REPUBLIC OF NAMIBIA

OFFICE OF THE ATTORNEY-GENERAL

FREQUENTLY ASKED LEGAL QUESTIONS

Windhoek, Namibia

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29 April 2015

Right Honourable Mrs. Saara Kuugongelwa-Amadhila, MP
The Prime Minister of the Republic of Namibia
Private Bag 13338
Windhoek

Dear 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 identified the most frequently asked legal questions and compiled this document to assist OMAs in answering questions on specific issues on a day-to-day basis.

3. My intention, Honourable Prime Minister, is to provide the OMAs with a source document to which they can refer to in future, to understand these most common legal queries. Going forward, we will be identifying issues as they arise and undertake the same exercise as and when required.

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

Sincerely,

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MR. SAKEUS E. SHANGHALA, MP
ATTORNEY-GENERAL

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1. CONSTITUTIONAL LAW

1.1 Status of advice of the Attorney-General

1.1.1 Article 87(b) of the Namibian Constitution mandates the Attorney-General to be the principal legal advisor to the President and Government. To *advice* means to recommend a cause of action, or offer advice to, or to inform a person/entity about a fact or a situation[1]. Thus, a legal advisor is a person who renders advice on law. Advice of the Attorney General is not law but guidance on the law.

1.1.2 On the other hand "principal" means to be (1) first in order of importance or (2) to be the most important or senior person in an organization or group.[2] Hence, the Attorney-General, being the principal legal advisor, is the most senior and ultimate legal advisor to the President and Government as opposed to any other legal advisors. This in itself envisages that there may be secondary legal advisors subservient to the principal legal advisor.

1.1.3 The Attorney-General is mandated to give legal advice to the President and Government. Government consists of three branches, the Executive, Legislature and Judiciary. However, with regard to the Judiciary, the Attorney-General gives legal advice to the exclusion of matters which are *sub judice* (matters before court).

1.1.4 Being the principal legal advisor, the Attorney-General may on request, or *mero motu* (on his/her own accord), provide advice to the President and Government, by virtue of Article 87(b) and (c) of the Namibian Constitution.

1.1.5 The advice of the Attorney-General is advisory in nature and is not binding in a Court of law; however, it serves as guidance on the legal affairs concerning the

[1] Concise Oxford Dictionary, 10th Editions, 1999, Oxford University Press, page 19.
[2] *Vide* footnote 1, page 1136.

President and Government. It follows that the President and Government should implement the advice given by the Attorney-General. In the event that the President and Government chose not to implement the advice of the Attorney-General, then it is trite that they revert to the Attorney-General with written reasons for their non-implementation.

1.1.6 If the President and Government chose not to implement the advice of the Attorney-General, and the advice notwithstanding intend to proceed to act contrary to the advice, and it is the Attorney-General's opinion that such conduct will infringe upon the Namibian Constitution, then it is for the Attorney-General to take all action necessary to protect and uphold the Namibian Constitution as required by Article 87(c) of the Namibian Constitution.

1.2 **The use of the Coat of Arms**

1.2.1 In terms of Section 3(1) of the National Coat of Arms of the Republic of Namibia Act, 1990 (Act No. 1 of 1990), the use and display of the Coat of Arms, or any depiction so closely resembling the Coat of Arms as to be likely to cause confusion, in connection with a person's trade, business, profession or occupation or in connection with any mark or description applied by him/her, to or in relation to goods made, produced or sold by him/her, without the prior written approval of the President or any person designated by the President for such purposes is prohibited.

1.2.2 Section 4(1) of the Act provides that a person who contravenes the provisions of the Act, or who commits an act which displays contempt for the Coat of Arms or which is likely to hold it up to ridicule, shall be guilty of an offence and liable on conviction to a fine not exceeding N$10 000, or in default of payment, to imprisonment for a period not exceeding 5 years, or to both such fine and such imprisonment. In addition, the Court who convicts a person may, in addition to the imposition of any penalty, order the confiscation to the State of all, or any part of the goods in respect of which the offence was committed.

1.3 **The reason why the President appoints Acting Ministers to perform the functions of Ministers in their absence as opposed to appointing Deputy Ministers**

1.3.1 The President appoints Ministers and Deputy Ministers in terms of Article 35 and Article 37 of the Namibian Constitution, respectively. Ministers are drawn only from the National Assembly, while Deputy Ministers may be appointed from the National Council.

1.3.2 Article 37 confers upon Deputy Ministers the duty to exercise or perform on behalf of Ministers any of the powers, functions and duties, which may have been assigned to such Ministers.

1.3.3 Section 4 of the Assignment of Powers Act, 1990 (Act No. 4 of 1990), provides that whenever the Prime Minister or a Minister is for any reason unable to perform any of the functions of his or her office, or whenever the Prime Minister or a Minister has vacated his or her office and a successor has not yet been appointed, the President may appoint any other Minister to act in the Prime Minister's or the said Minister's stead or office, either generally or in the performance of any function.

1.3.3 In light of the above, the President appoints only a Minister to act in the Prime Minister's or the Minister's stead and not a Deputy Minister. For this reason, the President does not appoint the Deputy-Minister to the Minister to act in his or her stead.

1.4 **Board membership of members of Parliament**

1.4.1 For purposes of this discourse, this issue may be addressed by segregating it into two parts, namely:

a) Where a member of the National Assembly and/or a Member of Cabinet is a Member of the Board of Directors of a State-owned Enterprise, State-owned Company, or is a member of a Government controlled close corporation, co-operative or trust; and

b) Where a member of the National Assembly and/or a Member of Cabinet is a Member of the Board of Directors of a private company, or a member of a close corporation, co-operative or trust.

