REPUBLIC OF NAMIBIA

OFFICE OF THE ATTORNEY-GENERAL

FREQUENTLY ASKED LEGAL QUESTIONS

SECOND EDITION

Windhoek, Namibia

May 2016

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May 12, 2016

Right Honourable Dr. Saara Kuugongelwa-Amadhila, MP

The Prime Minister of the Republic of Namibia

Windhoek

Dear Right Honourable Prime Minister,

FREQUENTLY ASKED LEGAL QUESTIONS

1. The Attorney-General being the principal legal advisor to the President and Government by virtue of Article 87(b) of the Namibian Constitution, receives

numerous requests from Offices/Ministries/Agencies (hereinafter referred to as "OMAs") for legal advice.

2. Incidentally, to the benefit of all interested persons, my Office has once again identified the most frequently asked legal questions and compiled this second edition of our publication, Frequently Asked Legal Questions, to assist OMAs in answering questions on specific issues on a day-to-day basis.

3. It is therefore my privilege to present to you, Right Honourable, this document as an easily accessible reference to assist you in performing your functions.

Yours sincerely,

_____

MR. SAKEUS E.T. SHANGHALA, MP
ATTORNEY-GENERAL

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1. CONSTITUTIONAL LAW

1.1 EXECUTIVE AGREEMENTS

1.1.1 Article 32 of the Namibian Constitution reads as follows:

> (1) As the Head of State, the President shall uphold, protect and defend the Constitution as the Supreme Law, and shall perform with dignity and leadership all acts necessary, expedient, reasonable and incidental to the discharge of the executive functions of the Government, subject to the overriding terms of this Constitution and the laws of Namibia, which he or she is constitutionally obliged to protect, to administer and to execute.
>
> (3) Without derogating from the generality of the functions and powers contemplated by Sub-Article (1) hereof, the President shall preside over meetings of the Cabinet and shall have the power, subject to this Constitution to:
>
> …
>
> (e) negotiate and sign international agreements, and to delegate such power;

1.1.2 Article 63 of the Namibian Constitution states that:

> (1) The National Assembly, as the principal legislative authority in and over Namibia, shall have the power, subject to this Constitution, to make and repeal laws for the peace, order and good government of the country in the best interest of the people of Namibia.
>
> (2) The National Assembly shall further have the power and function, subject to this Constitution:
>
> …
>
> (e) to agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e) hereof;

1.1.3 For the purposes of understanding executive agreements, Articles 32 and 63 of the Namibian Constitution must be read together.

1.1.4 Article 32(3)(e) of the Namibian Constitution, read in isolation, conveys the impression that the President can, following negotiations, sign treaties that enter into force upon signature and bind Namibia without the approval of Parliament.[1]

1.1.5 Not all international agreements require ratification. Therefore, the President is empowered to sign international agreements and bind Namibia contractually. In other words, Article 63(2)(e) of the Namibian Constitution is only applicable if it is the intention of the President and/or Government to make such an international agreement form part of the domestic law. If the specific international agreement requires ratification, a depository note or exchange of notes is necessary.

1.1.6 The process for ratification is enshrined in Article 63(2)(e) read with Article 32(3)(e) of the Namibian Constitution which states that:

> "(2) The National Assembly shall further have the power and function, subject to this Constitution:
>
> (e) to agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e) hereof; "

1.1.7 What is meant by 'subjecting' one action to another?

The word *subject* is defined as follows:

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[1] Onkemetse Tshosa (2010) "*The status of international law in Namibian national law: A critical appraisal of the constitutional strategy.*" NLJ. p. 19. Available at: http://www.kas.de/upload/auslandshomepages/namibia/Namibia_Law_Journal/2010_1/NLJ_section_1.pdf

"1. A thing that is being discussed or dealt with or that gives rise to something, 2. Dependent or conditional upon, 3. Conditionally upon."[2]

1.1.8 It should be emphasised that Article 32(3)(e) is subject to 63(2)(e) by the framework of Article 63(2)(e) of the Namibian Constitution. Thus, it may be said that this subjection is only applicable if the Agreement in question requires ratification, or it is the intention of the President and/or Government to make such Agreement a municipal law of Namibia. Therefore, the two may be read together or separately depending on the desired outcome.

1.1.9 Article 63(2)(e) requires that the National Assembly *agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(1) hereof.* While Article 32(3)(e) empowers the President to "*negotiate and sign international agreements, and to delegate such power".* Therefore, National Assembly's approval is only required for international agreements that requires ratification or whereby the Namibian Government intends to make the specific international agreement a domestic law of Namibia.

1.1.10 There seems to be different approaches to the interpretations of the afore-mentioned provisions:

(a) In *State v Carracelas*[3] the court held that the mere fact than an international treaty has been entered into does not *ipso facto* make the provisions of such a treaty part of the domestic law of Namibia. Legislative ratification of the treaty is first required before it will be considered a part of domestic law.

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[2] Judy Pearsall (1999). *The Concise Oxford Dictionary Tenth Edition*, Oxford University Press, Oxford, p.1427.

[3] State v Carracelas (1) 1992 NR 322 (HC)

(b) The *Erasmus approach'* is the most liberal and compatible with international law. In terms of the Erasmus approach, treaties binding on Namibia in international law are automatically incorporated into the domestic law.[4]

(c) The *Mtopa approach* is more restrictive and would require the agreement of the National Assembly for incorporation in certain cases and the development of domestic legislation in other cases.[5]

1.1.11 The approach of the court appears to be the most restrictive in that it requires the development of domestic legislation for incorporation of treaties into the domestic law in all cases.[6]

1.1.12 In other words if Namibia is to enter into an Agreement with Angola for the supply of oil. This is a bilateral international agreement that does not have to become law to make it valid in Namibia and it may not necessarily require ratification as it is merely a purely commercial agreement. Therefore, bilateral international agreements between two States that are purely commercial in nature will not necessarily require ratification and as such are valid under contract law without ratification from Parliament.

1.1.13 The same may be said for permanent joint commissions and memoranda of understanding, amongst others; they do not need to be taken to the National Assembly for approval for its ratification or accession. Some of these agreements however require Cabinet consideration and approval.

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[4] Devine D.J. (1994). The Relationship between International Law and Municipal Law in light of the Constitution of the Republic of Namibia. Volume 26 – Issue 2, Case Western Reserve University, p. 304 - 305

[5] Devine D.J. (1994). The Relationship between International Law and Municipal Law in light of the Constitution of the Republic of Namibia. Volume 26 – Issue 2, Case Western Reserve University, p. 304 - 305

[6] Devine D.J. (1994). The Relationship between International Law and Municipal Law in light of the Constitution of the Republic of Namibia. Volume 26 – Issue 2, Case Western Reserve University, p. 304 - 305

1.1.14 Therefore, Agreements that do not need ratification are referred to as Executive Agreements. Executive agreement may be defined as an Agreement between two Governments that is less formal than a treaty and is not subject to the constitutional requirement for ratification.[7] Put differently, there three branches of Government namely, the **Executive[8],** Legislature and Judiciary. Hence the name stipulates **Executive Agreement,** this simply means that it is those Agreements that fall within the domain of the Executive branch of Government.

1.1.15 In conclusion, Article 32(3)(e) may be applied alone, or alongside Article 63(2)(e) of the Namibian Constitution. In the first instance it will apply alone if no ratification is required by the international agreement in question, and in the second instance when only the approval of the National Assembly is required as per Article 63(2) (e) of the Namibian Constitution.

[7] http://www.britannica.com/topic/executive-agreement last accessed on May 10, 2016.

[8] Emphasis added.

1.2 The Procedure of Signing and Ratifying International Agreements in Namibia

1.2.1 For the purpose of this publication, we will use the term "international agreement(s)" or "agreement(s)" when generally referring to international instruments such as treaties, protocols, conventions, pacts, accords, final acts or agreements.

1.2.2 In the sphere of the law of treaties, the word "ratification" and its derivatives (such as "ratified") relate to an international act of becoming a party to an international instrument and does not refer to the domestic or national act of a State's Parliament, with which the term is usually associated. The international law usage of the term is reflected in its definition in the Vienna Convention, which reads as follows:

> "[R]atification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.".

1.2.3 States are guided by the relevant provisions of the Vienna Convention, as they reflect generally applicable customary international law relating to treaties (with the Convention being a codification of customary international law principles in that field, with a few exceptions). In relation to international agreements, which are subject to ratification, Article 16 of the Vienna Convention[9] specifies that the consent of States to be bound internationally is established through instruments of

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[9] Article 16 of the Vienna Convention reads as follows:

> "Exchange or deposit of instruments of ratification, acceptance, approval or accession
> Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:
> (a) their exchange between the contracting States;
> (b) their deposit with the depositary; or
> (c) their notification to the contracting States or to the depositary, if so agreed.".

ratification. Consent to be bound is, accordingly, expressed once the contracting States -

1.2.3.1 deposit instruments of ratification with the Secretariat of the international body under whose auspices the agreement is adopted;

1.2.3.2 exchange such instruments between them; or

1.2.3.3 notify each other, or the depositary, of their instruments of ratification, if so agreed.[10]

1.2.4 The internal or domestic steps which precede the deposit of the instrument of ratification do not constitute ratification, but comprise a process which leads to ratification on the international plane.

1.2.5 It is for this reason that Article 63(2)(e) of the Namibian Constitution does not state that the National Assembly ratifies an international agreement, but that it may "agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e)", which implies that ratification is not carried out when the agreement is before the National Assembly, but through a different act. The National Assembly merely agrees to the taking place of that different act.

