judiciary should be independent, namely –

• to guard against the abuse of executive power;
• to uphold human rights; and
• to assure the public that judges are impartial and fair.

Judge Dingake said that the idea of independence of the judiciary was not a complicated one – it meant deciding matters free from improper influence, 'from any force whatsoever', and deciding issues independently.

'Lawyers and judges must only owe their loyalty within the four corners of the constitution,' he said and made it clear that judges 'do not have bosses'.

Judge Dingake noted that there were a number of threats to the independence of the judiciary, including by judges themselves.

'One of greatest threats to the judiciary may be the judges themselves. When judges become a threat to the judiciary because they choose not to speak, they are complicit in destroying the independence of the judiciary,' he said, noting that judges possessed an asset 'in abundance' in the form of fearlessness or courage, which they should use.

He said that the following, in his view, were necessary for an independent judiciary to function optimally:

• Lawyers must not be timid or passive, but must be informed and independent.
• The Bench should not be complicit in activities that undermine the judiciary.
• Jurisprudence should not be anchored too much in legal positivism, for example with a focus on technicalities.
• The judiciary must not be cash starved.
• There must not be a concentration of power in one arm of the state.
• Judges must remain truly independent.

In conclusion, Judge Dingake said: 'Judicial independence, to achieve its great purpose, goes beyond the common assertion that we must safeguard the independence of judges; it also requires judges to judge independently, fearlessly and with complete fidelity to the constitution.'
Decriminalising freedom of expression in SADC

Advocate Pansy Tlakula, the Special Rapporteur on Freedom of Expression in Africa at the African Commission on Human and Peoples' Rights, at the 2012 SADC Lawyers' Association AGM and conference.

Editor of the Zimbabwe Standard Nevanji Madanhire.

In a session chaired by the vice-president of the Law Society of Lesotho and SADC LA councillor, Nkoya Thabane, advocate Pansy Tlakula, the Special Rapporteur on Freedom of Expression in Africa at the African Commission on Human and Peoples' Rights, spoke about a project to decriminalise freedom of expression in Africa. In addition, editor of the *Zimbabwe Standard*, Nevanji Madanhire, spoke about media laws in Zimbabwe and their effect on freedom of expression; and South African legal consultant and media freedom activist Simon Delaney discussed insult laws in southern Africa.

Using the African human rights system to advocate decriminalisation of freedom of expression in SADC

Ms Tlakula said that the court case in respect of the controversial 'spear painting', which depicted South African President Jacob Zuma with his genitals exposed, would have been an ideal test case to challenge laws curtailing freedom of expression on the African continent, had it not 'faded out'.

Ms Tlakula said this in relation to a project that advocates decriminalisation of defamation and other laws that she started as the Special Rapporteur on Freedom of Expression in Africa at the African Commission on Human and Peoples' Rights. In essence, she said that the project campaigns for the repeal or relaxation of laws that criminalise expression that exist in many African countries and which can result in severe penalties, including fines and imprisonment, as well as criminal records, which can prevent those convicted from working as journalists or taking public office and have the potential to bankrupt people.

Ms Tlakula said that the starting point for the project, which would involve a number of strategic partners, was research and that working groups were currently being rolled out in various regions.

The research would assist in identifying countries with laws that 'have a chilling effect on freedom' and where advocacy for the repeal of these laws had the potential for success. These would include countries where there had been a recent change in leadership that could be taken advantage of.

She said that it would be necessary to look at the relevant normative framework and use instruments such as the African Charter on Human and Peoples' Rights (the charter).

Ms Tlakula said that this would tie in with another leg of the project, namely strategic litigation.

She said that the African Commission on Human and Peoples' Rights had already decided on a number of cases involving freedom of expression, however none of these related to insult laws or defamation.

'The challenge for us is to identify an appropriate test case to lodge with the commission or the African Court on Human and Peoples' Rights,' she said.

Ms Tlakula said that such a case could be instituted directly in a country that had adopted the protocol and which permits citizens access to the court. However, she noted that very few countries had done so. Ms Tlakula suggested that a strategic option may be to institute action in one of the countries that had adopted the protocol and, after exhausting domestic remedies, to take the matter to the African Court on Human and Peoples' Rights for a decision.

Ms Tlakula said that the case involving the 'spear painting' would have been a good test case, adding that the limitation on free speech should be hate speech and not culture and tradition.

In response to this statement, President of the Black Lawyers Association, Busani Mabunda, who was attending the conference and AGM, asked Ms Tlakula how the right to dignity should be weighed against the right to freedom of expression in light of the fact that President Zuma's human dignity, 'as a natural person, title aside', was offended by the spear painting and questioned why it would be dangerous to invoke culture in a situation such as this one, where the painting had caused anger by being 'extremely offensive to culture'.