1.4.2 Article 47 of the Namibian Constitution which deals with "Disqualification of Members", provides, in relevant part that:

> "(*1*) *No persons may become members of the National Assembly if they:*
> *[…]*
> *(e) are remunerated members of the public service of Namibia;.*
> *[…]*
> *(2) For the purposes of Sub-Article (1) hereof:*
> *[…]*
> *(b) the public service shall be deemed to include the defence force, the police force, the prison service, para-statal enterprises, Regional Councils and Local Authorities.".*

1.4.3 In accordance with Article 47(1)(e) read with Article 2(b), a person is not eligible to be sworn in as a member of the National Assembly if he/she is a board member of a para-statal enterprise.

1.4.4 While the Namibian Constitution uses the term *para-statal enterprises*, it is trite that such reference bears to both State-owned Companies and State-owned Enterprises.

1.4.5 Article 63(2)(f) of the Namibian Constitution further provides as follows:

> "(2) The National Assembly shall further have the power and function, subject to this Constitution:
>
> […]
>
> (f) to receive reports on the activities of the Executive, including para-statal enterprises, and from time to time to require, any senior official thereof to appear before any of the committees of the national Assembly to account for and explain his or her acts and programmes;".

1.4.6 An inherent conflict of interest manifests itself when a Member of the National Assembly and/or a Member of the Cabinet is also a member of the Board of Directors or Committee or of management of a para-statal enterprise. Not to mention that such a breach may also conflict with the Oath of Members of the National Assembly, which requires of them to uphold and protect the Namibian Constitution.

1.4.7 Indeed, the Namibian Constitution, and perhaps many of the pieces of legislation governing para-statal enterprises do not provide for the automatic resignation of Members of the National Assembly or National Council, therefore, all such affected Members of the National Assembly and National Council should author a resignation letter to the Company Secretaries and the line Minister.

1.4.8 Then there is the matter where a Member of the National Assembly or Cabinet is also a sitting board member of a company, or is a member of a close corporation or co-operative or trustee of a trust, governed by the Companies Act, 2004 (Act No. 28 of 2004), the Close Corporation Act, 1988 (Act No. 26 of 1988), the Co-operatives Act, 1996 (Act No. 23 of 1996) or the Trust Moneys Protection Act,

1934 (Act No. 34 of 1934), respectively, which is not categorized as a State-owned company/enterprise – in other words, a privately owned entity.

1.4.9 With respect to Members of Cabinet, Article 42 of the Namibian Constitution provides as follows:

"Outside Employment

(1) During their tenure of office as members of the Cabinet, Ministers may not take up any other paid employment, engage in **activities inconsistent with their positions as Ministers,** or expose themselves to any situation which carries with it the **risk of a conflict** developing **between their interests as Ministers and their private interests** *[our emphasis]*.

(2) No members of the Cabinet shall use their positions as such or use information entrusted to them confidentially as such members of the cabinet, directly or indirectly to enrich themselves".

1.4.10 The fore-mentioned Article clearly contemplates a multitude of situations which may create a conflict of interests born from the actions of a Member of the National Assembly and of the Cabinet outside his or her official sphere.

1.4.11 As is evident from the language employed in the law, the restriction seems to be wide enough to prohibit a Member of the National Assembly and a Member of Cabinet from sitting on the board of a company, being a member of a close corporation or member of a board of trustees of a trust, of an entity whose purpose is aimed at personal or family interests (such as owning a farm, a home, other private property, owning equity in entities (commercial or not) where the member or beneficiary is not involved in the decision making of the body - and where such is the case, there is a degree of separation from the operating entity and the owning entity).

1.4.12 Too wide a construction may border on infringing the fundamental freedom and right to practice any profession, or carry on any occupation, trade or business

enshrined in Article 21(1)(f) of the Namibian Constitution (which apply to all persons, even Members of the National Assembly) may be viewed as extending beyond the restrictions permitted under Article 21(2) of the Namibian Constitution.

1.4.13 Rightly so, the restrictions upon Members of the Cabinet under Article 42 of the Namibian Constitution are merited and form part of the constitutional construct within which those Members of the Cabinet shall enjoy their fundamental freedoms and rights, however, even those restrictions cannot wipe away the rights of Members of the National Assembly and Cabinet to conduct their financial and/or business affairs.

1.4.14 From our reading of the Namibian Constitution, support for this view that the freedoms and rights of persons should be interpreted generously can be drawn from Article 59(2) of the Namibian Constitution, which provides that:

> *"(2) The National Assembly shall in its rules of procedure make provision for such disclosure as may be considered to be appropriate in regard to the financial or business affairs of its members".*

1.4.15 Furthermore, Namibian jurisprudence has developed a rule that imposes upon Courts a strict and narrow interpretation upon limitations of rights and freedoms so that individuals are not unnecessarily deprived of the enjoyment of their rights and freedoms. See for instance the case of *Elvis Kauesa // Minister of Home Affairs and Others*.[3]

1.4.16 A general proposition cannot be made that Members of the National Assembly and the Cabinet cannot own or partake in financial and business affairs of a private nature, if such affairs do not impair their ability to exercise their public functions in a fair, unbiased and proper manner. This is what section 22(1) of

[3] (SA 5/94) [1995] NASC 3; 1995 (11) BCLR 1540 (NmS) (11 October 1995).

the Powers, Privileges and Immunities of Parliament Act, 1996 (Act No. 17 of 1996) stipulates.

