

Provisions for managing and preserving records created in networked environments in the archival legislative frameworks of selected member states of the Southern African Development Community

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ABSTRACT

In most states in the Southern African Development Community (SADC), the national archives acts were enacted shortly after independence and modelled closely on British archival legislation. These acts were mostly written with paper records in mind, while being silent on records that appear in other media such as microfilm, audiovisual and electronic. This study provides a qualitative content analysis of archival legislation to assess the extent to which provision is made for the management and preservation of records created in networked environments in selected countries (Botswana, Lesotho, Malawi, Namibia, South Africa, Swaziland, Tanzania Zambia, and Zimbabwe) in the SADC region. The key finding suggests that while the archival legislation in South Africa makes provision for the management of electronic records, the pieces of legislation for the other countries are silent on this issue. Furthermore, all the pieces of legislation are silent on whether electronic records can be admissible as evidence in a court of law. The study recommends that the SADC should consider adding a legal instrument in the form of a protocol treaty on archival legislation and designing a model law or statute on electronic records management and preservation to be customised by member states.

KEYWORDS

Archival legislation; electronic records; National Archives Act; records management; SADC

Introduction

Legislation has a tremendous impact on how records, including those that are created and stored in networked environments, are managed in any country. The enactment and implementation of comprehensive, up-to-date archival legislation is a critical prerequisite for the establishment of an effective, integrated system for managing records.¹ Archival legislation provides the essential framework that enables a national records and archives service to operate with authority in its dealings with other organs of state. In many countries, legislation relating to the management of records and archives exists in the form of a national archives act.² However, according to Hamooya, Njobvu and Mulauzi,³ some of these legislations, especially in African countries, have weaknesses. The weaknesses that are found stem largely from the inflexibility of archival legislation in the face of the changing

nature of records in the digital era. This situation is exacerbated by the nature of most of the African legal systems that have been inherited from colonial masters. Even though colonial rule ended decades ago, there has not been a proper review of the legal systems of many countries in the region after obtaining independence.⁴ Another major issue is that most African countries' legislative frameworks are based on at least two of the three major legal frameworks, that is, common law, civil law and African indigenous law. There are countries that also have the influence of Sharia law but such countries are not in the Southern African Development Community (SADC) region. The civil and common law differences are important to highlight in this study because legal instruments play a nuanced role in judicial processes depending on the type of jurisdiction. This can also affect the way archival legislation is modelled to regulate electronic records management and preservation.

As in other parts of the world, the advent of electronic records in the SADC region has presented further challenges to the management and preservation of records.⁵ This has resulted in poor governance and accountability structures within governments. However, with the advent of new technologies, there has been a belief that the introduction of electronic systems would lead to the solution of recordkeeping challenges.⁶ Although electronic recordkeeping has many obvious advantages, studies done in many regions of the world have shown that it also brings its own challenges⁷ and the management of such records needs to be regulated. In Africa, technological development is moving faster than the corresponding legal systems,⁸ whereas in other countries such as Australia and Canada, the gap between the legal system and the digital world is not as wide since there have been studies dedicated to narrowing the gap. Even in Europe, the study of information technology law is often seen by students as complex and technical.⁹ Unfortunately, such studies are not widespread on the African continent.¹⁰ An even more recent phenomenon is the drive towards recordkeeping in the cloud.¹¹ For example, a study by Ngoepe¹² reveals low uptake of cloud storage in South Africa owing to issues such as a lack of guidelines and legislation regarding cloud computing. Thus far, the legal status of cloud storage has not been tested in courts and legal systems in the SADC region. While it may not be widespread in Africa, it is highly likely to increase following global trends elsewhere. Digital systems pose a tremendous challenge in the creation, maintenance and preservation of records. This challenge, especially in Africa, is compounded by the lack of infrastructure, outdated legislation on managing digital records and very few universities offering archives and records management modules.¹³ To enable the proper management and preservation of electronic records, there is a need for archival legislation to embrace records created and stored in networked environments. There is also a need for systems that guarantee legal ownership and custodianship to be put in place. Therefore, up-to-date legislation can provide an enabling environment within which appropriate records and archives systems can be built and these updated pieces of legislation would include the management and preservation of records created in networked environments.¹⁴ This study assesses the extent to which provision is made for the management and preservation of electronic records in archival legislative frameworks in the SADC region. It is hoped that the study will help records management practitioners, policy makers and governments in the SADC region to articulate model policies, procedures and practices for creating, managing, accessing and storing records on the Internet, especially social media and cloud computing. For this to succeed, individual member countries of the SADC need to formulate a firm national foundation which can support a regional approach. Ultimately, if the SADC desires to participate effectively in

the global economy, the region has to undergo regulatory upgrading that is easier to access from a regulatory standpoint.¹⁵

Contextual setting

This section provides background to the enactment of archival legislation in the SADC region. According to Allan,¹⁶ there are two major categories of legislation that generally relate to information, those that ‘control information across all public structures’ and those that ‘relate to specific information held in specific sectors or structures.’ Records and archives legislation may be composed of both primary and secondary legislation. Primary legislation (for example, acts, decrees, ordinances) is enacted by parliament or some other supreme legislative authority and secondary legislation (for example, rules, regulations) is promulgated, usually by a minister, under powers conferred by the primary legislation. Supporting the legislation will be other normative documents, such as national and international standards and procedural guidelines and instructions. According to the International Records Management Trust,¹⁷ there are two ways of approaching the framing of national records and archives legislation:

- Detailed prescription in primary legislation.
- A general framework established by primary legislation to which detail is added by secondary legislation and other normative documents.

