SOCIAL SECURITY ADJUDICATION IN THE LIGHT OF INTERNATIONAL STANDARDS

THE NEED FOR REFORM IN SOUTHERN AFRICA

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I. INTRODUCTION

A few years ago it was remarked that a single specialised adjudicating institution, let alone specialised courts, dealing with social security claims from all over the system appears to be generally absent in SADC (Southern Africa Development Community) countries.[1] This stands in sharp contrast to labour law institutions in SADC countries – all over the Region these institutions, which might comprise a dedicated labour court and/or a tribunal-like arbitration institution have been created, in particular in recent years.[2] In South Africa, for example, the position is that the present social security adjudication system is fragmented, with each piece of legislation providing for its own distinct appeal procedure.[3] In particular, it has been questioned whether utilising the general court system as the apex institutional framework to finally determine social security disputes is appropriate, given the socio-economic context and indigent profiles of many of the social security claimants and appellants in Southern Africa.[4] For these reasons, already in 2002, the Cabinet-appointed Committee of Inquiry into a Comprehensive System of Social Security for South Africa proposed that a uniform adjudication system be established to deal conclusively with all social security claims.[5]

This contribution therefore reflects on the need for reform of social security adjudication systems in SADC.[6] This it does from a standardised perspective, relying essentially on the international standards framework applicable to this context. These standards emanate partly from social security-specific instruments (in particular certain International Labour Organisation (ILO) Conventions and Recommendations) and partly from other human rights instruments developed in the United Nations (UN), European, Africa Union and SADC contexts, and have been interpreted by expert and/or judicial bodies tasked with supervising compliance with the said standards. In addition, from a domestic law perspective, constitutional provisions may also impact on the reform debate. Therefore, mention will be made of the role and impact of some of these provisions in selected SADC countries. Provisions relating to social security and to access to courts (and tribunals) will be considered in this regard.

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1 SADC has 15 member countries: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

2 MP Olivier, 'Developing an Integrated and Inclusive Framework for Social Protection in SADC: A Rights-Based Perspective' in MP Olivier and ER Kalula (eds), *Social Protection in SADC: Developing an Integrated and Inclusive Framework* (Centre for International and Comparative Labour and Social Security Law (CICLASS) and Institute of Development and Labour Law, 2004) 21, 43.

3 MP Olivier, L Jansen van Rensburg and LG Mpedi, 'Adjudication and Enforcement of Social security; Reviews and Appeals' in MP Olivier et al (eds) *Introduction to Social Security* (LexisNexis Butterworths 2004) 503. The authors state at 525:

> The system which currently provides for complaints and appeals against negative decisions taken by social security providers (mostly public institutions and/or officials) is riddled with problems: there is little consistency, as different bodies or officials are called upon to hear complaints and appeals in respect of different parts of the social security system, undue delays are common and the power of the courts to deal with these matters is unsatisfactory.

4 Ibid at 525-26; MP Olivier, 'Developing an integrated and inclusive framework for social protection in SADC', above n 2, 43-44. See also Part V below.

5 Government of South Africa, *Transforming the Present – Protecting the Future Consolidated Report: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (2002) 124.

6 The focus of the contribution is on the public social security framework, although some comparison with the private social security environment will be made.

The next part of the contribution discusses core elements of reforms which are required, with particular reference to the need to:

- Introduce an institutional and structural separation as regards social security claims and appeals;
- Guarantee access to courts or to independent and impartial tribunals to determine social security appeals; and
- Ensure due process, from the perspective of reasonable timeframes for the lodgement of complaints and appeal; expeditious (rapid) resolution of disputes and simple procedures; a fair hearing and procedural equality; appearance, representation and legal aid; and effective remedies and enforcement.

In the final part of the contribution, some high-level conclusions and recommendations for reform of the current framework are made.

II. CURRENT FRAMEWORK

A. *Constitutional reflections*

Provision made in SADC constitutions relating to access to justice may assist in the reform of SADC social security adjudication frameworks. This flows partly from the emphasis placed in some of the constitutions on and formulation used in relation to the right to access to courts,[7] to a court or an independent and impartial tribunal,[8] to a fair trial or hearing,[9] or to secure protection of law.[10] In addition, it could be argued that the constitutional protection afforded to the right to social security implicitly suggests that this right should be undergirded by an appropriate adjudication regime: without this there will be no meaningful expression of a constitutionally guaranteed right to (access to) social security. In fact, from a more general perspective it has been recognised that this right, embedded in the South African Constitution[11] and some other SADC

7 Art 82 of the Constitution of Mozambique (1990): 'All citizens shall have the right of recourse to the courts against any act which violates their rights recognized by the Constitution and the law.' Arts 107A & 107B of the Constitution of the United Republic of Tanzania (1977) stipulate that the courts shall be impartial and independent and shall 'dispense justice without being tied up with technicalities [sic] provisions which may obstruct dispensation of justice' (art 107A(2)(e)). See also art 29(1) of the Constitution of the Republic of Angola (2010).

8 Art 34 of the Constitution of the Republic of South Africa 108 of 1996: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' See also sect 41(2) of the Constitution of the Republic of Malawi (1994).

9 Art 12(1)(a) of the Namibian Constitution (1990): 'In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.'; sect 12(8) of the Constitution of the Kingdom of Lesotho (1993): 'Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority … the case shall be given a fair hearing within reasonable time.' For the same or similar formulation, see sect 21(10) of the Constitution of the Kingdom of Swaziland (2005) and art 19(1) of the Constitution of the Republic of Seychelles (1993), and art 29(4) & (5), as well as art 72 of the Angolan Constitution.

10 Art 18(9) of the Constitution of Zimbabwe (1980) (as amended): 'Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.' Similarly, sect 10(8) of the Constitution of Mauritius (1968): 'Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.' For similar provisions, see sect 10(9) of the Constitution of Botswana (1966) and art 18(9) of the Constitution of the Republic of Zambia (1991).

11 Constitution of the Republic of South Africa Act, 108 of 1996, sect 27(1)(c) provides: 'Everyone has the right to have access … to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.'

constitutions,[12] but less explicitly so in the case of most of the SADC constitutions,[13] implies certain procedural guarantees, which could be of relevance for the adjudication debate, too.[14] This protection must also be read in the light of the constitutional requirement, contained in a number of constitutions in SADC,[15] that administrative action must be just. Just administrative action is applicable not only to the decisions, conduct and actions of social security institutions, which are subject to review or appeal, but also to tribunals themselves, as they would generally be regarded as quasi-judicial institutions and not as courts of law.

The constitutional framework in SADC, relating to access to justice and the (right to) social security therefore provides a broad, principled basis for the application of social security adjudication principles, despite the terse provisions to this effect. This is strengthened by the provisions in these constitutions which allow international law norms and standards, also in relation to access to justice and social security adjudication, to be applied.[16]

B. *Statutory Framework: A Mixed Picture*

In undertaking an analysis of social security dispute resolution and specifically the adjudication of social security appeals in SADC countries, a chequered picture is revealed:

a) In some countries no statutory provision has been made for social security adjudication in respect of decisions taken by the mainstream social security institution, neither at the internal level (i.e. the level of the institution itself) nor at the level of an independent appeal mechanism;[17]

b) In other countries, however, recent developments have seen, or do foresee, the adoption of framework provisions in social security laws, in essence providing for the establishment of in particular a dedicated social security appeal institution meant to deal conclusively[18] with disputes emanating from the whole of the public social security,[19] and at times (also) the private social security environment;[20]

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12 Art 37 of the Seychelles Constitution similarly provides for the right to social security, while art 77 of the Constitution of Angola grants health and social protection as fundamental rights; related protection to the elderly and disabled is provided for in arts 82 and 83.

13 In some SADC country constitutions the constitutional reference is of a generalised nature, and does not create directly enforceable social security or broader social protection rights. For example, sect 30 the Malawian Constitution (1994) makes provision for a right to development and a corresponding duty on the State to ensure equality of opportunity as far as access to basic resources, education, health services, food, shelter, employment and infrastructure are concerned. Section 13, on the other hand, contains as one of the enumerated principles of national policy the obligation on government to promote the welfare and development of the people of Malawi. These goals may be taken into account by courts when interpreting the Constitution and other laws, or determining the validity of decisions of the executive. The Constitution of Zambia poses yet another example of provisions which extend protection not in the nature of enforceable rights. Under the (non-justiciable) principles of state in sect 112 the state will endeavour to provide social protection-related rights to its citizens subject to the ability of resources. For a similar non-binding reference to social protection/welfare rights, see sect 60(5) of the Swaziland Constitution and art 95 of the Namibian Constitution. In some of the SADC constitutions, a general right to welfare/social security is not provided for; instead, the relevant constitutions would merely protect subsets of such a broader right, such as the right to medical or health care and/or to old age assistance – see among others the Mozambican and Lesotho constitutions. In Tanzania, social rights, including the right to education, to social welfare and to just remuneration, are specifically protected in the Constitution: see sects 11 and 23 of the Tanzanian Constitution.

14 Cf *Sikutshwa v MEC for Social Development, Eastern Cape Province and Others* [2005] ZAECHC 18; 2009 (3) SA 47 (TkH) [81]: 'The Applicant, like so many grant applicants is in dire circumstances. Whether he is entitled to social assistance or not, I cannot say. But he is certainly entitled to be treated with dignity and respect, and he is entitled to be informed of the reasons for the decision not to approve his grant application. He ought to have been given those reasons on request.'

15 See among others sect 33 of both the South African and Swaziland constitutions; sect 43 of the Malawi Constitution.

16 See Part IIIB1 below.

17 E.g., Swaziland and Zambia: neither the Swaziland National Provident Fund Order, 1974 nor the National Social Security Authority Act 12 of 1989 (Zambia) (concerning the National Pension Scheme Authority – NAPSA) explicitly provides for social security dispute resolution. See also International Labour Organization [ILO], *Social security and the rule of law* (General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization) (Report of the Committee of Experts on the Application of Conventions and Recommendations to the International Labour Conference, 100th Session, 2011- Report III (Part 1B)) (2011) [409].

18 Subject, of course, to judicial review of the appeal institution's decisions.

c) Social security laws in certain SADC countries regulate to some extent social security adjudication by external institutions, also at the appeal level, in relation to specific social security schemes,[21] but not all social security schemes or all social security disputes;[22]
d) Labour law dispute resolution institutions are often tasked with social security adjudication – this is the result of the phenomenon that certain social security contingencies, notably sickness, occupational injuries and diseases, and maternity, are due to the absence of comprehensive social security schemes of a public nature, in many SADC countries provided for on the basis of employer liability, and consequently incorporated in the labour law frameworks of these countries;[23] and
e) To the extent that a dedicated appeal institution is not indicated, social security disputes are determined by the civil courts in the respective countries, usually on the basis of judicial review – however, for reasons discussed below,[24] this is in the absence of prior consideration by a dedicated appeal institution problematic, especially in the SADC context.

C. *Regional Context*

While some provision is made in SADC instruments concerning the adjudication of social security disputes at national level, the basis for intervention at a regional level is weak and, if political responses to jurisprudential activity thus far would serve as a yardstick, essentially ineffective. Only one SADC instrument, albeit of a non-binding nature, namely the Code on Social Security in the SADC (2007), makes explicit provision for social security adjudication, but then only at national level.[25] At regional level, the Code foresees the establishment of an Independent Committee of Experts to monitor compliance with the Code.[26] The other major instrument, in the absence of a binding Protocol,[27] relating to social security rights, namely the Charter of Fundamental Social Rights in SADC (2003),[28] is effectively a promotional instrument and does not, as such, regulate adjudication as a dispute-resolving mechanism. The foundational SADC instrument, the Treaty itself,[29] containing at best indirect references to social security,[30]

19 Notably Tanzania and South Africa. The Social Security (Regulatory Authority) Act 8 of 2008 (Tanzania) stipulates that decisions by underlying social security institutions may be reviewed by the Authority; a further appeal against the decision of the Authority lies to the envisaged Social Security Disputes Settlement Tribunal: see sects 43-46. In South Africa, in view of a long-recognised need (see n 5 above, and the accompanying text), the South African government has taken steps to develop a policy that will inform the establishment of a uniform social security adjudication system: see MP Olivier, A Govindjee and M Nyenti, *Policy: Developing a policy framework for the South African social security adjudication system*, prepared for the Department of Social Development, South Africa, December 2011 (on file with the author).