1.4.17 Nor can a *numerus clausus* (fixed list) be compiled as to what constitutes a private financial or business affair which may be disallowed as against the function of Members of the National Assembly or the Cabinet. It may be of use to state that simply because a Member is an owner of a farm, as an example, it would be incorrect to state that such a Member should not participate in a discussion or decision relating to farmland, agriculture or any matter remotely or otherwise relating to the subject matter. Instead, the circumstances of each case must be examined, as and when, they arise.

1.4.18 It may even be the case that the public interest is advanced by the pertinent knowledge with which such a Member may imbue the discussion. However, it is for the ethical consideration of each and every Member of the National Assembly and the Cabinet to eschew one's own avarice in *the best interest of the people of Namibia* as required under Article 63(1) of the Namibian Constitution.

1.4.19 Members of the National Assembly and the Cabinet are, therefore, encouraged to abide by section 21(2) of the Powers, Privileges and Immunities of Parliament Act, 1996, and to disclose their conflict if it becomes obvious to them, or as soon as they suspect that such an interest may conflict with their ability to execute their public office in a fair, unbiased and proper manner. If need be, such a Member may recuse him/herself from the discussions and decisions if it is impossible to reconcile such interests with the discussion or decision under consideration.

1.4.20 The above discussion equally pertains to Members of the National Council.

1.4.21 In conclusion:

1.4.21.1 Members of the National Assembly and the Cabinet may not be Board Members of para-statal entities and their subsidiaries, and they should resign forthwith;

1.4.21.2 Members of the National Assembly and the Cabinet may conduct private financial and business affairs.

1.4.21.3 In so conducting their affairs, Members of the National Assembly and the Cabinet may be members or board members of their private financial and business entities, not of para-statal enterprises, however, such Members should disclose their engagement in private financial and business affairs in accordance with the Powers, Privileges and Immunities of Parliament Act, 1996;

1.4.21.4 Such financial and business affairs should not impair the ability of Members of the National Assembly and the Cabinet to execute their functions relating to their public offices in a fair, unbiased and proper manner; and

1.4.21.5 Ethical considerations demand of Members of the National Assembly and the Cabinet to recuse themselves if it becomes obvious to them that such interests vitiate their ability to execute their functions relating to their public offices in a fair, unbiased and proper manner, or upon agreement with a request by their superiors to so do.

2. ADMINISTRATIVE LAW

2.1 Status of civil servants after election into political positions

2.1.1 In terms of Section 30(3) of the Public Service Act, 1995 (Act No. 13 of 1995), differentiation is made between the nomination and election of public servants as President, Members of the National Assembly and Regional Councils, and Local Authority Councils.

2.1.2 Section 30(3)(a) and (b) of the Public Service Act, 1995, entails that a staff member who accepts a nomination for election as candidate for Presidency or a member of National Assembly or regional council, is obliged to take vacation leave from the date of nomination, and if elected, he or she is deemed to have resigned from public office from the date of election.

2.1.3 On the other hand, section 30(3)(b) provides that a staff member who has been nominated for local authority elections is obliged to be on vacation leave from the date of the nomination. However, once elected he or she is considered as having been granted permission to conduct remunerative work outside Public Service in terms of section 17 of the Public Service Act, 1995.

2.1.4 In a nutshell, a staff member is considered to have resigned automatically from his/her position within the Public Service by operation of the law, and consequently no positive action is required on the part of the staff member to resign. It is important to note that these elected officials should forthwith cease to receive any remuneration as a staff member effective from the date of the election into office.

2.1.5 Section 1(3) of the Electoral Act, 2014 (Act No. 8 of 2014) however regulates that whenever anyone is appointed or elected to an office which requires the making of an oath or affirmation, and despite the date of election or appointment, the

assumption of office and performance of functions by the elected or appointed person is only upon the swearing in of such person.

2.2 **Fees for Board Members (sitting fees) who are civil servants on Boards of State-owned Enterprises**

2.2.1 Section 22(2) of the State-owned Enterprises Governance Act, 2006 (Act No. 2 of 2006), prohibits the payment of remuneration to a member of a board who is in the full-time service of the State.

2.2.2 There are two different categories of State-owned Enterprises, namely those which are created by an Act of Parliament and those which are created under the Companies Act, 2004 (Act No. 28 of 2004), as amended.

2.2.3 The statutes which establish State-owned Enterprises and the Articles of Association of a State-owned Enterprise which is established in terms of the Companies Act, 2004, determine whether or not civil servants sitting on their Boards are entitled to sitting fees. The statutes establishing these State-owned Enterprises have divergent provisions on the remuneration of civil servants who are members on their Boards. These divergent provisions can be summarised as follows:

(a) Those which provide for the remuneration of civil servants serving on their boards;
(b) Those which exclude civil servants serving on their boards from remuneration; and
(c) Those which are silent on the issue of remuneration of civil servants serving on their boards.

2.2.4 Although certain establishing Acts and founding documents of State-owned Enterprises provides that these civil servants be remunerated, section 22(2) of the State-owned Enterprises Governance Act, 2006, prohibits the remuneration of civil servants.

2.2.5 The State-owned Enterprises Governance Act, 2006, does not differentiate between civil servants who are appointed on the Boards of State-owned Enterprises by virtue of their employment in the Public Service (Ex Officio) and those appointed from the public pool by virtue of their expertise but happen to be in the Public Service.

2.2.6 The State-owned Enterprises Governance Act, 2006, is discriminatory towards civil servants who serve on Boards of State-owned Enterprises in that they are prohibited from being remunerated while all other members serving on the same boards are remunerated.