1.2.6 Owing to the definition of "ratification" under international law, the deposit, exchange or notification of an instrument of ratification to the relevant body is

[10] Naturally, if an agreement states that it enters into force upon signing only (hence, through a "definite signature" and not through ratification or other means), the President's signature (or that of his delegate) would suffice to express consent to be bound (or for an agreement to enter into force if so specified) and no instrument of ratification needs to be deposited. Furthermore, in terms of Article 7(2)(a) of the Vienna Convention on the Law of Treaties, the Head of State and the Minister responsible for foreign affairs has full powers to negotiate and bind the State. All other Ministers and officials require instruments of power to negotiate or conclude international agreements binding the State.

required if the agreement itself calls for ratification. This will be the case even if the internal processes of a State do not require approval by its Parliament.

1.2.7 There are two provisions in the Namibian Constitution, which confer powers in relation to the processes involved in concluding international agreements, namely -

1.2.7.1 Article 32(3)(e) which empowers the President (or his delegate) to "*negotiate and sign international agreements*"; and

1.2.7.2 Article 63(2)(e) which makes it the function of the National Assembly to "*agree to the ratification of […] international agreements which have been negotiated and signed in terms of Article 32(3)(e)*" (by the President or his delegate).

1.2.8 In circumstances in which an international agreement (which is signed by the President or his delegate) requires that it be ratified in order for it to come into force, the consideration of whether Namibia should ratify such an agreement becomes the function of the National Assembly by virtue of Article 63(2)(e) of the Namibian Constitution, and the signature of the President (or his delegate) is not sufficient to bind Namibia.

1.2.9 The process of enabling Namibia to become party to an international agreement, which requires ratification, can be outlined as follows:

1.2.9.1 The relevant line Ministry prepares, and submits to Cabinet, a Cabinet memorandum through which it seeks approval from Cabinet to negotiate an envisaged international agreement (the required format and content of the memorandum are set out in the Cabinet Handbook, 2016).

1.2.9.2 Having negotiated the proposed agreement with the approval of Cabinet and the assistance of the Office of the Attorney-General, the relevant line Ministry submits the negotiated (but yet unsigned) text of such agreement to

the Ministry of International Relations and Cooperation (which is the Government's facilitator with regard to international agreements through its Directorate: Treaties and Agreements).

1.2.9.3 The Ministry of International Relations and Cooperation scrutinizes the proposed agreement and submits it to the principal legal advisor to Government (the Attorney-General) for legal scrutiny and certification.

1.2.9.4 Following certification by the Attorney-General, the Ministry of International Relations and Cooperation submits, to the relevant line Ministry, the proposed agreement as certified, together with any comments made by the Ministry of International Relations and Cooperation and the Attorney-General.

1.2.9.5 After consideration of the comments made by the Ministry of International Relations and Cooperation and the Attorney-General, the President (or his delegate) may sign the proposed agreement.

1.2.9.6 Once the President (or his delegate) has signed the proposed agreement, the relevant line Ministry must seek approval from Cabinet (through the submission of a Cabinet memorandum) to authorize the relevant portfolio Minister to table the signed agreement before the National Assembly to seek a resolution in which the National Assembly agrees to the ratification of the agreement concerned. Cabinet may find reason in its deliberations, to delay ratification, to agree that the agreement not be ratified, or that it be ratified with reservations.

1.2.9.7 If the National Assembly resolves to agree to the ratification of the said agreement as proposed by the line Ministry with Cabinet input, the relevant

line Ministry then forwards, to the Ministry of International Relations and Cooperation, the following documents:

1.2.9.7.1 the signed agreement;

1.2.9.7.2 an instruction to the Ministry of International Relations and Cooperation to prepare an instrument of ratification relating to the agreement;

1.2.9.7.3 proof of the approval of ratification by Cabinet; and

1.2.9.7.4 proof of the resolution in which the National Assembly agrees to the ratification.

1.2.9.8 On the said instruction, the Ministry of International Relations and Cooperation prepares the relevant instrument of ratification, which the Minister responsible for international relations and cooperation signs.

1.2.9.9 The Ministry of International Relations and Cooperation (after signature of the instrument of ratification by its Minister) then deposits the instrument with the entity or person tasked with receiving instruments of ratification (the depositary) through an appropriate diplomatic representation such as a diplomatic mission of Namibia in the country in which the depositary is situated.

1.2.9.10 Once the depositary receives the instrument of ratification and finds it to be in order, it will send a confirmation of the deposit of the said instrument to the relevant diplomatic representation of Namibia; at this stage, Namibia would be considered to have ratified the agreement through the act of depositing the instrument of ratification.

1.2.9.11 Thereafter, the said diplomatic representation forwards the confirmation of the deposit to the Ministry of International Relations and Cooperation,

which in turn submits the confirmation to the relevant line Ministry and to the Office of the Attorney-General.

1.2.9.12 The ratified agreement must then be signed by the Speaker of the National Assembly and published in the Government *Gazette* (the publication is arranged through the division in the Ministry of Justice responsible for such *Gazette*). In practice, this division has been receiving instructions to publish ratified agreements from the Office of the President, the line Ministry concerned and the National Assembly, respectively.

1.2.9.13 Finally, it is the responsibility of the relevant line Ministry to ensure that measures are put in place to enable the Republic of Namibia to implement the ratified instrument.

1.2.10 The date on which an agreement comes into force is determined by, or under, the agreement itself.

(EXAMPLE OF ORDER PAPER OF THE NATIONAL ASSEMBLY)

Thursday, 21 April 2016 No. 31 - 2016

THIRD SESSION, SIXTH PARLIAMENT

REPUBLIC OF NAMIBIA

ORDER PAPER

OF THE

NATIONAL ASSEMBLY

THURSDAY, 21 APRIL 2016

(14:30 – 17:45)

NOTICES OF QUESTIONS

ORDER OF THE DAY

Resumption of Debate on the xxx – [Honorable Member]

NOTICE OF A MOTION

Minister of Line Ministry

That this Assembly –

Agrees to the ratification of / accession to the Convention / Protocol on **Subject Matter**.★

★ The order paper must indicate one or the other – ratification of or accession to..

(EXAMPLE OF INSTRUMENT OF RATIFICATION)

INSTRUMENT OF RATIFICATION OF THE AFRICAN CHARTER ON THE VALUES AND PRINCIPLES OF DECENTRALISATION, LOCAL GOVERNANCE AND LOCAL DEVELOPMENT

_____

WHEREAS the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development, was adopted by the Assembly of the African Union Heads of States and Government, June 26-27, 2014 by Decision No. 18th/28.10.14/006, at its 23RD Session at Malabo, Equatorial Guinea and was open for signature on October, 2014, and shall entered into force thirty (30) days after receipt by Chairperson of the Commission of the African Union of fifteen (15) instrument of ratification;

NOW THEREFORE I [name and title of the Head of State, Head of Government or Minister for Foreign Affairs] declare that the Government of [name of State], having considered the above-mentioned [treaty, convention, agreements, etc.], ratifies the same and understates faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed this instrument of ratification at [place] on [date] [signature]

……...

The Minister of International Relations & Cooperation

(EXAMPLE INSTRUMENT OF ACCESSION)

INSTRUMENT OF ACCESSION TO THE CONVENTION ON EARLY NOTIFICATION OF NUCLEAR ACCIDENT, 1986

_____

WHEREAS the Convention onConvention on Early Notification of Nuclear Accident, 1986, was adopted by the General Conference at its special session, September 24-26, 1986 and was open for signature at Vienna on September 26, 1986 and at New York on October, 1986, and entered into force on October 27, 1986;

NOW THEREFORE I [name and title of the Head of State, Head of Government or Minister for Foreign Affairs] declare that the Government of [name of State], having considered the above-mentioned [treaty, convention, agreements, etc.], accedes to the same and understates faithfully to perform and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I have signed this instrument of accession at [place] on [date] [signature]

……...

The Minister of International Relations & Cooperation

2. ADMINISTRATIVE LAW

2.1 DISCRETIONARY POWERS

2.1.1 Discretion (adverb-discretionary) means the freedom to decide what should be done in a particular situation[11], on the other hand, power (plural-powers) means a right or authority given or delegated to a person or a body.[12] In other words, to have a discretionary power means that an official has to make a choice between two or more validly legal possibilities, for example, a town-planning committee has a discretion whether to accept a proposed town-planning scheme or to reject it and in exercising this discretion the committee must take **all relevant factors** and considerations into account.[13]

2.1.2 Even though administrative bodies e.g. Ministries or administrative persons e.g. Ministers, amongst others, have discretionary powers, in the exercise of such powers all relevant factors must be considered or taken into account. Put differently, a Minister must not take a decision just because he/she is empowered to take a decision but, the Minister must first consider all relevant factors which factors are usually found in the enabling legislation, and those factors will assist in his/her decision-making.

2.1.3 Article 41 of the Namibian Constitution reads as follows:

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[11] Pearsall P. (1999). *Concise Oxford Dictionary Tenth Edition*, Oxford University Press, p. 409.

[12] Pearsall P. (1991). *Concise Oxford Dictionary Tenth Edition*, Oxford University Press, p. 1122.

[13] Yvonne Burns. (1999). *Administrative Law under the 1996 Constitution*, Butterworths, Durban, p. 104.

"All Ministers shall be accountable individually for the administration of their own Ministries and collectively for the administration of the work of the Cabinet, both to the President and to Parliament."

2.1.4 Where a statute stipulates that certain facts must be present or states that 'the official shall…' perform some or other action, the official has no discretion.[14] Article 41 of the Namibian Constitution literally means that Ministers are answerable to the President and to Parliament for the administration of their Ministries. In matters that attract or hold financial implications for the State, the administrative bodies do not and cannot exercise discretion. Section 21 of the State Finance Act, 1991 (Act No. 31 of 1991), stipulates that:

"Notwithstanding anything to the contrary in any law contained- (c) no claim against the State shall be settled, without the authorization of the Treasury."