Prescriptive primary legislation is most appropriate when poorly developed or decayed records and archives services are to be restructured and a life-cycle approach to their management is to be introduced. By establishing detailed practices and procedures for the management of records and archives throughout their life, legislation can give a clear mandate for implementation. On the other hand, it is difficult to make changes to those practices and procedures in the light of changing external circumstances, because such changes require time-consuming amendments to the primary legislation.

Some records and archives legislation establishes only a general framework (like the National Archives and Records Service of South Africa Act, No. 43 of 1996), leaving the detail to be added in the form of secondary legislation and normative documents. It is elastic in nature and may be subject to wide interpretation. In some cases it can be described as vague. This type of legislation makes revision easy, but may appear to lack the authority of the more prescriptive approach, especially in a country where the records and archives system is not well developed and the value of managing records and archives throughout their life is not widely recognised. In practice, all records and archives legislation will be composed of both primary and secondary texts. It is important to strike the right balance between the two in the light of the particular circumstances of the country. This is also the case with the legislative system in the SADC region. The following section provides background to the SADC.

Background to SADC

The SADC is a product of a treaty agreement of 1992.¹⁸ Before the signing of the SADC Treaty, the organisation was managed by a loose and non-binding legal structure of the Southern African Development Coordination Conference (SADCC).¹⁹ The origins of the SADCC lie in the Frontline States,²⁰ a group of eminent southern African countries that fought for independence from colonial rule. In the 1960s and 1970s, these newly independent

states supported national liberation movements in the region by coordinating their political, diplomatic and military struggles to bring an end to colonial and white minority rule. The idea was to secure international cooperation for collective self-reliance. The SADC needed a treaty that was supported by specific protocols as legally binding instruments. This is how the SADC was formed as an international regional organisation, established in terms of a treaty and declaration referred to as the 'Treaty of Southern African Development Community', which was signed by the heads of state and government of the signatory member states.²¹

In a nutshell, the SADC Treaty provides the legal framework of the organisation by setting out the status (Article 14 *SADC Treaty*), principles and objectives (Chapter 3, Article 4 and 5 *SADC Treaty*), obligations of member states (Article 6), membership (Chapter 4 Articles 37 and 8 *SADC Treaty*), the institutions (Article 9), procedural matters relating to areas of cooperation among member states (Article 21), cooperation with other international organisations (Article 24), financial issues (Chapter 9, Articles 25–27), dispute settlement (Article 32) and, lastly, sanctions, withdrawal and dissolution (Articles 33–35). The SADC Treaty makes provision for the formulation of subsidiary legal instruments such as protocols giving specific mandates to various SADC institutions. A total of 24 protocols have thus far been formulated. However, some of the protocols have been dormant since at least two-thirds of members need to sign them before they become binding.

Being a signatory to the SADC Treaty commits member states to accepting a series of principles, objectives and strategies on mutual, beneficial and equitable cooperation and integration; to participating in the structures and institutions of the SADC; and to negotiating a series of the already-mentioned protocols for implementation in the member states. Specific obligations are to be contained in the respective protocols, which have to 'spell out the objectives and scope of, and the institutional mechanism for cooperation and integration' (Article 22(1) *SADC Treaty* (1992)). However, the fact that most of the protocols have only come into force since 1998 indicates that the SADC still stands somewhat at the beginning of its journey.²²

Problem statement

As indicated by Hamooya, Mulauzi and Njobvu,²³ many countries in southern Africa are operating archives and records management services under out-of-date or incomplete legislation or even without any legislative provision at all. As a result, in many of these countries the infrastructures of successful development are deficient or lacking altogether. For example, Ngoepe and Keakopa²⁴ contend that the National Archives of South Africa does not have the necessary infrastructure to ingest electronic records into archival custody. This is despite the fact that technology has advanced and many organisations in the SADC region are increasingly saving and accessing records in the highly networked environments. It is necessary to control these records at their earliest convenience, preferably at the moment of creation. Thurston²⁵ argues that control of digital records at the point of creation and use is not a government priority anywhere and governments are not yet aware of trust issues, of the cost of failure to address them or of what needs to be done. They still tend to believe that technology will resolve the problems and focus on the dramatic benefits of online data without considering the integrity of digital information. It would seem that the problem of national archival ineffectiveness and inefficiency in most countries is aggravated by outdated archival legislation.²⁶ Therefore, it is necessary to update archival legislation to embrace records that are created and stored in networked environments.