20 The Pension Scheme Regulation Act 28 of 1996 (Zambia) empowers the relevant Minister to make regulations that will provide for the form and manner of appeals in relation to pension schemes other than the mainstream NAPSA scheme: see s 46(2).

21 For example, (i) Zimbabwe: see sects 35-37 of the National Social Security Authority Act 12 of 1989; (ii) Namibia: sect 45 of the Social Security Act 34 of 1994; (iii) Mauritius: sects 34A & 36 of the National Pensions Act 44 of 1976; and (iv) South Africa: sect 18 of the Social Assistance Act (SAA) 13 of 2004; sects 91(3)(a) & (b) and (5) of the Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993.

22 For example, sect 10 of the Social Welfare Assistance Act 10 of 1988 (Zimbabwe) provides for an appeal (in social assistance matters) to the relevant Minister; sect 37 of the Unemployment Insurance Act (UIA) 63 of 2001 (South Africa) indicates a Board-appointed National Appeals Committee as the appeal institution.

23 For example, Lesotho, Malawi and Swaziland. See also sect 77(3) of the Basic Conditions of Employment Act 75 of 1997 (South Africa).

24 Part V.

25 Art 21.1(b) of the code on Social Security in the SADC: see Part IIIB below.

26 Article 21.3 of the Code.

27 The definition of 'Protocol' in article 1 of the Treaty refers to a Protocol as an instrument of implementation of the Treaty, having the same legal force as the Treaty. Currently, there is no Protocol explicitly regulating social security. However, an unpublished version of a draft Protocol on Employment and Labour, which also covers social security standards, is already in existence. See also n 29 below.

28 *Charter of Fundamental Social Rights in SADC* (2003) <http://www.sadc-tribunal.org/docs/CharterFundamentalSocialRights.pdf> .

29 *Consolidated Text of the Treaty of the Southern African Development Community* (1992), as amended, available on <http://www.sadc.int/english/key-documents/declaration-and-treaty-of-sadc/>. The Treaty, as is the case with its antecedent Protocols, is a legally binding document providing an all-encompassing framework, by which countries of the region shall co-ordinate, harmonise and rationalise their policies and strategies for sustainable development in all areas of human endeavour.

potentially has relevance in two respects – the establishment of[31] and powers accorded the SADC Tribunal in both the Treaty[32] and the Tribunal Protocol,[33] and the (limited) reference in the Treaty to the role and relevance of international law.[34]

However, in essentially two areas – namely implementation and enforcement – problems have arisen. As far as implementation is concerned, it is required of SADC Member States to accord the SADC Treaty the force of law in their respective legal systems,[35] and to take all necessary steps to ensure the universal application of the Treaty.[36] However, SADC member states have generally failed to transpose the provisions of the Treaty and the Tribunal Protocol in their own legal systems. In the area of enforcement the SADC Tribunal has, despite progressive jurisprudential interpretation and pronouncements impacting in particular on access to justice,[37] proved to be an ineffective institution. In particular, the failure on the part of SADC to act against Zimbabwe for non-compliance with the Tribunal's decisions has revealed the weakness of SADC's enforcement mechanisms.[38] As noted by Erasmus:

> The Zimbabwe saga and that country's failure to comply with the SADC Tribunal's rulings on its human rights violations have revealed the weakness in this arrangement. The Summit was not prepared to act against Zimbabwe; instead, it decided to appoint a consultant to investigate the jurisdiction and terms of reference of the Tribunal. In the meantime, until the results are known, the functioning of the Tribunal has been suspended and the terms of the Judges (Members) have not been renewed.[39]

SADC legal instruments therefore, in particular via the Code on Social Security, provide an important but limited framework for social security adjudication at the national level, while regional level interventions, though supported by a broad-based Treaty and Protocol framework

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30 Ibid. The objectives of SADC include, according to art 5: the promotion of 'sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration' (art 5(1)(a)), and ensuring that 'poverty eradication is addressed in all SADC activities and programmes' (art 5(1)(j)). 'Human resources development' and 'social welfare' are specifically mentioned as areas on which SADC member states agreed to co-operate with a view to foster regional development and integration, and in respect of which the member states undertook, through appropriate institutions of SADC, to coordinate, rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programmes and projects — art 21, which enjoins Member States to cooperate with each other in the attainment of the organisation's objectives (see in particular art 21(1)).

31 According to art 9(1)(g), the Tribunal is established as one of the institutions of SADC. The establishment of the Tribunal was formally given effect to via the provisions of the Protocol on Tribunal and Rules of Procedure Thereof (2000): see <http://www.sadc.int/english/key-documents/protocols/protocol-on-tribunal-and-the-rules-of-procedure-thereof/>.

32 Art 16(1) of the SADC Treaty stipulates that the Tribunal 'shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it', while art 16(5) provides that the 'decisions of the Tribunal shall be final and binding'.

33 The Protocol, said to form an integral part of the Treaty, notwithstanding the provisions of Article 22 of the Treaty (see art 16(2) of the Treaty), provides as follows (see art 14 of the Tribunal Protocol): 'The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to: (a) the interpretation and application of the Treaty; (b) the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institutions of the Community; (c) all matters specifically provided for in any other agreements that States may conclude among themselves or within the community and which confer jurisdiction on the Tribunal.'

34 See Part IIIA1 in this regard.

35 SADC Treaty, art 6(5).

36 SADC Treaty, art 6(4).

37 See Part IIIB1 below.

38 The Treaty provides for sanctions against members that 'persistently fail, without good reason, to fulfil obligations assumed under this Treaty', or when they 'implement policies which undermine the principles and objectives of SADC' (SADC Treaty, art 33(1)). See Gerhard Erasmus 'Is the SADC Trade Regime a Rules-Based System?' (2011) 1 *SADC Law Journal* 17, 30: 'However, there is no political will to enforce the provisions on sanctions against members who violate their obligations under the Treaty. The Summit consists of the Heads of State or Government, and is SADC's supreme policymaking institution. However, unless provided otherwise in the Treaty, Summit decisions are taken by consensus, giving the member in violation of its obligations a veto over any sanctions. This is a major flaw in the system.'

39 Erasmus, above n 38, 29.

and the jurisprudence of the now-suspended SADC Tribunal, have thus far proved to be largely ineffective.

III. INTERNATIONAL STANDARDS IMPACTING ON SOCIAL SECURITY ADJUDICATION

A. *Domestic And SADC Law Relevance Of International And Regional Standards*

1. *Constitutional, statutory and regional reflections*

Constitutional and statutory context

In the search for an appropriate benchmark for the establishment of an appropriate social security appeal mechanism in Southern African jurisdictions, it is important to take into account international and regional standards. The extent to which these standards can be applied, or considered, depends largely, in the first place, on SADC constitutional provisions in relation to the incorporation and implementation of international law and, secondly, ratification of relevant instruments by the countries concerned.

Constitutions in the region invariably make provision for the role of international law,[40] and generally adopt an international law-friendly approach.[41] These Constitutions also at times foresee that international law plays a significant role as regards the interpretation of the relevant constitutional rights (including rights relating to access to justice and to social security) and the supporting legislative framework.[42] In the South African context, this has been held to include both binding and non-binding public international law.[43] Sometimes, SADC constitutions further provide for relatively uncomplicated mechanisms for the application of international law. The Constitution of Malawi recognises both incorporation and transformation as legitimate methods of deriving domestic effects from the state's international obligations.[44] This is also true for Namibia.[45] However, in other cases, for example South Africa[46] and Zimbabwe[47], statutory incorporation of the relevant international standards is as a rule required, before the international agreement becomes law.

There is a tendency in the region for labour law[48] and social security statutory instruments to include references to international law – in particular in relation to the interpretation of relevant

40 See, among others, sect 211 of the Malawi Constitution; sect 231-233 of the South African Constitution; sect 238(2) of the Swaziland Constitution; art 62(2) of the Constitution of the Republic of Mozambique (1990); art 13(1) & (2) of the Constitution of Angola; art 144 of the Constitution of Namibia; art 111B of the Constitution of Zimbabwe; art 64(4) & 5) of the Constitution of Seychelles.

41 For example, sect 233 of the South African Constitution provides that '… When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.' See further sect 236(1)(d) of the Swaziland Constitution; sects 13(k) and 44(2) of the Malawi Constitution; art 62(2) of the Mozambique Constitution; art 12(1) of the Angolan Constitution; sect 15(3)(b) of the Constitution of Mauritius; arts 95(d) and 96 of the Namibian Constitution; arts 108B(5)(f) & 108B(6) of the Constitution of Zimbabwe; art 48 of the Seychelles Constitution.

42 See sect 11(2) of the Malawi Constitution and art 48 of the Seychelles Constitution; sect 39(1)(b) of the South African Constitution, which stipulates that a court, tribunal or forum must, when interpreting the Bill of Rights, consider international law.

43 *S v Makwanyane* 1995 3 SA 391 (CC) [35]; *Government of RSA v Grootboom* 2000 11 BCLR 1169 (CC) [26]. For examples of reliance on a non-binding ILO Convention, see *Sidumo v Rustenburg Platinum Mines Ltd (Rustenburg Section)* 2008 2 SA 24 (CC) [61] and *Karras t/a Floraline v SA Scooter & Transport Allied Workers Union* 2000 21 *ILJ* 2612 (LAC) [27].

44 In respect of treaties, for example, sect 211(1) of the Constitution of Malawi provides that: 'Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.'

45 Art 144 of the Constitution of Namibia: 'Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.'

46 Sect 231(4) of the South African Constitution.

47 Sect 111B(1)(b) of the Zimbabwean Constitution.

48 It has to be noted that the labour law adjudication frameworks provided for in these statutes would also apply to these very areas of social security. See n 23 above and the accompanying text.

statutory provisions.[49] Especially in those countries where the Constitution and/or the relevant labour and social security law(s) provide for an international law-friendly approach, court judgments would reflect this particular approach. For example, in South Africa the courts have not hesitated to invoke the provisions of international instruments when interpreting fundamental rights, including those rights which have a socio-economic character.[50] This also appears to be the case in Lesotho.[51]

Regional framework

Regional instruments at the SADC level impacting on social security also promote the adoption of international standards, thereby setting a benchmark for member countries to follow. Article 3(1) of The Charter of Fundamental Social Rights in SADC (the Social Charter)[52] sets the human rights-sensitive baseline.[53] Furthermore, in addition to referring in many of its particular provisions to the specific relevant ILO norms, the Charter imposes on Member States to do the following in order to attain the objectives of the Charter:[54]

a) Establish a priority list of ILO Conventions;
b) Take appropriate action to ratify and implement relevant ILO instruments; and
c) Establish regional mechanisms to assist Member States in complying with the ILO reporting system.

Similarly, the Code on Social Security in the SADC[55] often[56] refers to specific ILO standards in particular social security areas and requires specifically of every Member State to maintain 'its social security system at a satisfactory level at least equal to that required for ratification of International Labour Organisation (ILO) Convention Concerning Minimum Standards of Social Security No. 102 of 1952'.[57] As indicated below, Convention 102 contains important core provisions on social security complaints and appeals.