2.1.5 This means that no one else but Treasury has the power to approve settlements whereby there is a claim against Government in other words, even if the line Ministry desires to settle out of court, it must first seek approval from Treasury. The term "shall" is peremptory. Peremptory means "*1, insisting on immediate attention or obedience. 2, final"*[15]*,* meaning that the provision requires strict compliance. Moreover "shall" is not the only term that is peremptory in nature, some provisions may use other peremptory terms including; "must" and "should", amongst others.

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[14] Yvonne Burns. (1999). Administrative Law under the 1996 Constitution, Butterworths, p. 104.

[15] Pearsall P. (1999), Concise Oxford Dictionary Tenth Edition, Oxford University Press, p.1059.

2.1.6 A recent example of a peremptory provision is Section 25 of the Public Procurement Act, 2015 (Act No. 15 of 2015), states that:

"The powers and functions of the internal structures of a public entity are exercised and performed in accordance with the prescribed procedure and processes."

This is an example of a peremptory provision, which demands compliance although it lacks the generally accepted peremptory words such as *shall, must* and *should*. Be that as it may, most provisions carry the language of shall, must or should so as to clarify its peremptory nature.

2.1.7 On the other hand there are instances whereby discretionary powers is allowed in law, and usually it exists in two forms:

2.1.7.1 Wide discretionary powers

2.1.7.2 Restrictive discretionary powers.

2.1.8 *The Minister may issue regulations as he/she deems necessary to control health.* This is an example of a wide discretionary power which gives the Minister the sole discretion to decide when and under which circumstances the regulations will be issued. This also means that the conditions precedent under which the discretionary power may be exercised are undefined. Despite this wide and undefined discretion, the Minister's power is always subject to legal restrictions in that he/she must always act within the scope of the Namibian Constitution, other applicable laws and he/she must pay heed to government policy by considering economic, social, political, cultural issues and so on.[16]

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[16] Yvonne Burns. (1999). Administrative Law under the 1996 Constitution, Butterworths, Durban, p. 106.

2.1.9 Section 20 of the Public Enterprises Governance Act, 2006 (Act No. 2 of 2006), states that:

"(2) The portfolio Minister may provide the State-owned enterprise in writing with any comments in relation to its budget for the next financial year."

This is another example of undefined discretionary powers, meaning it is up to the Minister to provide comments, or not, as it is not mandatory, in other words, only if the Minister deems it necessary to do so.

2.1.10 Section 8 of the Namibia Refugees (Recognition and Control) Act, 1999 (Act No. 2 of 1999), reads as follows:

"(4) The Minister may at any time, after having afforded a member of the Committee an opportunity to be heard, remove such a member from office, if the Minister is satisfied that he or she – (a) is for whatever reason incapable of efficiently performing his or her functions as such a member; (b) has conducted himself or herself in a manner that is unbecoming to such a member or is prejudicial to the interest of the Committee; (c) has failed to comply with any provision of this Act:"

This is an example of restrictive discretionary powers since the Minister has a choice to remove or not to remove however, should the Minister decide to remove a committee member, the Minister may only remove such a member subject to the conditions as indicated in the said section.

2.1.11 In principle, all types of discretionary powers are ultimately subject to all the laws of the country. Therefore, administrative bodies and officials should always make decisions with due regard to the laws of the land, in particular Article 18 of the Namibian Constitution, which provides as follows:

"Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

2.2 **Motor Vehicle Collisions involving Government Owned Vehicles**

2.2.1 Motor vehicle collisions involving Government-owned vehicles occur frequently. Section 11(1)(a)(iii) of the State Finance Act, 1991 (Act No. 31 of 1991) provides as follows:

> "Whenever any person who is or was employed in a ministry or public office caused any loss or damage to the State in that he or she is or was responsible for […] destruction of or damage to [……] movable goods owned or leased by the State; the accounting officer concerned or, in a case where an accounting officer has caused such loss or damage […], the Treasury, shall determine the amount of such loss, damage […] and, subject to the provisions of subsection (3), by notice in writing order such person to pay the amount so determined within a period of thirty days as from the date of such notice".

Consequently the Permanent Secretary, alternatively the Treasury, in the event that a Permanent Secretary is involved, has a duty in terms of this provision of the State Finance Act, 1991, to determine the amount of loss the damage or destruction has caused the State as a result of a person employed by a ministry or public office and the Permanent Secretary then has a duty to order such a person by way of a notice in writing to pay the amount of the loss which is payable within 30 days from the date of the notice.

2.2.2 The Permanent Secretary concerned should notify the Auditor-General of all the facts in connection with such a loss or damage in respect of which an order for payment has been made, unless the Auditor-General has directed otherwise[17]. Similarly, the Permanent Secretary should report such losses and damages to the

[17] Section 11(2) of the State Finance Act, 1991

Treasury in terms of Treasury Instruction E A 0102 (a). The Permanent Secretary may request that Treasury waive the claim against the person employed by a ministry or public office in whole or in part if for any reason he or she feels that the loss or damage should not be recovered or should be recovered in part only[18].

2.2.3 Treasury Instruction E A 0301 (b) requires that the Permanent Secretary must order an investigation to determine the liability of an official or employee and as such provides that:

> "Losses and damages caused by the acts or negligence of officials/employees, including losses and damages arising from the handling or driving of static or mobile state equipment, are also dealt with in terms of section 11(1) of the Act. Consequently the accounting officer must order an investigation and obtain the necessary written statements which are required in the prevailing circumstances to determine the liability of an official or employee whose acts or negligence may have caused the loss or damage or contributed to it and then further action must be taken in accordance with section 11(1) of the Act."

2.2.4 Treasury Instruction E A 0302 provides that the Permanent Secretary should report the matter to the Government Attorney, as soon as the identity and whereabouts of the person whose unlawful act or omission caused loss or damage to the State becomes known, together with such further particulars as may be available. This instruction further mandates the Government Attorney, upon receipt of this report from the Permanent Secretary, to consider the matter and to provide advice as to the method to be adopted by the Permanent Secretary for recovering the money or property. However, the Permanent Secretary does not have to report a matter to the Government Attorney in terms of this instruction, should the Permanent Secretary

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[18] Section 11(3) of the State Finance Act, 1991.

recover the loss by means of a deduction from the person's salary, pension fund[19] or by way of the provisions of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).[20]

2.2.5 Government-owned motor vehicles are not insured. The State carries its accident risks and accepts liabilities for any expenditure arising from third-party claims, damage to Government-owned motor vehicles or the loss of, or damage to State property which would otherwise be payable by an insurer.

2.2.6 The Government will defend and/or settle a matter involving an employee of a ministry or public office, who was involved in a collision involving a government-owned vehicle, provided that Section 18 of the Regulations[21] under the Public Service Act, 1995 are complied with. These regulations indicate that an employee of a ministry or public office may use a government vehicle only if he or she:

2.2.6.1 is in possession of a valid driver's license;

2.2.6.2 was authorised to make use of the vehicle to make the journey by a competent staff member;

2.2.6.3 does not deviate from the scheduled route;

2.2.6.4 does not take the vehicle to his or her residence unless he or she has written permission to do so by the competent authority;

2.2.6.5 does not allow any unauthorised person to travel on the journey or conveying unauthorised goods;

2.2.6.6 does not use the vehicle for any other purpose other than for official purposes

2.2.6.7 does not drive the vehicle under the influence of intoxicating liquor or stupefying drug;

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[19] Refer to section 37D of the Pension Funds Act, 1956 (Act No. 24 of 1956).

[20] Treasury Instruction E A 0302 (a).

[21] Government Gazette No. 1187 dated 01 November 1995

2.2.7 The Government Attorney requires, in addition to the requirements of Section 18 of the Regulations, that the employee of the ministry or public office may not have:

2.2.7.1 confessed liability to a third party;

2.2.7.2 allowed an unauthorised person to drive the vehicle; or

2.2.7.3 exceeded the speed limit when the collision occurred.

2.2.8 The relationship between a Government driver and the Government is governed by the principle of vicarious liability. This principle[22] dictates that in a workplace context, an employer can be held liable for the acts or omissions of its employees, provided that it can be shown that they took place in the course of their employment. If the Government driver is found to have violated the provisions of section 18 of the Regulations, he or she may be held personally liable in terms of Section 11 of the State Finance Act, 1991.

2.2.9 Section 11 of the State Finance Act, 1991, empowers the State to deduct monies from employees for damages caused to its vehicles. If the Government driver complied with the Regulations under the Public Service Act, 1995, but was negligent in causing the accident, the Government still has to pay the private driver based on the vicarious relationship between the employer and the employee. The loss suffered by Government must then be written off as irrecoverable and Treasury approval must be sought by the relevant Ministry. To recover any costs for damages caused to Government-owned vehicles, Section 11 of the State Finance Act empowers the State to deduct a maximum of one-fourth of the gross monthly salary of the employee or the damages may be recovered by means of a deduction from the employee's pension

[22] Peté, Hulme et al, Civil Procedure – A Practical Guide (2nd Edition), at 4-6. Oxford University Press, Southern Africa (2015).

fund if he or she has resigned. In the event that the Government driver complied with the Regulations under the Public Service Act, 1995, but was grossly negligent in his/her actions, he or she may be charged with misconduct. Further steps include the Government Attorney recommending a disciplinary hearing or suspension of a driver from driving Government vehicles for a specified period, to be confirmed by the Head of the employee's department.[23]

2.2.10 In the event that the Government Attorney is of the view that the other party is at fault for the collision and advises the Permanent Secretary to that effect, as is required by Treasury Instruction E A 0302, the Permanent Secretary or the Treasury, as the case may be, shall recover the amount concerned by judicial proceedings as provided for in section 11(4)(b) of the State Finance Act, 1991.

2.2.11 Ministries and public offices are urged to timeously provide the Office of the Government Attorney with the necessary documentation and/or information which will enable the Government Attorney to adequately comply with its duty to consider and advise them on matters relating to losses and damages which was caused by the acts or negligence of officials/employees as provided for in Treasury Instruction E A 0301. Timeously notifying the Office of the Government Attorney will also assist in avoiding the prescription of matters which would result in the State not being able to institute judicial proceedings to recover the loss and/or damage.