Table 1. List of archival legislation in the SADC region.

No	Country	Name of Act	Year
1	Angola	N/A	N/A
2	Botswana	Botswana Records and Archives Act	19782007
3	DRC	N/A	N/A
4	Lesotho	Lesotho Archives Act	1967
5	Madagascar	N/A	N/A
6	Malawi	Malawi Records and Archives Act	197519871989
7	Mauritius	N/A	N/A
8	Mozambique	Mozambique Historical Archives	19342007
9	Namibia	National Archives and Records Service Act	1992
10	Seychelles	N/A	N/A
11	South Africa	National Archives and Records Service Act	19221950s196019962001
12	Swaziland	Swaziland Archives Act	1971
13	United Republic of Tanzania	Tanzania Records and Archives Act	19652002
14	Zambia	Zambia Records and Archives Act	1964
15	Zimbabwe	National Archives of Zimbabwe Act	1935195819631986

Purpose and objectives of the study

The purpose of this study was to assess the extent to which provision is made for the management and preservation of electronic records in archival legislative frameworks in the SADC region. The specific objectives were to:

- identify archival legislation in the SADC member countries;
- examine selected archival legislation in the SADC region in order to check provision for electronic records management and preservation;
- assess selected archival legislation to determine if electronic transactions are admitted as evidence in courts of law in the countries;
- analyse the definition of a record in the selected archival legislation to establish if it makes provision for electronic records management;
- make recommendations on the provision for management and preservation of electronic records in archival legislative frameworks in the SADC region.

Research methodology

The research data for this study was drawn from archival legislation of selected SADC countries. Therefore, the current study employed qualitative content analysis of the legislation. The document study was supplemented by a review of related literature. Kothari²⁷ describes content analysis as the method used to analyse the contents of documentary materials, in this case pieces of legislation. Firstly, the archival legislation of the 15 countries listed on the SADC's website was searched online. As reflected in Table 1, the search yielded 10 results. It is worth noting that the archival legislation of Angola, the Democratic Republic of Congo, Mauritius and Seychelles could not be found online. This might be due to the fact that the countries are non-English-speaking and the researchers might have missed the legislation written in other languages, such as Portuguese. From the pieces of legislation identified, only those of Botswana, Lesotho, Malawi, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe were analysed. The other SADC countries were excluded owing to language barriers as they are non-English-speaking. The analysis included the examination of archival legislation in the SADC region in order to check provision for electronic

records management and preservation; the assessment of archival legislation to determine if electronic transactions are admitted as evidence in court of laws in the countries; and the interpretation of the definition of a record in the archival legislation to establish if it makes provision for electronic records management.

Archival legislation in the SADC region

In most SADC countries, except in South Africa, the National Archives Act was often enacted shortly after independence and modelled closely on the UK Public Record Act of 1958 or former colonial master, like Portugal in Mozambique and Angola. The National Archives and Records Service of South Africa Act does not strictly conform to the British model as it was largely influenced by Australian and Canadian thought.²⁸ As already indicated in the introduction, this colonial system is now outdated and is incompatible with current systems. Table 1 reflects the legislation per SADC country member and the year of enactment and amendment.

Botswana

The Botswana National Archives Act of 1978, as amended in 2007, gives a legal undertaking for government agencies to collect, preserve and access the nation's documentary heritage. The foundations of this national archives legislation were laid in 1978 through the National Archives Act. The mandate of this piece of legislation is to administer and manage archival activities in the country.²⁹ The custodianship of recordkeeping and management used to fall under the Ministry of Labour and Home Affairs.³⁰ Thus, National Archives only took an advisory role to government departments on how to properly keep records. It was not until 1985 that the Organisation and Methods Report recommended the restructuring of the archives. In 1990, a directive for the integration of registries into the National Archives paved the way for the restructured framework that also produced a new name – the Botswana Archives and Records Services. This move gave the National Archives the mandate to guide records management practices in the entire public sector. Furthermore, the President's Circular No. 4 of December 1992 introduced a new dimension of records management function.³¹

In order to understand the coverage of the specific legislation under consideration, it is important to identify what 'records' entail in terms of the Act. According to Part I 2(c) it includes any manuscript, newspaper, picture, painting, document, register, printed material, book, map, plan drawing, photograph, negative and positive pictures, photocopy, microfilm, cinematograph film, video tape, magnetic tape, gramophone record or other transcription of language, picture or music, recorded by any means capable of reproduction and regardless of physical form and characteristics. This wide coverage shows that the legislation intended to cover as many forms of records as possible in as many media as possible. In legal terms, wide coverage is mostly encouraged so that other aspects may not be subjected to non-protection owing to their falling outside the ambit of the legislation.