An international law-friendly and human rights-sensitive approach is also apparent from the provisions of the SADC Treaty itself, even though the Treaty does not contain, or incorporate, an enumerated list of fundamental rights. The Preamble of the Treaty[58] states in part that:

> MINDFUL of the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law ...

Furthermore, article 4(c) stipulates that Member States shall act in accordance with the principles of human rights, democracy and the rule of law. The now-suspended SADC Tribunal held that

49 E.g., sect 4(c) of the Lesotho Labour Code; sect 3(c) (see also section 1(c)) of the South African Labour Relations Act (LRA) (66 of 1995); sect 3(d) of the Employment Equity Act (EEA) 55 of 1998 and sect 2(b) of the Basic Conditions of Employment Act (BCEA) 75 of 1997; as well as the preambles of the LRA, BCEA and EEA.

50 See in particular *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC): the court referred extensively to international law instruments, especially the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the General Comments of the Committee on Economic, Social and Cultural Rights (UNCESCR) for purposes of interpreting certain fundamental rights and the manner in which the courts are prepared to enforce socio-economic rights.

51 Cf the Labour Court case of *Labour Commissioner v HWV* LC/144/95.

52 Of 2003. See <http://www.sadc.int>.

53 Art 3.1 'This Charter embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights (UDHR), the African Charter on Human and Peoples' Rights, the Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments'.

54 Art 5.

55 Of 2007.

56 For example, in relation to maternity rights, art 8.1 of the Code stipulates that: 'Member States should ensure that women are not discriminated against or dismissed on grounds of maternity and that they enjoy the protection provided for in the ILO Maternity Protection (Revised) Convention No. 183 of 2000.' See also arts 12.4 and 16.2 of the Code.

57 Art 4.3.

58 The Preamble contains a rather unspecific reference to international law, presumably aimed at characterising the (international) nature of the relationship between the member states themselves – this characterisation also appears from other provisions of the Treaty. The provision reads: 'BEARING IN MIND the principles of international law governing relations between States ...'.

the absence of human rights-specific entitlements and stipulations in the Treaty did not prevent the Tribunal from applying human rights approaches. In fact, so the Tribunal held, the very provisions of article 21(b) of the Tribunal Protocol allowed it to have regard to 'applicable treaties, general principles and rules of public international law'. On the basis of this approach, the Tribunal among others held that the Zimbabwe programme of enforced land acquisition without compensation constituted an infringement of an individual's entitlement to access to justice and to an effective remedy, and is racially discriminatory.[59] In the process of addressing in particular access to justice issues, the Tribunal did not hesitate to invoke and apply provisions of a range of international and regional human rights-based instruments, as well as comparative jurisprudence in relation to human rights.[60] In so doing, the Tribunal comprehensively referred to and relied on a range of international,[61] Africa-continental[62] and -regional instruments, as well as comparable human rights case law and commentary (and scientific contributions)[63] emanating from (continental,[64] regional and national[65]) Africa and other international,[66] regional[67] and national[68] adjudicating institutions, from the international sphere beyond Africa. In short then, the

59 See in particular *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007; *Gondo v Republic of Zimbabwe* SADC T 5/2008; *Tembani v Republic of Zimbabwe* SADC T 7/2008. See also the initial judgment of *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 3-4.

60 The Tribunal embarked upon this route despite the fact that it did not have specific human rights jurisdiction emanating from the SADC Treaty itself. In so doing, it followed the approach adopted by the East African Court of Justice, which operates under a similarly restricted framework: see *Katabazi v Secretary General of the East African Community and the Attorney General of the Republic of Uganda* [2007] EACJ 3 (1 November 2007); see also Tazorora TG Musarurwa, 'Human Rights, SADC and the SADC Tribunal' (2010) 1 *SADC Tribunal Review* 9, 11.

61 In particular -
- UN instruments, such as the UN Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in which They Live, Resolution 40/144 (1985), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (see *The United Republic of Tanzania v Cimexpan (Mauritius) & others* SADC T 1/2009, 7-8); the UN Charter and the UN Universal Declaration of Human Rights (see *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 45-46), the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Racial Discrimination (see *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 45-46, 47-49; *Gondo v Republic of Zimbabwe* SADC T 5/2008, 11; *Tembani v Republic of Zimbabwe* SADC T 7/2008, 5);
- Other international instruments, such as the Vienna Declaration and Programme of Action (*Gondo v Republic of Zimbabwe* SADC T 5/2008; *Tembani v Republic of Zimbabwe* SADC T 7/2008, 5-6);
- European instruments, such as the European Convention on Human Rights (see *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, p 19; *Gondo v Republic of Zimbabwe* SADC T 5/2008, 6); and
- In one case involving the withdrawal of an appointment of a prospective employee of the SADC Secretariat, the Tribunal considered the applicability of ILO Convention 158 of 1982, on Termination of Employment: *Mtingwi v SADC Secretariat* SADC T 1/2007 (the Tribunal held the Convention to be inapplicable to prospective employees).

62 In particular, the African Charter on Human and People's Rights (see *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 20, 30-31, 47; *Gondo v Republic of Zimbabwe* SADC T 5/2008, 7-8).

63 E.g. international law handbooks by South African and American scholars – see *The United Republic of Tanzania v Cimexpan (Mauritius) & others* SADC T 1/2009, 6-8; *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 25, 27.

64 In particular, the African Commission on Human and People's Rights (see *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 31-33; *Gondo v Republic of Zimbabwe* SADC T 5/2008.

65 In particular, judgments handed down by the South African Constitutional Court and other High Court divisions (see *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 34-35; *Gondo v Republic of Zimbabwe* SADC T 5/2008; *Tembani v Republic of Zimbabwe* SADC T 7/2008, 15-16, 18).

66 For example, the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights (see *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 49-51; *Gondo v Republic of Zimbabwe* SADC T 5/2008; *Tembani v Republic of Zimbabwe* SADC T 7/2008, 11-12).

67 E.g., case law emanating from the American Commission (see *The United Republic of Tanzania v Cimexpan (Mauritius) & others* SADC T 1/2009, 8), the Inter-American Court of Human Rights (*Gondo v Republic of Zimbabwe* SADC T 5/2008, 14; *Tembani v Republic of Zimbabwe* SADC T 7/2008, 6-7); the European Court of Human Rights (see *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 28; *Gondo v Republic of Zimbabwe* SADC T 5/2008; *Tembani v Republic of Zimbabwe* SADC T 7/2008, 6), and the Inter-American Court of Human Rights (see *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 29-30).

68 Such as case law emanating from UK-based courts, including judgments from the Privy Council (see *Kethusegile-Juru v The Southern African Development Community Forum* SADCT T 2/2009; *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, pp 36-38; *Tembani v Republic of Zimbabwe* SADC T 7/2008, 19).

human rights-abiding approach adopted by the Tribunal is clearly evident from the following statement appearing in one of the earlier Tribunal decisions:[69]

> This means that SADC as a collectivity and as individual member States are under a legal obligation to respect and protect human rights of SADC citizens. They also have to ensure that there is democracy and the rule of law within the region.

In conclusion, while the two (non-binding) SADC instruments pertaining to social security make ample reference to the relevance of international law/standards, the few general provisions in this regard embedded in the SADC foundational instrument, namely the Treaty, and the even more explicit provisions of the Tribunal Protocol, have had little impact, as is the case with the interpretive jurisprudence of the SADC Tribunal. In fact, at the regional level, this has now led to the suspension of the Tribunal and the review of its jurisdiction and terms of reference. At the national level, the negative political and legal responses to the decisions of the Tribunal have culminated in a refusal to acknowledge Tribunal decisions and to further cooperate with the Tribunal.[70] These responses have not been challenged by the Summit, the highest decision-making organ of SADC[71] and have in fact prompted the decision by the Summit to order the said suspension and review. This state of affairs can at least partly be ascribed to the very legal nature and structure of SADC. While SADC is, unlike the European Union, not a supra-national institution, but has the character of an international organisation,[72] its law-making and -implementation agenda is clearly premised on the sovereignty of the Member States, as is acknowledged in the SADC Treaty.[73] This potentially limits the scope for the adoption *and* implementation/enforcement of adjudication principles, in particular in relation to access to justice in social security dispute resolution, from a regional perspective.

1. *Ratifications*

SADC countries have generally failed to ratify post-World War II social security Conventions of the ILO, in particular those that contain provisions relating to social security adjudication, including Convention 102 of 1952 on Minimum Standards in Social Security.[74] However, there has been a more extensive ratification of other international instruments, which among others provide for access to courts (and/or independent and impartial tribunals), such as the African (Banjul) Charter on Human and Peoples' Rights,[75] the UN International Covenant on Civil and Political Rights (ICCPR),[76] the International Convention on the Elimination of All Forms of

69 See the initial judgment of *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 3-4.

70 See *Fick and others v The Republic of Zimbabwe* SADC T 01/2010, 3-4. In *Gramara (Pvt) Ltd and Another v Government of the Republic of Zimbabwe and others* (HC 33/09) [2010] ZWHHC 1 (26 January 2010) the High Court of Zimbabwe, while acknowledging the binding nature of Tribunal decisions at international level, nevertheless refused to register and enforce a previous decision of the Tribunal on the basis of domestic legal (in particular constitutional) and policy considerations: 'In the result, having regard to the foregoing considerations and the overwhelmingly negative impact of the Tribunal's decision on domestic law and agrarian reform in Zimbabwe, and notwithstanding the international obligations of the Government, I am amply satisfied that the registration and consequent enforcement of that judgment would be fundamentally contrary to the public policy of this country.'

71 The Summit comprises of all SADC Heads of State and/or Government. As the ultimate policy-making institution of SADC, it is responsible for the overall policy direction and control of functions of the Community. See art 10 of the SADC Treaty.

72 See article 3(1) of the SADC Treaty.

73 Article 4(a) of the SADC Treaty embeds the principle of the 'sovereign equality of all Member States'. This is the position despite the fact that SADC, like several other African regional communities, has decided to become a custom union and even a common market. As noted by Erasmus, above n 38, 22: 'The East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) are said to be customs unions already. SADC wanted to become a customs union in 2010, but postponed the decision at the eleventh hour.'

74 This Convention has only been ratified (in part) by the DRC – information obtained from the ILO Website <http://www.ilo.org/ilolex/english/newratframeE.htm>.

75 Adopted in 1981; entered into force 1986. The Charter has been ratified by all 53 AU member states, including all SADC countries: <http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf>.

76 Adopted in 1966; entered into force 1976. The Covenant has been ratified by all SADC countries: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

Racial Discrimination (CERD),[77] UN Convention on the Rights of the Child (CRC) of 1993[78] and the Convention on the Elimination of Discrimination against Women (CEDAW).[79] Although not directly dealing with social security rights, these ratified international instruments are nevertheless of importance as a yardstick to gauge SADC countries' compliance with international standards in relation to adjudication of disputes. However, the UN International Covenant on Economic, Social and Cultural Rights (ICESCR)[80] does explicitly provide for the right of everyone to social security, including social insurance,[81] to family- and maternity-related protection and assistance,[82] and to the enjoyment of the highest attainable standard of physical and mental health.[83] This important instrument has been ratified by 12 SADC member countries.[84]

It is not clear what all the reasons are for the non-ratification of in particular post-World War II social security ILO conventions by SADC Member States. This stands in sharp contrast to the ratification of all eight ILO labour law Conventions[85] that make up the ILO Declaration on Fundamental Principles and Rights at Work of 1998. Whereas only 9[86] of the then 14 SADC countries had done so by early January 2003,[87] all 15 SADC countries have now ratified all eight core Conventions.[88] It may be that domestic systems are not yet in line with the requirements of, for example, Convention 102, despite the measure of in-built flexibility, which is characteristic of the Convention.[89] The implication of the failure of ratifying this Convention and other social security Conventions of the ILO implies that a government is under no formal obligation to meet the minimum standards encapsulated in these instruments. And yet, it has to be noted that the current social security reform drive in countries such as Lesotho, Namibia, South Africa and Swaziland is largely informed by a desire to meet at least the minimum standards set in ILO Convention 102. Furthermore, to some extent the failure to ratify relevant ILO social security Conventions is ameliorated by the much improved ratification record of SADC countries in relation to other applicable international instruments, which also contain standards relevant to the adjudication of social security disputes.