2.2.7 There are conflicting provisions between the State-owned Enterprises Governance Act, 2006, and certain establishing Acts of State-owned Enterprises with respect to the remuneration of civil servants serving on these boards. For this reason, cognizance should be had that there is a need to interpret the rights of individuals generously. In the matter of *Elvis Kauesa // Minister of Home Affairs and Others*[4], a rule was developed that imposes upon courts a strict and narrow interpretation upon limitations of rights and freedoms so that individuals are not unnecessarily deprived of the enjoyment of their rights and freedoms. Consequently, section 22(2) of the State-owned Enterprises Governance Act, 2006, is in conflict with and the Namibian Constitution and jurisprudence, respectively.

2.2.8 It is against this background that an urgent amendment to section 22(2) of the State-owned Enterprises Governance Act, 2006, as well as the individual Acts of the State-owned Enterprises, should be made to align them to the Namibian Constitution and jurisprudence.

[4] (SA 5/94) [1995] NASC 3; 1995 (11) BCLR 1540 (NmS) (11 October 1995).

2.3 **Procurement of goods and services for the State**

2.3.1 Section 7 of the Tender Board of Namibia Act, 1996 (Act No. 16 of 1996) prescribes, amongst other things, that the Tender Board "shall be responsible for the procurement of goods and services for the Government, and, subject to the provisions of any other Act of Parliament, for the arrangement of the letting or hiring or the acquisition or granting of any right for or on behalf the Government, and for the disposal of Government property …". Hence, all goods and services which Government requires should be procured and disposed of by the Tender Board, unless specifically provided for in any other law.

2.3.2 Section 7(a) of the Tender Board Act, 1996, states that the Tender Board shall conclude these agreements on behalf of Government with any person, within or outside Namibia for the furnishing of goods and services to Government, or for the letting or hiring of anything, or the acquisition or granting of any right for or on behalf of the Government for the disposal of Government property and the Tender Board is not empowered to delegate this function to Ministries.

2.3.3 This means that Ministries cannot, on behalf of Government, conclude agreements for the procurement of goods and services, the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Government, as this function is assigned to the Tender Board.

2.3.4 Section 17(1) of the Tender Board Act, 1996, provides for the exemptions from the Tender Board procedures when:

> "*(a)* the estimated value thereof does not exceed N$ 10 000;
> *(b)* the opposite party to an agreement to be entered into is-
> (i) a statutory body, local authority or regional council in Namibia approved by the Minister; or
> (ii) the government of, or any statutory body, local authority or regional council in, a country other than Namibia, which

statutory body, local authority or regional council the Minister has likewise approved; or

(c) the Board in any particular case for good cause deems it impracticable or inappropriate to invite tenders,"

2.3.5 Section 17(2) of the Tender Board Act, 1996, requires that the reasons for exemption should be kept on record by the Tender Board.

2.3.6 Furthermore, section 21 of the Tender Board Act, 1996, excludes the procurement of goods and services, the letting or hiring of anything or the acquisition or granting of any right for or on behalf of the Namibian Defence Force and the Namibia Central Intelligence Agency of security related goods, property and services, as well as any exempted letting, hiring or procurement of rights as may be prescribed by the Minister on the recommendation of the Tender Board of Namibia.

2.3.7 Section 21(b) of the Tender Board Act, 1996, empowers the Minister, on the recommendation of the Tender Board, to prescribe further exemptions on such categories of procurement, letting, hiring, rights or disposal. Currently, there are no exemptions prescribed in accordance with section 21(b) of the Tender Board Act, 1996.

2.3.8 The Special General Power of Attorney No. 15 of 1983, granted by the then Administrator-General of South West Africa, dated 04 May 1983, conferred upon the Secretary, Director, Deputy-Director, Assistant Director, Control Administrative Officer and Administrative Officer of the then Department of Civic Affairs and Manpower (now the Ministry of Works and Transport), the powers to contract on behalf of Government in respect of immovable property.

2.3.9 Although the Tender Board Act, 1996, empowers the Tender Board of Namibia to procure all goods and services on behalf of Government, the Special General Power of Attorney in terms of sections 5, 6, 7(3), 8 and 14 vests the power to rent

state land with or without buildings or other improvements, sell, exchange of state land, repossession of land, signing of title deed or lease contract and cancellation of deeds upon the Ministry of Works and Transport.

2.3.10 The delegation in the Special General Power of Attorney is not in conflict with powers and functions of the Tender Board. For example, the person vested with the power to sell State land (in terms of the Special General Power of Attorney, section 5(2) Annexure is the Secretary, Director, Deputy-Director, Assistant Director, Control Administrative Officer and Administrative Officer of the Ministry of Works and Transport) can only do so after obtaining permission from the Treasury and the selling of such property can only be done through the Tender Board of Namibia.

3. LABOUR

3.1 Overpayment of Staff Members

Unauthorized remuneration:

3.1.1 Section 16 of the Public Service Act, 1995 (Act No. 13 of 1995), stipulates that, if a staff member receives undue remuneration or any other benefits in connection with his/her employment in the Public Service, and when a staff member receives remuneration for work performed outside the Public Service contrary to the provisions of the Act:

"that staff member or member of the services shall pay into revenue an amount equal to the amount of such remuneration or other benefit, or, where it does not consist of money, the value thereof as determined by the permanent secretary of the office, ministry or agency in which that staff member or member of the services was employed at the time of receipt thereof or, in the case of any permanent secretary, as determined by the Secretary to the Cabinet or, in the case of the Secretary to the Cabinet or the Secretary to the President, as determined by the Prime Minister, and if the amount is not so paid, it shall, subject to the provisions of paragraphs (b) and (c), be recovered from that staff member or member of the services by way of legal proceedings or in such other manner as the Treasury may approve and be paid into revenue."