The National Archives Act regulates that records which are 20 years and older should be open for public access. Archives are unique, as they keep fragile documents that contain some of the earliest information on Botswana. They are a vital part of the country's national heritage and in most cases exist in single copies. In Part II 3, the Act goes further

in regulating place of storage and deposit of records. In those storage places, legislation had to be promulgated in order to regulate the handling of archives with care to protect them against further deterioration. Access to these documents is facilitated through a Search Room service. Legislation prescribes that users need to register and complete the Archives Requisition form as a basic requirement for all users. Thereafter, access to documents is free and there will be no restrictions on open documents.

The Act also provides a number of flexibilities. In Part II 4(1), the Minister has authority to declare a place besides the National Archives to be a place of deposit for public records of any category. The advantage of this kind of arrangement is evident when considering the limited space and resources the National Archives may have at its main premises. However, great care must be taken and compliance measures must be put in place so that these premises continue to comply with the set standards of National Archives. The monitoring of such premises may prove cumbersome to untrained custodians of such venues and the standards may vary between urban and rural places.

The advent of technology, especially that of the cloud, is critical for the proper understanding of preservation of records going into the future. Part IV 6(1) gives the Minister a mandate to declare any place to be a place of deposit. The questions are: can the Minister declare a cloud as a suitable place for storage of records? Does the Minister have the capacity to determine such suitability? What are the legal obligations of having such a declaration? Does the Minister and Director have a legal capacity to monitor the cloud, and if there are violations in the cloud, can they charge those responsible for such violations? The law is not there yet to go that far.

According to Part IV 11(4), any person who destroys or disposes of any public records or authorises the disposal or destruction of such records other than in accordance with this section shall be guilty of an offence. Thus, the violation of the Archives Act is an offence. A loss in the cloud could also be construed as destruction of records, thus the law will need to be updated.

The National Archives Act identifies the position of the Director of National Archives as critical (sections 5–9, Part III). This is a public officer position. In this position, the Director relies on the Minister's delegation of duties. This is a worrisome arrangement since the Minister is concerned with other administrative duties. It is preferable that the Director should have a full mandate and custodianship of the archives and only consults with the Minister when necessary. In Part III 5(4) clear responsibilities of the Director are given, but the sections are not clear as to what resources and capacity the Director has to use the resources.

The Botswana government promulgated the Electronic Records (Evidence) Act in 2014. The Act provides the admissibility of electronic records as evidence in legal proceedings and authentication of electronic records. It also provides for the admissibility in evidence of electronic records as original records and for matters incidental and connected thereto. For example, section 5 of the Act indicates that where an electronic record is obtained from an electronic records system and duly certified as such by the certifying authority in relation to the operation or management of the approved process, it shall be presumed that it accurately reproduces the contents of the original records system.³²

Lesotho

The Lesotho Archives Act of 1967 is one of the oldest in southern Africa with records dating as far back as 1884. The Lesotho Archives Act defines archives as any documents or

records received or created in a government office or office of a public authority during the conduct of affairs in that office and which are from their nature or in terms of any other law not required to be dealt with otherwise. Archives and their records are considered valuable and that it is essential to protect them. It is therefore the mandate of the State Archives to preserve them. Lesotho has not managed to implement the legislation required in fulfilling the protection of archives.³³

The legislation of this Act is important in that it enables any organisation to operate with authority. However, this legislation has also not been followed. While the Act states that archives have a critical role to play but there is no clear relationship between the State Archives and registries, both operate in different worlds. One of the weaknesses is that the legislation does not give the national archival administration wide powers for protecting records as it does not enable the State Archives to be actively involved in all phases of the record life cycle. The Act creates offices to enable the full function of archives. These include the Chief Archivist, who oversees the records and archival services at national level. This office is charged with inspection of archives, taking charge of their custody, care and control. This Act establishes an Archives Commission, which is supposed to be tasked with making recommendations regarding the acquisition of records and disposal of archives. This office therefore plays a critical advisory role regarding proper keeping of archives and records management. It is sad that this Commission has not been functioning.

This legal framework has a number of shortcomings that renders the exercise of protection of archives a trivial exercise. It is still using a 30-year-old system. It becomes obvious that such an old system will not provide for digitisation, a current preservation mechanism now recognised globally. One cannot even start to think about cloud storage in a situation like this. The fines imposed for infringement on archives are very petty, for example the R200 or imprisonment of less than a year imposed against a person who damages any archival treasure is trivial. Access to archives is in a deplorable state. If no access can be granted, archives will remain isolated and unused. Therefore, the rationale for the existence of the archives will be questionable. There are also no proper measures put in place for effective lines of coordination. To some extent, some records get lost without proper tracing to know where exactly they are. Additionally, Lesotho suffers from acute budgetary constraints and in most cases relies on donor funding.

