



Inter Se

The Magistrates' and Judges' Association of Namibia (MJAN)

Quarterly Newsletter

September 2013

Issue 2

EDITORIAL NOTES

We are very pleased to bring to you our second Issue of *Inter Se*.

In May this year, I took over as the Editor of *Inter Se* Newsletter from the previous Editor Ms Bosman.

Inter Se is a quarterly newsletter and as such, we undertake to bring you subsequent Issues on a quarterly basis. This being our second Issue attractively indicates that *Inter Se* is still in its infant stages. As we all would expect, there are numerous challenges. To add value, content and sustain this Newsletter, we would need almost everyone onboard. We would appreciate efforts by all our members and stakeholders to contribute articles when requested and do so on time. To remain relevant we need informative, educational articles and letters, that are not only of importance or beneficial to our members, but so too should be to persons who inevitably would land their hands on our copies.

In this issue, are articles by The Honourable Chief Justice Peter Shivute and Mr. Justice Elton Hoff. I would like to thank Chief Justice Shivute and Mr. Justice Hoff, for having accepted our requests to contribute to the contents of this Issue, despite their obvious workload. The Chief Justice's article reminds us that to get anywhere, we first need to get together as members of the MJAN. Mr. Justice Hoff article should now recreate a uniform practice in our courts on how to record formal admissions after a plea of not guilty in cases where accused are unrepresented.

To be on par with the rest of MJAs around the globe, we are looking into best possible and cost effective ways to enable you, our readers, to access this newsletter electronically in the not so distant future.

Finally we are greatfull to PPS Namibia for sponsoring this publication.



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President's Report

INTRODUCTION

At present the Magistrates and Judges Association of Namibia comprises of 39 members (members in good standing only). Only two of these members are Supreme Court judges and one a High Court judge while the rest of the members are magistrates from different regions of the country. For the most part of last year (2012), we spent more time negotiating with the Government on salary improvements for magistrates – this process is ongoing.

During September 2012, the Association hosted a special Annual General Meeting (AGM) in Windhoek. Members from all over the country attended the AGM. The purpose of the meeting was to bring old members together and to recruit new members. The meeting discussed issues of collective concern and passed beneficial and important resolutions.

A regional workshop was held in Otjiwarongo during March 2013. This workshop was convened to provide training to newly-appointed magistrates. Topics were, inter alia, Judicial Ethics and Code of Conduct for Judicial Officers.

Very positive feedback was received about this workshop.

JUDICIAL APPOINTMENTS

Judges

The Judicial Commission is the body responsible for the appointment of judges. Since September 2012 two (2) permanent judges and eight (8) acting judges were appointed in the High court. The Chief Magistrate, Mr. P. Unengu, is one of those that were appointed as acting judges. Eight (8) ad hoc judges were appointed in the Supreme Court.

Magistrates

The Magistrates Commission is the body responsible for the appointment of magistrates. Thirteen (13) magistrates have been appointed since September 2012. Such magistrates were assigned to various regions within the country.

TRAINING

For the period September 2012 to present, two (2) workshops were facilitated. One was for Regional Court Magistrates during October 2012. Both Regional Court Magistrates and prospective Regional Court Magistrates at-

tended the workshop. There were some budget constraints but the training officer managed to secure funding with the aid of the Commonwealth.

The second training workshop was recently held in Swakopmund. The focus was on Court Administration and it was aimed at magistrates from junior ranks. More training of this nature will be held during the course of this year.

CASES OF INTEREST

The following cases drew a lot of interest to Namibia:

1. SA 17/2010 *The Minister of Justice v The Magistrates Commission & Another* delivered on 21 June 2012: The Supreme Court held that the Minister had the power to appoint a magistrate on recommendation by the Commission; however, she was obliged to dismiss a magistrate on recommendation by the Commission. The Minister could confirm that the Commission in fact made the recommendation but she could not embark on an enquiry of her own, as she had no discretion to refuse to dismiss such a magistrate on the ground of misconduct in

terms of section 21(3) of the Electoral Act of 1992. Act. That power is reserved for the Commission

CONCLUSION

2. SA 12/2011 Rally for Democracy and Progress & 8 Others v Electoral Commission Namibia & 5 Others delivered on 25 October 2012:

The appellants appealed against the results of the November 2009 general election for members of the National Assembly.