B. *Scope And Content Of Relevant International And Regional Standards: A Brief Conspectus*

There are several ILO Conventions and Recommendations which are helpful in the search for appropriate standards for social security adjudication. Some of the ILO instruments where these standards are reflected include:

- Social Security (Minimum Standards) Convention (No 102 of 1952)
- Employment Injury Benefits Convention (No 121 of 1964)

77 Adopted in 1966; entered into force 1969. The Convention has been ratified by all SADC countries, except Angola: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en>.

78 Adopted in 1989; entered into force 1990. The Convention has been ratified by all SADC countries: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en>.

79 Adopted in 1979; entered into force 1981. The Convention has been ratified by all SADC countries: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en>.

80 Adopted in 1966; entered into force 1976.

81 Art 9 ICESCR.

82 Art 10.

83 Art 12.

84 Botswana and Mozambique have not ratified the ICESCR; South Africa signed the instrument in 1994, and is yet to ratify same: Information obtained from <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en>.

85 I.e. the two Conventions on Forced Labour (Conventions 29 of 1930 and 105 of 1957), on Freedom of Association (87 of 1948 and 98 of 1949), on Discrimination (100 of 1951 and 111 of 1958) and on Child Labour (138 of 1973 and 182 of 1999).

86 I.e. Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Seychelles, South Africa, Swaziland and Tanzania.

87 Information obtained from the ILO Website <http://www.ilo.org> on 6 July 2007.

88 Ibid, on 31 January 2012.

89 For purposes of this contribution, within the context of Convention 102 two such flexibility arrangements need to be mentioned. The first is to be found in art 3(1) of the Convention, which provides for a delay in complying with the full spectrum of the obligations under the Convention, on the basis of perceived difficulty in complying with certain provisions of the Convention. The second flexibility arrangement relates to the allowance made in the Convention for countries to accept obligations in respect of only three of the nine benefit categories provided for in the Convention: see art 2(a)(ii), read with art 2(b) for specific details.

- Invalidity, Old-Age and Survivors' Benefits Convention (No 128 of 1967)
- Medical Care and Sickness Benefits Convention (No 130 of 1969)
- Maritime Labour Convention, 2006
- Employment Promotion and Protection against Unemployment Convention (No 168 of 1988)
- Medical Care Recommendation (No 69 of 1944)
- Income Security Recommendation (No 67 of 1944)

The applicable ILO standards and principles emanating from human rights instruments have recently been reflected on in a report compiled by a supervisory organ of the ILO, namely the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and submitted to the ILO Annual General Conference in Geneva in 2011.[90] This provides a useful summary of the principles discussed in more detail below. The ILO report stresses that these standards and principles constitute important guarantees, emanate from international social security law, and form part of the State's duty to ensure the proper administration of social security institutions and services.[91] It has to be stressed, though, that the explicit adjudication standards contained in the ILO Conventions are essentially minimal and do not, as such, given the specific formulation of the said standards, reflect all the principles which are now accepted as inherently and integrally attached to the adjudication of social security disputes and the broader notion of access to justice. It is therefore of interest to note that, as is reflected in its recent report, the CEACR, while acknowledging that a particular principle may not be embedded in ILO standards,[92] has at times given an extensive interpretation of a particular standard, as far as a particular Convention is concerned.[93] Furthermore, the CEACR has also relied on at least another overarching ILO standard, not specific to the adjudication of social security disputes, to infer rights and obligations in the area of social security adjudication – in particular, the right to have a recourse duly examined. Within the context of the right to a fair trial and with reference to the 'general responsibility of the State to guarantee the proper administration of social security and services',[94] the CEACR concluded,

> ... The right to have a recourse duly examined has been considered by the Committee of Experts as falling under the general responsibility of the State to guarantee the proper administration of social security institutions and services. Any dysfunctions in social security recourse procedures therefore have to be duly addressed by the State in conformity with the principles guaranteed by international social security law....

Also, SADC has adopted social security adjudication standards similar to those contained in ILO and international human rights instruments. Article 21.1(b) of the Code on Social Security in the SADC (2007) stipulates that

> [SADC] Member States should endeavour to establish proper administrative and regulatory frameworks in order to ensure effective and efficient delivery of social security benefits, in particular … *easy access for everyone to independent adjudication institutions that have the power to finally determine social security disputes, inexpensively, expeditiously and with a minimum of legal formalities*. (emphasis added)

Specific standards and norms relating to access to justice and the rule of law, with reference to the adjudication of disputes, were also set by the currently suspended SADC Tribunal. In *Gondo v*

90 ILO *Social security and the rule of law,* above n 17.

91 Ibid, [433, 438].

92 E.g., the length of the period which should be available to the claimant to lodge a complaint: the CEACR is of the opinion that such period should be of a reasonable duration – see ILO *Social security and the rule of law*, above n 17, [418].

93 For example, the right of appeal provision embedded in ILO Convention 102 of 1952 (see art 70 [1]), has been interpreted to imply the resolution of the dispute by a body which is independent of the administrative authority which in the first place took the decision; a review by the decision-taking authority would not satisfy the requirements of an appeal. Furthermore, according to the CEACR, if special appeal procedures are not available, access to the ordinary courts should be ensured: see ILO *Social security and the rule of law*, above n 17, [418].

94 This responsibility is evident from the framework and orientation of ILO Convention 102 of 1952. Also, art 28 of Convention 168 explicitly provides: 'Each Member shall assume general responsibility for the sound administration of the institutions and services entrusted with the application of the Convention.'

Republic of Zimbabwe[95] the Tribunal formulated the general requirements of the rule of law as follows:

> It is settled law that the concept of the rule of law embraces at least four fundamental rights, namely, the right to have an effective remedy, the right to have access to an independent and impartial Court or tribunal, the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation, the right to equality before the law and the right to equal protection of the law.

These and other entitlements, as far as they relate to access to justice, were commented on in detail in several of the Tribunal decisions, and can be summarised:

a) Domestic remedies must be exhausted first;[96] however, this is not required if the very domestic remedy is non-existent of has been removed by the national legislature;[97]
b) A claimant/appellant is entitled to an opportunity to make representations before an independent and impartial body,[98] and is entitled to equality before the law;[99]
c) The available remedies should be effective in law and practice, provide real redress, and include the payment of a judgment debt;[100]
d) Damages should constitute fair compensation,[101] and include both pecuniary loss and moral damages;[102] and
e) In the case of the Tribunal, as an exceptional arrangement, a cost order could be made against an un-cooperative government or another institution;[103] this could be linked to an order of contempt of the Tribunal.[104]

Other international instruments, some of which have been ratified by a range of SADC countries, contain provisions pertinent to the adjudication of appeals.[105] These instruments are therefore important for the discussion on determining social security appeals. From the African (continental) perspective, the African (Banjul) Charter of Human and Peoples' Rights states that every individual has the right to have his cause heard[106] – which includes the right to an appeal to competent national organs; the right to defend oneself, including the right to be defended by counsel of one's choice; and the right to be tried within a reasonable time by an impartial court or tribunal. In addition, the Charter provides for the enactment of protocols, including the Kigali[107] and Grand Bay, Mauritius[108] Declarations, as well as guidelines to supplement Charter rights.[109]

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95 SADC T 5/2008, 4.
96 *The United Republic of Tanzania v Cimexpan (Mauritius) & others* SADC T 1/2009, 5-6. This applies also to proceedings before the Tribunal. Article 15(2) of the Tribunal Protocol stipulates: 'No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.'
97 *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 19-23; *Kethusegile-Juru v The Southern African Development Community Forum* SADCT T 2/2009, 3.
98 *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 26-41; *Kethusegile-Juru v The Southern African Development Community Forum* SADCT T 2/2009, pp 5-6; *Tembani v Republic of Zimbabwe* SADC T 7/2008, 19-20; *Gondo v Republic of Zimbabwe* SADC T 5/2008, 8, 11-14.
99 Ibid, 11-14.
100 Ibid, 7.
101 *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 2/2007, 54-56.
102 *Kethusegile-Juru v The Southern African Development Community Forum* SADCT T 2/2009, 6-7.
103 *Tembani v Republic of Zimbabwe* SADC T 7/2008, pp 22-24; *Gondo v Republic of Zimbabwe* SADC T 5/2008, 8, 16-17; *Kethusegile-Juru v The Southern African Development Community Forum* SADCT T 2/2009, 7-8.
104 *Fick and others v The Republic of Zimbabwe* SADC T 01/2010; *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 3/2000; *Campbell (Pvt) Ltd v Government of Zimbabwe* SADC T 11/2008.
105 See M Nyenti, M Olivier and A Govindjee, 'Reforming the South African social security adjudication system: the role and impact of international and regional standards', Presentation at an International Conference on the 'Interaction between International, Regional and National Labour Law and Social Security: Standards and Methods', Stellenbosch, South Africa, 13-14 October 2011, [3] (on file with the author; see also Powerpoint presentation available online at <http://www.iislp.net.au/index.php/papers/conference2011presentations>).
106 Art 7 – in particular art 7(a), (c) and (d).
107 Declaration of the 1st African Union (AU) Ministerial Conference on Human Rights (8 May 2003) (Kigali, Rwanda).
108 Declaration and Plan of Action of the First OAU Ministerial Conference on Human Rights (12-16 April, 1999) (Grand Bay, Mauritius).

These continental instruments contain stipulations on the need to guarantee independence, accessibility and affordability of African judicial systems[110] and on the right to a fair and public hearing by a legally constituted competent, independent and impartial judicial body in the determination of a person's rights and obligations[111] – with specific reference to a fair and public hearing,[112] independent and impartial tribunals,[113] the right to an effective remedy,[114] and access to legal aid and assistance.[115]

Also at the UN level, several instruments contain a range of relevant measures related to adjudication of (civil) disputes, effectively impacting on social security adjudication as well. In particular, the International Covenant on Civil and Political Rights (ICCPR) enjoins state Parties to ensure that: (i) any person whose rights or freedoms recognised in the Covenant are violated shall have an effective remedy; (ii) any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and (iii) the competent authorities shall enforce such remedies when granted.[116] The Covenant further guarantees equality before courts and tribunals, and stipulates that in the determination of a person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[117]

Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[118] stipulates that state Parties shall assure to everyone within their jurisdiction effective protection and remedies, through competent national tribunals and other State institutions, against any acts of racial discrimination which violate his/her human rights and fundamental freedoms contrary to the Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination. Also, the Convention on the Elimination of Discrimination against Women (CEDAW) requires of state Parties to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.[119] Moreover, it should be noted that while the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not explicitly regulate the adjudication of disputes, the UN Committee on Economic, Social and Cultural Rights (UNESCR) has held that accessible, affordable, timely and effective remedies should be available to aggrieved individuals or groups.[120]

Finally, mention could be made of article 6(1) of the European Convention on Human Rights (ECHR),[121] which provides that 'in the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' The European Court of Human Rights has acknowledged that the right to a fair trial embodied in article 6, is applicable to claims concerning social security benefits.[122]

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109 African Commission on Human and Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* (1999).
110 Kigali Declaration Sect A, Art 5.
111 African Commission on Human and Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* Sect A, Art 1.
112 Ibid, Arts 2 & 3.
113 Ibid, Arts 4 & 5.
114 Ibid, Sect C.
115 Ibid, Sect H.
116 Art 2(3)(a)-(c) ICCPR.
117 Art 14(1).
118 Art 6 CERD.
119 Art 2(c) CEDAW.
120 UNCESCR *General Comment No. 9, The domestic application of the Covenant* (19th Session, 1998), UN doc. E/C.12/1998/24, [9].
121 Adopted in 1950; entered into force 1953.
122 *Feldbrugge* v. *Netherlands* (8562/79) [1986] ECHR 4 (29 May 1986) and *Deumeland* v. *Germany* (1986) 8 EHRR 448 86/3 (29 May 1986).