Malawi

The National Archives of Malawi is described as a wonderful treasure of the nation.³⁴ Despite the acknowledgement of this importance, there are no adequate mechanisms for controlling the flow of records and this leads to loss of files. Adequate security measures for records are not taken, resulting in incidents of missing files.³⁵ There are two pertinent statutes that inform the Act:

- the Printed Publications Act 19:01, which provides for the registration of newspapers, the printing and publication of books and the preservation of printed works in Malawi;
- the National Archives Act 28:01, which provides for the classification, conservation, custody, control, acquisition and disposal of certain public, judicial, historical and general records.

The Archives Act also provides for the regulation, creation, classification, maintenance and disposal of public records. The preservation of archival material for research and social

economic development is an objective that is still to be realised. The collection of historical manuscripts is critical for safeguarding the past. In addition, the Act provides for a nationwide advisory service in records and archives management. This is a unique feature of the Malawi Archives Act. The Act also provides for the registration of newspapers published in Malawi as provided for under the Printed Publications Act. It also administers the International Standard Book Numbering (ISBN) system in the country. This is different from other SADC countries. Despite these best efforts, Malawi's main challenge is the lack of built infrastructure, as well as adequate funding, and understaffing.³⁶ The staff also lack appropriate training. These challenges will hinder the future progress of archives in Malawi. One cannot even comprehend the use of digitisation of archives, let alone storage in the cloud.

Namibia

The National Archives Act, No. 12 of 1992, was passed by the National Assembly and signed into law in terms of the Namibian Constitution (Article 56). Its mandate is to 'maintain the institutional memory of government ministries, offices and agencies; collects and preserves the nation's history and unpublished documentary heritage; and supports education and research by providing access to these resources.'³⁷ The custody of all records, archives and other matters incidental to this domain of archives falls under this Act. The National Archives are also given a responsibility to supervise and provide training in records management in all government offices, ministries and agencies as well as parastatals. This Act is not a colonial instrument, since Namibia received its independence in 1990. However, it houses a number of repositories that detail the colonial history under German and South African rule. As in the case of Botswana, the Namibian Archives Act gives the Minister custody of archives that have been in existence for a period of 20 years or more.

Section 7 of this Act identifies items covered as those that have been acquired in terms of the Act. It also defines 'archives' as those documents received or created in the course of conduct of the office or those with authority in terms of section 1 of the law, repealed by section 17 of the Act. A government office or an office of the local authority or statutory institution is identified as that which can be authorised. In terms of place of storage, the Act refers to 'archives depot' as meaning the place of storage (section 5).

The Act identifies 'documents' to mean a combination of any medium and the information contained thereon or therein, including on paper, parchment, vellum, charts, plans, working drawings, or in volumes, files, scrolls, or in the form of punched cards, punched tape, magnetic tape, compact disc, photographic negatives and copies, cinematographic film, microfilm, microfiche or gramophone, phonographic or other kind of sound recordings. This coverage is not much different from the one provided for earlier in the case of Botswana. Thus, the coverage lacks the width to include all the other new forms of records like those stored on the cloud. However, section 12(d) may be interpreted to cover storage of records through technological advancements. It gives the Head of Archives the power to issue directives regarding computer or microfilm projects in respect of archives.

The Archives Act also provides for sanctions for wrongdoers. In terms of section 14(1), any person who (a) wilfully damages any archives or accessions, (b) removes or destroys any archives or accessions otherwise that is not in accordance with the provisions of the Act or any other law or (c) contravenes or fails to comply with the condition of an authorisation granted in terms section 10(5) shall be guilty of an offence and subject to conviction or liable

to a fine not exceeding R8000 and in default of payment, to imprisonment for a period not exceeding two years, or both such fine and such imprisonment.

The custodian responsibility of the Archives is vested in the 'Head of Archives', who, in terms of section 3, derives his powers from the Minister. The head is also in charge of the 'Head office', which is a government office where the head performs his or her executive duties as the chief executive officer of the ministry or public office of which such a government office forms part and, in the case of local authority or statutory institution, is appointed in terms of the Public Service Act of 1980 (Act 2 of 1980). It is clear from the Act that the 'Minister', meaning the Minister of Education and Culture, is mandated to safeguard the proper functioning of the archives. He or she is responsible for the regulation, execution and administration of matters concerning the custody and care of archives and accession in accordance with the provisions of the Act.

The accessibility of records in archives is controlled. Anyone who wishes to make use of these facilities will have to apply for this and make payment of the fee determined by the Treasury. This will give the user authority to use the facilities to do research or accessions, and to make copies of or extracts from them (section 2(g)). The use of archival facilities is not an absolute right and it may be denied. The Head of Archives may refuse access to any archives and accession in an archives depot or intermediate depot to any person who has been convicted of an offence under subsection (1).