Amongst the numerous and involved issues, was the question whether the said elections were freely and fairly conducted.

The Supreme Court found that the appeal must be dismissed, as the errors made during the election process were not so serious that they detracted from or diminished any principles in accordance with which the National Assembly elections had to be conducted under Part V of the

The Association is planning their AGM at the end of November 2013. The whole idea is for it to coincide with the Colloquium for Judicial Officers. The theme will be Judicial Independence. Different speakers, including the Chief Justice of Namibia and the Regional Vice President of the CMJA, will be invited to address judicial officers.

The Association has also hosted very successful wellness programs thus far and the Association intends on continuing with such programs as it has proven to be very valuable in strengthening the general well-being and morale of magistrates.

During the November AGM the following positions on the executive committee will be-

come vacant: The President, Secretary, Treasurer and additional member. Only paid up members will be allowed to stand for- or vote for the new executive members.

As president of the MJA, I wish to thank the executive committee for their dedication during the past three years and good luck to the new committee.



COMPILED BY: Divisional Magistrate A.H DIERGAARDT – PRESIDENT OF THE MAGISTRATES AND JUDGES ASSOCIATION OF NAMIBIA

This is supposedly a TRUE news story. I have my doubts, but you decide....

A lawyer in Charlotte, NC purchased a box of very rare and expensive cigars, then insured them against fire among other things. Within a month, having smoked his entire stockpile of these great cigars and without yet having made even his first premium payment on the policy, the lawyer filed a claim with the insurance company.

In his claim, the lawyer stated the cigars were lost "in a series of small fires." The insurance company refused to pay, citing the obvious reason: that the man had consumed the cigars in the normal fashion. The lawyer sued...and won!

In delivering the ruling the judge agreed with the insurance company that the claim was frivolous. The judge stated nevertheless, that the lawyer held a policy from the company in which it had warranted that the cigars were insurable and also guaranteed that it would insure them against fire, without defining what is considered to be "unacceptable fire," and was obligated to pay the claim. Rather than endure lengthy and costly appeal process, the insurance company accepted the ruling and paid \$15,000.00 to the lawyer for his loss of the rare cigars lost in the "fires."

But... After the lawyer cashed the check, the insurance company had him arrested on 24 counts of ARSON! With his own insurance claim and testimony from the previous case used against him, the lawyer was convicted of intentionally burning his insured property and was sentenced to 24 months in jail and a \$24,000.00 fine.

A Short History of the Magistrates and Judges Association of Namibia

Some of the Inter Se readers may not be fully aware of the origins of the Magistrates' and Judges' Association of Namibia (MJAN). The model for local Magistrates' and Judges' Associations is the Commonwealth Magistrates' and Judges' Association (CMJA).

The Commonwealth Magistrates' and Judges' Association (CMJA), headquartered in London, was founded in 1970 initially as the Commonwealth Magistrates' Association. The current name was adopted in 1988, thus allowing judges also to become members. This is the only organization that brings together judicial officers at all levels from across the Commonwealth.

The CMJA is to be distinguished from the official Commonwealth, a political/cultural organisation bringing together former British colonies, including other countries such as Namibia or Mozambique, which although not former colonies of Britain, are members. The CMJA is governed by a General Assembly of its members that meets every 4 years. The General Assembly is elected at Annual Conferences often held at some exotic or sought-

after holiday places in Commonwealth countries. The 2013 Annual Conference is being held in Jersey, Channel Islands, from 23-26 September 2013.

The CMJA encourages the establishment of local Magistrates' and Judges' Associations to foster collegiality and exchange of information amongst judicial officers at all levels of the judiciary. Namibia did not have a local MJA at independence until in 1995 when the first meeting was held in Windhoek.

The meeting constituting the Association was preceded by a judicial workshop where all judge and magistrates were invited. The occasion also saw the Secretary-General of the Commonwealth Judicial Education Institute, Judge Sandra Oxner, in attendance. At that meeting the present Constitution was adopted and office-bearers were elected.