[23] Public Service Staff Code Rules – Chapter D.IV, Part IV, Section 2(9).

2.3 Recovery of losses or damages to the State as a result of fruitless expenditure

2.3.1 Fruitless expenditure means expenditure which was made in vain and would have been avoided had reasonable care been exercised.[24] This includes transactions, events or conditions which are undertaken without value or substance and which do not yield a desired result or outcome.

2.3.2 Persons employed in a ministry or public office, must always act cautiously when spending State money or handling State assets, and must ensure that they abide by the public accountability principles to promote efficient, economic and effective use of resources and the attainment of value for money. The receipt, custody and banking of, the accounting for, and the control and disposal of State moneys, stamps, securities, forms having a face or potential value, equipment, stores and other moveable goods owned or leased by the State, is regulated in terms of the State Finance Act, 1991, as amended. It is this law that currently houses the public accountability of a person employed in a ministry or public office.

2.3.3 Section 11(1)(a)(iv) of the State Finance Act, 1991, makes provision for the recovery of losses or damages to the State as a result of fruitless expenditure by persons employed in a ministry or public office.

2.3.4 A person who is employed in a ministry or public office, is at all times expected to exercise reasonable care in the expenditure of State moneys by applying due diligence (careful application, attentiveness and caution) to ensure that a transaction, event or

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[24] Section 1 of the South African Public Finance Management Act, Act No. 1 of 1999, as amended. There is no provision in Namibian statutory law that defines "fruitless expenditure".

condition is achieved and if not achieved as planned that it should be managed to an acceptable level.

2.3.5 In the event that the State incurs loss or damage as result of a fruitless expenditure by a person employed in a ministry or public office, the State is entitled to recover in whole or in part, such loss or damage from such person. Section 11(1) of the State Finance Act, 1991 states that, when loss or damage is incurred as a result of fruitless expenditure, the accounting officer or if the case involves an accounting officer, the Treasury, shall determine the amount of such loss or damage by notice in writing and order such person to pay the amount so determined within a period of thirty days as from the date of such notice.

2.3.6 Where such order to pay has been made, the accounting officer or the Treasury as the case may be, shall notify the Auditor-General forthwith, unless the Auditor-General instructed otherwise, of all the facts in connection with such loss or damage in line with Section 11(2) of the State Finance Act, 1991 read together with Treasury Instruction B B 0104.

2.3.7 If a person who has been ordered to pay an amount in terms of Section 11(1) of the State Finance Act, 1991 fails to pay such amount within the stipulated period, the accounting officer concerned or the Treasury, as the case may be, shall in accordance with Section 11(4) of the Act, be permitted to recover the amount concerned-

2.3.7.1 in the case of a person employed in a ministry or public office, by way of a deduction from such person's monthly salary or, if the amount exceeds one-fourth of such person's gross monthly salary, by monthly deductions not exceeding one-fourth of such person's gross monthly salary;

2.3.7.2 in the case of a person who is not employed in a ministry or public office, by judicial proceedings.

2.3.8 There is nothing in law preventing the State from recovering loss or monies through judicial proceedings from a person who is still employed by the State. The accounting officer concerned or the Treasury, as the case may be, may cause the amount involved to be recovered by way of judicial proceedings, instead of monthly deductions, if the accounting officer or the Treasury, deems it advisable in any particular case.

2.3.9 Judicial proceedings for the recovery of losses or damages to the State as a result of fruitless expenditure shall be conducted by the Government-Attorney on behalf of the State, as contemplated in Treasury Instruction E A 0501.

2.3.10 The Treasury may grant a waiver under section 16(1)(c)(i) of the State Finance Act, 1991, or discharge a claim under section 20, of the State Finance Act, 1991, in whole or in part, against a person who has caused damage or loss to the State as a result of fruitless expenditure. In accordance with Section 11(3) of the State Finance Act, 1991, if for any reason an accounting officer is of the opinion that the amount of a loss or damage should not be recovered or should be recovered in part only from the person responsible, the accounting officer may request the Treasury to waive the claim against such person or authorise that such person be discharged from liability, whether in respect of the whole or a portion of the amount involved.

2.3.11 A person who has been ordered to pay an amount in terms of Section 11(1) of the State Finance Act, 1991 may also at their own accord request the Treasury in terms of Section 11(5) of the State Finance Act, 1991 to waive the claim against him or her or be discharged either wholly or partly from liability in respect of such amount.

2.3.12 Officials employed in a ministry or public office must ensure that all instances of fruitless expenditure are prevented where possible, and are detected and reported in a timely manner. Sound financial management and good corporate governance

practices are required to eliminate loss or damage to the State through fruitless expenditure of limited State resources. Where fruitless expenditure does occur and the State suffers loss or damage, recourse to administrative and juridical measures are available to recover such loss or damage.

3. INTERNATIONAL LAW

3.1 The precautionary principle

3.1.1 The precautionary principle is defined as:

3.1.1.1 "Environment management rule that if a threat of serious or irreversible damage to the environment or human health exist, a lack of scientific knowledge about the situation should not be allowed to delay containment or remedial steps if the balance of potential cost and benefits justifies exacting them. In other words prevention is better than cure; also called the preventive principle."[25]

3.1.1.2 "The precept that an action should not be taken if the consequences are uncertain and potentially dangerous."[26]

3.1.1.3 "that it is better to be safe than sorry."[27]

3.1.2 The precautionary approach principle is provided for under Principle 15 of the Rio Declaration on the Environment and Development (1992) as follows:

"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible

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[25] *Collins English Dictionary - Complete & Unabridged 10th Edition*. Source location: HarperCollins Publishers. http://www.dictionary.com/browse/..... Available: http://www.dictionary.com/. Accessed: March 09, 2016.

[26] *Ibid.*

[27] Article on the Precautionary Principle. By Wybe Th. Douma. (T.M.C Asser Institute) The Hague.

damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[28]

3.1.3 Hey[29] states that "[T]he concept requires policy-makers to adopt an approach which ensures that errors are made on the side of excess environmental protection' and that it 'may require preventive action before scientific proof of harm has been submitted'. Any formulation of the precautionary principle is, therefore, a 'tool for decision-making in a situation of scientific uncertainty' which effectively 'changes the role of scientific data'."

3.1.4 "The precautionary approach is based upon an entirely new set of assumptions, including: the vulnerability of the environment; the limitations of science to accurately predict threats to the environment; and, the availability of alternative, less harmful processes and products."[30] Some commentators perceive the emergence of this approach as marking a paradigm shift in international environmental law from a predominantly economic and anthropocentric stance to a primarily *eco-centric point of view*.[31]

3.1.5 The Precautionary Approach Principle has found its way into many other International Instruments as well as into the national legislation of many countries. Any detrimental effect on, or damage to the environment, must be prevented or effectively mitigated and thus there is a clear link between the definitions of adverse impact and the precautionary principle in the Benguela Current Convention.

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[28] Rio Declaration on Environment and Development, 1992.

[29] E. Hey. "The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution" 1992. Georgetown International Environmental Law Review 303-18 at 308.

[30] Ibid. p. 308.

[31] R.C.Earll, "Common Sense and the Precautionary Principle-An Environmentalist Perspective"(1992) 24 Marine Pollution Bulletin 182-6 at 183

3.1.6 The Benguela Current Convention defines adverse impact and the precautionary principle in Article 1 as follows:

> ""Adverse Impact"
>
> (a) includes any actual or potential detrimental effect on the Benguela Current Large Marine Ecosystem that results directly or indirectly from human conduct originating wholly or partly within the area under jurisdiction of a Party or from a ship or aircraft under its jurisdiction or control;
>
> (b) includes adverse impact that extends beyond the jurisdiction of a Party in which the physical origin of the adverse impact is situated; and
>
> (c) includes any actual or potential detrimental effect on legitimate uses of the Benguela Current Large Marine Ecosystem, on the health of the people of the Parties or on their ability to provide for their health, safety, cultural and economic well-being, which occurs or may occur as a consequence of a detrimental effect referred to in (a); but
>
> (d) does not include any actual or potential detrimental effect that is negligible or which has been assessed and to be determined acceptable under this Convention;
>
> […….]
>
> "Precautionary Principle" means the principle that a lack of full scientific certainty shall not be used as a reason for postponing measures or actions to give effect to the objective of this Convention."

3.1.7 In the matter of Gabcíkovo-Nagymaros Project (Hungary/Slovakia)[32] the International Court of Justice observed that:

"The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and the limitations inherent in the very mechanism of reparation of this type of damage."

3.1.8 In the matter of the Southern Blue-fin Tuna Cases[33] the International Tribunal for the Law of the Sea (ITOS) in its advisory opinion stated that the Article 192 obligation to protect the environment under UNCLOS is a *"general obligation"* of due diligence in cases of States sponsoring deep seabed mining.

3.1.9 In the Chatham Rock Decision[34] the New Zealand Environmental Protection Authority recently rejected two seabed mining applications for ironsands and phosphate mining on the ground of its potential for damage to the environment and uncertainties inherent in the applications as reasons to refuse the permit applications. The Decision Making Committee also concluded that it was left with a lack of certainty about both the receiving environment and the adverse effects of the project on the environment and existing interest.[35]

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[32] Para. 140 of the Judgment.

[33] Advisory Opinion of the International Tribunal of the Law of the Sea. (ITLOS) Seabed Chamber Case. No. 17, 1 February 2011. Para 131.

[34] Chatham Rock decision see, http;/www.epa.govt.nz. last accessed 27 May 2015

[35] Ibid.

3.1.10 There is a clear intention by many jurisdictions to adopt the precautionary approach due to the uncertainty of the adverse effects that an activity may have on the environment, the ecosystem and the ecology.