South Africa

Historically, South Africa has had a unified system of public records administration since its creation in terms of legislation in 1922, within which physical decentralisation at provincial level was accommodated.³⁸ In 1922, the Public Archives Act (Act No. 9 of 1922) was passed. The Act was brief and relatively simple. From the outset, the States Archives Services (SAS) custodial mandate embraced the records of all central and provincial government offices.³⁹

The basis for establishing a new archives and records management system for South Africa was provided by the 1996 Constitution, which provided in Schedule 5 that archives other than the national archives are a functional area of exclusive provincial competence. By virtue of this provision, each province should promulgate its own Act on archival infrastructure.⁴⁰ However, provinces are not autonomous to work independently from the National Archives and Records Service (NARS). To ensure a coherent and compatible records management system, the National Archives and Records Service Act contains specific provisions that impact on the archival and records management services delivered by provincial archival services. Section 3(g) provides for the NARS to assist, support, set standards for and provide professional guidelines to provincial archives services.

The National Archives and Records Service Act defines a public record as 'a record created or received by a governmental body in pursuance of its activities' and a governmental body is any 'legislative, judicial or administrative organ of the state'.⁴¹ According to section 13(2)(b)(ii) and section 13(2)(b)(iii), the national archivist shall determine the conditions subject to which electronic records systems shall be managed and records may be reproduced electronically. Public records therefore have to be managed through normative guidelines included in several advisory pamphlets and policy documents including:

- Advisory Pamphlet Number 1 – Managing public records and the law;
- Advisory Pamphlet Number 2 – Electronic records and the law;
- Advisory Pamphlet Number 3 – Records managers and the law;
- Advisory Pamphlet Number 5 – Managing email and the law;
- Records Management Policy;
- Guidelines for Managing Electronic Records: first published in 2000 and then updated in 2006.

The purpose of the guidelines was to assist governmental bodies in complying ‘with legislative requirements regarding electronic records as an integral part of the strategic management of their records resources.’⁴²

The record system in South Africa caters for two types of records, for example, records that will be destroyed after some time, usually before 20 years, and those that have an enduring value which will be permanently preserved in the archive repositories after 20 years. The need for records management therefore precedes the archiving of such records. There are also provincial archives that are part of the provincial structures and these have the responsibility to regulate provincial government departments and local government authorities. Despite their autonomy, NARS is still overall responsible for the provincial archives. Each provincial archive administers its own act. However, some of the provinces are still struggling owing to a lack of capacity and therefore still rely on NARS for support. In terms of section 4(1) of the Act NARS shall be managed by a national archivist and in terms of section 4(2) of the Act, the national archivist shall, in the performance of his/her duties, be assisted by officers and employees appointed in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994).

In addition, the South African government has established statutory bodies to coordinate and harmonise implementation of e-government projects. Recordkeeping is part of this project. Amongst these are the State Information Technology Agency (SITA) and the Government Information Technology Officers Council (GITO Council). SITA is responsible for the acquisition, installation, implementation and maintenance of information technology (IT) in the public sector. This statutory body could be the most relevant one when it comes to introducing the cloud as a storage mechanism. The GITO Council, which consists of national and provincial IT officers, is responsible for consolidating and coordinating IT initiatives in government, including e-government, to facilitate service delivery. This body will play an equally important role.

The South African government also enacted the Electronic Communications and Transactions Act in 2002 to legalise electronic transactions and communications to pave the way for electronic service delivery.⁴³ In terms of the Act, electronic records can be used as evidence in the court of law. However, authentic and reliable records/data messages should be created of electronic transactions and communications.

Swaziland

The Swaziland Archives Act is one of the outdated acts in the region. The Archives Act of 1971 created the National Archives of Swaziland. The Act requires public records to become accessible 30 years after creation. The Act mandates the Director of Swaziland National Archives to examine and advice on the care, custody, control and preservation of public

records. The Act further empowers the Director, at his or her discretion, to approve any institution, whether private or otherwise, as a place wherein may be deposited, housed or preserved, either permanently or temporarily, any public archives or records that have been declared public records. The Act allows for retention of records in the office of origin if approval is granted by the Director of the archives. In terms of the Act, the penalty of E200 or 12 months can be imposed on any person who wilfully damages or destroys archives. The Act is, however, silent on electronic records. Its focus is more on archives than records management. The gap on records management was bridged through the National Policy on Records Management (NRMP), which was developed and implemented in 2012. The NRMP provides detailed guidance on the management of records in the office of origin. The guidelines apply to all records created, received or maintained by Swaziland government ministries, departments, government parastatals, as well as private sector organisations; making all staff responsible for records management functions and responsibilities to ensure that accurate, authentic and reliable records are created and maintained in the conduct of official business transactions. Under the guidelines, records and documentation created in the course of business transactions are subject to public and contractual recordkeeping requirements.⁴⁴

Just like in South Africa, the Swaziland government enacted the Electronic Evidence Act in 2009. The Act provides for legal recognition of electronic records and admissibility in evidence or electronic records as original records. In this regard, an electronic record is defined as data that is recorded or stored on any medium in or by a computer system or other similar device that can be read or perceived by a person or computer system, and includes a display, print-out or other output. In terms of the Act, nothing in the rules of evidence shall apply to deny the admissibility on the sole ground that it is an electronic record. Electronic records are admissible if relevant and produced by an approved process (in accordance with regulations or organisations or certifying authorities appointed by the Minister). However, the following should be taken into consideration for the record to be admissible:

- Needs certification that it accurately represents the contents of the record.
- Integrity of systems, procedures and adherence to procedures is key.
- Should be created, stored and managed in the normal course of business.