As will be reflected on in more detail in the rest of this contribution, the above-mentioned ILO, other international and SADC instruments affect several areas of social security adjudication. There areas include:

- Establishment of sequential and complementary reviews and appeals procedures
- Establishment of independent and impartial courts or tribunals
- Provision of reasonable time limits for reviews (complaints) and appeals
- Guarantee of expeditious (rapid) and simple proceedings
- Enforcement of procedural guarantees to ensure a fair hearing
- Guarantee of representation and legal assistance
- Provision of effective (enforceable) remedies

IV. CORE ELEMENTS OF REQUIRED REFORMS[123]

A. *Institutional and Structural Separation: Complaints and Appeals*

A clear distinction has to be drawn between two stages of adjudication of social security disputes. This implies that a complaining applicant or beneficiary should be able to access a higher level independent appeal body, should they still feel aggrieved once the review procedure within the social security institution which decided on the issue in the first place has been exhausted. These 'internal' and 'external' adjudication bodies should be institutionally and structurally separate – they must be different institutions falling in separate structural domains.

According to the CEACR, there should both be a complaint and appeal phase: the complaint against the social security institution which took the original decision should, generally speaking, be lodged with a higher level administrative body within the institution, followed by an appeal against the decision of that body to an administrative, judicial, labour or social security court or tribunal.[124] This implies, according to article 27(1) of Convention 168 of 1988,[125] that a dispute concerning the refusal, withdrawal, suspension, or reduction of the quantum of benefits must be resolved by the body administering the scheme, and that there should thereafter be an appeal to an independent body. This is echoed by the provisions of article 70(1) of ILO Convention 102 of 1952,[126] in relation to the right of appeal in case of refusal of the benefit or complaint as to its quality or quantity, which has led to the following conclusion by the CEACR:[127]

> In accordance with Convention No. 102, the right of appeal should be guaranteed against decisions of a social security administration *either to a court of a general jurisdiction or to a special tribunal*. The concept of appeal further implies the settlement of the dispute by an authority that is *independent of the administration that reviewed the initial complaint*.

123 See also the paper by M Nyenti, M Olivier and A Govindjee, above n 105, [4].

124 ILO *Social security and the rule of law*, above n 17, [434].

125 Employment Promotion and Protection against Unemployment Convention.

126 Social Security (Minimum Standards) Convention. Art 70(1) provides as follows (for a similar provision, see art 34(1) of Convention 128 of 1967 (Invalidity, Old-age and Survivors' Benefits Convention) and art 29(1) of Convention 130 of 1969 (Medical Care and Sickness Benefits Convention)): 'Every claimant shall have a right of appeal in the case of refusal of the benefit or complaint as to its quality or quantity.' Two qualifications are contained in art 70(2) and (3) respectively, relating to two distinct scenarios:

(a) Where the administration of medical care is entrusted to a Government department – according to art 70(2), 'Where in the application of this Convention a Government department responsible to a legislature is entrusted with the administration of medical care, the right of appeal provided for in paragraph 1 of this Article may be replaced by a right to have a complaint concerning the refusal of medical care or the quality of the care received investigated by the appropriate authority.' A similar qualification is contained in art 23(2) of ILO Convention 121 of 1964 (Employment Injury Benefits Convention) and art 29(2) of Convention 130 of 1969 (Medical Care and Sickness Benefits Convention). Interestingly, art 31 of Convention 165 of 1987 (Social Security (Seafarers) Convention (Revised)) stipulates that the investigation of the complaint by the appropriate authority should be *in addition to* the right to appeal in terms of art 30 of that Convention, which provides: 'Every person concerned shall have a right of appeal in case of refusal of the benefit or complaint as to its nature, level, amount or quality.'

(b) Where a special tribunal has been established – according to art 70(3), 'Where a claim is settled by a special tribunal established to deal with social security questions and on which the persons protected are represented, no right of appeal shall be required.' A similar qualification is contained in art 23(3) of ILO Convention 121 of 1964 (Employment Injury Benefits Convention).

127 ILO *Social security and the rule of law*, above n 17, [406]. Emphasis added.

> *Merely guaranteeing the right to seek review* of the decision by the same administrative authority *would not therefore be sufficient to constitute an appeal procedure* under Convention No. 102.

The institutional and structural separation suggested here is evidently also reflected in the other, at times more elaborately worded Africa-based, UN and European instruments reflected on above.[128] This is evident from the emphasis placed in the standards emanating from these instruments on the final determination of disputes by an appropriate independent institution, namely a court or independent and impartial tribunal. This is further echoed by provisions in SADC constitutions relating to access to justice,[129] as well as by the requirement of access to adjudication institutions that have the power to *finally* determine social security disputes, encapsulated in article 21.1(b) of the SADC Code on Social Security.[130]

This required standard is for various reasons important for the reform of SADC social security adjudication systems. Firstly, as noted above,[131] in several cases, a formal internal complaints or review mechanism and/or external appeal body is not provided for by the relevant SADC social security law. This would generally also apply to the many instances where external labour law institutions undertake appeal functions[132] – in most of these cases a dedicated in-house review system, internal to the social security institution, is not provided for. In essence, therefore, the position is that provision for, and an institutional and structural separation between, an internal review and external appeals function in social security matters is simply non-existent in many SADC countries, in relation to most of the social security schemes.

Secondly, as is discussed in more detail below,[133] the current highest level of appeal body available under the existing social security laws often lacks the core characteristic of independence as required by international standards.

Thirdly, with some exceptions,[134] provision is not made in the social security laws for the civil courts to exercise a proper *appeal* function when hearing social security disputes. In other words, an opportunity to fully reconsider the matter heard by the lower-level adjudication institution does not, as a rule, exist. This is the result of the fact that disputes emanating from public social security institutions can be entertained by courts of law (usually a High Court) only on the basis of judicial review.[135]

B. *Access to Courts or to Independent and Impartial Tribunals*

Three core observations need to be made in relation to the nature and status of the institution that has to finally determine a social security appeal. It is evident, from both the general principles contained in international human rights instruments and the specific standards emanating from international social security law, that:

128 See Part IIIB above, and the references quoted.
129 See Part IIA above.
130 See Part IIIB above.
131 Part IIB above (see n 17). To this list could be added non-medical claims entertained by the Compensation Commissioner under the Occupational Diseases in Mines and Works Act (ODMWA) 78 of 1973 (South Africa) and by the Road Accident Fund in terms of the Road Accident Fund Act (RAFA) 56 of 1996 (South Africa).
132 Part IIB above.
133 Part IVB above.
134 See, for example, sect 91(5) of COIDA (South Africa), which regulates the exercise of *appeal* jurisdiction by the High Court in the event of certain disputes.
135 Civil courts invariably exercise judicial review functions in respect of administrative decisions taken by public bodies, such as public social security institutions.

a) Adjudication can be undertaken by either[136] a court or another independent[137] and impartial body, notably tribunals;[138]
b) The appeal institution has to be independent not only of the administrative institution which took the initial decision, but also of improper internal and external influence,[139] including influence by the parties and the executive;[140] and
c) Several matters need to be considered in determining the independence and impartiality of an adjudication institution. These matters include the manner of appointment of the adjudicators, their terms and removal of office, reporting and supervision, legal knowledge and expertise.[141]

While countries with established social security systems generally appear to guarantee the right to appeal to an independent body,[142] the picture in SADC countries is a mixed one. At the SADC regional level, there is some support for the requirement of an appeal to a court or an independent tribunal.[143] Constitutionally speaking, SADC constitutions invariably provide for access (in civil matters) to courts[144] or other (adjudicating) institutions,[145] at times referred to as tribunals,[146] emphasising specifically the independent and impartial nature of these institutions. From a statutory perspective, as mentioned above,[147] limited provision is made in social security laws for

136 ILO instruments often do not indicate the nature and identity of this body. Most of the Conventions merely mention the right to an appeal; art 27(1) of Convention 168 of 1988 indicates that this is an appeal to an independent *body*. Paragraph 112 of Recommendation 69 of 1944 (Medical Care Recommendation) refers to an appeal to an independent *tribunal*, while par 27(8) of the Annex to the ILO Income Security Recommendation 67 of 1944 suggests that appeals '… should preferably be referred to special tribunals …'; in addition, par 27(10) of the Annex to that Recommendation suggests that 'Provision for uniformity of interpretation should be assured by a superior appeal tribunal.' However, the CEACR has interpreted the right to appeal to imply right of appeal 'either to a court of a general jurisdiction or to a special tribunal' – see ILO *Social security and the rule of law*, above n 17, [406].

137 Independence of the appeal institution is rarely mentioned in relevant ILO instruments – see art 27(1) of Convention 168 of 1988, and par 112 of Recommendation 69 of 1944 where such mention is made. However, through its interpretative activity the CEACR has made it clear that the appeal authority should be independent of the decision-making body (ILO *Social security and the rule of law*, above n 17, [406] and should enjoy judicial independence (ILO *Social security and the rule of law*, [433]).

138 See Part IIIB above, and the references quoted, as well as ILO *Social security and the rule of law*, above n 17, [406]. See also art 10 of the Universal Declaration of Human Rights (1948), which states: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'

139 ILO *Social security and the rule of law*, above n 17, [433]. See also art 21.1(b) of the Code on Social Security in SADC (2007).

140 See, with reference to the ECHR, Interights *Right to a fair trial under the European Convention on Human Rights (Article 6)* (Manual for Lawyers), 2009, 28; *Belilos v Switzerland* (10328/83) [1988] ECHR 4 (29 April 1988); and *Langborger v Sweden* (1989) (Case no 11179/84 – (1990) 12 E.H.R.R. 416. In relation to the African (Banjul) Charter on Human and Peoples' Rights, see the African Commission on Human and Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* Sect A, Art 4 states: '... the independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities. In order for independence to be achieved, there shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revision except through judicial review in accordance with the law.' Also, Sect A, Art 5 stipulates '... The Commission requires an adjudication institution to be impartial, with its decision based only on objective evidence, arguments and facts presented before it. Judicial officers shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.'

141 African Commission on Human and Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance* Sect A, Art 4; ILO *Social security and the rule of law*, above n 17, [433].

142 I.e. a body 'independent of that which initially awards and pays benefits' – ILO *Social security and the rule of law*, above n 17, [409].

143 As indicated in Part IIIB above, according to the SADC Tribunal, a claimant/appellant is entitled to an opportunity to make representations before an independent and impartial court or tribunal. Also, art 21.1(b) of the Code on Social Security in the SADC refers to '*independent adjudication institutions*' (own emphasis).

144 The Angolan (art 29(1)), Mozambican (art 82) and Tanzanian (arts 107A & 107B) constitutions only refer to 'courts', with no mention of other adjudicating institutions or tribunals.