The Hon Mr Justice Bryan O'Linn was elected President of the Association together with the following other office-bearers: His Worship Magistrate Petrus Unengu (currently Acting Judge of the High Court) as Vice-president, Her Worship Magistrate

Johanna Salionga as Secretary, Her Worship Rina Horn as Treasurer and the Hon. Mr Justice Teek as additional member. All permanent judges of the High Court joined the association immediately after the founding meeting, but only a small number of magistrates joined at that time.

The strength of any organisation lies in numbers. Remember the old saying "there is strength in numbers", and this is true in respect of the MJAN. The more members there are the more effective the Association can become. It is ideal to have all eligible members join and become active participants.

This is particularly true of judges who as members of the senior judiciary can be of great assistance to the association and can mentor the members from the lower judiciary. This is absolutely crucial if the association is to have some relevance and influence. Secondly, MJAN needs to foster unity of purpose, reinvent itself and become better organised. The spirit of professionalism should permeate all its activities.

The third point I wish to make

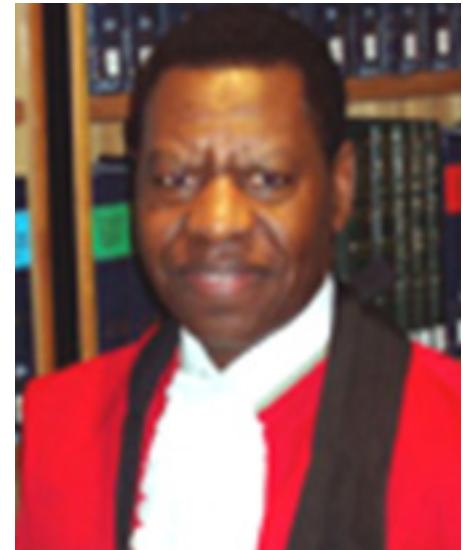
is that it is absolutely necessary for the MJAN to maintain links with the CMJA. In view of the fact the MJAN is the predominant umbrella association, with statutory recognition, in our country which allows judicial officers and judges to unite and interact, it is important that it becomes an active member of the CMJA. Such a global representation of this association

can produce benefits vital for the growth and strengthening of our judiciary.

CMJA has amended its membership fees to accommodate small jurisdictions such as ours.

There is no reason for us not to forge a closer relationship with the global association and by extension with our Commonwealth colleagues.

It can be done.



Hon. Chief Justice Peter Shivute

Recording formal admissions after a plea of not guilty and the right of an undefended accused to a fair trial

A frequent occurrence when perusing review cases is the inadequacy with which some magistrates comply with their duty to fully and accurately record formal admissions.

One of the examples of how a formal admission was treated is the following:

“Formal admissions explained, accused understands and admits to formal admissions”, without stating what admission has been recorded. It is trite law that the record of proceedings must reflect that the effect or consequence of a formal admission has been explained to an undefended accused person.

One of the circumstances in which a magistrate would be required to record formal ad-

missions is where an accused has pleaded not guilty but admitted certain allegations in the charge sheet. An admission is an acknowledgement of a fact.

In terms of section 115(2)(b) of Act 51 of 1977 a court must ask accused person whether an allegation which is not placed in issue by the plea of not guilty may be recorded as an admission of such an allegation.

If an accused person consents, the admission once recorded, is deemed to be an admission under section 220.

Where an accused person refuses to consent to the recording of an admission, it remains an informal admission and its admissibility is

governed by the provisions of section 219A. The State will be required to prove the other allegations in the charge sheet which are still in dispute.

A court is required to record only facts alleged by the State as admissions (deemed to be admissions under section 220) and should not record exculpatory parts of a plea explanation or any other self-serving statement, for example, where an accused on a charge of assault admitted the actus reus but added that he acted in self-defense, the averment that he acted in self-defense is not recorded as part of the formal admission, only the admission of the actus reus.

What needs to be emphasized is that it must appear from

the record of the proceedings what has been explained to the undefended accused person. This is important since the effect of a formal admission is that the admitted allegation (fact) becomes conclusive proof against such undefended accused person. It is the duty of any judicial officer, firstly, to satisfy himself or herself that the unrepresented accused person's decision to make the admission, has been taken with the full understanding of the meaning and effect of such an admission. In this regard the accused person must be informed that once he or she has so consented to an admission being recorded, the State would be relieved of the onus to prove such admission by way of leading evidence and that such admission would become conclusive proof against him or her.