Wrongly granted remuneration:

3.1.2 Section 16(2) of the Public Service Act, 1995, authorizes the Permanent Secretary to correct a staff member's or a member of the services' salary or scale of salary or withdraw any other benefit with effect from the date on which the incorrect salary or scale of salary or salary advancement or other benefit commenced, under the following circumstances:

a) an incorrect advancement of salary within the scale of salary applicable to his or her grading,
b) an incorrect salary or scale of salary at the time of a general or specific revision thereof, was awarded or granted to a staff member or member of the services, or was awarded or granted at the correct salary or scale of salary but at a time when or in circumstances under which it should not have been awarded or granted to him or her.

3.1.3 Section 16(3) of the Public Service Act, 1995, provides that:

a) where there is underpayment towards a staff member or a member of the services, such staff member or member of the services must be paid the amounts due.
b) in the event of overpayment, the Permanent Secretary, after consultation with the staff member or member of the services, and with the approval of the Treasury, may recover the money either by deducting from the salary of a staff member or member of the services which is in the employment of the Public Service, or through legal proceedings when such a staff member or member of the services is no longer is in the employment of the Public Service.

3.1.4 However, the amount to be recovered due to the overpayment as provided in section 16(3)(b) of the Public Service Act, 1995, may prescribe if not recovered within a period of three years as contemplated in section 11(d) of the Prescription Act, 1969 (Act No.68 of 1969). This means that if the debt which is due to the State as a result of overpayment as provided in section 16(3)(b) of the Public Service Act, 1995, is not recovered within a period of three years, the debt prescribes.

3.1.5 Furthermore, Section 16(3)(b)(ii) of the Public Service Act, 1995, confers a right upon the staff member or member of the services concerned, to be compensated by the State for any patrimonial loss which he or she has suffered or will suffer as

a result of that discontinuation or withdrawal resulting from the overpayment of wrongly granted remuneration.

3.2 **Severance pay on retirement**

3.2.1 Section 24(1) of the Public Service Act, 1995, provides that:

"Subject to the provisions of subsection (2) and (3), any staff member shall retire from the Public Service on attaining the age of 60 years and shall be so retired on reaching the said age."

The above section 24(1) has the implication that if subsection (2) and (3) are not applicable then a public servant retires at the age of 60 by operation of the law.

3.2.2 The above cited section sets the retirement age of public servants at 60 years with two exceptions:

a) if it is in the interest of the Public Service to retain a staff member on the conditions provided for in section 24(2), such a staff member may be retained in the Public Service until the last day of the month in which he or she attains the age of 67 years; and

b) a staff member may on request, in line with the conditions provided for in section 24(3), and subject to the approval of the Prime Minister, on the recommendation of the Public Service Commission, retire at the age of 55 years.

3.2.3 Section 24(1) provides that, as a general rule, the retirement age of staff members in the Public Service is 60 years. Furthermore, the provision provides for two exceptions to this general rule. The first exception is that some staff members may be retired beyond 60 years but not exceeding 67 years if it is in the interest of the Public Service to retain them for a further seven years, or such other period as the Prime Minister, on the recommendation of the Public Service Commission approves. The second exception is when a staff member is retired or allowed to retire at the age of 55 years for personal reasons.

3.2.4 The procedure is similar to that of the first exception, however, in the latter case, the Prime Minister shall only approve early retirement if he or she is satisfied that such retirement will not be to the disadvantage of the Public Service.

3.2.5 The Public Service Act, 1995, does not provide for the payment of severance pay upon retirement. The payment of severance pay upon retirement is provided for in the Labour Act, 2007 (Act No. 11 of 2007).

3.2.6 In terms of section 35(1)(c) of the Labour Act, 2007, severance pay shall be paid by an employer to an employee who has completed 12 months of continuous service in the event that the employee retires on reaching the age of 65 years.

3.2.7 Section 35(3) of the Labour Act, 2007, dictates that severance pay shall be "an amount equal to at least one week's remuneration for each year of continuous service with the employer". The Labour Act, 1995, in section 35(5) also provides that "the payment of severance pay in terms of this section does not affect an employee's right to any other amount that the employer is obliged to pay the employee".

3.2.8 Currently, severance pay is payable to a public servant who retires at the age of 65 years, who was retained in terms of section 24(2) of the Public Service Act, 1995. This is by virtue of the Labour Act, 2007, which compels the employer, in this case the Public Service, to pay severance pay to such employee retiring at the age of 65 years.

3.2.9 Therefore, public servants who have been retired at the age of 65 years are entitled to be paid severance pay as contemplated in the Labour Act, 2007, provided that the entitlement to severance pay has not prescribed as contemplated under section 11(d) of the Prescription Act, 1969. However, public servants who have retired at the age of 55 or 60 years do not qualify severance pay, due to the limitation currently imposed under the Labour Act, 2007.

3.2.10 The Labour Act, 2007, discriminates against employees whose conditions of employment retire them at different ages other than 65 years. This provision of the Labour Act, 2007, has the consequence that the majority of public servants will not receive severance pay because the Public Service Act, 1995, retires them before attaining the age of 65 years unless retained up to the age of 65 years in terms of section 24(2).

3.2.11 Section 2(4) of the Labour Act, 2007, states that where there is a conflict between a provision of the Labour Act, 2007, and a provision of a law, listed in subsection (5) thereof, of which the Public Service Act is one, in respect of which the Minister has not made a declaration referred to in section 2(3) of the Labour Act, 2007, the conflict must be resolved by implementing the most favourable provision between the two Acts.