3.1.11 States are under a duty to apply the precautionary approach in cases of uncertainty as to the impact of seabed mining on the marine environment and living marine resources and the precautionary approach has been held to be an integral part of the general obligation of due diligence of states.[36]

3.1.12 Namibia is under an obligation through its organs of State, by national and international law, to exercise and apply the precautionary principle and to ensure that the natural and cultural heritage of Namibia is preserved for the benefit of present and future generations. The State is bound by the provisions of the Environmental Management Act, 2007 as per Section 55 thereof, read together with Article 95(l) of the Namibian Constitution.

3.1.12 Namibia is furthermore bound by law to preserve, protect and mitigate harm and adverse effects of activities, which may cause harm to its environment. Namibia is bound to observe the Precautionary Approach by virtue of the United Nations Convention on the Law of the Sea (UNCLOS) and the Benguela Current Convention.

3.1.13 The general rules of public international law are binding on Namibia and form part of our national law. Even in the event the national legislation would have stated otherwise, the national legislation cannot be used as an excuse to act in contrast or in

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[36] Advisory opinion of the International Tribunal for the Law of the Sea.(ITLOS) Seabed Chamber Case No. 17,1 February 2011.Para 131.

violation of international law obligations as provided under Article 27 of the Vienna Convention of the Law of Treaties, 1969.

3.1.14 The Precautionary Principle therefore binds the entire State and not only the Minister responsible for marine resources. All public and private entities are required to observe precaution when it comes to any conduct, which may be detrimental to the ecological processes and biological diversity of Namibia and utilization of living natural resources. The sub-principle of sustainability is also encompassed within the broader Precautionary Principle.

3.2 The Difference between a Memorandum of Agreement and a Memorandum of Understanding

3.2.1 It may be that the two types of documents are distinct in nature, however the language in which they manifest or may be crafted proves in practical circumstances that there is no implicit difference between these two documents. The key consideration is whether the parties intend to be legally bound by the terms of the agreement. If so, they have likely created a legally enforceable agreement regardless of whether they call it a Memorandum of Agreement (MoA) or a Memorandum of Understanding (MoU)[37].

3.2.2 In other words, it does not matter whether one calls it a MoU or a MoA. What is imperative is what is contained in the document itself. The intention of the parties could be that of a MoA however, the parties may mistakenly term it as a MoU or *vice versa*. Meaning, parties may enter into wrong transactions with different outcomes than what they thought they were concluding.

3.2.3 For that reason, it is important for the parties to reflect in the document through the language, choice of words and intentions whether they desire a MoU or MoA. It is essential to clearly understand the underlining differences between a MoU and a MoA.

3.2.4 A contract is often defined merely as an agreement made with the intention of creating an obligation or obligations[38]. This means that when parties enter into an

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[37] http://www.changelabsolutions.org/sites/default/files/MOU-vs-Contracts_FINAL_20120117.pdf last accessed on 29. 02. 2016.

[38] Van Der Merwe. (2012). *Contract General Principles fourth Edition*, Juta and CO LTD, Cape Town, p.7.

agreement, they intend to be bound by it, and therefore it is enforceable before a court of law either national or international courts, whichever the case may be in a given circumstances.

3.2.5 An agreement is whereby two or more parties agree on something which is enforceable in a court of law should one party not adhere to the contents and/or intentions of the document.

3.2.6 In order to recognise an agreement, certain elements and/or clauses are always part and parcel of the agreement, namely, a clause indicating which laws will govern the agreement, and an dispute resolution clause which indicates that disputes will be resolved through arbitration, mediation or adjudication by a specific tribunal or court, amongst others. In other words clauses in an agreement are supposed to be crafted in such a way as to indicate that what is contained in the agreement is enforceable by courts or tribunals whichever the case may be.

3.2.7 Peremptory terms may be used in these agreements intended to indicate that the parties agree to be bound by the provision or the agreement in total. The absence of peremptory terms will, however, not invalidate the agreement, nor take away from it's effectiveness. Peremptory terms include *shall*, *must* and *should,* amongst others.

3.2.8 In order to fully comprehend what agreements are, it is also important to also understand what a MoU is.

3.2.9 A MoU is an instrument concluded between parties which contains the intended terms of both parties. It does not necessarily have to be governed by international law (or any other law) unless expressly provided to that effect within the agreement. Some may define the MoU to be a signed non-obligating and legally non-binding document that describes the intentions of the alliance members to work together to

address a shared development challenge[39]. However, to say that it is a legally non-binding agreement would be amiss because it creates legal obligations binding to the parties that sign it.

3.2.10 For instance, if there is a MoU between Namibia and another country and Namibia decides not to adhere to the terms of the MoU, hiding behind the fact that a MoU is not enforceable, this may still lead to other consequences such as political consequences or a country may retaliate whichever way as it deems necessary without using courts of law.

3.2.11 MoUs are based on good faith (honest intentions or beliefs). [40] Good faith also underpins the doctrine of *estoppel* (preclusion), which in international law is a substantive rule being founded on the principle that good faith must prevail.[41] Put differently, a MoA creates legal rights and obligations and a MoU does not, but which may in certain, special circumstances have legal consequences[42]. Meaning that legal consequences may at times flow from a MoU through the doctrine of *Estoppel*.[43]

3.2.12 MoUs are or may be concluded when parties want to make arrangement to cooperate without legal consequences in the strict sense – an agreement to agree. Usually

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[39] https://www.usaid.gov/sites/default/files/documents/1880/Section%206%20MOU%20Overview.public.updated022013.pdf last accessed on 29. 02. 2016.

[40] *Pacta sunt servanda*, meaning, that parties to an agreement must perform their obligations in good faith.

[41] Anthony Aust (2000) Modern Treaty Law and Practice, Cambridge University Press, p. 54

[42] *Idem*, p. 55.

[43] This English doctrine was introduced into South African law by the Appellate Division in the case of Trust Bank va Afrika v Eksteen 1964 3 SA 402 (A). The principle denotes a bar or impediment to a person from asserting a fact or a right or prevents one from denying a fact. Example, you signed the contract, therefore, you are estopped from denying that it exists.

Agreements will follow after MoUs have been established, as MoU's will typically contain arrangements that are general in nature and/or a foundation before concluding an Agreement afterwards. The practice has been that whenever parties want to cooperate in specific, technical areas that involve huge amounts of money, they would opt for a MoA as opposed to a MoUs. It is however important to note that any of the two types of agreements can and may achieve the desired effect and carry the same force depending on the contents and terms of the agreement, regardless of whether it is termed a MoU or MoA.

3.2.13 Perhaps the most significant feature of a MoU is found in its objective, which will indicate that it is merely cooperation, acting in the spirit of cooperation, sharing the aim of, with the aim of developing[44], amongst other things. Other features are the use of the terms "*will*" as it is not peremptory in nature and the use of paragraphs as opposed to clauses of MoA's.[45]

3.2.14 When parties want a document to be legally binding they should enter into MoAs and if they merely want to cooperate without legal obligations they should enter into a MoU. However, it should be clear in their language that it is merely intentions (MoU) or that it is a legally enforceable document (MoA).

3.2.15 The following table aims to illustrate further differences between MoUs and MoAs:

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[44] Anthony Aust (2000) Modern Treaty Law and Practice, Cambridge University, p. 488.
[45] *Idem*, p. 496.

Summarised comparisons[46]		
BASIS FOR CAMPARISON	**MEMORANDUM OF AGREEMENT**	**MEMORANDUM OF UNDERSTANDING**
Meaning	An agreement is a document in which two parties agreed upon to work together for a common objective.	A Memorandum of Understanding or MoU is a document which describes the terms of an arrangement between the two or more parties forming a bilateral or multilateral agreement.
Elements	Offer, Acceptance.	Offer, Acceptance, Intention and Consideration.
Enforceability	An agreement can be enforceable in the court of law.	A Memorandum of Understanding cannot be enforceable in the court of law.
Binding nature	It is always binding on the parties to the agreement.	It is binding upon the parties, if the memorandum is signed in exchange for monetary consideration.
Collateral rights	Yes	No

[46] http://keydifferences.com/difference-between-agreement-and-memorandum-of-understanding-mou.html last accessed on 29.02.2016.

Form	Oral or written	Written

4. LABOUR LAW

4.1 Secondment and Transfer of Public Servants

4.1.1 It is trite that an employment contract between an employer (in this case the Government of Namibia) and an employee (staff member) forms the basis of the relationship that is regulated by the legislation on labour; the Public Service Act, 1995 (Act No. 13 of 1995), and the Labour Act, 2007 (Act No. 11 of 2007).

4.1.2 Section 23, dealing with transfer and secondment and section 24, dealing with retirement and discharge, of the Public Service Act, 1995, form part of the basic conditions of service of all Public servants, to which they consented when taking up employment with the Government and are therefore bound by such.

4.1.3 Where there is conflict between the Public Service Act, 1995, and the Labour Act, 2007, in respect of terms and conditions of employment, the law providing the more favourable terms and conditions for the employee, shall prevail to the extent of the conflict as stipulated in section 9(3) of the Labour Act, 2007. Regarding the issue at hand involving secondment, transfer and discharge of a staff member, there is no conflict between the two statutes.

4.1.4 Section 23 of the Public Service Act, 1995, reads as follows:

"(4) (a) Any staff member may with his or her consent and on the recommendation of the Commission and on such conditions, in addition to those prescribed by or under any law, as may be approved by the Prime Minister on the recommendation of the Commission, be seconded by the Prime Minister, either for any particular service or for any period, to the

service of any other office, ministry or agency or any government, board, institution or body established by or under any law or any other body: Provided that prior approval has been obtained from the Treasury for expenditure incurred by such secondment."