Secondly, if an accused person consents to the recording of a formal admission such admission must be recorded, read back to the accused, and be confirmed by the accused. The following would by way of an example appear on the record:

"The following admission deemed to be an admission in terms of the provisions of section 220 of Act 51 of 1977 and confirmed by the accused

person is hereby recorded." "The accused admits that on 2 January 2013 and at Arandis in the district of Swakopmund he stabbed the complainant (include name) once with a knife on his thigh."

This duty of the judicial officer is especially of importance where an unrepresented accused person intends to admit an allegation which is beyond the range of his or her personal knowledge for example, the cause of death of a person who died of multiple injuries.

The duty referred to had been developed by the courts over the years, and the inclusion of the right to a fair trial as a fundamental human right in the Namibian Constitution underscores the importance of this duty of judicial officers enunciated by the courts.

In conclusion, and for the benefit of presiding judicial officers, it must be mentioned that there is authority that a formal admission does constitute evidence for the purpose of sections 81(1) and 118 of Act 51 of 1977. Thus where a formal admission, or an admission deemed to be an admission under section 220, has been recorded before a particular magistrate, the case cannot subsequently proceed before another magistrate in terms of section 118 and an additional count cannot thereafter be added in terms

of section 81(1).

I did not intent to deal exhaustively with formal admissions, but merely wish to emphasise the importance of recording admissions fully and accurately in relation to an unrepresented accused person.



Mr. Justice EPB Hoff

A WARM WELCOME TO OUR NEW MJAN MEMBERS



Magistrate Anthony Shapumba
Okakarara Magistrate's Court



Magistrate Esme Molefe
Rundu Magistrates' Court



Magistrate Peingeondjabi Shipo
Luderitz Magistrate's Court



Magistrate Clara Mwilima
Otavi Magistrate's Court



Magistrate Jennifer Nghishitende
Karasburg Magistrate's Court



Magistrate Elvis Mwilima
Outjo Magistrate's Court

The Role and Duties of the Ombudsman

Introduction

The Ombudsman is a constitutional office and being a creature of statute, the Ombudsman is obliged to comply with its statutory duties. The work of the Ombudsman is directed to one goal; i.e. to achieve equitable outcomes for complaints from the public and foster improved and fair administration by ministries and institutions. The main functions and duties remain the receiving and investigation of complaints relating to maladministration (in fact bad administration), violations of human rights and fundamental freedoms, misappropriation of public monies and misuse of government property and lastly, the overutilization of living natural resources and irrational exploitation of non-renewable resources.

Investigations

We usually receive complaints in person, telephonically and in writing (letters received through the post office, e-mail or faxes), but we also receive complaints directly during our regular visits to institutions such as prisons, police cells and hospital/mental institutions as well as during our annual complaint intake programmes, covering the whole country, including rural areas.

The Ombudsman's task is to conduct investigations and then to give "judgements". In the course of the interaction between citizen and the authority, the citizen may complain that the authority has acted "wrongly". The authority dismisses the complaint and the aggrieved citizen then takes the complaint to the Ombudsman.

A complaint is defined as an "allegation against a person". But in practice "complaint" covers approaches to the Ombudsman

whether for advice, information or to raise an issue. In these circumstances, the complainant has a "problem" which needs our intervention. The complainant then expects action from the Ombudsman, which is geared towards solving the "problem" which gave rise to the complaint. But the ultimate responsibility for providing the solution lies with the relevant authority. All that the Ombudsman can do is bringing a solution closer.

