international relations
& cooperation
Department:
International Relations and Cooperation
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER (INTERNATIONAL LAW)
Private Bag x 152, PRETORIA, 0001 Tel: +27 12 351 0857 Fax: +27 12 329 1721

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Ms L Shongwe
Acting Chief Director: SADC

AGREEMENT AMENDING SADC PROTOCOL ON GENDER AND DEVELOPMENT

1. The meeting with the Director-General on 30 June 2022 regarding the Department's position on the possible signing of the *Agreement amending the SADC Protocol on Gender and Development* (hereinafter "the Agreement"), bears reference.

2. The background to the matter is that Article 23 of the Agreement provides that it shall enter into force on the date of its adoption by a decision of three-quarters of the Member States that are Parties to the Protocol. According to the SADC records, the Agreement has entered into force on 31 August 2016. Twelve of the fifteen Member States have to date signed it. South Africa, Mauritius and Malawi have not yet signed it. The effect of Article 23 is therefore that the Agreement has entered into force, and that signature by the Heads of State of South Africa, Mauritius and Malawi subsequent to the date of entry into force will imply their consent to be bound by the provisions of the Agreement.

3. The Agreement aims to amend the *SADC Protocol on Gender and Development* (hereinafter "the Protocol") which entered into force in 2008. Article 6 of the Agreement amends Article 8(2)(a) of the Protocol. Subparagraph (a) prior to the amendment reads as follows:

   (a) No person under the age of 18 shall marry, unless otherwise specified by law, which takes into account the best interests and welfare of the child.

4. Amended, the provision reads as follows:

   (a) No person under the age of 18 shall marry.

5. We agree with the position of the Law Advisers of the Department of Justice and Constitutional Development who have indicated in their Legal Opinion 147/201819A+B, dated 7 August 2018, that both the *Marriages Act, 1961* and the *Recognition of Customary Marriages Act, 1998* provide for exemption allowing persons under 18 to marry under certain circumstance. No legislation in South Africa exists that provides for an outright prohibition of marriages under the age of 18. They therefore concluded that as the international obligations are only binding on

South Africa domestically once incorporated in South African law through legislation and this has not been done, there does not arise a conflict in domestic law. This is so because the Protocol will not form part of our law until it is domesticated in terms of section 231(4) of the Constitution.

6. It is indeed the position that the *Constitution of the Republic of South Africa, 1996* follows a dualist approach with respect to international agreements. Section 231(4) provides as follows:

> Any agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

7. In *Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC),* (hereinafter referred to as "the Glenister case") the Constitutional Court confirmed this dualist nature of the Constitution with respect to international agreements when it analysed section 231 (2) of the Constitution, which reads as follows:

> An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

8. The majority remarked as follows at pp. 404:

> "in our view the main force of s 231(2) is directed at the Republic's legal obligation under international law, rather than transforming the rights and obligations contained in international agreements into homegrown constitutional rights and obligations" (own emphasis).

9. Furthermore, the minority judgement of the Court in the *Glenister* on p 374, remarked that –

> "The approval of an international agreement, under s 231(2) of the Constitution, conveys South Africa's intention, in its capacity as a sovereign State, to be bound at the international level by the provisions of the agreement. As the Vienna Convention on the Law of Treaties provides, the act of approving a convention is an international act .....whereby a State establishes on the international plane its consent to be bound by a treaty'. The approval of an international agreement under s 231(2), therefore, constitute an undertaking at the international level as between South Africa and other States to take steps to comply with the substance of the agreement. This undertaking will, generally speaking, be given effect by either incorporating the agreement into South African law or taking other steps to bring our law in line with the agreement, to the extent they do not already comply." (own emphasis)

10. In our opinions RO100/2021 of 26 July 2021 and RO221/2021 of 2 December 2021, we advised that as a result of the existing exceptions in our domestic law to the prohibition of marriages by people under the age of 18 years, a conflict will indeed arise on the international plane between South Africa's obligation in international law to prohibit marriage by persons under 18, and the South African domestic law, as its international obligations will bind South Africa to implement its international obligation by prohibiting marriages under 18 if the Agreement should be signed and it then becomes binding upon South Africa. This conflict will remain until such time as South African law has been amended to prohibit marriages by persons under 18 *in toto*.

11. We have been advised of the policy reasons for consideration of the signing of the Agreement by the President, and consequently will now explore the legal effects of a situation where such a conflict may come into existence.

12. As noted above, should South Africa become a party to the Agreement without at first having amended its legislation to prohibit marriages by person under 18 *in toto*, it will not form part of South African domestic law although it will be binding upon South Africa on the international plane. International law. Furthermore, Article 26 of the *Vienna Convention on the Law of Treaties, 1969* places an obligation on States to perform treaties in good faith, and consequently South Africa must take the required legislative steps to bring its domestic law in

line with its obligations in terms of the Agreement in order to give effect to its international obligations.

13. It is also noted that the present position in South African law which allows for marriage by persons under 18, is also in conflict with Article 21(2) of the *African Charter on the Rights and Welfare of the Child* ("the African Charter") which became binding on South Africa upon ratification on 21 January 2000, which expressly prohibits such marriages. The *Maputo Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa* provides in Article 6(b) that the minimum age of marriage for women shall be 18 and was ratified by South Africa on 17 December 2004.

14. Within United Nations human rights bodies a clear international norm has developed of totally prohibiting marriages between persons under 18. General Comment No 4 of 2003 the *Convention of the Rights of the Child* (ratified by South Africa on 16 June 1995) recommended that States Parties increase the minimum age of marriage in their domestic law to 18 years.

15. In addition, South African law distinguishes between the minimum legal ages of marriage, under special circumstances, for girls (permitted to marry from the age of 12 years), and for boys (permitted from the age of 14 years). The United Nations *Convention on the Elimination of All Forms of Discrimination against Women* to which South Africa became a party on 15 January 1996, obliges States Parties in Article 2(a) to include the principle of equality of men and women in their constitutions and legislation, and in Article 16(a) specifically obliges States Parties to ensure the same rights to men and women to enter into marriage. It is submitted that the present distinction between boys and girls in South African law is in contravention of these international obligations.

16. Consequently, at present, a conflict already exists between South Africa's domestic law and its obligations in terms of the aforementioned African and United Nations instruments, which must be addressed as the Constitution in section 231(4) provides a clear pathway for the incorporation of the international obligations that South Africa undertakes, or have undertaken, by adopting legislation. There is thus an international legal obligation on South Africa to expeditiously amend its legislation to prohibit marriage by persons under 18 in all circumstances.

17. We trust that our comments will be of assistance to you.

ANDRE STEMMET
SENIOR STATE LAW ADVISER (INTERNATIONAL LAW)

PRETORIA
30 JUNE 2022