

JUDICIAL APPOINTMENT, TENURE, REMUNERATION AND DISCIPLINE IN NAMIBIA

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I have been asked to speak on this topic with regard to the position in Namibia. The appointment of Judges and their tenure are regulated in the first instance by the provisions in the Namibian Constitution regarding the Courts in Namibia. Chapter IX of the Namibian Constitution deals with the administration of Justice. Article 78 of the Constitution deals specifically with the Judiciary and reads as follows:

- “(1) The judicial power shall be vested in the Courts of Namibia, which shall consist of:*
- a) a Supreme Court of Namibia;*
 - b) a High Court of Namibia;*
 - c) Lower Courts of Namibia.*
- (2) The Courts shall be independent and subject only to this Constitution and the law.*
- (3) No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.*
- (4) The Supreme Court and the High Court shall have the inherent jurisdiction which vested in the Supreme Court of South-West Africa immediately prior to the date of Independence, including the power to regulate their own procedures and to make court rules for that purpose”.*

It is also necessary to refer to what the Constitution provides in respect of the Supreme and High Courts in articles 79 and 80, respectively:

“Article 79 The Supreme Court

- (1) The Supreme Court shall consist of a Chief Justice and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.*
- (2) The Supreme Court shall be presided over by the Chief Justice and shall hear and adjudicate upon appeals emanating from the High Court, including appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The Supreme Court shall also deal with the matters referred to it for decision by the Attorney-General under this Constitution, and with such other matters as may be authorised by Act of Parliament.*
- (3) Three (3) Judges shall constitute a quorum of the Supreme Court when it hears appeals or deals with the matters referred to it by the Attorney-General under this Constitution: provided that provision may be made by Act of Parliament for a lesser quorum in circumstances in which a judge seized of an appeal dies or becomes unable to act at any time prior to judgment.*

- (4) *The jurisdiction of the Supreme Court with regard to appeals shall be determined by Act of Parliament."*

Article 80 The High Court

- (1) *The High Court shall consist of a Judge-President and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.*
- (2) *The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The High Court shall also have jurisdiction to hear and adjudicate upon appeals from Lower Courts.*
- (3) *The jurisdiction of the High Court with regard to appeals shall be determined by Act of Parliament."*

Both these articles envisioned that there would be specific Acts of Parliament in respect of the Supreme and High Courts. This is exactly what occurred and the High Court Act, no. 16 of 1990, and the Supreme Court Act, no. 15 of 1990, respectively, were promulgated and came into force shortly after Namibia's independence in October 1990. I shall later refer to specific and relevant provisions contained in those Acts in respect of Judges.

Article 82 of the Constitution provides for the appointment of Judges of both Courts:

Article 82 Appointment of Judges

- (1) *All appointments of Judges to the Supreme Court and the High Court shall be made by the President on the recommendation of the Judicial Service Commission and upon appointment Judges shall make an oath or affirmation of office in the terms set out in Schedule 1 hereof.*
- (2) *At the request of the Chief Justice the President may appoint Acting Judges of the Supreme Court to fill casual vacancies in the Court from time to time, or as ad hoc appointments to sit in cases involving constitutional issues or the guarantee of fundamental rights and freedoms, if in the opinion of the Chief Justice it is desirable that such persons should be appointed to hear such cases by reason of their special knowledge of or expertise in such matters.*
- (3) *At the request of the Judge-President, the President may appoint Acting Judges of the High Court from time to time to fill casual vacancies in the Court, or to enable the Court to deal expeditiously with its work.*
- (4) *All Judges, except Acting Judges, appointed under this Constitution shall hold office until the age of sixty-five (65) but the President shall be entitled to extend the retiring age of any Judge so seventy (70):*
"provided that non-Namibians citizens are appointed as Judges under a fixed term contract of employment."

Article 83 of the Constitution deals with Lower Courts to be presided over by Magistrates in accordance with an Act of Parliament. Presently, the South African Magistrate's Court Act, no 32 of 1944, as it existed before Namibia's independence is still applicable with certain amendments made subsequent to

independence. It is foreseen that there will soon be a new Namibian Magistrate's Court Act. Subsequent to independence the Magistrates Act, no. 3 of 2003 came into force. That Act established a Magistrates Commission which provided for the establishment of a magistracy outside the Public Service and regulated matter like the appointment, qualification, remuneration and other conditions of service of Magistrates. Article 84 of the Constitution of Namibia prescribes the process for the removal of Judges from office before expiry of their tenure, which can only occur on recommendation by the Judicial Service Commission to the President of Namibia.