Tanzania

The Tanzania Archives Act was first passed 1965 but was amended in 2002 when a new Records and Archives Management Act No. 3 was introduced. The Tanzania National Archives Act was all drafted with the assistance of the International Records Management Trust, a records management consulting firm based in the United Kingdom.⁴⁵ The 2002 revision repeals the 1931 Records Disposal Ordinance 9 (Cap. 9), the 1965 National Archives Act no. 33 and the Presidential Circular no. 7 of 1963 on the Care and Disposal of Public Records.⁴⁶ The Tanzanian Records and Archives Management Act, 2002 established a Records and Archives Management Department. The Department's role, which is set out in this Act, includes ensuring that public offices follow good recordkeeping practices; establishing and implementing procedures for the timely disposal of public records of no continuing value; advising on best practices and established standards in recordkeeping in the public service; and establishing and implementing procedures for the transfer of public

records for preservation. According to the Act, 'records' include not only written records, but records conveying information by any means whatever; and references to records selected for preservation include electronic, audio-visual and microfilm.

Tanzania also passed the Electronic Evidence Amendment Act in 2007 following the amendment of the Evidence Act of 1967 to provide provision for the admissibility of electronic records as evidence in courts of law.⁴⁷ According to the Act,

In any criminal proceedings – an information retrieved from computer systems, networks or servers; or the records obtained through surveillance of means of preservation of information including facsimile machines, electronic transmission and communication facilities; the audio or video recording acts or behaviours or conversation of persons charged, shall be admissible in evidence.⁴⁸

Zambia

The National Archives Act of 1964 is the primary legal instrument applicable in so far as relevant legislation on records management is concerned in Zambia.⁴⁹ The Act provides for the preservation, custody, control and disposal of public archives, including public records of Zambia. This piece of legislation also derives from its predecessor, the Protectorate of Northern Rhodesia. In defining archives, the legislation is clear in that these should be of historical value. These also include judicial records. The full examples of records include papers, documents, registers, printed materials, books, maps, plans, drawings, photographs, micro-films, cinematograph films, sound recordings, photocopies, and negatives and positives of pictures.

Similarly to what other countries have in common, the role of the Minister in the Cabinet is clearly illustrated. It is the Minister who declares any place to be a safe place for records to be kept. The Minister also authorises the transfer of records from one place to another. The administrative role of the Director is also enumerated in the Act. The management and control of National Archives is the responsibility of the Director. The Director also regulates the conditions under which members of the public may inspect public archives in, or use the facilities of, the National Archives. Anyone who needs to inspect the archives will need permission from the Director. According to Section 4, any contravention of the Act can result in one being found guilty of an offence and liable to conviction that may result in imprisonment.

Part VI of the Act deals with copyright issues. This has a direct bearing on the reproduction of archived work. However, there is no copyright infringement if the reproduction of the work is authorised or directed by the Director. The Act is unique in that it provides for the establishment of a National Archives Advisory Council. This Council plays a critical role in advising the Minister on matters relating to the retention or destruction of public records, transfer of public records to the National Archives, access by members of the public to the public archives and the services of the National Archives, and on other such matters relating to the public archives and to historical records as the Minister may refer to the Council.

Zimbabwe

In Zimbabwe, the first legislative instrument for archives was the National Archives of Rhodesia Act of 1935, which was amended in 1958 as the Central Archives Act.⁵⁰ In 1963,

a further amendment was made and in 1986, the 1963 Act was repealed to make way for the current National Archives of Zimbabwe Act (1986). The mission statement of the Act states that it is to acquire, preserve and provide public access to Zimbabwean documentation in whatever format in an efficient and economic manner.⁵¹ This is a piece of legislation from the post-colonial era. However, Zimbabwe has yet to make a realistic declaration and committed programme to embark on a digitalisation programme in order to expand access and preserve the records and public archives in its custody.⁵² Zimbabwe does not have archival legislation that specifically caters for the creation, use, maintenance and disposal of electronic records, which has resulted in records management practitioners resorting to a hit-or-miss approach when managing electronic records.⁵³ Owing to economic hardship, the country has actually regressed from the gains made soon after independence.