4.1.5 Thus, it is very clear from the afore-mentioned provision that a secondment has to be done with the consent of the concerned staff member, "*with his or her consent"* and "*that prior approval has been obtained from the Treasury …".*

4.1.6 Secondment of a staff member without his or her consent would qualify as a unilateral change to the terms and conditions of employment, which in turn would constitute a breach of contract by the Government as employer. Consultation with the staff member, affording the staff member a chance to state his or her case (following the common law *audi alterem partem* rule) prior to the secondment, is not sufficient.

4.1.7 However, should a staff member refuse secondment by the employer for unjustifiable reasons, the employers has other avenues to get the same results that would have been brought about by secondment in any case. In other words, a staff member may nonetheless be transferred in terms of Section 23(1) of the Public Service Act, 1995, which states that this may be done *" …when the interest of the Public Service so requires…"*, provided that section 23(1)(a) to (c) is adhered to:

"(a) subject to the provisions of section 22(5), a staff member shall not upon such transfer suffer any reduction in his or her salary or scale of salary without his or her consent;

(b) a staff member who has been transferred to or employed in any post of a lower or higher grade than the grade applicable to him or her without any change in his or her salary and scale of salary shall, as soon as a suitable vacancy occurs, be transferred to a post to which his or her salary, scale of salary and grade will be appropriate: Provided further that, if such transfer is on the request of the staff member, his or

her salary, scale of salary and grade shall only be retained on a personal to holder basis if approved by the Prime Minister on the recommendation of the Commission;

(c) subject to the provisions of section 21, a staff member who has been transferred to or employed in a post of a higher grade than the post held by him or her or which is re-graded or converted to a post or a higher grade than the post held by him or her, shall not merely on account of such transfer or employment be entitled to the higher salary and scale of salary applicable to that post".

4.1.8 Transfer may take place without the consent of the concerned staff member. The *audi alterem partem* rule (right to be heard) which is a common law and Constitutional right reiterated in several case law[47], must however be respected. Consultation with the staff member is therefore essential before such staff member is transferred.

4.1.9 The employer (the Namibian Government) through its administrative bodies and officials has to adhere to the requirements of fair administrative action, as stated in Article 18 of the Namibian Constitution, before transferring employees[48]. Where a transfer involves major disruption for the employee, such as a change of city, the choice of the employee should be taken into account[49].

4.1.10 A staff member is therefore entitled to a "pre-transfer hearing" as stated in the *Onesmus* matter.[50] The principle to follow is that the procedure should be fair and reasonable as reiterated by Acting Judge Angula (at 239) in the *Viljoen* case.[51]

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[47] Onesmus v Permanent Secretary: Finance and Others 2010 (2) NR (460(HC); Viljoen & Another v Inspector-General of the Namibian Police 2004 NR 225 (HC)

[48] Simelela & Others v Member of the Executive Council for Education, Province of the Eastern Cape & Another (2001) 22 ILJ 1688 (IC).

[49] John Grogan, Workplace Law, 7th edition page 241 & Howell v International Bank of Johannesburg Ltd (1990) 11 ILJ 791 (IC)

[50] Onesmus v Permanent Secretary: Finance and Others 2010 (2) NR (460(HC)

[51] Viljoen & Another v Inspector-General of the Namibian Police 2004 NR 225 (HC)

4.1.11 Where a staff member refuses offers of transfer, which transfer is necessary in order to serve the Public Service, his or her case may be treated as a redundancy and the requirements for retrenchment should be followed.

4.1.12 Consequently, such a staff member may therefore be discharged in terms of section 24 of the Public Service Act, 1995:

> "(4) Subject to the provisions of section 5(I), any staff member may be discharged from the Public Service - (b) by reason of the abolition of the post held by him or her or of any reduction or reorganisation or readjustment of any office ministry or agency or any organisational component thereof;"

4.1.13 Section 24(3) of the Public Service Act, 1995, is also to be utilised in respect of staff members who are nearing the retirement age, and not willing to be transferred. They should be considered for early retirement (at attaining the age of 55). A consultation process is to be followed and early retirement packages suggested to them in order to afford the staff member an opportunity to be heard (*audi alterem partem* rule) and to ensure that a fair administrative action is followed.

4.1.14 Therefore it may be concluded that, where a staff member declines to be seconded, such staff member may be transferred. If he or she refuses the offer of transfer, his or her case is to be treated as a redundancy and he or she may be retrenched in terms of section 24(4)(b) of the Public Service Act, 1995.

4.1.15 When seconded, the staff member must be afforded an opportunity to be heard and the staff member must consent to such secondment.

4.1.16 Where a staff member is to be transferred, a consultation process in respect of the proposed transfer should take place, before a decision to transfer him or her is taken.

4.1.17 Consent of the staff member is not necessary for a transfer as long as the employer adhered to fair administrative action, which includes granting the staff member an opportunity to be heard. A transfer qualifies as a change to the terms and conditions of service and in the absence of a consultation and opportunity to be heard, such transfer shall qualify as a unilateral change to the terms and conditions by the employer and breach by the employer of the employment contract.

4.1.18 A consultation prior to a decision of transfer is also necessary in order for the employer to be made aware of possible personal circumstances which has to be taken into consideration before making a decision to transfer such employee (staff member), especially where the employer does not want to lose the employee.

4.1.19 It is further advised that a staff member, where possible, be granted a choice of duty stations to be seconded or transferred to.

4.1.20 Further, given that there is a recognition agreement with a labour union under section 64 of the Labour Act, 2007, it may be wise that such a matter be consulted with the recognised union to fortify the Employer's case.

5. PROPERTY LAW

5.1 Customary Land Rights Vis-a-Vis the Rights of a Local Authority When an Area is Proclaimed as a Town

5.1.1 Section 17 of the Communal Land Act, 2002 (Act No. 5 of 2002), provides as follows:

> "(1) Subject to the provisions of this Act, all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.
>
> (2) No right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land."

5.1.2 In terms of the above quoted section, **communal land is not capable of private ownership. Therefore, any person(s) who is granted a customary land right over a portion of land, is merely granted a right of usage and not ownership. Ownership of communal land remains vested in the State.**

5.1.3 **This means, any person who has a customary land right over a portion of land does not have any right of ownership over the piece of land in question, therefore, he/she cannot claim an ownership right of the land but merely the right to use such land.**

5.1.4 Having established who the rightful owner of the land is, one must now consider the vesting of such right following an extension of town boundaries. The obvious consequence of such extension is that the nature of the land now transforms from

communal to urban land, as it now falls within the boundaries of a specified local authority.

5.1.5 In this regard, section 4 of the Township and Division of Land Amendment Act, 1992 (Act No. 28 of 1992), reads as follows:

"Section 4 is hereby amended by the substitution for subsection (1) of the following subsection:

(1) When a township has been proclaimed an approved township, under the provision of this Ordinance or any other [Ordinance] law, the dominium of the land therein comprising all public places shall *ipso facto* vest in the local authority within whose area of jurisdiction such land is situated, or if such land is not situated within the area of jurisdiction of a local authority, in the [Executive Committee] State in trust for any local authority which may thereafter be constituted in respect of the area within which such land is situated.

5.1.6 In application of Section 4 of the Township and Division of Land Amendment Act, 1992 as quoted above, extension of the boundaries of a local authority has the consequent result that, the dominium or the control of the land in that extended portion of land, including all public places must and will now vest in the concerned local authority. This means, we cease to talk of communal land since it became urban land, the ownership of which no longer vests in the State directly but in the competent authority in question.

5.1.7 The pertinent issue or question now is; what happens to the occupants of the land in the newly established *urban land*?[52]

[52] All land within local authority areas is deemed urban land.

5.1.8 The Compensation Policy Guidelines for Communal Land were introduced to regulate compensation in instances where land is taken from communal areas for township expansion or other public sector development projects.

5.1.9 Section 19 of the Communal Land Reform Act, 2002 states that two rights are capable of allocation in respect of communal land. These are either, rights of leasehold or customary land rights which include the right to a farming unit, right to a residential unit and a right to any other form if customary tenure as the Minister may prescribe in the *Gazette*.[53]

5.1.10 The rights mentioned above have often been equated to what is known as *usufruct*, which is a personal servitude. A personal servitude confers the right to use and enjoy another's property and such right remains enforceable against the owner of the property, therefore making such rights real rights in nature.[54]

5.1.11 Simply put, although the land (communal) belonged to the State and subsequently to a local authority in question, the person that occupied the land before proclamation, vests a personal servitude over the piece of land in question which is also enforceable against the local authority. Thus, a town council cannot exactly enjoy its right of ownership over this piece of land peacefully without compensating the occupants for depriving them of their personal rights and for their improvements upon such land.

The following two avenues are available to a town council in such a case:

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[53] This means that the right comes into being with and upon the publication of the Gazette.

[54] Schoeman, J. (1983) *Silberberg and Schoeman: The Law of Property:* Butterworth: Durban. P.381.

5.1.12 On the face of it, since the land now belongs to the town council (upon proclamation of a local authority) and the occupants thereof would essentially be occupying the land illegally, the first option would be to institute legal action for the eviction of persons from the property, if the occupants refuse to vacate the land with justifiable compensation from the town council in question. As the rightful owner of the property in question, the council may approach a Court of law for an order of eviction against the occupants if they refuse to vacate under the auspice of both the Squatters Proclamation, 1985 (Proclamation No. AG 21 of 1985) and the Trespass Ordinance, 1962 (Ordinance No. 3 of 1962).