A very important provision in the Namibian Constitution, which has a direct bearing on the subject of this paper, is the provision contained in article 85, namely the establishment of a Judicial Service Commission. The composition of the Judicial Service Commission and its functions are set out in that article. Article 85 provides:

- "(1) A Judge may be removed from office before the expiry of his or her tenure only by the President acting on the recommendation of the Judicial Service Commission.*
- (2) Judges may only be removed from office on the ground of mental incapacity or for gross misconduct, and in accordance with the provisions of Sub-Article (3) hereof.*
- (3) The Judicial Service Commission shall investigate whether or not a Judge should be removed from office on such grounds, and if it decides that the Judge should be removed, it shall inform the President of its recommendation.*
- (4) If the deliberations of the Judicial Service Commission pursuant to this Article involve the conduct of a member of the Judicial Service Commission, such Judge shall not participate in the deliberations and the President shall appoint another Judge to fill such vacancy.*
- (5) While investigations are being carried out into the necessity of the removal of a Judge in terms of this Article, the President may, on the recommendation of the Judicial Service Commission and, and pending the outcome of such investigations and recommendation suspend the Judge from office."*

I shall now briefly refer to specific provisions affecting the qualification and appointment of Judges of both the High and Supreme Courts of Namibia as contained in the applicable Acts. Section 3 of the High Court Act reads:

"No person shall, in pursuance of the provisions of Article 82 of the Namibian Constitution, be eligible for appointment as Judge-President or as an additional or acting judge of the High Court, unless-

- a) such person has held office as a judge of a superior court in any country which is a member of the Commonwealth; or*
- b) such person has held office as a judge in any other country which in the opinion of the Chief Justice and the Judicial Service Commission is a country whose legal system and legal institutions are sufficiently comparable with the legal system and legal institutions of Namibia as to make the judge of such a country suitable for appointment as a judge of the High Court; or*

- c) such person has practised as an advocate of the High Court or any court or legal institution referred to in paragraph (a) or (b) of this section, for a period of not less than five years”.*

Section 5 of the Supreme Court Act provides that the Supreme Court shall consist of a Chief Justice plus other additional Judges in accordance with the provisions of Article 79(1) of the Namibian Constitution.

Both the High and Supreme Court Acts have been amended in respect of the retirement ages of Judges which are currently 65 years. Both these Acts also prescribe that the remuneration, benefits and privileges of judges may be prescribed by law. In that regard there is an Act, namely the Judges Remuneration Act, no. 18 of 1990 and Section 5 of that Act authorises the President, after consultation with the Judicial Service Commission, to make regulations regarding the benefits of Judges. Such regulations were indeed made in 1990 and had been replaced by new regulations in 2003. Regulations made by the President i.a. regulated issues such as leave of absence of Judges, sick-leave and special leave, accommodation, allowances, safety and security, official vehicles, the Motor Vehicle Scheme for Judges, transport and travelling, as well as specific conditions applicable to acting Judges. The Regulations currently in force contain an annexure that deals specifically with the aforementioned Motor Vehicle Scheme.

To put the above provisions of the Namibian Constitution, as well as the appropriate legislation concerning Judges, into proper perspective, the following summary will suffice. Judges are appointed by the President on recommendation of the Judicial Service Commission. That Commission consists of the Chief Justice (as chairperson), the Judge President of the High Court, two representatives from practicing lawyers' associations and only one representative from Government, namely the Attorney-General. The tenure of Judges are secured and only in the event of mental incapacity or gross misconduct can such tenure of office be terminated before expiry of the term of their appointments, namely before 65 years, by the President after investigation and on recommendation of the Judicial Service Commission. Such an unfortunate incident did happen in respect of a Supreme Court Judge, but during the investigation by the Judicial Service Commission, the particular Judge resigned, which resignation was accepted by the President.