Whilst performing his duties the Ombudsman has the following powers: (as per section 4 of the Ombudsman Act, Act 7 of 1990):

- (1)(a) the Ombudsman determine the nature and extent of any inquiry or investigation
- (b) the Ombudsman or any person on his or her staff authorized thereto by the Ombudsman in writing shall have, subject to the provisions of any law regulating the privileges or immunities
 - (i) the right to enter at any time after such notice as the Ombudsman may deem sufficient or appropriate any building or premises or any part of any building or premises, except any building or premises or any part thereof used as a private home, and to make such enquiries therein or thereon, and put such questions to any person employed thereon or finds himself in or on that building or premises in connection with the matter in question, as the Ombudsman may deem necessary in connection with that inquiry or investigation;
 - (ii) access to all books, vouchers, other documents, money, stamps, securities, forms having a face or potential value, equipment, stores and other movable goods in the possession or under the control of any person, except the private correspondence or goods of any such person, and which the Ombudsman deems necessary to inquire into or to investigate in connection with such inquiry or investigation;
 - (iii) the right to request particulars and information from any person, which the Ombudsman may deem necessary in connection with that inquiry or investigation;
 - (iv) the right, without payment of any fees, to make enquiries into and extracts from, or copies of, any such book, voucher or other document which he or she may deem necessary in connection with that inquiry or investigation;
 - (v) the right to seize anything, but subject to the provisions of this paragraph, which he deems necessary in connection with that inquiry or investigation or which is connected with that inquiry or investigation, as the case may be, and to retain any such thing in safe custody for as long as it is necessary for purposes of that inquiry or investigation;
 - (c) the Ombudsman may by notice in writing require any person to appear before him or her in relation to that inquiry or investigation at a time and place specified in such notice and to or her all such books, vouchers of him or other documents or things in the possession or under the control of any such person, but subject to the provisions of paragraph (b), and which the Ombudsman may deem necessary in connection with that inquiry or investigation;
 - (d) the Ombudsman may ad-

minister an oath or take an affirmation from any person

(3) Any person questioned under subsection (1) shall, subject to the provisions of subsection (4)-

(a) be required to co-operate with the Ombudsman and to disclose truthfully and frankly any information within his or her knowledge relevant to any inquiry or investigation of the Ombudsman;

(b) be compelled to produce any book, voucher or other document or thing, but subject to the provisions of subsection (1)(b), to the Ombudsman which the Ombudsman may deem necessary in connection with that inquiry or investigation.

Role of the Ombudsman

Being an Ombudsman is a difficult role to fill; it requires the office holder to dig deep into the operations of government when it is said to have ill functioned. However, I must hasten to add, it is an immensely satisfying role to perform; that is to help citizens achieve substantive justice when faced with problem in their interaction with public administration. It is the role of the Ombudsman as mediator in a dispute, to actively pursue basic fundamental truth and fairness based on his/her own personal framework of integrity, reasonableness and reliability, without any subservience or fear to act against any party, if necessary (Teek, P. Ombudsman Annual Report 1990 at page 3).

Over the years varying views and ideas of the role of the Ombudsman in respect of human rights have emerged:

- the Ombudsman is primarily viewed as a public defender – defender of human rights and also the defender of the public against bureaucracy (Abedin, A: What should be the primary focus of the Ombudsman? Protecting Human rights and addressing public grievances versus fighting corruption: emphasis on South Asia and the common worth Caribbean (2008) Vol 8 The International Ombudsman Yearbook at 152 & 3)

- the Ombudsman's primary task is helping to ensure that the government respects its citizens' human rights. (Supra)

- the Ombudsman is presented as the citizen's defender, champion or protector of human rights and freedoms, guardian of law, redresser of public complaints. (Oosting, M: Protecting the integrity and Independence of the ombudsman Institution: The Global Perspective (2001) Vol 5 The International Ombudsman Yearbook, at 25)

- the Ombudsman has been said to be a concept entrenched within a democratic system as a safeguard against governmental abuse of individual liberties. (Kajwara, F; Impact of the Ombudsman on good governance and public service administration (1997) Vol 1 Interantional Ombudsman yearbook at 56)

- the Ombudsman helps individuals by giving them a chance to exercise their right to make a complaint where they would either wise fear to do.(supra)

The power to investigate human rights issues and individual complaints is central to addressing human rights concerns in a meaningful manner and central to the protection role of the Ombuds-

man. Linked to this, is the role of the Ombudsman as watchdog, reviewing conditions in detention facilities, visiting facilities unannounced and meet in private with detainees.