145 As regulated in the Botswana (art 10(9)), Lesotho (sect 12(8)), Mauritian (sect 10(8)), Seychelles (art 19(7)), Swaziland (sect 21(10)), Zambian (sect 18(9)), and Zimbabwean (art 18(9)) constitutions.

146 See sect 43(2) of the Malawi; art 12(1)(a) of the Namibian; art 34 of the South African constitution.

147 Part IVA above, read with Part IIB.

the adjudication of social security disputes, in particular by external institutions.[148] While social security appeals may be heard in some instances by specialised courts,[149] adjudication by institutions other than courts, such as tribunals,[150] is regulated in only a few SADC countries. However, as a result of the limited treatment of these matters in the relevant laws, and the paucity of judicial precedent, it is rarely possible to determine whether these institutions are in law and fact independent and impartial.

In the SADC country where the most comprehensive legal treatment of social security adjudication is provided for, South Africa, the legal and factual situation does not reflect the international standards in relation to independence and impartiality. In general, social security adjudication forums in South Africa fail to meet the ideal standard of independence and impartiality, as they can effectively be regarded as internal organs of the social security institutions. In most instances, but with some exceptions, the political or administrative heads of the relevant Departments in charge of the respective social security institutions are responsible for the appointment of members of the adjudication forums. They also determine the length and (other) conditions of employment of members, including remuneration, can discipline the members and terminate their appointment.[151] These institutions also do not have independent funding through direct appropriations from parliament, as they are mostly funded by the relevant Departments as part of the Departments' annual budget allocations. The financial dependence of the adjudication forums is further indicated by the fact that they are not independent accountable institutions in terms of the Public Finance Management Act (PFMA) 1 of 1999. Management, governance, oversight and supervision are also undertaken by the Departmental or institutional heads; and the adjudication forums are in most cases required to report to Departmental or institutional heads.[152]

It is clear that in this particular area comprehensive legal reform is needed in most SADC countries. Much can be gained from the applicable international standards, emanating partly from ILO Conventions, but more particularly from a range of human rights instruments. In addition, SADC constitutions provide a clear benchmark and principled basis for the required reforms.

C. *Due Process*

1. *Reasonable timeframes for the lodgement of complaints and appeals*

The South African Constitutional Court recently (again) indicated that time limits and notice periods are considered necessary in a dispute resolution system as they bring certainty and

148 See also ILO *Social security and the* law, above n 17, [409] in relation to among others Swaziland.

149 For example, sect 37 of the National Social Security Authority Act 12 of 1989 (Zimbabwe) provides for an appeal to the Administrative Court should a person be aggrieved by a decision of the Board of the Authority; according to sect 45(1) of the Social Security Act 34 of 1994 (Namibia) an appeal against a decision of the Commission lies to the Labour Court; see further Part IIB above.

150 See in particular sects 43-46 of the Social Security (Regulatory Authority) Act 8 of 2008 (Tanzania); sect 36 of the National Pension Act 44 of 1976 (Mauritius); sect 18 of the Social Assistance Act 13 of 2004 (South Africa).

151 MP Olivier, A Govindjee and M Nyenti, above n 19, 22; M Nyenti, M Olivier and A Govindjee, above n 105, [4.1]. See, among others, reg 4 of the Regulations relating to the Lodging and Consideration of Applications for Reconsideration of Social Assistance Application by the Agency and Social Assistance Appeals by the Independent Tribunal Government Notice R. 746 of 19 September 2011 (Government Gazette 9591 of the same date) (appointment of Tribunal members by the line function Minister); see also sect 2(1)(b) read with the definition of presiding officer in sect 1 in COIDA; sect 40(2)(b) of ODMWA; and sect 37, read with sects 47-50 of the UIA. In the case of the Compensation Court, the Minister of Labour appoints presiding officers of the Court, subject to relevant laws governing the public service (sect 2(1)(b) read with the definition of presiding officer in sect 1 of COIDA). The Minister also appoints assessors to assist in the hearing of any objection (after consultation with the Compensation Board)(sects 8(1) and (4) and 12(1)(c) of COIDA), as is the case with appointment of one or more medical practitioners as medical assessors (section 8(4) of COIDA), and determines period and conditions of their appointment (section 8(5) of COIDA). The presiding officer could be considered to be an employee of the public service as they are officers and employees employed by the Minister according to the laws governing the public service (sect 2(1)(b) of COIDA). The independence and impartiality of such a presiding officer or assessor may consequently be compromised.

152 MP Olivier, A Govindjee and M Nyenti, above n 19, 22. See reg 6 of the Regulations to COIDA of 2008; sect 41(1) of ODMWA; sect 51 of the UIA; and reg 3(8)(a) of the Regulations to the Road Accident Fund Act of 2008.

stability to social and legal affairs and maintain the quality of adjudication.[153] However, where time limits are applicable, they must afford social security litigants an adequate and fair opportunity to bring a case, taking into account their ability to do so. As the court remarked, the socio-economic conditions in South Africa (the backdrop of poverty and illiteracy in South African society) are important in considering the reasonableness and justifiability of time bar and notice periods. This is because in a society where the workings of the legal system remain largely unfamiliar to many citizens, due care must be taken that rights are adequately protected as far as possible.[154] Time limits must therefore be treated with caution:[155]

> To pass constitutional muster, a time bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time bar is not necessarily decisive.[156]

These principles are echoed by international standards. According to the CEACR, the principle of due process implies the right of every person to a fair and public hearing by an independent and impartial court or tribunal within a reasonable time.[157] The CEACR suggests that although ILO standards do not prescribe the length of the period which should be available to the claimant to lodge a complaint, the Committee considers that such period should be of a reasonable duration.[158] Other international instruments also require a reasonable time period, as indicated above.[159] According to the European Court of Human Rights, the interests of the proper administration of justice justify the imposition of reasonable time-limits and procedural conditions for the bringing of claims.[160]

Some SADC constitutions require the adjudication of civil disputes within a reasonable time, without stipulating the length of the period, and whether condonation should be available.[161] Social security statutes sometimes, but often not, make provision for specific time periods within which appeals must be lodged.[162] Condonation is rarely allowed.[163]

It is suggested that there is scope for reform of time limits applicable to the adjudication of social security disputes involving public social security institutions in Southern African countries. Even within a country such as South Africa, the relevant time periods vary considerably in length.

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153 *Road Accident Fund v Mdeyide* 2011 (1) BCLR 1 (CC) [8]; see also *Brümmer v Minister for Social Development* 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC), [51].

154 *Road Accident Fund v Mdeyide* 2011 (1) BCLR 1 (CC) [70].

155 Where a statute imposes a time limit and/or notice period requirement, an aggrieved person is barred from bringing the case to court after the expiry of the time limit. In South African jurisprudence, time limits and notice requirements on the right of access to court have been described as 'conditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law' (*Benning v Union Government (Minister of Finance)* 1914 AD 180 at 185); 'a very drastic provision' and 'a very serious infringement of the rights of individuals' (*Gibbons v Cape Divisional Council* 1928 CPD 198 at 200). These requirements have the effect of 'hampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts' (*Avex Air (Pty) Ltd v Borough of Vryheid* 1973(1) SA 617(A) at 621F-G and *Administrator, Transvaal, and Others v Traub and Others* 1989(4) SA 731 (A) at 764E).

156 *Brümmer v Minister for Social Development* 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC) [51].

157 ILO *Social security and the rule of law*, above n 17, [432, 434].

158 Ibid [418].

159 Part IIIB above; see in particular art 7 of the African (Banjul) Charter of Human and Peoples' Rights.

160 *MPP Golub v Ukraine* (Application no. 6778/05) (18 October 2005).

161 For example, in the case of the constitutions of Angola (art 29(4)), Botswana (art 10(9)), Lesotho (sect 12(8)), Mauritius (sect 10(8)), Seychelles (art 19(7)), Swaziland (sect 21(10)), Zambia (sect 18(9)) and Zimbabwe (art 18(9)).

162 These periods range between 21 days (Zimbabwe: sect 37(2) of the National Social Security Authority Act 12 of 1989), 30 days (Tanzania: sect 46 of the Social Security (Regulatory Authority) Act 8 of 2008), and 60 days (Namibia: sect 45(1) of the Social Security Act 34 of 1994). As far as the South African social security statutes are concerned, the periods range between 90 days (Social Assistance Act (SAA): sect 18(1A); ODMWA: sect 50(1); UIA: sub-reg. 8(2) of the UIF Regulations; RAFA (medical claims): sub-reg. 3(4)(a) of the 2008 RAFA Regulations) and 180 days (COIDA: sect 91(1)).

163 Condonation may be granted in the case of, more specifically, Namibia (sect 45(2) of the Social Security Act 34 of 1994), and some of the South African social security schemes: SASSA (sect 18(4) SAA); UIF (sub-reg. 8(3) of the UIF Regulations); RAF (sub-Reg. 3(5) of the 2008 RAF Regulations).

It is further doubtful whether, generally speaking, sufficient time is granted when an appeal is lodged, bearing in mind the socio-economic conditions of social security clients (applicants, beneficiaries and dependants) and the geographical inaccessibility of claims procedures contained in several SADC social security laws. Also, some flexibility can be built into the system by empowering the adjudication bodies to consider the granting of condonation for late filing of an appeal, on good cause shown.

2. *Guarantee of expeditious (rapid) resolution of disputes and simple procedures*

International standards, including SADC regional standards,[164] require the expeditious resolution of disputes. As has been noted, this aims to protect the parties against excessive delays in legal proceedings and to highlight the impact of delay on the effectiveness and credibility of justice.[165] This has been echoed by the South African Constitutional Court: the court has held that inordinate delays in litigating damage the interests of justice – 'They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs.'[166]

Litigation procedures should therefore be simple and rapid.[167] As has been indicated by the CEACR,

> Simple and rapid procedures are crucial to ensure that the rights of complaint and appeal are accessible and effective. They are especially important in social security matters as benefits are, in most cases, the only financial support available to beneficiaries. The Committee stresses that decisions by the relevant administrative body that reject or modify benefits, claims or requests should be explained to individual claimants in writing in simple, clear and easy to understand terms. By 'easy to understand' the Committee intends for language and terminology to be used that would be readily understood by an individual of similar background, education and related circumstances.[168]

In particular as far as appeals are concerned, the right to a fair trial,[169] according to the CEACR, guarantees that any decision has to be duly motivated: the reasoning that led to the decision must be explained.[170] In fact, the requirement for simple procedures further requires that the law and regulations relating to social security (social insurance) '... should be drafted in such a way that beneficiaries and contributors can easily understand their rights and duties. In devising procedures to be followed by beneficiaries and contributors, simplicity should be a primary consideration'.[171]

Finally, within the sphere of the UN International Covenant on Economic, Social and Cultural Rights, in a general comment, the UN Committee on Economic, Social and Cultural Rights (UNESCR) noted as follows emphasised the importance of ensuring the availability of appropriate means of redress and accountability for violations of economic, social and cultural rights within national legal systems. States are under a duty to ensure that legal remedies, whether of a judicial or administrative nature, are available to aggrieved individuals or groups. These remedies must be 'accessible, affordable, timely and effective'.[172]

> The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate .... Any such administrative remedies should be accessible, affordable, timely and effective.

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164 Art 21.1(b) of the Code on Social Security in SADC (2007) requires the expeditious determination of social security disputes.

165 Interights, *Manual for Lawyers –Right to a fair trial under the European Convention on Human Rights (Article 6)* (2007), 52.

166 *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) [11].