5.1.13 However one has to recognise the fact that the occupants possessed a real right over this land and the deprivation of such right might be raised in Court possibly during eviction proceedings. The Expropriation Ordinance, 1978 (Ord. No. 13 of 1978) provides for expropriation of immovable property, including a real right in or over immovable property by the State or any competent body authorized by law in the public *interest*[55] **subject to payment of just compensation.**

5.1.14 Mindful of the fact that a real right does not equate or vest the holder thereof with a right of ownership, which therefore means that right of ownership of the property might actually vest in another person, whilst another may be holding a real right over it. The Expropriation Ordinance, 1978, empowers a competent authority e.g. town

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[55] In the case of Kessl v Ministry of Lands Resettlement & Others; & Two Similar Cases, 2008 (1) NR 167 (HC), the issue of what constitutes "public interest" was considered and the following was stated:

> "in considering what constitutes public interest, this would require a proper balancing of the rights of the public against those of individuals concerned. Reference was made to several international decisions which deal with factors that need to be considered in determining the meaning of what is in the public interest.
> These are: it must be:
> (a) that the expropriation is done for reasons of public utility and similar other lawful measures;
> (b) the furtherance of public interest requires the striking of a fair balance between the demands of the general interest and the requirements of the individual's fundamental rights; and
> (c) that lawful expropriation must not be discriminatory."

councils, amongst others, to expropriate real rights in question **however, such expropriation should be done subject to payment of just compensation.**

5.1.15 Recognising the duties under the Expropriation Ordinance, 1978, when a town council has made an offer of compensation to the occupants, which in fact is in line with what the Compensation Policy Guidelines for Communal Land provides; the council has discharged its duties towards such occupants even if they refuse to take the offer in question.

5.1.16 The fact of the matter is, whichever route a town council decides to pursue, they both will yield the same results, that is, the occupants will have to vacate the premises and compensation will still be payable by the town council in question.

What are the options that are available to a local authority if the occupants refuse to accept the proposal made by such a local authority?

5.1.17 Point No. 6.8 (Matters incidental) of the Compensation Policy Guidelines for Communal Land states that:

> "Negotiations and consultations with the affected families or land occupants should be the primary guideline in the process of determining the compensation amount(s)".

5.1.18 Further, under point No. 6.5 of the said Compensation Policy Guidelines for Communal Land, it reads that:

> "where possible, affected family people should be offered an equal size of land elsewhere to continue producing their food. This should be done in consultation with line Ministries, Regional Councils and Traditional Authorities".

5.1.19 Taking into consideration the injustices of the colonial era as far as land in general is concerned, it is important that every situation be approached with caution and be guided by the spirit of the Namibian Constitution. Therefore, consultations and negotiations with the affected persons should precede any legal actions by local authorities.

6. GENERAL

6.1 Are you required by Law to Carry Your Identification Document?

6.1.1 Identity documents are regulated by the Identification Act, 1996 (Act No. 21 of 1996). Section 10 of the Identification Act, 1996, reads as follows:

"(1) An authorized officer as defined in subsection (3) may request any person reasonably presumed to have attained the age of 16 years to prove his or her identity within a reasonable time to that officer by presenting –

(a) his or her identity document;

(b) his or her passport, proof of identity or other travel document as the Minister may prescribe; or

(c) any other proof of identity issued by the State on which the name and a photograph of the holder appear.

(2) If it comes to the attention of an officer acting in the service of the Ministry of Home Affairs that a person referred to in section 3 who has attained the age of 16 years has failed to apply for an identity document in terms of section 5(1), that officer shall take such steps as may be necessary to ensure that such person applies for an identity document.

(3) For the purposes of subsection (1) "authorized officer" means-

(a) a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977); or

(b) a person, or a member of a category of persons, designated by the Minister by notice in the Gazette."

6.1.2 In terms of section 10 of the Identification Act, 1996, if you are over the age of 16, a Police Officer may require you to prove your identity within a reasonable time. You are thus required to produce an identity document, a passport or some other government-issued proof of identification bearing your name and photograph. Failure to produce this kind of identification without a lawful excuse is a criminal offence which is punishable by a fine of up to N$4 000 or to imprisonment for a period not exceeding 12 months or to both such fine and imprisonment as purported by section 15(i) read with section 15(k)(ii) of the Identification Act, 1996.

6.1.3 Furthermore, if you are a Namibian citizen or permanent resident over the age of 16 and you have not applied for a Namibian identification document, the Police Officers are entitled to take such steps as may be necessary to ensure that you do so by virtue of section 10(2) of the Identification Act, 1996.

6.1.4 <u>In terms of the Identification Act, 1996, it is not mandatory for a person to carry their identification document on them</u>. However, always carrying your identification at all times, particularly when travelling would highly assist our law enforcement agencies to easily identify Namibians and legal foreigners from illegal foreigners, and criminals from non-criminals respectively.

6.1.5 The Immigration Control Act, 1993 (Act, No. 7 of 1993), and in particular section 42 states that:

"(1) (a) When a person who enters or has entered or is found within Namibia, on reasonable grounds is suspected of being a prohibited immigrant in terms of any provision of this Act, an immigration officer may –

(i) if such person is not in custody, arrest such person or cause him or her to be arrested without a warrant; and

(ii) pending the investigations to be made in terms of subsection (4) by such immigration officer, detain such person or cause him or her to be detained in the manner and at the place determined by the Minister, for such period, not exceeding 14 days, or for such longer period as the Minister may determine, not exceeding 14 days at a time.

(b) When any police officer or person or member of a category of persons authorized thereto in writing by the Minister on reasonable grounds suspects that a person is a prohibited immigrant and is not entitled to be in Namibia, such officer, person or member may require such person to produce to him or her proof that he or she is so entitled to be in Namibia and if such person fails to satisfy such officer, person or member that he or she is so entitled such officer, person or member may take him or her into custody without a warrant, and shall as soon as is practicable bring him or her before an immigration officer to be dealt with in terms of paragraph (a).

6.1.6 Section 42 of the Immigration Control Act, 1993, deals with the arrest and detention of prohibited immigrants found in Namibia. If a Police Officer on reasonable grounds suspects that a person is a prohibited immigrant, that Police Officer may require proof of legal presence in the country. A person in this situation who fails to produce such proof may be arrested without a warrant and detained while the matter is being investigated.

6.1.7 Therefore, as a Namibian citizen or legal person in Namibia, you might also be suspected of being a prohibited immigrant if you cannot prove that you are a Namibian citizen or legally in the country. Thus, it is advisable that people should carry their identification document on them at all times to avoid such inconveniences of having to be detained, while this situation could have been avoided.

6.1.8 In the Namibian case of *Minister of Home Affairs v Luiza Lomba* Case No. CA 126/2002 a sweep by police and immigration officials was conducted since they were in search of prohibited immigrants. Ms. Lomba was arrested late at night and detained for 11 hours because she was unable to produce any documentation showing that she was in fact a Namibian citizen. Once given a proper chance to search her room, she was able to produce a birth certificate, which indicated her Namibian citizenship. According to the Court, the fact that Ms. Lomba could not immediately produce an identification document was not sufficient to justify a reasonable suspicion that she was a prohibited immigrant. The court ruled that the police could have taken other steps first - such as conducting separate questioning of her and her roommate (who could produce a valid identification document), or taking down her details and asking her to report to them in the morning with her documents - following up through the roommate if she did not show up. In this case, the Court noted that an arrest is a very serious matter as it restricts personal liberty, infringes privacy and reflects negatively on a person's dignity and reputation. The court awarded Ms. Lomba damages of N$12 000 for her wrongful arrest and detention.

6.1.9 The lesson to be deduced from the above-quoted *Lomba* case, particularly by our law enforcement agencies, is that detention should be the last resort in these cases, if you are unable to have the suspect produce their identity document within a reasonable time. The Office of the Attorney-General considers wanton arrests as amounting to fruitless expenditure when compensation in the magnitude of the *Lomba* case is awarded, and it is hoped that the Inspector-General of the Namibian Police and the Accounting Officer of the Ministry of Finance have acted to recover the wasted damage costs from the responsible officers.

6.1.10 In summary, you are not required by law to have your identification document on you at all times, regardless of whether you are a Namibian citizen or a visitor from another country. Nonetheless, since you can be validly required to show an identity

document within a reasonable time, and because you can be arrested without a warrant if officials have a reasonable suspicion that you have no legal right to be present in Namibia, carrying your identity document with you is advisable.

6.1.11 On the other hand, you are required to have a valid driver's license on you whilst driving. This is a requirement in terms of section 31 of the Road Traffic and Transportation Act, 1999 (Act No. 22 of 1999), which requires that a driver of motor vehicle must carry a driver's license (or a temporary authorisation to drive) in the vehicle whilst driving. Failure to do so is an offence punishable by a fine of up to N$2 000 or imprisonment for up to six months, or both such fine and imprisonment.

6.2 **Determining the Jurisdiction of the Magistrates' Courts in an Agreement**

6.2.1 In the Namibian legal court system, there exist the High Courts (Supreme and High Court) and Lower Courts (Regional, Magistrates, District and Traditional Courts respectively).[56]

6.2.2 Nonetheless, whether Parties to an agreement indicate that a court will have jurisdiction or they omit such a statement, either way courts will have jurisdiction over all matters. The difference being that High Courts have inherent jurisdiction[57] over all matters and Lower Courts have limited jurisdiction. However, Parties tend to include provisions whereby they would want a particular court to have jurisdiction in their agreement. In order to analyse this norm, we will discuss the relevant provisions of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).

6.2.3 Section 45 of the Magistrates' Courts Act, 1944, reads as follows:

> "(1) Subject to the provisions of section forty-six, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto: Provided that no court other than a court having jurisdiction under section twenty-eight shall, except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court, have jurisdiction in any such matter."
>
> (2) Any provision in a contract existing at the commencement of the Act or thereafter entered into, whereby a person undertakes that, when proceedings have been or are

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[56] Article 78(1) of the Namibian Constitution.

[57] Article 78(4) of the Namibian Constitution.

about to be instituted, he will give such consent to jurisdiction as is contemplated in the proviso to subsection (1), shall be null and void."