3.2.12 In light of the above, there are discrepancies between the Labour Act, 2007, and the Public Service Act, 1995, with regard to retirement and severance pay. In order to eliminate these discrepancies, the Labour Act, 2007, which causes the discriminatory treatment of Public Servants, should be amended to make provision for payment of severance pay on retirement, regardless of the age of retirement. Alternatively, the Public Service Act, 1995, should be amended to make provision for the payment of severance pay upon retirement.

3.3 **Non-compliance with time lines in disciplinary enquiries**

3.3.1 Mainly two sections in the Public Service Act, 1995, have been the centre of disputes with regard to non-compliance with time lines in disciplinary enquiries.

3.3.2 Section 26(5) of the Public Service Act, 1995, provides timelines for the establishment of a disciplinary committee upon the denial of a staff member to the charges laid against him or her by his or her Permanent Secretary. This section in the Public Service Act, 1995 states that:

> *"If the staff member charged denies the charge, the permanent secretary concerned shall, within seven days from the date of receipt of the written denial, establish a disciplinary committee …"* [our emphasis]

3.3.3 Additionally, the Public Service Staff Rule E.X.I ("PSSR") issued in terms of section 35 of the Public Service Act, 1995, supplements the Public Service Act, 1995 as follows:

> *6.8.1 If a staff member denies the charge the permanent secretary concerned must establish a disciplinary committee within 7 days in terms section 26(5) of the Act.* [our emphasis]

3.3.4 Section 26(6) of the Public Service Act, 1995, states that:

"The chairperson shall, in consultation with the other members of the disciplinary committee, fix the time and place of the inquiry and shall give the staff member charged reasonable notice in writing of the said time and place: Provided that such inquiry shall be conducted within 21 days after the establishment of the disciplinary committee."

3.3.5 The PSSR is also clear that the time limits must be followed where it states the following:

"6.10.1 In order for a disciplinary inquiry to be considered fair the prescribed procedures must be followed e.g. the time limits set by the Act must be adhered to."

3.3.6 Both the Public Service Act, 1995, and the Public Service Staff Rules have not made provision for steps to be followed in the event that the time limit set out in the above cited provisions are not complied with as required by the law. There is also no provision made in the Public Service Act, 1995, or the PSSR for withdrawal of the charges meted against a staff member.

3.3.7 The first issue to consider is whether or not non-compliance invalidates or nullifies a disciplinary enquiry. In the matter of *Simataa // the Public Service Commission and Another*[5] (hereinafter referred to as "the *Simataa* case"), the court upheld the judgment which was delivered in the matter of *Zephania M Tjihumino // The Permanent Secretary of the Ministry of Finance and Others*[6] (hereinafter referred to as "the *Tjihumino* case"). In the *Tjihumino* case the Court held on page 28 that:

"The staff rules [….] demonstrates (sic) only one thing, the provisions of Section 26(6) and other time frames provided for in the Act must be strictly complied with. The disciplinary committee in this matter failed to comply with the provisions of section 26(6) which renders the disciplinary inquiry invalid."

3.3.8 This means that if the prescribed time limits are not strictly complied with the non-compliance invalidates or nullifies a disciplinary enquiry.

[5] (a12-2003) [2013] NAHCMD 306 (30 October 2013).
[6] Case No. LC3/2006, unreported judgment delivered on 2 November 2006.

3.3.9 With respect to the issue whether a staff member can be recharged if the disciplinary committee was not established in time as required by section 26(5) of the Public Service Act, 1995, or if the hearing is not conducted within 21 days after the establishment of the disciplinary committee, we shall refer to the *Simataa* case where the court held as follows:

> *"On the view I take of the matter it is not necessary to decide whether the first respondent was entitled to give advice of the general nature contained in its decision dated 19 November 2002. By this I mean advice relating to the specific steps to be taken, the charges to be brought, the composition of the disciplinary committee, etc. I shall assume for purposes of this judgment that the first respondent may do so. However, what the first respondent may not lawfully do is to advise the second respondent to take steps to circumvent and undermine the provisions of the Public Service Act, specifically the provisions of section 26(6). To do so would render those provisions nugatory. Similarly, the second respondent may not take decisions with such effect. By withdrawing the charges of misconduct and re-charging the applicant on the same facts after the disciplinary committee did not comply with section 26(6), the time limit imposed by the Act was rendered meaningless. The decisions taken by the respondents in this regard are unlawful and fall to be set aside." [our emphasis]*

3.3.10 Although the court's decision in the *Simataa* case is based on the time limits imposed in terms of section 26(6) of the Public Service Act, 1995, the same principle applies to the time limits imposed under section 26(5) of the Public Service Act, 1995, as well as to other statutory requirements.

3.3.11 Therefore, it goes without saying that the court has declared the practice of re-charging staff members after initial charges have been withdrawn for non-compliance with the time limits imposed by the law, unlawful and undermining the rule of law.

3.3.12 Accordingly, a Ministry may not recharge a staff member whose charges against him were withdrawn due to non-compliance with the requirements of the law.

3.3.13 With regard to the general question 'whether a staff member can be recharged after charges have been withdrawn against him or her', the Public Service Act, 1995 is silent on the issue of withdrawal of charges and subsequent recharging thereof.

3.3.14 In *Amalgamated Engineering Union of SA & Others v Carlton Paper of SA*[7] (hereinafter referred to as "the *Amalgamated* case"), the court held that:

> *"Whether the principle of autrefois convict (or that of res iudicata) is applicable to proceedings before the industrial court is not the decisive point. The matter remains of fairness. This court considers that it is unfair for senior management two months after a decision has been made by a properly constituted tribunal set up in terms of the company's disciplinary procedure to set it aside and to subject the employees concerned to a new enquiry, at least where facts had been adequately canvassed and the procedures in the company's own code on the face of them followed.*

3.3.15 It seems from the above cited paragraph from the *Amalgamated case* that where there are sufficient justifications an employer can set aside the initial disciplinary enquiry and start the process *de novo*. However, the basic test that the bringing of fresh charges on the same facts must pass is the fairness test.