Ms Tlakula said that while she did not condone the spear painting, which she noted was ‘disrespectful to the President and possibly even racist’, if it was located within the discourse of freedom of expression, this was ‘a different story’. She said that she had raised the ‘spear issue’, not in relation to the national laws of South Africa, but because she was ‘intrigued’ when she had looked at arts 27 to 29 of the charter in respect of duties and whether those articles could be invoked to limit any right in the charter. She said that she did not believe they could be so invoked. In this respect, she said: ‘If you introduce notions or standards outside international human rights discourse, then you embark on a dangerous path.’ Further, she said:

‘Speech can be offensive; it can violate human dignity; but, in my view, I do not think such speech should be limited on this basis only. It would be extremely dangerous to do so. African values are used to curtail freedom of speech. I do not think we should go there. That is a very dangerous path.’

South African legal consultant and media freedom activist Simon Delaney.

Effect of media laws on freedom of expression: The Zimbabwean experience

Mr Madanhire spoke about freedom of expression in the context of Zimbabwe’s historical development, as well as some of his personal experiences of being arrested for articles he had published.

Mr Madanhire said that the media and the judiciary were ‘two peas in a pod’, both equally important, and that one could not exist without the other. He added that persecution of the judiciary was similar to that experienced by journalists in Zimbabwe.

Mr Madanhire said that after independence in 1980 there was a sense of euphoria in Zimbabwe, which resulted in citizens being ‘lulled’ into a false sense of security; however, within two decades the euphoria had faded.

‘In the first 20 years we relaxed and believed the liberators could never go wrong. The new ruling elite was entrenching itself and we forgot the corrupting influence of power. Even the best priest can get corrupted and our liberation movement suffered the same fate and became corrupt,’ he said.

Mr Madanhire said that unlike in other African countries where there was an end to entrenched dictatorships, Zimbabwe had opted to maintain the status quo. ‘The ruling party created a wall of laws that would preserve its hegemony, which were mainly targeted at the media. This is why we are in the situation we are in today, because these laws were created for self-preservation specifically,’ he said.

However, he added that the ‘wind of change became almost inevitable’, starting in 2002 when the ruling party lost an election in respect of a referendum for the constitution. Mr Madanhire described this as a ‘wake-up call’ with severe consequences for the media, as the ruling party ‘knew its hegemony was threatened and the only way to fight it was to close the media space’.

The target was the now defunct *Daily News* newspaper, which was the first non-state owned publication at the time. He said that this paper challenged the leadership and exposed corruption.

A number of laws were passed with the aim of restricting freedom of expression, including by prohibiting the publication of false news, and the Zimbabwe Media Commission was established to enforce this legislation, Mr Madanhire said.

He added that the role of the commission included registering publishing houses and licensing journalists and therefore it had the power to refuse registration and terminate or suspend mass media, which it exercised by shutting down and banning a number of publications.

Mr Madanhire described how he had been on the receiving end of the criminal defamation law, including being incarcerated three times last year.

‘The law is being abused by those in power. In the three times I was arrested, we had exposed corrupt activities of individuals. For them to ensure that their activities do not continue to appear in public, they sue journalists and, while the lawyers are arguing, the story we would have published is put under the carpet. This has become a very convenient law for anyone involved in illegal activity. It has become very dangerous,’ he said, adding: ‘It is used mostly by politicians from a certain sector of the community. … The politics of patronage has been entrenched.’

Mr Madanhire called on lawyers in the SADC region to help eradicate the ‘draconian laws’ in Zimbabwe and to provide input on the new constitution being drafted.

‘I call on Zimbabwean and regional lawyers to have an input in the way the new national law will be crafted. SADC LA can work closely with them and they can have a serious input in the constitution. … I hope that legal minds can ensure that when the constitution goes to referendum it guarantees freedom of the press,’ Mr Madanhire said.

Insult laws: An insult to press freedom in southern Africa

Mr Delaney spoke on insult laws, which currently exist in all African countries save for South Africa and Namibia, despite being ‘completely indefensible’, according to Mr Delaney.

Insult laws include making it a crime to offend the honour and dignity of the country's officials, including the President and its armed forces, as well as the symbols of the state, and carry penalties of a fine or imprisonment, or both. In addition, they can be employed to ban newspapers and close down radio stations.

Mr Delaney said that these laws were problematic as there were no objective standards to determine if someone had been insulted and it was usually up to the leaders themselves to decide if they had been insulted and therefore whether these laws applied. Further, these laws do not discriminate between true and false information and were often designed to prevent the publication of truths, he said.

Mr Delaney added that the origin of these laws in Africa stemmed from the divine right of kings in the form of 'the monarch can do no wrong' in 1881, which 'had been superimposed on colonies in Africa without any updating'. These laws were now often relied on to stifle the publication of information on corruption and abuse of power, and did not serve any beneficial purpose, he said.

'These laws have no place in our society. … Public officials deserve less, not more, protection. They are servants of the public, not masters,' Mr Delaney said.

He said that there were a number of options to do away with these laws, including:

- Litigation, for example by using the friend of the court model.
- Lobbying legislators and generating dialogue.
- Advocacy, seminars, workshops and creating toolkits for the media.

Mr Delaney called on lawyers and law societies to play a part in encouraging debate about insult laws. To lawyers, he said: 'People need your help. We are the precious few who have licence to help as practitioners.'