6.2.4 The first part of the provision means that Parties may agree in writing (agreement) that a Magistrate Court will have jurisdiction on their matter even though it is beyond the jurisdiction of such a court. This is allowed under the law subject to section 46[58] of the Magistrates' Courts Act, 1944. In other words, issues mentioned under section 46 of the Magistrates' Courts Act, 1944 are not subject to consent of parties and Magistrate Courts are not allowed to adjudicate on such matters at all.

6.2.5 However, section 45(2) of the Magistrates' Courts Act, 1944, underpins that parties to an agreement may not indicate in their agreement that they will give their consent as regards the jurisdiction of courts when proceedings have begun or are about to start.

6.2.6 Put differently, parties may consent to the jurisdiction of the Magistrate Court whereby it is beyond its jurisdiction, when they so wish, but when they are concluding the agreement and provided the consent is not on issues stipulated under section 46 of the Magistrates' Courts Act, 1944. Should parties not adhere to this it will render the agreement null and void.

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[58] The relevant provision is subsection (2) of the Magistrates' Court Act, 1944 which states that:

(2) A court shall have no jurisdiction in matters-
(a) in which the validity or interpretation of a will or other testamentary document is in question;
(b) in which the status of a person in respect of mental capacity is sought to be affected;
(c) in which is sought specific performance without an alternative of payment of damages, except in-
  (i) the rendering of an account in respect of which the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette;
  (ii) the delivery or transfer of property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette; and
  (iii) the delivery or transfer of property, movable or immovable, exceeding in value the amount determined by the Minister from time to time by notice in the Gazette, where the consent of the parties has been obtained in terms of section 45;
(d) in which is sought a decree of perpetual silence.

6.2.7 In order to simplify agreements and avoid a situation whereby agreements are invalidated by courts, it is advisable that parties should avoid to the consenting of Magistrate Courts' jurisdiction and leave courts of appropriate jurisdiction to deal with the matter. Meaning there is no need to put a clause that this or that court has jurisdiction, this applies by operation of the law.

6.2.8 Nevertheless, if parties are so adamant that they want a jurisdiction clause in their Agreement we propose the following Clause:

"The Namibian Courts shall have jurisdiction on all matters related to this Agreement."

6.3 Jurisdiction in Terms of the Traditional Authorities Act, 2000 (Act No. 25 of 2000), and the Community Courts Act, 2003 (Act No. 10 of 2003)

6.3.1 Section 2(2) of the Traditional Authorities Act, 2000 (Act No. 25 of 2000) states that:

> "A Traditional Authority shall in the exercise of its powers and the execution of its duties and functions have jurisdiction over the members of the traditional community in respect of which it has been established."

6.3.2 This means that a traditional authority has jurisdiction (authority or control) over members of the traditional community it presides over. It should be emphasized that the afore-mentioned provision clearly states that *members of the traditional community* as opposed to *members of that particular tribe.* Therefore, control by the traditional authority should be applied to all members under the traditional authority, regardless of what tribe the person in question is from, as the test is whether one is a member of the traditional community in question or not.

6.3.3 In other words, a person of different ethnic origin ordinarily residing in another community which is not of his ethnic origin will be subject to the jurisdiction of the traditional authority by virtue of him or her being a member of that traditional community.

6.3.4 To elaborate on this further there is a need to define the key terms contained in Section 2(2) of the Traditional Authorities Act, 2000 namely, *jurisdiction* and *traditional community (members*).

6.4 Jurisdiction of Traditional Authorities

6.4.1 The word *'Jurisdiction'*, is not defined in the Traditional Authorities Act, 2000 (Act No. 25 of 2000) however, the Concise Oxford Dictionary[59] defines jurisdiction as follows:

> "1. the official power to make legal decisions and judgments.
> 2. the territory or sphere over which the legal authority of a court or other institution extends.
> 3. a system of law of courts."

6.4.2 From the above definition it may be said that jurisdiction can refer to a power over or control over a certain area or certain persons. Therefore, it may be over a population or geographical area or both.

6.4.3 It then follows that jurisdiction of the traditional authority may refer to the power over or control over its members, area or both.

6.4.5 In determining who the members of the traditional authority are over whom the traditional authority has jurisdiction over, the Traditional Authorities Act, 2000 (Act No. 25 of 2000) defines *traditional community* as:

> "an indigenous, homogenous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, who recognize a common traditional authority and inhabits a common communal area and may include the members of that traditional community residing outside the common communal area."

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[59] Judy Pearsall .(1999). *The Concise Oxford Dictionary Tenth Edition*, Oxford University Press, p. 763.

6.4.6 Of significance in the above definition is the phrase *'...and may include the members of that traditional community residing outside the common communal area'*. The phrase is noteworthy in that it provides that members of a particular traditional community do not necessarily have to reside within the same communal area or boundaries as that of the traditional authority in order for them to be members of that traditional community.

6.4.7 The use of the word '*may*' in the sentence indicates that the members have a discretion and an option to choose where they prefer to reside as provided for in Article 21 (1)(h) of the Namibian Constitution under the title '*Fundamental Freedoms'*.[60]

6.4.8 In determining which traditional authority one falls under, the definition of the word '*member*' in section 1 of the Traditional Authorities Act, 2000 (Act No.25 of 2000) is essential:

> "a person whose parent or both parents belong to a particular traditional authority, a person who is married to one who belongs to that traditional community or a person who has been adopted by a member of that traditional community or who by any other way has assimilated the culture and traditions of that community and has been accepted therein, becomes a member of that traditional community."

6.4.9 The provision relating to '*assimilation of culture and traditions'* contained in the definition of *'member'* above broadens the criteria used to determine membership to a traditional community. According to this definition, any person regardless of ancestry, language, cultural heritage, customs, traditions even race can be a member of a particular

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[60] Article 21(1)(h) of the Namibian Constitution provides that all persons shall have the right to:

"reside and settle in any part of Namibia."

traditional community without being married into it, being adopted or having a parent belonging to that community. The definition merely requires the person to have assimilated *i.e.* gradually adopted or absorbed the culture and traditions of that community and for the community to have accepted the person as a member thereof.

6.4.10 From the above-mentioned definition it follows that for one to fall under the jurisdiction of a particular traditional authority, for the purposes of the exercise of its powers and the execution of its duties one must first and foremost be a member of that particular traditional community. It follows from the definition of *'member'* that if one does not have a parent(s) from that traditional community and/or has not been married into it and/or has not been adopted into it and/or has not assimilated the cultures and traditions of it and been accepted into it, then one is not a member of that traditional authority regardless of the geographic area.

6.4.11 Membership of a traditional community is not merely by geographic location or communal area but by the factors mentioned in the definition namely, parental origin, marriage, adoption and assimilation.

6.4.12 Therefore a person by virtue of any of the factors provided in the definition is in fact a member of that particular traditional community and as such submits to the jurisdiction of that particular traditional authority regardless of where she/he resides.

6.4.13 In other words, if a person who falls within one jurisdiction of a traditional community, by virtue of the factors found in the definition is a member, choses to reside outside of the geographic boundaries of his/her traditional authority's area of jurisdiction, such a person will still submit to the jurisdiction of his/her traditional community, unless and until either by parental origin, marriage, adoption or assimilation he/she becomes a member of a different traditional authority's jurisdiction.

6.4.14 The Traditional Authorities Act, 2000, took into account that not all persons residing within the communal area of a particular traditional community are necessarily members of that particular traditional community. As a result, a provision requiring traditional authorities to respect the culture, customs and language of any person who resides within the communal area of that traditional authority but who is not a member of the traditional community which such member leads was included:[61]

> "A member of a traditional authority shall in addition to the functions referred to in subsection (1) have the following duties, namely, to respect the culture, customs and language of any person who resides within the communal area of that traditional authority, but who is not a member of the traditional community which such member leads."

6.4.15 In conclusion, jurisdiction does not refer to geographic or communal area alone but to persons regardless of their location.

Jurisdiction in Terms of the Community Courts Act, 2003 (Act No. 10 of 2003)

6.4.16 In determining whether jurisdiction in terms of this legislation is based on area or persons, the following provisions are considered.

6.4.17 Section 12 of the Community Courts Act, 2003 (Act 10 of 2003), states that:

> "A community court shall have jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognized by the customary law but only if-

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[61] Section 3(2)(e) of the Traditional Authorities Act, 2000 (Act No. 25 of 2000)

(a) The cause of action of such matter or any element thereof arose within the area of jurisdiction of that community court; or

(b) The person or persons to whom the matter relates are in the opinion of that community court connected with the customary law".

6.4.18 This provision empowers community courts to adjudicate upon any matter relating to any claim recognized under customary law, of which the cause of action arose within the geographic area of the community court's jurisdiction, or the persons involved are connected with the customary law of the respective area.

6.4.19 Jurisdiction of the community court in terms of this legislation is not only limited to members of the respective community but extends to any person irrespective of their origin provided that the cause of action or any element thereof arose within the court's geographic area of jurisdiction or if the person to whom the matter relates, is closely connected with the customary law of the community where the court is established.

6.4.20 It follows then that a person from a particular traditional community may be subject to the jurisdiction of a community court of a different traditional community if the cause of action arose within the geographic boundaries of that court.

6.4.21 Furthermore section 13 of the Community Courts Act, 2003, states that:

> "In any proceedings before it a community court shall apply the customary law of the traditional community residing in its area of jurisdiction. Provided that if the Parties are connected with different systems of customary law the court shall apply the system of customary law which the court considers just and fair to apply in the determination of the matter."

6.4.22 This provision takes into account that persons from different systems of customary law may be subject to the jurisdiction of a community court other than that of their particular traditional community and laws.

6.4.23 In conclusion, jurisdiction in terms of Community Courts Act, 2003, is predominantly determined by where the cause of action (which traditional community) arose and jurisdiction in terms of the Traditional Authorities Act, 2000, is primarily determined in terms of who is a *member of that traditional community.*

End.