167 Art 27(1) of ILO Convention 168 of 1988.

168 ILO *Social security and the rule of law*, above n 17*,* [428]; see also [429-431] and [436].

169 Discussed in Part IVC3 below.

170 ILO *Social security and the rule of law*, above n 17, [433].

171 Par 27(3) and (4) of the Annex to the ILO Income Security Recommendation 67 of 1944; ILO *Social security and the rule of law*, above n 17, [429]. See also art 21.1(b) of the Code on Social Security in the SADC for a similar requirement at the regional level.

172 UNCESCR *General Comment No. 9, The domestic application of the Covenant* (19th Session, 1998), UN doc. E/C.12/1998/24, [9]; ILO *Social security and the rule of law*, above n 17, [432].

SADC constitutions rarely express themselves on the period within which civil disputes must be finalised[173] and on simplicity (and flexibility) of the procedures.[174] However, almost without exception, these constitutions provide for a 'fair hearing'.[175] Social security statutes in SADC also provide little evidence of the trend that is discernible in countries with established social security adjudication systems to make the procedures in social security matters simple and rapid.[176] There are only a few examples where time-frames for the resolution of social security disputes have been indicated.[177] Explicit provision for simple and non-formal hearing procedures in relation to social security appeals is seldom made.[178] It is, therefore, clear that simplicity of procedures and the speedy resolution of social security disputes are generally speaking not guaranteed by SADC social security statutes. This may impair social security litigants' rights of access to justice. And yet, it is also evident that the broad-based constitutional provisions requiring a fair hearing, and the provisions of a host of international instruments, as interpreted by the relevant supervisory organs – as well as some best practice evidence in the SADC region – provide ample scope and opportunity to inform legal reform in this area in SADC countries.

3. *A fair hearing and procedural equality*

It is internationally – as well as in terms of regional standards applicable to SADC[179] and jurisprudence emanating from the SADC Tribunal[180] – accepted that social security appeal procedures should observe principles of due process. Considerations of procedural fairness and fair treatment are paramount.[181] In fact, as has been noted by the CEACR,

> [t]he right to a fair trial therefore is a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms, including the right to social security, and enables effective functioning of the administration of justice.[182]

It is, therefore, required that the resolution of disputes must be undertaken in a fair and public manner. As a rule, consequently, this requires a public hearing, unless special circumstances are present, such as where publicity would prejudice the interests of justice**.**[183]

Several associated rights are linked to the obligation to observe principles of due process. This includes in particular the need to ensure procedural equality between the parties to the dispute[184] – since social security applicants and beneficiaries usually have to face a government or administrative body, such as a social security institution. As a result, individual appellants should have 'reasonable opportunities to assert or defend their rights'.[185]

Procedural equality between the parties to proceedings further requires equal access to evidence, such as documents and expert opinions. Care should be taken to ensure that the

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173 However, art 29(4) of the Angolan constitution requires a ruling within a reasonable period of time, while art 29(5) stipulates that judicial proceedings should be swift; see also art 72.

174 Art 107A(2)(e) of the Tanzanian constitution requires of courts to dispense justice without being tied up with technicalities which may obstruct the dispensation of justice.

175 In particular, in the case of the constitutions of Angola (art 29(4)), Botswana (art 10(9)), Lesotho (sect 12(8)), Mauritius (sect 10(8)), Namibia (art 12(1)(a)); Seychelles (art 19(7)), South Africa (sect 34), Swaziland (sect 21(10)), Zambia (sect 18(9)) and Zimbabwe (art 18(9)).

176 See ILO *Social security and the rule of law* above n 17, [431], indicating that Namibia admitted that the appeal procedures in social security matters are neither simple nor rapid.

177 Notably the Independent Tribunal for Social Assistance Appeals (South Africa) (a 90 day time period for the finalisation of the appeal is stipulated – reg 16(2) of the 2011 Regulations, above n 151) and the Social Security Regulatory Authority (Tanzania) (indicating that an appeal lodged with the Authority must be reviewed within 30 days – sect 45 of the Social Security (Regulatory Authority) Act 8 of 2008).

178 Sect 45(1) of COIDA (South Africa) – in relation to claims, and not social security appeals – allows for carrying out an investigation *or* formally hearing a claim.

179 Art 21.1(b) of the Code on Social Security in SADC (2007).

180 See Part IIIB above.

181 See, to this effect, ILO *Social security and the rule of law*, above n 17, [432].

182 Ibid [433].

183 Art 6(1) ECHR; art 14(1) ICCPR; art 10 UDHR.

184 ILO *Social security and the rule of law*, above n 17, [433]; African Commission on Human and Peoples' Rights *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* Sect A, Art 2(a).

185 ILO *Social security and the rule of* law, above n 17, [436].

complainant (i.e. the social security appellant) does not alone bear the burden of proof.[186] Furthermore, parties should have adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence.[187] As indicated by the African Commission on Human and Peoples' Rights, a party should further be entitled to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the relevant body.[188]

Fairness also requires that proceedings should be inexpensive. Social security applicants and/or beneficiaries who appeal against decisions of social security institutions should not be deprived of the right to adjudication due to costs. According to the CEACR, pursuant to articles 70(1) and 71 of ILO Convention 102 of 1952, if a fee is charged, '... the cost of appeal should be kept at the absolute minimum so as to allow for the effective exercise of the right of access to justice, including by persons of small means'.[189]

SADC constitutions do in general terms require a fair hearing[190] and that civil disputes are publically resolved.[191] As far as the latter issue is concerned, the constitutions invariably stipulate that proceedings and the announcement of the decision by the court or other authority should be held in public. However, it is possible to deviate from the requirement of a public hearing (but not the public announcement of the decision, where this is explicitly provided for) in the event of any of a range of circumstances indicated by the respective constitutions, including consent by the parties to the dispute, or where the court or other authority may consider this necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings or in the interests of public morality, the welfare of persons who have not reached majority age, or the protection of privacy.[192]

Some of the above principles are at times adhered to by Southern African social security appeal institutions. Sometimes, for example, it may be stipulated that no fee is charged for the appeal proceedings, or that the social security adjudication institution could grant an equitable costs order.[193] However, in other areas requiring a fair procedure the international standards indicate that reforms are needed. For example, in several instances no provision is made for the appellant to present arguments and evidence and to challenge or respond to opposing arguments or evidence – simply because a personal appearance is not foreseen or allowed,[194] and the matter is decided purely on the basis of documents relied on when the initial decision was made. Also, from a procedural point of view, the various social security statutes do not formally regulate the burden of proof, and therefore largely leave it to the discretion of the adjudicator to deal with the matter.[195]

In conclusion, SADC constitutions, as also confirmed by responses at the regional level, contain broad-based provisions relating to a fair hearing and the public nature thereof. These provisions and responses, strengthened by the applicable international law framework, could be effectively employed to reform and improve the weak statutory basis in many SADC countries, which currently impacts directly on core procedural rights of claimants and appellants. In fact, the absence of procedural guarantees necessarily deprives social security beneficiaries of their entitlement to access to justice.

186 Ibid.
187 *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* Sect A, Art 2(e).
188 Ibid, [2(g)].
189 ILO *Social security and the rule of law*, above n 17, [436].
190 See Part IVC2 above.
191 However, art 29(1) of the Angolan constitution contains a different emphasis, by stipulating that 'The law shall define and ensure adequate protection for the secrecy of legal proceedings.'
192 See the constitutions of Angola (art 29(4)), Botswana (art 10(9)-(11)), Lesotho (sect 12(9)-(10)), Mauritius (art 10(9)-(10)), Namibia (art 12(1)(a)); Seychelles (art 19(7)), South Africa (sect 34), Swaziland (sect 21(11)-(12)), Zambia (sect 18(10)-(11)) and Zimbabwe (art 18(10)-(11)).
193 See in particular sect 46 of the Social Security (Regulatory Authority) Act 8 of 2008 (Tanzania) and sect 91(4) of COIDA (South Africa).
194 See Part IVC4 below.
195 Of course, to the extent that the general rule, relevant in judicial proceedings of a civil nature, does not apply – namely that the plaintiff bears the onus to prove his/her case on a balance of probabilities.

4. *Appearance, representation and legal aid*

The international standard of a fair and public hearing implies that the individual concerned has the right to personal appearance.[196] It has to be noted that a public hearing can only be dispensed with if special circumstances are present.[197] Furthermore, the right to be represented, as discussed below, would not make sense if the affected individual does not have the right to appear personally in the first place**.**

The right to a fair trial also implies a right to representation. According to the CEACR, the right to receive legal aid is an essential means of helping beneficiaries in their efforts to identify and understand their legal rights and obligations:

> The right to receive legal aid is an essential means of helping beneficiaries in their efforts to identify and understand their legal rights and obligations. It is often the case that the provisions of the relevant national legislation are not formulated in simple and readily understandable terms. Such aid is also rendered necessary by the unequal positions of the parties involved, as state institutions and bodies are in a more favourable position. Beneficiaries often feel helpless when faced with complicated provisions, and without proper assistance they may be unable to resolve the issues that arise. Assistance in social security matters enables people to understand their legal obligations and assert their legal rights more effectively.[198]

Consequently, the CEACR suggests that both parties involved in social security adjudication should be guaranteed the right to engage a lawyer or other qualified representative of their choice.[199] Furthermore, where necessary, legal assistance provided by the State should be available: 'the law should guarantee that claimants who cannot afford legal assistance are entitled to be represented by a public defender/counsel for the defence appointed by the competent authority.'[200]

This is echoed by the position (in general terms) adopted by the European Court of Human Rights[201] and the African Commission on Human and Peoples' Rights. The Commission suggests that a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so requires, and without payment by the party to a civil case if he or she does not have sufficient means to pay for it. The interest of justice is determined in civil cases by considering the complexity of the case and the ability of the party to adequately represent himself or herself; the rights that are affected; and the likely impact of the outcome of the case on the wider community.[202]

The right to appear personally and to be represented by legal representatives in civil disputes is specifically protected in most of the SADC constitutions.[203] However, explicit provision for legal aid is rarely made.[204]

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196 See generally ICCPR art 14(1); ECHR art 6(1); Banjul Charter art 7(1)(c) (right to defence).

197 See Part IVC3 above.

198 ILO *Social security and the rule of law*, above n 17, [425]; see also [426].

199 ILO *Social security and the rule of law*, above n 17, [436]; see also [426] and the African Commission on Human and Peoples' Rights *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* Sect A, Art 2(f). See further art 34(2) of ILO Convention 128 of 1967 (Invalidity, Old-Age and Survivors' Benefits Convention); art 27(2) of Convention 168 of 1988; and par 27(8) of the Annexure to Recommendation 67 of 1944.

200 ILO *Social security and the rule of law*, above n 17, [436].

201 The Court has held that a right to a fair and public hearing (art 6(1) ECHR) includes the right to legal aid and legal assistance in certain circumstances. Relevant considerations include the complexity of the procedure or of the case and the seriousness of what is at stake for the applicant: *Airey v Ireland* (1979) 2 EHRR 305, [26]; *P, C and S v United Kingdom* (2002) 35 EHRR 31 [91]; *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, [2005] ECHR 103.

202 *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* Sect H.

203 For example, the constitutions of Angola (art 29(2)), Botswana (art 10(11)), Lesotho (sect 12(10)), Mauritius (sect 10 (10)); Seychelles (art 19(9)), South Africa (sect 34), Swaziland (sect 21(12)(b)), Zambia (sect 18(11)(a)) and Zimbabwe (art 18(11)(a)).

204 See, however, art 29(1) of the Angolan constitution, which stipulates: '… justice shall not be denied to anyone due to a lack of financial means.' It is argued below that right to legal aid and legal assistance is embedded in the right to a fair public hearing in sect 34 of the South African constitution.