In terms of subsection 12 of the National Archives of Zimbabwe Act, a record (historical) is any record that, by reason of its enduring or historical value, deserves to be preserved in the national interest.⁵⁴ The Act aims to provide for the storage and preservation of public archives and public records; for the declaration and preservation of protected historical records; for the repeal of the National Archives Act (Chapter 309); and for matters incidental to or connected with the foregoing. This Act is administered under the Minister of Home Affairs or any other Minister appointed to carry the task as per the President's assignment. Any record of 25 years and older qualifies to be kept in the national archives (Section 2(a) (i)). According to Section 4, the Office of the Director is defined as a public office that forms part of the public service and which will, subject to the provisions of this Act, have the functions that are conferred or imposed upon him in terms of this Act. This office will therefore have direct management of the Archives as prescribed by Section 5(a). According to Section 6(b), the Director gives advice or instructions concerning the filing, maintenance and preservation and when necessary, the transfer of records. A wide interpretation of this duty can be construed to mean that such a person can decide on the implementation of a digitalisation mechanism to preserve records. This is ideal considering that Section 13 of the Act seeks to protect historical records against any destruction, defacing, alteration, mutilation or damage. Sections 10 and 11 deal with contraventions that can result in sanctions.

Conclusion and recommendations

From the legislation analysed, only the South African legislation specifically makes provision for the management of electronic records. The other pieces of legislation are silent on the management of electronic records. There was no archival legislation that indicates that electronic transactions are admitted as evidence in courts of law in the countries. In some countries this issue is addressed in evidence and communication acts, as demonstrated in the ones from Botswana, South Africa, Swaziland and Tanzania. Furthermore, all the pieces of legislation except the South African one do not provide the definition of electronic records but instead include it in the broader definition of record. This is also the case with Library and Archives Canada, which provides a broader definition of a record. This broad definition permits the National Archives to carry out several functions relating to the management of electronic records.⁵⁵ The pieces of legislation were clearly written with paper records in mind, since the focus is only on this type of record. For example, the legislation in Botswana, Namibia and South Africa prescribes that records can be transferred from the creating agency to an archives repository after 20 years, while in Zimbabwe legislation prescribes

this period as 25 years. The question is: 'What about electronic records?' Technology has changed this landscape; a day's work in technology can equate to a thousand years. This shows a number of trends that embody shifts in technology and archival legislations need to embrace that.⁵⁶ Creating agencies cannot wait for 20 or 30 years to transfer electronic records, as by that time they might be unreadable or lost. Therefore, there is a need to update archival legislation to also embrace records created in networked environments. These pieces of legislation need to embrace the Internet age. This will also help records managers and archivists to be able to identify the records to be preserved at the moment of their creation and determines the feasibility of preservation on the basis of the archives' technological capacity.⁵⁷ While it is acknowledged that the archival legislation under study requires amendments, it is worth noting that some African countries have introduced new legislations, for example the Gambia, Ghana and Sierra Leone. Furthermore, Uganda had no archival legislation, but passed a relatively modern piece of archival legislation in 2000.⁵⁸

The existing definitions of records need to effectively support the management of digital records by identifying elements that constitute a record. In a hardcopy environment, this is self-evident because they have a fixed documentary form and stable content.⁵⁹ However, in the digital world there are challenges. The form of a digital record 'may neither be fixed nor stable in the traditional sense'; the intrinsic and extrinsic elements of form would not be dependent on, nor inextricably linked to, physical medium. Practically, this is evident in statistical data and could be viewed as a pie chart, a bar chart or a table using the same stored digital record. Identifying records in more complex information systems such as relational databases and systems with different layers of content such as Geographic Information Systems further obscure the possibility of reaching definitional clarity.⁶⁰ The SADC should consider adding a protocol treaty on archival legislation. This will culminate in a model statute on electronic records management and preservation designed by the signatories and customised by member states. However, consideration should be taken into account of the complications of trying to harmonise laws across mixed jurisdictional countries.

In most SADC countries legislation should be developed that directs a relationship between the agencies that create the records and the archival institution, legislation that covers current developments in the field of cultural property. The state archives should be accorded the necessary dignity through better human resources and a relevant human resource grading system. Furthermore, advisory bodies on proper records and archives management should be re-established.

The overview given in this study has the obvious limitation of excluding non-English-speaking SADC countries such as Angola, Democratic Republic of Congo, Madagascar, Mauritius, Mozambique and Seychelles. A further study is recommended that will also examine whether electronic communications and transactions legislation makes provision for electronic records as evidence in courts of law in the region. The study should also be extended to non-English-speaking SADC countries and cover issues such as cloud technology, expanding discussions beyond just national archival legislation and explore other laws such as electronic communication and maritime law. As observed by Parer, legislation for the future must also reflect the impact emergent issues have on the business of the archives. Such emergent issues that need to be taken into account include but are not limited to: cloud computing, convergent technologies, e-business, e-transactions and the Internet.

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