The Right to good administration

Administrative procedures are in many countries comprehensively regulated by law. However, it is quite uncommon for good administration, the right to complain and ready access to the Ombudsman to have the status of fundamental rights in legal systems. Irrespective of whether good administration is a basic human right or not in our country, proper administration and good governance cut across all public service delivery and as such have a direct bearing on fundamental human rights; promotion of good administration is central to the work of all Ombudsman everywhere. Neglecting or refusing to reply to queries, failure to provide information, failure to give reasons, carelessness, undue delays, harsh or improper treatment, etc are everyday realities in the lives of citizens and Ombudsman. It is through their work that Ombudsman are developing good administration and raising it to the level of a basic human right.

The inextricable link between administrative justice and human rights is very well established in the Namibian Constitution (Article 18).

The Right to complain to the Ombudsman

The Ombudsman is somebody to whom citizens may take complaints about actions or omissions of officials in government service; someone who receive complaints from aggrieved person against government agencies, officials and em-

ployees.... (The International Bar Association, quoted by N. Abedin (supra) at 151)

If good administration is a basic human right that each citizen is entitled to, then aggrieved persons have the right to complain to the Ombudsman.

Bruce Barbour made an important point where he states:

"All the citizens we serve have a stake in our office. Each of them has a right to complain to us. Each of them deserves to have their complaint dealt with professionally, courteously and effectively." (Barbour, B; The Ombudsman and today's demographic realities (2004) A paper presented at the International Ombudsman Institute Quadrennial Conference, Quebec City)

The Right to ready access to the Ombudsman

If an aggrieved person has a right to complain, then he/she is entitled to speedy, free and informal procedures to address the wrongs. The state has a duty to provide aggrieved persons with ready access to an institution such as the Ombudsman to correct the wrongs.

Convinced that the Ombudsman is now more than ever before indispensable in the context of prevailing realities, Prof Ayeni argues "it is not far fetched to suggest that ready access to an Ombudsman now qualifies as a right in itself that every citizen is entitled to in a modern democratic state". For him the Constitution of the Republic of Namibia probably comes closest to this position with its guarantee of the service of its Ombudsman as a basic right. (Ayeni, V.O; the Ombudsman in the achievement of administrative justice and human rights in the new millennium

(2000). Presented at the 7th International Ombudsman Institute World Conference, Durban Vol 5 International Ombudsman Yearbook at 41-42)

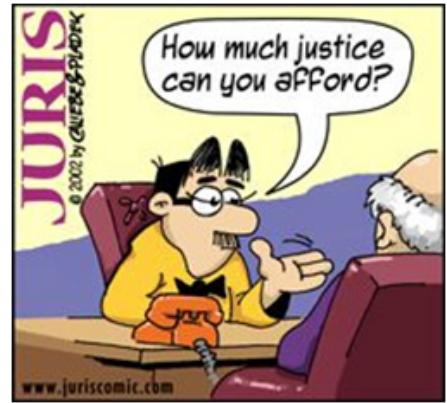
Article 25 (2) of the Constitution, in its Chapter on Fundamental Human Rights and Freedoms, provides that:

"Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient"

Conclusion

As a young democracy, Namibia has made enormous strides in addressing the inequities of the past, achieved national reconciliation, foster peace and unity and a common loyalty to a single state. However, much more needs to be done to make the practical enjoyment of all human rights and freedoms a reality for all Namibians.

Prepared by: Eileen Rakow
(Director)
Office of the Ombudsman



GOOD LAUGHS

MJAN events, flash back



Sponsored by:





The Magistrates and Judges Association of Namibia

P.O. Box 9246
Eros
WINDHOEK

Enquiries: Mrs. V. Stanley
The Secretary

APPLICATION FOR MEMBERSHIP

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TITLE: _____

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EMAIL ADD: _____

FAX NO: _____

Payment of annual membership fee of N\$ 400-00 made by: **please indicate**

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Banking details

Nedbank, Mainbranch, branch code:461609, Account no: 11000198597, Current account ,name:Magistrates and Judges Association.

Please Fax proof of payment to 061 238 492 or contact the Secretary

NB: Membership will be confirmed upon receipt of payment