[7] (1998) 9 ILJ 596 C.

3.3.16 This thinking seems to be corroborated by Van Niekerk, J in the *Simataa* case when she states that:

> *"However, I do not think that it is just a case of fairness towards the person charged with misconduct. It is in the public interest that misconduct by public servants be dealt with not only promptly, but also effectively to, inter alia, instill discipline, root out malpractices and to set examples."*

3.3.17 Furthermore, the court held in *Kamanya and Others v Kuiseb Fish Products*,[8] that:

> *"After all, our Labour Act requires a fair hearing and a fair reason for dismissal, whether or not this was done in the course of a single hearing or in the course of more than one hearing and irrespective of whether one of those hearings is labelled an 'appeal' hearing."*

3.3.18 In light of the above, there seems to be no impediment to recharging a staff member whose initial charges were withdrawn for reasons other than non-compliance with the requirements of the law, if the objective of bringing such fresh charges is to ensure that fairness prevails.

3.3.19 However, it is advisable that OMAs conduct investigations and establish all facts before a decision to charge a staff member is made in order to avoid unnecessary withdrawal and consequent re-charging which may be found wanting in the court of law.

3.3.20 In light of the judgment in the *Simataa* case referred to above, it is unlawful to reinstate the charges, which have been withdrawn due to non-compliance with the time limits imposed in terms of the Public Service Act, 1995.

[8] 1996 NR 125.

3.3.21 On the other hand, if there are compelling reasons or it is in the public interest that charges which have been withdrawn be reinstated; the Ministry may do so provided the reason for recharging is not to evade the law.

4. PROPERTY LAW

4.1 Alienation of Government Property

4.1.1 Section 18 of the State Finance Act, 1991 (Act No. 31 of 1991), as amended, states that regardless of what is contained in any other law, property of the State, movable and immovable, shall be alienated, let, exchanged, donated or disposed of in any other way, only with the authorisation of the Treasury.

4.1.2 Section 23(1) of State Finance Act, 1991, determines that authorisation shall be granted by Treasury in writing, the authorisation must be acquired beforehand, the authorisation may be granted in respect of any specific case or by way of general direction, the authorisation may be granted on such conditions as Treasury may deem fit and the authorisation may be varied or withdrawn by Treasury at any time.

4.1.3 The procedures for the different forms of alienation of government property are set out in the Treasury Instructions, issued in terms of the section 24 of the State Finance Act, 1991.

4.1.4 Upon granting approval for the alienation of property, the Treasury shall, in terms of section 23(2) of the State Finance Act, 1991, inform the Permanent Secretary of the Ministry of Finance and the Auditor-General of all cases in respect of which it has, whether in terms of the Act or any other law, granted any authorization or approval or has issued, made or laid down any instruction, determination or condition.

4.1.5 Furthermore the Special General Power of Attorney No. 15 of 1983 granted by the then Administrator-General of South West Africa dated 04 May 1983, conferred upon the Secretary, Director, Deputy-Director, Assistant Director, Control Administrative Officer and Administrative Officer of the then Department

of Civic Affairs and Manpower, with the powers to contract on behalf of Government in respect of immovable property.

4.2 **<u>The legality of fencing on Communal Land</u>**

4.2.1 Section 18 of the Communal Land Reform Act, 2002 (Act No. 5 of 2002), as amended, provides as follows:

"Subject to such exemptions as may be prescribed, no fence of any nature-

*(a) shall, **after the commencement of this Act**, be erected or caused to be erected by any person on any portion of land situated within a communal land area; or*

*(b) which, **upon the commencement of this Act**, exists on any portion of such land, by whomsoever erected, shall after such date as may be notified by the Minister by notice in the Gazette, **be retained on such land**,*

*unless **authorisation for such erection** or **retention** has been granted in accordance with the provisions of this Act."*
[Our emphasis]

4.2.2 In terms of Section 28(3) of the Communal Land Reform Act, 2002, an application for the retention of a fence must be made within three years of the date of the Notice by the Minister. The 1st of March 2003 was announced as the first date from which people who wished to keep existing fences could start applying for authorization to do so. The deadline was extended in 2006 in a Notice by the Minister of Lands and Resettlement dated 12 January 2006, which was titled "Communal Land Reform Act, 2002: Prohibition against fences" which provided as follows:

"Subject to any exemptions prescribed under section 18 of the Communal Land Reform Act, 2002 (Act No. 5 of 2002), I make known in terms of paragraph (b) of that section that no fence of any nature which existed upon the commencement of that Act on any portion of land situated within a communal land area shall be retained on such land after 28 February

2006, unless authorisation for the erection of any such fence has been granted in accordance with the provisions of the said Act."

4.2.3 The deadline was again extended to February 2012 in the Government Notice No. 19 of 2009 that was contained in the Government Gazette No. 4210 dated February 2009. It provides as follows:

"Under subsection (3) of section 35 of the Communal Land Reform Act, 2002 (Act No. 5 of 2002), I, with effect from 1 March 2009, extend the period within which an application for recognition of existing rights to occupy communal land in terms of subsection (2) of that section as referred to in Government Notice No. 44 of 25 February 2006 to the end of February 2012."