In light of international standards, there is evidently a need to reform parts of the social security adjudication framework in SADC countries as far as these issues are concerned. For example, some South African social security statutes provide for both personal appearance and representation and for the parties to a dispute to be represented.[205] However, this is not always the case. Sometimes, as a rule, no personal appearance, let alone representation, is allowed.[206]

Furthermore, contrary to the requirements of international and regional instruments, the statutes do not guarantee a right to free legal assistance for parties to social security disputes. However, it can be argued that a right to legal aid and legal assistance is foreseen in the right to a fair public hearing in section 34 of the South African constitution. South African courts have also confirmed this conclusion. In *Nkuzi Development Association v Government of the Republic of South Africa*,[207] the Land Claims Court held that labour tenants and occupiers have a right to legal representation or legal aid at state expense if substantial injustice would otherwise result, and they cannot reasonably afford the cost thereof from their own resources. This approach makes a compelling case for the provision of free legal assistance to the parties in social security disputes, also in view of their socio-economic status.

Representation and legal aid are areas where solutions are not easily forthcoming. Compliance with international social security law would require major adaptations in SADC countries. Cost implications constitute one consideration; the availability of suitably informed representatives another. A range of flexible and context-sensitive approaches may be required, as will be discussed in the concluding part of this contribution.[208]

5. *Effective remedies and enforcement*

The international standards applicable to due process entail that an appellant has the right to an effective remedy, which should be 'accessible, affordable, timely and effective', and be legally enforceable.[209] The African Commission on Human and Peoples' Rights has concluded that, based on the provisions of the African (Banjul) Charter on Human and Peoples' Rights,[210] Member States are compelled to ensure that any remedy granted is enforced by competent authorities; and that any state body against which a judicial order or other remedy has been granted complies fully with such an order or remedy.[211] The European Court of Human Rights has held that the non-execution of judgments granting social benefits constitutes a violation of a 'fair trial' required by article 6(1) of the ECHR: a government may not cite lack of financial resources as a reason for failure to pay compensation.[212]

The now suspended SADC Tribunal emphasised that available remedies should be effective in law and practice, and provide real redress.[213] Except for some SADC constitutions which in broad terms require effective protection or remedies[214] in civil matters, little concrete provision guaranteeing effectiveness as regards judgments and remedies is made in the constitutions. The same picture emerges from SADC social security statues. Therefore, from a legal point of view, more can be done to improve the effectiveness of remedies available under the different social security laws. For example, the possible remedies that can currently be provided by the public social security institutions in South Africa are limited due to the circumscription of such remedies in the various statutes. This emanates from the restricted powers afforded to these institutions. Sometimes the institution is only given the power to give a particular ruling provided for in the

205 For example, COIDA and ODMWA.
206 As in the case of appeals heard by ITSAA (Independent Tribunal for Social Assistance Appeals) (reg 16(2) of the 2011 Regulations in terms of the Social Assistance Act 13 of 2004, n 151 above) and the National Appeals Committee of the UIF (sect 37 of the UIA).
207 2002 (2) SA 733 (LCC) 737B-D.
208 Part V below.
209 ILO *Social security and the rule of law*, above n 17, [436] (see also [433]); UNCESCR *General Comment No. 9, The domestic application of the Covenant* (19th Session, 1998), UN doc. E/C.12/1998/24, [9].
210 Art 7.
211 *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* Sect C.
212 *Burdov v Russia* (Application no. 59498/00) (7 May 2002).
213 See Part IIIB above.
214 See art 29(5) of the Angolan and sect 41(3) of the Malawian constitutions.

relevant law;[215] at times it can grant another decision it deems appropriate.[216] The limited scope of remedies is often linked to the limitation on the kinds of disputes which a certain social security institution is entitled to deal with.

The same applies, as regards enforceability of the decisions of the existing adjudication mechanisms. Some of the social security statutes stipulate that the decisions of the adjudication forums are binding on the administrative institutions.[217] For example, the Compensation Court is considered to have the status of a magistrate court (with its decisions enforced as such).[218] However, most of the adjudication forums are not afforded the power and mechanisms to enforce their rulings. The implication is that formal court proceedings have to be embarked upon to enforce rulings. In most instances this would be impractical – also because of its unaffordability – and would effectively deny the appellant an appropriate remedy.

The area of remedies and enforcement therefore requires substantial legal reform. SADC statutory frameworks should allow for a sufficient scope of remedies and their enforcement – a legal framework which does not make proper allowance for this will have serious consequences for an individual's access to justice, as emphatically indicated by the SADC Tribunal.[219]

V. CONCLUSIONS AND RECOMMENDATIONS

This contribution has made clear that social security adjudication, especially at the appeal level, is inadequately regulated in SADC and not appropriately aligned with the international normative framework. This appears to be the position despite the presence of a constitutional framework in almost all SADC countries, which includes the right to a fair hearing by courts or other independent and impartial institutions; at times also the right to social security and social security-related rights; and certain procedural guarantees, encapsulated in the requirement that due process should characterise civil dispute resolution, including social security adjudication. International standards confirm and amplify these arrangements, despite the poor ratification of in particular relevant ILO Conventions by SADC member states. These and other international and regional instruments provide important guidelines and a normative framework, supported by an international law-friendly approach appearing from most SADC constitutions. SADC regional instruments and standards provide further support, albeit limited, as is the case with the human rights-oriented approaches adopted by the currently inoperative SADC Tribunal in relation to access to justice.

From an overall perspective, there is need to address structural deficiencies, implement a broad-based normative framework, and ensure political commitment. Streamlined social security adjudication structures are absent in many SADC countries, while fragmentation and the lack of an integrated adjudication institution at the apex level appear to be one of the core problems. Multiplicity of appeals institutions and processes – for example, where both labour law, social security and general court of law institutions deal with different parts of the social security system at the appeal level, as is the case in some SADC countries – is not conducive to a simplified operation of the system, the development of coherent jurisprudence, and a general understanding and appreciation on the part of users of the dispute resolution system.[220] To a large extent this is a direct consequence of the patchwork fashion in which the social security systems have developed and the uncoordinated regulation of the area of social security in SADC. The lack of an integrated legal framework is logically reflected in the disjointed and inconsistent system of adjudication.[221]

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215 For example, sect 50 read with sect 46 of ODMWA; sect 18(2)(b) of SAA; sect 37 of the UIA; sub-reg 3(11) of the 2008 RAF Regulations (Regulations to the Road Accident Fund Act of 2008 regarding the Road Accident Fund Appeal Tribunal) (medical claims).

216 See sects 91(3)(a) and 91(4) of COIDA.

217 For example, SASSA: reg 18(4) of the 2011 Regulations in terms of the SAA (n 151 above); reg 3(13) of the 2008 RAF Regulations.

218 Sects 61(2), 64(5), 87(4)(b) and 91(5)(b) of COIDA.

219 See Part IIIB above.

220 Note the comment of the CEACR in this regard: 'The general principles set out in international social security instruments, which call for recourse procedures to be simple and rapid, militate in favour of the harmonization of the applicable procedural law throughout dispute settlement procedures in social security matters.' (ILO *Social security and the rule of law*, above n 17, [436])

221 Olivier, *Developing an integrated and inclusive framework for social protection in SADC*, above n 2, 43.

Furthermore, despite the constitutional guarantee of access to a court or another independent and impartial authority, little provision has been made in SADC countries for a tribunal-kind of body to undertake the determination of social security appeals. It should be asked whether mere reliance on the court system to finally determine social security appeals is appropriate in the SADC context, considering the specific socio-economic context and the lack of access which most social security users have to courts. It is often argued that normally, the courts have only review and no appeal powers, that the ordinary courts of the country are not specialised enough to deal effectively with social security matters, that access to the courts is limited, particularly as far as the indigent are concerned, that cases are often dealt with on a purely technical and legalistic basis, with little regard to the broader considerations of fairness and that court proceedings tend to be prohibitively expensive.[222]

This does, of course, raise the question of institutional and financial capacity. Setting up streamlined and well-functioning adjudication institutions, systems and processes; enforcing decisions of an apex appeal institution; and communicating with and assisting users of the system across a diverse and sizeable geographical area may prove to be a challenge many SADC countries and legal/social security systems cannot presently meet. Cost implications for the appeal institution, also in relation to legal aid and interpretation services, and for the individual, in relation to representation and travel, may seem insurmountable. And yet, the severity of the impact of non-adherence to internationally accepted minimum standards and guarantees in this area on the livelihoods of mainly indigent beneficiaries, and the resultant denial of justice militate in favour of measured, appropriate and flexible responses. The roll-out of support interventions, such as technical assistance in developing a suitable adjudication system and raising awareness among users of the system, as well as the provision of training may go some way to addressing some of the concerns. Flexibility and simplification may also imply that it might be best, at least initially, to use an existing adjudication body, such as a labour tribunal, to also undertake social security appeals and to incrementally expand the jurisdiction of such a body. Cost considerations might also require flexible approaches as regards legal aid and representation. These approaches may range from financial and institutional support given by governments and/or donor organisations to non-governmental institutions operating in this field and university legal aid clinics specialising in giving advice and assisting in particular indigent applicants, to allowing representation by non-lawyers.

Introducing and implementing social security adjudication standards, norms and principles emanating from international social security law in SADC countries would require a proper understanding of the normative framework – among policy- and law-makers, representative organisations of users of the system, social security institutions and those entrusted with implementing the reforms. Changes to the current legal framework are therefore imperative, but so too do administrators and adjudicators, as well as the judiciary – given its oversight role in the final analysis[223] – need to be properly informed and equipped. Of course, many if not most of the principles embedded in the adjudication of social security disputes are known in the civil dispute resolution context, which should imply some familiarity with similar principles embedded in international norms. As the experience of international supervisory organs, including courts, in relation to the minimal formulation of standards shows, the interpretive activity of adjudicators and judges at the domestic level should fulfil an important role in the context-specific application, understanding and incremental development of these norms. Best practice experience in the SADC region confirms this truth – for example, the extensive interpretation given by the South African Constitutional Court to adjudication principles has achieved considerable progress, particularly in other areas of civil dispute resolution.

It might be that the CEACR suggestion of a best practice guide regarding social security procedures could be an important and authoritative tool to attain the normative objectives set out

222 Ibid.

223 In particular through the exercise of the judiciary's judicial review function.

above.[224] Such a guide could contain and explain the relevance and operation of applicable social security adjudication standards and principles reflected in ILO and international human rights instruments; the interpretation given to these standards and principles by supervisory organs; and best practice examples at the domestic level, in both the developed and developing world.

Perhaps political commitment to the introduction and implementation of relevant international and regional norms and standards might constitute the most difficult hurdle to overcome. As the short-lived existence of the now-suspended SADC Tribunal has indicated, countries in the Region might want to jealously guard their domestic legal systems – even at the expense of introducing and implementing regional and international norms – and refuse to implement decisions taken by a regional adjudication body. Such resistance need to be overcome through persuasion and a commitment to the cause of regional harmonisation of applicable standards – which is indeed emphasised in the SADC foundational document, i.e. the Treaty. Given the nature of SADC as an international organisation, this is a task which is mainly left to be fulfilled by decision-making institutions at the regional level, in particular the Summit. It remains to be seen whether this institution will succeed in providing the leadership and direction which is required to attain this particular objective.

224 The Committee is of the opinion that the development of a '... best practice guide to social security procedures would be a valuable tool for legislators and social security institutions and, if widely disseminated and followed, would no doubt facilitate improved access, expediency and efficiency in the exercise in practice of the social security rights of the persons protected. Clearly, any such improvements in the procedures regulating the provision of benefits the world over would result in tens of thousands of beneficiaries being salvaged from undue hardship. The establishment of such a social security procedural guide would improve the efficiency with which individual rights are exercised in social security matters.' – ILO *Social security and the rule of law*, above n 17, [437].