As mentioned, remuneration and other benefits of Judges are prescribed by legislation. The remuneration of Judges had been increased in 2007 after representations were made to the President by the Judicial Commission through the Ministry of Justice. Since independence and up to that stage the remuneration of Judges had not been increased. The purpose of the increase at the time was to provide for remuneration to be at least on par with that of Judges in South Africa. That was done, but nearly at the same time the remuneration of South African Judges was increased to more than double that of what Namibian Judges currently earn.

However, in addition to their salaries, Judges of the High and Supreme Courts are also entitled to housing and vehicle allowances for vehicles bought in terms

of the above-mentioned Motor Vehicle Scheme. This means that Judges buy their own vehicles and the Government compensates them according to a fixed formula for a period of 54 months according to a stipulated benchmark. Judges are further provided with laptop computers and have secretaries who are not legally trained. There is unfortunately no assistance for Judges after they retire as is the case in many other Commonwealth Countries. It is also understood that in many Commonwealth Countries Judges do not only have secretaries, but also have legally trained assistants, drivers and even researchers. Judges in Namibia unfortunately do not enjoy such privileges and it places a severe burden on Judges who are forced by a heavy roll to spend nearly full time in Court to do their own research, to write judgments and to struggle to have such judgments typed, without proper support. It may be necessary to refer to some statistics in order to view the workload of the judiciary in proper perspective. There is currently one High Courts and one divisional High Court in Namibia. The seat of the High Court is in the capital of Namibia, Windhoek, with 9 permanent and currently with 3 acting Judges. In Oshakati, in the North, a new High Court commenced work in February 2009 with currently 2 permanent Judges. While the Windhoek High Court hears all cases of civil and criminal nature, the Oshakati High Court currently only deals with criminal matters.

Civil matters include trials both on the fixed and floating rolls, opposed motions, interlocutory matters, a weekly motion court, a divorce court for both unopposed and opposed divorced, appeals, etc. In Oshakati criminal cases were enrolled and appeals were dealt with. In addition, the Judges of the High Court review criminal matters referred by Magistrates Courts in Namibia.

In the 2009/2010 financial year the following cases were finalised respectively in the Windhoek and Oshakati High Courts:

HIGH COURT OF NAMIBIA, WINDHOEK	
CATEGORY OF CASES	MATTERS FINALISED
CRIMINAL & CIVIL APPEALS	103
LABOUR APPEALS	41
CRIMINAL REVIEW CASES	1397
ADMIRALTY CASES	9
PREVENTION OF ORGANISED CRIME APPLICATIONS	1
LABOUR MATTERS	35
CRIMINAL MATTERS	14
CIVIL MOTIONS	668
CIVIL ACTIONS	1174

HIGH COURT OF NAMIBIA, OSHAKATI	
CATEGORY OF CASES	MATTERS FINALISED

CRIMINAL APPEALS	8
CRIMINAL CASES	7
CRIMINAL REVIEW CASES	417

As far as the Supreme Court is concerned, 22 appeals, 2 reviews, 62 applications and 9 petitions were heard by the Supreme Court in in the same financial year. There are currently a Chief Justice, 2 permanent Judges of Appeal and 3 acting Judges of appeal. Two of these acting Supreme Court Judges are retired Judges of the Constitutional Court of South Africa.

I was also requested to say something about the discipline of Judges. Apart from the Judicial Service Commission, a body that meets regularly and also entertains complaints from the public and the Law Society of Namibia, the Chief Justice, in respect of the Supreme Court, and the Judge-President, in respect of the High Court, are both in a position to have intimate knowledge of each Judge of their respective courts. Without interfering with the independence of each Judge in respect of his/her judicial work, both the Chief Justice and the Judge-President can take up issues with particular Judges that may have a bearing on their courts. In practice, Judges of the High Court often consult with the Judge-President in respect of personal involvements in various matters that may have an influence on the judiciary. Judges are prohibited to be involved in management of companies as directors. Judges of the Supreme and High Courts are currently considering the adoption of a Code of Conduct for Judges, which have been prepared after consideration of similar Codes of Conduct in force in several other jurisdictions and which will hopefully be finalised soon.

I thank you.