4.2.4 Section 18 of the Act prohibits fencing in communal areas in two instances; (1) erecting new fencing after the commencement of the Communal Land Reform Act, 2002, and (2) retaining fences which existed upon the commencement of the Act which time periods were extended to the end of February 2012 by the Notice contained in the Government Gazette No. 4210 of February 2009, unless authorization to erect or retain such fence(s) has been granted in terms of the Act. In other words, from the end of February 2012, everyone who retained fences in communal areas must have authorization to do so, unless they are exempted. Therefore, erecting or causing to be erected and / or retaining existing fence(s) without the required authorization in the above mentioned instances, constitutes illegal fencing.

4.2.5 It should further be noted that section 35 and section 28 of the Communal Land Reform Act, 2002, distinguishes between two types of "existing rights," i.e. the existing customary land rights and the existing right to occupy communal land, for the purposes of obtaining authorization for the retention of fences. In both instances, however, authorization to retain fences is required. Furthermore, if clarity on the circumstances concerning the existence of the fence (i.e. already

existing fences) on the communal land is required, a preliminary investigation may be conducted for that purpose as per section 37(2) of the Act. The Act provides detailed procedures that should be followed in conducting these investigations.

4.2.6 Erecting or causing to be erected or retaining existing fences without the requisite authorization constitutes an offence, which is punishable in terms of Section 44 of the Communal Land Reform Act, 2002, which provides that:

"(1) Any person who, without the required authorisation granted under this Act, and subject to such exemptions as may be prescribed-

(a) erects or causes to be erected on any communal land any fence of whatever nature; or

(b) being a person referred to in section 28(1) or 35(1), retains any fence on any communal land after the expiry of a period of 30 days after his or her application for such authorisation in terms of section 28(2)(b) or 35(2)(b) has been refused,

is guilty of an offence and on conviction liable to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(2) If the offence for which a person is convicted in terms of subsection (1) is continued after the conviction, such person is guilty of a further offence and on conviction liable to a fine not exceeding N$50 for every day on which the offence is continued".

4.2.7 It is our opinion that, at the conclusion of the preliminary investigation, if it is found that a fence has been erected or retained without the required authorization, the matter will be reported to the Police in the specific area and a case should be opened against the alleged offender. The alleged offender will then appear before a Magistrates' Court either through Court summons or arrest,

and evidence will be adduced. If found guilty of the offence, the Court will convict the offender in terms of Section 44(1) of the Act to either pay a maximum fine of N$4 000 or to a term not exceeding one year in prison, or both such fine and imprisonment.

4.2.8 The responsibility for the removal of 'illegal fences' lies with the offender, and upon failure by the offender to remove such 'illegal fences' the responsibility shifts to either the Chief, Traditional Authority or Land Board, who may either remove the fences themselves or cause them to be removed and thereafter recover the costs associated with the removal.

4.2.9 If the offender has been convicted in terms of section 44(1), then section 44(3),[9] section 44(4)[10] and Regulation 27 takes effect, in terms of which the Chief, Traditional Authority or Board (as the case may be), may give a written notification to the offender to remove the fence(s) within 30 days.[11] If the offender fails to remove the fence(s) within 30 days, the offender commits a further offence called a **continuing offence**[12] and the Court may be approached to penalize him/her to pay N$ 50.00 per day for the period that the Fence(s) are retained, and the Chief, Traditional Authority or Board may itself remove or cause the concerned fence to be removed. If any expenses are incurred in removing the fence(s), the Chief, Traditional Authority or Board has the right to recover the costs from the offender and/or they may sell the materials used for the erection of the fence(s) to cover these costs.[13]

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[9] Section 44(3) provides as follows: "If any fence is found to be on any communal land in contravention of subsection (1), the Chief or Traditional Authority or the board concerned may, in accordance with the **prescribed procedure**, cause such fence to be removed and may dispose of the material used for the erection of the fence in such **manner as may be prescribed**". Emphasis added.

[10] Section 44(4) provides as follow: "Any **costs incurred** in connection with the removal of a fence in terms of subsection (3) may be recovered from the person who erected or retained such fence in contravention of subsection (1)." Emphasis added.

[11] Regulation 27(4)(a).

[12] J. Malan *Guide to the Communal Land Reform Act, 2002*. 2nd ed. (2009 2nd ed, Legal Assistance Centre: Windhoek, 2009). at 53

[13] Section 44(2) read with regulation 27(b), (5), (6).

5. GENERAL

5.1 Citation of laws (proclamations, ordinances and statutes) in documents

5.1.1 The Constitution of the Republic of Namibia should be cited as follows:

The Namibian Constitution[14]

Note: Various literatures and judgments incorrectly cite the Namibian Constitution as 'Act No. 1 of 1990', when in fact Act No.1 of 1990 is the National Coat of Arms of the Republic of Namibia Act, 1990.

5.1.2 Acts of Parliament should be cited as follows:

Public Service Act, 1995 (Act No. 13 of 1995)

5.1.3 Ordinances should be cited as follows:

Factories, Machinery and Building Work Ordinance, 1952 (Ordinance 45 of 1952)

5.1.4 Proclamations should be cited as follows:

Interpretation of Laws Proclamation, 1920 (Proclamation No. 37 of 1920)

5.2 With reference to 5.1.2 to 5.1.4 the citations therein relate must be distinguished as follows:

a. the first time the statute is mentioned or made reference to in the document it should be as follows; 'Public Service Act, 1995' should appear in the text and is footnoted to provide the full citation 'Public Service Act, 1995 (Act No. 13 of 1995).'; and

b. subsequent references to the same statute should be 'Public Service Act, 1995.'

End.

[14] As per Article 148 of the Namibian Constitution.